

New Web-Based Alternative Dispute Resolution Systems

By Bob Pimm

Sixty CEOs of the world's largest businesses recently gathered for the Global Business Dialogue on eCommerce (GBDe). Asked to identify their top concerns about functioning in today's just-in-time and increasingly cross-border environment, they concluded: "National court systems [are] too expensive, too time consuming and judgments...hard to enforce...A global alternative dispute resolution system is necessary to encourage cross-border electronic commerce."¹

Why would problems with national court systems be the greatest concern for international business leaders? The reason may be because businesses in Europe and North America spend \$38 billion each year on legal fees associated with commercial litigation. Few of these lawsuits are multi-million dollar disputes. The average amount in dispute is \$80,000 and 86 percent of claims are under \$150,000. More than 50 percent of all cases are an alleged breach of contract. The litigation market consists overwhelmingly of routine commercial disputes, giving rise to a significant distraction to business activity (litigation) in which dissatisfaction rates are extremely high.

The GBDe cites time, costs and enforcement as the top three concerns. Let's look at the facts underlying these concerns.

- Time — The average time to resolution of litigation in North America is 600 days — almost two years. In today's just-in-time marketplace, 600 days is simply out of line with the needs and expectations of most businesses, most of the time.
- Cost — Statistics from the Department of Justice indicate that parties spend, on average, more than \$50,000 per dispute — dangerously close to the average \$80,000 amount in dispute. If the client is owed \$80,000 and it costs \$50,000 to get. It through litigation, the balance of \$30,000 will be further devalued by the time-value-of-money discount.
- Enforcement — The International Chamber of Commerce (ICC), which runs the International Court of Arbitration, says the principal driving force for businesses migrating away from traditional litigation toward alternative dispute resolution (ADR) methodologies is the "globalization of the world's economy." Apprehension about commencing litigation and enforcing judgments in foreign jurisdictions is fueling 35 percent annual growth rates in the use of ADR.

The growing ADR market

With this kind of year-over-year growth, data from the Organization for Economic Cooperation and Development (OECD) suggests that ADR now represents close to 10 percent of the size of the litigation market. It is estimated that the ADR market now represents about \$3.4 billion in fees paid each year. The ICC cites growth rates of 35 percent per year and, anecdotally, many lawyers note that close to 50 percent of their

clients' contracts now include mandatory ADR clauses aimed at eliminating litigation under the contract

Given the size of the market and annual growth rates, it is surprising that the traditional ADR service-provider market continues to be dominated by large not-for-profits and local micro firms. However, this tradition may not be solving the dispute resolution problems articulated by the GBDe as noted above. For example:

- Traditional paper-driven ADR systems often involve flying parties around the world with brief cases full of paper. Yet, businesses have migrated away from paper-driven, personal-contact methodologies in all other areas of their business. Businesses have been rapidly moving toward highly automated delivery systems for most of their core business lines (such as supply-chain management, customer-relations management and inventory management.) Thus, using technology-enabled solutions to resolve disputes arising from these relationships and transactions is a natural next step for clients and one that traditional bureaucratic paper-driven ADR systems seem ill-equipped to handle.
- Some traditional ADR service organizations have become as time-consuming and expensive as the standard court-based litigation they were intended to replace.
- As ADR is becoming "big business," law firms are increasingly hesitant to refer their clients' ADR work to ADR professionals in competing law firms or to ADR sole practitioners or to ADR micro firms that are not set up to manage the volume, complexity or international scope of their clients' needs.

In response to these drawbacks, online ADR systems are filling the gap in the traditional ADR service delivery market. Furthermore, a recent Justice survey concluded that more than 70 percent of respondents would consider using online ADR.² An example of the new online ADR services is the "Electronic Courthouse," which offers an alternative to commercial litigation and conventional mediation and arbitration — all available on a lawyer's desktop.

In the sports arena, parties to a dispute suitable for online ADR are players, franchises, contractors, suppliers, equipment manufacturers, retailers or wholesalers. The issues range from compensation, personal injury, dismissal and breach of contract, to contract negotiations. The parties may choose among binding arbitration, mediation, a stepped "Med-Arb" process or neutral evaluation. Mediation or binding arbitration may be used to resolve disputes once contracts are in place, while "early neutral evaluation" can resolve stumbling blocks at the contract negotiation stage.

On the entertainment side, online ADR services can offer the same dispute resolution methodologies (arbitration, mediation, "med-arb" and neutral evaluation) for an equally broad range of parties, whether broadcasters, authors, filmmakers or production companies, for copyright, corporate, commercial, contract compensation and other disputes.

Because parties and their “online resolution professional” can carry out the entire process from their desktops, an online dispute resolution service clearly has added benefits when parties are at a distance — eliminating the time and costs of travel, hotels and meeting facilities and overcoming scheduling delays associated with multiple meetings. Even when all parties are in the same city, the many other features of these services, such as proprietary template forms and legal databases, can save clients considerable time and costs.

Eight-step process

The online ADR model used by the Electronic Courthouse incorporates an eight-step process that mirrors the steps that parties and their counsel would carry out under conventional ADR methodologies, but through faster and more efficient tools accessible from the desktop. The steps are:

1. *Referral* — The parties are referred by participating law firms, industry associations and through marketing channels.
2. *Intake* — The parties confirm that there are two willing parties with a commercial dispute.
3. *Contract* — The parties commit to ADR rules, such as the American Arbitration Association, the UN Rules, or can craft their own using proprietary model rules.
4. *Input* — Using model forms, the parties search databases to find and cite appropriate case law, complete their document submissions and can securely send documentary evidence electronically supporting their claims.
5. *Output* — The parties can also address special needs, such as foreign translation or preliminary meetings to handle more complex disputes.
6. *Analysis* — The parties select a “resolution professional” by choosing from a short list generated automatically by matching the needs of the parties with the skills and experience of the resolution professionals on the service’s roster. It is the parties that make the final choice from this list. The parties may also have access to an extensive legal database of articles and resources uniquely crafted for business people who are not legal professionals.
7. *Resolution session* — The parties “meet” in what the Electronic Courthouse calls its ResolutionRoom, which includes all the tools that parties would use in a conventional ADR session, including:
 - *Voice* — a voice conference call with features like play-back and transcripts.
 - *Documentation* — The parties’ submissions and supporting documents are collated with value-added search and retrieval and related tools that eliminate digging through file folders and contracts.
 - *Drafting* — Model templates and collaborative drafting tools for drawing up minutes of settlement, as well as innovative tools such as international time docks and currency measures for cross-border disputes.
8. *Decision* — The parties receive a model resolution report incorporating the adjudicative award, minutes of settlement or evaluation report

What about online security and privacy?

Security is a key issue in any online transaction. Ironically, compared to public justice systems around the world, which are exactly that — public — online ADR is secure and private. For example, the Electronic Courthouse uses multiple security layers including high-level server security and password protection supporting the disputing parties' workrooms and resolution room, as well as software that downloads and backs up the server data and locks all parties' forms once they are submitted.

How do parties find online ADR services?

How do disputing parties find an online ADR service? In the case of the Electronic Courthouse, it acts as a broker, marketing its solution through international channels, industry associations and law firms, then referring the disputes to its roster of professionals. Thus, most of its referrals come from two sources (1) law firms and (2) marketing partners. Law-firm referrals occur when the law firm's clients have a mandatory ADR clause in the contract under dispute or when the client instructs the law firm to refer the dispute to an online ADR service. Many firms prefer referring ADR disputes to an exclusive online ADR service because they know that service represents no competitive threat to the law firm's other legal services.

There are three main reasons why entertainment and sports law clients will find an online ADR service worthwhile:

Affordable —

- 95 percent cheaper than commercial litigation.
- Costs are fixed and certain, as opposed to variable and uncertain.
- The ultimate result is the same a binding and enforceable decision or settlement agreement that has the same force and effect as a judgment of the court, in accordance with case law and arbitration statutes around the world.

Accessible —

- 99 percent faster than commercial litigation.
- Disputes are resolved within hours or days, not months or years.
- All that is required is a computer and a Web browser connection to the Internet

Applicable to today's markets —

- Proceedings are confidential rather than public — an important benefit when the allegation is that a product failed, a shipment arrived late or a sales force misrepresented a product.
- Compliance rates are higher — parties are more inclined to pay after a speedy process in which they have voluntarily participated. Arbitration awards and settlement agreements are enforceable with the same force and effect as judgments of the court.

It remains to be seen whether online ADR services are the answer to reducing the time to resolve disputes and the ever-increasing costs of resolving disputes. However, the Electronic Courthouse is an example of a unique innovation that may change the face of all dispute resolution, not just entertainment and sports law disputes. If you are curious to see how this service works, try a free demonstration at http://www.novaforum.com/main/novaforum_demo_revised.html

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Endnotes

1. Report of the Global Business Dialogue on eCommerce (GBDe). Hosted by the Organization for Economic Cooperation and Development (OECD), May 2000.
2. Department of Justice, "Research into Online Alternative Dispute Resolution," 23 May 2003, p.1 <http://www.justice.vic.gov.au/>