

ADR For Internet Startups
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1.0 Introduction

Conflict is not a particularly unique phenomenon in our professional and personal lives. Daily, individuals and businesses find themselves disagreeing on political issues, personal choices or the manner in which one's actions or an agreement should be interpreted. Conflict, though, is not necessarily a negative occurrence, as disagreements often lead to the investigation of differing viewpoints and unique approaches to similar circumstances. Rather, it is the manner in which conflict is dealt with which is often determinative of the satisfaction of relevant parties.

Mechanisms to resolve disputes are more prevalent in society than many recognize. For example, we often take for granted the most ambitious modern dispute resolution mechanism devised: the modern liberal democracy. Modern democracies resolve disagreements surrounding the manner in which a nation will pursue its goals through elected individuals who attempt to persuade one another of the merits of their positions in open debate and bind themselves to ensuing votes. The system is effective because it provides represented individuals with some say in government without monopolizing their time. Still, liberal democracies are not perfect and often sacrifice dealing with parties' emotions in addition to not being particularly effective at preventing future disputes. Nevertheless, the system works because there is a perceived equity and efficiency inherent in the system that makes it a satisfactory system in the eyes of its participants. Consequently, in designing a mechanism for the positive resolution of conflicts and derivative disputes, one has to identify the constituency for which a system is designed and address their interests. Moreover, one must ensure that the constituency embraces the dispute resolution mechanism and perceives it to be equitable and efficient.

This paper starts from the position that litigation is an inefficient, outmoded, time insensitive manner of resolving disputes which often does not provide participants with an adjudicator or advocates who are well versed in the technology or business realities underlying a dispute. The litigation process's failings are particularly acute to the sensitivities of Internet startups and consequently to address these concerns an alternative dispute resolution mechanism will be presented specifically for these firms. Internet startups face unique challenges and present an atypical business culture where the arena's playing field is largely wide open and participants do not benefit from entrenched power. The culture of internet firms is centred on an aptitude for current technology, non-hierarchical management structures and the preservation and protection of company ideas and processes (intellectual property) which may be the sole assets of a firm. There are few dominant players in the Internet industry and those who currently possess market power have little protection from the ambitions of other startup firms who want to usurp their power. Individual businesses themselves are mostly composed of few dedicated individuals who represent a firm's culture, initiative and future. Finally, the speed at which business is transacted in the internet sphere is often referred to as "internet time", which is roughly a factor of three times that of traditional modes of doing business (an "internet year" being considered four months).

Accordingly, this paper will first outline the theory underpinning the evaluation of conflict and dispute resolution. Next, the design of a dispute resolution mechanism will be undertaken using the DIRECT(E) approach. Finally, a dispute resolution model will be presented along with a brief annotation regarding the provisions of the model and its implementation.

2.0 Dealing with Conflict In Theory

People have positions on everything: which political party is the best choice to lead a country, the viability of universal health care, whether exposure to violence in the media promotes violent behavior in youth, and whether the designated hitter has ruined American League baseball. People within

organizations often hold different positions as well: which strategies the firm should pursue, which markets should be targeted, which suppliers should be used, what salaries are appropriate for which employees, and whether a corporate web-page should be flashy and hip, or understated and professional.

Disputes occur when two or more parties have different positions on a given issue. When choices must be made positions must be examined. Effective decision making requires effective conflict resolution. Constructive conflict resolution requires an examination of positions and their underlying frameworks.

2.1 Ladder of Inference

Again, a dispute occurs when two or more parties have different positions on a given issue. Conflict in itself is not a negative phenomenon. In fact, if it is resolved in a constructive manner, conflict can have very positive effects on an organization, and individual disputants. The fundamental element in constructive dispute resolution is the ability of disputants to *understand* the position of the opposing party. Full understanding of the position requires an understanding of the data and interests on which a position is built, and the underlying reasoning on which it is based.

Positions are based on perceived information (data) and are shaped by the interests of the party holding the position. People construct positions through a combination of deductive and inductive reasoning about perceived data and interests. The Ladder of Inference [\(1\)](#)

is a schema which illustrates how interests are built upon data, and reasoning. The modified Ladder of Inference below depicts the progression towards the formation of a position:

The selection and interpretation of data, and reasoning often occur unconsciously. As well, the interests of a party, while having a strong influence on a party's position, often go unexplored by that party. When disputants state their positions to each other they usually do not immediately relate the underlying reasoning, data, and interests. Disputes often arise in which parties spend a great deal of time and effort advocating their own positions (interacting at the top of the ladder), and little time inquiring about opposing positions. Inquiring about the data, reasoning, and interests which underlie opposing positions (moving down the ladder) and openly discussing the data, interests, and reasoning which underlie one's own position, are the keys to constructive conflict resolution.

2.2 Conflict is an Opportunity

Conflict exists in all aspects of life. Individuals have different positions and disagree with one another on a variety of issues and they have disputes of varying degrees of severity. Within organizations, conflict is omnipresent. Disagreement occurs over strategic direction, project valuation, resource allocation, operational issues, dress codes, and even whose turn it is to refill the water cooler. Conflict itself is not a bad thing. Conflict is an opportunity. When conflict is dealt with in a constructive manner it improves relationships, deepens commitment, allows individuals to learn, and organizations to evolve and improve performance.

Conflict can be dealt with in three ways:

1. Destructively _ Conflict can be a fight about incompatible positions.
2. Avoided _ Disagreements can be kept private.
3. Constructively _ Conflict can be treated as an opportunity to learn.

1. Dealing with Conflict Destructively

In this situation, both informal and formal conflict resolution processes begin with parties advocating their positions. A common next step is for the parties to attack opposing positions and defend their own positions. The strategy employed by the parties tends to be one of maximizing winning, minimizing losing, avoiding vulnerability, risk, embarrassment, and the appearance of incompetence. (2)

We see this strategy played out in courtrooms where opening statements are summaries of positions and reasoning, witnesses are called to shore up one position and raise doubt about the opposing position and closing arguments reassert positions and reasoning that remains unchanged from the outset of the trial.

The goal of conflict resolution should be to reach satisfactory outcomes through a process that respects participants' emotions, preserves relationships, and does so in a timely and cost effective manner. Conflict resolution is most effective when it is a cooperative pursuit. However, conflict resolution often becomes an adversarial process. Office politics, unresolved interpersonal issues, and unrevealed personal problems and concerns result in different personal agendas. Divergent agendas often put people in adversarial positions. An adversarial approach to conflict resolution creates an 'attack and defend' mindset that keeps personal agendas, reasoning processes, and information private. The ultimate result is that much time and energy is spent advocating opposing positions, and little or no time is focused on exploring data and interests in an effort to create mutually satisfactory decisions.

2. Avoiding Conflict

Conflict is often avoided because people perceive the potential costs of conflict resolution to be greater than the expected benefits. Conflict, when dealt with in a destructive manner, often becomes emotional and makes participants uncomfortable. Experiencing ineffective conflict resolution in the past reinforces the perception that conflict is a negative "thing" which is often better avoided than dealt with.

Unfortunately, ignoring conflict does not make it disappear. When conflict is not dealt with it persists, even if it is unspoken and the conflict may resurface. If it does not, the dissatisfaction of one or both parties may create resentment, which will hinder individual performance, and ultimately the performance of an organization.

3. Dealing with Conflict Constructively

The most detrimental aspect of avoiding conflict may be the opportunity cost. Conflict, when dealt with constructively, is an opportunity to learn, improve interpersonal relationships, transfer knowledge, make better decisions, and ultimately, improve organizational performance. Constructive conflict resolution requires participants to advance beyond simply advocating their own positions. It requires an exploration of the data and interests that underlie a position, as well as the logic upon which a position rests. Participants in conflict resolution must understand the foundations of their own positions, as well as the basis for incompatible positions. Understanding the underlying data, interests and reasoning of incompatible positions will likely reveal data and interests that are compatible, and even shared. Participants can then build satisfactory resolutions based on shared data, interests and common logic, resulting in an inquiry that leads to understanding which has the ultimate effect of 'expanding the pie' rather than dividing it.

3.0 Designing a Model

With an understanding of the nature of conflict and the opportunities which

it presents, a dispute resolution model was designed and was specifically tailored to the goals and needs of an internet startup.

We adopted a process which required three separate sets of meetings with a panel of internet entrepreneurs representing five e-businesses. The first meeting was very informal and consisted of an outline of our project and dispute resolution in general. We also attempted to determine the goals which the entrepreneurs thought would be most important in designing an alternative dispute resolution mechanism and gauged the entrepreneurs initial reaction to the concept itself. Our next meeting was very brief as we distributed questionnaires (see Annex 1) to our entrepreneurs and responded to any questions which they had regarding completing the form. Finally, we met with the entrepreneurs to discuss the results of the questionnaire and to discuss the elements of the alternative dispute resolution model which we had developed.

3.1 Goals for an Internet Start-Up ADR Model

While different organizations have numerous objectives in establishing an ADR system, a number of goals are common to most organizations. (3) Internet startups share the following common goals though the specific characteristics of their competitive environment forces these businesses to individually maintain a unique perspective:

Time _ All organizations wish to maximize time spent on productive activities and unproductive dispute resolution frustrates this desire. Time is of particular interest to internet startups because competition in the industry is fierce and the advantage often goes to the 'first mover'. A system that resolves disputes quickly is essential.

Cost _ All organizations want to minimize costs while achieving satisfactory results but the entrepreneurs involved in internet startups are particularly sensitive to cost because expenses decrease an entrepreneur's equity in his/her firm (spending often results in increased capital requirements which dilute an entrepreneur's equity and thus managers are incented to minimize costs). This type of cost management pressure is not experienced by managers in most mid-size or large organizations. Nevertheless, the desire to reduce costs is balanced by the entrepreneur's time-sensitivity as internet start-up entrepreneurs are willing to pay for quick, effective solutions.

Culture _ Appropriate ADR systems fit into an organization's culture. Culture is especially important in internet startups where people are the firm's most valuable asset and where competitive pressures are difficult to bear. It is essential that entrepreneurs maintain a corporate culture that promotes team-work and individual satisfaction. Also, culture is pertinent to internal relationships and relationships with external parties (customers and suppliers of services and capital).

Effectiveness in the Present _ As in all organizations, internet startups require feasible, executable, and durable solutions that fit organizational culture and goals.

Effectiveness in the Future _ All organizations want to work better and continually improve but the internet start-up's competitive environment requires more than speed, it requires acceleration. Firms must not only be knowledge-based, they must be learning-based. An appropriate ADR system will provide the opportunity to learn how to constructively resolve conflict more efficiently in the future.

3.2 DIRECT(E)

Having outlined the goals of the internet startup, the design of the dispute

resolution system will proceed using the DIRECT(E) approach outlined by Alan Stitt in *Alternative Dispute Resolution For Organizations*. (4)

3.2.1 Diagnosis

The first step in researching companies in this industry niche was to meet with the members of the representative organizations. Our meetings took the form of an informal interview. Our goal was to better understand the culture of these organizations, their structure, their communication patterns, their decision making processes, and current dispute resolution mechanisms. In total we researched five companies. They varied in size, ranging from three employees to thirteen. All of the companies were in a rapid growth stage and expected to be quickly adding employees, doubling in size every three months for the next year. The cultures were all similar and the firms were non-hierarchical, they employed a consensus-based approach to important decisions, exhibited shared leadership (recognizing individuals' unique skills) and high levels of autonomy, high levels of commitment to their work and the success of the firm (which were perhaps fuelled by the fact that stock option plans were in place for all organizations). The firms employed an informal organizational structure and maintained relationships that we would characterize as friendly as opposed to professional. All firms operated in open physical spaces which facilitated high levels of communication. Formal lines of communication were absent. Given the industries in which they operate, the firms are at the leading edge of technology, and they appear to be able to adapt to new systems well.

Disputes with external parties tend to be bi-lateral disputes. Disputes among internal parties may be bi-lateral, but are often multi-lateral. External disputes are likely to be technical disputes (e.g. with software developers) or differences of opinion (e.g. disagreeing about strategic and operational decisions with venture capitalists and other investors). Internal disputes were either differences of opinion (consensus-based decision making is difficult) or interpersonal (differences of opinion, an open environment, and high levels of open communication under heavy competitive and time pressures often resulted in interpersonal tension). These companies are competing in the 'new economy'. They are operating in uncharted waters, utilizing unique and untested business models. There is a high degree of uncertainty and data is hard to find, and difficult to collect. The absence of comprehensive data makes the decision making process less scientific than is ideal. An appropriate dispute resolution system must recognize that objective data will often be scarce.

Several members of each firm responded to a questionnaire designed to illicit information with respect to current methods of dealing with disputes, as well as respondents' impressions of various dispute resolution mechanisms. We found that current dispute resolution mechanisms were informal. They generally comprised conversation and debate, though there was mention of the potential for mediation by third parties. While respondents were generally positive about current dispute resolution methods they were concerned about the amount of time that is required to build consensus.

3.2.2 Interests

Next, to design a dispute resolution model one needs to examine the interests of the parties. Through preliminary interviews with the internet startups we determined that from their perspective, key elements of any dispute resolution system are (5): timeliness of resolution, preservation of relationships, cost, prevention of future disputes, and fairness. In an attempt to further narrow their interests we asked them to rank them in order of importance and found that individual entrepreneurs ranked the elements differently. Even within an Internet startup there was no consistency in the rankings. Simply, while the entrepreneurs could agree which elements were important in the design of a dispute resolution mechanism, there was no consensus regarding the individual importance of each object in that subset which indicates that systems for specific firms will require some degree of tailoring.

Also, the entrepreneurs were interested in resolving disputes to reflect their interests, but only to the extent that they felt that a dispute resolution mechanism was fair. Fairness was important, in turn, because it protects the interests of preserving relationships and it allows the entrepreneurs and their staff to foster "buy-in" for the mechanism. In addition, it is possible that one of the reasons that fairness is so important to internet entrepreneurs is that their businesses feature largely flat management structures. This flat structure gives e-business employees far greater freedom to express their opinions regarding the manner in which their firms are run and other sundry issues as opposed to the "old line" industrial hierarchy where decisions are made exclusively from the top down. The internet business structure nurtures an egalitarian approach to decision making and employee opinions and their creativity is fostered. Therefore, fairness is important because this culture will only thrive where there is perceived justice in both internal and external relations.

Perhaps equally interesting were the typical interests that were not present. Our test group rejected, to the extent possible, the idea of having expert agents represent them. This was not completely unpredictable given that a common characteristic of entrepreneurs generally is their desire to take control of situations and to have their destiny in their own hands. Also rejected as an interest was a need for formality. Though some may prefer a strict set of boundaries, the internet entrepreneurs rejected formal structures which were not subject to modification. We discovered, not surprisingly given their time sensitive schedules, that the internet entrepreneurs valued function over form. Consequently, they insisted that while a model structure should be instituted to save time and costs, it should be as flexible as possible and that if all parties to a dispute agreed, there should be the ability to modify the dispute resolution mechanism as desired.

3.2.3 Rights

To our surprise, we learned that to the internet entrepreneurs rights were in fact one of the most important aspects of a dispute resolution mechanism. The entrepreneurs were very attached to their businesses and to their involvement and control thereof. So, while they as a group were willing to try to facilitate dispute resolution, they were not, for the most part, willing to completely depart with their legal rights. Still, there appeared to be a link between the extent to which an entrepreneur was willing to forfeit legal rights and the age of the entrepreneur. We found that the older an entrepreneur was, the more willing he or she would be to part with his or her legal rights in favour of a mandatory and binding alternative dispute resolution. We believe that this relationship is a result of the probability that as one grows older there is a greater likelihood that an individual has had or is aware of a dysfunctional interaction with the legal system. Conversely, in our discussions we discovered that younger individuals seemed more likely to have a romanticized and heavily celluloid influenced perspective of the law often with no basis in reality.

On a more practical level, dispute resolution mechanisms must appear equitable or they risk being subject to judicial scrutiny. Specifically regarding arbitration, Stitt writes that "[i]f the process is not fair, one of the disputants could go to court and have the arbitration decision set aside." [\(6\)](#)

More generally, one should also be aware of the tension between the freedom to privately order one's affairs through an agreement which binds parties to dispute resolution processes and the interests of public policy. It is unlikely that a court would uphold a dispute resolution mechanism or a resulting agreement if it was patently unfair or if it seriously prejudiced the rights of either party. Consequently, it is in the best interest of the entrepreneurs to design systems which adequately respect the rights of both parties and that agreements which flow from a dispute resolution mechanism reflects this fairness.

3.2.4 Exits and Re-entries

As a result of the speed at which the industry moves and that the environment, business plans, and

opportunities change rapidly in the internet sphere, the entrepreneurs were keen to build flexibility into the system. In all of our meetings with the entrepreneurs, they consistently expressed their desire to avoid having to reach an agreement through the dispute resolution mechanism employed. Simply, if a dispute could suddenly be resolved outside of a process through an agreement which would dispose of a dispute, they wanted to be able to supplant any ongoing mechanism with that agreement. Accordingly, we discussed exits and re-entries at great length.

In a sense the group wanted a consistent loopback to negotiation but they were also adamant that during arbitration access to mediation should not be precluded. Simply, the parties hoped that any one procedure might possibly trigger a settlement which could be achieved more expeditiously or flexibly through an alternative mechanism and they did not want to be precluded from resolving a dispute simply because it was counter to the form of the dispute resolution mechanism.

Med/Arb was rejected as a viable dispute resolution mechanism specifically because it does not allow participants to loopback or re-enter other processes as arbitration typically arises immediately after an unsuccessful mediation. While this aspect of med/arb could be modified, the members of the e-businesses also feared that a med/arb where the mediator and arbitrator were the same person would result in mediation where the participants only contributed half-heartedly, fearing that anything they said would come back to haunt them in the arbitration phase of the process. Also, it was important to the entrepreneurs that a cool-down period be incorporated into the mediation process so that each party would have some time to contemplate what had occurred and so that they would not make a hasty decision to pursue arbitration or litigation without exploring further mediation or negotiation as solutions to resolving the dispute. These concerns were reflective of a broader trend: the entrepreneurs value speed but only insofar as it does not jeopardize the possibility of resolving a dispute or their other goals.

Interests - what are their interests (that is what are the goals, wants or needs behind the positions). Speed/time, preservation of relationship, cost, prevention of future disputes, fairness : we learned this from sitting down and discussing with them. Then in the survey asked them to rank. Not of interest and not on survey : need of expert agents to represent them, not interested in formality (formal documents or processes - just want something to work). Interested in function over form. Costs.

Rights - arbitration need fairness or can go to court and get challenged. Med/arb : don't buy in, not going speed at any cost, if med is same as arb he's heard anything and will stifle the goodwill of mediation. Also, invaluable time in cooling off when can step back and reassess problem is lost. Arb: should only be used as a last resort.

Exits and Re-entries - Left interest based to go to arb but judgment not handed down for several days - allows parties to loopback to interest based negotiation to find solution. Cooldowns lets parties reflect on consequences of unresolved conflict, make options, etc.

3.2.5 Creative

Not surprisingly, the firms studied were open to creative solutions to their dispute resolution problems. The organizations operate with a minimum of structure, and desired a system that allowed flexibility and opportunities to adapt. They were open to the idea of brainstorming options and the entrepreneurs were also open to role-playing. Role-playing would require disputants to play the role of their adversary and to make the best case for an opposing position. Role-playing forces parties in a dispute to understand opposing positions, the data on which they are based and the reasoning underpinning a position which is the first step towards generating mutually satisfactory positions. While more traditional organizations may view role-playing as silly and awkward, these firms understood its value.

A mechanism for identifying when conflict is dealt with destructively was suggested by one firm. They termed the tool a 'TooT', which stands for 'Time out of Time'. A TooT would be employed where parties embroiled in destructive adversarial conflict would stop and ask questions like: What are we doing? Are we getting closer to consensus, closer to a decision? Why isn't this working? A TooT is a way to communicate that the current dispute resolution process is not working. This is an opportunity to recall the established dispute resolution system, and utilize it to deal with conflict constructively.

3.2.6 Training

An essential element of any ADR system is training. Not only must members of an organization learn how to effectively employ a system, but they must be enticed to use it. The value of using a system must be conveyed to stakeholders and in the context of the internet start-up, time is of the essence. Time devoted to training will likely be minimal and real-time training is the ideal solution. Real-time training involves learning about the system while using the system to resolve real disputes (or potential disputes that are likely to occur in the future) which is an efficient way to learn and will involve basic skill training as well as real-time role-playing and observation. Moreover, as these start-up firms grow they will have to effectively and efficiently pass on dispute resolution expertise to new hires. Inviting new employees to observe the work of those experienced with the dispute resolution system will facilitate their learning. Also, documentation should be made available by making it accessible on a companies' intranet servers. Real-time role playing should be documented as well to provide practical examples.

3.2.7 Evaluation

Time constraints make assessment of the ADR system difficult. Pilot projects are not feasible but scheduled assessment points should be established in the future. E-mailed questionnaires should allow for efficient data gathering and on-line discussion boards made available through a companies' intranet can be a forum in which comments on the system - negative and positive - can be documented to be later used during reassessment and redesign phases.

3.3 The Model

The dispute resolution model is designed to deal with conflicts that have escalated to a point at which they are considered disputes. The objective of this model is to resolve disputes while paying particular attention to an e-business' interests outlined above (timeliness of resolution, preservation of relationships, cost, prevention of future disputes, and fairness).

ARTICLE

Preamble

When conflict arises, the two conflicting parties should attempt to appropriately deal with the issues in question so that discord does not escalate into a dispute. Nevertheless, any dispute arising out of or relating to this Agreement shall be resolved in accordance with the procedures specified in this Article, which shall be the sole and exclusive procedures for the resolution of any such disputes. At ANY time the parties may dispose of a dispute through mutual agreement irrespective of how that agreement was reached so long as the settlement was achieved within the bounds of the laws of [PROVINCE]. If the parties resolve the dispute the matter shall be considered decisively dealt with and both parties will execute a written agreement outlining the terms of the settlement. This dispute resolution mechanism and any information which either party receives as a result of negotiation, mediation or arbitration is confidential and may not be disclosed to any third person without the consent of every party to a dispute.

Notwithstanding the terms of this Article , *the parties shall not be considered to have forfeited their right to injunctive or mandatory injunctive relief and they may pursue such a remedy if they reasonably believe that the actions of a party will cause irreparable harm and produce damages which will be difficult to quantify.*

(a) Negotiation Clause

The parties to this agreement shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly, by negotiation between representatives who have the authority to settle the controversy. Any party may give the other party written notice, including via e-mail, of any dispute not resolved in the normal course of business. The parties may dispose of the dispute at any time but within 5 days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and the response shall include (a) a statement of each party's position and a summary of arguments supporting that position, and (b) the name and title of the representative who will attempt to resolve the disagreement. Within 10 days after delivery of the disputing party's notice, the representatives of both parties shall meet at a mutually acceptable time and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. Meetings may be conducted remotely through any medium upon which the parties agree including but not limited to teleconferencing, video-conferencing, Internet Relay Chat and digital whiteboarding. All reasonable requests for information made by one party to the other will be honored. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

(b) Mediation Clause

If the dispute has not been resolved by negotiation within 20 days of the disputing party's or parties' notice, or if the parties failed to conduct a meeting as contemplated in Article (a) within 15 days, the parties shall endeavor to settle the dispute by mediation under the [then current] CPR Mediation Procedure [in effect on the date of this agreement]. The parties have selected _____ as the mediator in any such dispute, and [he] [she] has agreed to serve in that capacity and to be available on reasonable notice. In the event that _____ becomes unwilling or unable to serve, the parties have selected _____ as the alternative mediator. In the event that neither _____ nor _____ is willing or able to serve, the parties will agree on a substitute.

The parties will, in consultation with the mediator, select a convenient time and place to conduct the mediation and will commence the mediation no later than 25 days of the disputing party's or parties' original notice pursuant to Article (a). Mediation will be conducted for no less than four (4) hours. At the expiry of the four hour threshold the parties will be free to leave though they are bound to refrain from pursuing the matter further for 2 working days. After this period, the parties are not prevented from pursuing negotiation to resolve the dispute. Mediation pursuant to this clause is confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

The costs of the mediation will be shared equally amongst every party to the dispute.

(d) Litigation and Arbitration Clause

If the dispute has not been resolved by non-binding means as provided herein within 30 days of the disputing party's or parties' original notice pursuant to Article (a), the parties must within 5 days thereafter resolve the dispute, pursue binding arbitration or initiate litigation. Clearly, the decision to resolve the dispute or pursue binding arbitration must be achieved collectively. One or both parties can decide to pursue litigation.

If either party pursues litigation that party will be bound by the rules of civil procedure of [PROVINCE];

If the parties pursue arbitration the parties shall share the costs of arbitration equally and will agree upon the appointment of an Arbitrator. If the parties are unable to agree upon an Arbitrator any party may apply to the General Division of a court in any Canadian jurisdiction for the appointment of an Arbitrator. The Arbitrator will work to resolve the dispute promptly and efficiently but, unless the parties otherwise agree, for no longer than seven working days from the commencement of the arbitration. Absent rules unanimously agreed upon by the parties, the Arbitrator will establish reasonable rules governing the proceeding. At any time during the arbitration, the parties may also conduct negotiation, mediation or any other process in pursuit of settling the dispute. The arbitration may be prematurely aborted if and only if the parties reach an agreement which disposes of the dispute.

The Arbitrator will not award damages in excess of compensatory damages and once a written decision is provided by the Arbitrator it will be deemed to finally dispose of the matter and the decision will not be subject to appeal. The decision will not be deemed by the parties to constitute a precedent for the interpretation of further disputes and the parties may only pursue an action to enforce the decision of the arbitrator. The arguments presented in the context of the arbitration, including any decision or the terms of a mutually agreed upon resolution will not be made public.

3.3.1 Discussion of the Model

Simply, the dispute resolution mechanism employs negotiation, mediation

and arbitration or litigation to resolve disputes in a timely manner. At the outset one may question why litigation (given our aforementioned opinion that it is outmoded and inefficient) was not removed as an option for the parties. In consulting with the principals of the internet businesses we discovered that almost all of the entrepreneurs would refuse to subscribe to a document that would remove their rights to go to court. Even though many of these same entrepreneurs recognized that litigation may not be in the best interest of their business and that it may be costly and time-consuming and result in an unfavourable result, they were uncomfortable with sacrificing what one of them termed their "inalienable right to pursue justice through the courts." As described above, there was a link between the willingness to part with legal rights and the age of an entrepreneur. Accordingly, an appropriate structure appeared to be to employ the negotiation and mediation mechanisms where interests could be raised and understood followed by an *ad hoc* and case-specific decision whether to pursue arbitration or litigation. This mechanism was deemed acceptable by our panel of entrepreneurs.

Negotiation

Clearly, the preamble contemplates an informal resolution of conflict and it attempts to facilitate the sharing of interests by the parties so that each is aware of the other's concerns. Still, disputes will arise and the Negotiation clause requires the parties to quickly notify one another of disputes. This notification must be in writing and the response of the other party must be in writing. Written notification requires each party to coherently identify the dispute and it forces each side to clearly establish their perspective as they summarize their position. Negotiations are then conducted to facilitate the resolution of disputes. One should take special note of the diverse and creative manners in which meetings can take place. We suggested several technological tools to facilitate interaction including meetings conducted through various mediums like digital whiteboarding, internet relay chat, teleconferencing and videoconferencing and e-mail for written notifications or document exchange. These tools provide fast, efficient methods of communication and they reduce costs. The parties to a dispute will determine which tools will be employed and undoubtedly this will depend greatly on the comfort of each party with certain technology and its appropriateness to a particular dispute. Finally, the parties are required to keep the negotiations

confidential which reflects a particular concern of e-businesses that their proprietary information, which is often a principle asset, be kept private.

Mediation

The most important feature of the mediation clause is the pre-selection of a mediator and a substitute mediator because it allows the parties to choose individuals with a particular expertise regarding the parties' businesses and the subject matter of an agreement. As the model is designed for the internet arena each mediator would likely be selected because of his or her understanding of the particular nuances of that sphere though there may be additional areas of expertise required. Thus, an agreement between two e-businesses may feature a different mediator than an agreement between an e-business and a bricks and mortar business like a supplier of tangible property. It is important that the selection of the mediator is made when the parties enter the agreement because when the parties need to employ the clause the distraction of selecting a mediator is not present (except in the unlikely circumstance that both selected mediators are unavailable). Parties to the mediation are required to participate only for a short period after which time they can abandon the process if they do not feel that it is effectively assisting the parties in resolving the dispute.

Litigation/Arbitration

Finally, if negotiation and mediation have not facilitated the resolution of a dispute, parties can employ arbitration or litigation. Arbitration would be conducted in concert with a jointly appointed Arbitrator which facilitates the selection of an individual who has expertise with regard to the subject matter of the disagreement. If an arbitrator could not be agreed upon, an application could be made to the judiciary to appoint one. As the decision of the Arbitrator is binding, the entrepreneurs explained that they would rather select that person when such an individual was required rather than pre-selecting individuals as is contemplated by the mediation clause. The rules of the arbitration are designed to be flexible so that the parties themselves can determine the manner in which the proceedings will unfold, though if they are unable to come to an agreement then the Arbitrator would impose reasonable rules for the arbitration. At each stage of the clause the parties are invited to agree on a manner in which to proceed and if an agreement is not reached on a certain matter there is a procedure whereby a certain aspect of the arbitration will be imposed on all parties to a dispute.

Negotiation, mediation and any process aimed at resolving a dispute were not precluded during the arbitration because the entrepreneurs were not interested in being bound to a certain process once it had begun. Rather, the entrepreneurs' priority was the resolution of disputes irrespective of the process.

The entrepreneurs were also concerned that any decision imposed on them by an arbitrator would not exceed the expense of the matter. It was felt that permitting punitive damages would lead to the mechanism being used as a sword to unjustifiably extract rents from a party to the agreement which would be counter to the spirit of the dispute resolution mechanism.

3.3.2 Implementation

While the model is designed to be implemented within any internet start-up, one should recognize that firms wishing to implement any dispute resolution mechanism would be wise to approach the process intraspectively with an eye to the unique needs within and without a particular organization. As highlighted above, the completed questionnaires indicated that after a certain level of refinement there was no consistency amongst the entrepreneurs about which goals of a dispute resolution mechanism were most important. Clearly, the internal workings of an organization and its culture will shape the tailoring of a dispute resolution model. Further, the industry in which a firm competes and its norms will also

likely affect the manner in which a model is employed. For the sake of brevity, it is sufficient to note that simply attempting to thrust boilerplate provisions on an organization - even those agreements which are designed for a specific industry or market segment - are infinitely less effective than a mechanism which has been ratified by relevant parties and which is tailored to the needs of those parties.

4.0 Conclusion

Conflict is an opportunity. When dealt with constructively, disputes can become valuable interactions that increase the pool of available data, promote exploration of various interests and reasoning processes, and motivate a generation of mutually satisfactory positions and decisions. Applying this reality to new industries allows these arenas to benefit from conflict as opposed to fearing it. The new economy is characterized by intense competition and extreme uncertainty and an ADR system which provides a solid framework for effective and efficient conflict resolution, while allowing the flexibility to adapt to novel situations is a great asset in such a challenging environment.

Appendix A

ADR Model Design Questionnaire For Internet Startups

How are disputes resolved currently in your organization?

What are the shortcomings of the current approach to resolving disputes?

How do you think disputes could be avoided?

What are your impressions of negotiation and what are the goals of negotiation?

What are your impressions of mediation and what are the goals of mediation?

What are your impressions of arbitration and what are the goals of arbitration?

Rank the following in order of importance (1-5) according to which are the most important elements of a dispute resolution mechanism:

Speed/time

preservation of relationship

cost

prevention of future disputes

fairness

Are you open to including a neutral party in the resolution of disputes?

What concerns do you have about participating in negotiation, mediation or arbitration?

What is your impression of litigation in terms of it being an effective manner of resolving conflicts?

Would you be willing to give up your right to litigate a matter and commit to an alternative dispute resolution mechanism?

1. Argyris, Chris, *Overcoming Organizational Defenses*, (New York: Prentice Hall ,1990) at 88-89.
 2. *Supra* note 1.
 3. Stitt, Allan J., *Alternative Dispute Resolution For Organizations*, (Toronto: John Wiley & Sons Canada Limited, 1998) at 11.
 4. *Supra* note 3 at 18-20.
 5. *It should be noted that effectiveness of outcome was assumed to be the chief priority of all firms.*
 6. *Supra* note 3 at 132.
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