

USING ADR TO RESOLVE ONLINE DISPUTES

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ABSTRACT

In the context of the Internet, where parties located in different corners of the world can contract with each other at the click of a mouse, litigation of online disputes is often inconvenient, impractical, time-consuming and prohibitive. Providing an alternative approach to resolve online disputes might assist in redressing grievances and gaining consumer confidence in e-commerce. Alternative Dispute Resolution (ADR) is an appurtenant candidate for such an approach.

The Virtual Magistrate Project, launched in 1996, initiated the idea of using ADR to resolve Internet-related disputes. The joint statement promoting the use of ADR in cyberspace, made by the European Union and the United States at a summit in Washington D.C. on December 18, 2000, set the ball rolling. Since then, various entities, including governments, consumer groups, lawyers, academia, and international organizations have been catapulted into arriving at an effective means to implement ADR globally on the Internet. This article summarily discusses some of the online ADR providers and the type of online disputes that are amenable to online ADR. Thereafter, this paper analyzes the effectiveness of using ADR in the online context and weighs its pros and cons. This paper also addresses some of the models proposed for an online ADR process and suggests some of the issues online businesses and online ADR providers should keep in mind to boost consumer confidence and make online ADR more effective.

I. INTRODUCTION

{1} The emergence of the Internet and its universal proliferation¹ has opened a Pandora's box of legal issues. As the Internet rapidly emerges as a speedy and cost-effective way of conducting business,² the number of disputes arising out of the use of this new technology also increases.³ The Internet promises to be a more economical, influential and global medium of doing business. In order to ensure that its potential is not undermined, it is incumbent that dispute resolution mechanisms used in settling online disputes are efficacious. In the context of the Internet, where parties located in different corners of the world can contract with each other at the click of a mouse, litigation of online disputes is often inconvenient, impractical, time-consuming and prohibitive.⁴ In such situations, the injured consumer or party might be left without an effective remedy and the (dishonest) Internet business or website owner would stand to gain. On the other hand, providing an alternative approach to redress such grievances might assist in resolving such disputes and gaining consumer confidence in e-commerce. Alternative Dispute Resolution (ADR) is an appurtenant nominee for such an approach.⁵

{2} By its very nomenclature, ADR is an alternative, or at the least, a supplemental process to litigation.⁶ By opting to pursue ADR, the parties use a process that is different and distinct from

litigation.⁷ Simply put, ADR refers to a process by which parties settle their disputes “out of court.” Private forms of ADR have existed for several years.⁸ The most commonly used forms of ADR on the Internet include arbitration,⁹ mediation,¹⁰ and negotiation.¹¹

{3} On December 18, 2000, a joint statement between the European Union and the United States was promulgated at a summit held in Washington D.C.¹² Both parties staunchly promoted the development of ADR in cyberspace in order to boost consumer confidence in e-commerce.¹³ The idea of using ADR to resolve Internet-related disputes was initiated when the Virtual Magistrate Project was launched in 1996. This summit set the ball rolling. Since then, various entities, including governments,¹⁴ consumer groups, lawyers,¹⁵ academics¹⁶ and international organizations,¹⁷ have been catapulted into reaching an effective means of globally implementing ADR on the Internet.¹⁸

{4} This article summarily discusses some of the online ADR providers and the types of online disputes that are amenable to online ADR. Thereafter, this article analyzes the effectiveness of using ADR in the online context by weighing its pros and cons. This article also addresses some of the models that have been proposed for an online ADR process and suggests some of the issues that online businesses and online ADR providers should keep in mind to boost consumer confidence and make online ADR more effective.

II. EXISTING ONLINE ADR SERVICES

{5} Several profit and nonprofit ADR organizations have established themselves in providing online dispute resolution services.¹⁹ However, it was initially in 1996 that several innovative projects were launched to demonstrate the applicability of ADR to disputes arising in an online context. The following section briefly describes some of the online ADR service providers.

A. The Virtual Magistrate Project

{6} The Virtual Magistrate Project (VMAG),²⁰ one of the first online ADR projects, is a classic illustration of how online ADR failed, as well as a good example from which to learn for future ADR service providers. The main aim of this project was to demonstrate that online technology could be used to resolve online disputes in a quick, cost-effective, and accessible means using arbitration.²¹ VMAG would serve as an arbitrator for any online disputes submitted to it. Arbitrators were appointed and trained by the American Arbitration Association.²² Arbitrators would generally decide whether the activity complained of was reasonable “in light of available information, network etiquette, applicable contracts, and appropriate substantive laws.”²³ All proceedings would take place by e-mail, and a decision was to be reached within three business days once the initial complaint was received.²⁴ However, VMAG was largely unsuccessful because several complaints were not within its jurisdiction and the project was not widely advertised, thereby creating less awareness of this service.²⁵ Moreover, in the only decision that it rendered,²⁶ one of the parties (the “alleged wrongdoer”) did not participate.²⁷ VMAG also lacked the ability to enforce its decision.²⁸

B. The Online Ombuds Office

{7} The Online Ombuds Office (OOO)²⁹ began in June 1996 as a “mediation service aimed at disagreements that arise from a broad array of online activities.”³⁰ In June of 1997, the Hewlett Foundation provided an award to establish the Center for Information Technology and Dispute Resolution at the University of Massachusetts with the aim of developing a richer set of online dispute resolution tools.³¹ The OOO currently exists as the “dispute resolution arm of the Center, working to

employ and develop online dispute resolution resources.”³²

C. World Intellectual Property Organization (WIPO)

{8} WIPO is the leading accredited domain name dispute resolution provider under the Uniform Domain Name Dispute Resolution Policy (UDRP) adopted by the Internet Corporation for Assigned Names and Numbers (ICANN).³³ At the time of registering a domain name, the registrant agrees to use the UDRP in settling any future domain name disputes.³⁴ Any entity with the view that a domain name infringes its trademark rights can initiate a proceeding under the UDRP.³⁵ As per the UDRP, complainants file a complaint with a resolution service provider, such as WIPO.³⁶ The respondent is also given an opportunity to defend itself against the allegations.³⁷ WIPO appoints a panelist, who acts as an arbitrator and decides whether the domain name should be transferred or cancelled, or whether the complaint should be denied.³⁸ The domain name case is usually concluded within two months using online procedures.³⁹ The WIPO arbitration award, however, *is not binding*, and either party can take the case before a court within ten days of the decision.⁴⁰ The WIPO process has been very successful in settling domain name disputes.

D. SquareTrade

{9} Founded in 1999, SquareTrade⁴¹ is another popular online ADR service provider that offers a forum to mediate e-commerce consumer disputes.⁴² Once the buyer or seller files a complaint with the site, SquareTrade notifies the other party of the complaint. The parties first attempt to resolve the dispute through direct negotiation, during which they can request the assistance of a mediator. The mediator assists the parties in reaching a fair and mutually agreeable settlement and recommends a solution upon the parties' request.⁴³ The parties ultimately reach a settlement agreement based on the direct negotiation or mediation.⁴⁴ However, the traditional legal system is always open to the parties who participate in the SquareTrade resolution process.⁴⁵

{10} SquareTrade also offers a Seal Program to online businesses in order to boost consumer confidence and trust.⁴⁶ The seal can be placed on the website of online businesses to assure potential buyers of recourse in the event that a transaction goes awry.⁴⁷ Online businesses that become members of the Seal Program are committed to certain standards and are monitored regularly to ensure compliance.⁴⁸ SquareTrade has entered into partnerships with several online businesses, including eBay, Verisign, and PayPal, to offer dispute resolution services.⁴⁹ It has resolved over 200,000 consumer disputes to date.⁵⁰

E. Cybersettle.com

{11} Cybersettle.com⁵¹ focuses on the settlement of monetary disputes, particularly insurance-related and workers compensation disputes.⁵² This service uses the process of blind bid negotiations to settle disputes.⁵³ Parties submit online confidential settlement bids through e-mail to the website. Cybersettle.com usually allows three rounds of bidding.⁵⁴ The initiating⁵⁵ party that is interested in settling the dispute enters three settlement offers as first, second, and third round offers, each of which has a predetermined expiration date.⁵⁶ Cybersettle.com e-mails the other party informing him that the initiating party has entered the bids.⁵⁷ The other party then provides settlement demands as first, second, and third round offers.⁵⁸ The software technology automatically compares the ranked bids to determine if the parties have arrived at a settlement.⁵⁹ The attorneys or claims professionals do not have to pay any fee unless there is a settlement.⁶⁰ Even where there is no settlement, the bids are kept confidential and the parties can pursue other means of resolution.⁶¹

{12} Cybersettle.com has assisted in settling over \$500,000,000 in claims since its inception in 1998.⁶² Cybersettle.com's online ADR service is the exclusive online settlement tool for the Association of Trial Lawyers of America⁶³ and the Canadian Bar Association.⁶⁴

III. CASES BEST SUITED FOR ONLINE ADR

{13} Online disputes typically arise in relation to material that is displayed or available online.⁶⁵ The inherent nature of these online disputes makes them amenable to online ADR. It has also been suggested that the self-regulatory nature of ADR would promote the natural evolution of a coherent body of customary cyberspace law for resolving online disputes.⁶⁶ Some of the types of disputes that could be resolved using online ADR mechanisms are briefly discussed below.

A. E-Commerce Disputes

{14} Disputes arising out of business-to-consumer contracts or business-to-business contracts initiated on the Internet could be resolved online. In online contractual disputes the parties are both presumably familiar with operating the Internet, have e-mail facilities, and have an online financial relationship, thereby making online dispute resolution easier.⁶⁷ Online ADR can be used to resolve issues concerning delivery of products, enforcement of warranties, guarantees on products, over-billing issues, and issues arising out of click-through agreements, to name a few examples. In fact, several online ADR providers are involved in assisting parties to reach a settlement in online contractual disputes. For instance, SquareTrade mediated a dispute between a purchaser and eBay. The purchaser was distraught when he noticed a strong mildew smell emanating from the leather chair he purchased on the eBay website. Within one week, eBay sent the purchaser a \$150 check to clean the chair.⁶⁸ This example highlights some of the advantages of using online ADR to resolve contractual disputes.

B. Domain Name Disputes

{15} As discussed above, domain name disputes are also amenable to online ADR. Each domain name registrant of a general top-level domain (such as a ".com" or ".net" domain name) agrees to submit any dispute arising out of a domain name registration under the UDRP to a resolution service provider.⁶⁹ The popularity of using online ADR to resolve domain name disputes can be adjudged from the sheer number of disputes decided. As of November 22, 2003, 5,589 domain name disputes have been filed with the WIPO Arbitration and Mediation Center, and 5,373 have been decided.⁷⁰ Other ICANN-approved domain name dispute resolution providers include the Asian Domain Name Dispute Resolution Centre, the CPR Institute for Dispute Resolution, and the National Arbitration Forum.⁷¹

C. Intellectual Property Disputes

{16} The development of digital communication has spawned a number of issues for intellectual property owners. With the use of new technologies, particularly the Internet, it has become much easier for intellectual property pirates to infringe upon intellectual property rights. For instance, copyrights in songs and movies are constantly infringed with their dissemination on file-swapping platforms such as Kazaa.⁷² Similarly, unauthorized hyperlinking, framing, and meta-tagging on the Internet could also violate copyright and trademark rights.⁷³ The choice to use arbitration to settle intellectual property disputes has been firmly supported.⁷⁴ Therefore, ADR, which is flexible and amenable to dynamic areas of law, may be useful in resolving online intellectual property disputes.⁷⁵

D. Monetary Disputes

{17} One author has suggested that when an online dispute concerns a disagreement about money, using online ADR to settle such disputes may facilitate the bargaining process in reaching a swift resolution.⁷⁶ Monetary disputes could involve credit card claims, claims between an insurance company and an online merchant involving e-commerce and Internet insurance, and subscription fees for online services, to name a few examples. In fact, as mentioned earlier, some online ADR providers, such as clickNsettle.com⁷⁷ and Cybersettle.com,⁷⁸ use a blind-bid negotiation process to negotiate and mediate online monetary disputes.

IV. WHY IS ADR AN EFFECTIVE TOOL TO SETTLE ONLINE DISPUTES?

{18} The flexible and often party-friendly nature of ADR, coupled with the remarkable technological features of the Internet, makes ADR an appropriate instrument to resolve online conflicts. The principal reasons in support of the preceding proposition are discussed below.

A. Economically Viable

{19} Cost is one of the most crucial factors in dispute resolution, as both sides would eventually like to reach an optimal decision at the lowest possible price. Online ADR best suits the financial demands of both parties. Most (if not all) of the document exchange in online proceedings takes place via e-mail, as opposed to fax (which is prohibitive) and post (which is slow).⁷⁹ Therefore, electronic transmission of documents is not only easier and faster, but it is also cheaper compared to litigation, where documentation is both costly and vast.⁸⁰

{20} One of the most recognized benefits of online mediation is that the disputants do not have to travel lengthy distances to settle disputes.⁸¹ Online disputes can arise between parties located in different countries; in that situation, at least one of the parties would have to travel in offline dispute resolution.⁸² The travel and accommodation costs involved may be prohibitive, thus making it impractical for the parties to resolve the dispute. Online dispute resolution, however, places both parties on a level playing field. It is unconcerned with the financial capacities of the parties, especially when compared to offline litigation, where deep-pocketed litigants may easily be able to afford on travel and accommodation for their lawyers, witnesses, and themselves, while the opposing litigants may not.⁸³ In the event that witnesses are required or face-to-face meetings are necessary, instant messaging, videoconferencing, or chat room conferences can be used to mitigate travel costs.⁸⁴

B. Speedy Resolution

{21} One of the main advantages of ADR over litigation is that it is less-time consuming. Where offline ADR may help settle a matter in days or months, as compared to the years it may take to resolve litigation, online ADR promises settlement of disputes within days or even hours.⁸⁵ The borderless nature of the Internet diminishes the communication problems faced by parties and counsel located in different time zones.⁸⁶ Further, as compared to offline ADR service providers, most online ADR providers function around the clock.⁸⁷ Interested parties can merely visit the provider's website and fill in certain electronic forms, thereby also eliminating any delays associated with receiving appropriate forms.⁸⁸ Moreover, the Internet enables parties to easily obtain data and other information about their cases in real time.⁸⁹ In addition to easy accessibility, e-mail simplifies the task of scheduling ADR proceedings and avoids any phone or fax-tags in the process.⁹⁰ E-mail is also a superior and swifter form of communication compared to fax, as it facilitates the sending of documents of multiple parties

simultaneously, thus saving time and money.⁹¹

C. Non-confrontational Mechanism

{22} While the intangible (and therefore anonymous) nature of the Internet is often a drawback in using this medium, these qualities could be advantageous in dispute resolution proceedings. By removing the physical presence of the opponent, online ADR provides the parties with a “dispassionate approach to the merits of [the] cause” of their dispute.⁹² This may also be beneficial when parties don’t trust each other or when they are uncomfortable confronting each other.⁹³ Further, since most of the arguments or dialogue take place asynchronously over e-mail, it allows the parties to a dispute to reflect on their positions before articulating them, without any time pressure.⁹⁴

{23} Additionally, such a mechanism blankets “any economic or other power imbalance that exists between the parties.”⁹⁵ Often in offline mediation or arbitration proceedings, a party that is more economically powerful, in reputation and in size, may intimidate the opponent and dominate the proceedings.⁹⁶ While “[a] competent mediator [or arbitrator] will seek to prevent power grabs by a dominant party,”⁹⁷ online ADR can help prevent such “power distortions” so that “the parties can have a clearer understanding of each other’s positions.”⁹⁸

D. Neutral Forum

{24} Sometimes a traditional ADR proceeding may take place at the office of either a party or that party’s lawyer. At times, this could determine who is in the position of power.⁹⁹ A neutral location, such as the arbitrator or mediator’s office or another institution, is essential to remove this power imbalance.¹⁰⁰ The Internet offers this neutral location and “denies a dominating party the potential to exploit the ‘home court advantage.’”¹⁰¹

E. Eliminates Complex Jurisdictional and Choice-of-Law Problems

{25} One of the most perplexing issues spawned by the Internet is jurisdiction. Since formal sources of dispute resolution, such as litigation, are restricted by concepts of legal sovereignty and comity, an injured party may not be able to obtain legal recourse without traveling to the place where the cause of action took place or where the wrongdoer resides or carries on business.¹⁰² In the context of the borderless Internet, however, who determines which country has jurisdiction? How is this determined? Further, how does one learn where the wrongdoer resides or carries on business? Nations are still coming to grips with this issue and are developing different theories and doctrines to deal with this problem.¹⁰³ In the interim, online ADR is not only a flexible and open medium, but also an attractive option to avoid jurisdictional concerns.¹⁰⁴ Parties transacting over the Internet can contract to submit disputes to an online ADR provider.¹⁰⁵

{26} Once the online ADR provider agrees to resolve the dispute, it must decide what law to apply. Should the jurisdiction be that of the website operator, the consumer, or a neutral country? Parties can avoid this problem by including a choice of law provision in their online agreement.¹⁰⁶

F. Facilitates Record Keeping

{27} Another benefit of using online ADR is that it facilitates the process of recording correspondence, pleadings, statements, and any other written, oral, or visual communication transmitted electronically.¹⁰⁷ The documentation of records and other online communication is not

only useful, but essential, especially if the ADR process provides for appellate review.¹⁰⁸

V. THE FLIPSIDE OF THE COIN: DISADVANTAGES OF ONLINE ADR

{28} The above section demonstrates the usefulness of ADR in resolving online disputes, but there are a number of drawbacks online ADR must overcome in order to be fully effective.

A. Lack of Human Interaction and Miscommunication

{29} An important facet of ADR is the “transformative and reconciliatory” role the mediators or arbitrators play in settling disputes.¹⁰⁹ When resolving issues, they engage in “therapeutic conversations” with the parties and seek to understand their concerns, feelings, and emotions before reaching a decision.¹¹⁰ Similarly, when online disputes are settled over e-mail, the parties may engage in caucusing without the mediator’s knowledge.¹¹¹ Unfortunately, “[e]ven videoconferencing or ‘web cams’ [do] not adequately address this party alienation. The subtleties of non-verbal communication are still lost in a web cam . . . session.”¹¹² The lack of face-to-face interaction also deprives the mediators and arbitrators of the opportunity to evaluate the credibility of parties and witnesses.¹¹³

{30} The impersonal nature of the Internet could cause miscommunication between the parties. Even if a sender is able to adequately express him or herself in writing, the recipient may still misinterpret the message.¹¹⁴ This is especially likely to occur when parties are located in different countries and speak different languages.¹¹⁵ Mediators may compound this problem if they “filter the messages in an e-mail exchange before revealing it to the other party.”¹¹⁶ Moreover, the fact that the parties do not know or trust each other may increase the likelihood of misunderstanding.¹¹⁷ A party to the dispute may also frustrate the process by not responding to e-mail or chat requests. This makes it almost impossible for the ADR provider to distinguish between a genuine technical difficulty and an uncooperative party.¹¹⁸

B. Inadequate Confidentiality and Security

{31} E-commerce emerged and still largely exists as “stranger-to-stranger” commerce, thereby making transaction and communication security and confidentiality one of the biggest concerns.¹¹⁹ In addition, confidentiality is one of the key features that makes ADR a more alluring option than litigation.¹²⁰ ADR proceedings are supposed to be completely private; this means that nothing used in mediation and settlement discussions can be used as evidence in court.¹²¹ Users of ADR are greatly concerned about the privacy of their proceedings and the privacy of any personal information that they supply to ADR providers before, during, or after the proceedings.¹²² It is therefore crucial that the same level of security and confidentiality is obtained in cyberspace. Despite the development of cutting-edge security technologies and encryption methods, the Internet “can still be porous when it comes to the security of data transmitted electronically.”¹²³ Inadequate Internet security has been a major deterrent in the growth of e-commerce and may also have a direct bearing on the use of online ADR.¹²⁴

C. Inadequate Authenticity

{32} Closely related to the issue of security is the issue of authentication, which is unique to the Internet.¹²⁵ Traditionally in an ADR process, one party can be certain that the other party it is dealing with is the party actually involved in the dispute. However, in cyberspace, it is not easy to verify the authenticity of messages received.¹²⁶ It is possible for a third party to impersonate or misrepresent one

of the parties in the dispute.¹²⁷

D. Unable to Meet the “Writing” Requirement for Arbitration of Disputes

{33} Online arbitration agreements face problems concerning their validity. An important criterion for valid arbitration agreements is that they must be in writing.¹²⁸ Agreements to arbitrate online are usually entered into online. Most domestic laws, however, do not consider an agreement to be in writing when it is recorded by electronic means.¹²⁹ In fact, even “[t]he current wording and interpretation of the New York Convention [on the Recognition and Enforcement of Foreign Arbitral Awards, 1958] (Art. II (2)). . . do[es] not include the agreement being recorded by electronic means.”¹³⁰ In the absence of some international consensus on this issue, it may be difficult to enforce an online arbitration award in domestic forums that do not legally recognize online arbitration agreements as being “in writing.”

E. Difficulty in Enforcing Online Arbitration Agreements

{34} Even if online arbitration agreements are said to satisfy the “writing” requirement, not all formally executed and valid arbitration agreements may be enforceable.¹³¹ Arbitration laws of some countries do not allow arbitration in cases where the parties have substantially unequal bargaining powers. Such an agreement may be against public policy and may thwart the aim of these laws, which is to protect consumers.¹³² For instance, in the United States, agreements may not be enforceable if they are procedurally or substantially unconscionable.¹³³ Even the European Union Directive on unfair terms in consumer contracts, for instance, declares unfair those clauses that are “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions”¹³⁴ As the near future of online ADR is likely to involve primarily business-to-consumer (“B2C”) transactions,¹³⁵ these current arbitration laws could be obstacles to the development of online binding arbitration.

F. Difficulties in Enforcing Online Decisions

{35} One of the advantages of ADR discussed above is that it avoids jurisdictional and choice of law issues. However, the circumvention of a country’s jurisdiction or laws by a private settlement of disputes may at times be unjust to one of the disputants, and may even be against the public policy of the country.¹³⁶ Further, in the case of online arbitration proceedings, once the award has been rendered, the same has to be enforced in the appropriate court.¹³⁷ It may be difficult to locate the other party on the Internet or, for that matter, where the party’s assets are located, which would be necessary to effectively enforce the award in that jurisdiction.¹³⁸ Unless parties are ensured that the awards rendered will be enforced,¹³⁹ or that a remedy is automatically meted out at the end of a proceeding,¹⁴⁰ they may not gain confidence in such online proceedings.

G. Insufficient Accessibility and User Sophistication

{36} Another drawback of online ADR is that it presumes that the parties and their counsel have unrestricted access to the Internet and e-mail. Although e-mail use and Internet accessibility is increasing, it is far from universal.¹⁴¹ Further, even if parties and their counsel do have Internet and e-mail access, they may not be sophisticated or savvy enough to use these technologies in the course of dispute resolution.¹⁴² In a real world legal dispute, an attorney assists the consumer in filing complaints and other pleadings. However, in an online ADR situation, the consumer generally drafts his or her own complaint. Sometimes the complaint may not be appropriately drafted; in other words,

legally relevant facts may be omitted and unnecessary facts may be included.¹⁴³ Since most of the communication with arbitrators and mediators is online, a party that is not comfortable with organizing and eloquently penning down its arguments may be at a disadvantage.¹⁴⁴ Further, as the dispute becomes more complex, such as a domain name dispute under ICANN's UDRP, clarity of thought and communication become crucial.¹⁴⁵ While permitting counsel representation may seem to solve the problem, it may not make online ADR that cost-effective after all.¹⁴⁶

H. Inadequate “Discovery” Procedure

{37} A significant component of the pre-trial stage is that of investigation and collection of evidence to support the case. This discovery or fact-finding process may be minimized or even absent in the online ADR process.¹⁴⁷ In a situation where the facts are disputed, a limited or non-existing discovery procedure may be a hindrance in a speedy and effective resolution.¹⁴⁸ The lack of discovery might also be onerous on complainants who must carry the burden of proof.¹⁴⁹ Limiting or eliminating the discovery process may violate the principles of natural justice and create due process concerns.¹⁵⁰

I. Limited Range of Disputes

{38} Online ADR is best suited to resolve certain types of disputes, particularly e-commerce disputes and domain name disputes. Each type of ADR mechanism, however, may not be suitable for every kind of online dispute.¹⁵¹ For instance, negotiation and mediation may be suitable in resolving money issues arising out of basic contractual disputes. However, since neither of these methods create a binding decision, they may not be suitable for resolving significant issues that often require assistance from courts or administrative authorities. Further, while arbitration may seem like the best method at the outset, there are various issues concerning its binding nature and enforceability, as discussed above, which make it less suitable to resolve major disputes. Tortious disputes on the Internet, such as defamation and trespass, may generally require substantial discovery and evidentiary proceedings; this may be inconvenient to carry on in the online environment.

VI. SUGGESTIONS TO IMPROVE THE ONLINE ADR PROCESS

{39} No dispute resolution process, whether it is litigation or any of the myriad forms of ADR, is perfect. The idea is not to dwell upon the drawbacks of these processes and criticize them, but to attempt to improve them and minimize their shortcomings. The previous two sections demonstrate that while online ADR may be a good tool to settle online disputes, there are certain areas that need to be resolved before the process becomes adequately effective. Several legal scholars have suggested means by which online ADR can be made successful. There have even been proposals for online ADR systems. An example of such a model has been formulated by the American Bar Association, and is discussed in a grouping of proposed guidelines.¹⁵² In this section, this article briefly summarizes and analyzes some of the recommendations, and the author presents other possibilities for improving the online ADR process. While these recommendations do not purport to be a comprehensive set, if used wisely, these ideas can definitely increase the success rates of online ADR.

A. Proposed Models

1. *Self-Regulation*

{40} The first proposed framework for online ADR was a self-regulatory model, which provided for current online ADR systems to develop with the passage of time.¹⁵³ Many hoped that a system

would eventually develop that would be best suited to adjust to the uniqueness of Internet disputes.¹⁵⁴ This system was intended to have the effect of “obviating the need for governments to intervene and legislate along geopolitical lines.”¹⁵⁵ However, an inherent defect with this system is that it is vulnerable to market forces and lacks any stability, or any legitimacy for that matter.¹⁵⁶ Consumers may not have faith in such a framework to settle their online disputes, and courts may also be reticent to enforce the decisions delivered by such online ADR service providers. Further, as e-commerce grows, a disorganized online ADR system may not adequately serve online communities.¹⁵⁷

2. Chargeback Mechanism for Online Disputes

{41} It has also been suggested that the “chargeback” mechanism used in cases of credit card disputes in the United States should be used to resolve some online disputes.¹⁵⁸ Credit card chargebacks operate under the Fair Credit Billing Act, which ensures that “if a consumer disputes a charge that appears on a credit card statement . . . the card issuer is not permitted to insist on payment unless and until they investigate the claim.”¹⁵⁹ Generally, there is an investigation, followed by negotiation, and then reinstatement of the charge.¹⁶⁰ Nevertheless, if there has been a genuine mistake, or if the consumer has truly been “ripped off,” it is very likely that the consumer will not be charged.¹⁶¹ A disgruntled consumer is able to vent his or her frustration through this process.

{42} Additionally, “even if the charge is later reinstated, the merchant had to answer for whatever it did to rouse the customer’s anger.”¹⁶² This process may be useful in the case of credit cards, where after reinstatement of the charge, the credit card company can levy a penalty, discontinue the charge, or even sue in court if the cardholder declines to make payment. However, in the case of an online purchase, where the goods are complained of being defective, if the e-business refunds the money back to the consumer pending online proceedings, it is uncertain whether the consumer will actually remit the money back to the e-business if the latter wins the dispute. To avoid such a situation, the online business could provide the customer with a store credit that they could take advantage of if they win, and if the customer loses, the online business could withdraw the credit.

3. Non-Binding ADR System

{43} Author Thomas Schultz has suggested that a self-regulated, non-binding dispute resolution system is a more effective, although not always a legitimate, method of resolving disputes.¹⁶³ Schultz argues that there is a “fairly strong correlation between the binding character of the outcome and the caseloads.”¹⁶⁴ Though non-binding arbitration awards occur rather frequently, binding awards tend to be either infrequent or unreported.¹⁶⁵ In addition, the non-binding nature of ADR is more favorable to the Internet, owing to the difficulties of validity, due process requirements, and enforcement.¹⁶⁶ While Schultz has empirical data and compelling arguments to support his proposition, it is too soon to narrow down the types of ADR proceedings that should be utilized to resolve online disputes. Pigeonholing online dispute resolution into non-binding ADR proceedings may not be conducive to the nature of the Internet where the types of online disputes that arise may change with advancements in technology. Disputes may be referred to as binding or non-binding depending upon their type. In some instances, consumers may prefer a binding decision, which ties down the e-business, over a non-binding one, which can be ignored.

4. Centralized Online ADR System

{44} One scholar has suggested the formation of a centralized online dispute resolution system, known as the Dispute Resolution Referral Center (DRRC).¹⁶⁷ Under the proposed DRRC, once a

complaint is filed, the DRRC would examine the complaint and offer recommendations of relevant online ADR service providers to the disputants.¹⁶⁸ It would rely on system operators to enforce the decisions.¹⁶⁹ The biggest advantage of the DRRC is that it would channel the complaint to the right source and facilitate a swift, cost-effective and efficacious decision. Additionally, a uniform body of law may develop over the Internet and help in regulating Internet disputes.¹⁷⁰ However, unless the DRRC is unanimously agreed upon as the sole framework, it is very likely that competitor frameworks would develop.¹⁷¹ Further, since the online ADR service providers are to be operated by the DDRC itself,¹⁷² the DDRC could become overburdened if there were manifold increases in the number of Internet disputes; ultimately, the entire system could collapse. A better alternative that has been suggested is that the DDRC should refer the matter to independent service providers where it could monitor the efficiency of these independent providers on a regular basis.¹⁷³ Theoretically, the DDRC does seem like a good framework within which to operate, but only time will tell whether such a centralized system can develop and withstand the ever-changing demands of cyberspace.

B. Recommendations and Changes

{45} In the absence of a workable regulatory regime, consumers, website operators and online ADR providers could adopt the following practices to ensure effective settlement of online disputes.

1. Clear Terms and Conditions by E-Businesses

{46} Every online business, whether it is an auction site, an online retail store, an online service provider, or an Internet banking site, should clearly set out the terms and conditions of its operation and those with which its users must comply. The terms and conditions must explicitly address issues concerning warranties, liability, consumer rights, and privacy.¹⁷⁴ They should also specify the method of dispute resolution that could be resorted to in the case of an online dispute. By delineating these issues, e-businesses can increase consumer confidence. Consumers can also understand their rights and responsibilities before using the website and be aware of the remedies available to redress future grievances. These terms and conditions must be placed in a conspicuous place on the website so that potential consumers have adequate notice.

2. Trustmarks or Webseals

{47} Since parties engage in stranger-to-stranger commerce on the Internet, instilling mutual confidence and trust is crucial for the success of Internet transactions. One method of inspiring such consumer confidence is by using a trustmark developed by a trustmark organization. A trustmark, sometimes known as a webseal, is a logo or symbol displayed on the website of an e-business which informs the consumer that the e-business has committed to compliance with qualitative standards or best practices, including certain redress mechanisms.¹⁷⁵ Subscribers (i.e. e-businesses) to a trustmark program “submit an online application, review and sign a license and related agreements, [and] compare and conform their policies to those of the trustmark provider.”¹⁷⁶ In return, they receive a unique graphic seal, along with confidential instructions on how to electronically display it on their website.¹⁷⁷ Trustmark organizations must have a monitoring mechanism to ensure that their subscribers continue to comply with the best practices or code of conduct associated with the trustmark.¹⁷⁸ Some examples of early trustmarks include TRUSTe and the Better Business Bureau Online Reliability Seal.¹⁷⁹ Another example is the SquareTrade Seal Program.¹⁸⁰ Under this program, sellers, including auction sellers, small businesses, and large enterprises, agree to settle disputes at the site.¹⁸¹ This agreement entitles them to place the SquareTrade Seal on their webpage.¹⁸² The presence of this seal, in theory, assures potential buyers that they will have recourse if a transaction goes awry.

3. Security Technology

{48} E-businesses, website operators and online ADR providers should make certain that they adopt security mechanisms to ensure the safety of their customer's information.¹⁸³ One way of restricting access to their websites is by using usernames and passwords.¹⁸⁴ Only authorized customers should be allowed to access these sites. In addition, website operators should adopt the latest security technology available and update this technology to prevent hacking into their computer systems.¹⁸⁵ Online ADR providers should also mandate that parties use digital signatures in their online communications.¹⁸⁶ The purpose of such digital signatures is two-fold: (1) it encrypts the online message or document, thereby providing security to the transmission, and (2) it also allows the receiver to verify the authenticity of the message, i.e. whether it has actually been sent by the purported sender.¹⁸⁷ While not all parties may be able to afford digital signatures, it may be possible and useful in the context of affluent parties.

4. Detailed Procedures by Online ADR Providers

{49} Online ADR providers must provide disputants with a detailed set of guidelines and instructions on how the entire online proceeding will be conducted. The provider must specify, inter alia, the form of ADR that will be used, the manner in which the neutral facilitator, mediator, or arbitrator will be appointed and the remedies to which parties will be entitled. Just as consumers are concerned about the privacy of their information when dealing with online businesses, they are equally concerned that the data they provide online ADR providers remain confidential.¹⁸⁸ Online ADR providers should therefore formulate and implement a privacy policy that informs their customers of privacy and data protection laws, regulations, standards, and guidelines which the providers follow, as well as the remedies that customers would have in the event the privacy policy were breached. The ADR provider may also allow less sophisticated parties the option of additional counsel or aid.¹⁸⁹ The policy should also specify if and how any "discovery" is to be conducted. A partial solution may be to build a procedural device into the online dispute-resolution process by which a neutral party would make an initial evaluation of the case, and if disputed material facts exist, a limited "discovery" process could be employed.¹⁹⁰

5. Low or Free of Cost Online ADR

{50} In order for online ADR to be valuable to online consumers, the service must be provided free of cost or at a low cost.¹⁹¹ More often than not, the monetary value of online disputes is small;¹⁹² it would be impractical to use ADR processes that are more expensive than the total monetary value of the case. Since most businesses carry some insurance to deal with disputes, including malpractice and products liability insurance, e-businesses could also use this insurance coverage to defray the costs of online ADR services.¹⁹³ Additionally, nonprofit and educational entities could broaden access to online ADR services for online consumers by seeking private and public funding.¹⁹⁴

6. Enforcement of Online ADR Decisions

{51} As discussed above, one of the drawbacks of online ADR is the inability of parties to enforce their decisions. A proposal for e-commerce disputes would be the insertion of a clause in an online user agreement whereby the parties, or at least the online business, agree to be bound by the decision of the online ADR provider. If the online business does not cooperate in enforcing the online decision, the aggrieved consumer may be able to sue in court for breach of contract.¹⁹⁵ Other options could include revocation of the online business's trustmark or the imposition of sanctions when an online

business displays a trustmark but fails to abide by the decision.¹⁹⁶

{52} In the case of online monetary disputes, a neutral third-party mediator or arbitrator could demand, or the parties may contractually agree, that the defendant deposit the disputed amount of money with the forum until the dispute is resolved. If the case is decided in favor of the plaintiff, the forum would award the damages from the corpus deposited with it; if the defendant wins, the money would be returned to the defendant.¹⁹⁷ Theoretically, this form of enforcement guarantees a party that justice will be rendered. As a practical matter, however, whether defendants would agree to deposit money with the mediator or arbitrator at the outset of the dispute is uncertain. Other suggested alternatives include agreement by the parties to submit a dispute arising out of non-enforcement of an online decision to a binding arbitration award, or empowering a mediator with the authority of an arbitrator to deliver a binding award once a settlement agreement is reached.¹⁹⁸

7. Greater Public Awareness and Understanding of Online ADR

{53} One of the major obstacles with respect to the growth of online ADR is the lack of public awareness, as well as understanding, of the ADR mechanisms. One of the main reasons the Virtual Magistrate Project failed was because of the lack of advertising. Online dispute resolution (ODR) providers must take concrete steps to market their services online.¹⁹⁹ Judicial authorities, educational institutions, e-businesses, governmental institutions, and non-profit organizations must also work together to establish initiatives that will broaden public understanding and confidence in online ADR.

C. The ABA Recommended Best Practices for Online Dispute Resolution Providers

{54} The American Bar Association Task Force on E-commerce and ADR has formulated certain “best practices,” which ODR providers are recommended to adopt in order to assist the providers, online customers, and online merchants.²⁰⁰ One of the effects of the *ABA Recommended Best Practices* is that it sets substantive minimums for ODR providers.²⁰¹ The ABA encourages ODR providers to disclose to the public their contact information, terms and conditions, services provided, procedures adopted for the resolution of disputes, and costs and prerequisites associated with their services.²⁰² This would facilitate a consumer’s decision in choosing that particular ODR provider. The ODR providers are also encouraged to disclose the type of technology and software that they use to ensure that the ODR process is easily accessible, efficacious, and secure.²⁰³

{55} The *ABA Recommended Best Practices* highlight the importance of impartiality and suggest that the ODR provider must disclose any contractual relationships that it may have with online businesses and trade organizations, and explain the manner in which “neutrals” are appointed to decide the cases.²⁰⁴ The ODR providers should disclose the qualifications of the neutrals.²⁰⁵ Confidentiality, privacy, and information security should be treated with the utmost importance and consumers should be made aware of how their personal information and case-related information will be safeguarded.²⁰⁶ Finally, ODR providers should disclose whether they provide any assistance in enforcing their decisions,²⁰⁷ and the jurisdiction in which complaints against the ODR provider can be brought.²⁰⁸

VII. CONCLUSION

{56} The Internet is a unique and evolving medium; therefore, ADR mechanisms used in the real world may not be easily duplicated in the online environment.²⁰⁹ Nevertheless, owing to the adaptable nature of ADR, traditional forms could be modified to resolve most online disputes. The flexible nature of ADR “would alleviate some legal-application problems relating to the rapid development of

both technology and a global economy.”²¹⁰

{57} While there are several challenges in the way of perfecting online ADR, it is only a matter of time before they are overcome. The rapid growth of online ADR providers in the last few years is evidence that online ADR is a more effective method for resolving online disputes than “real world” litigation. A more consolidated effort between governments, consumer groups, and the online industry could go a long way in facilitating a speedy and economical resolution of online disputes using online ADR.

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¹ In September 2003, approximately 680 million people used the Internet. Global Reach, *Global Internet Statistics*, at <http://www.greach.com/globstats/index.php3> (last updated Sept. 30, 2003).

² Projections by Forrester Research, Inc. indicate that online commerce will reach \$6.8 trillion by 2004. Global Reach, *Forrester Projects \$6.8 Trillion for 2004*, at <http://greach.com/eng/ed/art/2004.ecommerce.php3> (last updated Nov. 23, 2001). EMarketer predicts that by 2004, worldwide e-commerce revenues will total \$2.7 trillion. Nua Internet Surveys, *Worldwide B2B Revenues to Pass One Trillion*, at http://www.nua.ie/surveys/?f=VS&art_id=905358753&rel=true (last visited Nov. 22, 2003). While these two sources predict different results, it is certain that e-commerce will grow in the future.

³ The number of Internet-related complaints in the United States, for instance, increased from only twelve in 1995 to 18,622 in 1999. American Bar Association Task Force on E-commerce and Alternative Dispute Resolution, *Addressing Disputes in Electronic Commerce: Final Report and Recommendations of the American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution*, 14 (Aug. 2002), available at <http://www.law.washington.edu/ABA-eADR/documentation/docs/FinalReport102802.pdf> (last visited Dec. 3, 2003) [hereinafter ABA Final Report]. This constituted an increase from almost zero percent to twenty-two percent of the total consumer complaints. *Id.* at 15.

⁴ See Thomas Schultz, *Online Arbitration: Binding or Non-Binding?*, ADR ONLINE MONTHLY, at <http://www.ombuds.org/center/adr2002-11-schultz.html> (last visited Nov. 22, 2003).

⁵ ADR is a quicker, more flexible, and less expensive substitute for litigation. Ethan Katsh et al., *E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of “eBay Law,”* 15 OHIO ST. J. ON DISP. RESOL. 705, 707, 727 (2000). It also allows parties to a transaction to avoid some mutually disagreeable aspects of public law by contracting around them. Further, jurisdictional issues in the Internet context can also be avoided by an agreement of the parties. *Id.* at 707.

⁶ George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 HASTINGS COMM. & ENT. L.J. 695, 697 (1997).

⁷ *Id.*

⁸ Frank A. Cona, *Focus on Cyberlaw: Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 976 (1997).

⁹ “Arbitration is generally defined as the submission of disputes to one or more impartial persons for final and binding determination.” Friedman, *supra* note 6, at 698.

¹⁰ Mediation traditionally involves a neutral third party facilitator who helps parties in reaching a mutually satisfactory settlement. Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Help Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. TECH. & INTELL. PROP. 55, 70 (2001).

¹¹ Negotiation typically involves a discussion and deliberation of a dispute between the parties themselves so as to reach a settlement with or without the help of a third party facilitator. See Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659, 688 (1997).

¹² *Statement of the United States and the European Union on Building Consumer Confidence in E-commerce and the Role of Alternative Dispute Resolution*. (Dec. 18, 2000), at <http://www.useu.be/SUMMIT/ecom1218.html>.

¹³ *Id.*

¹⁴ See Alan Wiener, *Regulations and Standards for Online Dispute Resolution: A Primer for Policymakers and Stakeholders (Part I)* (Feb. 15, 2001), at <http://www.mediate.com/articles/awiener2.cfm>.

¹⁵ See ABA Final Report, *supra* note 3.

¹⁶ See Geneva Law School and Informatics Center, *E-com/E-law Project on ODR*, at <http://www.online-adr.org/scope> (last visited Nov. 22, 2003).

¹⁷ For instance, the World Intellectual Property Organization (WIPO) has set up an Arbitration and Mediation Center for the resolution of domain name disputes. See WIPO Domain Name Dispute Resolution Service, at <http://arbiter.wipo.int/domains/> (last visited Nov. 22, 2003).

¹⁸ Victoria C. Crawford, Note, *A Proposal to Use Alternative Dispute Resolution as a Foundation to Build an Independent Global Cyberlaw Jurisdiction Using Business to Consumer Transactions as a Model*, 25 HASTINGS INT'L & COMP. L. REV. 383, 383-84 (2002).

¹⁹ See Center for Information Technology and Dispute Resolution, *Current ODR Projects and Websites*, at <http://www.ombuds.org/center/onlineadr.html> (last visited Nov. 22, 2003).

²⁰ See Chicago-Kent College of Law, Illinois Institute of Technology, *VMAG: Online Dispute Resolution*, at <http://www.vmag.org> (last visited Nov. 22, 2003).

²¹ *Id.*

²² George H. Friedman & Robert Gellman, *An Information Superhighway "On Ramp" for Alternative Dispute Resolution*, 68 N.Y. ST. B.J. 38, 41 (1996).

²³ *Id.*

²⁴ Richard Michael Victorio, *Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century*, 1 PEPP. DISP. RESOL. L.J. 279, 283-84 (2001).

²⁵ Crawford, *supra* note 18, at 391-92.

²⁶ See Tierney v. Email America, VM Docket No. 96-0001 (May 8, 1996), available at <http://www.vmag.org/sample.html> (last visited Feb. 26 2004) (noting that the full text of the decided case is "coming soon").

²⁷ Ponte, *supra* note 10, at 64.

²⁸ *Id.*

²⁹ Online Ombuds Office, Center for Information Technology and Dispute Resolution, at <http://www.ombuds.org/center/ombuds.html> (last visited Nov. 22, 2003) [hereinafter Online Ombuds Office].

³⁰ Ponte, *supra* note 10, at 61.

³¹ Online Ombuds Office, *supra* note 29.

³² *Id.*

³³ WIPO Arbitration and Mediation Center, *Frequently Asked Questions: Internet Domain Names*, at <http://arbitrator.wipo.int/center/faq/domains.html> (last visited Nov. 22, 2003) [hereinafter WIPO, *Frequently Asked Questions*].

³⁴ ICANN, *Uniform Domain Name Dispute Resolution Policy* (Oct. 24, 1999), at <http://www.icann.org/udrp/udrp-policy-24oct99.htm>. [hereinafter ICANN, *Dispute Resolution Policy*].

³⁵ WIPO, *Frequently Asked Questions*, *supra* note 33.

³⁶ *See id.*

³⁷ *Id.*

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ SquareTrade, *About SquareTrade*, at <http://www.squaretrade.com/cnt/jsp/abt/aboutus.jsp;jsessionid=m5ysw6xln1?vhostid=daffy&stmp=squaretrade&cntid=m5ysw6xln1> (last visited Dec. 3, 2003) [hereinafter *About SquareTrade*].

⁴² William Krause, *Do You Want to Step Outside?: An Overview of Online Alternative Dispute Resolution*, 19 J. MARSHALL J. COMPUTER & INFO. L. 457, 462 (2001).

⁴³ *Id.*

⁴⁴ SquareTrade, *A Simple, Four Step Process to Resolve Disputes*, at http://www.squaretrade.com/cnt/jsp/odr/learn_odr.jsp;jsessionid=z5jy3hx7u1?vhostid=tomcat4&stmp=squaretrade&cntid=z5jy3hx7u1 (last visited Nov. 22, 2003).

⁴⁵ SquareTrade, *Frequently Asked Questions: Case Closing*, at <http://www.squaretrade.com/cnt/jsp/hlp/odr.jsp?vhostid=chipotle&stmp=squaretrade&cate=6&ques=1> (last visited Nov. 22, 2003).

⁴⁶ *About SquareTrade*, *supra* note 41.

⁴⁷ Krause, *supra* note 42, at 462.

⁴⁸ *About SquareTrade*, *supra* note 41.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Cybersettle, *What is Cybersettle?*, at <http://www.cybersettle.com> (last visited Nov. 22, 2003) [hereinafter *What is Cybersettle?*].

⁵² *See* Cybersettle, *Claim Resolution Services*, at <http://www.cybersettle.com/products/claimresolution.asp> (last visited Nov. 22, 2003).

⁵³ Cybersettle, *About Us*, at <http://www.cybersettle.com/about/about.asp> (last visited Nov. 22, 2003) [hereinafter

Cybersettle, *About Us*]. In fact, Cybersettle holds patent number 6,330,551 for the Computerized Dispute Resolution System and Method. *What is Cybersettle?*, *supra* note 51.

⁵⁴ Cybersettle, *Cybersettle Demonstration*, at http://www.cybersettle.com/demo/demo_pf.asp (last visited Dec. 2, 2003) [hereinafter *Cybersettle Demonstration*].

⁵⁵ In the case of Cybersettle.com, the initiating party must be an attorney or a claims professional. Cybersettle, *Attorney FAQ*, at <http://www.cybersettle.com/faqs/attyfaq.asp> (last visited Nov. 22, 2003) [hereinafter *Cybersettle, Attorney FAQ*].

⁵⁶ *Cybersettle Demonstration*, *supra* note 54.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Cybersettle, *Attorney Pricing*, at http://www.cybersettle.com/products/atty_pricing.asp (last visited Dec. 2, 2003).

⁶¹ See *Cybersettle Attorney FAQ*, *supra* note 55 (“Since no offer or demand is ever revealed to the opposing party, cases that do not settle online settle ‘offline’ in a shorter time period.”).

⁶² *What is Cybersettle?*, *supra* note 51. This online ADR service, however, also resolves several offline disputes. *Id.*

⁶³ Cybersettle, *ATLA, Cybersettle Launch Co-Branded Online Settlement System for ATLA Members*, at <http://www.cybersettle.com/news/companynews/20010425atla.asp?sourceid=10> (Apr. 26, 2001).

⁶⁴ Cybersettle, *Canadian Bar Association Names Cybersettle Its Official and Exclusive Online Settlement Tool*, at <http://www.cybersettle.com/news/companynews/20020917cba.asp?sourceid=17> (Sept. 17, 2002).

⁶⁵ Friedman, *supra* note 6, at 707.

⁶⁶ E. Casey Lide, Note, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 222 (1996).

⁶⁷ Friedman, *supra* note 6, at 708.

⁶⁸ See Michael Grebb, *Settle This: Which Technology Resolves Disputes Best?*, National Arbitration and Mediation, at <http://www.clicknsettle.com/pr032001.cfm> (last visited Nov. 22, 2003).

⁶⁹ ICANN, *Dispute Resolution Policy*, *supra* note 34.

⁷⁰ WIPO Arbitration and Mediation Center, *UDRP Case Filing and Decisions*, at <http://arbitr.wipo.int/domains/statistics/cumulative/results.html> (last visited April 22, 2003).

⁷¹ See ICANN, *Approved Providers for Uniform Domain-Name Dispute-Resolution Policy*, at <http://www.icann.org/dndr/udrp/approved-providers.htm> (last updated Mar. 1, 2002).

⁷² Kazaa Media Desktop, at <http://www.kazaa.com/us/index.htm> (last visited Nov. 22, 2003).

⁷³ See generally Jonathan B. Ko, Note, *Para-sites: The Case for Hyperlinking as Copyright Infringement*, 18 LOY. L.A. ENT. L.J. 361 (1998) (arguing that, “hyperlinking, the principal means by which computers browse through Web sites and access information on the Internet, constitutes a copyright infringement”).

⁷⁴ Lide, *supra* note 66, at 207.

⁷⁵ *Id.*, at 210.

⁷⁶ Victorio, *supra* note 24, at 299-300.

⁷⁷ See clickNsettle.com, at <http://www.clicknsettle.com> (last visited Dec. 12, 2003).

⁷⁸ Cybersettle, *About Us*, *supra* note 53.

⁷⁹ See Cona, *supra* note 8, at 991.

⁸⁰ See *id.*, at 992.

⁸¹ See Robert C. Bordone, Note, *Electronic Online Dispute Resolution: A Systems Approach – Potential, Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 192 (1998).

⁸² Lan Q. Hang, Comment, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 854 (2001).

⁸³ See Friedman, *supra* note 6, at 712.

⁸⁴ Victorio, *supra* note 24, at 289.

⁸⁵ See Alejandro E. Almaguer & Roland W. Baggott, III, Note, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 720 (1998) (discussing the goal of the Virtual Magistrate “to receive and resolve complaints within seventy-two hours (three business days) after acceptance”).

⁸⁶ Friedman, *supra* note 6, at 711.

⁸⁷ Victorio, *supra* note 24, at 290.

⁸⁸ *Id.*

⁸⁹ See Cona, *supra* note 8, at 991-92; see also Friedman *supra* note 6, at 711-12. (“For example, the Virtual Magistrate’s docket [was] accessible to the parties at all times, thus allowing them free access to all documents relating to their case.”)

⁹⁰ Victorio, *supra* note 24, at 290.

⁹¹ Friedman, *supra* note 6, at 711.

⁹² David R. Johnson, *Screening the Future for Virtual ADR*, 51 DISP. RESOL. J. 117, 118 (1996).

⁹³ See *id.*

⁹⁴ See *id.* at 118-19.

⁹⁵ Victorio, *supra* note 24, at 291.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*, at 292.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Henry H. Perritt, Jr. *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. INT'L. ECON. L. 563, 568 (2000).

¹⁰³ For instance, the United States uses the “minimum contacts” doctrine to gain jurisdiction over a dispute or a party. *See, e.g., Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 889 (6th Cir. 2002) (“The minimum contacts requirement is met if [Neo Gen Screening, Inc.] ‘purposely avail[ed] itself of the privilege of conducting activities within the forum State.’”) (quoting *Hanson v. Denkla*, 357 U.S. 235, 253 (1958)); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997).

¹⁰⁴ Lide, *supra* note 66, at 200.

¹⁰⁵ *See* Perritt, *supra* note 102, at 574.

¹⁰⁶ Lide, *supra* note 66, at 200. It is uncertain whether courts will respect such dispute resolution and choice of law provisions when adjudicating and enforcing online judgments or awards. Courts may be apprehensive when enforcing a dispute resolution and choice of law clause in an agreement where one party enjoys superior bargaining power. Generally speaking, online consumer contracts tend to favor the vendor or the service provider and are standard form contracts which cannot be modified by the consumer. In such cases, it is uncertain whether courts would invariably enforce the “exclusive” dispute resolution and choice of law provision because the consumer invariably has no bargaining power. Further, if the courts are of the view that there is no nexus between the chosen law and the dispute, or that the law of some other place has a greater connection to the dispute, they may apply such other law.

¹⁰⁷ Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 680-81 (2000).

¹⁰⁸ *See id.* at 681.

¹⁰⁹ Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 B.Y.U. L. REV. 1305, 1322 (1998).

¹¹⁰ *Id.* at 1325.

¹¹¹ *Id.* at 1348. These e-mails may be similar to “the practice in mediation of convening caucuses of members outside the presence of the full group of participants. A mediator often assumes that parties have discussed matters of mutual interest before entering into a mediation proceeding. She might want to prohibit or otherwise control caucusing after the proceeding begins.” *Id.*

¹¹² Victorio, *supra* note 24, at 293.

¹¹³ *See* Perritt, *supra* note 107, at 680.

¹¹⁴ Victorio, *supra* note 24, at 293.

¹¹⁵ *See* Friedman, *supra* note 6, at 713.

¹¹⁶ Victorio, *supra* note 24, at 293.

¹¹⁷ Eisen, *supra* note 109, at 1328.

¹¹⁸ See M. Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953, 976 (1996).

¹¹⁹ *Id.* at 971.

¹²⁰ Victorio, *supra* note 24, at 295.

¹²¹ *Id.*

¹²² See Almaguer & Baggott, *supra* note 85, at 735 (discussing the uncertain security of email in ADR).

¹²³ Friedman, *supra* note 6, at 713.

¹²⁴ See Friedman, *supra* note 6, at 713-14 (discussing the security improvements needed for online ADR to succeed).

¹²⁵ See Victorio, *supra* note 24, at 296.

¹²⁶ Katsh, *supra* note 118, at 973.

¹²⁷ Digital signatures may help in reducing the occurrence of this problem. See Katsh, *supra* note 118, at 974. They are not widely used, however, and they are not affordable for every consumer. See PGP Personal Products, at <https://store.pgp.com/default.php?cPath=79> (last visited November 23, 2003) (showing that the PGP Personal Desktop, a personal use security program that includes digital signatures, costs \$50).

¹²⁸ For example, in the United States, “the Federal Arbitration Act, and all state arbitration laws, require that the agreement to arbitrate must be in writing (although not necessarily signed).” Friedman, *supra* note 6, at 714.

¹²⁹ Schultz, *supra* note 4.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ In the case of *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 575 (N.Y. App. Div. 1998), concerning a consumer item valued between \$2000 and \$3000, the court held unconscionable a clause mandating ICC arbitration, since the costs of the deposit for arbitration would exceed the value of the transaction itself. See also Linda Alle-Murphy, Comment, *Are Compulsory Arbitration Clauses in Consumer Contracts Enforceable?: A Contractual Analysis*, 75 TEMPLE L. REV. 125, 158 (2002) (discussing the showing of unconscionability in arbitration clauses based on substantive and procedural unconscionability).

¹³⁴ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, art. 3, annex (q), 1993 O.J. (L 95) 29-34.

¹³⁵ According to the ABA Task Force, “[Online Dispute Resolution] is not used to any meaningful degree in the [business-to-business] market segment since the parties have made other arrangements for the settlement of disputes between them and disputes among them are rare in any case.” ABA Final Report, *supra* note 3, at 9. The ABA Task Force also notes that there are existing initiatives to create effective and trustworthy online dispute resolution mechanisms for B2C transactions and that the potential to resolve B2C transactions through online dispute resolution provides a rare opportunity. *Id.*, at 17.

¹³⁶ See Krause, *supra* note 42, at 475.

¹³⁷ See Perritt, *supra* note 102, at 571-72.

¹³⁸ *See id.*

¹³⁹ *See* Hang, *supra* note 82, at 860.

¹⁴⁰ *See* Henry H. Perritt, Jr., *Will the Judgment-Proof Own Cyberspace?*, 32 INT'L LAW. 1121, 1123 (1998) (“[T]he real problem is turning a judgment supported by jurisdiction into meaningful economic relief.”).

¹⁴¹ Victorio, *supra* note 24, at 297.

¹⁴² *See id.* ; *see also* Krause, *supra* note 42, at 480 (suggesting that differences in the sophistication and savvy of Internet use may create too large a burden on the average consumer).

¹⁴³ *See* Krause, *supra* note 42, at 480.

¹⁴⁴ *See id.*

¹⁴⁵ *See* Krause, *supra* note 42, at 481.

¹⁴⁶ *See id.*, at 480-81.

¹⁴⁷ *See* Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 201 (2000).

¹⁴⁸ *See* Krause, *supra* note 42, at 487; *see also* Thornburg, *supra* note 147, at 201-02 (discussing the effect of discovery on a consumer’s expected return).

¹⁴⁹ Krause, *supra* note 42, at 487; *see also* Thornburg, *supra* note 147, at 206 (explaining that the lack of discovery makes it more difficult “to present a sufficient quantum of credible information” to meet the burden of proof).

¹⁵⁰ *See* Krause, *supra* note 42, at 487.

¹⁵¹ Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2003 DUKE L. & TECH. REV. 4, 31 (2003).

¹⁵² American Bar Association Task Force on E-Commerce and ADR, *Recommended Best Practices for Online Dispute Resolution Service Providers*, at <http://www.law.washington.edu/aba-eadr/documentation/docs/BestPracticesFinal102802.doc> (last visited Nov. 29, 2003) [hereinafter ABA, *Recommended Best Practices*].

¹⁵³ Hang, *supra* note 82, at 863.

¹⁵⁴ *Id.*

¹⁵⁵ Almaguer & Baggott, *supra* note 85, at 714.

¹⁵⁶ *See* Hang, *supra* note 82, at 863.

¹⁵⁷ *Id.*

¹⁵⁸ Krause, *supra* note 42, at 472.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Schultz, *supra* note 4.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* “For instance, under ICANN’s Uniform Dispute Resolution Policy for domain names (UDRP) – ... the epitome of non-binding online arbitration – over six thousand decisions have been rendered, whereas the Chartered Institute of Arbitrators – which probably holds the lead in the field of online binding arbitration – has delivered approximately 70 awards.” *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Bordone, *supra* note 81, at 201.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* The DRRC would charge a nominal fee for its service to the complainants and possibly find public subsidies, as well. *Id.* at 209.

¹⁷⁰ *See* Hang, *supra* note 82, at 865.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ E-businesses could also have a separate privacy policy that informs customers of the manner in which any personal information they provide will be used by the e-business.

¹⁷⁵ ABA Final Report, *supra* note 3, at 19 n.37.

¹⁷⁶ *Id.*, at 21.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*, at 19 n.38.

¹⁸⁰ *See* SquareTrade, *Seal Program Overview*, at <http://www.squaretrade.com/cnt/jsp/hlp/seal.jsp?vhostid=chipotle&stmp=squaretrade&cate=0&ques=2> (last visited Dec. 1, 2003).

¹⁸¹ *Id.*

¹⁸² *See* SquareTrade, *The SquareTrade Standards*, at <http://www.squaretrade.com/cnt/jsp/sap/standards.jsp?vhostid=chipotle&stmp=squaretrade> (last visited Dec. 1, 2003).

¹⁸³ *See* Hang, *supra* note 82, at 859-60 (“The feeling of confidentiality in ADR proceedings promotes a feeling of trust among the parties. Protecting trust and the discussion process in ADR is very important because parties are more likely to speak freely when they can be sure that their words will not come back to be held against them.”).

¹⁸⁴ *See, e.g.*, Krause *supra* note 42, at 490.

¹⁸⁵ *Id.*

¹⁸⁶ *See generally* C. Bradford Biddle, *Legislating Market Winners: Digital Signature Laws and the Electronic Commerce Marketplace*, at <http://www.w3journal.com/7/s3.biddle.wrap.html> (last visited Dec. 1, 2003) (explaining how digital signatures operate).

¹⁸⁷ *Id.*

¹⁸⁸ Krause, *supra* note 42, at 489.

¹⁸⁹ *But cf.* Perritt, *supra* note 107, at 698-700 (“The low transaction value [of conducting business on the internet] makes it less likely that consumers will avail themselves of private counsel . . .”).

¹⁹⁰ Krause, *supra* note 42, at 488.

¹⁹¹ Ponte, *supra* note 10, at 89.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*, at 89-90.

¹⁹⁵ However, this option may not be economically feasible for the aggrieved consumer and it would entail more costs and attorney’s fees for litigation, which may not be recouped even if the outcome were favorable.

¹⁹⁶ ABA Final Report, *supra* note 3, at 35.

¹⁹⁷ *Id.*, at 37.

¹⁹⁸ *Id.*

¹⁹⁹ *See* Bordone, *supra* note 81, at 196-97 (“The structural innovation of a comprehensive dispute resolution system combined with an [effective] advertising campaign . . . will get the word out about online dispute resolution service and establish its legitimacy.”).

²⁰⁰ ABA *Recommended Best Practices*, *supra* note 152, at 1.

²⁰¹ *Id.*, at 2.

²⁰² *Id.*, at 3-4.

²⁰³ *Id.*, at 4-5.

²⁰⁴ *Id.*, at 6-7.

²⁰⁵ *Id.*, at 8-9.

²⁰⁶ *Id.*, at 7-8.

²⁰⁷ *Id.*, at 9.

²⁰⁸ *Id.*, at 10.

²⁰⁹ Goodman, *supra* note 151, at 19-27 (discussing the disadvantages of cyber-mediation).

²¹⁰ Lide, *supra* note 66, at 222.