Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities

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Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities†

by
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Introduction

By almost any means of measurement, 1996 was a breakthrough year for the use of the "Information Superhighway." Use of the Internet, various online services, e-mail, the World Wide Web, and other means of computer-based communication became quite commonplace in both the legal and business worlds. As this process occurred, it was inevitable that: (1) disputes would arise out of the use of this new technology, and (2) this new technology would be used to help resolve disputes.

This Article examines the actual and potential application of alternative dispute resolution—principally arbitration—to disputes arising out of online transactions, as well as the application of online technology to alternative dispute resolution. This Article will also discuss the perceived benefits and likely challenges associated with these concepts.

I
Background

A. Alternative Dispute Resolution

Every year, millions of business contracts are written which include provisions which establish dispute resolution procedures for use by the parties. Many, if not most of these predispute resolution provisions incorporate by reference the rules of an alternative dispute resolution (ADR) agency, such as those promulgated by the American Arbitration Association.1

By its very nature, ADR is an alternative to litigation—by electing to use ADR, the parties use a process separate and apart from litigation.2 The two major forms of ADR are mediation and arbitration.

1. Howard J. Aibel & George H. Friedman, Drafting Dispute Resolution Clauses in Complex Business Transactions, 51 Disp. Resol. J. 17 (1996). The American Arbitration Association (AAA) is a public-service, not-for-profit organization, see IRC § 501(c)(3) (1996), offering a broad range of dispute resolution services to corporations, attorneys, insurers, individuals, trade associations, unions, consumers, and all levels of government. Services are available through AAA headquarters in New York City and through offices located in major cities throughout the United States. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement. A full description of the AAA may be found at its home page on the World Wide Web. (visited Feb. 27, 1997)<http://www.adr.org>.

2. Id.
1. Mediation

Mediation is a process in which the parties discuss their disputes with an impartial person who assists them in reaching a settlement.\(^3\) The mediator may suggest ways of resolving the dispute but may not impose a settlement on the parties.\(^4\) Mediation offers the advantage of informality and reduces both the time and expense needed to resolve disputes.\(^5\) Perhaps the greatest benefit, aside from its relatively low cost, is that mediation works—mediation has an 85% settlement rate.\(^6\)

2. Arbitration

Arbitration is generally defined as the submission of disputes to one or more impartial persons for final and binding determination.\(^7\) The perceived benefits of arbitration are relative speed and low costs, informal procedures, impartial and knowledgeable neutral arbitrators, privacy, and very limited judicial review.\(^8\)

3. Hybrid ADR Processes

In addition to mediation and arbitration, a host of hybrid ADR processes have been developed over the years. A few are defined below.

a. Mini-Trial

A Mini-Trial “is a structured dispute resolution method in which senior executives of the parties involved in legal disputes meet in the presence of a neutral advisor and, after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement.”\(^9\)

b. Mediation/Arbitration

Mediation/Arbitration is a process by which the parties first attempt to resolve their dispute by mediation. If this does not result in a settlement, any party may insist that the matter be submitted to

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4. *Id.* at 60-61.
5. *Id.*
8. *Id.*
9. *Id.* at 20.
In some instances, the parties elect to have the same individual serve as both mediator and arbitrator. In some instances, the parties elect to have the same individual serve as both mediator and arbitrator.

c. Arbitration/Mediation

"Just as the parties can provide for mediation followed by arbitration, they can also do the reverse: i.e., establish a conventional arbitration process followed by mediation, which works as follows: the parties complete the arbitration process, with the arbitrator rendering a written award but not transmitting it to the parties." For a specified time period, the parties then mediate the case "before either the same neutral or a different individual." Having completed an arbitration, been exposed to the strengths and weaknesses in their own case as well as that of their adversary, and knowing that the arbitrator has already prepared an award, the parties are more likely to come to a mediated settlement. If this does not result, however, the arbitration award is released.

B. The Information Superhighway

American society is now undergoing a profound change. Armed with powerful and inexpensive computer technology, businesses, organizations, governments, and individuals are increasingly using computer networks to conduct transactions, promote goods and services, and exchange information on virtually any subject. Over the past several years, there has been an undeniable explosion in the use of the "Information Superhighway," a term coined by Vice President Al Gore. The term generally describes the use of computer networks for economic, social, governmental, and other activities. Business uses include communication, marketing, research, and financial transactions.

In the past two years, the Internet has become a familiar term to nearly everyone. Originally started as a Defense Department project to support communication between computers at research facilities, the Internet has grown into a world-wide network of countless

10. Id.
11. Arnold, supra note 3, at 63-64.
12. Id.
13. Id.
14. Id. at 76.
15. Id.
computer systems. By some estimates, 37 million people use the Internet. A huge amount of information on an almost infinite number of topics is now available online, and virtually any computer can connect to the Internet.

The fastest-growing component of the Internet is the World Wide Web, which connects, text, color photos, video clips, and sound, using so-called hypertext technology. The Web gives anyone the ability to make information available to other Internet users. Web pages come alive with high resolution color graphics, sound effects, and even motion pictures. Once connected to a Web site, a user can click on links that connect to other sites anywhere around the world. Users can also easily download information for local use.

II
The Use of ADR for Online Disputes

A. Notable Projects

During 1996, several innovative projects were launched to demonstrate the applicability of ADR to disputes arising in an online context. Other such efforts are in the works for the near future.

1. The Virtual Magistrate Project

In the Fall of 1995, a group of individuals involved in online communication and alternative dispute resolution convened in Washington for the purpose of exploring how online technology could be used to resolve online disputes. Very quickly, the concept of the Virtual Magistrate Project was agreed upon: a one-year demonstration

19. Id. See also Becker & Gerstein, supra note 17, at 13.
program would be established to develop an online dispute resolution system for addressing some of the disputes that may arise between online providers, subscribers, and others. Administration and operation of the project would be completely online, using the World Wide Web as a gateway. During the first months of 1996, the project took shape as its web site was developed, links to project partners were created, rules were established, a panel of arbitrators was identified and trained, and the web site was tested for technical performance. On March 4, 1996, the Virtual Magistrate Project was officially launched.

a. Virtual Magistrate Partners

The Virtual Magistrate Project is a joint venture of the Cyberspace Law Institute, the American Arbitration Association, the National Center for Automated Information Research, and the Villanova Center for Information Law and Policy. The Cyberspace Law Institute has overall operational and policy-making authority of the project. The American Arbitration Association acts as administrator of any cases submitted to the Project. The Villanova Center for Information Law and Information Policy provides the online gateway to the project, including the web site containing project materials, forms, rules, and the like. The National Center for Automated Information Research provided the initial funds for the Project.

21. Friedman & Gellman, supra note 20, at 40.
22. Id.
24. For a description of the AAA, see supra note 1.
25. The National Center for Automated Information Research (NCAIR) is a non-profit, educational corporation engaged in the study and application of technology to the legal and accounting professions. Its purposes are: “to study modern methods of research and information retrieval, to educate the professions in these methods, and to further the development and availability of these methods. . . .” NCAIR (visited Apr. 24, 1997) <http://www.law.vill.edu/ncair>.
26. The Villanova Center for Information Law and Policy (VCILP) is affiliated with the Villanova University School of Law, and is supported by grants from NCAIR. It cooperates with other interested law schools and all levels of government “to implement a cooperative distributed system of legal information through the Internet.” It also conducts research related to the field. See VCILP (visited Apr. 24, 1997) <http://www.law.vill.edu>.
27. Friedman & Gellman, supra note 20, at 40.
b. Project Goals

The primary short term goal of the project is to demonstrate that online technology can be used to resolve online disputes in a quick, cost-effective, accessible means.\(^{28}\) Longer term goals include determining the utility of online dispute resolution to other classes of cases, as well as the possible establishment of an online industry-wide protocol to resolve disputes through alternative dispute resolution.\(^{29}\)

c. How the Virtual Magistrate Operates

When a new subscriber logs onto an online service for the first time, he or she typically is required to read and acknowledge an online “terms of service” or “signup” agreement that sets forth the legal relationship of the parties.\(^{30}\) Since relatively few of these agreements currently provide for the resolution of disputes through arbitration, parties wishing to use the Virtual Magistrate Project must agree to submit disputes to the program on a case-by-case basis.\(^{31}\) In effect, they execute a submission to dispute resolution, at that time determining whether they wish to be bound by the decision of the Virtual Magistrate who essentially serves as an arbitrator.\(^{32}\)

d. Disputes Covered

The types of cases that can be submitted to the program are limited to disputes between users of online systems, system operators, and those who claim to be harmed by wrongful messages, postings, or files.\(^{33}\) These can consist of complaints about alleged copyright or trademark infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate materials, invasion of privacy, and other wrongful content.\(^{34}\) Some examples are:

- SUBSCRIBER posts a message in a discussion area of AMERICA ONLINE which, in the view of AOL defames an individual or corporate entity. AOL, based on authority in its terms of

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28. Id.
29. Id.
31. Id.
32. Id.
33. Id.
34. Id. at 41.
service agreement, deletes the posting. SUBSCRIBER, citing the First Amendment, cries foul.

- SUBSCRIBER posts a message in a discussion area of COMPUSERVE offering to sell certain software. The alleged creator of the software notifies COMPUSERVE that she is the owner of the software and that the provider is abetting a copyright violation. SUBSCRIBER claims original ownership of the software.

- SUBSCRIBER posts a message offering to sell Internet e-mail addresses for a fee, which PRODIGY believes is fraudulent or deceptive. PRODIGY removes the posting, and SUBSCRIBER protests.

e. Case Intake

Users of the Virtual Magistrate access the system via the project's home page on the World Wide Web. They can also gain access through the home pages of the Virtual Magistrate partners. The project site contains the Virtual Magistrate rules, a project description, information on recent developments, biographies of the arbitrators, training materials, a constantly updated docket, and an electronic docketing form. A party wishing to file a case completes and transmits the online filing form which results in a download to the AAA's system administrator.

NCAIR paid almost all costs of operation of the project. There was an initial $10 docketing fee to discourage frivolous filings, but this was dropped after a few months. Upon filing, the case is reviewed for acceptance to the program, and the parties are notified by the AAA system administrator of the outcome.

f. Appointment of Virtual Magistrates

Once the case is accepted, the AAA appoints a single arbitrator ("magistrate"), who is selected randomly by the AAA from the pool of eight individuals who have been qualified by the AAA and CLI,
and trained by the AAA. The arbitrators, who do not have to be attorneys, were selected based on their knowledge and experience relating to online technology. They receive compensation of $250 per case through funds available to the project.

g. The Case Administration Process

Special rules were developed for the project to address the special needs of online case administration. To the extent they do not conflict, the AAA's Commercial Arbitration Rules also apply. Generally, all communications take place via e-mail. These include routine "correspondence" between the parties and with the AAA and the arbitrator, the filing of briefs, and the award of the arbitrator. Each case has a unique docket number which is available online through a password-protected process. Once the case is concluded, however, the docket becomes available to the public. The rules provide that decisions are normally reached within three business days after acceptance of a complaint by the project. Awards are normally accompanied by opinions.

h. Scope of the Arbitrator's Authority

Arbitrators serving under the Virtual Magistrate project will generally be deciding whether "in light of available information, network etiquette, applicable contracts, and appropriate substantive laws, a system operator would be acting reasonably if it withheld postings from public access."

42. *Id.* at 41.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 42.
50. *Id.* at 41.
51. *Id.*
52. *Id.*
i. Experience Thus Far

The first case accepted to the project was *Tierney v. America Online (In re: E-Mail America).* Tierney, an AOL subscriber, objected to what he considered to be a deceptive e-mail advertisement from an outfit called E-mail America. He asked that the posting in question be deleted. AOL agreed to submit the dispute to the Virtual Magistrate Project. E-mail America allegedly did not respond to invitations to participate.

Within four days after submission of the dispute to the arbitrator, an award was issued which directed America Online to remove the offensive posting, which it subsequently did. Of interest, given the great speed at which the case progressed, were the geographic locations of the parties: AOL—Virginia, Virginia; Mr. Tierney—Maine; Virtual Magistrate Director—Washington, D.C.; Virtual Magistrate Web Site—Pennsylvania; AAA Headquarters—New York City; AAA-Administrator—Syracuse, N.Y.; and of course the arbitrator—Arkansas.

2. The BBBOnline Project

Conceived in late 1996, and scheduled to be launched during the first half of 1997, the BBBOnline project was established by the Better Business Bureau (BBB) to deal with disputes arising out of the purchase of goods and services via the web and various online services. The project essentially works as follows: in exchange for the right to post the BBB Online symbol on its web page, an online vendor makes several promises concerning its behavior. A key promise is to arbitrate, upon the demand of the customer, any disputes arising out of an online sale. The underlying premise of the project is that the migration of sales to the online realm has and will result in

54. Id.
55. Id.
56. Id.
60. Id.
growing problems of consumer confidence. For example, is the vendor legitimate? Will the goods be delivered as promised? Will they perform as promised? Will only authorized charges be posted to the customer's account? While these issues are present when goods are purchased by telephone or even in person, the "virtual" nature of the web increases the potential for such problems.

In theory, the BBBOnline symbol will be somewhat like a Good Housekeeping seal of approval. The customer gets some level of assurance that he or she is dealing with a legitimate vendor, with the BBB ready to step in and see to it that the vendor lives up to its promises (including arbitration at the option the customer). The program promises to monitor compliance, and also has established a mechanism for customers to validate the BBBOnline seal appearing on the customer's screen.

3. The Online Ombuds Office (University of Massachusetts)

This project, established in 1996, operates similarly to a traditional ombudsperson, except that the "office" exists in cyberspace on the World Wide Web. The physical location of the individuals serving in the ombuds role is therefore irrelevant. Besides offering the ombuds service for a variety of online disputes, the Online Ombuds Office web site contains extensive materials and case references which, in the view of the project directors, may promote settlement of disputes without the need for intervention by an online ombudsperson. The program plans to make use not only of e-mail, but also discussion groups and emerging videoconferencing technology.

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63. Id.
64. Id. By clicking on the "BBBOnline" icon, a user can ascertain that the icon is valid and authorized for use in that vendor's site.
66. Id. at 966-69.
67. Id. at 969.
4. America Online's “24-hours in Cyberspace” Promotion

While none of the major online providers has yet made the leap to including arbitration in its basic terms of service or sign-up agreements, America Online dipped its toe in the waters in early 1996, when it launched its so-called "24-hours in Cyberspace" promotion. This activity was essentially a contest, and the program rules contained a unique provision that any disputes would be resolved by arbitration conducted under the auspices of the American Arbitration Association. While the use of ADR to resolve disputes arising out of contests and promotions is not new, it is believed that America Online's contest was the first to utilize ADR for an online contest.

B. Online Transactions Amenable to Online ADR

As will be discussed in Part III, it is not only the author's view that online ADR can and ultimately will be applied to almost any kind of dispute, but also that disagreements arising out of some type of online transaction by their nature lend themselves to online ADR. Typically, a common denominator is that the event underlying the dispute relates in some way to the material available online. This in turn makes the dispute more amenable to the use on an online system to resolve differences between the parties. The following example illustrates why this is so.

CUSTOMER purchases software through the web. In her view, it does not perform as warranted by the VENDOR. VENDOR claims that the CUSTOMER's expectations are unrealistic and refuses to give a refund.

69. See, e.g., America Online Terms of Service (providing disputes be resolved by litigation in Virginia)(on file with author).


71. For example, the Atlanta Journal-Constitution "Atlanta Games" web site ran an Olympics trivia contest during the summer of 1996. Section 7 of the official contest rules provided that disputes arising out of the contest would be settled by arbitration under the auspices of the AAA. See Atlanta Games (visited Apr. 24, 1997)<http://atlantagames.com/buffs/buffer2.html>. Similarly, in 1994, General Mills included an arbitration clause for its Sega game sweepstakes, with the arbitration provision appearing directly on boxes of Honey Nut Cheerios. See Breakfast of Arbitrators?, WALL ST. J., June 30, 1994, at B1.

72. See supra note 70 and accompanying text.

73. See infra Part III.A.

74. Id.

75. Id.
Online ADR may work in this instance because: (1) both parties are familiar with the web and how to use it; (2) both parties presumably have e-mail capability; and (3) the parties have an already-existing financial relationship, making financial transactions easier to effect. Conversely, where a dispute does not arise from an online transaction, any one of the factors articulated above may be missing, thus making use of online ADR difficult, if not impossible.

Explored below are several substantive areas well-suited for using online ADR.

1. Internet or Online Service Provider Signup Agreements

Internet Service Providers (ISPs) such as Netcom, or Online Service Providers (OSPs) such as America Online inevitably have a sign-up agreement or terms of service agreement that a new user must accept at the time of enrollment. Typically, there is no negotiation of this document, which is presented on a “take-it-or-leave-it” basis. The new user is asked to scroll through the document, and indicate his or her acceptance by clicking on an icon. By so doing, a contractual relationship is formed between the provider and the user.

While some smaller ISPs have begun to use arbitration clauses in their sign-up agreements, the major providers have not yet done so. ADR seems well-suited here, given that the provider may otherwise find itself subject to litigation in any number of jurisdictions, foreign and domestic. By utilizing ADR, the parties would seemingly benefit in terms of time and money. The provider could limit disputes to certain classes, such as intellectual property and defamation matters, to avoid being subjected to petty claims over billing.


77. See, e.g., America Online Terms of Service, supra note 69.

78. Id.

79. For example, the Terms and Conditions for Minnesota OnLine provide that “All disputes arising out of or relating to these Terms and Conditions . . . shall be settled by arbitration . . . in accordance with the then existing Commercial Arbitration Rules of the American Arbitration Association.” Minnesota OnLine (visited Apr. 24, 1997)<http://www.state.net/MNonline/term.html>.

80. See Friedman & Aibel, supra note 1, at 18 (discussing relative benefits of arbitration).
2. Software Purchases

For years, software purchases have generally been subject to a "shrink-wrap" license, which the customer accepts by breaking the wrap and/or using the software. Increasingly, software is being sold over the Web, and the shrink-wrap license is being applied there as well. Whether software is sold physically (i.e., via disks or CD-ROM that the customer literally possesses) or is downloaded from the Web directly into the purchaser's PC, it would seem that disputes arising out of this relationship would be amenable to online ADR.

3. Electronic Commerce

As online commerce becomes more prevalent, the potential for disputes will increase. These matters can take the form of quality or delivery disputes as described above, in which case the principal parties are the purchaser and the vendor. Matters can also take the form of disputes between a customer and a financial institution, such as a credit card issuer. Regarding the latter, ADR has increasingly been used in the financial services area, and arbitration clauses are already appearing in credit card agreements. Disputes in this context can arise either where a customer believes a charge should be removed from a credit card account, or where the customer has some other type of dispute arising from an online banking transaction. Under any of these scenarios, online ADR would seem to be a feasible and beneficial means for resolving disputes.

81. See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)(upholding the enforceability of a shrink-wrap license). See generally Michael J. Dunne & Elizabeth A. Barba, Enforceability of Shrink-Wrap Licenses, N.J. Law., Sept. 1996, at 18. For an analysis of the major software firms, and their practices relative to selling software online, see Fred M. Greguras, Trudy A. Golobic, & Rebecca Duncan, Online Software Licensing, 9 CORP. ANALYST 122, 123 (1996).
82. See id.
83. See Part II.A.2 supra.
85. Froomkin, Flood Control, supra note 84, at 449-78.
4. Domain Name Registration

An individual or entity seeking to establish a presence on the
world wide web must register a domain name with InterNIC, a not-
for-profit organization. For example, the American Arbitration
Association's world wide web page address is: http://www.adr.org.
The “adr.org” portion of the address is the Association’s domain
name.

During the past two years, disputes have arisen when an
organization with a registered trade name attempted to register a
similar domain name only to find that the name had been “taken” by a
prior registrant. Recent changes in the InterNIC domain name
registration procedure require the registrant to attest that they are not
infringing on a trade name (the classic example was
“McDonalds.com”). If a name is challenged, InterNIC can place a
“hold” on the use of the domain name, and let the parties in interest
work out their differences. The InterNIC domain name registration
agreement already has an optional arbitration clause, calling for
disputes to be resolved under the rules of the American Arbitration
Association, but there is presently no requirement that disputes be
resolved online. It would seem to be a natural progression to call for
the use of online ADR.

86. Steve H. Bazerman & Jason M. Drangel, Domain Name Disputes: Trademark Dilution
to the Rescue, N.Y.L.J. Dec. 9, 1996, at 1. See also InterNIC Domain Name Registration
87. Id.
88. See generally Deborah Howitt, Note, War.com: Why the Battles Over Domain Names
89. See Seyamack Kouretchian, Revised Rules Govern Domain-Name Disputes, Nat’l. L.J.,
90. Id.
91. See InterNIC Domain Name Registration Agreement, supra note 86.

The Federal Trademark Act of 1995, enacted on January 16, 1996, adds a new provision to
section 43 of the Lanham Act, 15 U.S.C. § 1125, which makes injunctive relief available in the
event unauthorized use of a trademark results in “dilution” of the mark. 15 U.S.C.A. § 1125
(West 1996). Previously, the law limited such protection to instances where the unauthorized use
caused “confusion.” Presumably, this new legislation can be used where use of a domain name
causes dilution of the registered trade name. See Howitt, supra note 88, at 729-30. This in fact has
already occurred in at least two reported cases. In the first, Hasbro, Inc. v. Internet Entertainment
Group, Ltd., 40 U.S.P.Q.2d (BNA) 1479 (W.D. Wash. 1996), the court enjoined use of the
domain name “candyland.com” inasmuch as it diluted Hasbro’s use of the term “Candyland,”
which it has registered in 1951 in connection with its board game. See also Intermatic, Inc. v.
III
Application of Online Technology to Alternative Dispute Resolution

As the Internet and its fastest growing component, the World Wide Web, burst into the consciousness of the legal and business worlds during the past year, observers began to suggest that the benefits of emerging online technologies ought to play a role in streamlining the paper-laden way we resolve disputes.92 While the major purpose of projects such as the Virtual Magistrate of the Online Ombuds Office was to demonstrate the applicability of online ADR to online disputes, a concomitant goal was to demonstrate that online technology had a role to play in the administration of ADR in general.93 That is, while disputes arising out of online transactions are especially amenable to the use of online ADR, it is also evident that the use of online technology can be beneficial to the process by which disputes of any kind are resolved. At the same time, application of online ADR also presents several challenges.

A. Benefits of Online ADR

Online ADR offers several benefits for resolving business disputes:

1. Time Zone Differences

Communications problems presented by parties and counsel being located in several times zones diminish greatly through the use of online ADR. While some will assert that use of a fax can have the same benefits as e-mail, a closer inspection proves this is not necessarily so.94 For example, sending multiple faxes to several recipients can be time-consuming, if not expensive (with attendant long-distance charges). A broadcast e-mail, by contrast, takes mere seconds of connect time to a local phone number.95

2. Always-Open ADR Providers

Perhaps of more benefit is the ability to obtain case data and other information in real time, irrespective of whether the ADR

92. See, e.g., Friedman & Gellman, supra note 20, at 38.
93. Id.
95. Id. at 21.
provider is officially open for business when seeking the information. For example, the Virtual Magistrate’s docket is accessible to the parties at all times, thus allowing them free access to all documents relating to their case. With a link to the AAA’s home page, users may obtain various ADR form documents and rules around the clock.

3. Scheduling

The task of scheduling an arbitration hearing can be time-consuming, with phone and fax-tag being quite common. Use of e-mail simplifies this task. The benefits are enhanced if the parties conduct the arbitration “hearing” electronically, since the need to deal with the logistics of travel vanishes.

4. Economics

In addition to the much less expensive nature of e-mail versus fax for basic communications, added cost-savings result from transmission by e-mail of longer documents related to the case. These savings pale by comparison to those realized if the parties agree to conduct their hearing electronically, thus avoiding the need for themselves, counsel, and witnesses to assemble in a physical location.

5. Electronic Conferencing

In large, complex business disputes, prehearing conferences are often necessary to resolve procedural issues before the evidentiary hearings can commence. Often, this presents the likelihood of one or more administrative or procedural conferences with the administering organization or the arbitrators. Use of online technology permits these conferences to take place electronically, in private discussion areas, avoiding either expensive long-distance teleconference charges, or even travel and related expenses.

B. Challenges to Be Resolved Relative to Online ADR

The benefits that online ADR can bring to business disputes also raise challenges that require resolution before online ADR can be fully effective.

96. Friedman & Gellman, supra note 20, at 40.
97. Merrill, supra note 94, at 21.
98. Id.
99. Id. at 21-22.
100. See, e.g., AMERICAN ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES 10 (1996).
1. **Place of Hearing**

For enforcement and applicable law purposes, the “place” of an arbitration is of great importance.\(^{101}\) What is the “place” of a virtual arbitration? It is likely that this issue will be addressed either in the parties’ arbitration agreement, or in the development of the ADR rules of the various organizations that provide these services.

2. **Language**

As global trade increases, the use of ADR to resolve international business disputes will also increase. While the international arbitration rules of the AAA and the International Chamber of Commerce, among others, deal with applicable language for the arbitration proceeding,\(^{102}\) ground rules will have to be established relative to the language to be used for e-mail communications in online ADR programs.

3. **Accessibility**

While projects such as the Virtual Magistrate correctly assume that parties and counsel using the program have easy access to the World Wide Web and some level of e-mail capability, this is not yet the case for all levels of business disputes.\(^{103}\) Use of e-mail has increased dramatically in the legal and business worlds during the past two years,\(^{104}\) and will continue to do so, thus rendering this issue moot in the future. At the present time, however, e-mail use and web access is not universal.\(^{105}\)

4. **Security**

The Internet, despite recent improvements in technology, can still be porous when it comes to the security of data transmitted electronically.\(^{106}\) Use of the web as a gateway to an online ADR program facilitates universal access to the system, but still presents

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103. Merrill, *supra* note 94, at 20. Merrill estimates that “one third of attorneys in private practice” have e-mail.


105. *Id.*

106. *Id.* at 23.
some security challenges with regard to information the parties desire to keep confidential. Encryption software continues to improve security, but online ADR still needs improvements in this area. Other related shortcomings of currently available technology which directly bear on the use of online ADR include the lack of reliable proof that e-mails were received by the intended recipient and the need for a digital signature to ensure that e-mails received were actually transmitted by the alleged author and not an impostor.\footnote{Id. at 23. See also Mark E. Staib, \textit{British Court Authorizes E-Mail Service of Process}, 22 ABA LITtg. NEWS 3 (1996).}

5. Writing Requirement for Arbitration Clauses

The Federal Arbitration Act, and all state arbitration laws, require that the agreement to arbitrate must be in writing (although not necessarily signed).\footnote{9 U.S.C. \textsection 2 (1994). For a discussion of the enforcement of agreements made electronically, see Raymond T. Netter, \textit{Information Age in Law: New Frontiers in Property and Contract}, N.Y. Sr. B.J., May-June 1996, at 28, 31.} Although it is the author's view that an arbitration agreement existing in cyberspace satisfies the writing requirement of the Federal Arbitration Act, this issue has not yet been litigated.

6. Ambiguity of Statutes as to Subject Matter Arbitrability

The use of arbitration to resolve a host of subject matter disputes is now well-accepted. Over the course of the last decade, the United States Supreme Court issued one decision after another affirming the use of arbitration to resolve disputes previously ruled not arbitrable, such as securities disputes, age and race discrimination, and antitrust matters.\footnote{Decisions from the United States Supreme Court over the last several years have endorsed and supported arbitration, even in the face of potentially conflicting statutes. In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983), the Court held that the U.S. Arbitration Act establishes a “federal policy favoring arbitration.” In Southland Corp. v. Keating, 465 U.S. 1, 10 (1984), the Court ruled that the United States Arbitration Act creates federal substantive law that preempts the involuntary application of conflicting state laws, where the underlying transactions involve interstate commerce. Later, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628-29 (1985), the Court ruled that international antitrust disputes were subject to arbitration. In two companion cases in the late 1980s, Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 258 (1987), and Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480 (1989), the Court found, respectively, that disputes under the 1934 Securities Exchange Act and the 1933 Securities Act could be settled by arbitration. In a 1991 decision, the Court in \textit{Gilmer v. Interstate/Johnson Lane Corp.}, 500 U.S. 20, 20 (1991), supported the arbitrability of cases involving claims under the Age Discrimination and Employment Act.} By law, patent disputes are now subject to resolution by
arbitration, but the Copyright and Lanham Acts do not enjoy such status. This has impeded use of arbitration to resolve intellectual property disputes in some instances.

IV Suggested Next Steps

As courts, lawyers, governmental agencies, businesses, and individuals go online in droves, use of this medium to accomplish a wide range of activities—including resolving disputes—will become commonplace. Given just the recent history of the development of the Web and the demonstrated ability of the law, courts, business world, and society in general to adapt to technological changes, it is a virtual certainty that online ADR will become widely used over time, both for online disputes as well as business disputes in general. Some steps can be taken now to not only speed up this transition, but make it better.

A. Statutory Reform

The Federal Arbitration Act and the Uniform Arbitration Act should be amended to specifically state that the online arbitration agreements meet the writing requirement of the two statutes. The Copyright Act, the Lanham Act, and similar laws dealing with intellectual property should be amended to specifically authorize the use of ADR to resolve disputes.

B. Model ADR Language for Sign-up Agreements

It would behoove the online industry to develop model ADR language for signup agreements. Such a model would be useful to ensure the enforcement of the arbitration agreement and ultimate

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Most recently, the Court in two cases strongly reaffirmed the supremacy of the Federal Arbitration Act over state laws that put arbitration agreements on a separate footing from contracts in general. See Allied Bruce/Terminex v. Dobson, 115 S. Ct. 834, 838 (1995); Doctor’s Associates v. Casarotto, 115 S. Ct. 1652, 1656 (1996)(state law that required arbitration clauses in franchise agreements to be on first page of contract, underlined, and in capital letters, preempted by FAA).

decision. An example of such a model arbitration clause is provided in the appendix.

C. Specialized ADR Rules for Online ADR

ADR providers such as the AAA can play a leadership role by developing specialized administrative procedures to facilitate the use of online ADR. The proverbial wheel need not be reinvented; a brief set of supplementary procedures, suitable as an overlay for the existing arbitration and mediation rules, should be developed to address the special needs of online ADR.

D. Facilitate Online Filing

After developing specialized procedures, a mechanism should be established to begin the first step toward establishing a fully-function online ADR system. This will take the form of an online filing capability, allowing the parties to file disputes electronically with an ADR provider.114

V Conclusion

The future seems destined to bring dramatic changes to the way online disputes are resolved, and ultimately affect the way arbitrations and mediations are administered for a wide range of disputes beyond the online realm. For parties and their representatives, the near future will bring about the development of virtual alternative dispute resolution, with all communications and information related to the case available through their computer at any time from any place. For years, commentators have predicted that the future would bring the benefits of online technology to our paper-laden method of resolving disputes. The future, quite clearly, has arrived.

Appendix:
Model Online Arbitration Clause

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by [name of administering organization, such as the AAA] under its Commercial Arbitration Rules then obtaining, with the following procedural exceptions:

(1) Cases shall be heard and determined by one arbitrator knowledgeable in the area of the dispute from the special online panel established by the Association. Panel members will be on-call to respond by e-mail and otherwise to any dispute assigned to them.

(2) Each party shall be deemed to have consented that any notices, or process necessary or proper for the initiation or continuation of a proceeding under these procedures; for any court action in connection therewith; or for the entry of judgement on any award made under these rules may be served by electronic mail (“e-mail”) on a party by e-mail addressed to the party or its representative at the Internet e-mail address provided at the commencement of the arbitration. In the even a party does not have e-mail capability, the AAA shall make alternate arrangements consistent with the expedited nature of this program.

(3) There will be no oral hearing unless requested by any party, in which case the hearing may take place telephonically or by video conference. In all other cases, the parties will communicate their positions and evidence via e-mail. The arbitrator shall establish a fair procedure for all parties to present their case, consistent with the expedited nature of arbitration.

(4) Generally, the award shall be transmitted to the parties within forty-eight hours of the appointment of the arbitrator although failure to meet this deadline shall not invalidate the award. The award shall be accompanied by a brief explanation. Awards shall be made publicly available via the Internet and the World Wide Web, but any party may request redaction of its name. Unless the parties agree otherwise, the

115. The following model arbitration clause is just one possible approach to the sign-up agreement issue. For a discussion of ADR clause drafting, see generally Aibel & Friedman, supra note 1.
arbitrator shall set the place of the hearing in the award, for purposes of enforcement.

Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.