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REDUCING COSTS AND INCONVENIENCES IN INTERNATIONAL COMMERCIAL AR-  
BITRATION AND OTHER FORMS OF ALTERNATIVE RESOLUTION THROUGH ONLINE  
DISPUTE RESOLUTION

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I. INTRODUCTION

As the title indicates, the focus of this article is upon reduction of costs and other inconveniences in the use of the technically based Online Dispute Resolution ("ODR"). However, because ODR derives from the better-known offline Alternative Dispute Resolution ("ADR"), a brief description of the function and growth of ADR is necessary.

II. THE GROWTH OF ADR

The purpose of ADR (which in its primitive phase is older than any judicial system) is to provide an alternative to litigation within a national court system. Modern international ADR, more specifically in its arbitration form, developed as part of the growth of internationalism after the First World War with the creation of arbitral decisional bodies. These became known as institutional ADR providers and included the International Chamber of Commerce ("ICC") and the American

Arbitration Association ("AAA"). In time, the London Court of International Arbitration ("LCIA"), which prior to World War I acted as a decisional body in Great Britain for both domestic and international arbitral disputes, changed its name and purpose while at the same time limiting the right of judicial appeal from its decisions. Following the creation of the World Bank after the Second World War, the International Centre for Settlement of Investment Disputes ("ICSID") was established for the purpose of arbitrating or mediating private international investment disputes between states and nationals of other states. The main focus was upon resolving disputes between developing nations as debtors and foreign enterprises, especially contractors. Subsequently, the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") changed from a solely onshore institution to the role of an offshore provider. n1 The foregoing international ADR [\*508] institutions, together with certain trade associations based in London, n2 are the major providers of international ADR services in the world.

Following the adoption in 1958 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as the New York Convention, the number of international arbitration cases grew rapidly. The Convention is currently applicable to over 130 ratifying independent nations. By precluding litigation in national courts when parties are legally bound to arbitrate their disputes and providing that arbitral decisions be directly enforceable by the judiciary within any of the signatory jurisdictions, it caused international commercial arbitration to come of age.

International arbitral ADR provides several distinct advantages over litigation. In addition to simplified extra national enforcement, it allows for reduction in costs, control over selection of neutrals with expertise in the subject of the dispute, confidentiality, limited delaying tactics such as discovery and pre-hearing pleadings, and reduction in the length of proceedings.

In time, popularity brought its own set of problems. With the growth of private international trade law, legal practitioners sought to insert litigation procedures into the arbitral process. Within a short period of time, the heralded ADR claims of rendering the process inexpensive, expeditious, and informal, began to evaporate. Pre-hearing submissions, including the challenging of arbitrators, demands for discovery and qualification of witnesses, together with opening and closing statements and requests for extension of time, resulted in increased costs and delays while clothing cases with greater formality. As a result, ADR began to lose its reputation for being distinctly advantageous over litigation.

### III. CREATION OF ODR

ODR involves use of electronic communications within an extra judicial dispute setting. To a limited degree, the concept has been present as an adjunct to the judicial system (as well as ADR after its modern development), since the invention of the telegraph and telephone. Today, a considerable number of negotiations and dispute settlements are still conducted over the telephone.

[\*509] Modern ODR, as applicable to arbitration and mediation/conciliation, evolved with the invention of the computer and creation of the Internet.

Before discussing the various attributes of ODR, it would be beneficial to provide a definition. This, however, is more difficult than it would appear. In seeking to define the term, certain strict constructionists would limit its application to use only over the Internet, sometimes even precluding e-mail from inclusion. Others give it a broader definition by calling it Online ADR. For the purposes of this article and hoping to avoid as many technicalities as possible, the author considers any distance communications, utilizing electronic means for solving of disputes as within the definition of ODR.

ODR, as it is conducted today, has gone through three different stages of development. Until 1995 it was limited to solving specialized disputes within specific contexts. Between 1995 and 1998, with the growth of the Internet, development of ODR was mainly within the province of academicians and nonprofit institutions. Since 1998, commercial entities as well as governments and international institutions have begun to take an interest in the system. n4

It now appears that ODR is entering a fourth stage, involving the growth of exclusive online providers. At the beginning of 2003, there were a minimum of 76 ODR sites (46 in the U.S. and 20 in Europe alone), although as of this writing 19 are no longer active. n5 Other organizations such as the American Arbitration Association offer online filing and case management. As of the time of this writing, to the best of the author's information, none of the general offshore ADR institutions offer any form of dispute resolution through the Internet.

#### IV. FORMS OF INTERNATIONAL DISPUTE RESOLUTION

The primary forms of ODR, similar to ADR, are negotiation, mediation and arbitration. Negotiation and mediation are non-binding. Mediation is also considered a form of suggestive means while arbitration constitutes a binding or determinative means. There is actually a fourth generic form of non-judicial dispute resolution known as persuasive means. It lies between suggestive and [\*510] determinative means, is non-binding, and includes a myriad of different ways to settle disputes. n6

Negotiation is the most common form of dispute resolution, involving the settling of controversies directly between the parties. Other than studies of the different methods of negotiation and how they work, there is little data on how well it functions. It should, however, be noted that the vast majority of lower tier judicial actions in the United States are settled out of court through negotiations.

Mediation consists of negotiations, with a third party (the neutral) helping to guide the adversaries to a settlement. It is a non-binding form of dispute resolution, since it must be entered into voluntarily and any settlement requires the consent of the parties. Mediation is preferable to arbitration because it is less expensive and there is a good possibility that an ongoing commercial relationship may be maintained during the proceedings. Many lawyers are, however, hostile to the process, claiming that it is often used to delay final determination of the dispute. Another unconfirmed reason is that because it is non-binding, either or both of the parties might be able to do without legal assistance during the process or, at a minimum, avoid representation by high-priced international legal counsel.

Arbitration is the best known form of ADR, comprising in most cases a final and binding determination of the subject dispute. Its procedures are conducted according to certain pre-established rules of a provider or ad hoc by the parties themselves. Decisions are rendered normally by one or three neutrals, selected by the adversaries. n7

## V. UTILIZATION OF ADR FORMS BY ODR

With the recent development of communications technology through the computer and Internet, it became obvious that most if not all ADR forms could be addressed online. Negotiations can in their most simple form take place through e-mail as well as by telephone. Mediation might also be conducted through e-mail or other text-based forms of communications, as well as via audio and video conferencing. The latter function in real time and are much richer in media utilization. Like mediation, arbitration can be adapted to text-based systems of communications, although it would not be conducive to optimum utilization in the conduct of an adversarial proceeding. n8

It is important at this point to note the difference between synchronous and asynchronous forms of communications. Synchronous exchanges occur when one [\*511] party is expected to respond

in real time after the other party has finished his or her comments. Telephone, instant messaging, video and audio conferencing, and face-to-face interactions are considered synchronous. Asynchronous transmissions take place when the parties need not communicate at the same time as in the case of the fax, e-mail or threaded discussions. n9

The strongest argument against the use of text-based communications or audio conferencing is a lack of physical presence. Much can be read into the need for face-to-face interaction to understand cue-based body language of the parties involved. However, audio conferencing can provide media cues by voice intonation.

Video conferencing requires a greater bandwidth than audio conferencing, is generally more expensive, and does not provide an exact equivalence to face-to-face interaction. n10 Furthermore, coaching of witnesses out of range of the video camera could take place unless someone representing the adversarial party or the neutral is present. This, of course, would add to the expense. On the other hand, by involving visual interaction, video conferencing is currently the closest approximation to real presence in dispute resolution procedures.

The closest type of virtual reality to physical presence is called tele-immersion. Its superiority lies in the fact that, through the use of a multiple number of cameras, it approximates the illusion that the user is in the same physical space as the others involved in the process. However, its cost is 100 times more expensive than video conferencing. n11

## VI. DEVELOPMENT OF ODR

As previously stated, the telephone has been used continuously as an adjunct to litigation as well as to ADR. With the development of the computer and Internet, ODR began to grow. n12 First to arrive on the scene was e-mail, followed by other forms of text-based technical communications as

well as audio and video conferencing. Unfortunately, it must be recognized that as a dispute resolver, the new media has embraced only a limited number of disputes compared to offline ADR.

The greatest use of ODR (excluding negotiations over the telephone for which there are no figures available) has been in the area of mediation, followed by what is known as automatic negotiations. SquareTrade, an ODR provider utilizing [\*512] threaded discussion, through an exclusive arrangement with eBay (one of the most commercially successful dot.com enterprises), has handled over one million disputes since 1999, in 120 countries through five different languages.

SquareTrade serves a broad range of the marketplace, including partnerships (in addition to eBay) with Yahoo, Overture Services, PayPal, Verisign, and the California Association of Realtors. n13 Cybersettle, the second most successful ODR provider, settled 68,000 cases from June of 1998 to December of 2002, through automated negotiations. n14 This is a blind bidding system through which parties make a number of offers and demands toward settlement of their dispute by a computerized program. n15

## VII. ADVANTAGES OF ODR OVER ADR ARBITRAL PROCEEDINGS

The advantages of arbitral ODR over ADR in commercial disputes are apparent. However, despite the fact that since the millennium there have been any number of articles written, conferences held, and even a few books published on the subject, it is difficult to cite sufficient facts in support thereof. This by itself leads to the conclusion that ODR is still on the cutting edge. With this understanding, the author voluntarily proceeds upon unmapped terrain in describing its advantages and disadvantages.

### A. *Speed*

Speed of process is the first attribute that readily comes to mind. Initiation of the action together with the concomitant submission of filing fees sets the clock running. This is usually followed by the selection of arbitrators and determination of hearing dates without the common disturbing delays due to scheduling. Freed from the time constraints of travel, professional decision-makers, as well as the parties, their attorneys, and witnesses, usually have a greater degree of flexibility in determining availability.

The next step after selection and scheduling is determination of the ground rules for pre-hearing submissions and the exchange of witness lists. Once again, electronic communications are more expeditious than physical transfers or use of the mails. In addition, expertise may be more easily accessed no matter how remote the location of the parties. ODR also encompasses ease of data transfer, [\*513] retrieval and storage. n16 With a 24-hour a day capability, hearings may be postponed and reconvened without great difficulty. Finally, before rendering a decision, where the triers constitute an arbitral panel they may consult prior thereto without scheduling an additional session. In the event of a permissible appeal or review (uncommon in arbitration), n17 the parties can move expeditiously toward ultimate resolution.

#### *B. Convenience*

Anyone who has recently traveled through an airport is accustomed to time delays caused by standing in line to have luggage x-rayed and shoes and belts removed. Reservation of hotels as well as restaurants may also prove to be a nuisance. This is obviously avoided in Internet-based arbitration.

When simultaneous translations are required, no matter how esoteric the tongue, they can readily be made available without the physical presence of any foreign language expert. Conflict of laws



should not be an issue since almost all commercial disputes are contract based and the Internet is not conducive to jurisdiction by a national court. Finally, since the proceeding, as differing from arbitral ADR, takes place within a non-judicial setting, this factor by itself permits greater relaxation and informality during the progress of the hearing.

### *C. Expense*

The major financial savings in an ODR conflict rest upon elimination of transportation (usually air), restaurant and accommodation costs. There is also no need to pay rental charges for a venue. It must be noted that usually the largest expense in most litigious contests, whether judicial, ADR, or ODR-based, derives from counsel fees. It is well accepted that international arbitration invites expensive legal counsel. n18 This can be alleviated to a degree by ODR, which is more conducive to retention of local counsel, who are just as well steeped in contractual law as their supposedly more cosmopolitan brothers and sisters. Other expenses such as those of the provider, expert witnesses, and arbitrators n19 are generally the same in online and offline proceedings. As a rule, however, the total [\*514] cost of an international commercial arbitration within an ADR setting "may be substantial, representing 5% to 20% of the amounts in dispute." n20

## VIII. DISADVANTAGES IN ODR ARBITRAL PROCEEDINGS

The major objection to ODR by arbitral practitioners is the lack of face-to-face presence, deemed necessary to evaluate a witness's demeanor through body language. There is no denying that the richest communication is achieved through cue-based, eyeball-to-eyeball interaction. There is no better means for questioning and cross-examination of witnesses.

Currently, no method of Internet communications, including video conferencing, is able to achieve the exact equivalent to actual presence; this is obvious by reason of the limited screen size,

a lack of three dimensionality (flat screen effect), the color difference on the monitor and the static camera position. n21 However, use of desktop computers for video conferencing has now been successfully perfected in directly connecting numerous sites, no matter where located. As a result, it is now possible to link six or more computers with a clear picture by clicking on a previously provided e-mail link.

Audio conferencing, although less expensive, is not considered a substitute for video media except perhaps where an arbitral proceeding is based solely upon interpretation of law with no dispute as to the facts. Furthermore, both video and audio conferencing permit the parties to have more control over the process (such as coaching witness out of range of the camera or the microphone) than in a face-to-face proceeding.

## IX. ADVANTAGES OF OTHER ODR FORMS

### A. *Mediation*

Whether text or audio-based, speed is a definite advantage in initiating the process and permitting the neutral to contact the parties jointly or severally. Although the mediator is usually chosen by the provider, his or her qualifications can quickly be transmitted to the disputants and any objections on their part relayed immediately to the appointing body.

Convenience is also a factor. Not only is the problem of travel alleviated but translations in another language when needed, as in arbitration, are easily effected. Caucusing or private discussions with one of the parties, outside of the presence of the other and deemed of considerable benefit in most mediations, are more [\*515] easily facilitated than requiring one of the parties to wait outside of the conference room.

As in arbitral ODR, there are definite savings in transportation and accommodation fees as well as the cost of the venue. Furthermore, because the process is not binding until an agreement is reached, local counsel may be used or dispensed with at considerable financial savings.

### *B. Negotiations*

Speed is an advantage, especially when the parties come to an agreement and effectuate the results of their settlement. The expenses arising from travel, together with accommodations and food, can also be avoided.

The advantage of e-mail and threaded discussions in negotiations over face-to-face interaction or the telephone should be noted. While the former encompass one-way or asynchronous communications, providing the parties with time to think before responding, the latter do not. Finally, being out of each other's presence will help to maintain an ongoing business relationship between the adversaries. This may also be true in the case of mediation.

## X. DISADVANTAGES OF ODR IN MEDIATION AND NEGOTIATION

The only perceivable disadvantage, as in arbitration, is in the lack of face-to-face confrontation. This, however, may be disputed. The inability to study the other party's demeanor is not so debilitating, especially in view of the fact that neither process is binding, enabling either party, if not satisfied with the way matters are progressing, to terminate the process.

## XI. THE CASE FOR ODR

Not all communication technology is conducive to the different forms of dispute resolution. Text-based means such as e-mail, threaded discussions, and instant messaging are satisfactory for negotiations but too slow and cumbersome for direct use in arbitration and probably mediation. On

the other hand, threaded discussions and instant messaging may be used to complement audio and video conferencing in arbitration and mediation.

Voice-based communications through the telephone and audio conferencing are certainly adequate for negotiations and mediation. n22 Why the mediator must be able to observe the demeanor of the parties, as argued by many ADR purists, is beyond the understanding of the author. The main function of the neutral is to [\*516] help the parties reach a settlement they feel they can live with rather than persuade them regarding what he or she deems to be the best solution.

The arbitration process, being determinative, is approached differently. Just as personally viewing a concert or sporting event is unquestionably the more satisfactory manner of observation, this does not render useless the next best possibility of observing these forms of entertainment on television, video, or at the cinema. The cost, convenience, and speed factors can and will influence choice to a considerable degree. In commercial disputes, the same may be true. Unless a dispute involves a considerable amount of money or the consequences are of a highly serious nature, the advantages of ODR through virtual reality can be persuasive, especially with respect to small and medium-sized enterprises forced for survival to enter into the global economy.

## XII. EFFECT OF FUTURE TECHNOLOGICAL ADVANCES

Advancement in technology will most certainly improve the current state of arbitration and mediation over the Internet. The economic advantage of using desktop or laptop computers directly, without dependence upon studios for better reception, proves compelling. n23 The unquestioned advantages of arbitral ODR in costs, as well as speed and convenience, now serve as a more equivalent alternative to face-to-face arbitration. In situations where it is believed that ODR might not be completely sufficient, it may still be used to complement traditional ADR or litigation.

## XIII. CONCLUSION

It is clear that the advantage of ODR over ADR, within the forms of negotiation, and mediation, lies in speed, convenience, and financial savings. While Internet arbitration between desktop or laptop computers is not as satisfactory as face-to-face communications, its quality is continually improving with technological progress, permitting use of computers in clear and direct communications throughout the world.

Parties involved in negotiations, mediation, arbitration, and even one of the various forms of persuasive dispute resolution, need not await any further technological advancement. The various means of text, audio, and visually based electronic communications are currently satisfactory. What is required is a willingness to use. People have in the past gone through radical changes and adapted to new terrain despite the naysayers. Embracement of ODR is no different. Complete acceptance will come in time.

#### [\*517] POSTSCRIPT

Several months after the completion of this article, GlobalMedArb (GMA), through the use of a newly developed platform, was able to implement successfully the direct connection of several desktop or laptop computers. Through the use of an inexpensive Logitech video camera attached to a desktop or laptop computer, GMA demonstrated how Online Dispute Resolution sessions (in the form of arbitration and mediation) could be simply and inexpensively conducted in the future between sites in Mexico, Brazil, the U.S., Germany, and the Ukraine.

#### APPENDIX A

#### THE GENERIC FORMS OF DISPUTE RESOLUTION n24

#### **Negotiation**

Serves as a means for voluntary settlement of disputes. 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. Negotiation generally differs from other forms of ADR in that it does not require the services of a third party to help resolve the differences between the participants.

*Standard Negotiations* - Direct engagement in a give and take environment without the assistance of any third party. Cultural differences may affect the way the parties negotiate.

*Automated Negotiations* - An algorithmic system through which the parties make a number of confidential bids toward a settlement amount. A programmed computer (sometimes known as the fourth party as opposed to a live neutral third party) automatically settles the dispute at the arithmetic mean once the amounts are sufficiently close. This is the only online form of dispute resolution that would be difficult to duplicate offline.

*Facilitated Negotiations* - Services are provided in the form of a secured site and data storage.

[\*518] *The Neutral Listener* - A form of negotiation utilizing the services of a neutral to listen to the positions of the parties, without comment except to maintain order and make suggestions upon request.

*Assisted Negotiations* - A neutral is appointed at the sufferance of the parties, to assist in resolving the controversy. Within a variation devised by GMA, called Early Neutral Evaluation, 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 negotiation is feasible; (2) close enough so that settlement with the active help of a mediator is believed possible; or (3) too far apart to be settled ex-

cept by litigation or arbitration. 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 in negotiations

### **Suggestive Means**

This version of dispute resolution 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 any time 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.

*Standard or Facilitated Mediation* - The active services of a third-party neutral are utilized to suggest various means for solving a dispute between the disputants. The success of the process 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 mediator to influence the adversaries in concluding a final arrangement which, for the most part, is 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. [\*519] Several providers have informal procedural rules for the process. Although terminable at will by any party, an agreement for mediation may also temporarily delay action by the disputants for arbitration or adjudication. Mediation may also be tied by agreement to binding arbitration, should the parties fail to resolve their dispute within a specific period.

*Friendly Mediation* - Where the parties are domiciled in different nations, neutrals are selected from each of the countries involved.

*Evaluative Mediation* - The mediator utilizes the settlement judge model of convincing the adversaries that their chances of prevailing in an arbitration or adjudication are slimmer than they believe.

## **Persuasive Means**

This model consists of 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 by agreement before a dispute arises. Although parts of the informal process may be oral, the existence of a written account at some stage of the proceeding is what may be influential in causing the parties to settle their differences. Some persuasive means are directed toward risk management. The following are the better-known types.

*Persuasive Mediation* - Arguments by the parties are presented before a panel of mediators in summary fashion 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 within a specific period of 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 recommendation within the required time frame, it is considered accepted by that party.

*Facilitation* - This is sometimes called fact-finding. The neutral facilitator investigates and collects all of the relevant facts either by 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 [\*520] to convert the facilitator into a judicial referee or master whose findings are binding unless one of the parties appeals to a local court.

*Mini-Trial* - The name is a misnomer. The mini-trial is the most recently devised method of ADR. It comprises a pre-determinative, non-binding hearing process between disputant organizations. 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 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 consideration to the amount of time and expense that may be incurred in a full-fledged arbitral or court proceeding. Furthermore, the proximity of key executives might lead to a settlement of the matter. This is the most promising form of dispute resolution between corporate

bodies. A limited number of 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.

*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. SJT is designed to provide litigants with a preview of the likely outcome of a full arbitration or judicatory proceeding.

*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 conventional arbitration and governed by similar rules if any. Unless [\*521] provided otherwise, should the dispute proceed to adjudication or final arbitration, the advisory decision becomes available to the trier at the determinative stage.

*Med-Arb* - The neutral acts at the initial stage as a mediator 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 mediator assuming the role of an arbitrator. In

practice Med-Arb has not worked well because the parties, realizing the matter could move into conventional arbitration, might not be prone to divulge the extent to which they might be ready to concede on any given point during the mediation 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 mediation has been proposed. To date there is little evidence of its use or success.

*Arb-Med* - The arbitration hearing is held first, but the decision is temporarily sealed to permit the parties to settle the dispute by mediation. If within a certain period of time the dispute is not settled, the arbitration decision is opened and becomes determinative. If settled, the decision is deleted.

### **Determinative Means**

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

*Conventional Arbitration* -- A quasi-judicial proceeding governed by procedural rules and substantive or proper law, dependent upon the desire of the parties, the provider if there be one, 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 a provider who 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 selection of the sole trier or chairperson of a [\*522] 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 non-party 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.

*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. This type of arbitration functions best when the dispute is limited to a single precise issue, especially specific claims for damages. It is often used where the parties wish to avoid any type of compromised decision.

*Expedited Arbitration* - This is another variant of conventional 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 thereafter in abbreviated form.

*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 reviewable through regular judicial proceedings. As a result, this type of proceeding requires legislation for validity within the forum where it takes place. The advantage

is that it permits the parties to have their dispute determined expeditiously by a neutral of their choice, without waiting upon a court's calendar while preserving the appellate process.

*Review or Appeal* - Expedited review of an arbitral decision by a panel of experts under the terms of an arbitration agreement.

[\*523] APPENDIX B

## THE MOST COMMONLY USED TYPES OF ONLINE COMMUNICATIONS

Telephone - a non-Internet, user friendly and convenient venerable aural device, utilized for real time communications.

Fax - a non-Internet, asynchronous use of text-based messaging through means of telephonic communications.

E-mail - a computer-based means for text messaging, using a low bandwidth for asynchronous transmissions over the Internet.

Threaded Discussion - a low bandwidth multiparty means of asynchronous text transmission over the Internet, in response to a previously posted specified message.

Instant Messaging - a means of synchronous text-based messaging, similar to e-mail but providing for an immediate response.

Chat - text-based and more synchronous than instant messaging, it permits one party to respond before the other party has concluded his or her message. Operating in real time, it functions on a higher bandwidth than any other text-based means of communications.

Audio Conferencing - a synchronous voice-based means of communications over the Internet, involving a delay of a couple of seconds, requiring greater bandwidth use.

Video Conferencing - an audio/video form of synchronous transmission, requiring the highest bandwidth of any of the foregoing means of Internet communications.

Tele-Immersion - through use of a multiple number of video cameras, approximates the illusion that the user is in the same physical space as the others involved in the process.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure Alternative Dispute Resolution Arbitrations Foreign Arbitral Awards Copyright  
Law Formalities Arbitration Royalty Panels International Law Dispute Resolution Arbitration & Me-  
diation General Overview

### **FOOTNOTES:**

n1 The ICC, AAA, LCIA, ICSID, and SCC are known as "offshore" institutions because they offer arbitral and sometimes other dispute resolution services throughout the world. On the other hand, "onshore" institutions such as the Japanese Commercial Arbitration Association, the China International Economic and Trade Arbitration Commission (which currently administers the largest volume of arbitral cases in the world) and most national chambers of commerce restrict, within their boundaries, hearings on international disputes.

n2 Examples are the London Metal Exchange, The Cocoa Association of London, and The Rubber Trade Association of Europe, which provide arbitration services to settle disputes involving their members.

n3 The words "conciliation" and "mediation" are often used interchangeably, although there is a technical difference in some legal systems. Throughout the balance of this article, the term mediation will be used when describing either function.

n4 See ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 57-62 (2001).

n5 See Melissa Tyler & Di Bretherton, *Seventy-six and Counting: An Analysis of ODR Sites* 5-6 (2003), available at <http://www.ODR.info/unece2003/pdf/Tyler.pdf>.

n6 None of which to the author's knowledge have been used to date in ODR, but this could change. A list of various persuasive means appears in Appendix A, *infra*.

n7 See Appendix A, *infra*, for a listing of the specific types of dispute resolution.

n8 See Appendix B, *infra*, for a general description of the most commonly used types of online communications.

n9 COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS* 47 (2002).

n10 *Id.* at 53.

n11 Llewellyn Joseph Gibbons, Robin M. Kennedy & Jon Michael Gibbs, *Frontiers of Law: The Internet and Cyberspace: Cyber-Mediation: Computer Mediated Communications Medium Massaging the Message*, 32 N.M.L.REV. 27, 35 (2002).

n12 RULE, *supra* note 9 at 46-54.

n13 See <http://www.squaretrade.com>.

n14 Tyler & Bretherton, *supra* note 5 at 9.

n15 KATSH & RIFKIN, *supra* note 4 at 137.

n16 See Melissa Tyler & Di Bretherton, *Research into Online Alternative Dispute Resolution*, 35 (Mar. 2003), available at [http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online ADR/ile/Reseach\\_ADRExploration Report\\_03.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online%20ADR/file/Research_ADRExploration%20Report_03.pdf).

n17 Provided for under the rules of GMA, ICSID, and some of the London trade associations.



n18 Fees at the high end are estimated to be between US \$ 500 and \$ 800 an hour.

n19 The names of arbitrators, mediators, and other neutrals are usually drawn from the same lists.

n20 See Christophe Imhoos & Herman Verbist, *Settling Out of Court*, INTERNATIONAL TRADE FORUM, Issue 4 (2002).

n21 RULE, *supra* note 9 at 53.

n22 GMA uses closed circuit telephone communications or Voice Over IP in mediation as the most user friendly electronic apparatus.

n23 Video cameras at present can be attached to desktop or laptop computers at little cost.

n24 A portion of this Appendix is taken from an article by the author on *The Development of Online Dispute Resolution*, 2 STOCKHOLM ARB. REP. 1 (2002).