

VIRTUAL JUSTICE AS REALITY: MAKING THE RESOLUTION OF E-COMMERCE DISPUTES MORE CONVENIENT, LEGITIMATE, EFFICIENT, AND SECURE

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“Without Justice, There Is No Peace.”^{**}

INTRODUCTION

I. THE NEED FOR AN EFFECTIVE ONLINE JUSTICE SYSTEM

One of the most significant changes in society over the last decade has been the pervasive use of the Internet in our everyday lives.¹ Indeed, *Time* magazine even named “You” as its Person of the Year for 2006, acknowledging the prolific growth and undeniable importance of Internet users worldwide.² On-demand entertainment, instantaneous personal communication, and immediate access to virtually any information in the world are features of the Internet age that we live in.³ Perhaps the most

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^{**} MARIO I. AGUILAR, THE RWANDA GENOCIDE AND THE CALL TO DEEPEN CHRISTIANITY IN AFRICA 95 (1998).

1. The growth in the use of the Internet can be measured in several ways: increases in Internet sales revenue, advertising revenue, number of users, domain sites, etc. See Press Release, Computer Industry Almanac Inc., Worldwide Internet Users Top 1.2 Billion in 2006 (Feb. 12, 2007), <http://www.c-i-a.com/pr0207.htm> (“The worldwide number of Internet users surpassed 1.2 billion in 2006—up from only 2M+ in 1990, 45M in 1995 and 430M in 2000.”); see also Stuart Elliott, *Television Stations are Urged to Break a Few Rules*, N.Y. TIMES, Apr. 1, 2006, at C7 (stating Internet site ad revenues of \$12.5 billion for 2005, up 30.2% from advertising revenues in 2004); Internet World Stats, Internet Usage Statistics: The Internet Big Picture, <http://www.Internetworldstats.com/stats.htm> (last visited Jul. 1, 2009) (over 1.4 billion people worldwide use the Internet, more than 21% of the total world population as of May 12, 2008).

2. Lev Grossman, *Time Person of the Future: You*, TIME, Dec. 25, 2006, at 38.

3. The internet has redefined convenience. At the fingertips of the modern internet-user lies the ability to report one’s own news stories on “iReport,” broadcast to thousands of people in real time through

significant aspect of the Internet is the economic phenomenon of “e-commerce,” that is, the purchase and sale of goods and services using the Internet.⁴ E-commerce is increasing rapidly worldwide, and key indicators predict continued growth in the future.⁵ The ability of buyers to instantly shop and compare among legions of competing sellers throughout the world, coupled with the ability of vendors to quickly and inexpensively market to millions of potential consumers, makes e-commerce extremely efficient and desirable. This is especially true given the enormous convenience of conducting inexpensive advertising and commerce online, instead of having to pay for traditional advertising and having to physically travel to a particular store to consummate a sale.

Twitter.com, search for or edit articles in Wikipedia on millions of topics, surf the profiles of millions of MySpace.com or Facebook.com members, create and upload videos on YouTube.com, transfer and trade money into a personal bank account, purchase a car, place inexpensive calls to anywhere in the world, get a date, and win a hand of Texas Hold-em poker. See iReport, <http://www.ireport.com> (last visited Jun. 4, 2009) (website displaying citizen-users' unedited news stories, some of which are televised in CNN news); see Posting of David Pogue to Pogue's Posts: The Latest in Technology From David Pogue, <http://pogue.blogs.nytimes.com/2009/01/15/twittering-tips-for-beginners/> (Jan. 15, 2009, 13:32 EST) (describing the mechanics of the online messaging system, Twitter, and its unmatched capacity for real-time broadcasting); WIKIPEDIA, *Wikipedia: About*, <http://en.wikipedia.org/wiki/Wikipedia:About> (stating that Wikipedia, a collaborative online encyclopedia, currently has over 75,000 volunteer-contributors working on over 10,000,000 articles, all with links to related pages for more information); Jessi Hempel, *The MySpace Generation: They Live Online, They Buy Online, They Play Online, Their Power is Growing*, BUS. WK., Dec. 12, 2005, at 1 (discussing young Americans' propensity to use online blogs and social sites, such as MySpace.com and Facebook.com, as primary places to go “when you need a friend to nurse you through a breakup, a mentor to tutor you on your calculus homework, and an address for the party everyone is going to”); Rekha Menon, *Paying Bills at the Click of a Mouse*, THE FIN. TIMES LIMITED, May 10, 2006, at 4 (“online banking sites have evolved from static brochure-ware to sophisticated financial portals that enable customers to access accounts, trade online, and make mortgage payments”); Burt Helm, *Seven Ways to Get Cheap Calls: Internet Services Have Multiplied Your Choices for Phoning Across the Country, or Across the World Inexpensively—Sometimes for Free*, BUS. WK., May 22, 2006, at Tech. (discussing a variety of internet phone service providers that offer instantaneous and inexpensive internet voice connections to anywhere in the world with an operating internet connection); Leslie Walker, *New Trends in Online Traffic: Visits to Sites for Blogging, Local Information and Social Networks Drive Web Growth*, THE WASHINGTON POST, Apr. 4, 2006, at D01 (displaying statistics showing tremendous increases in use of traditional search engines, such as Yahoo and Google, as well as social networking sites); Press Release, Nielsen/NetRatings, Inc.: A Global Leader in Internet Media and Market Research, *Social Networking Sites Grow Over 47%, Year over Year, Reaching 45% of Web Users* (May 11, 2006), http://www.nielsen-netratings.com/pr/pr_060511 (displaying yearly growth of MySpace.com (a social site which offers music, videos, and blogging) at 376%, and showing a growth of thirty million members from April 2005 to April 2006).

4. See BLACK'S LAW DICTIONARY 551 (8th ed. 2004) (stating that e-commerce is “[t]he practice of buying and selling goods and services through online consumer services on the Internet.”); see also *Define and Sell: Where E-Commerce Wins Hands Down, and Where it Doesn't*, ECONOMIST, Feb. 24, 2000, at 76 (explaining that there are four types of e-commerce: business-to-business, business-to-consumer, consumer-to-business, and consumer-to-consumer). Business-to-business transactions are between large corporations, such as General Electric, and their subcontractors or suppliers. Business-to-consumer e-commerce “embraces normal retail activity on the web, such as bookselling by Amazon.com, or online stock-broking by Charles Schwab.” Consumer-to-business “takes advantage of the Internet's power to drive transactions the other way around,” where consumers bid on the product, and the business decides whether to accept the offer. Consumer-to-consumer “cover[s] new fashion for consumers' auctions, epitomized by the auction site eBay.com.”

5. See Press Release, Forrester, *Online Sales To Climb Despite Struggling Economy According To Shop.org/Forrester Research Study: Online Retail Sales to Reach \$204 Billion This Year* (April 8, 2008), <http://www.forrester.com/ER/Press/Release/0,1769,1205,00.html> (reporting that online retail sales are expected to rise in 2008 to \$204 billion, a seventeen percent increase from 2007); see also Sucharita Mulpuru, *US eCommerce Forecast: 2008 to 2012: B2C eCommerce Expected to Top \$300B in Five Years*, FORRESTER, Jan. 18, 2008, <http://www.forrester.com/Research/Document/Excerpt/0,7211,41592,00.html> (predicting online retail revenues of \$335 billion by 2012, which translates to over ten percent compound annual growth rate).

Despite all of the growth, convenience, and economic advantage that e-commerce offers, increased Internet sales activity also brings with it an increase in Internet legal disputes, as legal disputes arising out of typical business transactions have not disappeared merely because those transactions are made online.⁶ These inevitable e-commerce disputes must be resolved efficiently, fairly, and securely so that online buyers and sellers can place full confidence in e-commerce markets. The Internet must be viewed as a trustworthy online global marketplace fully operating under the rule of law. For this to occur, the principles of fairness, accessibility, and equity available in most physical courts must also be within reach for disputes arising out of online transactions. If e-commerce disputes cannot be resolved efficiently and fairly, then many of the economic and convenience advantages of e-commerce will be threatened due to legal enforcement risks and resulting business uncertainties.⁷

Courts in the U.S. have been desperately trying to adapt their pre-Internet legal systems to adjudicate post-Internet online legal disputes.⁸ Despite valiant

6. With a substantial amount of daily sales transactions taking place online, the amount of Internet-based litigation has increased. Because online consumer activity continues to grow by over fourteen percent per year, the amount of litigation resulting from these online transactions is likely to increase. *See* Mulpuru, *supra* note 5, at 1 (reporting an e-commerce annual growth rate in the double digits); E-Consumer.gov, E-Consumer Complaints January 1-June 30, 2007, http://www.econsumer.gov/english/contentfiles/pdfs/econsumer_stats.pdf (reporting almost 6,500 online consumer complaints and about 4,500 online business complaints worldwide from January 1 through June 30, 2007)(last visited Mar. 23, 2009); *See also* Alan Wiener, *Opportunities and Initiatives in Online Dispute Resolution*, 24 SPIDR NEWS, (Summer 2000) at 2, available at <http://www.mediate.com/articles/awiener1.cfm> (“The characteristics of the Internet community and of e-commerce transactions increase both the likelihood of online disputes arising and the difficulty of efficiently resolving them.”).

7. *See* Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 442-43 (2002) (explaining this concern is not just in the U.S., but also world-wide)

In cyberspace, e-consumers with purchasing problems have no clear means of redress for their concerns because cyberspace has no uniform laws and no unified court system. The global nature of the Web challenges national sovereignty and traditional court authority and amplifies concerns about choice of law and the enforceability of court judgments. The lack of well-established and credible online conflict resolution mechanisms dampens consumer confidence in the online marketplace, and hurts e-tailers involved in cross-border transactions.

Id.; Colm Keena, *EU Shoppers Hesitate to go Online*, IRISH TIMES, Mar. 16, 2004, at 19 (quoting European Commissioner David Byrne that only 16% of EU citizens make use of e-commerce due to a lack of consumer trust); Michael Rappa, *Managing the Digital Enterprise: Trust in Cyberspace*, Feb. 10, 2006, <http://digitalenterprise.org/trust/trust.html> (discussing lack of consumer trust in e-commerce regarding seller integrity and issues of legal recourse); Keith Regan, *EU Okays E-Commerce Dispute Law: The Proposed EU Regulation is expected to boost e-commerce confidence*, E COMMERCE TIMES, Dec. 1, 2000, <http://www.ecommercetimes.com/story/5635.html> (describing the EU’s passage of a new law, Brussels I, which attempts to remedy dwindling consumer confidence in the legal enforceability of online sales transactions by allowing the consumer to sue in his or her home country, regardless of where the seller lives). *See also* *EU’s ecommerce Tangle*, INFORMATION AGE July 5, 2001, http://www.information-age.com/article/2001/july/eus_ecommerce_tangle (describing the second EU law to address consumer confidence, Rome II, which deals with non-contractual liability).

8. American courts have had difficulty not only with obtaining jurisdiction over defendants who have Internet contacts with the forum state, but also with simply determining jurisdiction based on Internet use. *See, e.g.*, *Calder v. Jones*, 465 U.S. 783, 790 (1984) (developing the “effects test,” where jurisdiction is proper over a non-resident defendant who has purposefully caused “negative effects” to happen in the forum state). Several tests have been developed beyond traditional minimum contacts analysis in an attempt to guide the determination of personal jurisdiction regarding Internet use. *See* *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (E.D. Pa. 1997) (describing the sliding scale test for personal jurisdiction based solely on

efforts, traditional litigation, in a physical court chosen by either the online seller or the online buyer, is rarely the optimum forum for resolving an online dispute,⁹ especially if the item sold was relatively inexpensive.¹⁰ Because the average online transaction is only about \$150.00,¹¹ a traditional lawsuit is often not an economically worthwhile endeavor for an aggrieved party, given the significant time and cost involved in such a lawsuit.¹² Traditional litigation in a physical court to resolve an online dispute typically ends up subjecting

Internet use: “the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site”). Another test, “the effects test,” was developed early on in the publishing context, but has been used to help determine Internet jurisdiction. Although widely used in U.S. courts, both the “effects test” and *Zippo*’s sliding scale analysis have come under harsh criticism as being “unpredictable” and largely ineffective for determining personal jurisdiction. See *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 751 (E.D. Mich. 2000) (finding that the defendant, a Texas citizen who had purchased craft patterns from the Michigan plaintiff and had sold the plaintiff’s patterns to buyers in Michigan through eBay, did not “purposefully avail” herself of Michigan, the forum state, and thus did not meet the “minimum contacts” test for personal jurisdiction). See Notes, A “Category Specific” Legislative Approach to the Internet Personal Jurisdiction Problem in U.S. Law, 117 HARV. L. REV. 1617, 1619-20 (2004) (describing *Zippo*’s sliding scale test as unpredictable, and describing the “effects test” as inconsistent and ineffective). See also Daniel Steuer, Comment, *The Shoe Fits and the Lighter is Out of Gas: The Continuing Utility of International Shoe and the Misuse and Ineffectiveness of Zippo*, 74 U. COLO. L. REV. 319, 321 (2003) (arguing that “the *Zippo* test provides little useful guidance for courts wrestling with jurisdictional problems based on Internet activity” and instead of using *Zippo* as a “dispositive” test, courts should look back to *International Shoe* and its progeny for help with Internet jurisdiction); Dennis T. Yokomaya, *You Can’t Always Use the Zippo Code: The Fallacy of a Uniform Theory for Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1195 (2005) (“The decision in *Zippo*, while a significant and desirable change in the evolution of Internet jurisdiction, should not be applied to all personal jurisdiction issues involving the Internet.”); See generally *infra* Part I (explaining the need for courts to develop solutions to Internet cases).

9. See Henry Peritt, *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 675-76 (2000) (“Three characteristics of the Internet make traditional dispute resolution through administrative agency and judicial procedures unsatisfactory for many controversies that arise in Internet-based commerce and political interaction. The Internet’s low economic barriers to entry invite participation in commerce and politics by small entities and individuals who cannot afford direct participation in many traditional markets and political arenas When [legal] dispute resolution costs are high, as they are for traditional administrative and judicial procedures, the transaction costs of dispute resolution threaten to swamp the value of the underlying transaction Second, the geographic openness of electronic commerce makes stranger-to-stranger transactions more likely. The absence of informal means of developing trust, as when one shops regularly at the local bookstore, means that both merchants and consumers will be inhibited in engaging in commerce unless they have some recourse if the deal goes sour. Third, the Internet is inherently global. . . . In other words, it is difficult to localize injury-producing conduct or the injury itself in Internet-based markets or political arenas. Traditional dispute resolution machinery depends on localization to determine jurisdiction. Impediments to localization create uncertainty and controversy over assertions of jurisdiction.”).

10. See Jennifer LeClaire, *Online Holiday Sales a Record \$8.8 Billion*, E-COMMERCE TIMES, Dec. 30, 2004, <http://www.ecommercetimes.com/story/39329.html> (“The average sale amount during the time period from Thanksgiving through Monday, December 27 [2004], was \$145, a 12% increase as compared to the same time period in 2003.”).

11. VeriSign News and Events, *E-Commerce Grows 31 Percent, Pharming Emerges as Major New Security Threat*, June 14, 2005 www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/06-14-2005/0003870544&EDATE=.

12. Lawsuits are typically expensive and time-consuming, so the potential recovery must be high enough to justify the time and expense of pursuing the remedy. See Amy Dison, *Banking and Finance: Election Aftermath*, SMART BUSINESS PITTSBURGH, Jan. 2007, available at http://www.sbsonline.com/Local/Article/10711/79/88/Election_aftermath.aspx (stating that the average cost of a typical lawsuit exceeds \$100,000). See generally Jack Faris, *Small Businesses Heading for the Chopping Block*, INS JOURNAL, Feb. 20, 2006, available at <http://www.insurancejournal.com/magazines/southcentral/2006/02/20/features/68093.htm> (discussing the problematic trend of small businesses not being able to afford lawsuits typically costing twice as much as their income).

disputants to comparatively expensive, inefficient, and time-consuming lawsuits, often with unpredictable or unsatisfactory results, especially if the parties are from different parts of the country or of the world.¹³

Without a truly accessible and cost-effective legal system to resolve disputes arising out of online transactions, e-commerce participants end up having to buy and sell at their own peril, relying principally on the good-faith performance of their Internet transaction counterparts or on the vagaries of antiquated pre-Internet legal systems. Consequently, many Internet buyers and sellers risk suffering a violation of their rights—such as paying for an item that does not get delivered—because seeking justice in a physical court for an online transaction gone awry becomes a very difficult and often an impractical undertaking. Additionally, some risk-averse buyers and sellers choose not to enter e-commerce markets at all and instead choose to conduct all of their transactions exclusively in traditional physical, non-Internet markets. As a result, even if buying and selling in these traditional markets is not as cost or time effective as transacting online,¹⁴ some individuals may still elect to do so because they perceive the economic and legal risks of face-to-face sales to be

13. See *supra* note 8 and accompanying text (noting that U.S. courts have had difficulty establishing jurisdiction over Internet users without minimum forum contacts). See also Peritt, *supra* note 9, at 675 (noting that “it is difficult to localize injury producing conduct or the injury itself in Internet-based Markets . . .”).

14. See, e.g., Jeanette Teh, Note, *Privacy Wars in Cyberspace: An Examination of the Legal and Business Tensions in Information Privacy*, 4 YALE SYMP. ON L. & TECH. 1, 25 (2002) (explaining that customers engage in online commerce for increased convenience and the personal control to organize shopping around their schedule as opposed to shopping dictated by store hours—with the benefit of quick and efficient price comparisons). The increased freedom and convenience offered by shopping online has resulted in a shift of the balance of power from the producers to the consumers. *Id.* See also Scott F. Mascianica, *Why All The Wine-Ing? The Wine Industry's Battle with States Over The Direct Shipment Issue*, 17 LOY. CONSUMER L. REV. 91, 115-16 (2004) (suggesting that the increased choice and eliminations of the middleman in Internet transactions may increase the burden on other markets as more individuals each year turn to e-commerce to make purchases easier and more convenient); John A. Vernon, Stephan Goupil & Joseph H. Golec, *The Internet and Pharmaceutical Importation: Economic Realities and Other Related Issues*, 16 ALB. L.J. SCI. & TECH. 545, 546 (2006) (“[Internet technology has enabled] consumers to become more efficient buyers through the ability to identify low prices and obscure items.”); Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1619 (2000) (“Growth in mail-order and electronic commerce, however, has provided new channels through which consumers and producers or retailers can reach each other.”); Mike D. Earles, Notes and Comments, *Clicking on the Dotted Line: Florida's Enactment of the Uniform Electronic Transactions Act as a Boost to E-Commerce*, 25 NOVA L. REV. 317, 319 (2000) (“Some advantages of conducting business through e-commerce are that it is convenient, flexible, and efficient.”); Justin D. Petruzzelli, Note, *Adjust Your Font Size: Websites are Public Accommodations Under the Americans with Disabilities Act*, 53 RUTGERS L. REV. 1063, 1092 (2001) (“[Because] accessible, commercial Web sites enlarge the market of potential customers. . . . [s]hopping online is an efficient and likely simple means for a disabled person to purchase products.”); Anthony M. Cocco, *E-Commerce: What Law Firms with E-Clients Need to Know*, 17 No. 13 LAW. PC 6, 8-10 (2000) (demonstrating that buying and selling online means business can be conducted more efficiently and effectively); Saul Hansell, *The Search for the Perfect Gift: Just a Click, Not a Drive Away*, N.Y. TIMES Dec. 3, 2003, available at <http://query.nytimes.com/gst/fullpage.html?sec=technology&res=9F01E3D91F3AF930A35751C1A9659C8B63> (“[T]he Internet offers speed, low prices, detailed product information and a way to avoid the holiday crush at the malls.”); Junghyun Kim & Robert LaRose, *Interactive E-Commerce: Promoting Consumer Efficiency or Impulsivity?*, JCMC 10 (1), Article 9, Nov. 2004, http://jcmc.indiana.edu/vol10/issue1/kim_larose.html (last visited Mar. 23, 2009) (finding that “[a] convenience orientation leads Internet shoppers to Web site features that save their search costs in order to pursue their utilitarian outcomes during shopping. Such features may include search engines, price information, price comparison functions, and product reviews from other shoppers or experts.”).

considerably lower than those involved in a typical online transaction. The continued high growth rate of e-commerce will likely be compromised if online purchasers and sellers are not operating within a legal construct that generates confidence in the Internet as an arena for legally protected and easily enforceable transactions. Therefore, the rule of law must keep pace with the growth of the Internet so that online purchasers and sellers can have full confidence in the legitimacy of e-commerce, and the realistic ability to pursue a practical and effective legal recourse whenever necessary.

Given the foregoing concerns, this Article argues that the best way to resolve e-commerce disputes involves using the very same convenient and efficient mode in which these transactions are made in the first place, the Internet. Online Dispute Resolution (“ODR”) can solve many intractable cost, travel, and inefficiency problems associated with trying to adjudicate e-commerce disputes using traditional litigation in physical courtrooms. Therefore, ODR, as envisioned herein, offers online buyers and sellers the necessary confidence, convenience, fairness, and security to support the growth and stability of e-commerce far into the future.

II. SUMMARY AND STRUCTURE OF ARTICLE

Part One of this Article describes how traditional physical courts are not well suited to solve e-commerce disputes because such disputes often develop into inconvenient, expensive, and unpredictable litigation. For example, traditional courts determine both: (1) issues of personal jurisdiction, the court’s legal power over the parties¹⁵ and (2) conflicts of law issues, the court’s determination of applicable law governing the lawsuit,¹⁶ in terms of the physical location or activity of the parties involved. But physical location or activity determinations often lose meaning in online transactions. Consequently, when courts apply rules designed for cases filed in physical

15. Personal jurisdiction is “[a] court’s power to bring a person into its adjudicative process; jurisdiction over a defendant’s personal rights, rather than merely over property interests.” BLACK’S LAW DICTIONARY 870 (8th ed. 2004). The personal jurisdiction issue involves determining when one litigant can require the other, who may be located in a different state or country, to come and defend itself in the court or forum of the suing party. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). The court must determine if it has the legal power over the defendant to subject that defendant to any ruling the court might make. *Id.* at 318. Determining personal jurisdiction over the defendant involves an analysis of the applicable jurisdictional statute in the forum, and an additional analysis of the defendant’s contacts and activities within the forum state so as not to offend “traditional notions of fair play and substantial justice.” *Id.* at 316-19 (developing the modern “minimum contacts” test for personal jurisdiction over non-resident defendants). Personal jurisdiction over a defendant may be either general jurisdiction or specific jurisdiction. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122 (E.D. Pa. 1997). General jurisdiction confers to a court the power over an out-of-state defendant for any cause of action where the defendant’s contacts with the forum state are “systematic and continuous.” *Id.* Specific jurisdiction, on the other hand, confers to a court the power over an out-of-state defendant for forum-related activities only. *Id.*

16. Conflict of laws issues involve determining what substantive legal principles of which state, or country, will apply to determine the outcome of the case. The question is what set of competing substantive legal principles should apply to resolve the merits of the dispute, those of the seller or those of the buyer. *See* BLACK’S LAW DICTIONARY 319 (8th ed. 2004) (defining conflict of laws as “[a] difference between the laws of different states or countries in a case in which a transaction or occurrence central to the case has a connection to two or more jurisdictions”).

courts to Internet disputes, certain legal quagmires emerge. For instance, it is difficult, if not impossible, to determine in a legally principled way “where” an online transaction took place between a buyer and seller from different states or countries. Would it be in the state or country where the buyer’s computer is located, where the seller’s computer is located, where either of the servers are located, or, would it be in every state or country where the Web site is accessible? In terms of purposeful availment¹⁷—where a party often will be subject to the personal jurisdiction of a state if that party purposefully initiated contact in that state—it is difficult to determine who first engaged whom in an online transaction. Did the web surfer/buyer come to the Web site seller, or did the Web site seller effectively solicit the buyer by providing an interactive, accessible Web site in the first place? If the parties “met” online on a particular auction or third-party Web site such as e-Bay or Amazon, “where” did that transaction take place for purposes of personal jurisdiction and applicable law? In all of these circumstances it must be determined what state or foreign law should apply and in which state or country the lawsuit could take place. Traditional location-based legal determinations do not function well when applied to interstate e-commerce transactions.¹⁸ Although forum selection clauses and applicable law clauses in contracts can reduce this uncertainty, they cannot transcend expensive geographic location barriers that still require one or both parties to travel to a physical forum in order to adjudicate the dispute. ODR can effectively overcome these limitations, making a decision on the merits more attainable.

Part Two explains how ODR is specifically tailored to manage online disputes effectively. First, ODR has all of the same cost-saving and general efficiency advantages that traditional Alternative Dispute Resolution (“ADR”) has over conventional litigation¹⁹ because ODR is simply ADR on the Internet.

17. Purposeful availment is defined as deliberately engaging in significant activities within a state or creating “continuing obligations” between a litigant and residents. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). Purposeful availment is the intent element of “minimum contacts” because, in fairness, in order for a party to be subject to jurisdiction, that party has to voluntarily reach out to the jurisdiction and it must be foreseeable that they might get sued there. *Id.*; see also *Travelers Health Ass’n v. Virginia*, 339 U.S. 643, 649 (1950). “Foreseeability, therefore, is a critical component of due process analysis; defendant’s connection with the forum should be such that he can reasonably expect to be haled into court there.” Susan Nauss Exon, *A New Shoe is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI & TECH. 1, 6 (2000) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

18. See Martha L Arias, *Electronic Contracts and Jurisdiction Under State Long-Arm Status*, INTERNET BUSINESS LAW SERVICES, Aug. 6, 2008, http://www.ibls.com/Internet_law_news_portal_view.aspx?id=2116&s=latestnews (addressing the difficulty in asserting jurisdiction in cases involving electronic contracts).

19. ADR has several advantages over litigation: cost-effectiveness, speed, confidentiality, flexibility, less formality, relationship maintenance with a less adversarial environment, greater focus on substantive issues in dispute, party control and involvement in the resolution, fewer jurisdictional problems, and reduction of court dockets. Amy S. Moeves & Scott C. Moeves, *Two Roads Diverged: A Tale of Technology and Alternative Dispute Resolution*, 12 WM. & MARY BILL RTS. J. 843, 844 (2004); Amy Beasley, Comment, *The Road Not Often Taken: Alternative Dispute Resolution for Common Interest Communities in North Carolina*, 30 CAMPBELL L. REV. 315, 321-322 (2008). See also NAT’L ARBITRATION FORUM, *The Case for the Pre-Dispute Arbitration Agreements: Effective and Affordable Access to Justice for Consumers* (2004), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf> (last visited June 2, 2007) (highlighting that seventy-eight percent of trial attorneys find arbitration faster than lawsuits, arbitration is 36% faster than a lawsuit, and “consumers prevailed 20% more often in arbitration than

Beyond that, ODR employs technology to make dispute resolution even more convenient and far less expensive than traditional ADR. Because the resolution of the dispute occurs entirely online, ODR offers speed, convenience, and cost efficiency by transcending physical location barriers that limit traditional ADR as well as formal litigation. Thus, litigants do not have to spend time or money traveling to physical courtrooms or conference rooms. Nevertheless, ODR still provides the due process, fairness, and legitimacy offered by traditional resolution methods. In fact, ODR often enhances due process, fairness, and legitimacy because disputes can more easily be decided on the merits²⁰ of the case, given the technological ease and lack of expense in adjudicating online. Accordingly, ODR is not as susceptible to the same procedural maneuvering and gamesmanship often associated with formal litigation, nor is it constrained by the physical/location-based requirements of both traditional ADR and formal litigation.²¹ This reduced cost and increased efficiency is especially important in the international context where online buyers and sellers are not just located in different states or provinces of a single country, but are in different countries or even on different continents. Accordingly, because of the technology involved, disputes arising from online transactions that would otherwise be too costly or inefficient to pursue in a physical legal forum can now be adjudicated efficiently, inexpensively, fairly, and on the merits by using ODR.

Because it is important to see how a comprehensive ODR system could work in practice, Part Three describes and analyzes an intricate working prototype of a user-friendly yet sophisticated online dispute resolution system—"DotComJustice."²² The DotComJustice prototype goes beyond negotiation by e-mail, where participants simply submit competing offers of settlement, or other similar types of online negotiation and mediation currently available on the Internet.²³ ODR provides a convenient, trustworthy, and legitimate forum

in court").

20. Merits of the case are "[t]he elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points" BLACK'S LAW DICTIONARY 1010 (8th ed. 2004).

21. See James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1087 (2006) (recognizing that joinder is frequently used by plaintiffs' attorneys to establish a forum that will produce a favorable result for their clients); see also Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1507 (1995) (explaining that the drop in plaintiffs' rate of winning (from 58% in a case where there is no transfer, to 29% in transferred cases) is the result of plaintiffs forum shopping and how transfer removes that forum advantage; this statistical analysis supports the conclusion that the physical forum affects the outcome of the case); E. Kyle McNew, Note, *Are Rules Just Meant to be Broken? The One-Year Two-Step in Tedford v. Warner-Lambert Co.*, 62 WASH. & LEE L. REV. 1315, 1359 (2005) (explaining that where a plaintiff joins an irrelevant party solely to destroy diversity and drops that party out after one year, removal may be allowed to avoid inequitable results of forum manipulation).

22. Online at www.electroniclegal.com.

23. The number of sites offering various levels of ODR is large. See, e.g., Business and Consumer Bureau, *BCB Cyber Judge*, (2006), <http://www.businessconsumerbureau.com/cyberjudge.htm> ("[p]rovided as a private Binding Arbitration service for members and clients only"); see also Miriam R. Albert, *E-Buyer Beware: Why Online Auction Fraud Should Be Regulated*, 39 AM. BUS. L.J. 575, 637 app. (2002) ("[A] sampling of current online ADR projects and Web sites, with brief descriptions of the services offered"); Cybersettle, <http://www.cybersettle.com/info/about/company/overview.aspx> (last visited May 29, 2007) (asserting that by enabling parties to submit information and settlement offers through email, ODR promises a

to resolve e-commerce disputes on the merits by a competent decision maker, while limiting time, expense, and even the need for the parties to obtain legal counsel. Using the DotComJustice prototype, buyers and sellers can negotiate, mediate, and arbitrate their disputes online, and neither party has to leave the comfort of her computer to do so. All case filings are accessible online through a private dispute resolution page of the DotComJustice Web site, and the parties are able to make legal claims and defenses, negotiate informally, upload evidence, and make final arguments, all by simply clicking prompts and typing key information into discrete text boxes. There are also procedures for cases where more substantial sums of money are at stake to cross-examine witnesses and to make final oral arguments via the web, telephone, or video-conferencing, as well as an internal appellate procedure. The parties are notified of all developments in the case and the parties can upload their documents and filings by secure e-mail. Finally, the online arbiters are independent expert administrative judges, and because all online sales are treated as a sale of goods,²⁴ the applicable law is the text of the Uniform Commercial Code (“UCC”), or the United Nations Convention for the

much faster resolution and saves both parties from the stresses of traditional courtroom litigation, which can take years to reach a resolution); Cybersettle, <http://www.cybersettle.com/pub/home/about/factsheet.aspx> (last visited Mar. 23, 2009) (explaining that Cybersettle offers a patented online dispute resolution service to confidentially settle claims and that, since the site went online in August 1998, Cybersettle has settled over 196,082 transactions to date totaling \$1,457,807,565 in settlements; settlements obtained using the Cybersettle service are binding to the parties and the fees charged vary, depending on the settlement reached); Electronic Consumer Dispute Resolution (“ECODIR”) <http://www.ecodir.org/odlp/index.htm> (last visited Mar. 23, 2009) (explaining that ECODIR, which offers a free service to help consumers and businesses resolve their disputes online, offers a three-step process comprised of negotiation, mediation, and recommendation; if a resolution is not reached in the negotiation phase, then the parties move to mediation, and, likewise, if a resolution is not reached in mediation, then the mediator issues a recommendation to the parties; the resolution is not binding unless the parties agree that it will be binding); iCourthouse, <http://www.i-courthouse.com> (last visited Mar. 23, 2009) (describing i-courthouse, which offers users a virtual courthouse where disputes are evaluated by an online jury of peers, parties can opt to engage in mock trials to aid in determining the potential outcome of their case, parties can engage in voir dire and choose specific jurors, experts and evidence are presented online, juror deliberations can be monitored, and the parties decide whether the verdict shall be binding); Mediation America, <http://www.mediationamerica.com> (last visited Mar. 23, 2009) (offering online civil mediation and divorce mediation); Mediation Arbitration Resolution Services (MARS), <http://www.resolvemydispute.com/> (last visited Mar. 23, 2009) (explaining that MARS, which offers a virtual ADR center gives parties the opportunity to resolve disputes arising from online transactions in a convenient online environment, offers negotiation, mediation, and binding or non-binding arbitration; they also offer a “blind bidding” format to aid in reaching settlements); Center for Information Technology and Dispute Resolution, Online Ombuds Office, <http://www.ombuds.org/center/ombuds.html> (last visited Feb. 16, 2008) (describing the online OMBUDS office of the University of Massachusetts, established in June, 1996 and administered by the University of Massachusetts Center for Information Technology and Dispute Resolution; on OMBUDS, officials investigate disputes and make recommendations to the parties and the parties can enter into a settlement agreement if they chose to do so); The Chicago-Kent College of Law, Virtual Magistrate, <http://www.vmag.org/> (last visited Mar. 23, 2009) (describing Virtual Magistrate, an online dispute resolution site focusing on disputes arising from spamming, defamation, inappropriate messaging, removal of message board posts, online contract, property, or tort disputes, and concerns of online treatment).

24. For example, on DotComJustice, airline tickets and hotel accommodations would be treated as “goods” rather than “services” for purposes of applying the UCC, which is “a uniform law that governs commercial transactions, including sales of goods, secured transactions, and negotiable instruments” and “has been adopted in some form by every state.” BLACK’S LAW DICTIONARY 1565 (8th ed. 2004). DotComJustice, however, does not use any state adoption of the UCC, but instead uses just the text of the UCC itself as the source of governing law of all online disputes.

International Sales of Goods (“UN Convention”),²⁵ depending on the nature of the transaction.

This Article concludes by asserting that court systems and e-commerce participants should incorporate ODR as a modern justice system for all online transactions. The Internet must be perceived as a safe and legitimate global marketplace, where buyers and sellers can have meaningful access to competent and convenient legal enforcement mechanisms that adequately protect their legal rights and minimize their economic risks. Because traditional litigation in physical courtrooms is often prohibitively expensive in these types of cases, aggrieved parties often choose to forego their legal remedies because a formal lawsuit is just not worth it. Therefore, a comprehensive ODR system, like the DotComJustice prototype referred to herein, should be embraced because it is uniquely adapted to fairly and efficiently resolve e-commerce disputes on the merits in an accessible, cost-effective online forum that overcomes the physical and cost barriers associated with traditional litigation.

PART ONE

WHY TRADITIONAL PHYSICAL COURT SYSTEMS ARE NOT WELL-SUITED TO RESOLVE MOST E-COMMERCE DISPUTES

I. A HYPOTHETICAL ONLINE TRANSACTION

Consider an example of a typical e-commerce transaction. Suppose a California wine collector has created a Web site where he features wine tasting articles and offers to sell various types of wine to Web site visitors. A New Jersey woman “surfing the net” finds the site and decides to purchase ten \$50.00 bottles of the wine collector’s “Authentic California Wine” for her upcoming wine tasting party. She authorizes a \$500.00 payment to the California seller, plus \$30 for shipping and handling, on her credit card, according to the directions on the Web site. Two weeks later, she claims that she has only received five bottles of wine, although the seller claims he sent all ten bottles pursuant to her Internet order. He therefore refuses to send her any more bottles of wine or to refund any money for the alleged five missing bottles.

At this point, the buyer may simply forgo any legal action to recover her alleged \$250.00 loss and \$15.00 overcharge for shipping and handling for bottles of wine that never arrived, concluding that the possibility of not receiving the wine was simply a risk she took when she bought online from a virtual stranger. Although not every online transaction results in this kind of dispute, especially because of the seller’s desire to perform and obtain possible repeat business, and the purchaser’s desire to complete the transaction, the lack

25. U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980). Note also that parties may agree otherwise so that US domestic parties could agree to apply the UN Convention or parties from different countries might agree to apply the UCC.

of a practical legal recourse in the event of a dispute does not make the Internet a particularly secure or reliable place to do business. The law, therefore, should provide a practical legal mechanism to compensate a buyer for a seller's breach. Of course, the current remedy would be for the unsatisfied buyer from New Jersey to seek traditional legal relief in a physical court by filing a lawsuit in the New Jersey Small Claims Court.²⁶ However, if the New Jersey plaintiff seeks the traditional remedy by suing the California seller in a New Jersey court, certain problematic legal issues would immediately emerge.

There are many foundational issues in every legal dispute, but as this hypothetical demonstrates, two are particularly important, especially if the litigants are from different localities, as is often the case in typical e-commerce transactions.²⁷ One of these key issues is procedural (personal jurisdiction)²⁸ and the other is substantive (conflicts of law),²⁹ and both have significant ramifications. As a practical matter, these two issues might even determine the outcome of the case, if, for example, the costs of litigating in a foreign jurisdiction are as much or more than the amount at stake in the dispute. Accordingly, with respect to this interstate wine sale hypothetical, as with all such disputes, two important legal determinations must be made.

A. Would There Be Personal Jurisdiction over the Defendant in the Buyer's Home State?

Personal jurisdiction is important because it situates the *location* of the state's enforcement power in the event that legally-cognizant agreements between private parties go unfulfilled. Accordingly, the question in our hypothetical would be whether the New Jersey-based plaintiff could sue the

26. "[New Jersey] Small Claims [court] handles cases in which the demand is not more than \$3,000. . . . If the amount of money you are trying to recover is more than the money limits, but less than \$15,000, your case should be filed in the regular Special Civil Part. Cases in which damages are more than \$15,000 must be filed in the Law Division of the Superior Court." New Jersey Judiciary: Small Claims Frequently Asked Questions, <http://www.judiciary.state.nj.us/civil/civ-02.htm#Sm-c1> (last visited Mar. 23, 2009). Of course, this type of dispute scenario could occur for any type of online purchase, from airline tickets and hotel reservations, to cameras, boats, cars, and computers.

27. See, e.g., *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 747 (E.D. Mich. 2000) (describing a copyright infringement case where the defendant (consumer) was from Texas and the plaintiff (seller) was from Michigan); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 448-49 (3d Cir. 2003) (discussing a trademark infringement suit where the plaintiff was incorporated in Delaware, doing business in New Jersey and the defendant was from Spain); *Abiomed, Inc. v. Turnbull*, 379 F. Supp. 2d 90, 92 (D. Mass. 2005) (examining a situation dealing with defamation and trade secret misappropriation, where the plaintiff was from Massachusetts and the defendant was from Ohio); *Young Again Prods., Inc. v. Acord*, 307 F. Supp. 2d 713, 714-15 (D. Md. 2004) (describing a trademark infringement case where the plaintiff (company) was incorporated and doing business in Maryland and the defendants (resellers) were incorporated in Texas); *Dagesse v. Plant Hotel N.V.*, 113 F. Supp. 2d 211, 213-14 (D.N.H. 2000) (looking at a personal jurisdiction issue where the plaintiff was from New Hampshire and the defendant was incorporated in Aruba); *Weber v. Jolly Hotels*, 977 F. Supp. 327, 329 (D.N.J. 1997) (discussing personal jurisdiction where the plaintiff was from New Jersey and the defendant corporation was from Italy); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 297 (S.D.N.Y. 1996) (examining a trademark infringement suit where the plaintiff was from New York and the defendant was from Missouri).

28. See *supra* note 15 (describing in detail how personal jurisdiction is a court's power over the defendant, which is determined by the defendant's contacts with the forum state).

29. See *supra* note 16 (discussing how a conflict of laws issue is a determination as to which substantive law will apply in the case.)

California-based defendant in a New Jersey court, as the plaintiff desires, or would the New Jersey-based buyer have to sue the California-based seller only in a California court, which probably would be the seller's preference. To determine the threshold issue of *where* the lawsuit could take place, it must be decided where the defendant is subject to personal jurisdiction.³⁰ Personal jurisdiction is satisfied when the defendant has certain "minimum contacts" with the state that make it fair for the state court to exercise its legal power over the defendant,³¹ and the applicable jurisdictional statute is satisfied.

1. *Traditional Analysis*

Traditional personal jurisdiction jurisprudence involves the following conceptual framework. First, personal jurisdiction over an in-state defendant may be proper if the defendant received service of process³² while physically within the state's borders.³³ Another traditional means of obtaining jurisdiction is when the defendant lives, or is domiciled,³⁴ within the state. If the defendant

30. See *supra* note 15 (providing a detailed explanation of how courts determine personal jurisdiction and the different forms of personal jurisdiction they may take). Personal jurisdiction is an issue relating mostly to the defendant in a lawsuit because there is always personal jurisdiction over the plaintiff due to the fact that the plaintiff is the one specifically going to the forum court and requesting relief. As such, by the act of suing, the plaintiff is consenting to the jurisdiction of the court and therefore, personal jurisdiction over the plaintiff is automatic. See *Naum v. Brown*, 604 F. Supp. 1186, 1188 (E.D.N.Y. 1985) (stating the rule that the plaintiff consents to personal jurisdiction in a specific forum when he files an action in court in that forum).

31. This is a constitutional "due process" concern: "fair play and substantial justice," where fairness is determined by whether the court has found that the defendant has sufficient "minimum contacts" with the state to make the exercise of jurisdiction in that state over the defendant compliant with due process. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317-19 (1945) (discussing constitutional due process).

32. "Service of Process" is where the defendant receives official notice of the lawsuit. In federal court, for example, Rule 4 of the Federal Rules of Civil Procedure defines the "various means [and rules] with which a plaintiff may serve defendants" with notice of a lawsuit. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 154 (6th ed. 2004). See, e.g., *Green v. Humprey Elevator & Truck Co.*, 816 F.2d 877, 884-85 (3d Cir. 1987) (upholding the district court's dismissal of the plaintiff's negligence claim against the defendants because the plaintiff failed to meet the requirement of serving process (giving notice) upon defendants within 120 days, as prescribed by Rule 4); see generally *Coleman v. Milwaukee Bd. of Sch. Dirs.*, 290 F.3d 932, 935 (7th Cir. 2002) (affirming the district court's dismissal of a case because the plaintiff failed to serve the defendant in accordance with Rule 4).

33. See *Pennoyer v. Neff*, 95 U.S. 714 (1877) (holding that, prior even to the creation of the minimum contacts test for personal jurisdiction, one of the reasons the court could not exercise personal jurisdiction over the non-resident defendant was because he was not personally served with process while physically in the state). *But see Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990) (ruling in a 4-4 split on whether "presence" in the state alone is enough to obtain personal jurisdiction over a non-resident defendant, or whether the defendant's presence in the state is just one contact in the minimum contacts analysis for determining personal jurisdiction).

34. "Domicile" is residence in the state plus the subjective intent to remain there for the indefinite future. *Gordon v. Steele*, 376 F. Supp. 575, 577-78 (W.D. Pa. 1974). See *Gilbert v. David*, 235 U.S. 561, 569-70 (1915) (finding that the plaintiff was domiciled in the state of Connecticut because he "occupied a house to which he held the title" in the state continuously for ten years, and made affirmative actions showing his intent to remain for the indefinite future, such as "own[ing] other real estate in Connecticut," and declaring "his intention to become a voter there"). Note that a corporation's domicile is both its state of incorporation and its "principal place of business," 28 U.S.C. § 1332 (2006), but it is important not to confuse personal jurisdiction with subject matter jurisdiction in federal court where domicile can also be a determining factor of citizenship for purposes of §1332 diversity of citizenship subject matter jurisdiction. Subject matter jurisdiction is the court's power to have "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." *BLACK'S LAW DICTIONARY* 870 (8th ed. 2004). Thus, domicile can be used in both personal jurisdiction determinations and subject matter

is either present when served, or is domiciled in the state, then it is typically assumed that it would be fair and not unreasonable to exercise personal jurisdiction over that defendant, given the defendant's sufficient contacts with that state.³⁴ These contacts often would be found sufficient for the exercise of personal jurisdiction, provided the defendant had voluntarily connected himself to the state so that it was foreseeable that he may be sued there.³⁵ An out-of-state Internet seller is by definition not present, nor domiciled, in-state defendant. Thus, a non-resident Internet merchant, like the hypothetical California wine seller, is better thought of as an out-of-state defendant, assuming that he was not personally served at the moment he was physically present within the State of New Jersey.

For out-of-state defendants not physically present nor domiciled within the forum state when served, or who have not consented to or waived jurisdiction in the state,³⁶ the court must determine whether those defendants may have *other* types of sufficient minimum contacts with the state as to make it fair and reasonable for the court to exercise personal jurisdiction over them.³⁷ There is personal jurisdiction based on sufficient minimum contacts, provided that the defendant voluntarily connected himself to the state to the extent that it was foreseeable that he may be sued there.³⁸ Thus, the question would become whether the California wine seller had a sufficient connection to the State of New Jersey, based solely on this one Internet transaction, to make it fair to sue him there.

Personal jurisdiction over a defendant may be either general or specific jurisdiction.³⁹ To determine whether the court has general jurisdiction over the

jurisdiction determinations.

³⁴ See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 116 (1987) (holding that it would be unfair and unreasonable to exercise personal jurisdiction considering "the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum state"). On very unique facts, the *Asahi* case added to the "minimum contacts" test of *International Shoe*, 326 U.S. 310, by holding that the exercise of jurisdiction, even when there are technical minimum contacts sufficient for asserting personal jurisdiction, is not valid if it would be "unreasonable" under the circumstances. *Id.*

³⁵ See *supra* note 17 (defining "purposeful availment") The inquiry here becomes: Did the defendant voluntarily connect with the jurisdiction and was it foreseeable that he might be brought into court there? See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

³⁶ Consent is another basis by which to obtain personal jurisdiction. Consent to personal jurisdiction does NOT involve fairness based on physical location or connectedness to the forum; instead, the act of consent itself functions as the vehicle to satisfy the constitutional requirement of fairness. So, if a defendant without minimum contacts with the state nevertheless consents to personal jurisdiction in that state, the fairness of exercising personal jurisdiction is in that act of consent, rather than in any assessment of the defendant's physical connection to the territoriality of the state. See FED. R. CIV. P. 12(b)(2), 12(h) (allowing defendant to waive the Rule 12(b)(2) defense of a lack of personal jurisdiction and thereby making it possible to consent to personal jurisdiction). Recall, plaintiffs are always deemed to consent by simply filing the lawsuit. See *supra* text accompanying note 29 (explaining the rule on consent to jurisdiction).

³⁷ See *International Shoe Co v. Washington*, 326 U.S. 310, 316 (1945) (establishing the modern "minimum contacts" analysis for determining personal jurisdiction); See also *Asahi*, 480 U.S. at 113 (modifying the minimum contacts test to include reasonableness); *Hanson*, 357 U.S. at 253 (establishing that the defendant must purposefully avail himself of the forum state, so that it is foreseeable that he be hailed to court there).

³⁸ See *supra* text accompanying note 35 (detailing voluntary connections inquiry).

³⁹ General jurisdiction means that the court has power over the defendant regarding any cause of action

out-of-state defendant, courts traditionally ask whether the defendant does a significant amount of business in the state⁴⁰ or owns a significant amount of property in the state.⁴¹ In other words, does the defendant have certain substantial and pervasive contacts with the forum state that would justify the state's exercise of power over the defendant regarding any cause of action? In our example, the State of California would clearly have general jurisdiction over the California-based defendant seller because he lives there, works there, has a business there, and is connected to California to such a significant degree that it would be fair to sue him in California on any claim. On the other hand, to determine whether the court has specific jurisdiction over the defendant, courts traditionally employ a three-prong test: (1) does the defendant have minimum contacts with the forum state, (2) are those contacts highly related to the cause of action, and (3) is personal jurisdiction over the defendant reasonable.⁴² To state another way, does the defendant have contacts with the forum state that are so highly related to the present cause of action that it would be reasonable for the court to have power over the defendant regarding that cause of action? In all of these evaluations, for both in-state and out-of-state defendants, the critical factor is whether the physical location and geographical connection of the defendant is sufficient to make it fair for the court to exercise personal jurisdiction over him.

In our hypothetical, there would not be general jurisdiction over the California defendant seller in New Jersey State court because the defendant has no contacts to the State of New Jersey other than the single sale of the wine bottles to the New Jersey plaintiff-buyer. That one-time sale would not be considered "substantial" or "pervasive," and therefore, there would be no general jurisdiction.⁴³ It would be unfair to sue the defendant in New Jersey on any claim, such as a completely unrelated California property dispute having nothing to do with the sale of the wine, based on the defendant's very slight contacts to New Jersey. However, even though the California seller's contacts to New Jersey are very slight (just the one sale of wine), they are still very highly related to what plaintiff's lawsuit is all about: damages for alleged non-delivery of five of the ten bottles of wine purchased over the Internet by the New Jersey plaintiff. Therefore, it is possible that the New Jersey court might have specific jurisdiction over the defendant on that "specific" claim.

In addition to the constitutional due process/fairness concerns set forth

within the forum state, whereas specific jurisdiction means that the court has power over the defendant only regarding a cause of action arising from her contacts with the forum state. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122 (W.D. Pa. 1997).

40. *See LSI Indus. Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1373 (Fed. Cir. 2000) ("[W]hen an out-of-state defendant conducts 'continuous and systematic' business in [a forum state,] it is 'doing business' [in the forum state] and is amenable to process there, even if the cause of action did not arise from activity [in the forum state].").

41. *See Manley v. Fong*, 734 F.2d 1415, 1418, 1418-20 (10th Cir. 1984) (holding that because the defendant owned an equitable interest in an oil and gas lease in Oklahoma, which by Oklahoma law is an ownership of interest in real estate, the defendant "availed himself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws," and thus, the defendant was subject to personal jurisdiction in Oklahoma).

42. *See Zippo* 952 F. Supp. at 1122-23 (discussing the emergence of the three pronged test).

43. *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 416-17 (1984).

above, the court must also look to the state's jurisdictional statute to find personal jurisdiction. Thus, determining personal jurisdiction is a two-step process, involving the satisfaction of both (1) a jurisdictional statute, and (2) the minimum contacts test. Many states have a "laundry list" statute of the various situations in which that state's legislature has determined when its state courts should assert personal jurisdiction.⁴⁴ Other states have jurisdictional statutes that simply mirror the minimum contacts test.⁴⁵ In either event, these statutes are often referred to as "long-arm statutes"⁴⁶ because they allow state courts to "reach out and grab" out-of-state defendants and assert jurisdiction over them as long as the statutes are constitutional (meaning it would not offend "fair play and substantial justice" to apply them in the particular circumstance).

All of the foregoing traditional legal principles would come into play in the hypothetical Internet wine sale dispute to determine whether there would be personal jurisdiction over the California defendant-seller in New Jersey. As a practical matter, that determination most likely would have profound implications on the entire lawsuit. For example, if the New Jersey court found, by applying all of the previously mentioned legal principles, that there would be personal jurisdiction over the California defendant-seller, at that point the defendant most likely would just pay the requested \$250.00 refund (five bottles at \$50.00 each) to settle the lawsuit or just send five new bottles of wine if that would satisfy the buyer, rather than pay travel costs to defend himself in a New Jersey small claims court and, on top of that, risk losing the lawsuit on the merits. In light of the potential loss, the defendant probably would just write off the \$250.00 as a cost of doing business on the Internet, give plaintiff the money or additional bottles of wine, and choose not to engage in a cross-country legal battle in New Jersey over such a small amount. This would be an economically rational decision because the cost of a round trip airline ticket to New Jersey alone could be higher than the amount of the entire dispute.⁴⁷

On the other hand, if the court found, by applying all of the traditional tests, that there would not be personal jurisdiction over the California defendant-seller in New Jersey, then it would be the New Jersey plaintiff-buyer

44. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (2007) ("In addition to other acts that may constitute doing business, a nonresident does business in the state if the nonresident: (1) contracts by mail with a Texas resident . . . (2) commits a tort in whole or in part in this state, or (3) recruits Texas residents . . . for employment . . .").

45. For example, California's long-arm statute merely applies the Constitutional due process determination for minimum contacts. *See* CAL. CIV. PROC. CODE § 410.10 (2006) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").

46. A long-arm statute is "a statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory [state] where the statute is in effect." BLACK'S LAW DICTIONARY 961 (8th ed. 2004). *See, e.g.*, *Gibbons v. Brown*, 716 So. 2d 868, 871-872 (Fl. Dist. Ct. App. 1998) (dismissing the plaintiff's complaint because, although the defendant had previously filed suit within Florida, the defendant did not fall within the coverage of the Florida long-arm statute because she did not engage in substantial activity within the state, which is what the statute required).

47. The cost of a round trip airline ticket from San Francisco, California to Newark, New Jersey is around four hundred dollars if one buys three months in advance. *See, e.g.*, Cheap Tickets, <http://www.cheaptickets.com> (last visited Mar. 23, 2009) (providing discount airfare, hotels, car rentals, and cruises).

who probably would decide to drop the lawsuit all together, and simply write it off as a risky \$500.00 Internet purchase from a virtual stranger from California that did not work out entirely (although she received five of the ten bottles of wine, the other five never arrived and so she lost \$250.00). If the plaintiff was the one who had to travel across country to sue the defendant in a California court, then \$250.00 in possible recovery would simply not be worth it, even assuming she would prevail on the merits in the California lawsuit, which is not guaranteed. Again, dropping the lawsuit altogether would be the more economically rational decision for the New Jersey plaintiff-buyer to make, given the cost of a New Jersey-California round trip airline ticket alone, not to mention the time and energy required to pursue the \$250.00 matter.

As demonstrated by the hypothetical, two sub-issues make personal jurisdiction extremely problematic in a typical e-commerce dispute. The first sub-issue is the uncertainty in determining where a defendant will be subject to personal jurisdiction, and the resulting inefficiency in trying to figure it out. The second sub-issue is the high cost of traveling to the forum jurisdiction to participate in the lawsuit, no matter where it is, once jurisdiction is determined, and the resulting inefficiency when the amount in controversy is not high enough to justify this cost.

2. *But Don't Credit Card "Reversal of Charges" Policies Solve the Problem?*

It can be argued that these small amount-in-controversy Internet disputes can easily be handled by the existing policies of the purchaser's credit card company and therefore, this is much ado about nothing. For example, VISA has a policy called the "Purchase Security & Extended Protection Program," applying to Visa Business Credit/Check cardholders, which will reverse credit card charges based on a vendor's failure to deliver purchased goods.⁴⁸ However, even if the plaintiff's credit card company were to reverse the \$250.00 from the original \$500.00 payment, the credit card company would then either have to absorb the loss as a cost of keeping customers, or it would have to sue the California defendant-seller itself in a separate lawsuit for subrogation. Either way, the underlying loss would not magically disappear simply because the credit card company reversed charges to the credit cardholder. The reversal of the charge would not truly *resolve* the legal dispute at its core; instead, it would merely *shift* the consumer's loss to the

48. Telephone Interview with Joanna, ID # P080, Customer Serv. Rep., Visa (Aug. 1, 2005). See also Card Benefits, Purchase Security and Extended Protection Program, Visa http://usa.visa.com/business/cards/benefits/bft_purchase_security.html (last visited Mar. 23, 2009) (discussing the benefits and scope of coverage of Visa's extended protection). Mastercard, Discover, and American Express also have policies to protect consumer cardholders when a vendor fails to deliver purchased goods. Telephone Interview with Kevin, ID # KK57069, Customer Serv. Rep., Mastercard (June 9, 2008); Telephone Interview with Tina, ID # TJONE30, Customer Serv. Rep., Discover (June 9, 2008); Telephone Interview with Salmen, ID # 37200, Customer Serv. Rep., Am. Express (June 9, 2008). The credit card company temporarily credits the consumer and attempts to resolve the issue with the vendor by requesting proof of delivery or a statement of intent to either deliver the goods or credit the consumer; otherwise, the credit card company may take further action. *Id.*

credit card company. The credit card company might then try to shift the loss elsewhere by spreading the loss back to consumers generally in the form of higher fees or interest rates for its credit cardholders. Another undesirable possibility is that the credit card company might be able to convince (or coerce) the seller to refund \$250.00 to the consumer for the five bottles of wine that she allegedly never received. However, if she did actually receive the wine because the vendor acted properly, then the vendor would ultimately suffer from the shifted loss and have no realistic recourse to fight the buyer's allegation that five of the ten bottles were never sent.

Thus, there are at least three possible outcomes: (1) the credit company reverses the charges and absorbs the loss itself (which might then be passed on to consumers in the form of higher interest rates so that credit cardholders ultimately pay for the loss); (2) the buyer suffers the loss as a cost of buying online from a stranger if the credit card company refuses to reverse the charges (only in a situation where the seller did not send all ten bottles of wine); or (3) the seller suffers the loss as a cost of doing business over the Internet if the credit card company forces the seller to refund the buyer's account (only in a situation where the seller actually sent all ten bottles of wine). Under any of these scenarios, the resolution of the dispute is not based on the merits of the case. Rather, these solutions merely shift or redistribute the loss, often to those with the weakest relative bargaining power, and, as such, are not principled ways to resolve e-commerce disputes. At best, these reversal of charges policies merely place a bandage over the underlying e-commerce dispute, because they simply address a symptom – a claimed loss – instead of actually resolving the dispute according to a principled legal determination. Although these credit card reversal policies are efficient and seem to make the problem “go away,” in reality they reveal the unfortunate absence of a legitimate resolution system for online disputes. All parties involved simply play an ill-fated game of “hot potato” with the dispute and the resulting loss. This is clearly not a principled nor fully satisfactory way to resolve the dispute on the merits. In effect, it merely sweeps the problem under the rug.

Similarly, any attempt merely to “split the difference” between the parties' stated positions as a way of resolving the dispute is also not an authentic resolution on the merits. If that is all it took, one could simply flip a coin to obtain a quick result, but this method would not provide legitimacy as a dispute resolution system, even though such a result could be obtained very quickly and “efficiently.” It is true that a quick split-the-loss result can be legitimate if the parties truly agree to accept such results and move on, but a legitimate dispute resolution system must be able to determine principled legally-based outcomes when the parties refuse to agree to such a quick resolution that simply splits the difference or arbitrarily produces a final result.

If there is actual agreement by the parties to these proposed quick results, then such results can be legitimate resolutions of the dispute because of the genuine agreement between the parties, especially if they highly value getting a quick and “efficient” decision. However, if there is not a genuine agreement to accept the results, then these methods of resolution are not principled ways

of resolving the dispute, because they lack due process, fairness, valid assent, and, ultimately, legitimacy. In the end, online buyers and sellers must have confidence that if there is ever a dispute between them, and merely splitting the difference or arbitrarily shifting losses is an unsatisfactory resolution, there still remains a fair, principled, and just way to resolve the dispute that is also convenient and cost-effective. In short, the rule of law must protect online dispute resolution as an accessible and practical recourse if necessary. As a result, credit card reversal policies made by credit card agents do not actually solve the underlying legal dispute, and therefore do not serve as any kind of substitute for an actual justice system. Moreover, the cost and indeterminacy problems of personal jurisdiction remain practical impediments to resolving online disputes.

3. *The Merits of the Dispute Are Lost if the Case Ends Up Being Decided Merely as a Practical Matter Based on Personal Jurisdiction Determinations*

Because justice requires that disputes be resolved on the actual merits of the case, the legitimacy of a resolution is obviously undermined when a case is instead decided on expediency or other tactical concerns when the parties cannot settle. Therefore, personal jurisdiction determinations take on critical strategic importance in typical low-cost e-commerce disputes. This is especially true if an opponent will concede the entire lawsuit because it is financially not worthwhile to fight in another state. In such circumstances, justice is not served because the case is not decided on what actually happened (such as whether or not the wine was delivered) but merely on the procedural determination of where the lawsuit can take place and how costly it would be. When using traditional litigation in physical courtrooms, disputes cannot ever be resolved on the merits without first determining, and then physically attending, a forum that has the necessary legal power to hear and decide the case. But if determining, and then physically attending the proper traditional legal forum is prohibitively expensive as a practical matter, then the reality is that justice suffers.

Even if enough money were at stake in the dispute to make it worthwhile to fight the lawsuit no matter where jurisdiction would be, there are still significant “home field” strategic advantages for the side that prevails on the issue of personal jurisdiction, and is able to have the lawsuit in a more convenient and familiar forum than the opposing party. For example, litigating in a more familiar and friendly setting,⁴⁹ not needing to travel great distances to litigate,⁵⁰ and not having to spend extra money on other logistical expenses

49. See Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1093 (1989) (finding that the tactic of litigating in the plaintiff's home forum allows the plaintiff great benefit because he can “employ familiar counsel to litigate before familiar judges”).

50. U.S. courts have great deference for the plaintiff's choice of forum because, in addition to other factors, it keeps the plaintiff's burden of traveling far distances low. See *Pro Access, Inc. v. Orlux Distrib., Inc.*, 428 F.3d 1270, 1281 (10th Cir. 1995) (choosing Utah over France as a forum for the lawsuit, thus holding that one of the reasons for the choice was because the travel expenses (hardship) for the Utah plaintiff to fly to France (where Defendant resided) would place too great a burden on the plaintiff and decrease his chances of “convenient and effective relief”).

all work in favor of the local party and against the out-of-state party.⁵¹ The out-of-state party may have to hire a local attorney with whom he is not familiar or comfortable. Also, he may have to travel for hearings, discovery, and other pre-trial meetings. If he keeps his own counsel, that attorney may be unfamiliar with local court procedures, laws, and conventions, so that inconvenience, unfamiliarity, and higher costs associated with litigation in a foreign court can alter the parties' relative bargaining power in settlement negotiations.⁵² Personal jurisdiction is just one of the key problematic threshold issues in resolving e-commerce disputes in a traditional physical courtroom.

B. What Substantive Contract Law of What State or Country Would Apply to Govern the Dispute?

An additional threshold issue to address before even considering the merits of the case is what substantive sale of goods/contract law would apply to the lawsuit. In our hypothetical, would it be the law of California, New Jersey, or even some other state? As with personal jurisdiction, geography and physical connection factors largely determine this issue. Courts use "conflicts of law" principles⁵³ that depend mostly on *where* the incidents giving rise to the lawsuit took place,⁵⁴ in order to determine which substantive law should

51. Without travel, housing, and transportation expenses, the plaintiff can spend the saved money on discovery, expert witnesses, and formulating a stronger case. *See, e.g.*, 4 AM. JUR 2D *Alternative Dispute Resolution* § 1 (2007) (describing how arbitration procedures save large costs in trial preparation time, expert witness fees, and travel time and expense for depositions).

52. From an economic point of view, the less expensive the lawsuit is for one side, the more willing they will be to continue litigating the case, while the more expensive it is, the less willing they will be to continue the lawsuit. This assumption of rational behavior underlies modern theories of economic behavior. *See, e.g.*, Richard A. Posner, *Rational Choice, Behavioral Economics and the Law*, 50 STAN. L. REV. 1551, 1551 (1998) (positing that a rational person chooses "the best means to the chooser's ends").

53. *See supra* text accompanying note 16 (defining conflicts of law). For example, in *Danziger v. Ford Motor Co.*, 402 F. Supp. 2d 236 (D.D.C. 2005), the plaintiff brought a products liability suit against Ford for injuries incurred when her Ford Explorer crashed in Nebraska. *Id.* at 237. The court had to determine which law applied to the case and whether the plaintiff could recover punitive damages. Six different states potentially had an interest in the suit. *Id.* at 238. Under the Restatement (Second) Conflict of Laws § 145 (1971), the "significant relationship" test for determining which state law applies to the conflict, the court found that Michigan (Ford's headquarters) and Maryland (where the product was placed in commerce) were the two states with the most significant relationship to the conflict. *Danziger*, 402 F. Supp. 2d at 240. The laws of Maryland allowed for punitive damages, while Michigan did not. *Id.* However, the court realized that Maryland applied the test of "lex loci delicti" ("the place of the wrong"), and thus, the law of Nebraska, which precluded punitive damages, applied. *Id.* The court held that no punitive damages would be awarded and that the law of Michigan applied, because Maryland's interest was diminished by the fact that the wrong was committed outside the state. *Id.* at 241.

It is important not to confuse this substantive law "conflict" of law issue, with "choice" of law issues even though courts sometimes use them interchangeably. "Conflict" of laws describes a dispute between the application of one state's substantive laws as opposed to another state's laws, or a foreign country's substantive laws, while "choice" of law describes a dispute between the application of one state's substantive laws and of federal procedural laws. *See* 1 TENN. JURISPRUDENCE, CONFLICTS OF LAWS, DOMICILE AND RESIDENCE § 4 (2004) (stating that choice of law [for U.S. diversity jurisdiction cases] involves choosing between an application of state law or federal law to govern the dispute: the federal court must always apply federal procedural law for purposes of discovery, timing conferences, etc., but must use the state's substantive law [the state in which the federal court sits] to govern the actual dispute [some exceptions apply]).

54. The general rule of applying the law of the situs is a statutory requirement for claims against the U.S. 28 U.S.C. § 1346(b)(1) (2006). *But see* *Richards v. United States*, 369 U.S. 1, 15 (1962) (finding an

apply. The substantive legal principles that will apply in the case will be those of the place that relates to the physical location(s) of the main incident(s) giving rise to the lawsuit. For example, *where* did the defendant allegedly harm the plaintiff?⁵⁵ *Where* was the contract that defendant allegedly violated signed⁵⁶ and/or to be performed?⁵⁷ *Where* is the subject property in dispute located?⁵⁸ In all these instances, the courts will apply the substantive law of a particular state according to its conflicts of law principles, which generally are based on the geography and location of some key aspect of the dispute.⁵⁹ Thus, even when a court determines that it has personal jurisdiction over the out-of-state defendant, that ruling only determines *where* the lawsuit can take place. The court still must determine *what* substantive law it is going to apply to govern the case: that of its own state, that of some other state, or even that of a foreign country, if applicable.

Assume for purposes of the California wine sale hypothetical, that the substantive contract law of California is “pro-consumer” (where the defendant-seller must show that the item was actually delivered to the plaintiff buyer) while that of New Jersey is “pro-seller” (where the defendant-seller need only show that the item was placed in the mail correctly addressed to the plaintiff

exception to the general rule of applying the law of the situs of the wrong when “more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such interest in the multistate activity.”)

55. *See e.g.*, *Armor v. Michelin Tire Corp.*, 923 F. Supp. 103, 106 (S.D. W. Va. 1996) (holding the substantive law that applied in the case was that of West Virginia, because the car accident that was the matter in dispute in the case, occurred in West Virginia).

56. In United States federal and state court cases determining the appropriate forum for litigation surrounding the formation of a contract, most courts use the Restatement Second of Conflict of Laws, which provides the “significant relationship” test, which take the following factors into account:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6. (2) In the absence of an effective choice of law by the parties, the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1971).

57. *Id.*

58. *See e.g.* *Mitchell v. State Farm Fire & Casualty Co.*, 902 F.2d 790, 794 (10th Cir. 1990) (holding that Colorado law applied to the lawsuit, because Colorado was where the property in dispute was located and “the location of the insured property (the subject matter of the dispute) . . . is the single most important factor in making the choice of law determination . . . and, as the case law demonstrates, is almost invariably controlling”).

59. Note that it is possible for a state’s conflict of law principles to provide that the law of another state should apply. Most states apply the “most significant relationship test” which involves a determination of a number of factors to see which law should apply to the dispute:

[T]he factors relevant to the choice of applicable law include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states . . . , (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability, and uniformity of result, and (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). *See also Mitchell*, 902 F.2d at 793-94 (applying the Restatement test for determining which law applied to dispute, and concluding that the situs of the property controlled).

buyer).⁶⁰ The same considerations affecting the outcome of the case in the context of personal jurisdiction may be contemplated if California's supposed pro-consumer law were applied. In that instance, defendant-seller might think it too difficult to overcome the "pro-consumer" law because it would be too onerous to prove the actual delivery to plaintiff-buyer and therefore would acquiesce by simply refunding the money to plaintiff-buyer or by sending five more bottles of wine. On the other hand, if New Jersey's supposed "pro-seller" law were to apply, then plaintiff-buyer might think it too difficult to overcome because defendant-seller could easily prove he simply put the bottles in the mail correctly addressed to plaintiff-buyer and therefore plaintiff-buyer would surrender by simply dropping the lawsuit and foregoing the collection of the money for the five bottles that were never delivered. In this way, the determination of what substantive law applies can also determine the outcome of the case, assuming there is a meaningful difference in the possible substantive laws that might govern the dispute.

To further illustrate the strategic importance of conflicts of law determinations, consider the applicable substantive rules in a card game, such as poker,⁶¹ especially *after* the cards have been dealt. At that point, the outcome of the game would likely depend upon the applicable substantive rules of the game, such as whether the players are playing "five card draw, nothing wild" or "seven card stud, aces wild."⁶² If it is not clear at the outset of the game which of these two sets of rules apply, the players will look at the cards they have been dealt and then argue for the application of the rule set that strategically would help them the most. For example, a player might argue for the application of "seven card stud, aces wild" because the player has been dealt a pair of aces, which would result in a significant strategic advantage for him under this particular set of poker rules.

Maneuvering to gain an advantage is poignant in a lawsuit, where, metaphorically, the parties can see what cards their opponent has been dealt—

60. I do not mean to suggest that this "pro-consumer/pro-seller" substantive law description is necessarily a correct or fair characterization of either California or New Jersey substantive contract law regarding the sale of goods. Rather, these assumptions are made here merely for the sake of argument and comparison regarding the possible strategic maneuvering in this hypothetical.

61. Poker is a card game where "[p]layers contribute toward a central pot that contains play chips or chips representing actual money. Players are then dealt cards (a 'hand'), some or all of which are concealed." From that point on, players raise bets, placing more chips in the pot, which represent their perceived strength in the "hand" they were dealt (the strength of the hand is determined by the set of rules the players are playing by). If a player perceives his "hand" has no winning potential, he folds (unless he tries to bluff the others into folding first). "After the betting rounds are over, the player with the strongest hand—or the last player left standing after the others have folded—wins!" PartyPoker.com, Basic Poker Rules, http://www.partypoker.com/how_to_play/poker_school/basic_poker_rules/ (last visited Mar. 24, 2009).

62. These are simply two sets of hypothetical rule variations on the game of poker. However, the different substantive law of the game can have substantial effects on a player's success or failure. The first set of rules/laws—"5 card draw, nothing wild"—allows a player to ask for four new cards if she has not been dealt a good hand, whereas the second set of rules/laws—"7 card stud, aces wild"—forces the player to keep the hand they are dealt (which can either be strong or weak depending upon whether the cards are helpful or not), but allows an ace to be played as any card in combination with other cards. Also, a player might prefer that the second set of rules apply if the player has been dealt aces, but might not care if the player has not been dealt any aces. Vegas Insider, Poker Room, http://www.vegasinsider.com/visports/poker/poker_basic_rules.html (last visited Mar. 24, 2009).

through pleadings and discovery⁶³—as well as their own “cards,” that is, their own facts and evidence. Applying this gaming concept back to the context of our hypothetical, assume another conflicting set of substantive contract rules. For example, what if California law favored the legal position of the plaintiff-buyer (e.g., if California law required a plaintiff to only show simple breach to recover damages), whereas New Jersey law favored the legal position of the California defendant-seller (e.g., if New Jersey law required a plaintiff to show a bad-faith breach of contract, a higher and more difficult standard, to recover damages)? As before, both sides would most likely argue for the application of the substantive law that favors their own side in order to gain a strategic advantage in litigation.⁶⁴

C. How the Parties Would Argue Both Personal Jurisdiction and Conflicts of Law Issues in the Hypothetical

Interestingly, in the hypothetical wine sale dispute, the parties might take somewhat paradoxical but completely understandable strategic positions regarding which law should apply for both personal jurisdiction and conflicts of law purposes.⁶⁵ First, the New Jersey plaintiff-buyer would argue that the New Jersey court has personal jurisdiction over the California defendant-seller, and that California’s pro-consumer substantive law should apply to the case, as opposed to New Jersey’s pro-seller substantive law. The California defendant-seller, on the other hand, would likely argue that New Jersey does not have personal jurisdiction over him, but, if sued in California (where there would be jurisdiction over him because it is his domicile),⁶⁶ he would argue that New Jersey’s pro-seller substantive law should apply, not California substantive law. Thus, the parties would want to sue or be sued where it is most convenient for them and most difficult for their opponent – in the party’s home state – but each party also would want to have the most helpful substantive law apply to gain a strategic litigation advantage – in this case, the substantive

63. Pleadings and discovery basically reveal to all parties involved the factual nature and evidentiary support for the legal claims and defenses being forwarded by the parties as they pull together all of the potential relevant facts, exhibits, and evidence that can be used in the case. In this example, it is as though the players have to show each other the cards they each have been dealt. *See generally* STEPHEN C. YEAZELL, CIVIL PROCEDURE 329-65 (6th ed. 2004) (explaining that the initial pleadings define precisely what is at issue in the disputes); *see, e.g.*, ELIZABETH WILLIAMS, 36 OHIO JURISPRUDENCE 3D *Discovery and Depositions* § 7 (2008) (“Parties may, subject to the discretion of the court, obtain discovery regarding any unprivileged matter which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .”).

64. *See, e.g.*, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (attempting to curtail the evils of “forum shopping” for substantive law and holding that the substantive law to be applied in federal diversity cases is that of the state in which the federal court sits and not competing general federal common law). In *Erie*, the plaintiff wanted general federal common law to apply – ordinary negligence in a tort action – where the defendant wanted Pennsylvania law to apply – “willful and wanton” conduct in order to recover in a tort case, which is a higher standard than ordinary negligence. *Id.* The case demonstrates the litigation advantages of applying different substantive law to the case. *Id.*

65. While related, it is important to keep separate the issues of personal jurisdiction and conflicts of law. *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (applying Florida substantive contract law to the contract, but it was much less clear whether Florida would have personal jurisdiction over defendants).

66. *See* *Gilbert v. David*, 235 U.S. 561, 569–70 (1915) (finding personal jurisdiction based on domicile, which is residence in the state plus the intent to remain indefinitely in the state).

contract law of the state of their opponent.

The most important policy issue here, however, is to note how *none* of these tactical maneuvers have *anything* to do with resolving the dispute according to the *merits* of the case. That is, the technical procedural wrangling of personal jurisdiction and conflicts of law issues have absolutely nothing to do with whether the plaintiff-buyer actually received all ten of the promised bottles of wine. If the focus is solely on personal jurisdiction and conflicts of law as the critical threshold issues of the case, it is easy to lose sight of what the lawsuit is actually about. Most disturbingly, personal jurisdiction and conflicts of law issues may end up being determinative of the entire lawsuit as a practical matter, without ever reaching the merits of the case. If these personal jurisdiction and applicable law issues would determine the likely practical outcome of this type of e-commerce, low-amount-in-controversy case, then the necessary justice, fairness, security, and legitimacy that should be provided in a high functioning legal dispute resolution system is absent.

Of course, all legal disputes, even small ones like the hypothetical wine sale dispute, should be decided on the merits of the case, that is, on what really happened regarding the missing bottles of wine. Disputes should be decided on the facts that gave rise to the lawsuit in the first place, and who, if anyone, is at fault – that is justice, after all.⁶⁷ On the other hand, procedural and tactical maneuvers regarding travel costs to the forum or competing applicable substantive laws present a serious problem, especially in low-amount-in-controversy cases, like a typical e-commerce online dispute, because such factors often determine the outcome of cases long before the litigants can even get to the merits of the case.⁶⁸ As long as personal jurisdiction and conflicts of law issues remain critical issues in low-cost Internet dispute cases, fewer such cases will be decided on the merits and e-commerce will continue to be plagued by risk and uncertainty.

Unfortunately, when a low cost Internet transaction develops into a legal dispute, the parties often do not have the time, money, or inclination to engage in an expensive legal battle to resolve threshold procedural issues surrounding the dispute, let alone the dispute itself.⁶⁹ To the extent they have any time or money to make the legal fight worthwhile, it should all go toward addressing the merits of the case and should not be wasted arguing over *where* to have the dispute or *what law* will govern the dispute. Ideally, there should be a quick, efficient, and fair adjudication that can be decided on the merits of the case.

67. Justice is “[t]he fair and proper administration of the laws.” BLACK’S LAW DICTIONARY 881 (8th ed. 2004) (determining justice between parties in a court of law involves an evaluation of the merits of each side’s case).

68. See Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 91 (2003) (“Federal courts dismissed 63% of the Internet-related cases in 2002, on the grounds of lack of personal jurisdiction.”); see, e.g., *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 750–51 (E.D. Mich. 2000) (dismissing case for lack of personal jurisdiction over defendant who did not show intent to do business with customers in Michigan).

69. See generally Ettie Ward, *The Litigator’s Dilemma: Waiver of Core Work Product Used in Trial Preparation*, 62 ST. JOHN’S L. REV. 515, 523 (1988) (explaining that “[t]here is no reason to build in higher pretrial costs when pretrial litigation is already too costly and time-consuming”).

II. CURRENT ATTEMPTS OF THE AMERICAN LEGAL SYSTEM TO APPLY LOCATION-BASED LEGAL ANALYSIS TO E-COMMERCE DISPUTES

As a preliminary matter, it is important to acknowledge why location-based analysis often works satisfactorily for traditional, non-Internet based transactions that occur in a specific and identifiable physical location. For example, in our hypothetical California-New Jersey wine sale, instead of the buyer and seller being from different states, assume instead that they are both from the same town in New Jersey, and they have completed the ten wine bottle transaction in-person at a wine store in New Jersey. Under these circumstances, it would be clear that personal jurisdiction over the defendant-seller would be proper in New Jersey, and that New Jersey law would apply because the transaction took place in New Jersey, and New Jersey would have a greater interest in the lawsuit than any other state. Further, the lawsuit would be relatively convenient and inexpensive for both parties to attend and participate as the specific county where the parties reside in New Jersey would be the proper venue.⁷⁰ Local travel costs would presumably be insignificant and neither party would have any natural advantage in where the lawsuit takes place as they would be stuck, for better or worse, with New Jersey contract law. Thus, the location-based method of determining personal jurisdiction and what substantive law applies to govern the lawsuit, generally works fine when the physical transaction itself is located in a specific geographical area common to both parties and the costs are not disproportionate to the recovery so that the lawsuit is still an economically worthwhile pursuit. Historically, such has often been the case because most sales have been traditional face-to-face transactions occurring in the same physical space.

However, attempting to apply these personal jurisdiction principles (long-arm statutes and the minimum contacts test) to Internet transactions, courts have recognized the difficulty with using location-based doctrines as described above and have subsequently attempted to address the problem by developing a “sliding scale” analysis. That is, courts look at whether personal jurisdiction is constitutionally permissible by determining if a defendant’s activity in the state is “directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”⁷¹ This sliding scale analysis is

70. Venue is the “proper or a possible place for a lawsuit to proceed because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant.” BLACK’S LAW DICTIONARY 1591 (8th ed. 2004). After the case has been brought in the proper state (forum), venue is used to further localize the dispute to a specific district within the forum, and if no district within the forum is proper, the rules of venue stipulate the case should be transferred to a proper district in a proper forum. In federal cases, venue is governed by 28 U.S.C. § 1391 (2004). *See, e.g.*, Gray v. Millers Mut. Ins. Co., 997 F. Supp. 387, 389 (W.D.N.Y. 1998) (holding that, pursuant to § 1391, venue was improper in the Western District of New York because the defendant did not fall into one of the enumerated venue categories, and the action warranted transfer to the Western District of Pennsylvania, where venue was proper).

71. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (E.D. Pa. 1997).

At one end of the spectrum are situations where a defendant clearly does business over the Internet [the active Web site]. If the defendant enters into contracts with residents of a foreign jurisdiction that involves the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not

obviously not a bright line rule, and therefore it often fails to lead to a predictable outcome for disputes involving Internet transactions.

A. *Clear Answers for Internet Disputes Only in Very Limited and Economically Undesirable Circumstances*

There are a handful of situations involving Internet jurisdiction that are clear, but they are rare, leaving the majority of Internet transactions open to argument regarding personal jurisdiction determinations. First, if a Web site does not have any interactive components that allow customers to actually place orders, but is instead more of a static, linear electronic brochure, then it is referred to as a “passive Web site.”⁷² If a potential buyer comes across a passive Web site on the Internet and decides to contact the seller in order to arrange a purchase, often there will be no personal jurisdiction over that seller in the buyer’s home state, provided the seller’s only contact to the state is the existence of that passive Web site on the Internet.⁷³

However, if a Web site is passive, it may limit exposure to lawsuits in many jurisdictions, but it really defeats much of the economic efficiency and consumer convenience that justifies the creation of a commercial Web site in the first place. Such a passive site is economically undesirable because it is nothing more than a digitized brochure or mailer that simply exists online and does not take full commercial advantage of the customer communication and interactivity provided by the Internet. Accordingly, most modern Web sites of sellers are not passive, given that the purpose of a commercial Web site is to provide an efficient, convenient transaction portal to allow customers from all over the country, and the world, to shop for and purchase goods or services in an interactive and instantaneous transaction.⁷⁴ If a Web site is designed to

grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and the commercial nature of the exchange of information that occurs on the Web site. *Id.*

72. *Id.*

73. *Bensusan Rest. v. King*, 937 F. Supp. 295, 299 (S.D.N.Y. 1996) (holding that New York did not have jurisdiction over a Missouri restaurant for trademark infringement where the Missouri restaurant’s Web site was not interactive and was not designed to attract New York residents). *See also*, *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008) (dismissing a California lawsuit brought by a California-based plaintiff who purchased an automobile on eBay from a private Wisconsin-based seller because the Wisconsin seller defendant did not have sufficient minimum contacts with the State of California based on the eBay sale to a California purchaser).

74. Because the simple act of allowing customers to purchase from a Web site involves an interaction of “repeatedly transmitting files over the Internet” (i.e. bidding on the item, filling in credit card information, filling in shipping address, receiving confirmation by email), it classifies an Internet vendor’s Web site as “active” and subjects them to personal jurisdiction under the traditional Zippo test, thus most online sales Web sites are considered “active.” *Zippo Mfg. Co.*, 952 F. Supp. at 1124–25. The very nature of an online sales Web site is to allow customers from anywhere in the world to access the Web site and purchase items from it. *See generally* Karen Alboukrek, Note, *Adapting to a New World of E-Commerce: The Need for Uniform Consumer Protection in the International Electronic Marketplace*, 35 GEO. WASH. INTL. L. REV. 425, 429 (2003) (discussing the growth of e-commerce and the various consumer protection problems, including jurisdictional issues, that have followed, “[t]hrough global data communications networks (e.g., the Internet and the World Wide Web), both businesses and consumers are able to transcend global barriers The Internet frees businesses from the cost of physical location, allowing even the smallest businesses to attain a worldwide presence and conduct business on an international level.”).

attract people from all states, process orders from anyone, regardless of their location, and establish specific customer relationships in a particular state, as some are, then jurisdiction may be found in any state where the Web site is accessible and active.⁷⁵

Not surprisingly, many Web site vendors are now concerned that by having a modern interactive Web site, they are subjecting themselves to jurisdiction in all fifty states in the U.S., and perhaps in every country in the world. As a result, they often argue that, despite the basic interactivity of their Web site, they should not automatically be subject to personal jurisdiction in every state in the U.S. and every country in the world, simply because their “modern” interactive Web site is accessible worldwide.⁷⁶ As set forth below, this has led to a great deal of uncertainty for online sellers and buyers. It is revealing that the *Zippo* case, with its “active vs. passive” Web site distinction, was decided over ten years ago, when many vendors were just beginning to use Web sites in their marketing strategy, and therefore were largely using Web sites passively, as rudimentary electronic brochures, instead of interactively, as modern marketing communication portals.

B. *Uncertainty for the Majority of Current Web Site Sellers*

When a Web site is neither strictly “passive,” nor a full-blown interactive Web site obviously evidencing a national commercial plan that is specifically targeted at the particular buyers in the particular state in question, personal jurisdiction over the Web site seller becomes very unclear.⁷⁷ Thus, for online transactions that fall between the two extremes of a completely passive site and a full interactive site with specific customers targeted in the state in question, courts are inconsistent in their jurisdictional holdings. Defendants argue that the mere establishment of a Web site, even a somewhat active Web site, should not satisfy the minimum contacts test because the creation of a Web site alone does not constitute a purposeful effort to have contacts with specific people in a particular location.⁷⁸ Further complicating the issue, even if a consumer is

75. See *Zippo Mfg. Co.*, 952 F. Supp. at 1127 (finding minimum contacts when a company offered a paid news service had over 3,000 customers in a state, and had entered contracts with local service providers).

76. See *Id.* at 1126 (“Defendant repeatedly characterized its activities as merely ‘operating a web site’ or ‘advertising.’”). See also *Maritz Inc. v. Cybergold Inc.*, 947 F. Supp. 1328, 1339 (E.D. Mo. 1996) (describing defendant’s assertion that other than setting up a Web site, defendant has no other contacts with the jurisdiction).

77. See, e.g., *Maritz Inc.*, 947 F. Supp. at 1333 (finding that Missouri could exercise personal jurisdiction over a non-resident defendant because the defendant’s Web site, although not maintaining sales or online communication with residents in Missouri, gave Missouri residents the opportunity to put their names on a mailing list and receive mailings and promotions regarding the defendant’s services). But see *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 541 (E.D. Pa. 1999) (finding that personal jurisdiction could not be exercised over a non-resident defendant’s Web site that had a “lease application that may be printed out, but not sent over the InternetInternet,” a form for a customer to “order and pay” for a video, and a “link by which a user may send e-mail directly to” the defendant).

78. See, e.g., *Molnlycke Health Care AB v. Dumex Med. Surgical Prods. Ltd.*, 64 F. Supp. 2d 448, 451 (E.D. Pa. 1999) (“The court . . . holds that the establishment of a Web site through which customers can order products does not, on its own, suffice to establish general jurisdiction. To hold that the possibility of ordering products establishes general jurisdiction would effectively hold that any corporation with such a Web site is subject to general jurisdiction in every state.”).

not specifically targeted in a particular state but an inquiry comes from a consumer and then a sale is made, determining who initiated the contact in such a transaction is difficult. It is true that in most cases the buyer makes the initial inquiry and shows interest in buying from the seller, but the buyer would not have contacted the seller if the seller had not presented its product on the Internet in the first place.⁷⁹

Likewise, when a seller answers a buyer's purchasing inquiries about a product before the buyer decides to purchase it, do those post-inquiry sales efforts constitute purposeful minimum contacts sufficient to confer personal jurisdiction over the seller in that state? Or, do those particular sales efforts merely constitute a general passive advertisement that is probably not enough to confer jurisdiction?⁸⁰ It is important to acknowledge that a Web site is different from an advertisement in a national magazine.⁸¹ As one court stated, "unlike hard-copy advertisements . . . which are often quickly disposed of and reach a limited number of potential consumers, Internet advertisements are in electronic printed form so that they can be accessed again and again by many more potential consumers."⁸²

Although analogies may be somewhat helpful in an Internet jurisdiction analysis, reasoning by analogy in this context may not be all that helpful. Setting up a Web site that can be accessed by individuals in far away states who also visit cyberspace is not the same as a defendant physically setting up shop in the buyer's home state. Even sending advertisements through the mail, television, radio waves, or telephone wires is still not the same as using the Internet, although these are at least closer analogies. Phone calls, mailers, television, and radio advertisements are directed toward specific consumers within certain geographical markets.⁸³ In those instances, defendants have

79. See, e.g., *Thompson v. Handa-Lopez, Inc.*, 988 F. Supp. 738, 743–44 (W.D. Tex. 1998) (holding that Texas could exercise personal jurisdiction over the defendant because his Internet casino Web site directed advertising to all states including Texas, and the defendant "continuously interacted with the casino players," even though the interaction was purposefully initiated by the customers).

80. See, e.g., *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) ("A person's act of placing information on the Internet' is not sufficient by itself to 'subject that person to personal jurisdiction in each State in which the information is accessed.'" (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002))).

81. See generally *Maritz, Inc.*, 947 F. Supp. at 1332 ("Because the Internet is an entirely new means of information exchange, analogies to cases involving the use of mail and telephone are less than satisfactory in determining whether the defendant has 'purposefully availed' itself to this forum. Unlike use of the mail, the Internet, with its electronic mail, is a tremendously more efficient, quicker, and vast means of reaching a global audience. By simply setting up, and posting information at, a Web site in the form of an advertisement or solicitation, one has done everything necessary to reach the global Internet audience.").

82. *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164 (D. Conn. 1996).

83. See *Maritz, Inc.*, 947 F. Supp. at 1332–33 ("A company's establishment of a telephone number, such as an 800 number, is not as efficient, quick, or easy way to reach the global audience that the Internet has the capability of reaching. While the Internet does operate via telephone communications, and requires users to place a 'call' to a Web site via the user's computer, a telephone number still requires a print media [directed toward a specific forum] to advertise that telephone number. Such media would likely require the employment of phone books, newspapers, magazines, and television. Even then, an 800 number provides a less rapid and more limited means of information exchange than a computer with information downloading and printing capabilities. With a Web site, one need only post information at the Web site. Any Internet user [not limited to a specific forum as would be the case with a magazine or newspaper] can perform a search for selected terms or words and obtain a list of Web site addresses that contain such terms or words. The user can then access any of those Web sites.") (emphasis added).

much more voluntary awareness and control over where they are directing their advertising, and, as a result, such defendants would have a commensurate responsibility such that they could be sued in the states or countries of their targeted buyers.

On the Internet, however, defendants do not have this same kind of awareness and control. The seller does not know who might access the Web site or where in the world those Web site visitors will be from. Again, the problem of determining who initiated the transaction emerges once someone accesses the Web site and orders a good or a service. Over ten years ago, the Supreme Court cautioned that given the “changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now,”⁸⁴ but it has yet to give a definitive answer. Thus, courts have been unable to solve both the personal jurisdiction problem and, by analogy, the conflicts of law problem for Internet transactions. It remains unclear at what exact point a passive Web site becomes sufficiently interactive in order to subject its owner to personal jurisdiction in states where the site can be accessed by buyers.⁸⁵ This uncertainty is disadvantageous for Internet buyers and sellers alike because it makes legal recourse less predictable and thus more expensive. Of course, even in certain extreme circumstances, when personal jurisdiction is clear, this still does not address cost, convenience, and the geographical issues involved. Even if the jurisdictional issue is resolved, it can still be very expensive and inconvenient to be required to physically travel to the proper forum in order to adjudicate the case.

III. ARE FORUM SELECTION CLAUSES AND APPLICABLE LAW SELECTION CLAUSES IN INTERNET SALES CONTRACTS THE ANSWER TO THE UNCERTAINTY AND LITIGATION RESOURCE PROBLEMS?

It is possible to provide otherwise elusive predictability and party choice to the personal jurisdiction and conflicts of law issues by having the buyer and seller agree to a mutually selected forum from the outset of their transaction, and to mutually selected applicable substantive law, in the event their transaction ends up in a dispute. As a result, personal jurisdiction and conflicts of law issues will not need to be litigated because they will have already been determined by the parties in their contract. Instead of spending time on those issues, the parties could use all of their legal resources on adjudicating the merits of the dispute. For example, in the California wine sale hypothetical, if the parties agreed from the outset of their transaction that only the state of California would have personal jurisdiction over them, and that New Jersey

84. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 742 (1996) (plurality opinion) (citation omitted).

85. John Stephens, *United States: E-Commerce - Jurisdictional Issues in the United States*, MONDAQ BUS. BRIEFING, Nov. 14, 2006, <http://www.mondaq.com/article.asp?articleid=44252> (“[I]t is clear that the U.S. courts have not established a uniform method for determining personal jurisdiction based on Internet contacts.”). See generally Carlos J.R. Salvado, *An Effective Personal Jurisdiction Doctrine for the Internet*, 12 U. BALT. INTELL. PROP. L.J. 75–79 (2003) (discussing personal jurisdiction issues with the Internet).

substantive law would apply in the event of a dispute, then if a dispute arose, at least there would be no uncertainty as to where there would be personal jurisdiction over the parties and which substantive law would apply. Given the terms of the agreement, litigation would be appropriate only in California and only the substantive contract law of New Jersey would apply to govern the dispute.⁸⁶

In effect, forum and applicable law selection clauses trump the usual tests for determining whether and where there is personal jurisdiction and what substantive law applies. For example, in *Decker v. Circus Circus Hotel*, the plaintiffs were from New Jersey and made reservations for the Circus Circus Hotel in Nevada over the Internet from their home computer.⁸⁷ While visiting the hotel in Nevada on vacation pursuant to their reservations, the plaintiff suffered an injury.⁸⁸ Although the injury took place in Nevada and therefore Nevada law applied,⁸⁹ the plaintiffs sued the hotel in New Jersey arguing that there was personal jurisdiction over the Nevada hotel in New Jersey because the original hotel reservation took place in New Jersey.

Using the traditional tests for determining personal jurisdiction, the court stated that the hotel provided the means to make the reservations on the Internet and therefore was commercial in nature, which put the hotel into “an endless stream of commerce.”⁹⁰ Because jurisdiction can be exercised over a non-resident defendant that “delivers its product into the stream of commerce with expectation that they [sic] will be purchased by consumers in the forum state,”⁹¹ and the hotel’s Web site had elements of an active site, there probably would have been personal jurisdiction over the Nevada hotel in New Jersey.

However, that determination was never made in this case, because the parties previously agreed to a forum selection clause as part of their transaction, naming only Nevada as having personal jurisdiction in the event of a dispute.⁹² The court held therefore that there was no personal jurisdiction over the parties in New Jersey due to the forum selection clause, even if there otherwise might have been jurisdiction based on the interactivity of the hotel’s

86. Of course, all of the cost, convenience, and familiarity advantages to one party, and the disadvantages to the other party of these personal jurisdiction and applicable law determinations would remain, but at least it would be clear which state has exclusive personal jurisdiction (CA) and which exclusive substantive law applies (NJ). The physical travel and inconvenience issues remain because the lawsuit still will have to take place in a particular locality. The New Jersey plaintiff still would have to travel to California (defendant’s home state) to sue the defendant seller and the law of New Jersey (pro-seller) would apply, both of which are better for the defendant seller than for the plaintiff buyer. But again, at least this legal determination would be known at the beginning of the suit.

87. 49 F. Supp. 2d 743, 745 (D.N.J. 1999).

88. *Id.*

89. There was no applicable substantive law selection clause. As a result, under typical conflicts of law principles, the law of the place of the wrong—where the injury occurred—would be controlling. *See Richards v. United States*, 369 U.S. 1, 9 (1961) (stating the general rule that the applicable law to a case is that of the place where the act or omission occurred). As such, the applicable law question was not raised as an issue in the case as it was clear that the law of Nevada would apply.

90. *Decker*, 49 F. Supp. 2d at 748.

91. *Id.* (showing an expansive view of Internet e-commerce jurisdiction (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980))).

92. *Id.*

Web site.⁹³ Therefore, the court also applied the reasoning of an earlier U.S. Supreme Court case, *Carnival Cruise Lines v. Shute*,⁹⁴ where the Court noted that forum selection clauses are desirable because they dispel any confusion about which forum will have personal jurisdiction. The Court further noted that these clauses save both time and expenses associated with pre-trial motions, and they promote “judicial economy.”⁹⁵

It is clear that a pre-dispute forum selection clause and an applicable law selection clause in the original sales contract provide predictability and efficiency in the event there is a dispute between the parties. Not having to spend any time or money in order to determine: (1) whether there is personal jurisdiction in a particular state; and (2) what substantive contract law should apply to the lawsuit, represents an important savings to the parties, as well as a savings of judicial resources needed to decide those issues formally. The reduced litigation costs can even extend to future buyers in the form of reduced prices; so at least part of the problem is solved with forum selection and applicable law clauses.

A. *Some Uncertainty Concerns Remain*

Although forum selection clauses generally reduce procedural wrangling over personal jurisdiction issues, and applicable law clauses generally reduce arguments over conflicts of law issues,⁹⁶ some courts have still held that they are not controlling.⁹⁷ Although these clauses are desirable for purposes of predictability, they can sometimes also conflict with principles of equity and fairness.

First, an online shopper might not fully realize what exactly they are agreeing to when they click “I agree,” which purportedly binds them to the terms of the clause. Moreover, such important terms might be buried in the contract or at the bottom of the Web site in small print, raising significant

93. *Id.*

94. 499 U.S. 585, 595 (1991) (enforcing a forum selection clause because both parties had notice of the clause, the clause was not made in bad faith, and was not unreasonable).

95. Judicial economy is “efficiency in the operations of the courts and the judicial system . . . the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary’s time and resources.” BLACK’S LAW DICTIONARY 863 (8th ed. 2004).

96. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481-82 (1985) (stating that the contract signed by the parties had an applicable law designation—Florida law—but not a forum selection clause, and holding under its own minimum contacts determination, held that the Florida court had personal jurisdiction over the defendants).

97. Some courts have held that forum selection clauses are merely private contractual provisions between the parties that have nothing to do with the court’s due process constitutional power to exercise personal jurisdiction and conflicts of law principles based on existing law. Some courts have even gone so far as to say that forum-selection clauses are invalid. *See, e.g., Savage v. People’s Bldg. Loan & Sav. Ass’n*, 31 S.E. 991, 993 (W. Va. 1898) (“[J]urisdiction cannot be taken away by consent.”). However, in the vast majority of states, if a forum selection clause is not unreasonable, or not made in the presence of unfair bargaining power, undue influence, duress, or against public policy, it is enforceable. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). *Compare Carnival Cruise Lines*, 499 U.S. at 595 (enforcing forum-selection clause because clause was not agreed to in bad faith or by fraud, and both parties had notice), *with America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 710 (Cal. Ct. App. 2001) (denying enforcement of a forum-selection clause because it violated California public policy).

concerns as to whether there was actual agreement by the buyer, which might render the clauses unenforceable.⁹⁸ In an effort to be clear and thorough as to what exactly is being agreed to, sellers may provide detailed questions and individual clauses that must be signed (or “clicked”) by the buyer akin to having to provide initials to various provisions in a contract, like a standard rental car agreement. However, sellers also want online shopping to be a fast and easy experience in order to encourage return patronage. If there are long lists of boilerplate terms that buyers must thoroughly “check,” “click,” and then “sign” for each sale, the volume of online sales could be drastically reduced. Instead of being convenient, a seller’s Web site could become too complicated, legalistic, and not user-friendly for the buyer. There are also problems of proof, as acceptance of terms relies on the seller accurately capturing and storing the buyer’s “click through”, which could easily be manipulated (i.e. there is no signed piece of paper in triplicate).

Even though under federal law a forum selection clause is *prima facie* valid,⁹⁹ a court may invalidate it if a party can “clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”¹⁰⁰ While forum selection clauses are often desirable for sellers to limit their exposure to lawsuits in various locations, buyers might challenge these clauses as unfair. A forum selection clause that would cost an out-of-state plaintiff more in litigation costs than the value of damages in the event of a lawsuit might be challenged as unenforceable where a court would determine whether the seller designed the clause as a deterrent to litigation.¹⁰¹ Further, state legislatures may step in with different solutions in different states.¹⁰²

It is important to remember the ultimate goals here. Sellers want

98. See, e.g., *Klar v. H. & M. Parcel Room, Inc.*, 73 N.E.2d 912, 913 (N.Y. 1947) (holding standard form contract printed on parcel check unenforceable).

99. See *supra* notes 87–91 and accompanying text (discussing forum selection clauses).

100. *Bremen*, 407 U.S. at 15.

101. In the case of small value claims, forum selection clauses limiting class actions can be challenged, but otherwise the burden on the plaintiff to invalidate the forum selection clause is high. See, e.g., *Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1066 n.2, 1069 (N.D. Cal. Aug. 10, 2007) (distinguishing forum selection clauses from choice of law provisions; upholding the use of California law to find the arbitration clause enforceable but the class action waiver as unenforceable); *Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1024 (Wash. 2007) (“We affirm the Court of Appeals’ holding that the forum selection clause in the AOL contract at issue is unenforceable on public policy grounds if the lack of a class action procedure leaves the plaintiff with no feasible avenue for seeking relief in violation of the [Consumer Protection Act].”). *But cf.*, e.g., *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 246 (E.D. Pa. 2007) (finding that the forum selection clause was valid and reasonable with no fraud or overreaching, did not violate public policy, and did not deprive plaintiff his day in court despite hardship of a heart condition and added expense); *Triple Z Postal Servs., Inc. v. United Postal Serv., Inc.*, No. 118057/05, 2006 WL 3393259, at *7-*8 (N.Y. App. Div. Nov. 24, 2006) (dismissing a claim upon finding that the California forum selection clause in the franchise agreement was valid and could not be circumvented by artful pleading that the claims did not arise from the contract when the agreement was infused in all aspects of the dispute); *LSPA Enter., Inc. v. Jani-King of N.Y., Inc.*, 817 N.Y.S.2d 657 (N.Y. App. Div. 2006) (finding the forum selection clause valid and stating, “[a] contractual forum selection clause is *prima facie* valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy . . . or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court The plaintiffs failed to demonstrate that the subject clause was invalid for any of these reasons.”)

102. See *supra* note 97 and accompanying text (discussing how some courts have held that forum selection clauses are non-controlling).

consumers to be confident and comfortable with the online services and products being offered, and would like to avoid the spread of negative feedback on the Internet that would injure the seller's reputation.¹⁰³ This could become a problem for sellers if consumers start complaining about products and services where disputes arise because the buyer did not, or could not, travel across country to sue in small claims court over a \$250.00 claim. Consequently, the benefit of the forum selection clause to the seller might be diminished if negative complaints about how the clauses work in practice proliferate on the Internet.

B. *Cost and Travel Concerns Remain*

Additionally, even when these forum selection clauses are fair and enforced, which is often the case despite these possible challenges, they still do not make it any easier for out-of-state parties who must litigate the case in the home state of their opponent. This will often be the case because a physical forum of at least one of the parties must be selected.¹⁰⁴ Therefore, the existence of the clause does not change the fact that the lawsuit still must take place in a physical location in a particular state and the parties are required to physically travel there to litigate. Consequently, even with a forum selection clause, there remain high costs and strategic "home court" considerations to take into account. Similarly, although an applicable law clause removes uncertainty as to what law will apply in the event of a dispute, it can still make it harder on one party if they agreed to apply the substantive law of a state that is advantageous to the opposing party.

C. *Unfair Bargaining Power to Exploit These Differences*

Given the advantages of litigating in a local court and forcing an opponent to have to travel to a foreign state, as well as the ability to have favorable substantive law apply to the case, many online sellers may begin requiring such contract clauses in order to limit their exposure and to obtain a

103. For example, on eBay sellers are ranked by feedback from buyers. A seller's negative ranking does not inspire confidence and may prevent buyers from choosing his product. *See generally* Alex Mindlin, *A Skeptical Eye on Auction Surcharges*, N.Y. TIMES, May 5, 2008, at C4 ("eBay bidders react in profound ways to a seller's numerical 'reputation' on the site."). eBay also states that "[f]eedback fosters trust between people by acting as both an incentive to do the right thing and as a mark of distinction for those who conduct transactions with respect, honesty, and fairness." *See* eBay, Trust & Safety, <http://pages.ebay.com/aboutebay/trustandsafety.html> (last visited Mar. 24, 2009) (providing eBay users with information on how eBay regulates the auction site for customer safety).

104. One of the problems with forum selection clauses is that one party usually agrees to submit to the forum of their opponent if they want the deal to be done. *See* *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) (upholding the clause under a consent theory despite the fact that the plaintiffs, who had purchased a cruise ticket from the defendants, had no ability to change or alter the agreement regarding forum due to lack of bargaining power); *see also* James Zimmerman, *Current Issues in Arbitration: Restrictions on Forum-Selection Clauses in Franchise Agreements and the Federal Arbitration Act: Is State Law Preempted?*, 51 VAND. L. REV. 759, 760 (1998) ("[T]he party inserting the forum-selection clause has superior bargaining power . . . the other party to the contract, if seeking redress for a breach of the contract, must travel to a distant and unfamiliar jurisdiction to have the claim heard, often before the opposing party's 'home court.'").

litigation advantage in the event of a lawsuit.¹⁰⁵ As a result, if most online sellers have superior bargaining power over online purchasers, then online consumers may find forum selection/applicable law clauses on every Web site they visit.¹⁰⁶ Consequently, if consumers wish to avoid these clauses as required by sellers, they may be very limited in where they can shop online. This works against the underlying purpose of online shopping in the first place, which is for buyers to be able to shop at their convenience, without having to give up legal rights or suffer litigation disadvantages in the event of a dispute, just to complete the sale.

Consumers may be reluctant to engage in e-commerce, or begin to lack confidence in the medium, if they are required to sign such onerous contract clauses. Although they might obtain some predictability, they may also realize that they are agreeing to legal provisions that end up working to their detriment if litigation ensues. Hence, an online consumer may actually be worse off by signing a forum selection or applicable law clause, if that clause requires her to give up her right to sue in her home state and/or the ability to fight for better applicable law in the event of a dispute. To a consumer, even the *possibility* of loss on the issue of personal jurisdiction or applicable law is better than the *certainty* of loss on those issues based on a contractual provision that always and necessarily works to the seller's benefit, and often against the buyer, because the seller effectively controlled the contract terms when the transaction was made.

Accordingly, even if the parties sign a forum selection clause and an applicable law clause to avoid uncertainty and reduce litigation expense, it is often the online seller who will benefit most because the seller, especially an institutional seller, has more bargaining power in determining the terms of the contract clauses.¹⁰⁷ Without significant competition of like sellers offering

105. Since forum-selection clauses are usually upheld unless unreasonable (*supra* notes 88–89 and accompanying text), Internet vendors would be at a great advantage to place such clauses in online sales contracts. Courts also have further incentive to uphold such clauses, with regard to online sales, because it furthers expansion of e-commerce and of the Internet as a whole. See William J. Condon, Jr., Comments and Notes, *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433, 446 (2003) (“Enforcing clickwrap agreements encourages commercial expansion, protects small business, and promotes the Internet as a valuable vehicle for conducting business.”); see also Florencia Marotta-Wurgler, *Are “Pay Now, Terms Later” Contracts Worse For Buyers? Evidence from Software License Agreements* (N.Y. Univ. Sch. of Law, Working Paper No. 144, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799282 (discussing problems and issues arising out of the growth in use of “rolling standard form” contracts (which includes forum selection clauses) due to the rise of e-commerce).

106. See Zimmerman, *supra* note 105 (discussing the imbalance of power that results from forum selection clauses). This is analogous to the trend of ADR in many disputes, for example in the HMO industry and various other industries where consumers have to agree to certain clauses affecting their legal rights if they want to do business. Forum selection clauses, often included with “standard form contracts,” have tremendous advantages for online businesses. See generally Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) (“Standardized contracts have thus become an important means of excluding or controlling the ‘irrational factor’ in litigation . . . they are a true reflection of our time with its hostility to irrational factors in the judicial process.”). The “irrational factor” that most plagues online retailers is the question of personal jurisdiction and where they can be hauled into court. By placing forum-selection clauses into sales contracts, online vendors are controlling the “irrational factor” and reducing their risk of potential litigation.

107. In general, the party with the most bargaining power is the one who inserts the forum-selection

better terms, the online buyer's only options are to accept terms that do not work in her favor or not buy online at all. This is undesirable not only to the buyer, who would like to complete the transaction without having to simultaneously give up any legal rights, but also to the seller, who ultimately wants to make the online sale, and possibly future sales, to the buyer. Of course, the seller would like to make the sale *and* have the buyer agree to bring a lawsuit only in the seller's home court and only according to the substantive law of the seller's choosing, but this is certainly detrimental to the buyer. As a result, consumers may come to view these clauses as more undesirable than the uncertainty and expense of having to determine what forum would have personal jurisdiction and what substantive law would apply in the event of a dispute.

In sum, current attempts to incorporate e-commerce disputes into the existing jurisprudence of brick and mortar courtrooms, with physical location-based perspectives, have been largely ineffective. Forum selection and applicable law clauses solve predictability issues but also raise fairness issues and, in any event, do not overcome physical barriers which lead to cost, convenience, inefficiency, and, ultimately, legitimacy problems. As a result, the rule of law must transcend old realities in order to face the challenges of adjudicating low-cost online transactions between buyers and sellers from different states, and even countries. The answer necessarily involves the very technology that makes e-commerce possible in the first place, and which makes e-commerce disputes so difficult to adjudicate on the merits – the Internet itself.

clause. See Zimmerman, *supra* note 105, at 760 (discussing how differences in bargaining power can result in potentially unfair forum selection clauses). The illustration of bargaining power between online sellers and online buyers can be analogized to the relationship in bargaining power between a franchisor and franchisee.

In the typical franchise contract, the franchisor is a large, national corporation, represented by sophisticated legal counsel. The franchisee is an individual, often unsophisticated, and almost always unrepresented by legal counsel at the time of contracting. The contract is presented to the franchisee on a take-it-or-leave-it basis. If the franchisee objects to the terms the franchisor can usually find another willing franchisee. The contract is several pages long, with the arbitration/forum-selection clause hidden beneath boilerplate legalese. These circumstances provide a great incentive for franchisors to use the forum-selection clause as a weapon to limit the franchisee's legal recourse. The franchisees, often unsophisticated and not represented by legal counsel, are likely not to read the clause or to understand fully its implications. Even if the franchisee does recognize the clause's significance, little or no opportunity to change it will exist.

Id. at 760–61 (internal citation omitted); see also Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002) (“Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.”); see generally Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 522–24 (2008) (discussing the disparity in bargaining power between consumers and businesses with regard to forum selection clauses in standard form contracts).

PART TWO**ONLINE DISPUTE RESOLUTION: SOLVING THE PERSONAL JURISDICTION & CONFLICTS OF LAW PROBLEMS IN ONLINE DISPUTES BY PROVIDING MORE PREDICTABILITY, CONVENIENCE, EFFICIENCY, AND LEGITIMACY**

*“[T]he Internet must be developed and protected in the same way we develop and protect markets—through the establishment of fair rules of engagement and the exercise of the rule of law.”*¹⁰⁸

I. LEAVING THE OLD GEOGRAPHY-BASED SYSTEM AND IMAGINING A NEW CYBER PARADIGM

As set forth in Part One, online transactions have complicated the personal jurisdiction and conflicts of law issues because the consummation of transactions in cyberspace has greatly expanded the geographic reach of business operations.¹⁰⁹ As a consequence, it has become quite difficult to determine where the economic injury occurred, where the contract was entered into, or where it is to be performed when the transaction was made on the Internet and the parties are from different states or countries.¹¹⁰ The Internet has also changed to a great degree the nature of physical and/or business voluntary “connectedness” to a state that makes it foreseeable to be sued there.¹¹¹

As we have seen, simply because a seller in California looking to sell bottles of wine can sell them to a buyer in New Jersey over the Internet just as easily as selling them to a fellow Californian, does not mean that a legal dispute arising between them will be just as easy to resolve in terms of

108. Colin Rule, *The Assault on Reason*, STAN. L. SCH. CENTER FOR INTERNET & SOC’Y, May 18, 2007, <http://cyberlaw.stanford.edu/node/5412>. Rule is e-Bay’s Director of Online Dispute Resolution. *Id.*

109. *See supra* notes 8, 16 and accompanying text (discussing issues with obtaining personal jurisdiction, as well as conflicts of law issues with internet users); *see also* Marcelo Halpern & Ajay K. Mehrota, *The Tangled Web of E-Commerce: Identifying the Legal Risks of Online Marketing*, 17 *COMPUTER L.* 8, 10 (2000) (“The benefits of a global, timeless, interactive marketing presence on the Internet come at the expense of increased legal risks . . . extended customer reach and a continuous commercial presence mean greater exposure to the various—and often conflicting—rules and regulations of jurisdictions.”).

110. *See supra* notes 52–57 and accompanying text (discussing potential conflicts of law). Traditional conflict of law principles are made extremely complicated where the contract, tort, or injury takes place in the “interactive” world. *See also* Sarah K. Jezairian, Note, *Lost in the Virtual Mall: Is Traditional Personal Jurisdiction Analysis Applicable to E-Commerce Cases?*, 42 *ARIZ. L. REV.* 965, 970 (2002).

Traditional American personal jurisdiction analysis is firmly based on territory and geography. Cyberspace, on the other hand, is a world without physical boundaries, a world that has been described as a “barrier-free world marketplace.” [Internet] transactions occur without either party ever technically leaving its own forum. The business concepts of export and import, traveling, and sending and receiving, concepts that have been relied upon in the past for determining who went to what forum state, are altered beyond recognition when operating online. Most troubling of all, an immense number of people who do business online have no idea of the physical location of the other parties to the transaction. . . . And yet courts are applying personal jurisdiction analysis, with few or no alternatives, and with varying results, to e-commerce cases.

Id.

111. *Id.*

personal jurisdiction and conflicts of law issues. If it were that simple, then with the creation of a Web site and the click of a mouse, a small California seller would *always* be subjecting himself to personal jurisdiction not only in New Jersey, subject to New Jersey substantive law because the transaction occurred there, but conceivably to all fifty states and every country in the world, along with the respective substantive laws of those states or countries because an Internet transaction can “occur” in all of those localities as well.¹¹²

As a result, an Internet seller may make the business decision that it is simply not worth subjecting himself to lawsuits in all fifty states and every country in the world just because someone from each state or country might access his Web site. If the seller decides to limit his sales locally, then he loses the power of the Internet – the easy and fast connection to interested customers located around the world.¹¹³ The possibility that a Web site could subject all Internet sellers to worldwide jurisdiction has the potential of inhibiting the growth of the Internet,¹¹⁴ as the appeal of online selling may be offset by the legal danger of being sued in all fifty states and every country in the world.

Some might say “so be it,” that is the cost of having access to and contact with potential customers nationwide, and even worldwide.¹¹⁵ Still, at least with a local sale, the seller knows he is subjecting himself only to the jurisdiction and applicable law of the state in which he physically sells, as long as he has no contacts with other states.¹¹⁶ On the other hand, if the seller decides to market and sell nationally by setting up shop or distributing in all fifty states, then he would also know that such a substantial physical

112. See, e.g., *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164–165 (D. Conn. 1996) (holding that the Connecticut court could exercise personal jurisdiction over the Massachusetts defendant because he maintained a Web site with advertisements and a toll-free phone number that was accessible by any person in any state, and thus the defendant purposefully availed himself of the privilege of doing business not only with the forum state, Connecticut, but with any state).

113. See Alboukrek, *supra* note 75, at 429–31 (discussing the benefits that the “borderless” Internet provides for businesses: worldwide access and greater choice, enhanced competitiveness and quality of service, mass customization and personalized products and services, elimination of intermediaries and product availability, and greater efficiency and lower costs).

114. See generally Kristen Woeste, Comment and Casenote, *General Jurisdiction and the Internet: Sliding Too Far?*, 73 U. CIN. L. Rev. 793, 815 (2004) (explaining that relying on *Zippo*’s sliding scale interactivity test may assert general personal jurisdiction beyond the scope that the U.S. Constitution allows. “The suggestion that the interactive nature of a Web site alone could justify the assertion of general jurisdiction is dangerous for the future of e-commerce.”).

115. If the non-resident Internet vendor is found to have “purposefully availed” itself of every possible forum (i.e. knowingly interacting with residents of the forum, receiving sales revenue from the forum, transmitting information with the forum, using an advertising or media outlet in the forum, or distributing/shipping in the forum), theoretically, the Internet vendor is subject to being hailed into court anywhere. See, e.g., *CoolSavings.com, Inc. v. IQ.Commerce Corp.*, 53 F. Supp. 2d 1000, 1004–05 (N.D. Ill. 1996) (holding that the California Internet vendor was subject to personal jurisdiction in Illinois because it had a Web site accessible by Illinois residents and utilized the services of a Chicago-based marketing firm to promote its product).

It may seem unfair to subject IQ [the defendant] to personal jurisdiction almost anywhere in the country, but to us it seems even more unfair to allow IQ to introduce its program to the entire country [through the Internet] while remaining subject to personal jurisdiction only in its home state and thus requiring patentees from all over the country to go to California in order to litigate their infringement claims.

Id. at 1003.

116. This is the purposeful availment requirement for personal jurisdiction. See *supra* note 17 and accompanying text (defining purposeful availment).

undertaking probably will subject him to (1) personal jurisdiction in all of the states with which he has connected and (2) the applicable law of the states in which he has sold.¹¹⁷

In either of those two extremes – just one state for the physical sales in that state, or all fifty states for Internet sales in those states – at least there is some predictability based on the level of physical connectedness and activity within the state. However, it is difficult to say exactly where along that physical activity spectrum an online seller should be placed.¹¹⁸ Courts have not provided consistent guidance,¹¹⁹ and whatever consensus may eventually develop, it might not be appropriate to tie so much to traditional geographical notions when these Internet transactions defy those antiquated concepts altogether.

On the other hand, if sellers are not subject to personal jurisdiction in all possible states and countries but only in their home state, then a buyer would be able to sue a seller only in the seller's home state if there is ever a dispute regarding the transaction. If so, interstate buyers will feel far less secure in their online purchases, as such lawsuits in foreign jurisdictions might be prohibitively expensive, especially if the amount in controversy is low. The fundamental problem is that either result – being able to sue only the seller's state or in all fifty states and everywhere in the world – is undesirable and harmful to e-commerce. Therefore, the problem is that our traditional court systems are unable to resolve these e-commerce disputes efficiently and fairly on the merits, without the attendant uncertainty and expense presented by jurisdictional and conflict of law issues.

But what if personal jurisdiction and conflicts of law issues could simply be eliminated as issues in the case, without the use of forum and applicable law selection clauses that still require at least one party to travel and physically litigate the case in a foreign jurisdiction, possibly under foreign law? Instead, what if the travel expenses and time spent by the parties could be minimized or

117. Traditional personal jurisdiction analysis, based on geography, physical location, and the “minimum contacts” test, would typically allow personal jurisdiction to be asserted anywhere where the product (designed or marketed by the defendant) is purposefully sold (i.e., where the defendant purposefully avails himself of the privilege of sales income from the forum state). *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 110 (1987) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

If the sale of a product of a manufacturer or distributor is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others.

Id.

118. *See supra* notes 8, 104 and accompanying text (discussing the unpredictability that has developed given how courts have been struggling to apply existing law to cyberspace transactions).

119. The majority of e-commerce cases, when determining personal jurisdiction over non-resident defendants, adopt the *Zippo* sliding scale test. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (E.D. Pa. 1997). However, the *Zippo* test has been criticized as vague, inconsistent, un-constitutional, and unfair. *See supra* notes 8 and 104 and accompanying text (discussing the unpredictability that has developed given how courts have been struggling to apply existing law to cyberspace transactions). Some courts have refused to use the *Zippo* test when analyzing general personal jurisdiction over non-resident defendants, leaving general case precedent for determining personal jurisdiction over Internet vendors muddled with inconsistency and confusion. *See, e.g., Lakin v. Prudential Secs.*, 348 F.3d 704, 711–12 (8th Cir. 2002) (holding that the “*Zippo* test alone is insufficient for the general jurisdiction setting”).

even eliminated altogether so that the dispute could be conveniently and inexpensively decided on the merits based on the parties' written submissions on the Internet? If so, e-commerce could become a much safer and more reliable way to do business because the threat of a lawsuit on the merits would be a more realistic option for an aggrieved party to efficiently seek legal redress. Such a practical solution would result in an increased confidence in the Internet as a more reliable forum where transactions are legally protected and enforced because a lawsuit on the merits is now a convenient, realistic, and efficient option to seek meaningful legal redress.

II. SOLVING THE PERSONAL JURISDICTION AND CONFLICTS OF LAW PROBLEM

A. Internet Personal Jurisdiction

Personal jurisdiction problems that are inherent in traditional e-commerce disputes are eliminated with the parties' consensual use of ODR.¹²⁰ ODR resolves the problems inherent in e-commerce cases with the parties' consent, in an oral or contractual agreement, to exclusive personal jurisdiction in the ODR forum¹²¹ because it entirely eliminates the need for a minimum contacts analysis.¹²² By having both parties consent to where the dispute will be held, the parties avoid the problem of uncertainty regarding where they might be hailed into court.

Perhaps most importantly, ODR does not fall victim to the unfair bargaining issue presented by traditional forum selection clauses because the forum selected is not a physical one, but instead exists entirely online, so that both parties can easily "travel" there via the convenience of their computer.¹²³ This also prevents any familiarity or access advantage, as there often is with a physical court, because both parties would have equal access to, and familiarity with, the online forum. Indeed, the online forum makes the computer a great "equalizer," thereby balancing the travel hardships and "home court" advantages of the parties. By removing cost and inconvenience barriers, ODR

120. ODR "encompasses several forms of dispute resolution, such as negotiation, mediation, and arbitration, which are offered on the Internet and are conducted through written digital communications." Orna Rabinovich Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 255 (2006).

121. Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J.L. & TECH. 25 (2004) (stating that online dispute resolution eliminates jurisdictional problems inherent in online cases because "[p]arties transacting over the Internet can contract to submit disputes to an online ADR provider."); see also Ivonnely Colon-Fung, Note, *Protecting the New Face of Entrepreneurship: Online Appropriate Dispute Resolution and International Consumer-to-Consumer Online Transactions*, 12 FORDHAM J. CORP. & FIN. L. 233, 241 (2007) ("[O]nline dispute resolution avoids jurisdictional issues because parties can bind themselves to dispute resolution through an arbitration agreement."); Henry H. Perritt, *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 676 (2000) ("[A]ppropriately designed ADR mechanisms . . . solve the jurisdictional problem because use of them manifests consent.")

122. See *supra* Part I (emphasizing that traditional litigation to online disputes is expensive, inefficient, and time consuming because of the requirement of personal jurisdiction).

123. See Moeves & Moeves, *supra* note 19, at 856 (discussing the benefits of online mediation in comparison to "extensive cross country travel, which included flight delays, costs, and the discomfort of cramped airline travel").

helps to provide better access to justice than traditional, costly physical courts.

B. Conflict of Law: The Objectivity of the Uniform Commercial Code or the UN Convention on the Sale of Goods

Moreover, with ODR, there is not the inherent advantage of a seller being able to dictate the applicable substantive law because the applicable law is always the same no matter where the parties are from. The applicable law will always be the objective text of the Uniform Commercial Code (“UCC”) for U.S. domestic sales or the UN Convention for international sales.¹²⁴ As discussed in Part One, the online nature of Internet disputes makes it almost impossible to determine where the events giving rise to the lawsuit took place.¹²⁵ Therefore, because the parties transact without knowing where the situs of the wrong might take place, without ODR they often subject themselves to the substantive law of a forum of which they may not have notice.¹²⁶

The use of ODR allows parties to avoid this potentially unfair outcome by selecting and consenting to the specific substantive law that will govern any and all disputes that may arise out of the transaction between them. That substantive law will either be the text of the UCC or that of the UN Convention. As a result, neither party can shop for different applicable law in order to gain some real or perceived advantage.¹²⁷ This litigation gamesmanship is eliminated by ODR agreements because parties consent to be governed by the text of the UCC or the UN Convention, which are objective sets of laws that govern sale of goods transactions. By selecting this substantive law, parties avoid determination of disputes based upon the possible bias of a particular forum or other unfair advantages that may exist for one side.¹²⁸ By selecting the UCC as the governing law, parties will know that the applicable law will be objectively fair, and that the outcomes will be based on the merits of the case, and not on any other factors, such as citizenship or international relationships. Case law from differing jurisdictions interpreting these texts would not be controlling, although they could be persuasive authority for an online arbitrator or mediator to consider. In each dispute, only the text of the UCC or the UN Convention will be controlling authority.

124. See generally U.C.C. §§ 2-105, 2-725 (1977) (discussing United States commercial contracts law); United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980 (discussing international commercial law).

125. See *supra* Part I (stating that an online transaction is conducted from different parts of the country or the world).

126. *Id.*

127. John Fellas, *Choice of Forum in International Litigation*, INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 2005, at 283 (PLI Litig. & Admin. Practice, Course Handbook Series No. 721, 2005) (quoting English judge, Lord Simon of Glaisdale, “forum shopping is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdiction, he will naturally choose the one in which he thinks his case can be most favorably presented: this should be a matter neither for surprise nor for indignation”).

128. See *supra* Part I (explaining how disputes are often decided merely on procedural determinations such as where the lawsuit can take place).

III. KEY ELEMENTS OF ODR

A. *ADR Benefits over Formal Litigation*

Before addressing the specifics of ODR, it is important to point out that, in reality, ODR fully incorporates ADR,¹²⁹ and therefore it contains all of the advantages and benefits that ADR has over traditional litigation.¹³⁰ First, the use of ADR is based upon the contractual consent of both parties to avoid formal litigation and instead seek an alternative method to resolve the dispute.¹³¹ This agreement has the advantages of being mutually beneficial and it maintains due process concerns because both parties have the opportunity to be heard and have their claims addressed in a proceeding.

Second, ADR recognizes that relationships between parties are valuable, and although a legitimate claim exists, resolving it should look not only to a just decision on the merits, but also to the goal of continuing the professional relationship between the two parties after the dispute is resolved, especially in a business transaction.¹³² ADR facilitates the continuation of a business relationship by removing the dispute from the intimidating, adversarial courtroom,¹³³ and placing it in a neutral forum where both parties are free to discuss their points of view. Accordingly, ADR promotes continuing relationships by removing many of the cold formalities of courtroom litigation that often result in bitterness between parties.¹³⁴ These formalities include

129. ADR stands for "Alternative Dispute Resolution," although some say it is really better thought of as "private dispute resolution." Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three Step Model*, 10 HARV. NEGOT. L. REV. 287, 296 (2005) ("The basic forms of ADR are arbitration, mediation, and negotiation.").

130. See Amy Moeves & Scott Moeves, *supra* note 18, at 843–44 ("Negotiation, mediation, and arbitration have replaced litigation in many contexts because these methods of dispute resolution are more efficient, less costly, and less combative than litigation."); see also Beasley, *supra* note 18, at 321–322 (stating advantages of ADR over litigation: cost-effectiveness, speed, confidentiality, relationship maintenance, greater focus on substantive issues in dispute, party control, and reduction of court dockets).

131. See Beasley, *supra* note 18, at 322 (explaining how arbitration in courts is based on a mutually agreed contract).

132. THE METROPOLITAN CORPORATE COUNSEL, *Experts Compare the Advantages and Disadvantages of Litigation and ADR* (Aug. 2006), <http://www.metrocorp.counsel.com/pdf/2006/August/34.pdf> (last visited Feb. 25, 2008) ("After mediation or arbitration, parties are less likely to continue to be standing on scorched earth and are more likely to continue to do business with one another."); Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273, 305 (2006) ("The voluntary, nonbinding and informal character of some ADR proceedings ensures that parties can exercise control over their dispute and allows them to focus on producing "win-win" solutions that save time and costs and strengthen personal and business relationships among the parties to the dispute."); see also Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 53 (2007) (discussing advantages of ADR over traditional litigation: lower costs and less time to resolve a dispute, preservation of long-term relationships, more accessible forums for dispute resolution and production of "mutually agreeable resolutions that may advance both parties' needs to some degree").

133. Lenden Webb, Note and Comment, *Brainstorming Meets Online Dispute Resolution*, 15 AM. REV. INT'L ARB. 337, 371 (2004) ("Lawsuits are the antithesis of a relationship because bringing such a suit is admitting that the relation has failed. . . . ODR's strength is the ability to maintain relationships.").

134. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) ("[M]ediation is less hemmed-in by rules of procedure or substantive law . . . [t]he focus, instead, is upon establishing a degree of harmony through a resolution that will work for these disputants.")

litigation tactics such as filing protracted motions to dismiss for lack of personal jurisdiction or improper venue. In most cases, parties will end up filing as many motions as possible to delay the litigation, costing time and money for the other party by requiring them to respond.¹³⁵ Because these motions do not exist in an ADR forum, it improves the chances that the bitterness inherent in the beginning stages of traditional litigation will be avoided by the use of ADR.

Additionally, ADR recognizes that not all disputes involve “wrongs.” Many problems arise due to “misunderstandings, accidents, or other situations where getting the problem resolved quickly is more important than placing blame.”¹³⁶ With ADR, the resolution can be “forward-looking” by finding a workable solution to the problem, rather than “backward-looking” by requiring fault and blame to be placed squarely on one of the parties before moving ahead.¹³⁷ It is important to understand that often parties arrive at settlements without either side admitting to any liability.¹³⁸

Third, a significant benefit of ADR is that it imposes lesser time commitments and costs on the parties than traditional litigation does. The average contract-based lawsuit takes approximately two years to resolve in traditional litigation, while ADR cases may be finished in as little as five or six months.¹³⁹ The long duration of traditional litigation is likely to be extremely burdensome and costly for both parties, and is a deterrent to Internet consumers.¹⁴⁰ ADR is also significantly less expensive than traditional litigation,¹⁴¹ which involves the expensive analysis of discovery, the hiring of

135. Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 848–49 (1996) (“Much like litigation, arbitration is characterized by trial-like adversarial confrontation, but it is conducted privately and employs more relaxed rules of evidence and procedure than litigation.”); see, e.g., *Naposki v. First Nat. Bank of Atlanta*, 798 N.Y.S.2d 62 (2d Dep’t 2005) (holding that defendants’ counsel was subject to a \$5,000 sanction for unnecessarily delaying the resolution of the appeal in a New York action by filing motions to extend the time to file a brief while withholding information regarding settlement); see also *In re Pinotti*, 585 N.W.2d 55 (Minn. 1998) (holding in an attorney disciplinary proceeding that the attorney’s misconduct involving repeated filing of unsubstantiated claims, confusing and improper motions, warranted his suspension from the practice of law).

136. ETHAN M. KATSH, *ONLINE DISPUTE RESOLUTION* (Jossey-Bass) (2001).

137. Riskin, *supra* note 134, at 34.

138. See *id.* at 34 (“In most mediations, the emphasis is not on determining rights or interests, or who is right and who is wrong, or who wins and who loses because of which rule; these would control the typical adjudicatory proceeding. The focus, instead, is upon establishing a degree of harmony through a resolution that will work for these disputants.”); see also Tristan Loo, *The 7 Benefits of Mediation*, http://synergyinstituteonline.com/detail_article.php?artid=89 (last visited Mar. 24, 2009) (explaining that traditional litigation is hostile, adversarial, and focuses on assigning blame and punishment but that mediation doesn’t have this focus, instead it seeks to invent a solution to a mutual problem through cooperative problem-solving); see also ROGER FISHER ET. AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 57–62 (Bruce Patton ed., Penguin Books 1983) (1981) (explaining that the success of a settlement negotiation depends on all parties cooperating by working closely together to develop collective solutions rather than being close-minded and critical of one another).

139. *Experts Compare the Advantages and Disadvantages of Litigation and ADR*, THE METROPOLITAN CORPORATE COUNSEL, Aug. 2006, at 34, available at <http://www.metrocorp.counsel.com/pdf/2006/August/34.pdf>.

140. *Id.*

141. See *id.* (“All forms of ADR, even arbitration, are less costly than litigation, particularly if ADR is pursued early in the life of the dispute.”); see also Richard Miles, *Evaluation of ADR in United States Attorney Cases*, INTERAGENCY ALTERNATIVE DISPUTE RESOLUTION CIVIL ENFORCEMENT AND REGULATORY SECTION NEWSLETTER, Oct. 1, 2003, at 1, available at <http://www.adr.gov/newsletter/volume1issue1.pdf> (stating that in

attorneys who may charge \$400.00 per hour, and the costs of extensive travel over a two-year (or more) period.¹⁴² In short, lower costs and time commitments make ADR a more favorable forum than traditional litigation, and because ODR fully encompasses ADR, ODR has all of the same benefits and advantages as ADR.

B. Procedural Benefits of ODR over ADR, as Well as Formal Litigation

The efficiency benefits of ADR over formal litigation are clear, and ODR fully encompasses all of them. Accordingly, ODR has all of the benefits that ADR has over formal litigation, and, in addition, ODR expands the benefits of ADR even further through the use of Internet technology.¹⁴³ Those specific benefits of ODR over ADR are set forth more fully below.

1. Convenience

The use of ODR gives both parties the same convenience that the Internet itself provides: the ability to conduct one's affairs from the comfort and ease of their home or office computer.¹⁴⁴ Because an entire dispute can be resolved on the written submissions, those involved in the dispute save hundreds, if not thousands, of dollars that would otherwise be spent commuting to a physical location to adjudicate the case in person at a mutually convenient time.¹⁴⁵

Additionally, because ODR recognizes the value of efficiency in e-commerce disputes and avoids the formalities of traditional courtrooms, both parties are able to spend a minimal amount of time adjudicating the dispute. The nature of ODR allows for parties to be flexible with the designation of

2003 the average costs saved by using ADR instead of traditional litigation was \$10,700).

142. See *What Arbitration Means (for Consumers and Employees)*, NATIONAL ARBITRATION FORUM, 2006, available at <http://www.adrforum.com/users/naf/resources/WhatArbitrationMeansForConsumersAndEmployees.pdf> (providing that consumer goods and employment cases are resolved in about 104 days through arbitration, 85% faster than through litigation, which takes 650 to 720 days for a resolution).

143. See Lodder & Zelezbihow *supra*, note 130, at 337 ("ODR combines the effectiveness of ADR with the comfort of the Internet.").

144. Note the critical difference with ODR: traditional ADR still requires parties to physically travel to the location of the mediator or arbitrator, or to the office of opposing counsel, while ODR is conducted through the Internet, which requires no travel and mutual scheduling, the parties need only an Internet connection. Strategy, gamesmanship, and manipulation are generally limited when each side merely submits simple written submissions over the Internet.

145. See Mohamed Wahab, *Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement*, 12 INT'L J.L. & INFO. TECH. 123, 129-30 (2004) ("ODR is a more convenient dispute resolution system in terms of its swiftness and comfort, as the parties to a dispute would presumably be amenable to settle their disputes that emanated from cyberspace in cyberspace without any need for regularly convening in a specific location for in-person hearings, negotiation, or mediation sessions."); see also Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 468 (2002) ("On the Web, online information exchanges and virtual meetings can take place through the use of e-mail, chat rooms list serves, bulletin boards, conferencing software, software-based mediation packages or videoconferencing, at a fraction of the cost and time involved for either party if traveling to a different state or country to prosecute or defend their claims in person."); Colon-Fung, *supra* note 115, at 250 ("Online arbitration may be the only feasible option in cases where the low value of the transaction effectively bars the consumer from seeking redress or where one or more of the parties cannot afford to travel abroad.").

their time for the dispute.¹⁴⁶ For example, because ODR communication does not have to occur in real-time, parties, in a chat room, may choose the best time for them to make or respond to arguments in the case. Thus, parties set their own “court appearances” as long as they meet deadlines previously agreed to under the terms of the mediation or arbitration agreement, allowing each party to have more freedom to conduct everyday obligations and have a minimal impact on their work schedules. Because the resolution process is conducted online, parties can respond to written submissions on their own personal time. Thus, they do not have to be available to arrange, or re-arrange, their schedules in order to physically meet with opposing parties, counsel, and mediators or arbitrators in person for dispute resolution sessions. If an attorney is hired, hourly attorney fees apply only for written submissions, and not for traveling or waiting associated with in-person meetings.

2. *Low Cost*

One of the most important benefits of using ODR is its low cost, especially when compared to litigation, and even when compared to traditional ADR. One of the issues with resolving e-commerce disputes through litigation and traditional ADR is that the amount in dispute will often be substantially outweighed by attorney’s fees and costs of travel.¹⁴⁷ Thus, practicality concerns often override the economic reasons for pursuing litigation. However, ODR resolves this problem by providing a means to justice that often is not prohibitively expensive.

Many ODR providers have established a system that uses a flat fee based on the cost of the item purchased, or a sliding scale based upon the settlement amount.¹⁴⁸ Cybersettle.com,¹⁴⁹ for example, charges a \$100 settlement fee for settlement amounts up to \$5,000.00.¹⁵⁰ The largest fee quoted for Cybersettle.com is \$700, which is for settlement amounts over \$500,000.00.¹⁵¹ Compared to traditional hourly attorney’s fees, these costs are miniscule. The low cost provided by ODR makes it worthwhile to bring a dispute over a relatively inexpensive e-commerce item, while traditional litigation deters the pursuit of justice given the disproportionate costs of resolution. DotComJustice fees, *see infra* Part III, are also very low, involving little or no filing fees and a preliminary registration fee that is a small percentage of the

146. Wahab, *supra* note 146, at 130.

147. See Orna Rabinovich-Einy, *Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 254 (2006) (“[T]he costs associated with litigation or alternative dispute resolution are prohibitive, given that many of the disputes are over small sums of money”); see also Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J. L. & TECH. 25, ¶ 20 (2004) (“The travel and accommodation costs involved may be prohibitive, thus making it impractical for the parties to resolve the dispute.”).

148. See Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. TECH. & INTELL. PROP. 55, 65–70 (2001) (discussing costs of ODR services).

149. Cybersettle, <http://www.cybersettle.com> (last visited Mar. 24, 2009).

150. Pricing for Trial Lawyers, <http://www.cybersettle.com/pub/home/products/pricing.aspx> (last visited Mar. 24, 2009).

151. *Id.*

parties' transaction amount.¹⁵² Instead of deciding not to pursue a legal remedy because a traditional lawsuit is too expensive in light of the amount in controversy, ODR makes reaching a legal remedy realistic and cost effective in the event of a dispute.

3. *Speed and Efficiency*

The development of ODR has been motivated by the same concerns as the development of the Internet itself: speed and efficiency. While traditional litigation can take months or years to be resolved, ODR "promises settlement of disputes within days or even hours."¹⁵³ All ODR services take place online, sometimes supplemented through the telephone, thus no time is needed to travel to a physical trial or ADR hearing.¹⁵⁴ Parties can access information relating to their dispute around the clock because the Internet, unlike traditional courtrooms, never closes.¹⁵⁵ This is especially significant when parties live in different time zones. Communication with the other party is also efficient and fast, as the use of email and online chat forums allow instantaneous access for those involved in the dispute. ODR provides a forum that gives participants a fast and efficient resolution of their dispute, yet it does not sacrifice due process or legitimacy of results as long as the mediator or arbitrator has expertise and the process is fair. For more involved disputes, it is possible to use telephone or videoconferencing to, for example, ask questions of certain witnesses.

4. *Special Adaptation for Online Disputes in a Non-Threatening Forum*

ODR, as opposed to litigation or traditional ADR, allows consumers to interact in an environment with which they are familiar and comfortable – the Internet. Traditional courtrooms and conference rooms of mediators and arbitrators involve legal formalities and an "us versus them" environment that often intimidates parties involved in a dispute.¹⁵⁶ Additionally, many e-commerce consumers have far less experience in dealing with attorneys and the process of litigation or ADR than their counterparts who might be

152. See <http://www.electroniclegalforum.com/elfDemo.aspx> (demonstrating a model online dispute resolution system for e-commerce transactions with a pricing model amenable to resolving lower dollar value disputes).

153. Shah, *supra* note 121, at ¶ 21.

154. See, e.g., Cybersettle.com, Cybersettle Overview, <http://www.cybersettle.com/pub/home/about.aspx> (last visited Mar. 24, 2009) (stating that disputes can be settled instantly, via the Internet).

155. See Orna Rabinovich-Einy, *Balancing the Scales: The Ford-Firestone Case, The Internet, and The Future Dispute Resolution Landscape*, 6 YALE J. L. & TECH. 1, 29 (2004) ("Through ODR, parties can resolve their differences even more quickly than through traditional ADR. Travel time is often eliminated or shortened. The need to set up 'appointments'—frequently at the cost of devoting time to one's work obligations—is reduced when ODR is not conducted in real time.")

156. See Justin D. Leonard, *Cyberlawyering and the Small Business: Software Makes Hard Law (But Good Sense)*, 7 J. SMALL & EMERGING BUS. L. 323, 355 (2003) (explaining that "meeting with a lawyer can be intimidating and sometimes incomprehensible" for laypersons confronted with legalese and inadequate explanation of the law and formal courtroom procedures and even in formal lawyer conferences); see generally Joan R. Tarpley, *ADR, Jurisprudence, and Myth*, 17 OHIO ST. J. ON DISP. RESOL. 113 (2001) (discussing courtroom formalities and how ADR attempts to avoid them).

institutional sellers from large companies.¹⁵⁷ Experience in the courtroom or conference room alone, in some cases, can be enough to prevail in a dispute. The more experienced party can intimidate the less experienced party by filing endless motions, discovery requests, and using other time consuming and frustrating tactics. With ODR, the only formalities involved are those established by the parties' consensual agreement and the parties "have a more active role and more process control than they do in litigation."¹⁵⁸ When using ODR, parties are focused on constructing persuasive written arguments, perfecting their evidence, and communicating directly with the third-party decision maker and the opposing party. They will be less concerned with complying with courtroom formalities, warding off endless motions, or resolving procedural issues such as figuring out when it is okay to "approach the bench." Placing the parties in a comfortable and familiar forum tends to allow for a faster and more relaxed resolution of the dispute that is focused on the merits.

ODR also avoids the common problem of party confrontations that are inherent in traditional courtrooms and ADR conference rooms.¹⁵⁹ Parties do not have the opportunity to look into each other's eyes and try to intimidate one another, or force each other into submission with their obvious attributes of wealth, or have lawyers cross-examine the parties in a confrontational manner. Rather, the only thing being considered in ODR are the merits of the dispute as set forth in the parties' written submissions. The dispute is stripped down to the essence of the parties' interests and positions.

Along these same lines, another benefit of ODR is that it can remove at least some illegitimate barriers of racism, sexism, or other similar forms of discrimination that can occur in litigation or traditional ADR settings, because with ODR the involved parties see only the text of the written submissions. The parties' physical appearance and characteristics, and even personality, are not readily apparent online, so all that is seen and considered is the substance of the parties' written submissions and the evidence that is uploaded to the site. Thus, the case can be decided more on the merits, instead of being tainted by prejudice toward the person making the arguments or because of biased testimony that is based on dealing with them in person. In short, the Internet can serve as an "equalizer" in this context because mediators and arbitrators only read the parties' written submissions instead of seeing and hearing them in person.

157. See Shah, *supra* note 121, at ¶ 23 (discussing issues with power imbalance, often based on experience and familiarity with the dispute resolution system, between the parties).

158. Experts Compare Litigation and ADR, *supra* note 133, at 60.

159. See Shah, *supra* note 121, at ¶ 22-23. ("By removing the physical presence of the opponent, online ADR provides the parties with a 'dispassionate approach to the merits of [the] cause' of their dispute. This may also be beneficial when parties don't trust each other or when they are uncomfortable confronting each other. Further, since most of the arguments or dialogue take [sic] place asynchronously over e-mail, it allows the parties to a dispute to reflect on their positions before articulating them, without any time pressure. Additionally, such a mechanism blankets 'any economic or other power imbalance that exists between the parties.'").

IV. SUBSTANTIVE BENEFITS OF ODR OVER ADR AND FORMAL LITIGATION: PROVIDING MORE DUE PROCESS AND LEGITIMACY OF RESULTS

A. *Predictability*

Another benefit of ODR is that it offers predictability because it provides both parties with knowledge of where the dispute will be heard (online), and what will be the basis for the decision-making (the text of the UCC or the UN Convention). Predictability in these areas means that the parties do not have to spend any time or money litigating these issues. Both the UCC and the UN Convention provide unbiased model law for commercial sale of goods disputes and have been tested for decades.¹⁶⁰ The model laws are transparent and accessible so both parties will be on notice of the consequences of their actions.

Additionally, because basic contract law will require both parties to comply with the terms of the contractual agreement, ODR agreements are enforceable in a court of law. One of the greatest benefits of ODR is the presence of a “digital trail” that consists of all electronic communications between the parties.¹⁶¹ The record “may serve as a check on the behavior of mediators, parties, and their representatives, even if no formal appeal procedure exists.”¹⁶² The record provides the agreement, or contract, between the parties and all of the parties’ communication with respect to their transaction leading up to and including the dispute.

Once an arbitration decision is reached, it becomes enforceable to the same extent a traditional in-person arbitration decision is enforceable.¹⁶³ So if either party violates the terms of their ODR settlement agreement or arbitration award, the non-breaching party has an action in law against the breaching party.¹⁶⁴ Thus, the contractual agreement formed by the use of ODR will be enforced by a court of law to the same degree an agreement is reached by traditional ADR. The parties cannot escape the terms of their agreement, or an arbitration award made online, any more or any less than they can escape them if reached through traditional in-person ADR.

B. *Security*

“Electronic transactions are inherently risky.”¹⁶⁵ For example, the very thought of buying an item on e-Bay from a seller located thousands of miles away, in a different country, who speaks a different language, may be

160. U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods, 52 Fed. Reg. 6262 (Mar. 2, 1987); U.C.C. § 1-103 (1977).

161. Rabinovich-Einy, *supra* note 156, at 31.

162. *Id.*

163. *See, e.g.*, Federal Arbitration Act, 9 U.S.C. § 9 (2000) (explaining the procedure for enforcing arbitral awards). *See Enforcement supra* Part Three, IX.

164. *See id.* § 2 (“[A] transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable . . .”).

165. Wahab, *supra* note 146, at 128.

disconcerting for the average purchaser. Although many consumers have entered e-commerce markets, a significant number are still deterred by the risk factor.¹⁶⁶ Much of the risk arises from questions of whether an e-commerce sale is enforceable in a court of law and whether the person committing the wrong could be tracked down. A key factor to the rise of e-commerce is the existence of an enforceable mechanism to resolve online disputes.

Although e-commerce generally is growing, the amount of e-commerce for larger ticket items is actually decreasing.¹⁶⁷ This suggests that at least some online consumers are growing wary of buying larger ticket items on the Internet due to the inherent legal risks and uncertainty as set forth in this Article. However, if those who may be reluctant to engage in e-commerce, especially for larger ticket items, were made to feel that their transactions were easily and reliably enforceable, it would promote the use of e-commerce among risk-averse consumers.

Additionally, the presence of a reliable ODR system will likely lead to fewer cases of fraud or misrepresentation because sellers will know that they will be held legally responsible for the transaction. "Securing a trust-worthy ODR process encourages people to conduct more and more transactions online, which leads to the progression of e-commerce which in turn increases the profit margin for online businesses."¹⁶⁸

Finally, there might even be an environmental benefit to using ODR over ADR and traditional litigation, which rely on paper and physical travel. To the extent parties do not need to fly long distances or even drive to courtrooms and conference rooms, they save energy and therefore reduce green house gases. Similarly, to the extent paper submissions are eliminated, the use of paper is slightly diminished.¹⁶⁹

Although the benefits of ODR over conventional ADR and traditional litigation are clear, it would be helpful to see how a typical e-commerce dispute might be resolved using an online justice system. Thus, what follows in

166. See *supra* Part I (explaining the risk factors consumers face in e-commerce transactions). See also Anne Broache, *eBay CEO: Phishers Threaten User Trust*, CNET News.com, (Mar. 9, 2007), available at <http://www.zdnetasia.com/toolkits/0,39047352,61995180-39094240p,00.htm> (stating that "[t]he success of big-ticket item sales rides on customer trust . . .").

167. Brad Stone, *eBay Says Its Crackdown on Fraud Is Showing Results*, N.Y. TIMES, June 14, 2007, at C9 (explaining how fraud, piracy, and counterfeiting problems have forced eBay to take a more proactive stance to enhance openness and trust by expanding its anti-counterfeiting campaign, improving controls and geographic restrictions, and providing more feedback to customers and users). See also Christina Binkley, *Ensuring That Your Cartier Is Really a Cartier; Existing Efforts to Weed Out Welter of Fakes Fall Short; A Labor-Intensive Solution*, WALL ST. J., Apr. 5, 2007, at D1 (discussing the need for greater security with high-priced online purchases due to the difficulty in investigating authenticity).

168. Wahab, *supra* note 146, at 129.

169. E-commerce is even good for the environment in that it saves consumers from having to drive to the store. See [inthenews.co.uk, Helping Save the Rainforests](http://www.inthenews.co.uk/news/science/Internet-shopping-helping-save-rainforests-$445592.htm), July 24, 2006, [http://www.inthenews.co.uk/news/science/Internet-shopping-helping-save-rainforests-\\$445592.htm](http://www.inthenews.co.uk/news/science/Internet-shopping-helping-save-rainforests-$445592.htm) ("[A]nalytists believe that Internet shopping reduces the amount of energy being wasted and makes the buying and distribution of products more efficient, as well as easing road congestion"). But see Sam Williams, *Online Shopping and Its Impact on the Environment*, THE GOTHAM GAZETTE, Jan. 2006, available at <http://www.gothamgazette.com/article//20060118/7/1721> (explaining that due to the rise in e-commerce transactions, "New Yorkers left more than 8,300 tons of cardboard and mixed paper [from shipping] at the curbside in the first full collection week after the Christmas holiday, a 21 percent jump over the same period last year").

Part Three is a short explanation of how the hypothetical California wine seller defendant and New Jersey wine bottle purchaser plaintiff might resolve their dispute using a high-functioning ODR system. Not every possible permutation of the dispute is considered herein, but enough of the dispute is set forth to give a realistic impression of how the system would work.

PART THREE:

THE "DOTCOMJUSTICE" PROTOTYPE: THE FIRST COMPREHENSIVE ONLINE ARBITRATION SYSTEM TO RESOLVE E-COMMERCE DISPUTES

Because e-commerce is becoming such an integral part of our economy,¹⁷⁰ we need buyers not only to continue to make online purchases, but we also need to attract more potential buyers. But to do so will require more confidence in online markets. When buyers are without a practical legal recourse for dissatisfaction with an online purchase, justice fails, which leads to a decrease in the confidence of online purchasing.¹⁷¹ Addressing these concerns is critical in encouraging the future robust growth of e-commerce. ODR helps online buyers to feel more secure in their purchases, because they see that online sellers stand behind their products when they participate in an ODR system like DotComJustice. Buyers will be more likely to make purchases online if they feel there is a practical legal option in the event the transaction results in a dispute because they can rest assured that there will be a meaningful legal remedy if something goes wrong with the sale.

Online sellers will also benefit from this increased online consumer confidence. Although sellers at first might be reluctant to open themselves up to easy-to-file online lawsuits by disgruntled purchasers, in the long run these sellers would benefit by standing by their online products. It is similar to sellers who offer warranties for their products. At first glance, one might argue that sellers would simply lose money if they agreed to fix or replace any defective product they have sold because consumers would simply take advantage of them. However, sellers continue to offer warranties because, in the long run, warranties result in increased sales as consumer confidence in the sellers' products increase.¹⁷² Consumers actually begin to be suspect of products that do not offer warranties.¹⁷³ In the same way, online purchasers will have more confidence in the online marketplace if they know they are

170. See John Ryan, Rambod Nader, & Thomas P. Lihan, *Internet-Based Exercise of Personal Jurisdiction*, J. INTERNET L., Sept. 2003, at 1 ("In the span of less than a decade, the Internet has become ubiquitous. Internet presence is a virtual necessity in today's business world.")

171. A buyer may be without recourse where she purchases an item that costs much less than it would cost to litigate or where there would be no realistic forum in which the seller-defendant would be subject to personal jurisdiction. See generally *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F.Supp 1119, 1123-26 (W.D. Pa. 1997)(discussing the outer boundaries of personal jurisdiction based on Internet transactions).

172. See generally Vincent M. Gonzales, Note, "The Buyer's Specifications Exception to the Implied Warranty of Fitness for a Particular Purpose: Design or Performance?," 61 S. CAL. L. REV. 237, 242-43 (discussing the advantages of express warranties).

173. *Id.*

buying from sellers who are willing to be sued online if there is a problem with the online sale. It is very short-sighted for online sellers to take solace in the fact that online purchasers currently have difficulty bringing traditional lawsuits against online sellers. This is not an optimal long-term vision for e-commerce.

Boschetto v. Hansing, a recent Ninth Circuit case, brought to light the problematic injustice with typical online purchases, as the court dismissed the online buyer's claims for a lack of personal jurisdiction over the online seller.¹⁷⁴ This particular lawsuit, however, was not over a low-value purchase, but was instead a dispute over a \$34,106 vintage car, giving rise to concerns other than those of a cost-prohibitive lawsuit due to a low-value purchase.¹⁷⁵ In *Boschetto*, a California citizen purchased a vintage automobile on eBay from a Wisconsin-based seller.¹⁷⁶ The California buyer alleged that the automobile was delivered in a sub-standard condition and not as advertised.¹⁷⁷ The California buyer sued the Wisconsin seller in Superior Court in California.¹⁷⁸ The court found that there was no personal jurisdiction over the seller, so the buyer was left with the very expensive and difficult option of having to file a lawsuit in Wisconsin, where the seller lived.¹⁷⁹ ODR not only provides justice for low-value online purchases, over which one likely would not be willing to litigate, but also will provide justice for higher-value purchases (which give rise to the same jurisdictional issues as low-value purchases). DotComJustice—which the reader can access at www.electroniclegalforum.com—improves upon traditional ADR by addressing both cost-prohibitive and jurisdictional issues that are of concern with both high- and low-priced items. In doing so, it has the potential of ultimately stimulating the economy beyond what we have already seen.

I. THE INITIAL PURCHASE

It is best if online buyers and sellers agree to resolve any future dispute between them *before* such a dispute ever develops. This is true because there often will be more cooperation and goodwill between the parties at the outset of their e-commerce transaction, before any dispute has developed. Such cooperation and goodwill is less likely after a dispute has developed, as mutual trust is probably suffering at this point. Parties also may be positioning for future litigation once a dispute develops, and therefore may choose not to arbitrate solely as an adversarial tactic. Strategically, one or both parties might consider engaging in ODR at that point to be a relative disadvantage.

Also, agreeing to arbitrate at the beginning of the e-commerce transaction has the added benefit of allowing the parties to record their entire transaction

174. 539 F.3d 1011, 1019 (9th Cir. 2008).

175. *Id.* at 1014.

176. *Id.*

177. *Id.* at 1015.

178. *Id.*

179. *Id.* at 1019. *See also* International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) (holding that personal jurisdiction exists where the defendant has sufficient minimal contacts).

on the ODR Web site. Because all communication between the parties to the transaction is recorded, the parties create an authenticated digital record of their entire transaction. This means that almost all of the “evidence” in any future dispute between them is already recorded, authenticated, and available for ODR. Moreover, if the parties are aware from the beginning of their transaction that everything they communicate to each other is being recorded, and will be accessible in any future dispute, they will be much more likely to live up to their contractual obligations. In short, if the parties are aware that someone – i.e., an ODR Web site via a future arbiter/judge– is watching and recording their entire transaction, then they will have an additional, powerful motive to “be on their best behavior” throughout their transaction, as well as less of an incentive to breach their recorded contractual obligations and end up in a legal dispute.

A. *Registration of the Transaction*

The hypothetical California seller would offer the DotComJustice icon on the seller’s Web site. This offer to any and every possible buyer serves the function of consent by the seller to resolve any dispute arising out of the online transaction using DotComJustice, as long as the buyer also agrees to use the DotComJustice Web site in the event of a dispute. Again, despite successful businesses subjecting themselves to more potential lawsuits through DotComJustice, it is still in their interest to use the DotComJustice system because it communicates to buyers that in the event of a dispute, the seller stands behind its product, ensuring the quality of the product and thereby increasing sales. Additionally, considering the trade-off of more potential lawsuits for more potential sales, an increased risk of suits would be worth it to a successful business in terms of increased sales.

If the hypothetical New Jersey buyer selects the DotComJustice icon as she makes the online purchase by clicking the “Yes” button, she indicates her desire to use DotComJustice for any potential dispute with the seller arising from their online transaction. After completing the purchase and consenting to the terms of the DotComJustice arbitration agreement, the buyer registers the transaction on the DotComJustice Web site, www.electroniclegalforum.com. As a first-time user, the buyer will be prompted to create a username and password to access the Web site, as well as to provide contact and billing information. The seller already would have supplied this information to the DotComJustice Web site. After completing the Buyer Information page, the buyer can view the Product Registration page. Information from the sale regarding the product, seller and buyer, and all of their communication regarding the transaction, has been automatically collected from the transaction. The buyer must select the “Register” button to complete the registration process. At that point, the transaction is registered and will be referenced in the event of any further communication between the parties or a dispute over the transaction. Much of the information entered by the buyer to make the sale is used to populate the DotComJustice web page for that particular transaction.

B. Arbitration Agreement—Forum Selection and Choice of Law

As part of their transaction, both the buyer and seller have agreed to use DotComJustice to adjudicate any dispute between them arising from the transaction. Each party has had the opportunity to review the DotComJustice rules in their entirety and has agreed to adhere to them exclusively, and each understands that any dispute will be resolved online using only the DotComJustice rules, which apply to both the buyer and the seller. Each party has the right to seek justice by using the DotComJustice system for any dispute arising out of the transaction until resolution. On the basis of consent by both parties, DotComJustice will provide the exclusive forum, rules, and remedy for their dispute. The parties agree that there will be no personal jurisdiction in any physical court of law and they further agree that only the text of the UCC (or the UN Convention, if the parties are from different countries) will apply to govern the dispute. Both parties are charged at that time a nominal percentage of the value of their transaction in order to register it, such as one-half of one percent (for example, a \$50.00 purchase would require each party to pay only twenty-five cents to register the transaction).

II. BUYER DISSATISFACTION

The buyer in the California wine hypothetical, who allegedly only received five of the ten bottles of wine she ordered, has decided to file a complaint against the defendant seller. After logging onto the DotComJustice site, she uses the password she was given during the registration process to access the transaction for which she wants to file a complaint. Once the transaction is accessed, she selects “File New Complaint on a Purchased Product” from the “Select One of the Following Tasks” page. The buyer then selects the wine transaction from the list of products on the “Registered Products” page. The buyer is then directed to the “Choose Type of Complaint” page, where she decides either to pursue a formal complaint against the defendant seller or to begin informal e-mail contact with the seller.

A. Informal Complaint

Before filing a formal complaint against the seller, the buyer may contact the seller by e-mail to attempt to settle their dispute without involving the DotComJustice ODR process and fees. If, however, e-mail conversations do not resolve the issue to the buyer’s satisfaction, she may continue with the formal complaint. The informal e-mails then can be uploaded to the DotComJustice Web site in order to add to the “digital record” of the case.

It is important to point out that some disputes are likely to be resolved through the informal negotiation process. But for the purpose of the demonstration, assume the buyer chooses to make the formal complaint.

B. Formal Complaint

The formal complaint is a legal document that holds the same ramifications as a notice to arbitrate the dispute. The plaintiff's complaint will indicate:

1. All claims against the defendant regarding the transaction in this case;
2. The plaintiff's formal trial position before the judge; and
3. The plaintiff's informal offer to settle with the defendant, which will not be seen by the judge.

The DotComJustice website guides the plaintiff-buyer through the complaint with a series of screens that list issues affecting the transaction in this case. Each screen informs the plaintiff that she must tell the judge any and all problems with the transaction by answering "Yes" or "No" to each question and then, for each "Yes" answer, provide factual details in the available text box (limit 500 words). The categories provided by DotComJustice are:

1. Delivery Issues
2. Quality Issues
3. Appearance Issues
4. Utilization Issues
5. Misrepresentation Issues
6. Cost Issues

This process is designed to assist the plaintiff in drafting the complaint. In the wine sale hypothetical, the plaintiff-buyer might select "Only Some Items Delivered" under "Delivery Issues" because she allegedly received only five bottles of wine from her order of ten bottles. She may also select "Poor Customer Service" under "Utilization Issues" because the defendant-seller refused to address her complaint about the missing bottles. If the plaintiff-buyer discovered that the "Authentic California Wine" she purchased was actually made in Oregon, she could select "Advertising Claims Misrepresented Quality" or "Seller Misrepresented Quality" under "Misrepresentation Issues." Or, if she discovered that the seller charged her credit card \$600.00 instead of \$500.00, she could select "Charged More than Stated Price" under "Cost Issues."

The plaintiff is then asked to make a request for a remedy on the "Formal Trial Position Before Judge" page. The plaintiff buyer must briefly summarize the legal relief she is seeking from the judge. Her statement should indicate what she wishes to happen to make right the wrong allegedly done to her and/or to compensate her for the harm she suffered. This is her opportunity to describe the final decision she wishes the judge to make in this case. The hypothetical plaintiff-buyer would likely want the remedy to include her expectation interest (the value of the wine she ordered: \$250.00) plus her reliance interest (her shipping costs: \$30.00) plus her DotComJustice filing

fees (for large purchasers such as an automobile there will be filing fees as high as \$49.00 plus the percentage of the transaction that was assessed for registering with DotComJustice at the outset of the transaction). The formal trial position of the plaintiff should not include any settlement offers, but only what would fully restore the plaintiff to the position she would have been in had there been no problems with the transaction.

C. Offer to Settle

The plaintiff-buyer also has the opportunity to offer to the defendant-seller what she would accept to resolve the dispute at this point in the proceedings. While the plaintiff is not required to make an offer to settle, not making an offer does not prevent the defendant from making one later in the process. The plaintiff's offer will not be used by the judge in making a determination in the case and will not be seen by the judge if the offer is rejected and the case continues. A defendant may accept the offer to settle and never have to submit an answer to the complaint. There are three possible outcomes to the plaintiff's offer to settle:

1. The defendant accepts the plaintiff's offer. Both parties are bound by the terms of the plaintiff's offer, the case will be resolved, and no further proceedings will be necessary.
2. The defendant rejects the plaintiff's offer. Proceedings will continue, and the defendant must answer the complaint.
3. The defendant responds to the plaintiff's offer with a counteroffer. The plaintiff may either accept that offer (which will resolve the case and end the proceedings) or reject it (in which case proceedings will continue).

Assume the hypothetical plaintiff-buyer offers to accept three more bottles of wine, plus shipping and filing fees, to settle the dispute.

D. Creation of Special Dispute Resolution Page

After the plaintiff-buyer submits an offer to settle, she has one last opportunity to review her complaint and settlement offer, and to make any changes before filing it with DotComJustice. The complaint is generated based on the information the plaintiff supplied by checking boxes and filling out the text boxes. The plaintiff can then review the summary, make changes if necessary, and then finally submit it to the DotComJustice Web site.

Once the complaint is filed, the plaintiff cannot amend it. The plaintiff must also pay a filing fee commensurate with the amount in controversy. The filing fee is a nominal amount and is charged to the complaining plaintiff only to make sure the plaintiff is serious and invested in the allegations in the complaint. It also deters frivolous, unfounded lawsuits as well as subjects the plaintiff to paying costs to the defendant for a frivolous action.

Once the nominal filing fee is paid, the complaint will be filed and the plaintiff will receive an e-mail containing the case number, password, and

instructions regarding future e-mails with prompts through the DotComJustice process. Then, after the case is successfully filed, the complaint will be served on the defendant via e-mail notification.

III. SERVICE OF THE COMPLAINT ON THE SELLER

A. *E-mail Service*

The hypothetical defendant-seller receives an e-mail notification that a complaint has been filed against him on the DotComJustice Web site regarding a recent transaction in which he indicated that any dispute arising out of that transaction would be resolved using DotComJustice. Recall that the seller has already registered with DotComJustice, which means that the site automatically populated his identifying information during the initial registration of the transaction. The e-mail serves as official notice of the plaintiff's complaint, and also provides the defendant with the assigned case number and password to that complaint. The e-mail tracks whether the defendant has opened the it, and the defendant is asked to acknowledge receipt of service. The defendant then has twenty calendar days to respond to the complaint. The e-mail contains a summary of the complaint, the plaintiff's informal offer to settle the case immediately, and a link to access the DotComJustice Web site.

B. *Traditional Service Used if Defendant-Seller Fails to Respond*

If the defendant fails to open and respond to the e-mail service notification by DotComJustice, then under the DotComJustice rules, the plaintiff will resort to traditional service of process per Rule 4 of the Federal Rules of Civil Procedure, and the defendant would have to pay for that service as a sanction for failing to respond to the e-mail.¹⁸⁰ Rule 4 requires the plaintiff to provide the defendant with a copy of the complaint and summons to defend the suit.¹⁸¹ Under Rule 4(e), a defendant may be personally served with a copy of the summons and complaint in hand, by any non-party over the age of 18 (Rule 4(c)), anywhere a jurisdictional statute would apply to the defendant.¹⁸² A defendant may also receive substituted service under Rule 4(e) if the summons and complaint are left with someone other than the defendant at the defendant's dwelling, with someone of suitable age and discretion, who also lives at the defendant's dwelling at the time.¹⁸³ If service is made according to Rule 4(e), the defendant has twenty days to respond to the complaint.¹⁸⁴

180. See generally FED. R. CIV. P. 4 (describing the requirements needed for a summons to issue).

181. FED. R. CIV. P. 4(c)(1).

182. FED. R. CIV. P. 4(k)(1).

183. FED. R. CIV. P. 4(e)(2)(B).

184. FED. R. CIV. P. 12(a)(1)(A).

C. *Default—If No Defendant-Seller Response*

If the defendant fails to respond to the plaintiff's traditional service of the complaint, then the defendant defaults (forfeits) similar to Rule 55 of the Federal Rules of Civil Procedure.¹⁸⁵ At that point, the DotComJustice site would automatically note an "entry of default," and the plaintiff could obtain a default judgment in her favor. The defendant who has defaulted can request that the judgment against him be set aside, but to be successful, he must show mistake, inadvertence, or excusable neglect for failing to respond.¹⁸⁶ If there has been no default judgment, but only an entry of default, the defendant may have the entry set aside "for good cause shown."¹⁸⁷

IV. DEFENDANT-SELLER RESPONSE

Assuming the defendant receives notice and does not default, the defendant has twenty days to respond to the complaint.¹⁸⁸

A. *Acceptance of Plaintiff-Buyer's Offer*

The defendant-seller may decide to settle the dispute according to the terms offered by the plaintiff-buyer. If he accepts this offer, the case will end through settlement. His acceptance will be sent directly to the plaintiff, and the parties will be bound by it. The DotComJustice judge will never see it. If the defendant would accept only part of the plaintiff's offer, he must select "No," but he has the opportunity to create his own counteroffer after responding to the plaintiff's complaint. In the hypothetical, the plaintiff-buyer offered to settle this case for three bottles of wine, plus her shipping costs and filing fees. Assume the defendant-seller is willing to supply the three bottles of wine, but not the shipping costs or filing fees. He must decline the offer to settle and may make his own counteroffer at the end of his response or answer to the plaintiff's complaint.

B. *Answer to Plaintiff-Buyer's Complaint*

The defendant-seller must formulate his answer by responding to each of the specific allegations contained in the plaintiff-buyer's generated complaint, and he must complete his response and post it on the DotComJustice Web site within twenty days of receiving notice of the complaint. First, the defendant must admit or deny that he took part in the transaction referenced in the case to ensure that the correct defendant has been identified for the transaction at issue. In our hypothetical the defendant seller must admit to participating in the transaction with the plaintiff buyer because he claims to have sent her 10

185. FED. R. CIV. P. 55(a).

186. FED. R. CIV. P. 60(b)(1); *See* Burrell v. Henderson, 434 F.3d 826, 832 (6th Cir. 2006) (discussing the requisite elements for setting aside a default judgment).

187. FED. R. CIV. P. 55(c).

188. FED. R. CIV. P. 12(a)(1)(A).

bottles of wine and there is a clear “digital record” of the transaction. Next, the defendant must indicate:

1. Whether the defendant admits, denies, or does not know if each of the plaintiff’s allegations in the numbered paragraphs is true;
2. The defendant’s formal trial position before the judge; and
3. The defendant’s informal offer to settle or counteroffer to the plaintiff’s offer to settle.

The defendant only has to respond to those issues identified by the plaintiff in her complaint generated by DotComJustice. For each issue, the defendant may view the plaintiff’s supporting factual details and submit his admissions or denials. The defendant must also provide all of the details pertaining to the plaintiff’s allegation, fully explaining why he should not be at fault for any of the allegations made regarding issues he denies. For example, the hypothetical plaintiff-buyer has alleged that she only received five bottles of wine. The defendant denies this because he asserts that he sent all ten bottles of wine and does not know if the plaintiff actually received her full order or not. Again, there is a 500-word limit text box for the defendant-seller to provide those explanations.

The defendant also has the opportunity to state his formal trial position before the judge regarding the complaint filed in this case. The defendant may either:

1. Agree with the plaintiff’s formal trial position (confess);
2. Disagree; plaintiff should not receive any of the relief requested (no liability); or
3. Disagree; but plaintiff should receive only the relief suggested by the defendant in the box below (partial liability).

C. Counteroffer to Settle

After asserting his formal trial position, the defendant may propose to the plaintiff an offer (if no offer was made by plaintiff) or a counteroffer (if an offer was made by the plaintiff). This is the defendant’s opportunity to put forward a resolution to end the dispute immediately. The offer/counteroffer will not be used by the judge to make a determination in the case and will not be seen by the judge if it is rejected and the case continues. There are three possible outcomes to the defendant’s offer/counteroffer to settle the case:

1. The plaintiff accepts the defendant’s offer/counteroffer. Both of the parties will be bound by the terms of the defendant’s offer/counteroffer, the case will be resolved, and no further proceedings will be necessary;
2. The plaintiff rejects the defendant’s offer/counteroffer. Proceedings will continue; or
3. The plaintiff responds to the defendant’s offer/counteroffer with yet another counteroffer.

Following the defendant's offer/counteroffer to settle, the defendant-seller has one last opportunity to review his answer and make changes before filing it with DotComJustice. Once the answer is filed, the defendant cannot amend it. The defendant does not have to pay a filing fee. Once the defendant clicks "Continue," the answer will officially be filed and it will be served on the plaintiff via e-mail notification (no formal traditional Rule4 service would be necessary at this point, and throughout the rest of the case) .

The plaintiff will receive an e-mail indicating that the defendant has offered to settle the dispute according to the listed terms. If the plaintiff accepts these terms, the parties will be legally bound to them, the case will end, and the parties will not have to proceed to trial. If the plaintiff wishes to make a counteroffer to defendant's offer/counteroffer, she must indicate the terms of that other counteroffer. Continuation of the informal counteroffer process will suspend case proceedings until the last counteroffer is rejected without a counteroffer provided. If no settlement is reached, the next phase of the proceedings involves submitting all of the supporting evidence by each side in the case.

V. FACTUAL INVESTIGATION

A. *Uploading Supporting Evidence*

If no settlement is reached, the parties will receive an e-mail from DotComJustice informing them that they are in the "Discovery," or factual investigation, phase of the case. Discovery means that each of the parties will submit their supporting evidence and then subsequently review the evidence submitted by the other party. The parties have fifteen days from the date of the e-mail request to submit evidence to support his or her case. Each party will submit evidence by uploading it to the DotComJustice Web site from a computer. Uploading evidence follows the same process as attaching a file to an e-mail. In some cases, it will be necessary to send tangible, non-documentary items to the judge. All tangible, non-documentary items sent to the judge must correspond to a written explanation uploaded as a numbered exhibit. Once the evidence is submitted, it cannot be retracted. All evidence will be available for review by the parties fifteen days after the initial discovery e-mail. Some examples of the types of evidence to support each case include the following:

1. Documentary evidence: letters, contracts, invoices, memos, e-mails, photographs, etc. (the assumption is that DotComJustice will have most of the communication information as between the parties, but there may be other documentary evidence that is not part of the parties' official communication regarding their transaction, such as an invoice from a courier service to the defendant for delivering an item to the plaintiff).
2. Tangible, non-documentary evidence: items that must be inspected

by the judge and are reasonable to ship by parcel post, such as mechanical parts or electronic devices. An adversary cannot examine such evidence, only the judge examines the item.¹⁸⁹

- a. Submit a document that contains: a description of the item, a digital photograph of the item, and an explanation of why it needs to be inspected by the judge.
 - b. Ship the item to the judge with proper insurance.
3. Testimonial evidence: up to three witness statements made under oath (affidavits) with identification information about the witness.

B. Selection of Judge

DotComJustice judges will be experienced arbiters employed by the Institute for Administrative Justice, University of the Pacific, McGeorge School of Law. Their objectivity is enhanced for a couple of reasons. ODR as envisioned herein is one step removed from traditional ADR, because the judges will interact with parties through DotComJustice and be paid by DotComJustice, rather than interacting with and being paid by the parties directly. As a result, ODR through a third-party dispute resolution system like DotComJustice reduces the ADR concern of “capturing” judges. Instead of the parties paying for the arbiter’s services directly, providing an economic incentive to rule in favor of the large institutional seller over the one-time consumer, DotComJustice rotates judges. This will encourage adjudication on the merits, which will be necessary for DotComJustice to be seen as legitimate and stay in business, as opposed to a repeat client in ADR capturing the same judge by continuing business with her.

Also, the entire DotComJustice system heavily relies on consumers because if it were known to consumers that the system was partial to large companies, then they would lose trust in the system and cease to utilize it. This legitimacy is based on long-term, as opposed to short-term, economic incentives for the system. Even if DotComJustice could prosper with loyalty to large companies in the short term, this unfavorable-to-consumers approach would be discovered in the long term, and consumers would cease to use it. For this reason, the system will focus on long-term legitimacy and be fair even in the short term. Although this does not entirely solve the concern that economic incentives favor the interests of institutional sellers, it goes much further toward solving the problem than current ADR where the parties pay arbiters directly for their services. Finally, the fact that arbiters are connected with an academic institution, rather than a purely private business entity, lends more credibility to the Web site.

189. This is a trade-off in obtaining justice by means of efficient and low-cost dispute resolution, whereas full discovery obtainable only through traditional litigation would be cost-prohibitive for such purchases, affording little or no justice at all. One of the overall goals of ODR is to reduce the time and expense of dispute resolution. Thus, certain efficiency trade-offs are necessary in order to keep ODR inexpensive and not time-consuming. Making these kind of trade-offs makes it possible to obtain justice in these types of cases by not making them prohibitively expensive and time consuming.

The assigned judge will be given a link to all of the information submitted in the case for review. At the end of the fifteen-day discovery period, no more evidence will be accepted unless the judge requests it (see below). The judge will then have two weeks to review the complaint, answer, and all submitted evidence. If at the end of the two-week period the judge has not requested the submission of more evidence, the parties will then be asked to submit final arguments (see below).

C. Judge's Request for Additional Information (Optional)

If the judge requests additional evidence from either or both parties, then both parties will receive an e-mail informing them of the judge's request. The party from whom the additional evidence is requested has fifteen days from the date of this e-mail to comply with the judge's request. The judge will repeat the process to request additional evidence until satisfied that no additional evidence is necessary. The parties may e-mail the judge and ask her to consider ordering the other party to submit certain evidence. It is within the Judge's discretion to honor or ignore the request.

VI. SUBMISSION OF WRITTEN FINAL ARGUMENTS

A. Parties' Simultaneous Submissions

1. Written Argument

Both parties will receive an e-mail informing them that all evidence has been received and a reasonable amount of time has passed for it to be reviewed by the judge and by each of the parties. At this stage, both the plaintiff and the defendant will submit written final arguments to the judge. The written final arguments will not be viewed by the opposing party until after both final arguments have been submitted and reviewed by the judge. Each party will have fifteen days to formulate and submit a written final argument with reference to his or her numbered exhibits and the numbered exhibits of the opposing party. The written final argument may only be submitted once and cannot be amended or retracted.

The written final argument is the opportunity for each side to make its case to the judge and to call into question the evidence and allegations of the other party. Each party should be sure to discuss all evidence presented and to review the complaint and answer in order to focus on the key issues in the case. Each argument should address the most important facts of the case, avoid name-calling and repetitiveness, and be as concise and direct as possible.

2. *Reference to Submitted Evidence*

The final written argument must make specific reference to the evidence exhibits presented, although the exhibits need not be uploaded as attachments to the written argument. The final written argument should refer to any evidence exhibit by exhibit number.

B. Request for Cross-Examination (Optional)

For cases where the amount in controversy is over \$5,000, under the DotComJustice rules there is an option to cross-examine witnesses. After the parties have submitted their written final arguments in such cases, they will have fifteen days to review the final argument of the opposing party and to formulate a request for cross-examination of any witness whose statement under oath was submitted as evidence. If a party does not wish to cross-examine any witnesses, he or she may select the “Decline” button on the “Request for Oral Cross-Examination” page. However, if a party wishes to request a cross-examination, he or she will be required to indicate which witness or witnesses to cross-examine, including the date and time of the request and the means by which to do so, either video conference or telephone conference. Ultimately, the judge decides whether or not to grant the request for cross-examination.

The judge will contact the parties with the arrangements for cross-examination after conferring with each party and their witnesses regarding scheduling and availability. By submitting a request to cross-examine a witness, the requesting party acknowledges and agrees to be responsible for the additional cost of the procedure and to be bound by the rules governing cross-examination procedure. Again, cross-examination will be used only in cases involving an amount in controversy over \$5,000.00 to justify the additional time and expense.

Although ODR is not a perfect solution to the problem that traditional ADR and litigation present where one party can better afford costs than the other party, it is an improvement over traditional dispute resolution. Despite the additional cost for cross-examination, ODR is more efficient and far less costly than the traditional dispute resolution time and money necessary to question the witness in person at a specific physical location to which the parties and the judge must travel.

C. Request for Final Oral Argument (Optional)

Before, during, or after the cross-examination phase of the trial, either party may submit a request to make a final *oral* argument. The final oral argument is the last opportunity to be heard by the judge in this trial. If the party does not wish to request a final oral argument, he or she may select the “Decline” button on the “Request for Final Oral Argument” page. If the party wishes to request a final oral argument, he or she must indicate available dates and time for oral argument and specify the means, either video conference or

telephone conference. The judge decides whether or not to grant the request for oral argument. If granted, the judge will contact the parties with the arrangement for final oral arguments after conferring with each party regarding scheduling and availability. By submitting a request for oral argument, the requesting party acknowledges and agrees to be responsible for the additional cost of the procedure and also acknowledges and agrees to be bound by the rules governing oral argument.

VII. FINAL JUDGMENT

After all information is submitted, and all procedures exhausted, the judge enters her final decision within a reasonable time, and both parties receive an e-mail notification of the decision so they can access the written opinion and arbitration award. The judge's opinion will include the following:

1. Findings of Fact. The Findings of Fact will include analysis of the factual record and resolution of all pertinent factual disputes between the parties. These will be numbered paragraphs in accordance with the parties' pleadings (plaintiff's complaint and defendant's answer);
2. Conclusions of Law. The Conclusions of Law will include an analysis of the parties' pleadings, all submissions and all applicable law, and the legal reasons for the decision and how the text of Article 2 of the U.C.C., or the U.N. Convention, was applied;
3. List of All Pertinent Evidence Relied Upon. The opinion/decision will set forth the listed items of evidence submitted by the parties that the judge admitted and considered in making the judge's findings of fact and conclusions of law; and
4. Final Resolution of the Dispute and Arbitration Award, If Any. The Final Resolution will set forth the judge's clear, final directive to the parties as to how exactly the dispute is to be resolved. The judgment will include the award and state the specific amount of damages, if any, to be paid to the prevailing party.
5. Timing. The judge will render a final written decision judgment within thirty days of the final written submissions, or within ten days of the Entry of Default if defendant has defaulted.

VIII. INTERNAL APPEAL

For cases involving an amount in controversy over \$5,000.00, DotComJustice has an internal appeal procedure. It basically follows the same procedure of allowing each side to submit written provisions – written appellate briefs and the request for oral argument. The important point is that a different DotComJustice judge will review the appeal and either affirm or reverse the decision. The system is flexible, designed to quickly settle or mediate small cases, all the way up to large sales for such items as boats, cars,

or artwork. Regardless of the extent of DotComJustice procedures used, ODR will be significantly less costly and time consuming than a traditional lawsuit or even a physical conference-room-based arbitration.

IX. ENFORCEMENT

Assume that the DotComJustice judge in our hypothetical wine sale dispute determines that the California defendant wine seller is at fault. As a result, the judge orders the California defendant seller to pay the New Jersey plaintiff buyer \$250 for the five bottles of missing wine. How would the plaintiff go about collecting that \$250 if the defendant refused to pay it?

The short answer is that there would be a series of legal “sticks and carrots,” or, traditional legal consequences, coupled with special online incentives, that would, in virtually all cases, produce the desired compliance with the award. It is important to note at the outset, however, that enforcement and collection issues are also concerns for traditional arbitration awards, not just for ODR arbitration awards.¹⁹⁰ Enforcement of a traditional ADR arbitration award is a fairly rudimentary legal procedure where the arbitration award is filed in a court that has personal jurisdiction over the defendant, the court then enters the arbitration award as a judgment, and, if necessary, attaches a lien against defendant’s property, and/or bank accounts, within the state in order to obtain the necessary funds to pay the “judgment creditor.”¹⁹¹ Because a DotComJustice decision would be essentially an arbitration award, enforcement of that award would simply follow the same enforcement and collection procedures as a traditional non-internet arbitration award.

Although the procedure to enforce an ODR arbitration award using traditional enforcement methods would be no better or easier than it would be to enforce a typical ADR arbitration award, neither would it be any more difficult or problematic. However, given the special online incentives to pay an ODR judgment as set forth below, the general enforcement of arbitration awards would be enhanced using ODR over ADR.

A. *Traditional Legal Consequences*

Because an ODR and ADR arbitration award are both arrived at pursuant to voluntary agreements to arbitrate the dispute, existing enforcement and collection procedures could be used to enforce either type of award.¹⁹² In our example, the New Jersey plaintiff buyer would merely file the DotComJustice

190. See Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 593 (2007) (explaining that enforcement and collection of judgment issues are fully present in traditional arbitration disputes).

191. See 9 U.S.C. §§ 9, 13 (Federal Arbitration Act provides procedure for court confirmation of the arbitration award and explains how the award is enforced in the same manner as a traditional court judgment). A “judgment debtor” is “[a] person against whom a money judgment has been entered but not yet satisfied.” BLACK’S LAW DICTIONARY 390 (3d pocket ed. 2006). A “judgment creditor” is “[a] person having a legal right to enforce execution of a judgment for a specific sum of money.” *Id.*

192. See 9 U.S.C. § 13 for an explanation of the enforcement and collection procedures of arbitration awards in federal court. State court enforcement and collections procedures are substantially similar.

\$250 arbitration award with a California court in the county where defendant lives to ensure proper personal jurisdiction over the defendant, and then request that the court enforce the judgment against the defendant.¹⁹³ The California court would then enforce the online arbitration award, that is now a judgment, by attaching a judgment lien to the defendant's bank account, or other property, or even garnish his wages if necessary, in order to obtain payment for the plaintiff, and possibly even award fees if the defendant had no good cause for resisting enforcement.¹⁹⁴

Admittedly, these collection and enforcement procedures can cost some money, and take some valuable time to pursue, which both can serve to defeat much of the attractiveness of ODR, where, as we have seen, there is a high premium on the low cost and convenient resolution of disputes. However, one should measure these obstacles against the existing alternative under traditional ADR practice – which offers nothing better. Current arbitration practice has the same pitfalls of having to go through an enforcement and collection procedure if the defendant refuses to comply with such an award.

Still, the advantage of ODR over ADR rests primarily in all of the convenience and cost savings associated with determining the liability and damages of the action online, instead of having to do so in person. So at a minimum, when it comes to enforcement, the same enforcement and collection procedures are available to an online, ODR, judgment creditor, as they are to a traditional, ADR judgment creditor. However, there would be some special, built-in, incentives for DotComJustice parties to satisfy any judgment entered against them beyond what is currently available using existing enforcement procedures and techniques for traditional, non-internet arbitration awards. These incentives would elevate the cost and speed of ODR enforcement over traditional ADR enforcement.

B. Special Online Incentives

In our hypothetical, the California wine seller has an outstanding judgment against him in the amount of \$250 for failure to deliver the five bottles of wine. Given the internet context of ODR, there are various online incentive strategies that can be used to ensure party compliance with DotComJustice awards beyond what is currently available in traditional non-internet ADR practice.

First, one of the key benefits of having a comprehensive online system is that the buyer and the seller have convenient access to critical information about all potential buyers or sellers with whom they are about to do business. If the California defendant seller has refused to pay the \$250 judgment against him in our hypothetical case, then there would be an “outstanding judgment” of \$250 listed by defendant's name that would be accessible by all future

193. See CAL. CODE CIV. P. § 1280 et seq. (West 2007) (outlining California's particular manner for domesticating arbitration awards).

194. See CAL. CODE CIV. P. § 695.010 et seq. (West 2007) (outlining California's particular manner for enforcing money judgments).

buyers. As a result, future buyers who may be considering making a purchase from this defendant seller could easily check his “outstanding judgments” rating to see if there are any outstanding judgments against him. Thus, failure to pay a previous judgment would mean that all future buyers would be on notice that if they buy from this particular defendant seller, they would be buying from someone who had previously been found to have failed to deliver five bottles of wine as promised. Additionally, the potential buyers would be informed as to whether the judgment was, or still is, outstanding, and for how long it was, or has been, outstanding with the amount of interest accruing on that judgment.

The loss to the defendant in potential future sales, coupled with the possible loss of goodwill among future buyers, would serve as a powerful incentive for that defendant seller to pay any outstanding judgment against him and remove the bad mark against his online merchant history. In addition to providing a powerful economic incentive to pay an outstanding judgment, buyers also would benefit from knowing more about a potential seller’s DotComJustice history. If a buyer knows that a potential seller has been using an ODR system like DotComJustice for a couple years and that there are no outstanding judgments against him, and perhaps even that he has never failed to pay any judgment against him, such would give the buyer much more confidence in the seller’s likelihood of future satisfactory performance, instead of having to buy sight unseen from a virtual stranger on the Internet. Accordingly, when enforcement of online arbitration awards is enhanced in this manner, confidence in e-commerce grows even further.

Next, the DotComJustice website could create various categories of legal compliance that sellers or buyers could put on their websites in order to give potential customers or sellers more assurance about the strength and consistency of their compliance history. For example, there could be something like a “five-star rating system” that would be valuable to online parties. Under such a system, five stars for a seller or buyer could mean that the seller or buyer has never failed to pay or comply with a DotComJustice decision or order. Similarly, four stars could be for being late in paying a judgment only a few times, but eventually all judgments had been paid. Three stars could be for having only, say, one to three outstanding judgments, and so on.

Such a rating system would provide a very strong incentive for online parties to pay any and all judgments against them, much like a credit report is a strong incentive for borrowers to pay on their loans, or other credit they have received, to the extent the borrower would like to obtain future loans, and and/or pay lower interest rates on those future loans as a reward for having particularly good credit.¹⁹⁵ The third-party auction site, “e-Bay,” has used such

195. Free credit reports from national reporting agencies Experian, Equifax, and TransUnion may be obtained once a year through the Annual Credit Report Request Services by phone, mail, or website, annualcreditreport.com. Because a credit report depicting a poor credit rating can be damaging to an individual’s attempts to obtain a loan and purchase a home, avoidance of such a report functions as an incentive to pay off debt as soon as possible. See Randy Forbes, *Understanding Your Credit Report*, (Capitol

a reporting system on buyers' and sellers' performance and reliability in order to provide strong incentives encouraging e-Bay users to engage in good business practices.¹⁹⁶ This kind of online reporting is an effective way of encouraging good business behavior because buyers and sellers do not want to have to overcome negative online business reputations and their undesirable repercussions.

Finally, perhaps one of the most effective ways to provide an incentive to pay an online judgment would be to offer to all sellers a special, coveted "Gold Rating of Trustworthiness" that would make enforcement easy and convenient should there be any judgment in the future. This would involve sellers putting up a special financial "bond" with DotComJustice that would act as a safety fund on which DotComJustice could immediately draw in order to satisfy any future judgment. In other words, a seller might want to provide the most assurance possible to a potential online buyer that it stands behind its products by having a special judgment fund or account on hand with DotComJustice to satisfy any future judgment. That way, any judgment ordered against a defendant immediately could be satisfied from the fund that the particular defendant already has on hand with DotComJustice. Most importantly, there would be no waiting or any expense for the party entitled to the judgment award because it would be immediately satisfied upon issuance by the DotComJustice Final Judgment Decision.

Consider how the online payment system of "PayPal"¹⁹⁷ provides a fund for an online purchaser to draw on at the moment the sale is made. An online purchaser and seller consummate their transaction without either having to wait for the other to perform first – "send me the wine first, then I will send you the money" vs. "no, send me the money first, and then I will send you the wine." The problem of having to wait for the performance by the other party before performing oneself is solved by simply having PayPal hold the parties' funds and having them immediately available to consummate a particular sale. The seller of an item feels safe in performing (sending the item) because the seller knows the funds from the buyer for the item will be readily available from a reliable third-party, PayPal.¹⁹⁸

In the same manner, the DotComJustice "Gold Rating for Trustworthiness" would ensure that any online judgment creditors would not have to wait or pay extra for their judgment to be enforced in the traditional manner. Instead, the judgment immediately would be satisfied from the seller's

Monitor), Jan. 30, 2009; *see also* www.experian.com; www.equifax.com; www.transunion.com.

196. *See* e-Bay Feedback Forum, e-Bay, <http://www.ebay.com> (follow "Feedback Forum" hyperlink at bottom of page) (explaining the reporting system of buyers and sellers who monitor their own ratings and try to solve problems so that they do not have easily accessible outstanding complaints against them).

197. *See* How PayPal Works, PayPal, <https://www.paypal.com> (follow "Learn how PayPal works" hyperlink) (explaining how PayPal works: funds are immediately drawn from the buyer's credit card account or bank account that is linked to PayPal to pay the seller electronically).

198. This is also reminiscent of a "stand by letter of credit," where a lender receives a guarantee of payment from a third-party so that if there is ever a problem in receiving payment on a loan from the borrower, the lender simply needs to present the standby letter of credit to another creditor who immediately makes the funds available in order to make the payment. *Centrifugal Casting Mach. Co. v. Am. Bank & Trust Co.*, 966 F.2d 1348, (10th Cir. 1992).

special fund once the judgment is issued by the DotComJustice judge. In this way, the cost and time lag associated with traditional enforcement and collection procedures would be eliminated entirely, making it much more attractive to use ODR arbitration rather than traditional ADR arbitration or traditional litigation.

C. An Improvement over Existing Enforcement

At the very least, enforcement and collection is the same whether it be for a traditional ADR arbitration award or for an online ODR arbitration award. So there is no loss in using ODR over traditional ADR when it comes to enforcement and collection of an arbitration award. Of course, all of the savings and convenience associated with determining liability and damages are still present with ODR over ADR. However, where ODR enforcement and collection goes far beyond that of traditional ADR enforcement and collection is parties that can employ the innovative uses of the technology for online transactions by having easy access to centralized information about the payment histories of DotComJustice buyers and sellers. Moreover, providing special classes of past performance in compliance with judgments as a further incentive to comply with awards, or the use of a special fund to make the collection of any future award immediate and not involve any additional costs, makes enforcement much easier, inexpensive, and convenient when using ODR instead of traditional ADR, or formal litigation.

X. A MIXTURE OR HYBRID OF ODR AND TRADITIONAL ADR

Another benefit of ODR is its flexibility; various manifestations of ODR are possible. For example, the parties might agree to use all of the procedures of the online system, but then have the final arbitration proceeding in person, as sort of a hybrid of ODR and traditional, in-person ADR. But whether various permutations such as this are used or other adoptions gain favor, the future must adapt to the growth of e-commerce on the Internet. Our current brick and mortar courtroom or ADR conference room systems never even contemplated the Internet or e-commerce, and therefore are largely antiquated and not well-suited to resolve e-commerce disputes. Legal systems must keep up with economic and social reality in order to remain relevant and legitimate.

CONCLUSION:

**THE NEED FOR A COMPREHENSIVE ONLINE JUSTICE SYSTEM TO
RESOLVE E-COMMERCE DISPUTES IN THE FUTURE**

Resolving e-commerce disputes using formal litigation, or even using streamlined traditional ADR procedures, are meager attempts to squeeze a square peg into a round hole because neither formal litigation, nor conventional ADR, is designed to adjudicate e-commerce disputes *online*. As

a result, neither formal lawsuits nor ADR are sufficient means to adequately and efficiently resolve disputes arising out of online transactions, especially in commonly occurring e-commerce transactions involving a low amount in controversy between parties from significantly different physical locations. As a practical matter, given the high cost and inconvenience concerns associated with pursuing traditional legal remedies for an e-commerce dispute, “caveat emptor,” or “let the buyer beware,” is often the only legal reality for a party who suffers a legal wrong in an Internet transaction. However, obviously the protection of legal rights on the Internet should be a paramount concern, far beyond a mere “buyer beware” paradigm.

Therefore, given the current practical impediments to justice for online buyers and sellers, a highly developed ODR system such as DotComJustice should be used to promote fairness, convenience, security, and efficiency for all e-commerce transactions in the future. Because the nature of ODR values efficiency and low cost, while guaranteeing a secure, trustworthy, and enforceable legal forum, the traditional litigation nightmares of significant time commitment, excessive cost, and procedural formality are avoided, allowing the parties to address the true merits and interests of the dispute easily and efficiently.

From the convenience of an online computer, both parties are able to put forth their positions and arguments effectively, can quickly address the problems involved, and, finally, can focus on finding a solution on the merits of the case in the most cost-effective way possible. The vexing problems of personal jurisdiction and conflicts of law are wholly eliminated using ODR because ODR transcends the geographical barriers and legal quagmires associated with Internet transactions. Accordingly, ODR offers a workable online justice system to protect the legal rights of buyers and sellers on the Internet. The rule of law should be expanded not only to the various countries of the world in general,¹⁹⁹ but also to the Internet in order to make the Internet an international marketplace where the opportunity for legal redress is a convenient, efficient, and practical option for parties in an e-commerce dispute.

It is high time for legal options to develop in order to truly make e-commerce safe and reliable in the 21st Century. Reminiscent of how the rule of law in the “Wild, Wild West” of 19th Century America eventually allowed agricultural and emerging industrial commerce to flourish in its midst, so too can ODR, as envisioned herein, establish legal certainty and security on the burgeoning frontier of the Internet. ODR will help make the Internet a truly secure global marketplace where e-commerce may flourish to its full potential. ODR is an effective legal mechanism for the resolution of e-commerce disputes. It provides a promising outlook for the future growth and the

199. See James A. Goldston, *The Rule of Law Movement in the Age of Terror*, 20 HARV. HUM. RTS. J. 15, 15 (2007) (“One of the defining characteristics of the last half-century has been the expansion of the rule of law into many corners of the globe. At mid-century, core rule of law principles—an independent judiciary, due process, and the right to counsel—were mere aspirations in most societies. By century’s end, however, more than half the world’s population lived in countries whose legal systems afforded at least a modicum of protection of individual rights.”); see generally ABA Rule of Law Initiative, <http://www.abanet.org/rol/> (last visited on Mar. 24, 2009) (promoting the rule of law around the world).

legitimacy of e-commerce. In the end, we must bring a workable justice system to the Internet; for without justice, there can be no peace.