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VIRTUAL VENUES: IMPROVING ONLINE DISPUTE RESOLUTION AS AN ALTERNATIVE TO COST INTENSIVE LITIGATION

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This article investigates the growing presence of online alternative dispute resolution in the commercial setting, with the eventual goal of making suggestions to improve current online systems. While out-of-court dispute resolutions such as arbitration and mediation have been a long-time alternative to lengthy litigation, the development of the Internet and other advanced forms of communication has led to increased prevalence and increased possibilities for online dispute resolution.

Section I provides a succinct review of the history of online dispute resolution. The focus of this section is two-pronged. The first prong discusses how technological advancements have led to changes in the function and performance of online dispute resolution systems. The second prong focuses on the progression of online dispute resolution through “four distinct phases:” “hobbyist;” “experimental;” “entrepreneurial;” and “institutional.”¹

The next two sections of this article provide an analysis of the primary characteristics of current online dispute resolution systems. Section II focuses on the benefits of such systems, while Section III focuses on the negative aspects of these systems. While the Internet has led to many beneficial changes in alternative dispute resolution, it has also brought about new issues that must be addressed. It is only by balancing these benefits and disadvantages that a truly effective system of online dispute resolution can be established.

This balancing is the attempt of Section IV. This section focuses on possible responses to the shortcomings of the current implementation of online dispute resolution. The goal of this section is to look at the draw-

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1. Paul Stylianou, *Online Dispute Resolution: The Case for a Treaty Between the United States and the European Union in Resolving Cross-Border E-Commerce Disputes*, 36 SYRACUSE J. OF INT'L L. & COMM. 117, 118 (2008).

backs addressed in Section III and provide possible solutions that could decrease the overall severity of these negative effects. Finally, Section IV provides a series of recommendations, the implementation of which may help to address some of the downsides of online dispute resolution systems and expand the reach of currently existing systems.

I. OVERVIEW OF THE DEVELOPMENT OF ONLINE DISPUTE RESOLUTION

Online dispute resolution has seen many developments in its relatively short existence. An analysis done by Melissa Tyler and Di Bretherton at the International Conflict Resolution Centre at the University of Melbourne for the Department of Justice Victoria, found that online dispute resolution has already undergone three broad stages of development: hobbyist; experimental; and entrepreneurial.² Furthermore, the study found that the system of online dispute resolution is currently in a fourth phase, institutionalism.³

The initial hobbyist phase was characterized by a smaller group of individuals promoting the concept and working on the development of online dispute resolution.⁴ This phase, “generally consisted of individual enthusiasts without formal funding sources.”⁵ During the experimental phase, the core group interested in the development of online dispute resolution moved away from unfunded individual enthusiasts towards scholars and non-profit organizations “that were funded by foundations and international bodies” to run online dispute resolution pilot programs.⁶

While the shift from the hobbyist phase to the experimental phase led to an increase in the use of online dispute resolution and improvements to general online dispute resolution mechanisms through the creation of pilot programs, it was not until the entrepreneurial phase that the general public could easily access online dispute resolution.⁷ Similarly, the entrepreneurial phase was marked by the increased presence of for-profit organizations that “began to launch private online alterna-

2. Melissa Conley Tyler & Di Bretherton, *Online Alternative Dispute Resolution*, 7 VINDOBONA J. INT'L COM. L. & ARB. 199, 200-01 (2003).

3. *Id.* at 201.

4. *Id.* at 200.

5. Stylianou, *supra* note 1, at 118.

6. Tyler & Bretherton, *supra* note 2 at 200; *See also* Stylianou, *supra* note 1, at 118-19 (explaining that “[t]he ‘hobbyist’ phase generally consisted of individual enthusiasts without formal funding sources, while the ‘experimental’ phase represented a shift from individuals without formal funding to scholars with research grants”).

7. Stylianou, *supra* note 1, at 119 (stating that “the ‘entrepreneurial’ phase ushered in a new era of online dispute resolution”).

tive dispute resolution” systems.⁸

Having completed the entrepreneurial phase, online alternative dispute resolution is now entering the fourth, or the institutional phase.⁹ The most noticeable characteristic of this phase has been the piloting and adoption of online alternative dispute resolution by a range of official bodies—often local governments and government agencies.¹⁰ This promotion of online alternative dispute resolution by official bodies is most commonly seen in the fact that “governments, agencies, and other official entities, are beginning to provide [online dispute resolution] services directly to consumers.”¹¹

While much of the development in online dispute resolution has revolved around the providers as they have progressed through the four phases outlined above, other significant changes have also occurred in the substantive process in which online dispute resolution is performed. Many of these changes have revolved around recent technological advances. While early versions of online dispute resolution were limited by communication between opposing parties solely through e-mail, advances in online communication technology have allowed for significant advancements in online mediations and arbitrations.¹²

With technological advancements, online alternative dispute resolution systems have been able to “use forums such as chat rooms, websites with encryption software and password protection, instant messaging, and video conferencing” to create a number of online alternative dispute methods.¹³ The main forms of online dispute resolution that have developed as a result of technological advancements include arbitration, mediation, facilitated negotiation, case appraisal, and automated negotiation. Of these methods, facilitated negotiation is the “simplest form of online alternative dispute resolution in which online space is provided where parties can negotiate directly.”¹⁴

8. Tyler & Bretherton, *supra* note 2, at 201.

9. See *Id.*

10. *Id.*

11. Stylianou, *supra* note 1, at 118.

12. Tyler & Bretherton, *supra* note 2, at 203. “[T]he main communication methods used in online ADR have changed as improved technology has become available. Early online ADR sites tended to rely mainly on email.” *Id.*; See also Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 333 (2008). “Broadly speaking, computer networking does not replace other forms of human communication. Instead, it increases the range of human connectedness and the number of ways in which people are able to make contact.” *Id.*

13. Stylianou, *supra* note 1, at 118; see also Haloush & Malkawi, *supra* note 12, at 334. “Currently there is very much interest in the online possibilities of mediation. Mediation cannot avoid being affected by the new IT technology because communication is central to mediation’s ability to lessen tensions and reach agreement.” *Id.*

14. Tyler & Bretherton, *supra* note 2, at 202.

In contrast, online mediation and online arbitration provide a neutral third-party to assist in negotiations. In the case of mediations, these negotiations generally take place through e-mail, a secure website, or videoconference and are non-binding.¹⁵ In arbitration situations, such negotiations may take place through any of the previously mentioned mediums or may be done solely through the submission of documents to the third-party arbitrator; in any of these arbitration scenarios, the decision of the third-party would be binding upon the parties.¹⁶

In a case appraisal system, a neutral third-party considers a dispute between two parties and provides advice regarding the strength of claims and probable outcome of the case.¹⁷ This is done either through a “virtual jury mock trial” or by an “expert advice” opinion.¹⁸

The final form of online dispute resolution, which has arisen solely due to technical advancements, is automated negotiation. Automated negotiation has been described as:

[a]n innovative form of online alternative dispute resolution that does not have an exact offline analogue. It includes processes such as “blind bidding” where parties submit confidential settlement offers for a number of rounds. A computer program automatically notifies them of a settlement at the arithmetic mean once the amounts are sufficiently close.¹⁹

This automated method of dispute resolution allows two parties to potentially settle an issue without ever involving a human third-party. While these technological advancements have significantly assisted in the development of online dispute resolution systems, scholars agree that further developments in software focusing on the online forum in which negotiations take place and communication between the parties is critical to the further development of online dispute resolution systems.²⁰

15. *Id.*

16. Haloush & Malkawi, *supra* note 12, at 332. “Arbitration proceedings may be based only on the exchange of pleadings, evidence, and other written stages . . . whereas mediation seeks to improve communication, adequate software that allows positions to be stated and documents to be shared may provide a sufficient frame for online arbitration.” *Id.*

17. Tyler & Bretherton, *supra* note 2, at 202.

18. *Id.*

19. *Id.*

20. Haloush & Malkawi, *supra* note 12, at 333.

While the characteristics of the space in which parties meet is not very integral to the success of alternative dispute resolution, the nature and design of virtual space in which online alternative dispute resolution occurs is extraordinarily important if not critical. This is due to the fact that the nature of the online space will shape how expertise is delivered and the manner in which the parties will be able to interact. *Id.*

See also *Id.* at 346. “Adequate software could be a necessary, indeed indispensable, element for online interactions to be successful. Software is the ingredient that provides the elec-

II. BENEFITS OF ONLINE DISPUTE RESOLUTION

Now that an overview of the progression and current state of online dispute resolution systems has been provided, this article turns to an assessment of these systems. This section covers the four most significant benefits of a system of online dispute resolution: (1) creating remedies for those often left out of other forms of dispute resolution; (2) improving the quality and effectiveness of negotiations; (3) speeding up the resolution of disputes; and (4) removing many symbolic detriments to an effective resolution of disputes.

A. EXPANDING THE REACH OF THE JUSTICE SYSTEM

One of the biggest benefits of online dispute resolution is that such systems can drastically decrease the cost of getting a dispute resolved; thus allowing the opening of the doors of the justice system to traditionally disadvantaged groups.²¹ As compared to filing suit in a court, the cost of online dispute resolution is a “mere trifle.”²² There is even a fairly significant difference between the costs of using online dispute resolution as compared to using other forms of alternative dispute resolution. These additional savings tend to revolve around the cost of travel and venue reservation that is required in other forms of alternative dispute resolution, but not in the online dispute resolution setting.²³

B. INCREASING THE QUALITY OF NEGOTIATIONS

Another significant benefit of online dispute resolution systems is the ability of such systems to improve the quality of negotiations as compared to other forms of alternative dispute resolution. One way in which

tronic medium with its architecture and functionality. It is software that allows the existence of effective dispute resolution systems online.” *Id.*

21. Karen Alboukrek, *Adapting to a New World of E-Commerce: The Need for Uniform Consumer Protection in the International Electronic Marketplace*, 35 GEO. WASH. INT’L L. REV. 425, 425 (2003).

22. Stylianou, *supra* note 1, at 124. “The cost of paying for online dispute resolution services, whether to send the dispute to an arbitrator or to provide a forum for the parties to come to a mutual agreement, is a mere trifle compared with the expensive proposition of litigation.” *Id.*

23. Thomas Schultz, *Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT’L L. 799, 834 (2008) (stating that when disputes relate to fairly small dollar amounts courts “do not offer a rational option, because the costs they entail are prohibitive . . . The Internet is more conducive to such cost problems than the ordinary real-world environment, because of the characteristically heightened geographic distances and jurisdictional ambiguities, as well as the need for translation” and other factors); *See also* Llewellyn Joseph Gibons, *Creating a Market for Justice; A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT’L L. & BUS. 1, 4-5 (2002).

online dispute resolution helps to improve the quality of negotiations is by removing the physical presence of the parties from the “room” at the time of negotiating. While it may seem counterintuitive that the separation of two individuals could actually increase the quality of communication, by removing the physical presence of the parties online dispute resolution allows both parties and the third-party—if one is involved—to focus on the substantive issues rather than emotions, which often become overbearing in a face-to-face negotiation.²⁴

In addition to removing the physical presence of the parties, online dispute resolution helps to increase the quality of negotiations by providing parties with time to review offers and make well-informed, well thought out responses. In-person negotiations require immediate responses to suggestions and offers, and often the first response given by a party is not the best possible one. Online dispute resolutions can effectively use e-mail to allow parties a period of time in which they can consider proposals and settlements before responding to the opposing side.²⁵

C. SPEEDING UP THE RESOLUTION PROCESS

Online dispute resolutions can also help to significantly speed up the amount of time it takes to resolve a dispute. Time-consuming jurisdictional rules often burden litigation; however, many of the rules that would extend the timeframe for the resolution of a dispute are not required in online dispute resolution.²⁶

Furthermore, unlike in-person mediation or arbitration in which the parties must find a time when they are both available to meet at a physical venue, and possibly find times to return again in the future, online dispute resolution allows each party to “attend” the negotiation in accordance with its own timeframe. A party can respond through e-mail within a reasonable time period that is convenient for it without concern to the availability of the opposing party.

D. REMOVAL OF SYMBOLIC DETRIMENTS

Further, online dispute resolution can remove symbols that could hinder the negotiation process by discomforting one or both of the parties. Whether in a courtroom or in some form of mediation or arbitration, a party to a dispute may feel suppressed in a face-to-face meeting due to many different reasons. Oftentimes the “threat of physical violence, shyness in face-to-face settings, and socio-economic status cues”

24. Benjamin G. Davis et al., *The First International Competition for Online Dispute Resolution: Is This Big, Different and New*, 19 J. INT'L ARB. 379, 389 (2002).

25. *Id.*

26. Gibbons, *supra* note 23, at 4.

prevents a party in a dispute from fully expressing its opinion.²⁷ In online dispute resolution, however, the fact that the parties are completely isolated significantly decreases, if not completely eliminates, the fear that such settings would stifle a party.

Furthermore, it has been said that, “part of the attraction of arbitration, traditionally, is that it moves dispute resolution from an identifiable place, i.e., a courtroom, to any place. . . Arbitration is less concerned with the symbolism that a particular place might represent.”²⁸ While this statement is certainly applicable to all forms of arbitration, it is particularly relevant to online dispute resolution—whether it is arbitration or mediation. Completely removing the necessity of a physical forum eliminates the possibility that symbolism is suggested to the parties; thus truly moving dispute resolution to “anywhere.”

III. DISADVANTAGES OF ONLINE DISPUTE RESOLUTION

While online dispute resolution has many benefits, as discussed above, the system also has a fair number of disadvantages as compared to traditional courtroom litigation or other forms of in-person alternative dispute resolution. The latter part of this article addresses these downsides in an attempt to formulate a better online dispute resolution system. This section, however, will focus on a brief analysis of the four most prominent disadvantages of online dispute resolution, which include: 1) the technological gap between different groups of society; 2) the concerns regarding procedural and substantive fairness; 3) the potential for miscommunications; and 4) the problems faced by the neutral third-party, namely gaining authority over the parties in a mediation setting and properly controlling the flow of information.

A. PRESENCE OF A TECHNOLOGICAL GAP

One of the most significant problems with online dispute resolution is that the technological nature of such a system may actually dissuade many individuals who would greatly benefit from its cost-effectiveness from using it. While technological advances have been useful in increasing communication abilities between parties, such advances presume that the users have an understanding of the underlying technology.

This presumption, however, is not always warranted as there is a gap between many groups in society in relation to technological knowledge and use, and it seems that this gap may continue to grow.²⁹ Many

27. Stylianou, *supra* note 1, at 124.

28. Haitham A. Haloush, *Jurisdictional Dilemma in Online Disputes: Rethinking Traditional Approaches*, 42 INT'L LAW. 1129, 1140 (2008).

29. David A. Hoffman, *The Future of ADR*, 14 DISP. RESOL. MAG. 6 (2008). “It appears that the pace of technological change in the realm of electronic communications will con-

of the underprivileged groups that would benefit the greatest from the decrease in costs resulting from a system of online dispute resolution may have difficulty using such a system because those groups tend to have less exposure to the technology than the opposing party. Additionally, many of these individuals simply may not be able to access the technology that is necessary for online dispute resolution (e.g. at the very minimum, a computer and an Internet connection).

The structure of the online systems that is currently in place further exacerbates quite a few of the problems that exist regarding technological gaps between individuals and the effect of such gaps on online dispute resolution. The formatting of many of the current online dispute resolution systems is excessively confusing, thus further adding to the problems that a technological gap causes.³⁰ Oddly enough, however, advances in technology may actually be the solution to these technological issues. This issue is discussed in more depth in Section IV.

B. CONCERNS REGARDING PROCEDURAL AND SUBSTANTIVE FAIRNESS

Another commonly discussed issue relating to online dispute resolution is that such a system encumbers procedural and substantive fairness. This argument is generally focused on the fact that many of the due process rights that are associated with courtroom litigation are missing in online dispute resolution.³¹ As one legal scholar has noted:

[i]deas of “due process,” including the confrontation of parties and witnesses, the right to a trial by jury, and the ability to present evidence, are all features of the U.S. legal system which can be blunted by ODR [online dispute resolution] systems that often employ a single decision-maker and deny recourse to appeals or judicial review except in very limited circumstances.³²

A successful system of online dispute resolution will need to balance these core due process rights with the benefits and cost-effectiveness associated with an online system of dispute resolution.

continue to accelerate, and therefore this structural gap may widen over time.” *Id.* at 7; see also David Larson, *Technology Mediated Dispute Resolution (TMDR): Opportunities and Dangers*, 38 U. TOLEDO L. REV. 213, 218 (2006).

30. Bruce L. Mann, *Smoothing some Wrinkles in Online Dispute Resolution*, 17 INT’L J. L. & INFO. TECH. 83, 84 (2009). “The problem is exacerbated by instructions about the process that are not explicit enough for some disputants . . . with written instructions that are intimidating, FAQ’s that are too long, and few or no pictorial renditions of the meeting space.” *Id.*

31. Stylianou, *supra* note 1, at 124.

32. Mary Shannon Martin, *Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT’L L.J. 125, 157 (2002).

C. POTENTIAL FOR MISCOMMUNICATIONS

While the physical separation of parties can help the neutral third-party focus on the substantive issues rather than on the parties' emotions, such physical separation also leaves ample opportunities for miscommunications between the parties or between one of the parties and the neutral third-party. Scholars have noted that many of the issues surrounding online dispute resolution come from the "reduced communication cues' inherent in a text-based system of dispute resolution where instant messaging and e-mails remove traditional methods of judging another human's sincerity, such as facial expressions, body language, and tone of voice."³³

During the process of in-person arbitration and mediation, the neutral third-party can analyze the body language and tone of voice of the parties to judge the possibility of a successful negotiation. In an online system that lacks a face-to-face component, however, "these traits often fall flat."³⁴

D. THIRD-PARTY AUTHORITY ISSUES

An additional difficulty that has been associated with online dispute resolution in a mediation context is attempts of the third-party mediator in obtaining some sense of authority over the participants. The neutral third-party mediator must have a good relationship with the parties in order to effectively mediate the dispute; yet, this authority is "often procured through natural charisma," a trait that is "difficult to communicate online without seeing a person."³⁵ Thus, the mediator in an online dispute must find a way beyond charisma to establish a repertoire with the parties involved.

Another difficulty that arises for the neutral third-party in mediation negotiations is the control of the fluidity of information. While, as discussed above, timing between the presentation of one party's opinion and the other's response can be a useful tool, excessive time between communications can have an intensifying effect where parties become less likely to achieve resolution.³⁶ Thus, the online mediator must handle the flow of information so as to allow enough time for parties to thoroughly review and respond. The mediator must also make sure that the

33. Tyler & Bretherton, *supra* note 2, at 210.

34. Lois Gold, *Influencing Unconscious Influences: The Healing Dimension of Mediation*, 11 *MEDIATION Q.* 55, 58 (1994).

35. Haloush & Malkawi, *supra* note 12, at 343.

36. COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS* 47-82 (Jossey-Bass ed., 2002).

transfer of information is fluid enough so as to not impede the achievement of a resolution.

IV. RECOMMENDATIONS FOR THE DEVELOPMENT OF ONLINE DISPUTE RESOLUTION

The problems described above do not necessarily outweigh the benefits that come from an online dispute resolution system. The system can, however, be further improved. While I propose a fair number of changes that could possibly help the online dispute resolution systems, these changes roughly fall into three categories: (1) using advances in technology to level the playing field between parties to a dispute; (2) increasing the involvement of the government in the online dispute resolution arena; and (3) learning more about the process of online dispute resolution through empirical research. This final recommendation is less of a suggestion for modifications to the current system and more of a call for research so that an understanding of how online dispute resolution functions and a determination of how best to fit this function into the ever-adapting society can be achieved.

A. LEVELING THE PLAYING FIELD THROUGH TECHNOLOGY

Advances in technology can be used in a variety of ways to help decrease the discrepancy that often exists between parties to a commercial-based alternative dispute resolution. The first, and arguably most important, use of technology would be the use of strict formats for online dispute resolutions and the creation of in-depth tutorials to guide parties to an online dispute resolution through the entire process. Advancements in computer technologies have made “plug-and-play” systems that simply require a user to enter information into clearly designated boxes a more than realistic possibility for any online alternative dispute resolution.³⁷ Tying the theme of technology with that of government regulation, the presence of a simplified plug-and-play option and in-depth tutorials as to the function of an online dispute resolution “venue” can be conditions to the government certification, discussed *infra* IV(B), of an online arbitrator or mediator.³⁸

37. Hoffman, *supra* note 29, at 7. “The computer industry continues to develop even newer, user-friendly, plug-and-play interfaces that enable even the technologically challenged to participate in Internet communications, which now include audio and video as well as text.” *Id.*

38. Mann, *supra* note 30, at 85. “The first factor resides in substandard ODR presentations made by inarticulate and lesser dispute-wise disputants that could be readily addressed with an online tutorial or job aid. In fact many ODR providers do offer stepwise instructions and FAQ’s. They are by all accounts, not explicit enough – not on point.” *Id.*

Technology can also serve a purpose beyond making the format of an online dispute resolution website more understandable. Advances in technology can also be used to simplify the negotiation process for different segments of the country, or for that matter, the world. Companies or institutions offering online dispute resolution services can easily add in a translation service, or keep mediators that are multilingual, so that each party has the option of submitting their opinion in the language they are most comfortable utilizing. The use of translation software would allow for the online dispute resolution industry to expand to individuals that are generally denied access to dispute resolution mechanisms due to language barriers, and would also possibly allow those offering online dispute resolution services to expand beyond domestic transactions to international commercial transactions.

A final use of technology can be to decrease some of the disadvantages that online dispute resolution faces as a result of a lack of face-to-face contact. Increased use of video-conferencing, which would allow for the closeness of an in-person interaction without requiring the parties to actually go through the inconveniences of meeting at a common location, and other new technology would allow online dispute resolution arbitrators and mediators to mimic a face-to-face transaction when necessary, without ever requiring the parties to leave their home.³⁹

B. GOVERNMENT INVOLVEMENT IN ONLINE DISPUTE RESOLUTION

Online dispute resolution would also benefit greatly from increased governmental involvement. This involvement can come in a variety of forms including: the creation of model rules; the creation of a certification board for online dispute resolution providers; and legislation that regulates contractual clauses requiring consumers to enter into mandatory arbitration of commercial disputes.

Creating a set of model rules for providers of online dispute resolution services would allow for a system of uniformity that would likely increase consumer protections. The model rules would have the ability to ensure that online dispute resolution providers do not skew the resolution system towards commercial entities that have a greater ability to pay large fees. The creation and adoption of model rules by Congress would not require legislators to begin understanding the world of online dispute resolution from scratch. In 2002, the American Bar Association released a publication entitled *Recommended Best Practices by Online Dispute Resolution Service Providers* that would provide a strong start-

39. Hoffman, *supra* note 29.

ing point for any prospective model rules.⁴⁰

The creation of model rules would be greatly benefitted by the creation of a licensing board that would be responsible for certifying online dispute resolution providers. This certification process would allow the government to monitor organizations providing dispute organization and would provide consumers with a sense of confidence when considering whether to solve a commercial dispute through online dispute resolution.

Finally, at the very minimum, the government should be involved in limiting the scope of commercial mandatory arbitration clauses. When consumers are forced to resolve their disputes through binding arbitration, they are often on an unlevel playing field where an unprepared consumer is thrown into a binding resolution system against a well-prepared, well-funded commercial retailer.

This argument against mandatory arbitration clauses in retail contracts was briefly addressed by the United States Congress. On July 12, 2007, Senators Feingold and Durbin introduced a bill in the Senate, which was focused on eliminating mandatory arbitration provisions from employment and commercial contracts.⁴¹ The initial idea behind the allowance of mandatory arbitration clauses was that such clauses would be used in situations in which parties were similarly situated.⁴² Due to interpretations by the Supreme Court, however, these clauses began to be applied to commercial sales cases in which the parties were not at all similarly situated.⁴³

While the proposal made in the bill covered a very pertinent topic, the bill never came out of committee in 2007 and was not resubmitted by the Senators in following years. In my opinion, it would be to the general benefit of the online dispute resolution system if the proposals found in the Arbitration Fairness Act were reconsidered by Congress.

C. THE NECESSITY FOR EMPIRICAL RESEARCH

While the previous two sections have provided more concrete recommendations to improve online dispute resolution, a critical step towards actually bringing about improvements is the conducting of additional research. Much of the literature surrounding online dispute resolution, including this article, makes significant assumptions regarding the interactions between parties in a face-to-face negotiation as opposed to an online negotiation. In an attempt to establish a basis to address this

40. AMERICAN BAR ASSOCIATION TASK FORCE ON E-COMMERCE AND ADR, RECOMMENDED BEST PRACTICES BY ONLINE DISPUTE RESOLUTION SERVICE PROVIDERS (2002) <http://www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf>.

41. Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007).

42. *Id.* at § 2(1).

43. *Id.* at § 2(2)-(3).

question, this section provides some suggestions as to empirical research that can be conducted to prove or disprove some of these assumptions and expand the body of knowledge related to the differences between in-person and online negotiation.

An empirical study of the “success” of online dispute resolutions as opposed to in-person negotiations should primarily focus on assessing two factors: the percentage of negotiations that result in an agreement and the satisfaction of the parties with the negotiation process. An assessment of these two factors would allow us to compare the effectiveness of online dispute resolution with more traditional, in-person forms of dispute resolution and would also allow for an assessment of an individual’s general comfort in using the Internet to resolve disputes. While both of these concepts may initially appear to be easy to account for, there are numerous considerations that a researcher would want to keep in mind.

When comparing the agreement rate of online and in-person alternative dispute resolution, it is important to follow the “agreement” and the parties beyond the initial negotiation. While an initial agreement may be easily reached in an online setting, it is possible that the distance between the parties and the lack of face-to-face interactions could result in fewer of the agreements actually being followed through by the parties. Thus, researchers would need to conduct follow-up surveys to see what percentage of non-binding negotiations are fully complied with in both the online and in-person settings.

Equally important to a study of the percentage of compliance is a study of the satisfaction of the parties in each of these settings. While an online agreement may lead to a quick result, this is not necessarily the most efficient process if one or more of the parties are dissatisfied with the result and process and believes that at least part of this dissatisfaction is attributable to the nature of the dispute resolution process.

Many of the arguments made above rest on the assumption that parties conduct themselves differently in person than they do online. Future research should test these assumptions and if a difference in participant attitude is seen, should note what result these differences have on the parties’ views of the negotiation process.

V. CONCLUSION

While online dispute resolution has undergone significant changes in the recent past, there is still much room for improvement of the system. According to the literature discussed above, the process of online dispute resolution has adapted through the “hobbyist” phase, the “experimental” phase, and the “entrepreneurial” phase, and is now in the “in-

stitutional” phase in which government organizations and agencies will begin to promote and provide online dispute resolution services.

The proposals I have provided above, however, suggest that the system of online dispute resolution has not fully entered the institutional phase, and more importantly, online dispute resolution *should not* completely enter the institutional phase. I argue that the best form of online dispute resolution is one that incorporates aspects of both the third, entrepreneurial phase, and the fourth, institutional phase. This “hybrid” form of dispute resolution would likely be characterized by a government regulated system of online dispute regulation that is run by the private sector.