

ALTERNATIVE DISPUTE RESOLUTION IN CYBERSPACE: THERE IS MORE ON THE LINE, THAN JUST GETTING “ONLINE”

Rachel I. Turner*

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I. INTRODUCTION

The potential plaintiff is in Dallas, the potential defendant in Tiruporur, and the mediator in Hong Kong? They never leave their home cities. They never meet face to face. Yet they are mutual parties in an online dispute resolution process. Cyberspace is putting all new meaning to Alternative Dispute Resolution. Alternative Dispute Resolution (ADR) plays an essential function in the role of settlement and resolution processes. In addition, ADR’s role in the international business arena is expanding and developing rapidly.¹ However, the past few years have taken ADR further than ever. “1999 was a year in which a variety of Internet entrepreneurs decided that there were commercial opportunities in online dispute resolution,”² and thereby created an all new dimension to ADR. The use of online dispute resolution has already proven itself effective in the battle over domain names.³ Several domain name disputes have been settled utilizing online processes.⁴ As ADR services

* JD candidate, class of 2002, Nova Southeastern University Shepard Broad Law Center, Fort Lauderdale Florida.

1. *I’ll See You Out Of Court As ADR Grows Globally, So Do Disputes About It*, 10 CORP. LEGAL TIMES, Feb. 2000, at 17 [hereinafter *I’ll See You Out Of Court*].

2. Ethan Katsh, *The New Frontier Online ADR Becoming a Global Priority*, 6 No. 2 DISP. RESOL. MAG., Winter 2000, at 6.

3. Business This Week 1 (*Cybersquatting*): *New Online arbitration service has domain name cases filed*, IRISH TIMES, Feb. 25, 2000, at 60; See also *The WIPO Dispute Settlement Process*, WIPO MAG., Feb. 2000.

4. *Id.*

become more popular online, questions on jurisdiction, privacy, uniformity, and enforcement must be resolved.

The United States government defines the Internet as “[t]he international computer network of both Federal and non-Federal interoperable packet switched data networks.”⁵ This definition makes the Internet sound like something out of a science fiction movie. In reality, this network connects cultures, people, laws, businesses, and inevitably creates an entirely new global legal arena. Are we, as legal professionals, ready to be thrust into this arena? Encompassing such a potentially broad range of legal issues and conflicts necessitates moderation and management in online ADR to safeguard the already recognized benefits of more traditional approaches. This international step must be taken gracefully so it will not disrupt the positive international business relationships that already exist. Proper training, cultural sensitivity, established guidelines, and a governing mechanism must be established before the spread of ADR to the Internet jeopardizes the preexisting success of ADR in the global marketplace.

Part one of this article will discuss and define ADR generally. Part two will examine the use of ADR internationally. Part three will demonstrate, using Hong Kong and India as examples, the differences in ideology and practice of ADR. The fourth section will focus on the role ADR has played, and will potentially play in the future, on the Internet. Part five will examine some of the problems faced by the Internet expansion of ADR. Finally, part six will conclude with a forecast of the future role the Internet will have on ADR.

II. THE ROLE OF ADR IN THE DISPUTE RESOLUTION PROCESS

ADR serves as a mechanism for opposing parties to find solutions without resorting to litigation. ADR generally refers to “any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, Mediation, factfinding, minitrials, Arbitration, and use of ombuds.”⁶ The most common forms, and the forms addressed in this paper, are Arbitration and Mediation.⁷ Both serve substantially different roles in dispute resolution processes. Arbitration is a procedure in which a dispute is:

[S]ubmitted, by agreement of the parties, to an arbitrator or to a tribunal of several arbitrators who give a decision on the dispute that is binding on the parties. In contrast to a Mediation, once the parties have freely agreed to submit a dispute to Arbitration, a party cannot

5. 15 U.S.C. § 5501(C)(a)(2) (2000).

6. 5 U.S.C. § 571 (2000).

7. TERRY TRANTINA, *An Attorney's Guide To Alternative Dispute Resolution (ADR): "ADR 1.01,"* in CORP LAW & PRACTICE HANDBOOK (1999).

unilaterally withdraw from the Arbitration. Mediation (also known as conciliation) is a procedure in which a neutral intermediary, the mediator, endeavors, at the request of the parties to a dispute, to assist them in reaching a mutually satisfactory settlement of the dispute. The mediator does not have any power to impose a settlement on the parties. Mediation is also voluntary in the sense that either party may, if it so chooses, abandon the Mediation at any stage prior to the signing of an agreed settlement.⁸

As this paper will display Arbitration plays the leading role in the international realm.

III. THE USE OF ADR INTERNATIONALLY?

International business is not a new phenomenon; neither are international disputes. Modern technology is only making both more commonplace. In the world of international business disputes, Arbitration is the resolution tool of choice.⁹ Estimates indicate ninety percent of international contracts include an Arbitration clause.¹⁰ The role of Arbitration on an international scale is comparative to the role litigation plays in the "litigation happy" United States. Arbitration is by far, the international king of ADR.¹¹ International Arbitration, is Arbitration that concerns international transactions, as well as Arbitration between different entities from different countries involving issues that extend further than domestic law.¹²

The presence and broad use of Arbitration internationally begs the question, "Why not Mediation?" The United States seems to be fighting the Mediation battle alone. Although there is pressure to establish and update Mediation rules at the International Chamber of Commerce, (ICC) the pressure is coming solely from the United States. In the United States, there are organizations and educational services that teach, practice, and embrace Mediation techniques.¹³ This is not necessarily indicative of the international

8. The WIPO Arbitration and Mediation Center, at <http://arbitrator.wipo.int/center/index.html> (last visited Sept. 15, 2000).

9. Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 94 (2000).

10. *Id.* at 73.

11. R. Doak Bishop & James D. McCarthy, *Toning Up For International Fights*, LEGAL TIMES, Aug. 3, 1998, at 32.

12. *I'll See You Out of Court*, *supra* note 1, at 18.

13. Ole Amundsen, *ADR 101: Finding a Course that Suits Your Needs*, at <http://www.conflict-resolution.net/articles/index.cfm?doc=training.cfm&title> (last visited Sept. 14, 2000). "A wide variety of training programs are available, which can accommodate a range of time constraints and cost concerns. Basic programs that introduce participants to various techniques in ADR are available through universities, private consultants, and state offices of dispute resolution." *Id.*

perception of Mediation. "Since the demand is only coming from the United States, the ICC is not taking [it] as seriously as it needs to" the international role of Mediation.¹⁴ Mediation is perceived as an American product, and its domestic popularity has not diminished. The American Arbitration Association reports an increase in the use and interest of Mediation in the United States.¹⁵

Under different names, Mediation has been used in other countries. However, resistance to using Mediation has been fed by the perception that the United States pushes its use internationally.¹⁶ Countries are not comfortable utilizing a system they are unfamiliar with, nor are they willing to use a system they see being pushed solely by the United States.¹⁷

Fifteen years ago, in Europe, Mediation and other ADR attempts were met with animosity.¹⁸ Only recently has Mediation made its way on the international agenda of ADR. Lately, there have been numerous ADR organizations formed. The involvement of European legislatures resembles the behavior that preempted the use of Mediation in the United States.¹⁹ This propensity indicates Mediation may be at an early stage of development in the international marketplace.

This is not to say there is no current international support for Mediation. The London Court of International Arbitration (LCIA) is adopting rules to assure that there are qualified mediators available.²⁰ "That's the cornerstone of the problem. You can't have Arbitration panels migrate to Mediation. Many of them are not trained in Mediation, they have a different outlook, they are more decision-making oriented than facilitative and evaluative oriented."²¹ Although this preparation indicates a concern for the future of Mediation, today the method of choice for resolving international disputes is unquestionably Arbitration.

Cost effectiveness and speed have been the emphasis in the recent international rule changes to national arbitral laws.²² These changes have further defined the popularity of Arbitration over Mediation.²³ Several noted reasons for Arbitration's international supremacy include; its enforceability through treaty obligations, its ability to provide a neutral forum, its ability to

14. *I'll See You Out Of Court*, *supra* note 1, at 18.

15. RICHARD HILL, PRIMER ON INTERNATIONAL ARBITRATION (1995).

16. *I'll See You Out Of Court*, *supra* note 1, at 18.

17. *Id.*

18. *Id.* at 22.

19. *Id.* at 18.

20. *Id.* at 17.

21. *I'll See You Out Of Court*, *supra* note 1, at 17.

22. Bishop, *supra* note 11, at sec. 32.

23. *Id.*

allow experts in the field of the dispute to be the decision makers, and it's becoming faster, and cheaper.²⁴

While these characteristics feed recent excitement and expansion of international Arbitration, there is fear that as American ideals, driven by litigation desires, become more influential, these characteristics may be threatened.²⁵ There are plenty of American attorneys who are trying to turn Arbitration into litigation.²⁶ The United States needs to take a cautious role not to push Arbitration internationally, and jeopardize an international backlash. Lack of enthusiasm for Mediation, driven by fear of American persuasion, should serve as an example to our leaders that aggressiveness may lead to international resistance in the use of Arbitration as well.

International Arbitration is supported and allowed by national laws.²⁷ Companies either agree via contract that Arbitration will be the means used to solve potential disputes, or, there is an agreement to arbitrate after a dispute arises. Primarily, Arbitration is prescribed by contractual agreement.²⁸ Five key elements of an Arbitration clause include: 1) a choice of law clause; 2) the venue; 3) the language to be used in the proceedings; 4) the number of arbitrators; and 5) the method of appointing arbitrators.²⁹ Arbitration is used successfully throughout the global marketplace. It is imperative the development and expansion of this process happen globally. To force American ideals through a global network will only threaten the historic success of ADR. "International cooperation is necessary to conduct harmonious trade and business relations, now being increasingly conducted in cyberspace."³⁰

IV. THE ABSENCE OF GLOBAL CONSISTENCY IN THE USE OF ADR

Successful network expansion of ADR techniques compels thorough understanding of the role ADR currently plays internationally. With recognition of the various perspectives and practices of ADR, a globally amicable system is more likely. An understanding of the domestic role Arbitration plays in countries like Hong Kong and India illustrates the ideological differences this international step must consider. The following information does not intend to summarize the entire practice of ADR in either

24. *Id.*

25. *Id.*

26. *I'll See You Out Of Court*, *supra* note 1, at 22.

27. Hill, *supra*, note 15.

28. *Id.*

29. *I'll See You Out Of Court*, *supra* note 1, at 17.

30. *Pornographers & Cybersquatters*, THE STATESMAN (INDIA), Apr. 2, 2000, available at 2000

place. Each would require, at minimum, a separate article. However, the glimpse provided serves to exemplify the differences that currently exist globally.

Hong Kong demonstrates enthusiasm in the increased use of Arbitration.³¹ The Hong Kong International Arbitration Center (HKIAC) serves to help consumers in both domestic and international affairs.³² The center provides services in negotiation, conciliation, Mediation, Arbitration, and litigation.³³ HCIAK incorporates the United Nations Commission on International Trade Law (UNCITRAL)³⁴ model law for international cases. The Laws of Hong Kong govern the domestic situations.³⁵ The strength of the system is that it combines “[m]aximum of independence from the court system, with a strong regime of court support in areas where this is required.”³⁶ In Hong Kong, Negotiation is the most common form of dispute resolution.³⁷ Hong Kong is currently attempting to expand the use of ADR to less typical areas. Currently, a pilot program is being tested to see if ADR can be used to solve divorce disputes.³⁸ This attempt serves to reduce the caseload of the court systems.³⁹ Hong Kong exemplifies the progressiveness of ADR. In Hong Kong, there is statutory law⁴⁰ that governs, one organization that assists clients, and an established ideology that ADR is very distinct from the court system.

India illustrates the newly recognized ability of ADR to empower the poor. In India, there is the general perception that the laws are tools to help the rich.⁴¹ Certainly with the increased association of ADR and technology, this perception will need to be addressed. Similar to the concept in Hong Kong, India attempts to separate ADR approaches from the court system.⁴² India also

31. David W. Rivkin, *Arbitration In P. R. China And Hong Kong*, DISP. RESOL. J. (Sept. 1994) (reviewing NEIL KAPLAN, JILL SPRUCE, & MICHAEL J. MOSER, HONG KONG AND CHINA ARBITRATION: CASES AND MATERIALS (1994)).

32. Hong Kong International Arbitration Centre, *HKIAC Guide For The Appointment of an Arbitrator*, at <http://www.hkiac.org/guide.htm> (last visited Sept. 9, 2000) [hereinafter HKIAC].

33. *Id.*

34. In June 1985, the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on International Commercial Arbitration (Model Law). Pierre Cornout, *The New International Arbitration Rules Of The American Arbitration Association And The UNCITRAL Model Law: A Comparative Overview*, INT'L L. PRACTICUM, Autumn 1993, at 20.

35. HKIAC, *supra* note 32.

36. *Id.*

37. *Id.*

38. *Hong Kong: ADR Developments*, WORLD ARB. & MEDIATION REP., June 1999, at 159.

39. *Id.* at 159.

40. For the relevant laws, see the Arbitration Ordinance Chapter 341, of the Laws Of Hong Kong.

41. D.K. Sanpath, *The View from India: Credibility is the Problem Reaching the Powerless with Mediation and Legal Advice*, 17 CONFLICT RESOL. NOTES 4 (April 2000), available at <http://www.conflictorg/vol74/credibility.html>.

42. *Id.*

incorporates the UNCITRAL model for international ADR and relies on Indian law for domestic situations.⁴³ Although there has been contract law and ADR practiced historically in India, only in the past twenty years has it been able to shed its pro-court bias.⁴⁴ The recent opening of the Tiruporur Mediation Center attempts to change the perception that resolution always favors the wealthy. The center emphasizes “[f]air play, justice, and give and take.”⁴⁵ It also utilizes local villagers in the operation of the center. Here, Mediation is the mechanism most utilized. Mediation has made great strides domestically to alleviate the powerlessness felt by the poor in India.⁴⁶ People once feeling powerless, now feel powerful. India’s ADR practices are delicately emerging to include a population of people who other wise feel left out. The technological future of ADR must be cautious not to reaffirm the traditional fears of the poor, in India and around the world, that this is a system for the wealthy.

The state of ADR in Hong Kong and India exemplifies the concept that the world is not necessarily on the same page. The use and recognition of ADR techniques is far from globally consistent. ADR’s multi-faceted role needs to be realized before a safe path for its future can be determined. Although the spread of ADR to the Internet offers exciting changes, its growth must promote the perception that this tool is not only for the wealthy. Likewise, the recognized success of ADR should encourage its expansion. The progression needs to be made with the knowledge of the differences that exist.

While the focus of this paper is on the international impact of this new technology, cultural sensitivity to the different domestic ADR practices is essential. The exchange of information internationally directly effects international relations.⁴⁷ Internet expansion has resulted in the common use of “global communication.”⁴⁸ With an awareness of the different uses of ADR,

43. “India passed the Arbitration and Conciliation Ordinance in January 1996. It is based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL). Goals of the new law are (1) to encourage alternative dispute resolution, establish an internationally-recognized legal framework for arbitration, consolidate domestic and international law, and (2) to ensure enforcement of foreign awards.” Carolita L. Oliveros, *International Distribution Issues: Contract Materials*, A.L.I., Mar. 2000.

44. Fali S. Nariman, *Courts And Arbitrators: Paradigms Of Arbitral Autonomy*, 15 B.U. INT’L L. J. 185, 189 (1997).

45. *Id.*

46. *Id.*

47. HOWARD H. FREDERICK, *GLOBAL COMMUNICATION & INTERNATIONAL RELATIONS* (1992).

48. *Id.* at 11. The author defines “Global Communication” as the “[i]ntersection of disciplines that studies the transborder communication of values, attitudes, opinions, information, and data by individuals, groups, people, institutions, governments, and information technologies, as well as the resulting controversial issues arising from the structure of institutions responsible for promoting or inhibiting such messages among and between nations and cultures.” *Id.*

the current Internet expansion will not jeopardize the existing international relations.

V. ADR ON THE INTERNET

It is logical that online ADR began with disputes arising out of Internet regulation. It is also not surprising that the "litigation-loving" United States was the origin of this new trend.⁴⁹ As of May 1, 2000, there have been 531 cybersquatting cases filed with the World Intellectual Property Organization (WIPO).⁵⁰ United States Senator Spencer Abraham introduced the Anti-cybersquatting Consumer Protection Act, establishing misdemeanor penalties for first time cybersquatting offenders, and Class E felony penalties for repeat cybersquatting offenders.⁵¹ Today, Cybersquatting is a crime.⁵²

The Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit organization that controls domain name⁵³ management.⁵⁴ As part of the options for resolving cybersquatting disputes, they offer opposing parties the ability to solve these disputes online.⁵⁵ There are a few providers recognized by ICANN to solve these domain name disputes.⁵⁶ One of the largest providers of online settlement processes for cybersquatting, is WIPO's global online Arbitration system.⁵⁷ "The Arbitration service, which enables companies to avoid costly lawsuits, aims to tackle obvious cases of people

49. Lesley Stones, *Online Arbitration Takes Off*, 20 BUS. DAY, Mar. 23, 2000 at 20, available at 2000 WL 745266.

50. The WIPO Arbitration and Mediation Center, at <http://arbiter.wipo.int/center/index.html> (last visited Sept. 15, 2000).

51. Peter Brown, *New Media and the Internet: Staying Interactive in the Hi-Tech Environment*, 590 P.L.I. (2000).

52. "A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person- (i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and (ii) registers, traffics in, or uses a domain name that- (I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark; (I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark; (I) in the case of a mark that is distinctive at the time of registration of the domain name, is a trademark, work, or name protected" Steven R. Borgman, *The New Federal Cybersquatting Laws*, 8 TEX. INTELL. PROP. L. J. 265, 268 (2000).

53. Domain names are artificial constructs that aid Internet users in identifying and distinguishing different sites on the Internet by providing a recognizable textual address. Jonathan Gaskin, *Policing the Global Marketplace: Wielding a Knife in a Gunfight*, COLUM. J. TRANSNAT'L L. 19, 23 (1999).

54. *eResolution Online Arbitration System Targets Cybersquatters*, ASIA PULSE, March 2, 2000, available at 2000 WL 2683898.

55. *Id.*

56. Thomas F. Gibbons, *Mediation, Arbitration Venture Into Brave New World*, 146 CHI. DAILY L. BULL., July 19, 2000, at 141.

57. Brown, *supra* note 51.

registering domain names in which they have no rights or legitimate interests”⁵⁸ The caseload has doubled in less than a month.⁵⁹ The director of WIPO’S Arbitration and Mediation center interprets these statistics to “[r]eflect the market’s growing confidence in the procedure and it’s efficient and balanced handling”⁶⁰ Although, the execution of this program started out focusing on a narrow range of disputes, it has triggered a whole new phenomenon in online dispute resolution.

The phrase ‘Online ADR’ generally refers to the “application of dispute resolution skills and resources over a network.”⁶¹ This definition goes far beyond settling domain name disputes. New trends in ADR on the Internet imply that we are just beginning to see the impact of this technology on the world of ADR. Cybersettle is part of the new genre of online options to settle all types of disputes.⁶² Although Cybersettle’s online service is new, it utilizes very simple traditional strategies.⁶³

Typically an insurance carrier representative will enter three confidential settlement offers through Cybersettle’s secure website, Cyberdocket.com. The claimants’ attorney is then contacted by claims facilitators from Cybersettle and invited to participate in the online resolution of the case. If the claimant’s attorney agrees, he submits three demands, one for each three rounds, via a secure input at the same website. If the offer and demand are within... 30 percent of the original demand, the case settles immediately for the average of the two amounts. If there is no settlement after three rounds, neither side is prejudiced because all the figures are held in strict confidence.⁶⁴

This technique has been used in traditional negotiations, designated as blind bidding,⁶⁵ but now it’s being done over a network, rather than a conference table. Cybersettle has been party to over 400 resolutions.⁶⁶ More than twenty

58. Business This Week 1, *supra* note 3, at 60; *The WIPO Dispute Settlement Process*, WIPO MAG., Feb. 2000.

59. *Id.*

60. *Id.*

61. Katsh, *supra* note 2, at 6.

62. Daniel Eidsmoe, *Calling Their Bluff Settlement Rates Low But Hopes Still High for Online Resolution of Personal Injury Claims*, 6 no. 2 DISP. RESOL. MAG., Winter 2000, at 9.

63. *Id.*

64. *Id.* at 10.

65. “Blind Bidding” refers to the process of both parties putting down on paper what they would accept as a settlement, giving the paper to the clerk, and splitting the difference in the numbers were within a given range. Kate Marquess, *Point, Click-Settle Quick! Online Negotiations Hailed for Efficiency, But Some Prefer Face to Face*, 86 APR. A.B.A. J. 82 (2000).

66. Scott Brede, *Cyber\$ettle-An Electronic Messiah Whose Time May Not Yet Have Come Before*

insurance carriers have used the service.⁶⁷ One of the keys to the success of online services like Cybersettle, is that it does not allow ego and personality to interfere with settlement, as they do in face to face negotiations.⁶⁸

Cybersettle is not alone. There are several existing websites where disputes can be settled over the Internet.⁶⁹ Furthermore, domain name disputes and insurance claims are not the only disputes being resolved. Another United States based service, clickNsettle.com,⁷⁰ currently offers Arbitration service for contracts, personal injury, commercial liability, medical malpractice, and employment practices.⁷¹ London Resolve⁷² a similar service out of the United Kingdom, specializes in online resolution of defective software and other computer crime cases.⁷³ NovaForum.com⁷⁴ a Toronto, Canada based operation, has contracted arbitrators from around the world, and guarantees online disputes will be settled within seventy-two hours.⁷⁵ The Toronto group sees their service as essential in bolstering consumer confidence in the online market.⁷⁶ "Burchetta, Goetz, and Roy Israel, CEO of National Arbitration and Mediation (NAM) Corp., contend their services can help settle any dispute as long as the question is 'How much?'"⁷⁷ The question of 'how much' is inherent in the majority of, if not all, disputes. The confidence in these online systems

Settling Claims in Cyberspace, Says One Wag, Lawyers Should First Learn How to Use the Internet, 25 THE CONN. L. TRIB., June 7, 1999, at 7.

67. *Id.* at 5.

68. *Id.*

69. Some of the other providers of similar services include: clickNsettle.com; eResolution.com; Settlementnow.com; and Online Ombuds Office, WIPO Arbitration and Mediation Center, Resolution Forum Inc., i-courthouse, Keylaw.com.

70. *Why clickNSettle.com?*, at http://www.clicknsettle.com/why_cns.cfm (last visited Sept. 14, 2000). "[C]lickNsettle.com offers a wide range of innovative dispute resolution products designed to meet the changing needs of businesses and individuals worldwide. From complete solutions for insurance companies, corporations, law-firms and e-commerce providers to highly customized individual programs, clickNsettle.com has the experience, services and technology . . . clickNsettle.com enables you to settle any dispute, anywhere in the world." *Id.*

71. Stones, *supra* note 49, at 2.

72. *Conflict Resolution*, at <http://www.londonresolve.com/Conflict.htm> (last visited Sept. 8, 2000). Provides, "[o]n-line and in-person process and expert alternative dispute resolution and consulting services that include: Negotiation, Settlement Negotiation, Mediation/ Conciliation, Meeting Facilitation, Co-mediation, Conciliation, Settlement Conference . . ."

73. *Id.*

74. NovaForum.com, *The Right Platform to Power Online Dispute Resolution Services*, at <http://www.novaforum.com/methods.stm> (last visited Sept. 10, 2000). This service "[c]ombines online collaboration tools, video, live chat, text and transcript capabilities with full case management, fact assessment, analysis, and weighted issue/interest variables." *Id.*

75. Financial Post, *eWorld*, NAT'L POST, June 8, 2000, available at 2000 WL 21838421.

76. *Id.*

77. Marquess, *supra* note 65, at 82.

indicates online Arbitration and Mediation services may redefine the world of ADR.

The most blatant benefit of using cyberspace as a venue, is that distance between parties becomes irrelevant. This characteristic clearly leads to the conclusion that online Mediation will be especially critical in the world of international Arbitration.⁷⁸ The biggest expense in disputes that cross international borders is travel time. Conducting these encounters online eliminates those expenses.⁷⁹ Without time or travel concerns, online dispute resolution can bring experts from all over the globe together.⁸⁰ "It could also resolve cross-border litigation. Instigating legal action in another jurisdiction is so complex and expensive that many cases never reach that stage."⁸¹

Cybersquatting is an international problem. Estimates suggest disputes of generic domain names could escalate into the tens of thousands.⁸² Disputes arising from Internet activity will certainly add to the assortment of international legal issues. "It should also be noted that national registrars are moving to the adoption of complaint management procedures with regard to domain names, which means that in the near future we can expect disputes over national identity domains."⁸³ The solutions to the domain name disputes illustrate the ability to utilize this technology to solve international disputes. Already, parties to WIPO's dispute resolution service come from all over the globe. "Given the global nature of e-commerce and the small dollar value of most consumer transactions, trying to settle disputes in court is probably not a practical option for most consumers and businesses . . . ADR can provide this option."⁸⁴ The global marketplace is becoming more and more intertwined through technological advances. ADR has proven effective and popular in the global marketplace. The Internet has provided a neutral, nearby venue for resolving long distance disputes. The combination of technology and long standing ADR techniques offers new opportunities to develop and control business relationships regardless of distance.

VI. HURDLES FACED BY ONLINE EXPANSION OF ARBITRATION

Only time will tell what, if anything, stands in the way of online ADR becoming as popular as traditional settlement options. However, even at the early stage it is in now, there are already hurdles that need to be overcome.

78. Benjamin Wittes, *The Office Of The Millenium*, 2 LEGAL TIMES 27, 44 (1997).

79. *Id.*

80. Stones, *supra* note 49, at 4.

81. *Id.* at 4-5.

82. *eResolution Online Arbitration System Targets Cybersquatters*, *supra* note 54.

83. *Id.*

84. Gibbons, *supra* note 56, at 24.

This technology requires trained experts, of which there is an apparent shortage.⁸⁵ Additionally, if this expansion is going to be successful, there has to be willing consumers. Currently, the consumer base is hesitant to jump online to solve disputes.⁸⁶ The potential of online expansion to destroy and cheapen the legal profession needs to be understood.⁸⁷ The high potential for fraud must be addressed.⁸⁸ Jurisdiction and choice of law in cyberspace, remain the subject of much intellectual debate.⁸⁹ Questions of Internet privacy and consumer confidentiality must also be answered. This section of the article could not possibly discuss all the problems online ADR faces, they are unknown. The next few paragraphs will discuss the most prevalent problems that will likely test our abilities to carry out online ADR successfully. This article will consider the lack of trained individuals, then consumer confidentiality and privacy concerns.

Technology is not going to sit idle while the legal profession waits to get comfortable with modern changes. Historically the legal profession as a whole is reluctant to technological advances. In the United States, the birthplace of online ADR, the fear is that our legal professionals are not prepared for the new role the Internet will play in their occupation. "Lawyers who don't or can't see that e-law represents the future may be quickly left behind."⁹⁰ The majority of people who use the Internet are not very sophisticated users.⁹¹ There are still many people who are not even connected to the Internet.⁹² Overall, the general public is fearful of conducting such consequential matters online.⁹³ Moreover, many attorneys have never ventured into cyberspace.⁹⁴ "Even some of the biggest promoters of ADR think the young industry isn't ready to make the

85. Stones, *supra* note 49. A general trend in recent articles discussing the Internet expansion of ADR point to the lack of trained professionals, as a problem faced by this technological advance. See, e.g., Jean Hellwege, *Nothin' But Net: Will E-Law Change the Practice of Law?*, 36 JUN. TRIAL 12 (2000).

86. Stones, *supra* note 49.

87. Hellwege, *supra* note 85, at 16. "[T]he new technology could degrade the profession. Several sites are full of slick content that cheapens what we as lawyers do." *Id.*

88. *Id.* "[T]he Internet offers increased opportunities for consumers to become unsuspecting victims of fraud. The potential for fraud is magnified considerably when you're using joethelawyer.com." *Id.* at 15.

89. See, e.g., Joanna B. Bossin, *What Constitutes Minimum Contacts in Cyberspace?*, 521 U.L. REV. (1997); Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J. L. & TECH. 3 (1997); Matthew R. Burnstein, *Conflicts on The Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75 (1996).

90. Hellwege, *supra* note 85, at 16.

91. Dave Thom, *E-mail Arbitration Takes ADR to Cyberspace*, N. J. L. J. Apr. 15 1996, at 15.

92. *Id.*

93. Stones, *supra* note 49, at 6.

94. Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and The Promise*, 49 DUKE L. J. 147 (1999).

move to the Internet.”⁹⁵ The services being provided online do not replace the roles of the trained professional. The goal of the online expansion, is not to replace lawyers; it is to adjust the role of lawyers in light of the available technology.⁹⁶ Ensuring these systems operate successfully, at a professional level, requires professionals that fully comprehend and are comfortable using the systems.

Although there is little consensus as to the best strategies and techniques for online ADR, there is little doubt that the need for those who understand the process of dispute resolution, and are comfortable with the machines being employed, is a necessity.⁹⁷ To assure quality service is being provided, professionals must be properly trained. Not only in the technological workings of the systems, but in their advisory positions. Both mediators and arbitrators must understand, and be trained in, their respective roles.⁹⁸ There is a lack of experienced arbitrators willing to preside online.⁹⁹ Although online services are being offered today, there is no way to assure a qualified representative and not a ‘computer geek’ is on the other end of the terminal.¹⁰⁰

A classic advantage to ADR is confidentiality,¹⁰¹ leaving the secrets of the parties private, in case trial is inevitable. The expansion of ADR to the Internet compounds the concern of confidentiality in ADR, with the concern of privacy of Internet use. In the United States, for example, statutory law mandates that “[a] neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided to the neutral.”¹⁰² Who has access to the information once it has been electronically transferred? The concern over Internet privacy increases with our use and dependence on the world of cyberspace. As the information on the Internet becomes more personal and consequential, the trouble over who may access the information grows.

Currently, the strongest existing safeguard to Internet privacy is a public key encryption.¹⁰³ Although it’s not comforting to Internet users, as you

95. *Id.*

96. Julie Brienza, “Web-Footed” Lawyers Dip, Not Plunge, Into the Internet, 35 DEC. TRIAL 12 (1999).

97. Katsh, *supra* note 2, at 6.

98. *Id.*

99. Stones, *supra* note 49, at 5.

100. *Id.*

101. *ADR and Technology, Special Supplement ADR, 2000, CPR’s Online Seminar*, 18 ALTHCL 129 [hereinafter *ADR and Technology*]. “Obviously one traditional lure of ADR from some parties standpoint is to preserve confidentiality.” *Id.*

102. 5 U.S.C. § 574(a) (2000).

103. “Encryption allows an individual using cryptographic algorithm and a key, to turn a message into gibberish. Once the message is sent to the intended recipient, the gibberish is decoded and becomes

browse, every electronic move you make, may be being watched, tracked, and recorded.¹⁰⁴ The Federal Trade Commission suggests four necessary elements to assuring privacy online. They propose; commercial operators should provide notice to their customers about how their personal information is used, offer the consumer a choice on whether their information is used, secure the information that is gathered, and allow the consumer access to their information to encourage accuracy.¹⁰⁵ Adopting an international model incorporating these elements will give the consumer more control. With increased control and increased confidence in the online process, perhaps more consumers will utilize the procedure. Moreover, with these additional safeguards, concern of who is watching our cyberspace activity will diminish.

While securing the information disclosed with encryption techniques, there is still the concern over whether the traditional confidentiality found in ADR will remain a feature in cyberspace. International arbitration is a highly competitive business.¹⁰⁶ Use of ADR techniques is consensual by the parties.¹⁰⁷ Different commercial providers of ADR services utilize different rules.¹⁰⁸ "In June 1985, the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on International Commercial Arbitration The Model Law represents a modern procedural framework which is liberal in its provisions and de-localized, without neglecting fundamental requirements of procedural justice or due process."¹⁰⁹ Under the UNCITRAL Arbitration Rules, confidentiality is granted by article 25 and article 32. Article 25 asserts that hearings shall be held in camera unless the parties agree otherwise, and article 32 provides that the award may be made public only with the consent of both parties.¹¹⁰

Considering the lack of uniformity in international ADR, there is inherently lack of uniformity in online ADR. In order to assure the consumer is protected by the traditional concept of confidentiality in an ADR proceeding, in cyberspace, commercial providers must make their rules unambiguous to users.¹¹¹ Furthermore, the old saying "buyer beware," applies full force. Online consumers must understand that Internet activity is vulnerable to fraud and

readable." Sheri Hunter, *The Internet & Communications Law: Defamation and Privacy Laws Face The Internet*, 17 COMM. LAW. 16, Fall 1999, at 21.

104. *Id.* at 20.

105. *Id.*

106. Drahozal, *supra* note 9, at 83.

107. *Id.* at 82.

108. Vivienne M. Ashman, *UNCITRAL Initiatives To Further Harmonize And Modernize Arbitration Laws, Rules And Practices* 624 P. L. I. 635, 638 (2000).

109. Cornout, *supra* note 34, at 20.

110. Ashman, *supra* note 108, at 638.

111. Hunter, *supra* note 103, at 20.

privacy invasion. Consumers must also understand the rules of the ADR procedures that are being offered by a particular provider. This is not to suggest there is no governing body of law that applies to the Internet, or that there is no protection if laws are violated in cyberspace. "All existing national laws apply to cyberspace, in theory; the difficulty is knowing how to apply or interpret them."¹¹²

VII. CONCLUSION: FORECAST ON "CYBER-SETTLING"

"ADR took a long time to take root in the legal profession, and online ADR is one of those things we're going to have to do very slowly and let people get comfortable with."¹¹³ There are mixed predictions on what role the Internet will have on ADR, but there is no denying the Internet will have an impact on ADR and the legal profession in general. Supply and demand will dictate the growth of this new commercial phenomenon. Consumers that currently use ADR generally look for speed, effectiveness, expert knowledge, and cost in the dispute resolution mechanisms they employ.¹¹⁴

Certainly, the idea of conducting Mediations and Arbitrations in cyberspace would have sounded delusional to our legal predecessors. However, online ADR may become more expansive than ever imagined. The idea of an entire online courthouse was made a reality over a year ago:¹¹⁵

I-Courthouse provides jury trials for the Internet community. The firm provides a service to individuals and businesses interested in having their disputes evaluated or decided online by a jury of their peers. The service is also marketed to attorney's who wish to conduct mock trials to gauge their strengths and weaknesses of their case before trial.¹¹⁶

In this system, everything takes place online. The use of audio, video, graphic, and other digital media allows for evidence exhibits. There is a jury selection process, and of course verdicts and verdict summaries.¹¹⁷ The ingenuity clearly exists to expand online options. The question is: Will it work?

After all the exciting options this new technological step offers, there seems to be two major setbacks. The predominant criticism is that the

112. Richard Hill, *Will Cyberspace use Cybercourts?* INT'L COMM. LITIGATION, Oct. 11, 1997.

113. Thom, *supra* note 91, at 15.

114. Hill, *supra* note 15, at 34.

115. Gibbons, *supra* note 56, at 6.

116. *Id.*

117. *Id.*

technology will detract from the human aspect needed in ADR, and as a result, the application is limited to more impersonal situations. "Once you start the practice of law in the virtual setting, a degree of personal touch disappears to become nothing more than cook-book law" ¹¹⁸ Of course, there is additional criticism and obstacles, but the majority of the negative commentary concentrates on this theme. Perhaps this is a real concern, or perhaps this concern is the reaction of professionals unwilling to venture into the new world of jurisprudence that cyberspace encourages.

The forecast for the future of online ADR is certain. It is not the future; it is now. The future is the expansion of its use, and the adaptability of its services. It is only a matter of time until there is comfort in conducting ADR online and the services that provide online ADR take off. ¹¹⁹ As the richness and adaptability of online communications continues to flourish, online opportunities for ADR will too. ¹²⁰ There is still a severe need to improve the software that operates these systems. ¹²¹ "But it's early and technology will certainly change as rapidly as e-commerce itself." ¹²²

In conclusion, it seems we are on the brink of an online revolution. The technology already marginally exists to conduct online ADR. There is software that allows it to operate. There are willing participants, willing clients, and more and more disputes with every business and Internet transaction. Test programs and pioneers in the industry demonstrate money making potential and success. It is very inviting to jump in and get started, but there is a lot more on the line than just getting "online". This technological advance will undoubtedly affect international business relationships. The integrity of the global legal profession also hinges on how seriously we consider each move. It is far more important to be patient and ensure proper training, international education, consumer protection guidelines, and some international order of information than to jeopardize failure.

118. Hellwege, *supra* note 85, at 16.

119. Brede, *supra* note 66, at 5.

120. *ADR and Technology*, *supra* note 101.

121. Gibbons, *supra* note 56, at 6.

122. *Id.*