

Disciplining ODR Prototypes: True Trust through True Independence
By
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"We are discovering that the new world perhaps needs speed. Globalization may indeed need speed, provided it remains in connection with our basic aims, justice and community spirit. But if we want speed, we need to have trust, trust between ourselves, trust between all those who meet, whether they are the parties or counsels, or arbitrators, or finally judges. I think it is one of my great discoveries for myself that you can't have speed if you don't have trust between those who are partners in whatever is happening." The late Chairman Michel Gaudet, ICC International Court of Arbitration, Gaudet Day, May 7, 1998

Abstract

While much focus has been placed on trust in ODR, less attention has been placed on the issue of providing independence in the ODR process to provide justice and earn that trust. Independence of the ODR process is, however, a crucial concern if ODR is to play its full role in consent-based (i.e. Negotiation, Mediation and Arbitration) and non-consent based (Litigation) dispute resolution. Without independence, ODR is essentially a computerized and glorified form of one-sided customer service, an administrative process that is at best ersatz dispute resolution and, at worst, a fraud when notwithstanding that one-sided bias it claims to users to be independent.

Building on my experience from the late 1980's creating the case management system in four languages at the ICC International Court of Arbitration to today in developing the International Competitions for Online Dispute Resolution (<http://www.ombuds.org/cyberweek2003/icodr2.html>) for law students worldwide (participants from 26 law schools in 2003), this paper will share some concerns and ideas about integrating independence in system design for ODR procedures.

The paper starts by presenting the growth projections and nature of the principal arena of electronic commerce: business to business electronic commerce. The paper notes the role that ODR can play in this arena. The paper then highlights the structural problems of independence in ODR. First, to help us see the dimensions of the problem, the paper draws on my original research in examining the Uniform Domain Name Dispute Resolution Policy of the Internet

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Corporation for Assigned Names and Numbers and explains why I am led to the conclusion that it is an international scam.² Second, the paper will examine the structural independence problems with auction, marketplace dispute resolution sites with regard to the owner/member dispute resolution and the member/member dispute resolution. Third, the paper will examine the structural independence problems in the US-EU Safe Harbor Initiative privacy dispute resolution mechanism where B2B issues clash with B2C dispute resolution to the disadvantage of the aggrieved consumer, and ultimately, to the dispute resolution system.

The paper highlights the tension for independence in embedded ODR systems (i.e. when the ODR system provides the only means of dispute resolution in an auction site and that site is a significant source of cases/revenue for the provider), non-embedded systems, systems that are based on the ODR provider staff doing the dispute resolution, and systems based on panelists doing the dispute resolution.

With regard to neutral selection, the paper highlights the tensions between random selection methods and criteria based selection methods. The paper looks at issues with regard to the standardization of the ODR programs developed. The paper looks at the timing and nature of human intervention. The paper looks at the process for verification of independence of neutrals. The paper looks at storage record issues with regard to system decisions.

The paper then looks at how the ICC International Court of Arbitration arbitration system works and how the structure attempts to maintain the independence of the process as a dispute resolution service provision and as to the neutral selection. This model is particularly selected as it is resolutely focused on being acceptable worldwide and has a strong reputation. By deconstructing the structural elements of independence verification and management of discretion, the paper suggests approaches that might be envisioned more broadly in the ODR setting.

The paper notes how that system operates within the context of legal systems worldwide and court scrutiny. The paper attempts to address how we can assure discipline and morality in the design of ODR prototypes in a situation where we do not have an international arbitrator or judge that can oversee the ODR prototype.

I. Introduction

A. Business to Business electronic commerce

Business to Business electronic commerce worldwide is growing and is expected to continue to grow. While rate of growth, magnitude, even definitions of what constitutes Business to Business electronic commerce differ from source to source (see Figure 1), for the near term Business to Business electronic commerce is expected to be the dominant type of electronic commerce in the world. A 2001 United States Bureau of the Census analysis of the United States estimated that all Business to Business electronic commerce represented 90 per cent of total electronic commerce.³

² Benjamin Davis, *Une Magouille Planetaire: The UDRP is an International Scam, An Independent Assessment of the Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers*, 72 *Miss L. J.* 815 (Winter 2002)

³ Thomas L. Mesenbourg, *Measuring Electronic Business*, August 2001, <http://www.census.gov/eos/www/papers/ebusasa.pdf> (Last viewed on June 27, 2002). The report estimated that Manufacturing (\$485 Billion) and Merchant Wholesale Trade (\$134 Billion) sectors' electronic commerce (characterized as Business to Business electronic commerce) was substantially higher than electronic commerce in a special grouping of service industries (\$25 Billion) and Retail Trade (\$15 Billion) (characterized as Business to Consumer electronic commerce).

Figure 1

Comparative Estimates: B2B E-Commerce Worldwide, 2000-2005 (in billions)

	2000	2001	2002	2003	2004	2005
eMarketer	\$278	\$474	\$823	\$1,409	\$2,367	-
AMR Research	\$371	\$704	\$1,375	\$2,261	\$3,350	\$4,739
Computer Economics	\$3,068	\$5,232	\$6,815	\$9,907	-	-
Forrester Research	\$604	\$1,138	\$2,061	\$3,694	\$6,335	-
International Data Corporation (IDC)	\$282	\$516	\$917	\$1,573	\$2,655	\$4,329
Gartner Group	\$433	\$919	\$1,929	\$3,632	\$5,950	\$8,530
Morgan Stanley Dean Witter	\$200	\$721	\$1,378	-	-	-
Goldman Sachs & Co.	\$357	\$740	\$1,304	\$2,088	\$3,201	-
Ovum	\$218	\$345	\$543	\$858	\$1,400	-

Source: eMarketer, AMR Research, International Data Corporation (IDC), Gartner Group, 2001; various, as noted, 2000

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B. Drivers and components of Business to Business electronic commerce

Whether viewed as e-business infrastructure (the share of total economic infrastructure used to support e-business processes and conduct electronic commerce), e-business (any process that a business organization conducts over computer-mediated networks), or more narrowly as electronic commerce defined as the value of goods and services sold over computer-mediated networks⁴ electronic global business is growing rapidly. Five catalysts for increasing Business to Business electronic commerce adoption have been noted:

- Increasing experience with web technologies
- Consolidation of industry standards
- Simplification of application technologies
- Increasing stickiness in B2B applications (electronic markets integrating with electronic infrastructure)
- Costs savings (increased revenue streams through advertising, auctioning, procurement or other services together with product cost and process cost savings)⁵

Business to Business electronic commerce is made up of several components. First and oldest is Electronic Data Interchange (“EDI”) built on trading partner agreements such as the American Bar Association Model Electronic Data Interchange Trading-Partner Agreement. Through the American National Standards Institute (“ANSI”) accredited standards committee X12 (“ASCX12”) and the United Nations Electronic Data Interchange for Administration, Commerce and Transport (UNEDIFACT) technical standards are developed for EDI.⁶

EDI on closed value added networks is evolving onto virtual private networks and beyond.⁷ Researchers are moving beyond Hyper Text Markup Language (“HTML”) to develop a further universal format for structured documents and data on the Web such as eXtensible

⁴ i.e. electronically linked devices that communicate interactively over networks. See Mesenbourg, supra note 2

⁵ p. 3, B2B: 2B or Not 2B, Version 1.1 (November 11, 1999), Goldman Sachs, www.gs.com/hightech/research/b2b (Last viewed on June 27, 2002).

⁶ See generally, Ronald J. Mann and Jane Kaufman Winn’s forthcoming casebook, E-Commerce, Winter 2002 Draft.

⁷ Id.

Markup Language (“XML”).⁸ While EDI and XML are expected to coexist for some time,⁹ the United Nations Center for Trade Facilitation and Electronic Business (UN/CEFACT) and the Organization for the Advancement of Structural Information Standards (“OASIS”) are developing ebXML.¹⁰ RosettaNet is developing a standard that harmonizes with ebXML.¹¹ Microsoft is developing BizTalk.¹² Work is going forward on a standard syntax for an XML language for Online Dispute Resolution – odrXML.¹³ The technical standards are being developed to spur the growth of Business to Business electronic commerce through internet business exchanges. By removing some of the constraints related to EDI, technical impediments are expected to be reduced as electronic trading networks are built.

A second area of Business to Business electronic commerce is through the various online business to business marketplaces or exchanges. Whether vertical exchanges that are industry-specific or horizontal exchanges that are industry-diverse, it is estimated that in 2003 there will be 120 public marketplaces online, 1500 private exchanges (connecting large enterprises) and another 1500 private exchanges (connecting small/medium sized companies).¹⁴

A third area is through direct business to business, through which businesses allow other businesses to purchase their products or services through their website.

C. Alternative Dispute Resolution

Dispute resolution mechanisms for Business to Business electronic commerce are expected to mirror developments in the offline business to business context. The choice of mechanism appears to be driven by the classic concerns relating to bargaining power, security, cost and enforceability (domestically and transnationally).

For EDI, because of its integrated nature, the general expectation is that disputes are resolved through negotiation – litigation or ADR beyond negotiation being rare. This may evolve with the development of XML but it appears too early to make any forecast.

While marketplace and direct business proprietary terms and conditions are not always available, surveys of marketplaces and direct businesses suggest that dispute resolution clauses split into two broad groups - those that select a court forum and those selecting arbitration.¹⁵ As between online and offline dispute resolution, the traditional dispute resolution institutions appear to be undertaking a sustained effort to develop proprietary platforms¹⁶ or partner with platforms¹⁷ to permit online as well as offline response to the needs of Business to Business electronic

⁸ <http://www.w3.org/XML> (Last viewed on July 1, 2002)

⁹ Center for Digital Commerce, An Analysis of the Emerging Electronic Trading Network Market (August 7, 2001), <http://digital.syr.edu> (Last visited on June 26, 2002) (On file with the Task Force).

¹⁰ www.oasis-open.org (Last viewed on July 1, 2002)

¹¹ www.rosettanet.org (Last viewed on July 1, 2002).

¹² “Microsoft BizTalk Server 2002 Partner and Standard Editions Bring Integration to the Masses,” <http://www.microsoft.com/presspass/press/2002/Jun02/06-17MassIntegrationPR.asp>.

¹³ <http://lists.oasis-open.org/archives/members/200206/msg00009.html> (Last viewed on July 1, 2002).

¹⁴ “Estimated Number of Online Exchanges, 2003,” www.emarketer.com citing IBM, 2001 (Last viewed on June 27, 2002).

¹⁵ In a survey of 50 direct business to business sites, 48 percent (24) had accessible Terms and Conditions of Sale. Only 12 per cent (6) of these sites provided for some type of ADR – principally binding arbitration. Of the direct business sites surveyed, 40 per cent (20) provided a choice of law – essentially law of the vendor.¹⁵

¹⁶ See the American Arbitration Association online site at www.adr.org. There is also the work at the International Chamber of Commerce on its NetCase. In addition the Inter Pacific Bar Association has developed an online arbitration mechanism at www.i-cass.org.

¹⁷ CPR Institute for Dispute Resolution (www.cpradr.org) and Arbitraje y Mediacion (www.aryme.com) are listed as partners with Online Resolution. www.onlineresolution.com (Last viewed on June 27, 2002).

commerce dispute resolution. In addition, specific business to business initiatives have been developed by dispute resolution service providers.¹⁸

While encouraging generally the development of Business to Business electronic commerce, governments have appeared to focus dispute resolution policy attention on the business to consumer arena and let business to business electronic commerce evolve in its own manner. The United States Federal Trade Commission, the European Union, the Organization for Economic Cooperation and Development, and others have focused legislative and policy attention most on building consumer trust in business to consumer electronic commerce.¹⁹ Technical developments in business to business have been focused at the technical standards setting level (as described with regard to EDI and XML above) or as trade concerns in the context of UNCITRAL or WTO. It appears that there is a consensus that “settlements of disputes resulting from business-to-business transactions, both offline and online, will follow their own rules with a very high degree of party autonomy, mostly in the form of binding arbitration.”²⁰

II. Structural independence tensions: triangular conflicts

Three models of dispute resolution for Business-to-Business electronic commerce are scrutinized in this section. Analysis of these models focuses on independence of the dispute resolution procedure. The analysis highlights the problem of what might be termed triangular conflicts of interest in disputes in the Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers, Business to Business electronic marketplaces, and Business to Business electronic commerce in trust services such as seals and trustmarks.

Independence of the dispute resolution model is hypothesized to be a key aspect of a dispute resolution system that will ensure long-term sustained confidence. The importance of the independence principle in dispute resolution is borne out in the court cases. In arbitration the key independence principle was²¹ pronounced in *Commonwealth Coatings Corporation v. Continental Casualty Co.* which focused on the need to avoid bias or the appearance of bias.

“This rule of arbitration and this canon of judicial ethics (note: both seeking disclosure) rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.”... “We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.”²²

The concern in this paper is with whether triangular conflicts of interest create the type of interest that is “direct, definite and capable of demonstration...rather than remote, uncertain or speculative.”²³ The concern is with whether a person or company has “a personal interest in the

¹⁸ CPR Business-to-Business E-commerce Initiative, www.cpradr.org (Last viewed on June 27, 2002); eCommerce Dispute Management Protocol, American Arbitration Association, www.adr.org (Last viewed on June 27, 2002),

¹⁹ See generally, the initiatives noted at the ABA Task Force web site at www.law.washington.edu/ABA-eADR (Last viewed on July 1, 2002)

²⁰ Page 8, Tokyo Recommendations, Global Business Dialogue (“GBDe”) GBDe Conference 2001, September 13-14, 2001. www.gbde.org (Last viewed on June 27, 2002)

²¹ See generally, B. Davis, *Une Magouille Planetaire: The UDRP is an International Scam, An Independent Assessment of the Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers*, 72 *Miss. L. J* 815. (Winter 2002). Portions of this analysis are inspired by the research for that article.

²² *Commonwealth Coatings Corp v/ Continental Casualty Co.*, 393 US 145, 89 S. Ct. 337, 21 L. Ed 2d 301 (1968)

²³ *Hayne, Miller & Farni, Inc. v/ Flume* 888 F. Supp. 949, 953-54 (E.D. Wisc. 1995) reprinted in Thomas Carbonneau, *Cases and Materials on the Law and Practice of Arbitration* (second edition), page 526 (2000)

proceedings, whether pecuniary or otherwise, which would have biased his (her or its) judgment in the proceedings.”²⁴

Even if procedures are considered non-binding²⁵ or not arbitration²⁶, the concerns about the integrity of the process under the U.S. Federal Arbitration Act standards are still relevant, particularly in new procedures by new dispute resolution service providers in new business to business structures. Moreover, concerns about conflict of interest and non-disclosure are not peculiar to the United States but form a common theme in arbitration statutes²⁷ and rules around

²⁴ Austin South 1, Ltd. v. Barton-Malow Co. 799 F. Supp.1135, 1142 (M.D. Fla. 1992) reprinted in Thomas Carbonneau, Cases and Materials on the Law and Practice of Arbitration (second edition), page 526 (2000).

²⁵ A procedure may state it is non-binding but that is not enough. Take for example the Uniform Domain Name Dispute Resolution Procedure of the Internet Corporation for Assigned Names and Numbers. As demonstrated in the recent case of Jay D. Sallen d/b/a J.D.S. Enterprises v. Corinthians Licenciamentos Ltda and Desportos Licenciamentos Ltda (U.S. C.A. 1st Circuit), (No. 01-1197, December 5, 2001) reprinted in www.adrworld.com (Last viewed on February 28, 2002) (reversing the lower court and concluding that initiation of proceedings in district court stayed the WIPO panel's order to transfer the domain name. Transfer after dismissal of district court case but during appeal was possibly wrongful, a domain name registrant whose name is suspended in an extra-judicial dispute resolution procedure can seek a declaratory judgment that his use of the name was, in fact, lawful under the Anti Cybersquatting Consumer Protection Act) a lower court took the view that the domain name holder who lost under the UDRP did not have a right to seek a declaratory judgment under the ACPA. In other words, the UDRP would have been binding and final notwithstanding its language. Fortunately, the Court of Appeals reversed based on its own interpretation of the ACPA. However, this problem highlights the concern that is beyond the object of this paper that the UDRP can become binding if the local law does not give a redress to the losing party – particularly the Respondent who has the domain name transferred and is alleged not to have any trademark rights.

²⁶ Even if the procedure is non-binding arbitration, impartiality (including the concept of independence) of the panelist should be expected. Compare, for example, the Texas Alternative Dispute Resolution Act (“TEXAS CIVIL PRACTICE & REMEDIES CODE CHAPTER 154. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES §154.027. Arbitration. (a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party (emphasis added), who renders a specific award.”), www.texasadr.org/adract.cfm (Last viewed on April 17, 2002).

²⁷ Article 12, UNCITRAL Model Law on Arbitration “(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence...” reprinted in Carbonneau, Cases and Material on the Law and Practice of Arbitration, page 804 (2000). IBA Ethics for International Arbitrators, Article 2.1 “A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias.” Article 3, Elements of bias 3.1 The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises where an arbitrator favors one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arise from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.” Article 4 Duty of Disclosure “A prospective arbitrator should disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence. Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.” reprinted in Carbonneau, Cases and Material on the Law and Practice of Arbitration, pages 838-839. Article 1452 French Civil Code “The arbitrator who thinks that there may be a ground for his disqualification must inform the parties of it. In such circumstances, he can accept his terms of reference only with the agreement of the parties” reprinted in Carbonneau, Cases and Material on the Law and Practice of Arbitration, page 942 1996 United Kingdom Act Section 24 (1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds (a) that circumstances exist that give rise to justifiable doubts as to his impartiality;” reprinted in Carbonneau, Cases and Material on the Law and Practice of Arbitration, page 971 Article 7, International Arbitration Rules of the American Arbitration Association, “1. Arbitrators acting under these rules shall be impartial and independent. Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence.” reprinted in Carbonneau, Cases and Material on the Law and Practice of Arbitration, page 1063; Article 7 Rules of Arbitration of the International Chamber of Commerce, “ General provisions 1. Every arbitrator must be and remain independent of the parties involved in the arbitration. 2. Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts of circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. 3. An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration.” reprinted in Carbonneau, Cases and Material on the Law and Practice of Arbitration, page 1081, London Court of International Arbitration Rules “Article 5.2 All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party... 5.3 Before appointment by the LCIA Court, each arbitrator shall furnish to the Registrar a written resume of his past and present professional positions;... and he shall sign a declaration to the effect

the world. Even in mediation, it is axiomatic that having the neutral be independent and reveal any potential interests is central to maintaining confidence (read trust) in the integrity of the process.²⁸ Thus, tensions with independence go to the heart of the ability to trust a mechanism.

A. Model 1: Structural independence tensions in the Uniform Domain Name Dispute Resolution Procedure of the Internet Corporation for Assigned Names and Numbers – The Risk of Registry/Registrar Asset Damage

ICANN accredits registries, registrars and dispute resolution service providers. Dispute resolution service providers select panelists to decide the cases brought by complainants against domain name holders. Figure 2 presents the structure of dispute resolution under a typical UDRP case.

The list of panelists is determined by the Dispute Resolution Service Provider. Those panelists' decisions determine whether the UDRP is considered a reasonable policy. If the UDRP is considered a reasonable policy, then the registries, registrars, ICANN and the Dispute Resolution Service Provider escape liability for damages to complainants and domain name holders for registering a domain name under the Anti-Cybersquatting Consumer Protection Act in the U.S.A.²⁹

If a panelist in a domain name dispute resolution dispute is linked to a registry and/or registrar, there is a tension as to the independence of the panelist as regards any two disputants. The reason is that the domain name is a contested asset between the two disputants (complainant and domain name holder). At the same time the domain name is an asset in the database of the registry over which the registry has control. In addition, the domain name is subject to a registration agreement over which the registrar exercises control and that forms part of the assets of the registrar.

The dispute between the complainant and the domain name holder concerns the disposition of that asset commonly held by the registry, the registrar, and the domain name holder and sought by the complainant as an effort to defend its own intellectual property. Managing the complainant/domain name holder dispute raises costs for the registrar or registry. Disputes as to assets on the balance sheet of the registry/registrar and potential liability for the designation of ownership of that asset raises the financial risk of the business model of the registry or registrar.

Thus, the panelist is sitting in decision over an asset contested by two entities (one a client, the other a potential client, and both potential plaintiffs as regards the registry/registrar) that

that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration. Each arbitrator shall thereby also assume a continuing duty forthwith to disclose any such circumstances to the LCIA Court, to any other members of the Court, to any other members of the Arbitral Tribunal and to all the parties if such circumstances should arise after the date of such declaration and before the arbitration is concluded." reprinted in Carbonneau, *Cases and Material on the Law and Practice of Arbitration*, page 1111-1112.

²⁸ "TEXAS CIVIL PRACTICE & REMEDIES CODE CHAPTER 154. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES (§154.023. **Mediation.** (a) Mediation is a forum in which **an impartial person, the mediator** (emphasis added), facilitates communication between parties to promote reconciliation, settlement, or understanding among them", www.texasadr.org/adract.cfm (Last viewed on April 17, 2002). See also, International Chamber of Commerce ADR Rules in force as from July 1, 2001: Article 3.2 "Every prospective Neutral shall promptly provide ICC with a curriculum vitae and a statement of independence, both duly signed and dated. The prospective Neutral shall disclose to ICC in the statement of independence any facts or circumstances which might be of such nature as to call into question his or her independence in the eyes of the parties. ICC shall provide such information to the parties in writing." ICC Publication No. 809. The need for disclosure has most recently been highlighted for the Online Dispute Resolution ("ODR") area in particular through the draft final report and recommendations of the American Bar Association Task Force on E-commerce and Alternative Dispute Resolution (I serve as Assistant Reporter). See www.law.washington.edu/ABA-eADR (Last viewed on April 10, 2002).

²⁹ F. Lawrence Street and Mark P. Grant, *Law of the Internet* Section 4.02(5)(e), Page 4-18, LexisNexis (2002 Filed through Release No. 2, February 2002); 15 U.S.C. 1114(2)(D)(ii).

affects the financial risk of his client registry's/registrar's balance sheet. The client's interest in avoiding risk as regards the domain name asset shades the thinking of the panelist while s/he settles the difference over the domain name asset between the parties to the dispute. "What decision reduces the client's (i.e. registry's and/or registrar's) risk the most?" becomes a question that could be asked. That client concern influences the independence of the panelist and creates the potential for conflict or actual conflict. That conflict is obviously magnified when the registry/registrar or any of its related companies do substantial business with one of the parties to the dispute for other even unrelated products. Absent disclosure of the link to the registry/registrar, the panel decision – no matter how well written – is tainted by this cloud over independence. Unfortunately, from a review of a specific situation where this fact pattern emerged, no disclosure has been made.³⁰

B. Model 2: Structural independence tensions in Business to business marketplaces – the owner/member tension

In business to business marketplaces, there are contracts between the market place owner and each member ("owner/member contract") and contracts that arise from the contracting between members of the marketplace ("member1/member 2 contract"). The degree of control by the owner may vary but the expectation is that the owner may insist on a standard dispute resolution method for all owner/member contracts. The owner may have substantial authority with the members of the marketplace due to it being a dominant enterprise or a coalition of dominant enterprises in a given industry or function. On the other hand, consistent with party autonomy, the parties to the member1/member2 contract may settle on the same or different means of dispute resolution.

In the cases where the dispute resolution service provider for the owner/member contract is the same institution as that foreseen in the member1/member2 contract, careful attention would appear warranted as to neutral selection. Because the owner may have substantial business interests with regard to any given member, it would appear prudent to avoid actual bias or the appearance of bias. To assure this, the neutral selected by the dispute resolution service provider should have no connection to the owner or make full disclosure to the parties to the member1/member2 contract of any links to the owner. The same would appear true in the case of disputes under the owner/member contract where member1/member2 contracts are present. It would appear prudent that a neutral with ties to member2 for example who may have substantial business interests with member1 would disclose such interests to the owner and member1 in an owner/member1 dispute – again – to preserve the integrity of the process.

Example (see Figure 3): Construction Company A owns a construction marketplace website. Subcontractor 1 and subcontractor 2 are members of that site having each signed an owner/member agreement with Construction Company A. Subcontractor1 and subcontractor 2 sign a contract unrelated to Construction Company A. Construction Company A contracts with Subcontractor2 in an unrelated contract. A dispute arises between Subcontractor1 and Subcontractor2 under the agreement they signed within the marketplace. All contracts foresee the same dispute resolution service provider. Care should be taken in the appointment of any neutral to avoid bias or the appearance of bias which might occur if the neutral has ties to Construction Company A.

I am unaware of any sites that address this tension in neutral selection.

C. Model 3: Structural independence tensions in Business to business services in trust services

³⁰ See Benjamin Davis, *Une Magouille Planetaire, the UDRP is an International Scam, An Independent Assessment of the Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers*, 72 *Miss. L. J.* 815 (Winter 2002)

In Business to Business services in trust services, the tension is one that arises from being at the border between business to business electronic commerce and business to consumer electronic commerce. One example is in the area of privacy policies. To the extent a company purchases consumer privacy dispute resolution services from a trustmark or seal, both parties are engaged in Business to Business electronic commerce (the company and the trustmark/seal organization). The trustmark or seal may undertake examination itself or appoint a third party neutral to examine any complaints filed by the consumer. To the extent the trustmark has on its Board of Directors representatives of the company about which the consumer files a complaint, it would appear prudent that recusal mechanisms be in place and disclosed as part of the operation of the trustmark or seal to avoid the actual bias or appearance of bias as regards dispute resolution of consumer complaints concerning that board member. In addition, tensions may arise in situations where significant clients of the board member are the subject of consumer complaints under the mechanism. Resolution through disclosure of these potential conflicts is particularly relevant in the context of EU-US Safe Harbor Program in which representations are made to the U.S. Department of Commerce.³¹ However, it would merit reflection in non-Safe Harbor arenas also (See Figure 4 for the two examples below).

Example1: French consumer has a privacy complaint against Microsoft Corporation and its controlled U.S. subsidiaries ("Microsoft"). Microsoft provides in its declaration as part of the EU-US Safe Harbor Program that privacy policy dispute resolution is to be provided by www.truste.org.³² A representative of Microsoft sits on the Board of Directors of www.truste.org.³³

Example2: A user of Verisign trust services has a dispute with Verisign with regard to its privacy policies. Verisign provides that its privacy policies are reviewed by www.truste.org.³⁴ A representative of Verisign sits on the board of www.truste.org.³⁵

I am unaware of any clear rules that address these concerns at the site.

III. Further structural independence tensions: Embedded and non-embedded dispute resolution service providers and panels vs. inhouse dispute resolution service providers

Where the dispute resolution service provider is embedded (i.e. owned by the owner of the marketplace or has a significant component of its caseload and revenue being generated by this specific activity) tensions as to structural independence increase. While any dispute resolution service provider wants to please the party(ies) that determine whether it will be allowed to continue to have the cases it is handling, the embedded provider is in a more precarious position as its life is dependent on this one stream of cases. Thus, in the UDRP setting, pleasing ICANN, the registries, and the registrars (which have substantial influence on ICANN) are heightened concerns of the dispute resolution service provider. In the Business to Business marketplace, pleasing the owner of the marketplace is a key success factor. In the privacy disputes arena, pleasing the Board member companies is a key success factor. Where the control interest of the key entity are not consistent with independence of the dispute resolution service provider, pressure to conform to the key entity's wishes comes to bear on the dispute resolution service

³¹ Safe Harbor Overview, http://www.export.gov/safeharbor/sh_overview.html (Last viewed on July 2, 2002), Safe Harbor List <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list> (Last viewed on July 2, 2002). I thank Jay Knoll of www.covisint.com for drawing my attention to Microsoft and the dispute resolution aspect of the privacy policies under the EU-US Safe Harbor Program.

³² Microsoft and its Controlled U.S. subsidiaries declaration, EU-US Safe Harbor Program, <http://web.ita.doc.gov/safeharbor/shlist.nsf/5624e34187d9c4dc85256960005fc648/0fe0d3d9a40a570485256a7a006d8084!OpenDocument> (Last viewed on July 2, 2002)

³³ Truste Board of Directors, http://www.truste.org/about/truste/about_boa.html (Last viewed on July 2, 2002)

³⁴ Verisign home page, <http://www.verisign.com/> (Last viewed on July 2, 2002)

³⁵ Truste Board of Directors, http://www.truste.org/about/truste/about_boa.html (Last viewed on July 2, 2002)

provider. Where the dispute resolution service provider is not so embedded (i.e. has multiple streams of cases) pressure on integrity will be less as there is no particular interest in having results that favor one key entity over another (this could be viewed as a diversification effect or a volume effect).

This tension between embedded and non-embedded is heightened in the situation where a dispute resolution service provider is providing the neutral role inhouse. In that setting, the survival interest of the dispute resolution service provider will influence the inhouse “neutral” who will be tempted/pressured to make decisions that favor the interests of the key entity that is the client of the provider.

The pressure is different with regard to panelist systems. There the pressure of favoring the clients of the provider is filtered through the selection of the panelist. However, to the extent that the panelists only come from an approved list, there is pressure to have on the approved list only the type of individuals who will be most acceptable to the key entity that is the client of the provider for use by the dispute resolution service provider. Even random selection of these people who are the exclusive universe for panelists only masks the subtle selection influence on the decisions that would ultimately be made. It should also be noted that additional pressure could still be brought to bear (as in the inhouse setting) to have the panelist actually selected in a given case have certain qualities that could lead to a greater likelihood of a decision in favor of one party over the other – to the benefit of the selector of the dispute resolution service provider’s services in the types of triangular settings described above. Where the owner (for example of a marketplace) is essentially indifferent to the results that occur in disputes between any two members of the marketplace, the pressure on the dispute resolution service provider to meet the owner expectations is reduced. Where, on the other hand, the owner is not indifferent, it seems normal that the dispute resolution service provider will feel that pressure.

This is the subtlety of the triangular relationship situation that may lead to the potential for unease of participants in such settings with the results that arise. Figure 5 presents the tensions felt.

Figure 5
Structural Independence Tensions

	External panelists	In House
Embedded Dispute Resolution Service Provider	Greater pressure to select “our type” of panelists	Greatest pressure to make “our type” of decisions
Non-embedded Dispute Resolution Service Provider	Little pressure to select “our type” of panelists	Some pressure to make “our type” of decisions

IV. Dispute Resolution Prototypes

It is the contention of this paper that those who are likely to be the non-embedded dispute resolution service providers are those providers with greater experience and caseloads; i.e. the traditional providers such as the established arbitration institutions. Those who are likely to be the embedded dispute resolution service providers are the new dispute resolution prototypes seeking to make their name in a new market. Obviously, the traditional dispute resolution service providers entering a new market like electronic commerce are subject to similar acceptance pressures as the newer prototypes (particularly those responsible for developing the new market) but that pressure is tempered by the base of cases and revenue from the traditional cases and the discipline of the traditional provider’s corporate culture.

How then does an embedded dispute resolution service provider (i.e. a new prototype) demonstrate the discipline that will allow it to provide trust and therefore independence? Several possibilities appear present:

A. Random selection of panelists

A new provider can protect itself from pressure by resolutely using a random selection criteria for the panelists. The problem that may arise, particularly when moving transnationally, is that, in the absence of human intervention and discretion, there will be mismatches as to skill sets of the panelist for the given cases and dissatisfaction with the manner those cases are addressed. To avoid these situations, criteria to discriminate between the members of a pool of panelist candidates would likely be created to have better fit between panelist and case. Random selection would thus occur after a first human determination of the subset of panelists to be placed in competition with each other. That reintroduction of human intervention however reduces the benefit of random selection.

B. Criteria based selection

Here emphasizing the specialized expertise of one's panelists and the careful selection process might assure that the vetting of candidates avoids non-independent panelists being selected. The cost of this vetting structure might be substantial however and, the pressure to satisfy key entities would be strongest due to the selection process being a centralized human intervention.

C. Party based selection

In this purest system, no panelists are provided by the dispute resolution service provider, but rather they are provided by the parties. The result is that the negotiation on independence is taken out of the hands of the dispute resolution service providers and party autonomy determines the level of independence actually present. On the other hand, when a party is recalcitrant, such a system is frustrated leading to dissatisfaction of the party that seeks to move forward.

V. A mixed model of discretion and autonomy: the ICC International Court of Arbitration Model

Neutral selection by the ICC International Court of Arbitration ("ICC Court") is a mixture of party autonomy and structural selection processes (in cases where the will of the parties to select the panelist to hear the dispute fails). How the ICC Court manages the diversity of situations might be instructive to prototype creators.

A. Party selected panels.

If parties name the entire arbitral tribunal, the Court's role is to verify independence of the individuals proposed and, if no question of independence arises, confirm them in their role. The selection of the panelists is taken completely out of the hands of the arbitral institution (except for verification of independence) and the pressures of panel selection are fought in a negotiation between the parties. Pressure on the institution is relieved.

B. Court appointed Chair or Sole Arbitrator.

Where there is selection of a neutral by the ICC Court, the parties are free to provide their wishes as to the qualities they seek in the Chair or Sole Arbitrator. The Court has the discretion to take those criteria into account, as well as add additional criteria as it makes the selection of which National Committee it wishes to invite to propose an individual to serve as the Chair or the Sole Arbitrator. The Court is not constrained to select a specific national committee.

This separation of roles between who proposes (and keeps the lists of potential panelists) (the National Committee) and who appoints (the ICC Court) is a key means to reduce the likelihood of independence being compromised in the selection of the neutral. Each national committee in the decentralized ICC system has its own manner of identifying candidates to be potentially proposed for appointment by the ICC. Thus, those seeking to add or become panelists have to contend with different approaches and different centers of power in each country that determine who will be allowed on the list. The National Committees guard this power jealously. The National Committees may also have nationality criteria for their panels thus seriously restricting the ability to impose one or a small group of candidates in many countries. Put another way, there is stickiness in being able to be put on a national committee's list.

A second aspect of this is that the number of nominations through any given National Committee are not significant. Thus, even if pressure allows someone to get on the list it is very possible for someone to languish on the list of a National Committee without being proposed for years simply for lack of sufficient invitations for proposals from the ICC Court and because of the priority of those already on the list.

A third aspect is the Court's discretion to accept a proposal of a national committee. The Court meets in Committees of the Court of three members made up of the Chair (or Vice-Chair) and two other members of the Court for most decisions on appointment.³⁶ The Members of the Court and the Chair are appointed by the ICC Council (the Supreme Authority of the Federation) for three-year terms upon proposal of their respective national committees. Once appointed, the Secretary General of the ICC or the National Committee cannot remove a member of the Court – that would take an unheard of urgent decision of the Presidency of the ICC, an extremely unlikely prospect. Thus, the Members of the Court have some autonomy as to their position from the Chair of the Court and the ICC. In addition, the decisions of the Committee of the Court are to be unanimous. Thus, an effort to pressure the Court requires pressuring the Chair and two members of the Court to get a certain person named.

A fourth aspect is that the Chair and the Member of the Court's main interest is in the institution retaining and increasing its reputation as that enhances their role. There is reluctance/if not hostility to pressure. All these confluence of structural choices has the result of leaving the Court with substantial discretion as to the selection of the Chair or Sole Arbitrator.

This is not to say that pressure may not be brought to bear on the Court. The counsel on the case, the Secretary General of the Court, the Chair of the Court, or a Court member can be pressured. Yet, the tendency of all of these is to react negatively to this type of pressuring. Each is protected as decisions made at each of these levels are made in committees. The counsels' recommendations to the court go through a vetting process by the counsel among themselves. The Court decides, except in urgent cases, in Committee. Complex matters that might be delicate will be sent to the full Court. It is simply difficult to get all of the autonomous decisionmaking participants lined up in one way or another. In any event, in extreme cases of pressure, a member of the Court or the Secretariat can avail themselves of Appendix II to the arbitration rules of the International Chamber of Commerce, International Court of Arbitration which states:

“3. When the Chairman, a Vice-Chairman or a member of the Court or of the Secretariat is involved in any capacity whatsoever in proceedings pending before the Court, such person must inform the Secretary General of the Court upon becoming aware of such involvement.

4. Such person must refrain from participating in the discussions or in the decisions of the Court concerning the

³⁶ Only rarely in emergency cases would the Chair act alone to make an appointment.

proceedings and must be absent from the courtroom whenever the matter is considered.

5. Such person will not receive any material documentation or information pertaining to such proceedings.³⁷

C. Direct appointments

In some cases, the ICC Court may know of an individual with specific skills who does not come from a country with a National Committee. In that setting, the ICC Court may select that individual directly, provided that there is no objection from the parties. Thus, in the setting where the most direct control is held by the ICC Court, there is a constraint of the party will that narrows the discretion to make use of that tool. In addition, if the ICC Court were to make frequent use of this power, this would counterbalance the structures for arbitration selection that are key roles of the National Committees that propose arbitrators and nominate the Members of the Court. Such frequent selection in this matter would appear to run counter to the interests of the National Committees and thus, the Court is restricted in forcing a centralized selection process. Instead, there is dialogue between the Court and the National Committee to achieve consensus candidates.³⁸

VI. Structural impediments to centralization: suggestions for ODR dispute resolution prototypes

Structural impediments to centralization in the neutral selection process that diffuse responsibility and separate the selection from the appointment role may ultimately be the best means of assuring the independence of the panelists that are being selected. This would suggest that the dispute resolution service provider attempting to create ODR is free to provide for party selection, random selection and/or criteria based selection mechanisms in the prototype but, to assure independence, the actual process of selection for consideration, evaluation and appointment should be split among entities within the structure that have autonomy. This helps avoid that the agenda of one key entity so dominates the selection process that the selections conform to its will.

One concern is that the strengths of this diffuse system may slow the ability to adapt to new markets. However, the hope is that such processes will in fact lead to solid qualified selections that enhance the reputation of decisions made in the new sector. This, in turn, enhances the sense that justice has been done through the decision of an independent panelist and, by extension, builds trust. Thus true trust is developed through true independence through this discipline to the ODR prototype.

³⁷ Articles 2.3, 2.4, and 2.5, Appendix II, Internal Rules of the International Court of Arbitration of the ICC, ICC Rules of Arbitration in force as from 1 January 1998, ICC Publication No. 581

³⁸ The Chairman of the Court's power to act alone is limited to urgent matter. This also serves as a means to reduce the ability to place pressure at one point on the system to get a specific panelist named.