OVERCOMING IMPASSE:
ARE THERE LIMITS TO ONLINE MEDIATION?

Please note: The information in this paper was current as of the publication date. It has not been updated since its presentation in May, 2001.

Appendices

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Are There Limits To Online Mediation?

by

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I.   Introduction

Technical, Legal and Procedural Issues

Discussions of online dispute resolution more commonly focus on technical, legal, and procedural issues, some of which are the following:

A. What constitutes a "writing" or "signature" under applicable treaties and statutes?
B. What is the location of the seat of an online arbitration?
C. Is it appropriate for arbitrators to deliberate between themselves online?
D. Procedural and evidentiary aspects of online dispute resolution.
E. Privacy, confidentiality and security issues related to online dispute resolution.
F. Authentication and validation of documents and other evidence submitted online.
G. Interim orders "signed" by the Chair of the Arbitral Tribunal.
H. Arbitral Award "signed" by all members of the Tribunal.
I. Technical issues: [1]
   o passwords
   o secure communications (encryption)
   o digital signatures
   o video conferencing
   o receipts
   o capabilities to handle extensive documentation and authentication method for documents
   o capabilities to "hyperlink" briefs with documents (exhibits)

- capabilities to handle different groups of users, i.e, restrictions to add, delete, and/or modify documents, private communications, private/restricted annotations, and work on drafts
- integrated messaging capabilities, i.e, e-mail, voice, video, and facsimile
- capability to work "off-line"
- user friendly interfaces
- capability to handle different languages

The question that I would like to examine today is whether or not there are limits to the effective use of online mediation. However, before examining this question, we should first describe what we mean by "online mediation".

<div align="center">

Online Mediation

</div>

The WIPO Arbitration and Mediation Center describes mediation as follows:[(2)]

Mediation (also known as conciliation)[(3)] is a procedure in which a neutral intermediary, the mediator, endeavors, at the request of the parties to a dispute, to assist them in reaching a mutually satisfactory settlement of the dispute. The mediator does not have any power to impose a settlement on the parties. Mediation is also voluntary in the sense that either party may, if it so chooses[(4)] abandon the mediation at any stage prior to the signing[(5)] of an agreed settlement.

Using the WIPO definition of mediation, in its purest form "online mediation" would then be mediation which is, from the initiation of the process through settlement, totally online. That is, no phone calls, telefaxes, personal meetings, video conferencing, or paper communications of any nature whatsoever at any time. This author's definition of "online mediation" would also include the active intervention of the third party neutral, i.e., the mediator, and not merely the computer facilitation of offers and counteroffers back and forth.

II.   Challenges To The Expanded Use Of Online Mediation

Assuming for the purpose of our discussion that we will be able to overcome the technical and legal issues related to online mediation, the more interesting question is what are the human, interpersonal limitations, if any, to online mediation?

I have been fortunate to have been actively engaged in international business negotiations for twenty (20) years and to have had the opportunity to work with colleagues from the Americas, the Middle East, Western and Eastern Europe, and the Asia/Pacific Region. One thing that I learned early on in my career was that no matter how often I communicated with my counterpart by phone, telefax and, in the early days before e-mail, by telex, I always learned something new, and usually fundamental to the negotiations, in a personal meeting over coffee, lunch, dinner or drinks that was not communicated to me in the five (5) phone calls I had the day before while I was sitting in my office in San Antonio. I also think back to all of the times that I have had the honor of serving the parties to a dispute as a mediator and the parties thought they were at an impasse and there was no way that we were going to resolve the matter. I would then take each of the parties aside, possibly separately from or together with their respective attorneys, and we would more often than not find a solution to the problem, move forward with the negotiations, and conclude an agreement.

Out of my personal experiences has grown my belief that the personal interaction of the mediator with the parties is critical to a successful mediation. It is fundamental to the process that the parties have confidence in the mediator, particularly in complex disputes. How do the parties develop that relation with and confidence in the mediator when they are not physically together? How does the mediator look the parties in the eye in an online mediation? How does the mediator communicate a message by different voice inflections, body language, or facial expressions in an online mediation? Or, does any of this matter?

I submit that it does matter. But it is also true that these are changing times. The amount of e-commerce is growing almost exponentially. The number of business to business (B2B) websites for industry consortiums is increasing steadily.[6] There are generational differences in expectations and norms of business between those of us that came to the internet later in our careers and the younger generation that learned to read by the use of a computer in preschool. So what is the answer? I guess the answer is, two fold, i.e., (i) what is the question, and (ii) it depends on who is asking the question.

Can the role of the personal interaction of the mediator with the parties be taken out of or minimized in the process of online mediation or should it be? My answer to that question would be NO. However, I would submit, that is not the relevant question. The more relevant question is can we adopt our interpersonal communication skills to online mediation? My answer to that question is a resounding YES. Are there limits to the use of online mediation? My answer would be of course there are. What are those limits? My answer would be that depends. Depends on what you ask. It depends on the nature of the dispute, the parties involved, the evolution of the law and technology, and finally and most importantly, the skills of the mediator.

III.   Conclusion

A wise man once told me "be careful what you wish for because you may get your wish." Those of us that have long advocated the expanded use of mediation, arbitration and other forms of alternative dispute resolution and the utilization of state of the art technology in the process have gotten our wish. Our challenge now is what are we going to do with it? Online dispute resolution is in its infancy. Are we going to be satisfied to hide behind our first instinct which is to conclude that the humanistic aspects of mediation create an impenetrable barrier that will impose a finite limit to the expanded role of online mediation or are we instead going to consider these humanistic aspects as yet another challenge to be overcome. The answer to that question as all other questions of human nature lies within each one of us. I for one am excited about the opportunity to face those challenges and push the envelope beyond what is currently imaginable. In short, I challenge each of us to dare to dream, I can hardly wait to learn what you discover.

APPENDIX 1

Partial Listing
Of
Electronic ADR Resources

1. ADR World.com
2. Conflict Resolution Information Source
3. Dispute Resolution Resources
4. Campus Mediation Resources
5. Center for Analysis of Alternative Resolution Systems
6. Emory Law Library/Electronic Reference Desk - ADR
7. National Arbitration Forum's Forum Library
8. Cardozo Online Journal of Conflict Resolution (COJCR)
9. Conflict Management In Higher Education Report
10. ExpertLaw.Com
11. Government Executive Magazine
12. Conflict Resolution Newsletter
13. ADA Mediation Discussion Group

14. [AuctionWatch](#)
15. [An article about mediator use of the internet.](#)
16. [Mediating on the Internet: Today and Tomorrow by James C. Melamed, J.D.](#)
17. [Center for Information Technology and Dispute Resolution - University of Massachusetts - Amherst](#)
18. [Mediate.com](#)
19. [International ADR](#)
20. [ADR & Conflict Resolution Books](#)
21. [The Mediator](#)
22. [American Bar Association Section of Dispute Resolution](#)
23. [State Bar of Texas ADR Section](#)
24. [arbsearch.com](#)

APPENDIX 2

Partial Listing
Of
Online Dispute Resolution Administrative Organizations

1. [One Accord](#)
2. [New Court City](#)
3. [Allsettle.com](#)
4. [Clicknsettle.com](#)
5. [Cybersettle.com](#)
6. [eResolution](#)
7. [Square Trade](#)
8. [Webmediate](#)
9. [The Subordinate Courts of Singapore](#)
10. [iCourthouse](#)
11. [Internet Neutral](#)
12. [The Peruvian Cibertribunal](#)
13. [CyberSolve](#)
14. [Disputes.org](#)
15. [Internet Neutral](#)
16. [MIRC](#)
17. [Online Mediators](#)
18. [Resolution Forum](#)
19. [SettlementNow](#)
20. [SettleSmart.com](#)
21. [Virtual Mediator at Key Law](#)

Online Dispute Resolution Services provided by other administrative bodies such as:

[American Arbitration Association (AAA)](#)

[CPR Institute for Dispute Resolution (CPR)](#)

International Chamber of Commerce (ICC)
[International Court of Arbitration](#)

World Intellectual Property Organization (WIPO)

London Court of International Arbitration (LCIA)

APPENDIX 3

Reference Books and Articles[7]

22. Rosenchein, Jeffrey S., Rules Of Encounter: Designing Conventions For Automated Negotiation (1994).
23. Barriers To Conflict Resolution edited by Arrow, Kenneth J. (1995).
24. Acuff, Frank L., How To Negotiate Anything Anywhere (1993).
25. Reid, Alistair, Teleworking: A Guide To Good Practice (1994).
26. Cyber-Society: Computer Mediated Communication And Community edited by Jones, Steven (1995).
27. Croson, R. T., Look At Me When You Say That: An Electronic Negotiation Simulation (1999).
28. Reid, F. J., The Effects Of Time Scarcity On Conflict And Compromise In Computer Conferencing (1998).
29. Austin, R., Computer Conferencing: Discourse, Education and Conflict Mediation (1997).
30. Living Networked On And Offline, Wellman, Barry; Hampton, Keith. Contemporary Sociology, 28 No. 6, Nov. 1999, 648-54.
31. Cyberspace And Identity, Turkle, Sherry. Contemporary Sociology, 28 No. 6, Nov. 1999, 643-8.
32. The Effect Of Gender and Communication Mode on Conflict Resolution, Wachter, R. M., Computers In Human Behavior, 15 No. 6, Nov. 1999, 763-82.
33. Evaluating Self And Others In Electronic And Face-To-Face Groups, Weisband, Suzanne, Atwater, Leanne, Journal of Applied Psychology, 84 No. 4, Aug. 1999, 632-9.
34. Breaching Or Building Social Boundaries? SIDE-Effects Of Computer-Mediated Communication, Postmes, Tom Spears, Russell Lea, Martin. Communication Research, 25 No. 6 Dec. 1998, 689-715.
35. Not Just Talk, Maybe Some Risk: The Therapeutic Potentials And Pitfalls Of Computer-Mediated Conversation, Lebow, Jay. Journal of Marital and Family Therapy, 24 No. 2, Apr. 1998, 203-6.
36. Life On The Line: The Therapeutic Potentials Of Computer-Mediated Conversation, Miller, John K. Gergen, Kenneth J., Journal of Marital and Family Therapy, 24 No. 2, Apr. 1998, 189-202.
37. The Eyes Have It: Minority Influence In Face-To-Face And Computer-Mediated Group Discussion, Poppy McLeod, Lauretta Baron, Robert S. Marti, Molli Weighner, Journal of Applied Psychology, 82, Oct. 1997, 706-18.
38. Same Message Different Medium, Silver, Larissa. WE International, No. 42-43, Fall/Winter 1997-1998, 24-5.
39. Group And Interpersonal Effects In International Computer-Mediated Collaberation, Walther, Joseph B., Human Communication Research, 23, March 1997, 342-69.
40. Reframing Sociological Concepts For A Brave New (Virtual?) World, Cerulo, Karen A. Sociological Inquiry, 67, Winter 1997, 48-58.
41. Contexts And Cues In Cyberspace: The Pragmatics Of Naming In Text-Based Virtual Realities, Jacobson, David, Journal of Anthropological Research, 52, Winter 1996, 461-79.
42. Information Suppression And Status Persistence In Group Decision Making: The Effects Of Communication Media, Hollingshead, Andrea B., Human Communication Research, 23, Dec. 1996, 193-219.
43. Making Friends In Cyberspace, Parks, Malcolm R. Floyd, Kory. Journal of Communication, 46, Winter 1996, 80-97.

44. Computer-Mediated Communication: Impersonal, Interpersonal, and Hyperpersonal Interaction, Walther, Joseph B., Communication Research, 23, Feb. 1996, 3-43.

APPENDIX 4

Examples of Mediator Websites

Dispute Management, Inc.

Jeffrey G. Kichaven

Upchurch Watson & White Mediation Group

Mosten Mediation Centers

Mediate.com Dynamic Web Site

1. APPENDIX 5

Partial Listing of Mediator Online Databases and Referral Sources

1. International Association of Mediators and Arbitrators
2. Martindale-Hubbell ADR Directory
3. Mediate.com

[1]Summary of technical issues raised by RA Erik Schaefer, Cohausz & Florack, Duesseldorf, Germany; e-mail: es@cohausz-florack.de; http://www.cohausz-florack.de

[2]WIPO Arbitration and Mediation Center website
http://www.arbider.wip.int/mediation/index.html

[3]Not everyone uses Amediation@ and Aconciliation@ interchangeably. Some, including this author, distinguish between the two processes by using the WIPO definition to describe Amediation@ and describing the Aconciliation@ process to be one in which the third party neutral states opinions and recommends terms of settlement to the parties.

[4]While this author would agree that mediation does not require the parties to reach agreement, to state that a party may Aabandon@ the process Aat any stage@ may be overstating the case. Query, what constitutes Agood faith@ mediation in the context of an assertion by one of the parties that the other party did not negotiate in Agood faith@ in violation of either a contractual obligation or court order to do so?

[5]This raises the question of what constitutes a Asignature@ in an online mediation.

[6]On 26 October 2000 the Wall Street Journal, reported that AAn international consortium of nine large airlines, including Air France, British Airways, and the three biggest U.S.

carriers, has joined forces with a trio of major aerospace suppliers to form a new web-based trading exchange. The site is designed to sell everything from jet fuel to spare parts to catered meals, according to industry sources.@ (at page A3).

[7]This list was compiled by Anne-Marie Hammond, BA LLB, 2nd year, MA Conflict Analysis and Management, Royal Roads University, Victoria, BC, Canada.

⚱ 1. Summary of technical issues raised by RA Erik Schaefer, Cohausz & Florack, Duesseldorf, Germany; e-mail: es@cohausz-florack.de; http://www.cohausz-florack.de

⚱ 2. WIPO Arbitration and Mediation Center website http://www.arbider.wip.int/mediation/index.html

⚱ 3. Not everyone uses "mediation" and "conciliation" interchangeably. Some, including this author, distinguish between the two processes by using the WIPO definition to describe "mediation" and describing the "conciliation" process to be one in which the third party neutral states opinions and recommends terms of settlement to the parties.

⚱ 4. While this author would agree that mediation does not require the parties to reach agreement, to state that a party may "abandon" the process "at any stage" may be overstating the case. Query, what constitutes "good faith" mediation in the context of an assertion by one of the parties that the other party did not negotiate in "good faith" in violation of either a contractual obligation or court order to do so?

⚱ 5. This raises the question of what constitutes a "signature" in an online mediation.

⚱ 6. On 26 October 2000 the Wall Street Journal, reported that "An international consortium of nine large airlines, including Air France, British Airways, and the three biggest U.S. carriers, has joined forces with a trio of major aerospace suppliers to form a new web-based trading exchange. The site is designed to sell everything from jet fuel to spare parts to catered meals, according to industry sources." (at page A3).

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