

E-COMMERCE AND THE LAW

ADR IN CYBERSPACE

Increasingly, litigants are using arbitration and mediation to resolve disputes in e-commerce cases. The National Arbitration Forum (NAF) is one of the world's most active organizations in the ADR field, and it is helping more and more litigants resolve e-commerce disputes. This chapter has already discussed one example of NAF's work: the conflict involving Google over which domain names rightfully belong to that company. Another example involves a dispute between Sigma Two Group LLC and Avenstar.

Sigma Two Group manufactures simulated firefly lights for residential and consumer use. It sells its goods using the domain name fireflymagic.com. Avenstar, a competitor, registered the domain name magicalfireflies.com and used this site to sell competing goods. Sigma Two Group asked NAF to step in to resolve the domain-name conflict. NAF considered the "magical fireflies" case on the basis of its authority under the Uniform Domain Name Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers, known as ICANN. NAF determined that the domain names magicalfireflies.com and fireflymagic.com were confusingly similar. It also ruled that Avenstar had no rights or legitimate interest in the domain name magicalfireflies.com and that, in fact, the company had registered and used the domain name in bad faith. The result was that Avenstar was required to transfer the domain name magicalfireflies.com to Sigma Two.

An important advantage of using the ADR policy outlined in ICANN is that it is faster and cheaper than pursuing litigation based on trademark law. NAF relies on its panel of legal experts, who apply their knowledge of trademark, copyright, and e-commerce law. In ruling on the magical fireflies case, an attorney for Sigma Two pointed out that "[i]t's important for businesses with similar problems to know there is a speedy and relatively inexpensive dispute resolution process that may resolve their problem short of litigating in federal court."

Source: "Christie, Parker & Hale, LLP Wins Favorable Ruling for Client Sigma Two Group LLC in Domain Name Dispute," *Business Wire*, July 9, 2008.



BUT WHAT IF . . .

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say that, in the Case Opener, Hooters and Phillips decided to settle through mediation. However, mediation did not work out. Phillips wanted to then try another form of ADR, but Hooters said that only one form of alternative dispute resolution could be used in a dispute. Is Hooters correct? Why or why not?

SUMMARY JURY TRIAL

The summary jury trial began in 1983 when a court in Cleveland attempted to relieve pressure on an overloaded docket. A [summary jury trial](#) is an abbreviated trial that leads to a nonbinding jury verdict. Two advantages are inherent in this method of dispute resolution. First, it is quick; a summary jury trial lasts only a day. Second, because the jury offers a verdict, both parties get a chance to see how their case would fare before a jury of their peers.

The process of the summary jury trial is similar to that of a regular trial, but there are some important differences. Each judge can set his or her own rules. At the start of the summary trial, the judge advises the jury on the law. Then, each party's lawyer presents an opening statement along with a limited amount of evidence before the jury. Two key differences here are that the lawyers have a limited amount of time for this presentation and there are generally no witnesses. All the evidence is presented by the lawyers. The jury then reaches a verdict. Although this verdict is only advisory, the jury is not aware that the verdict is not binding. After the jury provides the verdict, the parties participate in a settlement conference, where they decide either to accept the jury verdict, to reject the verdict, or to settle on some compromise. Approximately 95 percent of cases are settled at this time. However, if the case is not settled, it will go to a regular trial. At that trial, nothing from the summary jury trial is admissible as evidence.

COMPARING THE LAW OF OTHER COUNTRIES

ADR IN FRANCE

France shares various ADR techniques with the United States, including mediation and arbitration. As a signatory to the New York Convention, France respects foreign arbitration tribunals. Indeed, the International Chamber of Commerce, mentioned on page 96, is the world's leading institution for resolving international commercial disputes—and it is seated in Paris.

Like the United States, France also has an interest in the efficient resolution of disputes. To that end, France passed a law in 2019 that created a legal framework for online ADR. The law also imposed a prerogative on judges to send litigants to ADR forums. Civil disputes of under 5,000 euros, subject to a few exceptions, must pass through mediation before being heard by a French court. Parties embroiled in higher-stake disputes must also show they have attempted to settle before approaching the court.

France has a unique ADR method called conciliation. Conciliation is an ADR technique that boils down to informal negotiations between disputants led by a conciliator. The conciliator is appointed by a court and, surprisingly, comes free of charge. In mediation, the mediator ostensibly attempts to facilitate discussion between the parties. However, the conciliator leads discussions and uses his or her expertise to drive the parties to an optimal solution. French companies facing insolvency often seek conciliation as the first step to restructuring. In many cases, the conciliation procedure reaches an amicable agreement among all stakeholders, bringing in new creditors, and extending its lifespan. Even if an agreement is not reached, the conciliation process can create a court-approved framework relevant to future “financial safeguard plans.”

MINITRIAL

A [minitrial](#) is similar to arbitration and mediation because it involves a neutral third party. Disputing businesses generally use minitrials. Business representatives of the disputing businesses participate and have settlement authority. Lawyers for each side present their arguments before these representatives and the neutral adviser, who then offers an opinion as to what the verdict would be if the case went to trial. The neutral adviser's opinion, like the jury's verdict in the summary jury trial, is not binding. Next, the business representatives discuss settlement options. If they reach an agreement, they enter into a contract that reflects the terms of the settlement.

A minitrial may be preferred to arbitration for three reasons. First, a minitrial is less costly than arbitration. Second, in the typical minitrial, the business representatives, who presumably understand the complex matters of the dispute better than an outside arbitrator, have settlement authority. Third, the procedures of the minitrial can be modified to meet more precisely the needs of the parties. For example, parties may give the neutral adviser the authority to settle the case if the representatives cannot come to a settlement agreement after a certain period of time.

EARLY NEUTRAL EVALUATION

With *early neutral evaluation*, sometimes called *early neutral case evaluation*, the parties select a neutral third party and explain their respective positions to this neutral, who then evaluates the strengths and weaknesses of the case. The parties use this evaluation to reach a settlement. Early neutral evaluation was pioneered in the Northern District of California and is now used in a number of other federal courts.²⁴

PRIVATE TRIALS

Several states now allow [private trials](#), an ADR method in which a referee is selected and paid by the disputing parties to offer a legally binding judgment in a dispute. The referees do not have to have any specific training; however, because retired judges often serve as referees, this method is often referred to as "rent-a-judge."

Generally, a private trial occurs after a case has been filed in district or state court. After the parties have engaged in discovery and developed their positions, the parties may choose to participate in a private trial. The parties would typically notify the trial judge overseeing their case that they are participating in a private trial. The disputing parties determine the time and place of the trial and conduct the trial in private to ensure confidentiality. The referee writes a report stating the findings of fact and the conclusions of the law. This report is filed with the trial judge; however, if any party is dissatisfied with the resolution of the case, the party can request a trial before a trial court judge. If this request is denied, the party can appeal the decision of the referee.

Recently, private firms have started to offer private jury trials. The jurors are hired by the private firms and are often better educated than typical jurors and have served in multiple private jury trials. Many scholars criticize the typical jury because they believe that such a jury is unable to accurately fulfill its role as fact finder. Thus, offering a better-educated, experienced jury helps assuage criticisms of the jury yet offers the advantage of judgment by a jury of peers.

The private trial has been criticized for several reasons. First, scholars argue that use of the private trial could lead to a two-tiered system of justice. Those who have financial resources can afford a private trial that is much faster than litigation, while those who are lacking resources are forced to use the slower public system. Second, private trials, like arbitration, have been criticized because they allow disputing parties to "hide" the dispute from the public.

Court-Annexed ADR

LO 4-3

Explain court-annexed ADR.

The 1998 Alternative Dispute Resolution Act required that in all district courts, civil litigants must “consider the use of an alternative dispute resolution process at an appropriate stage in the litigation.” However, each district court can decide whether to *require* ADR. Some courts mandate certain forms of ADR, while other courts make ADR completely voluntary. Some simply mandate that all potential litigants be informed about alternatives to litigation. Some courts refer almost all civil cases to ADR, while others refer cases according to subject matter.

Mediation is the primary ADR process used in federal district courts. In the federal system, most of the district courts and almost all the circuit courts have mediation programs using judges or lawyers as mediators. Mediation programs are also under way in more than one-third of the state courts and in many bankruptcy courts.²⁵ As of January 2021, the Fourth Circuit Court of Appeals reported that since its program had started in 1994, approximately 34 percent of the cases assigned to mediation are successfully handled each year.

The district courts vary greatly in terms of which ADR methods are approved. For example, in the Northern District Court of Alabama, each judge conducts an ADR evaluation conference to determine whether a case is appropriate for ADR. The case could be either arbitrated or mediated. In contrast, in the Northern District of California, arbitration, mediation, early neutral evaluation, and settlement conferences have been approved for use, and approximately 43 percent of parties choose mediation.²⁶ The ADR staff of the Northern District of California also works with parties to structure a nonbinding summary bench or jury trial. The judicial officer may order a nonbinding arbitration to all simple contract and tort cases under \$100,000.