

7-1-2011

## Enhanced Dispute Resolution Through the Use of Information Technology

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### Recommended Citation

Garret Brouwer, *Enhanced Dispute Resolution Through the Use of Information Technology*, 3 519 (2011).

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ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION  
TECHNOLOGY

By  
Garret J. Brouwer \*

The invention of computers and the internet changed the world as we knew it. Everything from shopping to politics has been affected. People all over the world can connect with the click of a mouse, sharing vast amounts of information and goods. Alternative dispute resolution (ADR) is one field that has benefited greatly from technological advances of the past twenty years. In a world that emphasizes speed and efficiency, ADR is seen by many as an ideal alternative to litigation. When an E-Bay transaction has gone wrong, the ability to resolve it in a few weeks through an online arbitrator, and at minimal cost, is much more appealing to an online consumer than hiring a lawyer and going to court. The concepts of Online Dispute Resolution and the use of information systems to assist in negotiations are still relatively new to society and legal professionals. Few rules have been established. Authors Arno R. Lodder and John Zeleznikow delve into the subject in their book, *Enhanced Dispute Resolution Through the Use of Information Technology*. These authors address three major areas: the law as it pertains to online ADR and the use of information systems in negotiation; the technology available to lawyers in practice or researchers interested in studying dispute resolution; and the efficient use of available systems while maintaining legal and ethical safeguards.<sup>1</sup> Both authors are from outside the United States, so they focus heavily on European and Australian methods of dispute resolution. Arno R. Lodder is an associate professor at the Computer/Law Institute of the Vrije Universiteit Amsterdam and directs the Centre of Electronic Dispute

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<sup>1</sup> ARNO R. LODDER & JOHN ZELEZNIKOW, ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY 169 (Cambridge University Press 2010).

Resolution.<sup>2</sup> John Zeleznikow is a professor and researcher in Australia, at Victoria University's Laboratory of Decision Support and Dispute Management.<sup>3</sup>

## I. INTRODUCTION

Lodder and Zeleznikow began their book by providing a general overview of dispute resolution and the different techniques available. The authors describe negotiation "as a process where the parties involved modify their demands to achieve a mutually acceptable compromise."<sup>4</sup> Mediation is similar to negotiation in many regards, but a neutral third party is inserted between the parties in conflict. This mediator helps the conflicting parties address issues and find acceptable solutions.<sup>5</sup> Arbitration is an adversarial process that takes place outside the traditional court system. In place of a judge, a neutral third party hears submissions from both sides and makes a binding award on both parties.<sup>6</sup> Litigation is a contest that takes place in a court of law with the goal of enforcing a right or seeking a remedy.<sup>7</sup> While the definitions offered were rather simplistic, the authors used them as a means to introduce unfamiliar parties to the world of ADR. Lodder and Zeleznikow intend this book to be read by a general audience, not just legal professionals.<sup>8</sup>

Much of the introduction is dedicated to the concept of fairness and justice in ADR support systems. In recent years, courts all over the world have been promoting the use of ADR as an effective, and even preferred, alternative to litigation. They cite ADR's speed, flexibility of outcomes, informality and the

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<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 4.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 15.

solution oriented (as opposed to blame- oriented) outcomes as reasons for its use.<sup>9</sup> Despite the court's promotion of ADR, the authors worry that the outcomes may not always be fair. They propose a few methods that they believe will ensure justice in negotiation support systems. Transparency by both sides ensures that if something does go wrong in a settlement, both parties can recreate the steps taken and will be able identify and correct any unfairness that may have occurred.<sup>10</sup> Bargaining in the shadow of the law, or a lawsuit, is also promoted. If both parties know there is potential for a lawsuit they should adhere to legally just and fair principles. When both parties are operating under the assumption that their actions could be reviewed by a court, they will theoretically be on their best behavior. Unfortunately, these methods could reduce the candidness of both parties, encourage others to pursue future settlements, potentially cause a bias on the part of the mediators when bargaining in the shadow of the law and, lastly, lead to the development of support systems that are complex and costly.<sup>11</sup>

The remainder of the introduction is dedicated to showing how information technology can be used to support dispute resolution and the benefits of using such tools.<sup>12</sup> These areas are covered in depth in the remaining chapters. A comprehensive outline is provided at the end of the initial chapter. This outline gives the reader an opportunity to understand both the thought processes of the writers and the direction the book will be taking. As mentioned earlier, the authors intend this book to be read by a broad audience. In order to achieve this goal, the book is written at a high-school graduate level. Everyone from dispute resolution professionals to people with a passing interest in the subject should be able comprehend the subject matter.<sup>13</sup>

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<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 11.

<sup>11</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 11-12.

<sup>12</sup> *Id.* at 12-13.

<sup>13</sup> *Id.* at 15.

## II. NORMS FOR THE USE OF TECHNOLOGY IN DISPUTE RESOLUTION

Considering the relative novelty of Online Dispute Resolution, the first topic that the authors discuss is the legal and ethical norms associated with the process. Not until recent years has the discussion generated interest within the academic community. A number of doctoral dissertations were cited by the authors to emphasize just how undeveloped the discussion currently is.<sup>14</sup> The fair trial principle was used as a starting place for the discussion. Using Europe as an example, the authors state that the concept of a fair trial is fundamental to modern legal systems. Without a guarantee of fair trial no one will participate. The same is true of ADR systems. While methods of ADR need to be fast and efficient, they need to be fair to be taken seriously.<sup>15</sup> Procedural transparency is one way to ensure that participants feel they are being treated fairly.<sup>16</sup>

To date, there are very few, if any, concrete rules in place controlling Online Dispute Resolution (ODR). As a result, the authors of the books were forced to pick and choose provisions from legislation in similar areas. They focus primarily on European Union recommendations regarding arbitration (1998), mediation (2001) and a mediation directive passed in 2008.<sup>17</sup>

First, the authors believe that ODR should rely on the same basic principles as arbitration in the European Union. All third parties governing ODR should be independent and free to make decisions in a neutral environment. Third parties should equally represent both the consumer and businesses.<sup>18</sup> ODR service providers should ensure that their process is transparent by publishing annual reports. Publishing such reports would ensure that outsiders can independently

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<sup>14</sup> *Id.* at 19.

<sup>15</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 21.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Id.* at 23-31.

<sup>18</sup> *Id.* at 25.

analyze the decisions rendered.<sup>19</sup> Both parties should be adequately heard. Any proceeding should be effective in achieving the goals of ADR. It should be cheap, easily accessible and expedient.<sup>20</sup> In addition, the process should not deprive the participants of substantial legal rights; it should be voluntarily entered into and it should provide the consumer with the right to be represented if he/she so desires.<sup>21</sup>

Next, there are a number of principles applicable to ODR that can be taken from the European Union's Recommendations on Mediation from 2001. They are essentially the same concepts as previously mentioned: impartiality, transparency, effectiveness, and fairness.<sup>22</sup> The only significant difference is the introduction of fairness. Fairness, in this context, is the duty of the third party to notify both conflicting parties that they have the right to refuse participation or can withdraw at any time from the procedure.<sup>23</sup>

Perhaps the most compelling and comprehensive piece of legislative discourse presented by the authors was the European Union's directive regarding mediation, passed in 2008. As opposed to the recommendation already discussed, directives are binding on member states.<sup>24</sup> All members of the European Union are expected to pass laws that coincide with the directive. For the most part, the directive took the principles of the previous two recommendations and codified them. There were some significant additions, however. One such addition was a clause giving mediated agreements the power to be enforced by any court competent to do so.<sup>25</sup> Another addition was a provision ensuring that all agreements were confidential in nature, with two notable exceptions. Information from mediations can be entered into other proceedings if this information is needed

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<sup>19</sup> *Id.*

<sup>20</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 26.

<sup>21</sup> *Id.* at 26.

<sup>22</sup> *Id.* at 27.

<sup>23</sup> *Id.* at 28.

<sup>24</sup> *Id.* at 29.

<sup>25</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 30.

to protect the best interests of children or to prevent harm to an individual's physical or psychological integrity.<sup>26</sup>

Moving from the basic principles that should guide ODR, the authors shift their focus to subject matters that should fall under the ODR umbrella. Using European Union guidelines for electronic commerce, the authors identify conditions for establishing an electronic commercial transaction. The European Union e-commerce Directive defines any transactions in which services are normally provided for remuneration, at a distance, through electronic means, and at the individual request of the recipient, as electronic commerce.<sup>27</sup> This is an important distinction for ODR service providers. Practically all sellers involved in these types of transactions would be ideal clients. In addition, companies involved in distance selling are pin-pointed as ideal consumers of ODR services.<sup>28</sup>

Despite a lack of statutes specifically pertaining to ODR, there are a number of requirements specifically drafted for the field. These guidelines come from a wide variety of professional groups including some arbitral bodies (International Chamber of Commerce), consumer organizations (European Consumer's Organization), and even the American Bar Association (ABA).<sup>29</sup> According to the authors, the ABA guidelines have become highly influential since their initial drafting in 2002. They place a number of burdens on online merchants and marketplaces. In order to ensure consumer protection, all merchants should disclose to their customer the existence of pre-dispute ADR/ODR clauses. Merchants should also disclose the nature of the online merchant's dispute resolution process and any existing contractual relationships with ADR/ODR providers. Lastly, merchants should provide their customers with information to educate themselves about ADR/ODR methods.<sup>30</sup> By following these simple steps

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<sup>26</sup> *Id.* at 31.

<sup>27</sup> *Id.* at 32-33.

<sup>28</sup> *Id.* at 34.

<sup>29</sup> *Id.* at 36.

<sup>30</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 36.

merchants would not only be acting in an ethical and legal manner, but would prevent a great deal of unnecessary litigation stemming for ADR/ODR.

### III. DEVELOPING DISPUTE RESOLUTION PROCESSES

Shifting from the legal side of the ODR process, Lodder and Zeleznikow move into a discussion about the basic theories of negotiation and how information systems can be used to enhance a party's negotiating position. After giving a brief overview of the topics to be discussed, the authors move straight into the concept of Principled Negotiation. Developed from the Harvard Negotiation Project, this approach to negotiation relies heavily on problem-solving and mutual cooperation.<sup>31</sup> Basic principles of this approach are: separating the people from the problem; focusing on the underlying interests of the parties and not their explicit positions; inventing options that will be of mutual benefit to both parties; and insisting on objective criteria when coming to an agreement.<sup>32</sup> All of these goals can be achieved if the parties involved know their best alternative to a negotiated agreement, or BATNA for short.<sup>33</sup>

The concept of a BATNA is an important one within the ADR community. BATNAs help parties determine the strengths or weaknesses of opposing offers. An established BATNA can put pressure on the other party to continue negotiations.<sup>34</sup> Accurate BATNAs can also help parties determine whether or not ADR is in their best interest. There is no need to waste time with negotiation when the party's best potential outcome will be reached through litigation.<sup>35</sup> Unfortunately, determining an accurate BATNA is not as easy as it appears.

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<sup>31</sup> *Id.* at 41.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 42.

<sup>34</sup> *Id.* at 43.

<sup>35</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 43.

Two well established hurdles to negotiations are optimistic overconfidence and reactive devaluation.<sup>36</sup> Optimistic overconfidence is a concept that was developed from a number of scientific studies over the last thirty years. The basic principle is that people have a tendency to overestimate the strength of their position and ability. These two overestimations can be detrimental to the negotiation process.<sup>37</sup> Accurate BATNAs can be used to compensate for this overconfidence, or they can become the victim of it. Overconfident BATNAs can lead parties to reject settlement offers that are in their best interest.<sup>38</sup> To encourage a reality check of individual BATNAs, the authors promote the use of dispute resolution systems. They contend that the use of an unbiased system to check an overoptimistic BATNA will make the user more realistic and refocus the negotiation.<sup>39</sup>

Reactive devaluation is another problem that arises in negotiations. The basic concept is that people have a tendency to devalue information and offers that are provided by the opposing party.<sup>40</sup> It is believed that, since the other party made the offer, the offer must be in the other party's best interest, and as a result should be ignored or rejected.<sup>41</sup> Naturally, this can create some serious problems in a negotiation. Similarly to optimistic overconfidence, such a belief can force parties to reject beneficial offers or information. Again, the authors believe that this psychological trap can be avoided by the responsible use of dispute resolution systems.

In addition to potential pitfalls in negotiation, there is also a brief discussion on the concepts of expanding the pie, awarding compensation and

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<sup>36</sup> *Id.* at 43-45.

<sup>37</sup> *Id.* at 44.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 45.

<sup>40</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 45.

<sup>41</sup> *Id.* at 45.

logrolling.<sup>42</sup> One helpful tool that the authors provide is a “Negotiator’s Checklist.” The checklist provides an effective breakdown of questions and strategies that should be considered at the various stages of negotiation, from preparation to the “end play.”<sup>43</sup> While such a checklist may be unnecessary for a seasoned negotiator, it could be an effective template for beginners or intermediates in need of structure.

After explaining the basics of negotiation, Lodder and Zeleznikow delve into some of the more complex theories. They begin with a brief explanation of the game theory. While the authors do an effective job of explaining the importance of game theory in a variety of fields, the definition and explanation are lacking substance. There is an interesting discussion on the theory of utilitarianism and how it can be used as a means to enhance the effectiveness of negotiations.<sup>44</sup> Utility theory states that goods should be used in a way that promotes the greatest happiness for the greatest number of people. To determine what would provide the greatest happiness for the most people, a negotiator has to understand the underlying interests of the potential beneficiaries. In negotiations, the same is true. In order to work out a successful agreement, a negotiator needs to understand what the other side really wants.<sup>45</sup> This concept is very similar to the Harvard Negotiation Project’s findings that were discussed earlier.

An important aspect of any negotiation is understanding the risks. This applies not only to the risk of agreeing to an unfavorable settlement, but also the risk of rejecting a settlement and losing at trial. There are a number of support systems that the authors promote to assist parties in determining risk. WIRE IQ is a system specifically developed for the insurance industry. It catalogs thousands of records involving settlements of claims. These records are then analyzed and synthesized for customers to provide charts and comparative analysis of the claim

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<sup>42</sup> *Id.* at 46.

<sup>43</sup> *Id.* at 47-8.

<sup>44</sup> *Id.* at 50-1.

<sup>45</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 51.

at hand and similar catalogued claims.<sup>46</sup> JNANA is also mentioned as a popular decisions support system for lawyers, but is not elaborated on. Apparently, it is only available to commercial enterprises.<sup>47</sup>

Once the basics of negotiation have been laid out for the reader, Lodder and Zeleznikow shift their focus to specific fields that could benefit from the use of decision support systems and the problems involved in creating them. In recent years Relationships Australia, a government agency dealing with domestic disputes, has been increasingly interested in using decision support systems to assist them with their overburdened workload.<sup>48</sup> They reached out to one of the authors, John Zeleznikow, to assist them in their endeavor. The key is to create a system which produces decisions that not only comply with legal/ethical principles, but also prevents future conflicts through clear decisions and the use of a collaborative approach. Systems such as Family\_Winner and Family\_Mediator have already been used with success in Australia.<sup>49</sup>

Most of the remaining chapter is dedicated to examples of how decision support systems have been implemented in various fields across Australia. Decision support systems have been largely unhelpful in Australian family law and mediation, but not necessarily due to any fault of their own. Australian courts have had a difficult time establishing uniform standards on how to deal with children. This inconsistency has made it nearly impossible to have a decision support system, which relies on concrete parameters, to be useful in this field.<sup>50</sup> There is far too much judicial discretion involved. In the family mediation and divorce context, a number of systems have been developed and implemented. These include DEUS, Split-Up, Family\_Negotiator, AdjustWinner, Family\_Winner and AssetDivider.<sup>51</sup>

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<sup>46</sup> *Id.* at 53.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 56.

<sup>49</sup> *Id.* at 57.

<sup>50</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 61.

<sup>51</sup> *Id.* at 63-64.

Any professional practicing in family law may find it beneficial to look into these systems. They place heavy emphasis on asset division. As a word of caution, a number of these systems appear to have been created by John Zeleznikow himself.

Another system that was mentioned by the authors in the field of damages claims was SAL. SAL is a case-based reasoning program that makes factual comparisons to previous cases and determinations. It also takes into consideration factors such as plaintiff responsibility, types of litigants and even the skill of the opposing lawyer.<sup>52</sup> In the context of industrial relations, there are a number of programs available to consumers. *Negoplan* uses rule-based reasoning to model labor negotiations in the Canadian paper industry.<sup>53</sup> *Persuader*, on the other hand, uses case-based reasoning and decision theoretics to provide decisional support in the United States' industrial sector.<sup>54</sup>

One area that has been deemed too sensitive to involve decisional support systems is the bargaining of charges and pleas in the criminal context. Charge bargaining (Australia) and plea deals (US) have become increasingly common in both systems. It is estimated that almost 90% of all guilty pleas in the US are negotiated.<sup>55</sup> Despite the efficiency that plea deals promote in the criminal justice system, there are also a number of grave concerns. The process of negotiating a plea deal is not particularly transparent, and going to trial is discouraged because of the potential for harsher sentences. Most defendants would rather take a plea than risk an erroneous guilty charge at trial where their penalty would be much greater.<sup>56</sup> Justice is not necessarily served by the practice. Considering the already sensitive nature of this area of law, decisional support systems are viewed with skepticism.

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<sup>52</sup> *Id.* at 64.

<sup>53</sup> *Id.* at 66.

<sup>54</sup> *Id.*

<sup>55</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 67.

<sup>56</sup> *Id.* at 69.

#### IV. TECHNOLOGIES FOR SUPPORTING DISPUTE RESOLUTION

This chapter focuses predominantly on the technology that is currently available to ADR and ODR professionals, as well as that technology's role in the process. Initially, the authors want to make sure that the reader comprehends the distinctions between synchronous and asynchronous technology. Synchronous technology allows direct communication between parties with minimal time between the transmission of the data and its reception.<sup>57</sup> Some examples would be face-to-face communication, video conferencing, or use of a telephone.<sup>58</sup> Asynchronous technology does not allow for parties to communicate at the same time.<sup>59</sup> There is no instantaneous contact between the two parties. E-mail, instant messaging and texting would all be examples of asynchronous technologies.<sup>60</sup>

There are a number of Online Dispute Resolution providers that are spotlighted in the book. The first is a domain name dispute resolution system called ICANN. ICANN is essentially an online arbitral proceeding in which a party commits himself to arbitration by registering a domain name.<sup>61</sup> If a complaint is filed against that party, they can enter into non-binding arbitration. While decisions can be appealed to the courts, very few ever are.<sup>62</sup> The process generally costs about \$1,000 - \$3,000, but is quick and awards are easily enforceable.<sup>63</sup>

Another successful provider of ODR services is Cybersettle. This system is designed specifically for insurance companies.<sup>64</sup> When there are single-issue monetary claims that need to be handled, each party is asked to enter three sums. If

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<sup>57</sup> *Id.* at 73.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 73.

<sup>61</sup> *Id.* at 74.

<sup>62</sup> *Id.* at 75.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 76.

the three sums coincide, a settlement can be granted; if not the parties are notified that a settlement could not be reached. There is even an internal system that deals with enforcement. Since 1998 the system has handled over 200,000 transactions worth \$1.6 billion.<sup>65</sup>

SquareTrade and e-Bay are the last two systems that are spotlighted. SquareTrade was the original system used by e-Bay to handle disputes. It also provided the template for e-Bay's current dispute resolution process. This template is used to handle almost all of the disputes arising out of e-Bay transactions gone awry.<sup>66</sup> These systems are heavily user dependent. The two parties define the conflict and then propose potential solutions. If the parties propose the same solution, a contract is offered and the matter is resolved. When a solution cannot be reached by the parties, they then proceed to an e-mail based mediation phase. Mediators can suggest a solution if the parties are unable to agree.<sup>67</sup>

Moving away from the discussion about individual service providers, the authors shift their focus to two new concepts they have developed. They believe that in all ADR/ODR negotiations, the technology itself and the service providers should be treated as parties. It is important to understand the technology that is being used and how to harness it effectively. A service provider must select a medium that is available to clients on a cost efficient basis. Parties should be able to rely on and trust the technology, as well as have some expertise in using it.<sup>68</sup> Technology, if used correctly, can help promote faith in the ODR process. When the technology of choice is inconvenient, difficult to use, or untrustworthy, the ODR process loses all legitimacy.<sup>69</sup> Providers of information technology are also important to the negotiation process. To ensure the integrity of the process, you

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<sup>65</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 76.

<sup>66</sup> *Id.* at 76.

<sup>67</sup> *Id.* at 77.

<sup>68</sup> *Id.* at 78.

<sup>69</sup> *Id.*

must employ a reliable provider who is adept at dealing with any technical complications. A reliable technology provider is vital to the success of ODR.<sup>70</sup>

A final concept of importance in providing ODR services is matching the technology medium to the service being provided. The goals of the technology are: facilitating communication; supporting the exchange of documents; supporting decision-making; and enabling decision-making.<sup>71</sup> Balancing the aforementioned goals with the essential principles of ADR (speed, efficiency and cost effectiveness) is essential when choosing the technology for the system.

#### V. ADVANCED INTELLIGENT TECHNOLOGIES FOR DISPUTE RESOLUTION

Chapter 5 is by far the most technical in the book. As a result, not a great deal of time will be spent explaining the complex details of how each system operates. Instead the focus will be on the systems and their general uses.

There are four main tools that are used to create the systems discussed in this chapter. Rule-based reasoning relies on a collection of rules that form the conditions under which the program is forced to operate.<sup>72</sup> Case-based reasoning uses previous experiences and factual scenarios to determine how similar future cases will turn out.<sup>73</sup> Machine learning is a process through which an artificial intelligence system attempts to learn automatically as it is fed more data.<sup>74</sup> Neural networks are the combination of a multitude of self-adjusting processing elements that collaborate in a dense, inter-connected network.<sup>75</sup> This final process is ideal in

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<sup>70</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 79.

<sup>71</sup> *Id.* at 84.

<sup>72</sup> *Id.* at 87.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> LODDER & ZELEZNIKOW, *supra* note 1, 88.

situations that present classification difficulty, have vague terminology, have defeasible rules, and have discretion.<sup>76</sup>

Traditional negotiation support systems have been template based. Negotiation Pro, The Art of Negotiating, INSPIRE and DEUS are all such systems. These systems do not typically assist the parties in coming to solutions, but are helpful gauges. The systems require both parties to fill out a number of predetermined questions. Once both parties are done, the system can establish what issues are in dispute and how close they are to a resolution. This information can hopefully guide negotiations to a successful outcome.<sup>77</sup>

A number of systems are also based upon bargaining and game theory models. Systems using game theory require parties to rank and value each issue in dispute by allocating 100 total points. Using these numbers, the system determines a “fair” distribution of the assets. While these systems are “fair” in the respect that each party’s desires are met, they completely fail to take justice into consideration.<sup>78</sup> Adjusted Winner has been used as a means to distribute property fairly.<sup>79</sup> Smart Settle is used in a similar manner.<sup>80</sup> Family\_Winner, a Zeleznikow product, is used in the family mediation context.

Split-Up is a system that provides guidance on property distributions resulting from a divorce. Using previous case law, the creators determined ninety-four variables that they deemed to be important when dividing up property.<sup>81</sup> All of the variables are interdependent. Parties are required to input information and then the system determines an equitable distribution depending on the priorities of each party. This system is currently being used in Australia by Victoria Legal Aid with a great deal of success.<sup>82</sup> Not only has the system been successful in settling

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<sup>76</sup> *Id.* at 88.

<sup>77</sup> *Id.* at 88-90.

<sup>78</sup> *Id.* at 91.

<sup>79</sup> *Id.*

<sup>80</sup> LODDER & ZELEZNIKOW, *supra* note 1, 94-5.

<sup>81</sup> *Id.* at 113.

<sup>82</sup> *Id.* at 114.

disputes, but it is also an effective tool for BATNA calculations. The system allows the user to input different variables and determine how they would affect divisions of property. It also helps users determine the strength of an opposing party's offer. By providing practitioners with a benchmark distribution template, all offers can be compared and effectively judged.<sup>83</sup>

Family\_Mediator is another Zeleznikow product that is discussed at length by the authors. This system was meant to address concern of justice that Family\_Winner did not provide for when dividing property.<sup>84</sup> To fix the problem, Family\_Mediator requires all parties involved to assess the importance of property to be divided. Once importance to the parties is determined, each piece of property is assigned a scaled point value. These points are then divided equally amongst the two parties.<sup>85</sup>

AssetDivider is another property division program that relies on the actual values of the property to divide it equally. Interests ratings are still used, but they are balanced with the actual value of the property.<sup>86</sup> This tool has been used successfully by mediators to propose potential divisions of property. The authors surmise that the program is so successful because it emphasizes equality in both the importance of the property to the parties and the value of the property received. Parties are generally satisfied with such outcomes.<sup>87</sup>

Two new initiatives by the Australian government are also covered in the book. Both telephone and online dispute resolution systems have been set up by the Family Court of Australia. To use the phone system, known as The Telephone Dispute Resolution Service (TDRS), the initiating party calls the hotline and expresses his or her interest in using their services.<sup>88</sup> TDRS contacts the other party

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<sup>83</sup> *Id.* at 115.

<sup>84</sup> *Id.* at 117.

<sup>85</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 118.

<sup>86</sup> *Id.* at 118.

<sup>87</sup> *Id.* at 120-21.

<sup>88</sup> *Id.* at 122.

and determines their interest. Each party goes through a basic intake process and they schedule a time to discuss their problem over the phone with a mediator. According to recent statistics, 80% of TDRS cases result in agreement. Fifty seven percent of those agreements are full and 23% are partial. The system has been considered a major success.<sup>89</sup>

Using a similar procedure to TDRS, The Australian Online Family Dispute Resolution Service (OFDRS) is an attempt by the Australian government to resolve domestic disputes through online mediation and resources.<sup>90</sup> Parties are provided with a number of services and resources through the website. Videos are available to help them prepare for the negotiation and avoid dangerous negotiation habits. Blogs and message boards will also be available to disputants. AssetDivider is provided to help parties establish accurate BATNAs. There are hopes that one day the entire negotiation process can be handled online.<sup>91</sup>

The remaining chapter is dedicated to four dispute resolution systems that assist in everything from BATNA development to plea-bargaining. A system recently introduced to assist in BATNA development is called The BEST-project. This is an online system that uses case law to assist users in determining accurate BATNAs.<sup>92</sup> One of the novel aspects of the system is that the search function is meant to be used by lay people. Knowledge of legal terms and issues is unnecessary to use the system effectively.<sup>93</sup>

INSPIRE is a unique system that allows for the comprehensive study of negotiation styles across cultures.<sup>94</sup> It is a system that allows parties to record and review all of the information from their negotiations. All aspects of the negotiation are routed through the INSPIRE system. Parties can make or reject offers, communicate with the opposing party and even store information within the

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<sup>89</sup> *Id.* at 122-23.

<sup>90</sup> LODDER & ZELEZNIKOW, *supra* note 1, 124.

<sup>91</sup> *Id.* at 124-25.

<sup>92</sup> *Id.* at 125.

<sup>93</sup> *Id.* at 126-27.

<sup>94</sup> *Id.* at 127.

system. Once negotiations are completed, the computer reviews the information and analyzes it for negotiation tendencies or practices. The system has been instrumental in helping researchers study cultural similarities and differences in the area of negotiation.<sup>95</sup>

GearBi is a prototype for online arbitration. It is based around four main design principles; simplicity, awareness, orientation, and timeliness.<sup>96</sup> The system is similar to INSPIRE in the sense that it is an online database that stores all of the information needed for the proceeding. Arbitrators are allowed total control of the process. They can request documents, make judgments, communicate with the parties or do any other necessary duty through the GearBi system.<sup>97</sup> While the system has not been widely used, the potential is there.

Criminal law, as mentioned earlier, is still an area that has not embraced electronic decision support systems. Despite that fact, Lodder and Zeleznikow believe that decision support systems could be effective in providing sentencing guidelines for practitioners.<sup>98</sup> The authors think that sentencing should be a uniform process throughout the courts. If a system could be created that took into account all of the aspects involved in sentencing, judges and magistrates could impose uniform and fair sentences in all cases. These systems could also be used by prosecutors to determine fair plea bargains, or by defense counsel to determine whether or not trial is in their best interest.<sup>99</sup>

## VI. A THREE-STEP MODEL FOR ONLINE DISPUTE RESOLUTION

Chapter 6 is dedicated to a three-step model, developed by the authors, that they believe produces an effective ODR environment. All ODR processes should

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<sup>95</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 128-32.

<sup>96</sup> *Id.* at 133.

<sup>97</sup> *Id.* at 132-38.

<sup>98</sup> *Id.* at 139.

<sup>99</sup> *Id.* at 139-45.

give the parties feedback on the likely outcomes of the dispute if the negotiations fail. The process should attempt to resolve existing conflicts through argumentation and dialogue. Finally, for those issues that are not resolved, the system should provide alternative solutions for resolving the dispute using compensation and trade-off strategies.<sup>100</sup> If a system incorporates these three principles, Lodder and Zeleznikow believe that the ODR process should be successful.

In order to help parties develop a BATNA, programs such as The BEST-project should be made available to them. By giving participants access to a similar program, they can develop BATNAs unilaterally. This step is important to ODR because it provides each party with a basic understanding of potential outcomes and alternative courses of action.<sup>101</sup> Without this understanding participants are unlikely to trust the process when a decision goes against them. Options ensure that participants enter the system voluntarily.

Rational communication is the most important aspect of any negotiation. In order to be effective, an ODR system must provide participants with an array of communication options.<sup>102</sup> Parties have to operate in an argumentative environment that promotes open and honest communication. One possibility is to initiate the ODR process by allowing parties to, individually, state the issue and force them to support that issue with a factual statement. Once the issues are established, a structured dialogue begins.<sup>103</sup> This method allows parties to confront one another, but in a way that forces them to continue with a discussion.

If parties are unable to reach an agreement on their own, decision support systems should be made available to them. Providing these systems will force parties to continue the negotiation process with the support of an objective system. While it cannot force the parties to come to an agreement, hopefully it will open

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<sup>100</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 146.

<sup>101</sup> *Id.* at 147.

<sup>102</sup> *Id.* at 148.

<sup>103</sup> *Id.* at 150-52.

them up to other solutions.<sup>104</sup> The decision support system may come up with a scheme not previously proposed by either party. It may also temper the expectations of both parties. Having an objective “opinion” interjected into the negotiation can bring an unrealistic party back down to earth. Generally, these systems would be most effective when combined with a mediator.<sup>105</sup>

Much of the remaining chapter is dedicated to the discussion of fair negotiation principles in ODR. Transparency and bargaining in the shadow of the law are the two most important concepts discussed. To ensure that participants have faith in the process, it is important that the procedure and information exchange are transparent. If the parties begin to doubt the legitimacy of the process, it will be ineffective and unenforceable.<sup>106</sup> Bargaining in the shadow of the law is also important because it promotes legally just and fair standards of conduct in ODR. Agreements are also seen as fairer when the bargaining process mimics the outcomes of the courts.<sup>107</sup>

There are potential problems with transparency and negotiating in the shadow of the law. Some disputants are hesitant to speak frankly if agreements are not kept out of the public eye. One of the major benefits of ADR is the secrecy of the process. A transparent process puts that benefit at risk of being lost.<sup>108</sup> Mediators can also be seen as biased if they begin advising parties on the benefits of transparency and negotiation in the shadow of the law. People choose ADR with the understanding that if a third party is involved, they will be neutral. If the mediator is viewed as having an underlying agenda, neutrality is lost.<sup>109</sup> Discovery is another problem associated with ODR systems. ADR/ODR is not conducive to discovery. The process is supposed to be fast, efficient and cheap. Adding

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<sup>104</sup> *Id.* at 156.

<sup>105</sup> LODDER & ZELEZNIKOW, *supra* note 1, at 156-60.

<sup>106</sup> *Id.* at 161-64.

<sup>107</sup> *Id.* at 165-66.

<sup>108</sup> *Id.* at 166.

<sup>109</sup> *Id.*

discovery to the process jeopardizes those goals. At the same time, discovery is an important part of the adjudicatory process. Eliminating it completely is problematic.<sup>110</sup> Finally, a party's inability to see the potential repercussions of failing to negotiate undermines the process. Many disputants become lost in trying to resolve the dispute at hand, without considering the big picture. Promoting transparency and bargaining in the shadow of the law can exacerbate this problem.<sup>111</sup>

## VII. FUTURE PROSPECTS

The final chapter of the book summarizes and looks forward to effects that technology could have on ADR/ODR. As society becomes increasingly dependent on technology, the more comfortable people will become in engaging in the ODR process. We can currently shop, socialize and educate ourselves online. It is only a matter of time until we can resolve our disputes there as well.<sup>112</sup> This dependence on technology will also lead to a whole host of new problems that need to be resolved. Internet relationships and transactions are becoming increasingly complex. The more complex they become, the more problems will arise from them. Since these problems arise online, it makes sense to deal with them online, in an efficient and cheap manner.<sup>113</sup> Courts across the globe are near their breaking point in regards to caseload. ADR is one alternative to dealing with those problems. Technological advances are making it possible to deal with those matters in new and unique ways that were never possible before. Within the next 10 years, the authors predict that more than half of dispute resolutions will be assisted by technology. That number could be even greater if a groundbreaking

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<sup>110</sup> LODDER & ZELENIKOW, *supra* note 1, at 167.

<sup>111</sup> *Id.* at 167.

<sup>112</sup> *Id.* at 168.

<sup>113</sup> *Id.* at 168-69.

ADR/ODR application is created. Hopefully someone will create a system for ADR that has the effect Google had on internet searches.

#### VIII. CONCLUSION

This book takes an interesting look at an ADR culture that is becoming increasingly dependent on technology. The authors do an effective job of addressing all of the major issues surrounding ADR/ODR. They present well-conceived ideas in a manner that is easy to understand. For readers that are new to ADR, the initial chapters educate them about the basic concepts and strategies behind negotiation and ADR. Anyone that has experience in the field will probably not learn anything useful, initially. Developers, including practitioners, of ADR processes for companies or public institutions would do themselves a service by reading this book. It presents them with a comprehensive list of principles they should incorporate into whatever systems they are developing. Readers are also introduced to a number of electronic dispute resolution aids that can assist them in negotiations. While the explanations of the systems were overly technical at times, Lodder and Zeleznikow provide readers with a clear understanding of how the systems work and their potential benefits. Tools assisting in BATNA development and the division of property can be helpful to practitioners in family law or business transactions. Technical developers of electronic dispute resolution tools would also benefit from this book. There are a number of detailed technical explanations of some of the programs that could assist developers in creating of new systems.

While the book is worth reading for a number of reasons, it is not without its flaws. Neither of the writers are from the United States. As a result, there is a heavy focus on European and Australian methods and rules. Anyone hoping to learn about the substantive laws in the United States regarding ADR/ODR will be sorely disappointed. Another issue with the book is that there is a heavy focus on

systems created by the authors. While that may be because there are not a lot of systems available, it had the feel of an infomercial at times. At least two of Zeleznikow's systems were discussed in depth. It makes one question what the true motives of the book are. With that said, the book, on the whole, is a worthwhile read for practitioners looking for an introduction to the field or for electronic tools to assist in dispute resolution. Developers of ADR/ODR systems and electronic dispute support systems could also learn practical principles they can incorporate into their new, or current, systems.