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Introduction: ADR in Cyberspace

*Stephen J. Ware &
Sarah Rudolph Cole*

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Introduction: ADR in Cyberspace

STEPHEN J. WARE*
SARAH RUDOLPH COLE**

I. INTRODUCTION

The Internet's rise in popularity as a means for conducting transactions and facilitating communications raises new issues and concerns for participants in both cyberspace and dispute resolution. This Symposium takes advantage of expertise from both fields, bringing together specialists in these areas to explore means for resolving disputes both in cyberspace and by utilizing cyberspace innovations.

David Brin begins this Symposium with great optimism about the Internet's potential as a mechanism for resolving society's problems.¹ He cites "four marvels of our age—science, democracy, the justice system, and fair markets"—that have "nourished much of our unprecedented wealth and freedom."² Then he contends that "the Internet has potential for creating a fifth great arena, equal to the others."³ For the Internet to achieve this greatness, Brin argues, a competitive process must emerge that separates the

* Visiting Professor of Law, The Ohio State University College of Law. Professor of Law, Samford University, Cumberland School of Law. J.D., University of Chicago Law School; B.A., University of Pennsylvania.

** Associate Professor of Law, The Ohio State University College of Law. J.D., University of Chicago Law School; B.A., University of Puget Sound.

¹ See generally David Brin, *Disputation Arenas: Harnessing Conflict and Competitiveness for Society's Benefit*, 15 OHIO ST. J. ON DISP. RESOL. 597 (2000).

² *Id.* at 601 (emphasis omitted). Brin's characterization of these four "marvels" finds support in the work of other insightful analysts. See generally, e.g., NATHAN ROSENBERG & L.E. BIRDZELL, JR., *HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE WESTERN WORLD* (1986). It surely would be rejected, however, by those who associate liberalism, capitalism, and science with white male oppression of women and people of color. See generally DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (critiquing these radical feminists and multiculturalists).

³ Brin, *supra* note 1, at 601.

good from the bad. The other four arenas accomplish this through the following mechanisms: (1) peer review among scientists, (2) elections for political office, (3) argument and evidence in litigation, and (4) consumer choice in markets.⁴ These four processes, each in a roughly Darwinian way, ensure a constant struggle among people, ideas, and things that preserves the good while winnowing out the bad. The Internet currently lacks an analogous process.

Brin's proposal for such a process on the Internet is both plausible and attractive. Brin's proposal is a "disputation arena," a forum for testing and challenging proposed visions or models of the world.⁵ Ultimately, the disputation arena amounts to something like an old-fashioned debating society. It will be quite good for debating the merits of, say, Tolstoy's writing versus that of Dostoevsky, or the Beatles' music versus that of the Rolling Stones. It even may be a useful forum for debating the merits of public policy questions, like gun control.⁶ But these are the not the only sorts of disputes that may arise. An entirely different sort of dispute is most familiar to lawyers: X claims that Y breached a duty owed to X so X seeks some remedy, such as money from Y. Brin has little to say about these sorts of disputes. As Joseph Stulberg observes, Brin's proposal "suggests an arena not so much of dispute resolution as active education."⁷ Indeed, Brin concedes that his proposal does not "offer explicit results."⁸

Explicit results are produced by adjudication, whether governmental (litigation) or private (arbitration), and by negotiated and mediated agreements. Three processes of dispute resolution—arbitration, negotiation, and mediation—are the Big Three of alternative dispute resolution.⁹ They assist in the resolution of massive numbers of disputes, day-in-day-out, year-in-year-out. They are the workhorses. How can we best adapt them to the new technology of cyberspace? That is the topic of the remaining contributions to this Symposium.

⁴ See *id.* at 602.

⁵ *Id.* at 605-09.

⁶ See *id.* at 610.

⁷ Joseph B. Stulberg, *Mediation, Democracy, and Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 617, 635 (2000); cf. Stulberg, *supra*, at 632-34 (defining "dispute").

⁸ Brin, *supra* note 1, at 614.

⁹ For example, they receive the lion's share of attention from the major dispute resolution casebooks. See generally, e.g., EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* (1997); STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (3d ed. 1998); JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION* (2d ed. 1996); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (2d ed. 1997).

II. ARBITRATION

Arbitration is just starting to move online, so Paul D. Carrington¹⁰ and Henry H. Perritt, Jr.¹¹ are less able to describe how virtual arbitration does work than how it might work. In separate articles, Carrington and Perritt each make a persuasive case that much of the time and expense of arbitration could be saved through the use of cyber technology. Pleadings will be served and filed electronically. While some tangible evidence may have to be seen in person, other evidence does not. "The simplest technologies, e-mail exchanges and web-based discussion spaces, can be used when written statements by witnesses are sufficient. They also are sufficient for textual documentary evidence"¹² For depositions, "[t]he party calling a witness will prepare a direct examination on videotape and send a print to the adversary. When the adversary is prepared to do so, he may conduct a cross-examination"¹³ Videoconferencing replaces travel. Evidence will be submitted electronically to the arbitrator who then examines it.¹⁴ If a hearing is deemed necessary, it also will be conducted by videoconference.¹⁵

While Carrington envisions this process as "virtual arbitration," his ideas and Perritt's might apply equally to litigation. It will not surprise us, however, if litigation adopts this technology more slowly than arbitration does. As Carrington suggests, international commercial arbitration seems particularly well-suited to cyberspace.¹⁶

Perritt focuses on the one-shot consumer transaction involving a small dollar amount rather than on the large international arbitration between repeat players.¹⁷ Perhaps for this reason, he suggests that the "purported benefit of online arbitration is modest."¹⁸ He is more encouraged by the model of credit card chargebacks through which credit card issuers investigate cardholder claims of billing errors.¹⁹ The method used to resolve challenged billing errors is successful for the following reasons: (1) it is

¹⁰ See generally Paul D. Carrington, *Virtual Arbitration*, 15 OHIO ST. J. ON DISP. RESOL. 669 (2000).

¹¹ See generally Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675 (2000).

¹² *Id.* at 680.

¹³ Carrington, *supra* note 10, at 669.

¹⁴ See *id.* at 670.

¹⁵ See *id.*

¹⁶ See *id.* at 672.

¹⁷ See Perritt, *supra* note 11, at 676-77.

¹⁸ *Id.* at 688.

¹⁹ See *id.* at 689-94.

"cheap, easily accessible, and quick"; (2) it gives the consumer "leverage" against the merchant; and (3) it does not require the consumer to "find a lawyer or a third-party dispute resolution forum" because the adjudicator, so to speak, is the credit card issuer.²⁰ Perritt suggests this model to "designers of online dispute resolution systems."²¹ Following the logic of Perritt's view, then, it may be that traditional dispute resolution mechanisms cannot be utilized on the Internet without adaptation for the unique nature of the forum.

III. NEGOTIATION

Negotiation survives and, in fact, thrives on technological change. People originally negotiated in person. Then they negotiated by mail, and then telegram, and then telephone. It will surprise no one that people are now using the Internet to negotiate resolutions of their disputes. Sending an e-mail is not fundamentally different from sending a letter, only faster.

But some envision the Internet as a means to transform more profoundly the negotiation of disputes. For example, Ernest Thiessen and Joseph P. McMahon, Jr. contend that "[c]yberspace and sophisticated computer technology are presenting new opportunities for overcoming the challenges of conventional negotiation"²² To that end, Thiessen and McMahon tout "a new product and negotiation process called 'One Accord.'"²³

A central purpose of One Accord is to provide a neutral site that obtains each side's confidential information about interests, priorities, and best alternatives to negotiated agreements.²⁴ Once One Accord obtains this information from both parties, it combines the information to generate settlement terms better for both parties than other settlement terms.²⁵ This, of course, is what mediators long have attempted to assist parties in accomplishing. And it is fair to say that One Accord's software is not negotiation software, but mediation software. One Accord is a mediator or, as Thiessen and McMahon call it, a "neutral facilitator."²⁶ It would not be accurate, however, to dismiss One Accord as merely mediation with some

²⁰ *Id.* at 692.

²¹ *Id.* at 691.

²² Ernest M. Thiessen & Joseph P. McMahon, Jr., *Beyond Win-Win in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 643, 643 (2000).

²³ *Id.*

²⁴ *See id.* at 647-48.

²⁵ *See id.* at 648.

²⁶ *Id.* at 645.

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high-tech jargon. One Accord takes the foundation of mediation and then adds to it both analytical rigor and technological power.

Few mediators without software like One Accord's have the capacity to quantify precisely party preferences and so consistently push parties toward their best agreement. And One Accord uses computers to store and manipulate data with speed and accuracy unknown to a mediator using only her head and a pad of paper. In short, One Accord seems like a promising way to convert abstract theory about "efficiency frontiers" and the like into agreements that actually might be better for the parties than what they otherwise would reach through negotiation.

IV. MEDIATION

Mediation on the Internet is also the subject of contributions by Bruce Leonard Beal²⁷ and by the group of Ethan Katsh, Janet Rifkin, and Alan Gaitenby.²⁸

Beal is the "Internet Neutral," providing "the world's first wholly online mediation service."²⁹ Despite this, and in contrast to Thiessen and McMahon, Beal concedes that pure online mediation is still ahead of its time. "Businesspersons have not yet accepted mediation negotiations by e-mail, Internet chat rooms, and the like."³⁰ Videoconferencing, by contrast, is Beal's preferred technology for effective mediation. Beal argues that "[o]nline mediation will not manifest fully until videoconferencing becomes commonplace and the following apply: (1) video cameras and microphones are built into computers; (2) videoconferencing software is bundled with computers; and (3) modems are fast enough (i.e., 'broadband' or 512 kilobytes per second and greater) to accommodate videoconferencing."³¹ Katsh and his coauthors also endorse videoconferencing as an "obvious solution to the lack of face-to-face encounters" in Internet mediation.³² The views of Beal and of Katsh, Rifkin, and Gaitenby provide a nice contrast to the views of Thiessen and McMahon. Beal emphasizes videoconferencing

²⁷ See generally Bruce Leonard Beal, *Online Mediation: Has Its Time Come?*, 15 OHIO ST. J. ON DISP. RESOL. 735 (2000).

²⁸ See generally 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 (2000).

²⁹ Beal, *supra* note 27, at 736.

³⁰ *Id.* at 737. In some contrast, Katsh and his coauthors' eBay mediation project relied "almost exclusively" on e-mail and apparently was quite successful. See Katsh et al., *supra* note 28, at 710.

³¹ Beal, *supra* note 27, at 736.

³² Katsh et al., *supra* note 28, at 718.

because Beal is especially concerned about the mediator's ability to demonstrate a "serious demeanor, professional presentation, occasional humor, and just plain charisma."³³ Similarly, Katsh, Rifkin, and Gaitenby worry that the e-mail medium gives the mediator "difficulty using the intuitive cues of body language, facial expression, and verbal tonality that are part of face-to-face mediation processes."³⁴ In contrast, Thiessen and McMahon seem to place less weight on these factors and more weight on the rational, technocratic side of approaching "efficiency frontier[s]."³⁵

Katsh, Rifkin, and Gaitenby engaged in a pilot mediation project for eBay, the largest online auction site on the Web.³⁶ While their article discussing this project makes many fascinating points, we will address only one. Katsh and his coauthors "postulate that it is the nature of 'eBay law,' the law of the individual online marketplace, that may shape opportunities for online ADR in the future . . ."³⁷ What they mean by "eBay law" is best explained with an example. They suggest that "the most significant statistic" generated in their pilot project is the large number of eBay users willing to participate in their mediation process.³⁸

Why would most eBay users be willing to participate with us? Whether or not they actually wished to reach a mutually acceptable outcome, they typically had concerns about further participation and involvement in eBay and about how the dispute might affect their future in eBay. eBay was important to them, and eBay ran its site in such a way that a user's eBay future could be affected by disputes that arose. If they ignored eBay law, they did so at some risk to their future online life and even to their economic well-being.³⁹

³³ Beal, *supra* note 27, at 737.

³⁴ Katsh et al., *supra* note 28, at 714; accord Stulberg, *supra* note 7, at 638-40 (discussing various media of communication).

³⁵ Thiessen & McMahon, *supra* note 22, at 646.

³⁶ See Katsh et al., *supra* note 28, at 707.

³⁷ *Id.* at 708.

³⁸ *Id.* at 728.

³⁹ *Id.* This is an example of the general point that agreements are enforced not only by courts but by private sanctions such as boycott. See generally David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990). Private sanctions are especially important with respect to agreements to arbitrate. See Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 490 (1995); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 473 (1996); see also Lisa Bernstein, *Opting Out of the Legal System:*

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In short, Katsh, Rifkin, and Gaitenby suggest that eBay mediation occurs “in the shadow of” eBay law.⁴⁰ eBay and other online marketplaces promulgate their own private law, or “rule-sets,”⁴¹ “that users can choose to join or not.”⁴²

This is exciting. As David Post argues, “our ability to move unhindered into and out of these individual networks with their distinct rule-sets . . . is a powerful guarantee that the resulting distribution of rules is a just one”⁴³ Post suggests that “our very conception of what constitutes justice may change as we observe the kind of law that emerges from uncoerced individual choice.”⁴⁴ Through this process, the Internet may be a truly liberating force.

Extralegal Contractual Relations in the Diamond Industry, 21 J. LEGAL STUD. 115, 149 (1992). Bernstein observes that

[u]nlike a court, the [New York Diamond Dealers Club arbitrator] has the ability to bring unique pressures on the losing party to pay: it can put him out of business almost instantaneously by hanging his picture in the clubroom of every bourse in the world with a notice that he failed to pay his debt.

Id.

⁴⁰ Katsh et al., *supra* note 28, at 727.

⁴¹ *Id.* at 732 (citing David Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 167 (1997)).

⁴² *Id.*

⁴³ Post, *supra* note 41, at 167, *quoted in* Katsh et al., *supra* note 28, at 732.

⁴⁴ *Id.*, *quoted in* Katsh et al., *supra* note 28, at 732. One of us has made that argument with respect to the choice among competing systems of private law offline. See Stephen J. Ware, *Arbitration and Assimilation*, 77 WASH. U. L.Q. (forthcoming 2000); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 744–47 (1999).