

ONLINE DISPUTE RESOLUTION

A MODERN ADR APPROACH

By Paul W. Breaux





As technological advances continue to shrink the world, the personal and business interactions in which we engage can lead to disputes with others that are geographically distant. Thus was born the field of Online Dispute Resolution (ODR). Far from its beginnings with eBay, ODR has adapted and grown into its own separate field of alternative dispute resolution (ADR). This article will give a brief description of the various forms of ODR currently being offered and is intended to be a resource for further exploration of this brave new world.

Automated Negotiation Platform

One cannot begin a discussion on ODR without starting with eBay

and SquareTrade. eBay knew that, with the millions of transactions occurring through its website, disputes such as billing, warranties and non-delivery of goods were inevitable. For these one-time transactions involving geographically distant parties with no real connection, SquareTrade developed an assisted negotiation process as its first-line of dispute resolution. The process is initiated when a party files an online complaint form and is directed to a pull-down menu with options for the nature of the complaint. If the available options do not match the situation, the complainant can fill out an open-faced box with his own description. Afterwards, the complainant is directed to choose from possible solutions, with the same option of including his own solution in an open-faced box. The complaint and requested solution are then sent by the system to the other party, with the request to choose several solution options available or

suggest his own.¹ This back-and-forth continues until the matter is resolved or an impasse is reached. In this way, the product “is a technological hybrid of negotiation and mediation . . . moving the parties from a problem mode to a solution stance.”²

e-Mediation

In the event that a dispute cannot be resolved through the assisted negotiation process, the SquareTrade model utilized by eBay offered assistance for a nominal fee through online mediation. Because of the relatively small amount of money involved and parties’ geographical distance from each other, traditional face-to-face mediations were not an option. Instead, the mediation takes place through individual email communications between the mediator and the parties in a “shuttle diplomacy” format. There are many advantages to this approach,

including convenience (differences in time zones, geographic locations and conflicting work schedules can be accommodated);³ access to mediators with experience who may not be available locally; the slower pace may allow for more deliberate application of mediator techniques; and text communication may result in the balancing of power if one of the parties is more articulate or persuasive in face-to-face discussions.⁴ The disadvantages include the potential loss of confidentiality due to all of the communications occurring in a written format; the “lack of warmth, immediacy, rapport and other attitudes and affects that make face-to-face mediation what it is;” and that “messages conveyed online . . . are prone to misinterpretation . . . and to causing deterioration of trust.”⁵

Despite these potentially negative factors, services such as Modria and Juripax (based in the United Kingdom and purchased by Modria in April 2014) offer this model for cases beyond e-commerce. Modria focuses on providing resolutions services to large businesses for handling customer complaints, as well as government entities for citizen complaints (*i.e.*, property valuation disputes).⁶ Juripax expands the types of cases handled to include employment/labor, divorce/parenting, small claims disputes, and personal injury and construction cases that are in the preparation stage.⁷ Both utilize dispute intake forms that can be used for dispute categorization and diagnosis before getting to the mediation stage. Modria is an “institutional service provider,” meaning that it provides its dispute resolution service by “performing intake of cases, collection of fees, assignment to mediators from [their in-house] roster, provision of training and support to neutrals, etc.”⁸ Juripax, on the other hand, offers its dispute resolution module to outside mediators for an annual fee.

Other providers, such as Virtual Courthouse and the American Arbitration Association (AAA), have added a video-conferencing option to their services.⁹ With the Virtual Courthouse model, the parties and mediator join the conference from their respective locales. Through a series of clicks, the mediator is able

to provide a more traditional mediation experience with the ability to invite all of the participants in for a joint conference, as well as conduct private caucus sessions with each. Those invited by the mediator can see and communicate with each other and the mediator through their individual monitors. The AAA model works much the same way, with the difference being that the parties and mediator participate at one of AAA’s 23 regional sites. While AAA maintains its own roster of mediators in a service provider business model, Virtual Courthouse is open to any mediator who chooses to sign up for its services. Although mediating through video-conference still lacks the “warmth” of face-to-face meetings, video-conferencing does reintroduce tone, spontaneity and visual clues into the e-mediation process. All of the services discussed above, with the exception of AAA, propose their websites as secure platforms for dispute case management purposes as well.

Noam Ebner, an assistant professor at the Werner Institute at Creighton University’s School of Law and a negotiation/ADR scholar, provides a quick suitability test to see if a case is suitable for mediation:¹⁰

► Are disputants geographically distant from each other (common in e-commerce) or from their preferred neutral?

► Did the dispute itself arise from an online transaction or interaction?

► Is travel to face-to-face mediation impossible, cost-prohibitive or a factor likely to rule out mediation for any other reason?

► Does the dispute include trans-jurisdictional issues, making choice of law or court decision enforcement difficult?

► Are the parties unwilling, or unable, to meet with each other face-to-face?

► Do scheduling issues or party preferences make it difficult or impractical for parties to convene for face-to-face mediation?

► Is a party/mediator handicapped or disabled in a way challenging travel or convening?

► Are there concerns regarding inter-party violence or intimidation that make convening in the same room a risky

prospect?

► Have parties participated in the past in e-mediation?

If the answer to any one of these questions is “yes,” then e-mediation can be seen as a suitable forum for dispute resolution. In light of these factors, Ebner believes that e-mediation may be particularly adaptable for elder and health care disputes.

e-Arbitration

(The following discussion is derived from Mohamed S. Abdel Wahab’s “ODR and E-Arbitration.”)¹¹

As noted in the discussion of e-mediation, the advancement and increasing use of information and communication technologies (ICTs) in business and everyday life has led to these technologies being used to bring arbitration online. In defining “e-arbitration,” Wahab argues that “the sheer exchange of electronic communications or submissions, or the simple use of teleconferencing or video-conferencing for an arbitration hearing, would not suffice to characterize the process as e-arbitration.”¹² His admittedly idealistic notion of “e-arbitration” would mean that the proceedings would be “conducted wholly or substantially online . . . includ[ing] filings, submissions, hearings, and awards being made or rendered online.”¹³ In today’s world, however, e-arbitration providers fall within the former category, with an eye toward the future ideal version.

The numerous advantages to e-arbitration versus traditional arbitration include the speed within which the entire process can be conducted, its cost-effectiveness, its accessibility and availability, and its case management efficiency.¹⁴ As far as disadvantages, it became evident early in its development that properly addressing the technical challenges of confidentiality, privacy and security concerns would be paramount to the acceptance of e-arbitration by its eventual users. “Virtual Magistrate,” which launched in 1996 and conducted the process largely through email, was not very popular and resolved only one case.

“CyberTribunal,” another project which launched the same year, utilized software applications and encryption technologies for security, implemented arbitration rules and procedures in accords with those used for international commercial arbitration, and provided transparency and due process, all of which led to its resolving 100 cases before the project concluded in 1999.¹⁵ In the modern world of technology, any attorney contemplating the use of e-arbitration would want to ensure that the provider has in place the use of “encryption technologies, digital signatures, firewalls and passwords . . . to guarantee both privacy [of the proceedings] and authentication [of documents].”¹⁶

As far as the legal challenges of e-arbitration, they include the agreement to arbitrate itself, procedural issues and awards-related challenges.¹⁷ Arbitration provisions are prevalent in business and consumer contracts. The question arises as to whether *e-arbitration* provisions will be held enforceable, particularly in regards to consumer contracts (such as with credit cards or software licenses) where the language often occurs buried among long, tedious provisions seldom, if ever, read by the consumer. To alleviate this concern, several measures can be implemented, including notifying consumers in enhanced size and colored font that they are entering into an e-agreement, requiring them to perform a specific consensual act, and not allowing them to enter into the contract unless they specifically agree to the e-arbitration clause.¹⁸ Regarding the issue of due process, an attorney should ensure that the use of technology in the arbitral proceedings (*i.e.*, emails, document uploads, audio/video conferencing, etc.) is such that all participants have equal access to the appropriate and necessary information in order to present their evidence, counterclaims, etc. on equal grounds.¹⁹ Finally, regarding arbitral awards, the question arises as to whether one that is “e-written and e-signed . . . considered an original?”²⁰ The writing requirement is satisfied where the e-document provides “a functional equivalent of a paper document” and

the relevant state law proscribes to the “functional equivalent” doctrine.²¹ Concerning the validity of an arbitrator’s e-signature, adequate technologies are available and need to be implemented by the provider to “identify the signing arbitrator, indicate the arbitrator’s intention in respect to the content of the award, and [ensure] the reliability of the arbitrator’s signature.”²²

There are several U.S.-based, e-arbitration service providers. Modria and net-Arb offer an asynchronous arbitration product whereby communication takes place through one-way messaging. Modria does this through its all-inclusive dispute resolution module (dispute diagnosis, assisted negotiation, mediation, then, if necessary, arbitration), while net-Arb relies on email. ZipCourt follows in much the same way, but offers the parties two options: “Arbitrator’s Discretion” (where the arbitrator independently reviews the case and makes a decision based on local law), and “Baseball Arbitration” (where the parties each submit a proposed resolution and the arbitrator chooses the one he believes is best).²³ Virtual Courthouse offers to arrange arbitrations face-to-face, via audio, video or a combination.²⁴

Conclusion

As we become increasingly comfortable with technology encroaching into more aspects of our lives, our readiness to handle our disputes via technology will continue to rise. From fully automated negotiation platforms, to hybrids of e-mediation and e-arbitration, the practice of dispute resolution is following the trend of an increasingly paperless society. There are even hypothetical discussions in the ODR community of a time when e-arbitration is fully automated to a point where a final decision will be made without human intervention by a computer equipped with artificial intelligence (AI)!²⁵ While much work still needs to be done to bring ODR into mainstream use, its convenience and cost-effectiveness makes ODR a permanent fixture in the future of alternative dispute resolution.

NOTE: *The dispute resolution providers listed in this article were a sample of those in operation. Their mention is not a recommendation or an endorsement by the author of their services.*

FOOTNOTES

1. The description of SquareTrade’s automated negotiation process is an adaption of the description found in Orna Rabinovich-Einy’s “Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation,” 11 *Harv. Negot. L. Rev.* 258 (Spring 2006).
2. *Id.*
3. *Id.* at 259.
4. Noam Ebner, “E-Mediation,” *Online Dispute Resolution Theory and Practice*, Chapter 17 (May 2013), www.mediate.com/pdf/ebner1.pdf.
5. Ebner, p. 378.
6. www.modria.com/resolution-center.
7. www.juripax.com/EN/home.php.
8. Ebner, p.372.
9. www.virtualcourthouse.com; www.adr.org/aaa/ShowPDF?doc=ADRSTG_002566.
10. Ebner, p. 379.
11. Mohamed S. Abdel Wahab, “ODR and E-Arbitration,” *Online Dispute Resolution Theory and Practice*, Chapter 18 (May 2013), www.mediate.com/pdf/ebner1.pdf.
12. Wahab, p. 402.
13. *Id.*
14. Wahab, p. 403.
15. Wahab, p. 400.
16. Wahab, p. 413.
17. Wahab, p. 403.
18. Wahab, p. 410.
19. Wahab, p. 414-415.
20. Wahab, p. 424.
21. *Id.*
22. Wahab, p. 425.
23. Wahab, p. 436.
24. See www.virtualcourthouse.com/index.cfm/category/41/arbitration-demand.cfm.
25. Wahab, p. 420.

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