

DEVELOPMENT OF ONLINE DISPUTE RESOLUTION — The Wave of the Future in Alternative Dispute Resolution



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1. INTRODUCTION

For the purposes of this paper, Alternative Dispute Resolution (ADR) is defined as a voluntary method for dispute resolution outside normal judicial determination. Negotiations, Arbitration, and Conciliation/Mediation¹ are well-known means of ADR but there are also many lesser-known forms that come within the general term. In other words, ADR encompasses a myriad of systems utilized for potential resolution of controversies between parties, generally beyond the purview of national courts.²

Over the last two decades a number of electronic forms of instantaneous communications have developed. Many of these are now being applied to ADR. As a result, the term "Online Dispute Resolution" (ODR) has been formulated to cover this use. The designation ODR may be somewhat misleading since electronic communications comprise a tool utilized to

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¹ The terms are interchangeable although in the past there was a difference that remains in some places. There is, however, no general agreement as to how either term is defined. For the purposes of this article, the process will be designated in most cases as conciliation.

² A description of the various types of ADR is contained in the Appendix to this article.

improve ADR rather than a new system to displace it. There are several kinds of electronic communications. The most common, the telephone, reaches back to the 19th century and has been utilized over the past hundred years for oral negotiations as well as a supplement to litigation. ODR also includes the telefax, e-mail, Online Ombuds, chat, and video conferencing among others. Each of these will be discussed regarding their applicability to ADR, following a cursory description of the formation of the latter.

2. ADR DEVELOPMENT

(i) *Pre World War II*

To better understand the modern day application of ADR, a brief history is necessary. ADR in the form of negotiations, conciliation, and arbitration “must have existed since the dawn of commerce,”³ before the development of any form of adjudication. Within the tribal setting each of the above forms of dispute resolution was used extensively. It was only upon the development of the nation-state, especially in Europe, that arbitration fell into disuse because, it is generally assumed, of the lack of enforceability. As a tool of dispute resolution, it remained in use for settling controversies within the guilds in the Middle Ages and in private party maritime disputes. Enforcement was obtained through a threat of expulsion from the association involved. In East Asia, partly through the admonition of Confucius that “law is for Barbarians” and the cultural aversion toward confrontation, the primary forms of peaceful dispute settlement were negotiation, compromise, and conciliation.

With the growth of industrialization in the 19th century, the courts in Continental Europe proved inadequate in many cases of solving commercial disputes. As a result, there was a rebirth of arbitration among merchants in the developing nation-states. The civil law courts initially refused to recognize ADR but eventually began to see its worth, especially where agreed to by the parties subsequent to the time of the dispute. In Great Britain, common law judges began to assign cases involving the law merchant (for which they lacked general understanding) to appointed arbitrators with expertise in the area. The opinions of the latter were then enforced through the courts. The London Court of Arbitration (LCA) was founded in 1892 to directly handle arbitral disputes. Decisions of the British courts as well as the LCA remained subject to judicial appeal, through what is known as the “case stated system.” In the United States there was very little development until the beginning decades of

³ Mustill, *Arbitration: History and Background*, 6 *Journal of International Arbitration* 43 (1989).

the 20th century, but some arbitration did take place with enforcement based upon the voluntary commitment of the parties. In Eastern Asia negotiation and conciliation continued to be the main forms of dispute settlement until the present.

The end of World War I saw the growth of internationalism and the creation of the International Chamber of Commerce (ICC) in Paris. At first directing its attention to publishing international mercantile standards, the latter institution eventually created what is known as the ICC International Court of Arbitration. Not a court in the common meaning of the word, it developed into one of the foremost providers of private arbitration throughout the world. At generally the same time, the major problem of enforcement was solved by the insertion of arbitration provisions into the prevailing civil codes of several European nations. These provided for execution by the courts of arbitral decisions based upon pre– conflict as well as post–conflict agreements. In Great Britain and throughout its empire, arbitration during the first half of the twentieth century continued to be administered directly or indirectly by its courts, still subject to the case stated system of judicial appeal. As a result, more agreements provided for arbitration before the ICC, whose rulings were not subject to appeal to local courts except for egregious determinations.

In the United States, despite the adoption of the Federal Arbitration Act in 1925, ADR failed to develop except in the area of labor law. Because of the extensive increase in labor actions by trade unions in the 1920's and 30's, and the inability of the courts to effectively control them, systems of conciliation and contractual arbitration developed in various industries. The outcome of these labor determinations was for the most part enforceable by the courts through adoptive federal laws.

In 1926 the American Arbitration Association (AAA) was formed as a full service neutral ADR provider in various areas of dispute resolution including labor, maritime, commercial and private international law. Although not a branch of the U.S. Government, the AAA has been perceived as such by a number of foreign enterprises, limiting its use despite its excellent reputation.

During the same period, before the Second World War, a considerable number of non–governmental arbitral institutions were created by the chambers of commerce in several other nations to arbitrate both domestic and international disputes. With minimum exceptions, however, these institutions operate basically as onshore providers, differing from the ICC, AAA, and several other similar agencies which provide ADR services beyond national boundaries.

The most serious continual problem prior to World War II was the difficulty of international enforcement of arbitral decisions, despite the Geneva Protocol of 1923 and Geneva Convention of 1927. These international treaties, ratified by a limited number of nations, provided a cumbersome means for enforcing arbitral decisions rendered within the boundaries of one nation by the courts of another.

(ii) Post Second World War Developments

The period following World War II witnessed the growth of international organizations such as the United Nations, World Bank, and International Monetary Fund. In addition, a means for enforcing private international arbitral awards was incorporated into the domestic laws of many nations through ratification of certain international treaties. The most important were the New York and Washington Conventions.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in 1958 and known as the New York Convention, is probably the most significant document in terms of the development of international commercial arbitration in the modern world. To date it has been ratified by over 125 nations.⁴ Its two most significant features require the courts of ratifying states to refuse to entertain legal actions involving valid arbitration agreements and to directly recognize and enforce foreign arbitral awards. At present, these provisions as well as others have been enforced by the courts of most of the ratifying nations, especially the more developed ones.

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, otherwise known as the Washington Convention, was adopted in 1965 by the World Bank through the establishment of the International Centre for the Settlement of Investment Disputes (ICSID).⁵ The main purpose was to provide a forum to determine international disputes between private contractors and foreign nations (usually developing ones) by requiring contracting states to recognize and enforce ICSID awards through their courts. The major impetus for enforcement is that refusal might preclude future loans by the World Bank. Over 134 nations have ratified the document at last count.

⁴ See www.un.org/Depts/Treaty - Chapter XXII.

⁵ See www.worldbank.org/icsid.

Besides the two international arbitral conventions described above, there are any numbers of regional ones providing for reciprocal enforcement of international ADR matters. These, however, are not important for the purpose of this article.

During this same period, the United Nations Commission on International Trade Law (UNCITRAL), in the interest of harmony, adopted for use in international commercial proceedings proposed arbitration (1976) and conciliation rules (1980) and a Model Law on International Commercial Arbitration (1985) to serve as a guide toward harmonization of municipal law on the subject. Following along the pattern of internationalism, the Stockholm Chamber of Commerce (SCC) through its Arbitration Institute, one of the more prestigious international ADR providers, developed into an offshore institution.

At the same time, because of pressure in the international commercial community and the diminishing number of cases brought before the LCA, Great Britain amended its laws to remove the “case stated” system in private international commercial disputes. It resulted in considerable restrictions on the right of judicial appeal in international arbitration matters. Shortly thereafter in 1986, the London Court of Arbitration changed its name to the London Court of International Arbitration (LCIA).⁶ Australia, Canada, New Zealand and many other members of the Commonwealth similarly removed their statutory “case stated” provisions as applicable to international arbitration. Unfortunately, some former colonies such as Jamaica, Malaysia, and several within Anglophone Africa, as well as Ireland, have failed to change many of the laws inherited from Great Britain including those that still permit judicial appeals from international arbitral decisions.

(iii) Current Problems of Development

The increase in use of ADR, especially arbitration, after overcoming initial hostility of the courts and the difficulty of enforcement between different jurisdictions is now facing selective growing pains. A large part of the expansion has been due to globalization and the boom in the e-commerce market consisting of sales over the Internet in terms of two generic groups - business to business known as B2B and business to consumer called B2C. Internationally, B2B is expected to grow from \$145 billion in 1999 to \$7.9

⁶ Redfern and Hunter, *Law And Practice Of International Commercial Arbitration* 33 (3rd ed. 1999).

trillion in 2004.⁷ It is also anticipated that access to the Internet will increase to 100 million users in the next four years, bringing the total to 350 million in 2005. In a recent survey based upon interviews with senior executives and corporate counsel of Fortune 1000 or similar large enterprises, 51% said that their companies incorporate dispute resolution clauses into their B2B contracts.⁸ It is assumed the percentage would have been higher if limited to international agreements.

As initially devised, ADR and especially arbitration was intended to provide expeditious, inexpensive, and informal means of dispute resolution. Unfortunately, it currently fails in all three purposes. Conventional arbitration is confronted with almost the same amount of obstacles inherent in the judicial system as it assumes many of the latter's characteristics caused by the expanded role of lawyers. This in turn has resulted in increasing costs which sometimes exceed that of litigation. Finally, the expansion of rules and regulations and judicial interference have encroached upon the ideal of informality.

It should further be understood that ADR does not lend itself to certain legal disciplines. Most nations preclude its use in mandatory fields of law such as constitutional, criminal, and divorce, in which the state has pronounced interests, while accepting ADR as a private voluntary means of settlement of contractual, maritime, employment, domestic relations, construction, and investment disputes, among others. Furthermore, a number of states have failed to separate domestic from international arbitration in legal application. In most of these, domestic arbitration as well as uncoupled international arbitration decisions, unless as a general doctrine specifically exempted under municipal law, are appealable within the local judicial system. As a result, in order to avoid hurdles such as time delays and technical procedural requirements, it is sometime more conducive within those countries to resort directly to the local courts.

The impetus for use of ADR in international commercial disputes, arises not only because of the tremendous growth in international commerce but from the desire of parties to avoid subjecting their claims to courts located within the national boundaries of the opposing entity. This is especially true where a government agency, acting in a proprietary capacity, is involved in a commercial dispute. No nation directly or through its governmental agencies, will knowingly subject itself to the jurisdiction of the courts of another

⁷ Slate, *Online Dispute Resolution: Click Here To Settle Your Dispute*, 56-JAN Disp. Resol. J. 8, 10 (2001).

⁸ *Id.* at 12.

country. This alone lends itself to ADR, utilizing rules not perceived as favorable to one adversary or the other.

It is important to note that a considerable minority of the more than 192 independent nations have not adopted the New York Conventions. Furthermore, many of the laws or doctrines in several of these non-New York Convention countries are anachronistic or present cumbersome obstacles to ADR actions in the area of international commercial law. As a result, few if any experienced lawyers will agree to provisions in an international agreement providing for arbitration outside the ambit of any Convention state. This does not mean that a party domiciled within a country that has failed to ratify the foregoing treaty may not be subject to enforcement of an international arbitral decision. The New York Convention is applicable where the arbitration proceeding is conducted within the boundaries of any nation that has adopted either treaty, no matter what the domicile of any of the parties. The problem unfortunately lies with enforcement. If attachable assets of a losing party to an arbitral action, domiciled in a non-Convention state, are located in any nation adhering to either of the foregoing treaties, there is generally no problem in obtaining redress. However, where enforcement is sought within a non-Convention state, the losing party may seek delay or reversal through the local judicial system.

3. RECENT DEVELOPMENTS IN MOVING AWAY FROM A PAPER-BASED ADR SYSTEM

The current expansion of international B2B commerce⁹ has not increased the expedition of ADR services. For the most part these applications are paper-based which remains the prevailing method for pursuing commercial conflict resolution, both domestic and international, through ADR.

With the creation of the Internet and the growth of the telefax and e-mail, various electronic means have been developed or proposed to improve existing ADR systems through utilization of these new tools. To date, growth has not been as extensive as expected. The desire to avoid experimentation is natural within the legal as well as other professions and this has proven to be the main cause of resistance to what many in the field consider revolutionary. Nevertheless, the time has come for exploring optional means of improving ADR. Electronic communications will not solve all of the problems presently

⁹ ABA Journal, Sep. 2002, p. 28.

inherent in paper-based ADR, but will provide much needed improvement toward making the process more expeditious, inexpensive, and informal. The pertinent question for now is how many enterprises and proprietary governmental bodies that are parties to international commercial agreements will in the future, in the interest of expediency and economy decide to have their disputes resolved online, including filing complaints, presenting documents, rendering decisions, and servicing by online providers.

Beginning with expedition, one of the most serious complaints involving international ADR pertains to delays in scheduling. Another is applicable to the selection of venues while a third relates to the time involved in the submission of documents. Through its very nature, electronic communications will reduce such delays. By the same token, informality will come about because of the proceeding being removed from a judicial-type physical environment. Finally, the expense of travel and accommodations will be eliminated together with the reduction, although unfortunately not the exclusion, of paperwork.

4. INTEGRATION OF ELECTRONIC FUNCTIONS INTO ADR

One of the major criticisms of ODR is that each of its forms of electronic messaging is deficient in richness or facilitation of media. In other words, physical presence provides a greater degree of transmission of cue-based context than any form of electronic communications.¹⁰ This does not, however, destroy the value of various kinds of ODR as applicable to specific forms of ADR. For example, the telefax and e-mail provide a means for instant transmission of textual communications. The two are generally considered the furthest removed from face-to-face communications, placing them on the lowest electronic rung of media richness. However, because they are asynchronous in nature (dependent on order of response) as opposed to the synchronous or simultaneous means of rejoinder inherent in other forms of ODR, each permits a greater degree of privacy in electronic communications than the telephone or chat. In some jurisdictions the law authorizes electronic signatures to be used as evidence of binding documents. As a result, a printed copy of a telefax or e-mail message may serve as documentary evidence or confirm a negotiated agreement.

¹⁰ Gibbons, Kennedy and Gibbs, *Cyber-Mediation: Computer Mediated Communications Medium Messaging The Message*, 32 N.M. L. Rev. 27, 49 (2002).

The next form of ODR in the chain of electronic communications is known as Online Ombuds. Taking the initial concept of the Ombudsperson developed in Sweden over 200 years ago, Online Ombuds permits a party to unilaterally consult with a complaint handler or dispute resolver.¹¹

Continuing along the spectrum of ODR messaging is what is technically called Multi-User Dimensions (MUDS), better known as chat. It permits both asynchronous and synchronous text messaging over the Internet. Although several people may communicate at the same time, it provides less privacy than the telefax or e-mail.

The next order of media communications is not electronic in nature but should be mentioned as forms of non-presence messaging. They include personal written text (letters, memos), formal written text (documents, bulletins), and formal numeric text (computer output). These forms of interchange, although not instantaneous, are used at times as part of ODR.

Richer in media than the previous forms of electronic messaging is the telephone, whose use is well understood throughout the world. Oral rather than textual in utilization, it allows for synchronous or simultaneous exchanges by the parties involved.

Each of the foregoing means function without visual presence. As a result, the richer media of cue-based appearances is lacking. A system known as video conferencing, by which audio and video signals are simultaneously transmitted and received over the Internet, supposedly would remedy this drawback. However, effective video conferencing is currently quite expensive, requiring high speeds over a large bandwidth known as broadband. The costs, as a practical matter, are beyond the range of most potential ODR users. As technology develops, however, it is believed that video conferencing will become economically feasible.¹² As a result, it will eventually permit efficient and practical utilization of desktop computers, with the screen segmented to include the adversaries or their counsel, necessary third parties, and the neutral(s), depending upon the type of ADR. It is important to remember that video conferencing is not equivalent to physical presence, generally lacking eye-to-eye contact and thus less media rich.

The closest form of virtual reality to physical presence is known as tele-immersion. This new vision technology approximates the illusion that the user

¹¹ See www.ombuds.org/faq.

¹² Gibbons, Kennedy and Gibbs, *op. cit. supra* at 33, 34.

is in the same physical space as others involved in the ODR proceeding. The cost, as might be suspected, is about 100 times more expensive than video conferencing, making its present use in ODR practically prohibitive.¹³

From the foregoing, it is apparent that current means of electronic communications within the scope of ODR will never completely substitute for physical presence. On the other hand, the practical advantages may serve to offset lack of eye-to-eye intercourse. Its use will certainly result in ODR being less expensive and more rapid in presentation than any paper-based form of ADR. Acceptance remains to be seen. In this respect it is important to consider the popularity of cinema. At the time of its initial appearance, many skeptics thought it would never to any degree replace live theater. The same might be said of televised concerts or other forms of entertainment as opposed to live ones. Although in each case the live event might be preferred to the virtual one, a considerable reduction in cost plus a wider-based audience range able to observe the presentation at different times has prompted acceptance of the insinuated presentation. This could offset the deficit of richness of media, although many detractors of ODR claim that its use creates a greater capability for ambiguity.¹⁴

5. EXISTING ODR PROVIDERS

The last decade has witnessed the establishment of a considerable number of ODR providers, several of which are no longer in existence despite their innovativeness. Some of the categories of online approaches are:

“Online Claims Submission: This terminology refers to the capability to permit a claimant to submit claims directly through the Internet for one type or multiple types of claims, including claims that may still be processed largely offline.

Online Algorithmic ADR: This dispute resolution method utilizes the Internet and an automated set of rules to assist parties in simple disputes to be able to reach agreement without the involvement of mediators or arbitrators.

Online Assisted ADR: This process contemplates combining Internet access and online applications to dispute resolution services such as document sharing, postings, case status, and mediator or arbitrator selection, and instructional exchanges instantly, anytime, anywhere and in support of offline, traditional meetings or hearings.

¹³ *Id.* at 35.

¹⁴ *Id.* at 49.

Online ADR Today: This means dispute resolution services that are accomplished completely online, including documents only arbitrations, algorithmic methods, and limited subject matter mediations. All interactions are accomplished through the Internet, through chat rooms, posting boards, and, if necessary, conference calls, and Web-based meetings. This is not an effective method today to do complex cases or full arbitration solutions.

Online Dispute Risk Management: This process extends the continuum of dispute resolution (negotiation to litigation) to that of dispute risk management, focusing on: risk assessment, prevention, and containment in addition to dispute resolution. These online services allow all participants in the B2B e-commerce process to actively find and share ways to prevent missed expectations entirely or contain disagreements before they expand into a dispute.”¹⁵

The following is a list, as of the date of this article, of functioning ODR providers:

NAME¹⁶
1-2-3 Settle *
All Settle *
American Arbitration Association (AAA)
Better Business Bureau Online
Chartered Institute of Arbitrators
ClaimResolver
ClickNsettle *
Cybercourt (German)
Cybersettle
Electronic Consumer Dispute
Resolution - ECODIR (French)
eNeutral
European Advertising Standards Alliance
iCourthouse
iLevel
Intellicourt
Internet Neutral
Internet Ombudsman
Iris Mediation (French)
Mediation Arbitration Resolution
Service (MARS)

¹⁵ Slate, *op. cit. supra* at 13, 14.

¹⁶ Center for Information Technology and Dispute Resolution, University of Massachusetts, www.ombuds.org/center/onlineadr.html.

National Arbitration Forum
Nova Forum
OnlineDisputes, Inc.
Online Ombudsman Office
Online Resolution
Resolution Forum Inc.
ResolveItNow*
Resolvemydispute.com
SettlementOnline*
SettleOnline
SettleSmart*
SmartSettle
Square Trade
The Claim Room (UK)
The Mediation Room
The Virtual Magistrate
USSettle
WEBdispute.com
Webmediate.com
WeCanSettle*
Word and Bond

1-2-3 Settle, Allsettle, ClickNsettle, ResolveItnow, SettlementOnline, SettleSmart, and USSettle (*noted by an asterisk beside their name*), are ODR algorithmic or blind bidding providers which, through their software, automatically compare confidential settlement offers in what is essentially a limited bidding system. Should the proffered amounts come within a specific percentage of each other before the bidding is ended, the dispute is automatically settled at a midway figure.¹⁷ There was great hope initially that algorithmic providers would facilitate a large number of settlements between insurance companies and their insureds. Unfortunately, many insurers have found it to their advantage to delay coming to terms as long as possible in order to obtain the best possible compromise from their prospective.

The Internet Corporation for Assigned Names and Number (ICANN) was founded at the beginning of the dot.com era to provide a uniform domain name system and prevent what is known as cybersquatting through a new process of accrediting dispute resolution providers.¹⁸ The World Intellectual

¹⁷ Birke and Teitz, *U.S. Mediation In 2001: The Path That Brought America To Uniform Laws And Mediation In Cyberspace*, 50 Am. J. Comp. L. 181, 208 (2002).

¹⁸ Katsh, Rifkin, and Gaitenby, *E-Commerce, E-Disputes, And E-Dispute Resolution: In The Shadow Of "Ebay Law,"* 15 Ohio St. J. on Disp. Resol. 705, 721 (2000).

Property Organization (WIPO), located in Geneva, Switzerland, is one of the accredited providers as is Asian Domain Name Dispute Resolution Center with two offices (CIETAC in Beijing and HKIAC in Hong Kong), CPR Institute for Dispute Resolution, Disputes.org, and National Arbitration Forum.¹⁹ Their decisions, however, are not final but subject to appeal within the local judicial system.

The most economically thriving of the ODR providers currently is Square Trade which specializes in B2C conciliation services. Through an arrangement with eBay, an online auctioneer and currently the most financially successful dot.com company on the Internet, Square Trade has handled thousands of disputes and, according to its claims, successfully resolves most of them.

Several of the other ODR providers listed above, specialize in negotiations or conciliation or restrict their services to domestic users. There are a few, however, that offer a larger gambit of services including arbitration and conciliation. In addition, the AAA has given indication of its eventual involvement in ODR. Finally, there are a number of other enterprises that offer services over the Internet in training or the filing of documents for ODR or judicial matters.

6. THE MERGING OF ODR WITH EXISTING MEANS OF ADR

Certain types of electronic communication adapt better to different forms of ADR than others. Much depends upon the degree of richness of media required. Where eye-to-eye contact or body language cues are deemed necessary, such as in certain arbitration cases, physical presence might be preferred. On the other hand, oral testimony including cross-examination may be sufficiently encompassed within a secured audio-visual form of communication, conducive to a fair hearing. Although lacking in the total richness of media found in physical presence, there are a number of advantages to virtual reality provided by video conferencing. Furthermore, an arbitral proceeding based solely upon a written presentation and final oral argument may satisfy adversarial needs through use of secured e-mail or MUDS (when a synchronous text messaging is required) and closed circuit telephone. Although not as rich in media as video conferencing, except where eye-to-eye contact or cue based body language is necessary, a text/voice-based system of

¹⁹ Some are engaged in other forms of ODR as well.

communications might prove sufficient in low profile disputes or where the monetary amount or stakes involved are not relatively high.

Conciliation on the other hand, being purely voluntary in acceptance of final resolution, in its offline version requires the presence of all parties in the same room only during the initiation of the proceeding, to hear their version of the dispute, and at a final session should the adversaries reach agreement. As a result, most sessions are conducted with each party remaining in separate rooms for a large part of the proceeding. Although traditionalists might disagree, there is nothing that really requires the physical presence of the parties at either the first or final session. In fact, depending upon the level of hostility, it might be better in many situations if the disputants did not physically meet at the beginning stage. Their initial positions can be presented orally via telephone or through text without damage to their position and the private meetings with the conciliator similarly arranged.

Differing tactics are utilized by conciliators, including private sessions with each party, proposing alternatives for purposes of agreement, and gently pressuring the participants toward a final accord by utilizing the settlement judge model of convincing the adversaries that their chances of prevailing in an adjudication or arbitration are slimmer than they thought. This is known as the evaluative means of conciliation. Other neutrals prefer the facilitative method through which the disputants spend as much time together as possible, with the neutral imposing his or her opinion to a limited degree.²⁰ Depending upon needs, the medium of communications may be by text and asynchronous where the facilitative type of conciliation is desired. Where active participation of the neutral is favored, the evaluative version may be utilized through synchronous means such as MUDS or, better yet, private circuit telephone. Telephone conferencing has been successfully used in family mediation²¹ and there is no obvious reason to preclude its adaptation to international commercial conciliation. In fact, it is far less expensive when connecting parties by telephone from all over the world than offline physical presence and more conducive to simultaneous translations. The author has met with contrary arguments from some experienced mediators, based upon their perceived need for cue-based eye-to-eye contact requiring physical presence. This begs the question of why is this necessary when the consent of all parties is essential for resolution, unless the conciliator finds it important to maintain some visual tricks up his or her sleeve.

²⁰ Birke and Teitz, *op. cit. supra* 198-9.

²¹ Coltri and Hunt, *A Model For Telephone Mediation*, 36 *Fam. & Conciliation Courts Rev.* 179, 181 (1998).

Electronic communications are conducive to other forms of ADR as well. Unfortunately, with limited exceptions, few of these are being utilized even in paper-based proceedings. One exception may be what is known as the neutral listener. Its purpose is to provide a quick and inexpensive means of dispute resolution as well as sufficient damage control in the form of risk management so that the disputants may continue to do business with each other.

7. A NEW VERSION OF ODR

A new ODR provider known as GlobalMedArb (GMA),²² with which the author is associated, seeks to improve the more commonly used forms of ADR through electronic means, while rectifying some of the most obvious weaknesses. While providing various services along the spectrum of ADR, it purposely and pragmatically seeks to limit its offerings to international commercial disputes.

Beginning with what it designates as Early Neutral Evaluation (a variation of the neutral listener), the parties to a disputed commercial agreement are provided with a quick and inexpensive means of settlement while still negotiating in order to preserve their contractual relationship. The fact that they do not meet personally is an advantage. Different from some other forms of the neutral listener, GMA requires a provision in the agreement, accessed from the latter's web site, designating early neutral evaluation as the method of resolution of any controversy between the parties. Any adversary may access the subject provider through the mails, fax, or secured e-mail to immediately place in motion the attempted settlement process. A neutral will be immediately appointed, subject to removal upon request of any of the parties.

The entire procedure should not take more than one week and permits certain supplemental actions. Should the neutral determine after reading the submissions that the positions of the parties are close enough to reach settlement, he or she may suggest that they continue to negotiate or, with their consent, submit a proposed settlement. On the other hand, should the evaluator opine that the matter might require conciliation, the contestants may request that the former serve in that capacity. Early neutral evaluation can be easily utilized where there are more than two parties involved or when the first language of any of the disputants differs from the others. Since e-mail is text based, all that is required without sacrificing expedition is use of a translator at

²² See www.GlobalMedArb.com.

GMA's place of operation. Finally, the contractual provision designating early neutral evaluation as the initial means of settlement may be tied to compulsory conciliation.

As in its paper-based version, utilization of the conciliation process must be provided for in the contract or agreed upon after a dispute arises. It is a voluntary procedure, restricted only by a proviso that precludes the parties from seeking to litigate or arbitrate the matter during the period provided for in the contractual provision. There is a designated time frame, usually not more than thirty days, to offset the criticism that conciliation is often used to delay final determination of a matter through arbitration or litigation. At the end of the designated period, unless the agreement requires that the matter proceed to mandatory arbitration, the contenders are free to pursue whatever remedies they desire. Any party to the agreement may access GMA through the mail, telephone, telefax, or secured e-mail. As in the case of early neutral evaluation, the conciliator may be removed at the request of any party. Usually a single conciliator will be appointed unless the contestants hail from diverse cultures and agree on the desirability of more than one neutral. In the latter instance it has been found that the inclusion of one conciliator for each of the cultures involved, improves the effectiveness of the mechanism.

The procedure will ordinarily be conducted through closed circuit telephone but, at the option of the contestants, may be effectuated through Internet means by fax, secured e-mail, MUDS, or the more expensive video conferencing. The process is governed by the simplified UNCITRAL Rules of Conciliation unless the parties decide otherwise. As with early neutral evaluation, the contractual conciliation provision may require a step up to binding arbitration should conciliation fail. Since the procedure is voluntary, meaning that no party need accept any proffered settlement, any of the adverse participants may feel more comfortable in representing themselves or utilizing local rather than expensive international counsel.

Binding ODR arbitration provides a technical challenge regarding richness of media. As differing from early neutral evaluation or conciliation its end product is determinative, subject to a new and innovative GMA review process to be discussed below. Unfortunately at present, as set forth above, there is no effective economically feasible method for utilizing a desktop computer for audio-visual coverage of an arbitral proceeding. But as also represented, where the dispute is based solely upon written submissions, the parties may consent to present their case through text over the Internet with oral arguments via closed circuit telephone. The latter means of communication, however, are not the desired media for lawyers accustomed to both direct oral testimony of

witnesses including cross-examination. As stated previously, it is believed that eventually video conferencing over the Internet will be reasonably priced with the arbitrator(s), witnesses, disputants and counsel appearing in segmented parts on a desktop computer screen. The technology, however, is about three or four years in the future. As a result, other than opting for a text and voice-based proceeding or the very expensive current means of video conferencing, the only alternative is a paper based arbitral proceeding.

When the breakthrough does arrive, local counsel may be utilized by the disputants at a considerably lesser cost than international attorneys, together with a savings on travel, food, and accommodation expenses, expedition of process, and the informality which comes with participating from a local office or telecasting studio. There is also a further advantage in using voice over translations when necessary and extending the process to include third parties. Choice of arbitrators (whether single or tripartite) as in conventional offline ADR arbitration will be by the disputants following specific procedures. Furthermore, the problem of scheduling will be lessened to a considerable degree. The procedure is to be governed by the UNCITRAL Rules of Arbitration and the Rules of Evidence of the International Bar Association, with the substantive law provided by the 1980 U.N. Convention on Contracts for the International Sale of Goods,²³ unless the parties desire otherwise. The latter has proven to be a successful merger of the common and civil law. Finally, the site of the arbitration, under GMA's supplementary rules of procedure, will be within the state where the sole arbitrator or panel chairperson initiates the process.

A new and innovative Review Process, as a safeguard and to obviate criticism that arbitral decisions are not appealable, is on offer by GMA provided the parties have previously agreed to the process. A list of fifteen well-respected international scholars and lawyers will be provided to the adversaries, from which those seeking review may cross out names. The objective is to reduce the number of members of the Review Board, depending upon how many adversaries are involved - for instance five where there are two contestants. The review will be expedited and paper or text and voice based, until video conferencing becomes economical feasible. Its end result will be either a one-word opinion upholding the determination of the arbitrator(s) or a reasoned reversal without any published dissent. Should the arbitration be overruled, the matter will be subsequently determined according to agreement of the parties.

²³ See www.doc.gov/ogc/occic/cisq.

Case officers will be designated by GMA to assist the parties in each of the forgoing proceedings and technical officers, upon request, to aid in the use of the electronic mechanisms. As an additional service, GMA intends to offer its technical online facilities to trade associations and other ADR providers as a supplement to their offline operations.

8. CONCLUSION

As mentioned previously, use of the Internet or telephone precluding body language cues or eye-to-eye contact lessens the richness of media that many ADR scholars believe necessary for any fair determination of a pending dispute. Again, the author disagrees. Except where a considerable sum of money is involved or in matters of extreme legal importance, the use of ODR through its savings in costs, time consumption and formality, more than offsets the advantages of a paper-based procedure. The problem has been and still remains whether ODR is an idea whose time has come. However, just as the cinema and television have supplanted live presentations to a considerable degree, Canute-like stances cannot hold back the tides coming from the sea.

APPENDIX

THE FOUR GENERIC FORMS OF ADR

1. Negotiations

There are those who dispute whether negotiations are considered a form of ADR. Despite such arguments, in conformity with the general definition of ADR negotiations serve as a means for voluntary settlement of disputes, although sometimes at the behest of the judicial system. Engagement must be at the sole determination of the parties and, once agreement is reached, is fully binding provided it does not encroach upon any of the protections provided by mandatory municipal law. Negotiations generally differ from other forms of ADR in that it doesn't require the services of a third party to help resolve the differences between the participants.

2. Suggestive ADR

These versions of ADR consist of a non-binding, voluntary method for settling disputes through the aid of a third-party neutral where the disputants are unable to do so by direct negotiations. What sets it apart from other third party forms of ADR is that very little if any of what takes place is in writing and the parties are generally free at anytime to dispense with the process. The neutral's role in the process is to aid the disputants in settling their differences. Historically this has been the preferred method for settling disputes in Eastern Asia. Suggestive means may also be utilized when the controversy is between more than two parties. Neutrals generally have some expertise but this is not a requirement and they may be removed in most situations at the request of any party for whatever reason. At the end of a specific period of time or when it appears that the parties are unable to resolve their differences, the process will be terminated. There are basically two types of suggestive ADR: The Neutral Listener and Conciliation/Mediation.

2.1. The Neutral Listener:

This is the least expensive and most expeditious type of dispute settlement. It provides the best means for the parties to a contract to maintain an ongoing relationship while solving a controversy. A neutral is appointed by an ADR provider at the sufferance of the parties, to help determine the controversy. Within a brief period, the adversaries, in confidence, submit their version of the dispute to the neutral as well as what is acceptable to them for settlement.

Within a limited time after receipt thereof, the neutral privately advises the parties whether, in his or her opinion, their demands are: (1) substantially similar or overlapping to a degree that settlement by further negotiations is feasible; (2) close enough so that settlement with the active help of a neutral is believed possible; or (3) too far apart to be settled at the time. Upon mutual request, the neutral may submit a suggested written agreement to the parties or appoint an expert to prepare a report on technical, financial, or other specialized matters for their benefit in further considering resolution of the dispute. Some ADR providers permit their services to be accessed unilaterally, followed by notice to the other party or parties inquiring whether they desire to participate. Other providers require an agreement between the disputants before this service can be retained.

2.2. Conciliation:

This is a form of negotiations using the active services of a third-party neutral or neutrals to suggest various means for solving the dispute between the opponents. The success of conciliation depends largely upon the trust that the parties impart to the neutral in divulging the extent to which they are ready to concede on any point and the ability of the conciliator to influence the adversaries in concluding that any final arrangement is, for the most part, of their own making. All communications are confidential, usually oral, and may not be used in any subsequent legal or arbitral action; nor may the neutral testify in this regard. Several ADR providers have informal procedural rules for the process. Although terminable at will by any party, an agreement for conciliation may temporarily delay action by the disputants for arbitration or adjudication. Conciliation may also be mandatorily tied to binding arbitration should the parties fail to resolve their dispute within a specific period.

3. Persuasive Means

These are non-binding written opinions or recommendations of neutrals depending upon the method selected. This is the generic term for the most recently devised forms of ADR. In many cases, persuasive means are difficult to provide for by agreement before a dispute arises. Although parts of the informal process may be oral, the existence of a written account of some stage of the proceeding is what may be influential toward causing the parties to settle their differences. Some persuasive means are directed toward risk management. The following are the better-known types.

3.1 *Persuasive Mediation:*

Arguments by the parties are presented before a panel of mediators. On the hearing date, the arguments of the disputants are presented in summary fashion before the neutrals within a limited time, sometimes restricted to no more than one hour each. The panel then renders a proposed confidential settlement that the parties must accept or decline to accept within a limited time. If any party rejects the proposed settlement, the matter then proceeds to arbitration or adjudication, depending upon the desires of the parties, with the terms of the suggested settlement made public although not binding. The parties may further agree, should any subsequent arbitral or judicial determination be similar to the proposed settlement, that the rejecting party be subject to a penalty. If a party neither accepts nor rejects the decision within the required time frame, it is considered accepted by that party. The process is also called Michigan Mediation in tribute to its place of origin.²⁴

3.2 *Facilitation:*

This is sometimes called fact-finding. The neutral facilitator investigates and collects all of the relevant facts through either an informal proceeding involving private meetings with each party, a more formal quasi-judicial hearing similar to advisory arbitration, or a combination thereof. The written proposal of the neutral facilitator is then presented to the parties for possible agreement. Although the proposal is seldom agreed upon in toto, it is often utilized by the parties to negotiate a settlement. This form of ADR may be altered by agreement to convert the facilitator into a judicial referee or master whose findings are binding unless one of the parties appeals to a local court.

3.3 *Mini-Trial:*

The name is a misnomer; however, the mini-trial is the most recently devised method of ADR. It comprises a pre-determinative, non-binding hearing process between disputant organizations.²⁵ Key executives, with authority to agree upon or recommend a settlement sit on a panel with a neutral and listen to a presentation of the dispute by counsel for the parties in an expedited proceeding. Discovery is abbreviated and the issues are narrowed to the most significant. The quasi-judicial hearing including witnesses and the presentation of documents is expected to be completed within two or three days, depending

²⁴ Redfern, *op. cit. supra* at 36.

²⁵ *Ibid.*

upon the number of contestants. There is the prospect that the executives, after listening to the evidence and the position of the other party or parties, will give serious thought to the amount of time and expense that may be incurred in a full-fledged arbitral or court proceeding. Furthermore, the proximity of key personages might lead to a settlement of the matter. This is the most promising form of risk management. A limited number of ADR providers have devised rules for Mini-Trials. In the event that a resolution does not occur, at the end of the proceeding the neutral submits a written report to the sitting executives containing his or her “prediction” of the outcome, should the matter proceed to arbitration or adjudication. Initially, the report is distributed in confidence for further discussion. If a settlement is not reached after a set period of time, the prediction may or may not be made available to the trier of any future binding proceeding, depending upon the agreement of the parties.

3.4 Summary Jury Trial (SJT):

The decision-maker consists of a panel of individuals (usually six) selected at random by the parties to serve as jurors. The members of the panel are not told that either party may reject their decisions. Under agreed terms, counsel for the contestants undertake limited discovery and prepare arguments in which evidence is presented in summary form, with each side restricted regarding the amount of time permitted. The jurors may present a consensus verdict or separate opinions outlining their perception of the matter at hand. The disputants may also directly or through counsel pose questions to the individual members of the panel after the latter have come to their decision.²⁶ SJT is designed to provide litigants with a preview of the likely outcome of a full arbitration or adjudicatory proceeding.

3.5 Advisory Arbitration:

This is similar to conventional arbitration except that the decision of the trier is not binding but put forward for the parties to utilize for purposes of settlement. The conduct of the proceeding is the same as final and binding arbitration and governed by similar rules if any. Unless provided otherwise, should the dispute proceed to adjudication or final arbitration, the advisory decision becomes available to the trier at the determinative stage.

²⁶ *Id.* at 38.

3.6 Med-Arb:

The neutral acts at the initial stage as a conciliator with the understanding that at any given time, should he or she or the parties believe that they are unable to agree upon an acceptable settlement, the proceeding is then bifurcated with the conciliator assuming the role of an arbitrator.²⁷ Med-Arb was initially devised as a means for settlement in American labor disputes. In practice it has not worked well because the parties, realizing the matter might move into conventional arbitration, were not too prone to divulge the extent they might be ready to concede on any given point during the conciliation process. A variation known as “Med-Arb Opt Out,” by which either party has the option of requesting selection of a new arbitrator when it is determined that the matter cannot be solved by conciliation has been proposed. To date there is little evidence of its use or success.

4. Determinative ADR

This is a binding form of ADR voluntarily entered into, involving the selection of a neutral or neutrals to serve as triers of law and fact in lieu of a court. Sometimes called private adjudication. A record may or may not be taken of the hearing and a reasoned written opinion usually provided with a ruling at the end of the proceeding. The decision is generally enforceable in a court of law.

4.1 Conventional Arbitration:

The most commonly used form of ADR. Conventional arbitration is a quasi-judicial proceeding governed by procedural rules and substantive or proper law, dependent upon the desire of the parties and the prevailing regulations of the state where the process takes place. The proceeding may be initiated by arrangement between the parties after the dispute arises (arbitration by submission) or agreement entered into previously as either a requirement of an association to which the contestants belong (institutional) or a provision of a written contract between the participants (ad hoc). Ad Hoc, meaning for this special purpose, may arise under the auspices of the provider or arbitral agency which determines the agenda or by independent design of the participants. No judicial appeal from the decision may be had except for fraud or lack of due process in the proceeding, unless prevailing law or the arbitration agreement provides otherwise. The number of arbitrators (usually one or three) is subject to determination by the parties. Where an agreement is lacking regarding the

²⁷ *Id.* at 36, 37.

selection of the sole trier or chairperson of a panel, appointment will be made by either the arbitral provider or a local court where the process is initiated. In tripartite arbitration, each participant usually selects a nonparty affiliated trier who in turn choose the chairperson of the panel. In international arbitration, the single arbitrator or chairperson generally may not be a national of the same country as any of the parties.

4.2 Final or Last Offer Arbitration:

This is a variant of conventional arbitration where, following the hearing, each party submits in writing its final offer or demand to the arbitrator or arbitrators, who must then select one or the other without providing any reasons.²⁸ This type of arbitration functions best when the dispute is limited to a single precise issue, especially specific claims for money. It is often used where the parties are opposed to any type of compromised decision.

4.3 Expedited Arbitration:

This is another variant of commercial arbitration in which the parties are required to present their case within a limited time frame, usually one or two days, with the arbitrator's decision submitted shortly afterwards in abbreviated form.

4.4 Private Judge Selection:

Sometime called Rent-a-Judge, this is a midway proceeding between arbitration and adjudication, by which the parties agree upon a trier other than a sitting judge (usually a retired member of the judiciary or someone learned in the law) to decide the dispute through a formal proceeding. The decision is enforceable through the local courts. The trier is paid by the parties with his or her findings appealable through regular judicial proceedings. As a result, this type of proceeding requires legislation for validity within the forum where tried. The advantage is that it permits the parties to have their dispute determined expeditiously without waiting upon a court's calendar while preserving the appellate process.

²⁸ *Ibid.*