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ADR and the New Frontier:  
the Future for Virtual Arbitration and Dispute Resolution

I. INTRODUCTION

Two neighbors fight over property lines and ownership of shrubbery.¹ A homeowner hosts a party, and valuable personal property is taken and damaged. A consumer purchases landscaping equipment that is defective, but the seller will not warranty the items. Each dispute appears to be a typical conflict that may be settled in court or through alternative dispute resolution (ADR). However, these disputes become unique when they occur in virtual environments, where the complainants and respondents are actually avatars, and the items in dispute are virtual.² Virtual worlds, such as Second Life are referred to as “massively multiplayer online role-playing games,” and they have become popular ways for people to socialize, communicate, and “live.”³ Second Life allows people to create avatars⁴ that move throughout the virtual world to buy land,

¹ The following examples are hypotheticals. See Lawrence Lessig, Code and Other Laws of Cyberspace. 9-23 (1999) (relaying similar hypothetical stories about what “could” happen in online environments).
² See Lessig, supra note 1 at 10 (discussing the differences between disputes that occur in real space versus virtual space). See also Michael H. Passman, Transactions of Virtual Items in Virtual Worlds, 18 Alb. L.J. Sci. & Tech. 259, 261 (2008) (discussing an instance where a person was denied an opportunity to return a pair of virtual shoes that did not match the virtual seller’s advertisement, leading the seller to claim, “We don’t give refunds here . . . This isn’t real life.”).
³ See R.V. Kelly, Massively Multiplayer Online Role-Playing Games: The People, the Addition and the Playing Experience (2004). People use virtual space to socialize in virtual rooms, walk around, talk to one another, homestead, raise pets, etc. See Lessig, supra note 1 at 11. Massively multiplayer online role-playing games allow participants to “see, hear, use, and even modify the simulated objects” within the virtual world. Bragg v. Linden, 487 F.Supp.2d 593, 594 (E.D. Pa. 2007).
⁴ Avatars are “pictures, drawings, or icons that users choose to represent themselves.” John Suler, The Psychology of Avatars and Graphical Space in Multimedia Chat Communities: A Study of the Palace, The Psychology of Cyberspace (2007), available at http://www-usr.rider.edu/~suler/psycyber/psyav.html. Some people like to add “props” to their avatars, such as clothing and other personal items. Id. The word “avatar” drives from the Sanskrit word for “crossing down or descent.” Bragg, 487 F.Supp.2d at 594. It was originally used to refer to the Hindu deity’s earthly incarnation. Id.

houses, and businesses. All residents have intellectual property rights in anything they digitally create, which allows them to buy and sell with other avatar residents through the Linden dollar. Virtual spaces like Second Life are much more than computer games – they are real environments where people do things and, essentially, live.

With more people spending time in virtual worlds and in other online environments (including e-mail, e-commerce, e-contracts, chat rooms, etc.), the rise of online disputes is not surprising. Property, intellectual property, and contract disputes are all typical conflicts that arise as a result of online transactions and communications in online environments. And because there are generally no uniform set of laws or court systems that specifically address online disputes, parties and legal experts alike struggle to find the best way to approach dispute

appeared as a “balding bespectacled cartoon rendering himself,” and he gave a virtual speech about a variety of legal issues and property rights in virtual worlds. Id.


6 What is Second Life? supra note 5. Users can convert Lindens to U.S. dollars in Second Life at a Linden dollar exchange. Id. The Second Life marketplace currently boasts a thriving economy that produces millions of dollars of transactions each month.

Lessig notes that “avatar space” originated from “MUD” or “MOO” space, which were virtual, text-based worlds. MUDs and MOOs contained only text (no pictures), so they were not as popular as spaces with avatars. Lessig supra note 1 at 11-12. Lessig notes that virtual worlds are: the movie version of a cyberspace novel. You build things here, and they survive your leaving. You can build a house, and people walking down the street see it. You can let them come in, and in coming into your house, they see things about you. Or they can see how you construct your world. If the particular Avatar space permits it, they can see how you’ve changed the laws of the real world. In real space, for instance, people slip on wet floors, but in the space you’ve built that law may not exist. Id at 12.

7 See Lessig supra note 1 at 11 (noting that “[t]here is real life in Avatar space, constituted by how people interact. The space is where people interact – much as they interact in real space no doubt . . . the interaction is in cyberspace. People ‘jack’ into thee virtual spaces. They do things there.”).

8 In 2005, global online revenues were “estimated to reach the trillions,” and online transaction disputes were “increasing with lightning speed.” Lucille M. Ponte & Thomas D. Cavenagh, Cyberjustice: Online Dispute Resolution (ODR) for E-Commerce xiii (2005). Online transactions are extremely popular in the twenty-first century and as they continue to increase, so will the disputes that result. Id. at 7.

9 See infra notes 25-55 and accompanying text (discussing general online legal disputes).
prevention and remedy. Users often choose to participate in virtual worlds or in online transactions because of the ease and efficiency of the internet. Therefore, when a dispute arises, users often look for a resolution mechanism that will give them similar quick-paced results. It is for this reason that online dispute resolution (ODR) methods, particularly online arbitration, have become so popular in resolving online disputes.

This comment discusses the ways in which ADR and internet technology (IT) organizations have teamed together to use online arbitration to resolve online disputes. Part II explains the types of disputes that generally occur online, as well as the current online arbitration mechanisms that can be used to resolve those disputes. Part II explains (i) why and how people choose online arbitration; (ii) what kinds of online arbitration centers exist; (iii) how courts have reacted to online arbitration; and (iv) advantages and disadvantages of online arbitration. Part II also discusses virtual arbitration – the new frontier of arbitration – which moves online arbitration from a text-based format into a text and image-based format. Part III analyzes online arbitration versus virtual arbitration and concludes that as the popularity of virtual worlds, such as Second Life, continues to increase, so will the call for a virtual ODR

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10 See PONTE & CAVENAGH, supra note 8 at 1 (discussing the lack of uniform laws and court systems in the global online marketplace).
11 See infra notes 62-78 and accompanying text (discussing why people choose ODR).
12 See infra notes 69-73 and accompanying text (explaining that people want a remedy that matches the online environment where dispute occurred).
13 ODR methods are adopted from ADR methods. See infra notes 56-61 and accompanying text (discussing how ODR flows from ADR).
14 See infra notes 56-57 and accompanying text (discussing the use of online arbitration to resolve online disputes).
15 See infra notes 56-125 and accompanying text (discussing the way in which online arbitration works and is treated by courts).
16 See infra notes 25-55 and accompanying text (discussing some common types of online disputes).
17 See infra notes 56-125 and accompanying text (discussing online arbitration mechanisms).
18 See infra notes 62-78 and accompanying text (discussing why people choose online arbitration).
19 See infra notes 79-103 and accompanying text (discussing the different ODR centers).
20 See infra notes 104-113 and accompanying text (discussing how courts have reacted to online arbitration).
21 See infra notes 114-125 and accompanying text (discussing the advantages and disadvantages of online arbitration).
22 See infra notes 131-156 and accompanying text (discussing the movement toward virtual arbitration).
mechanism that matches the virtual world in which the dispute occurred.23 Text-only online arbitration separates people from one another and increases the risk of distrust in confidentiality, document exchange, and dehumanization. Image-based virtual arbitration deters distrust and dehumanization by allowing parties to meet in a virtual world that mirrors the real world and allows them to move around, speak, and show expression.24

II. BACKGROUND

A. Types of Online Disputes

Some typical disputes in online environments include property, intellectual property, and contract disagreements.25 These disputes can involve real world products and transactions or virtual products and transactions.26 For example, a disagreement may arise when a consumer purchases a faulty tangible product online with the intent to use that product in the real world. Likewise, a disagreement may arise when a user purchases a faulty virtual product online, with the intent to use that product in a virtual world, such as Second Life.27 Whether the dispute involves real or virtual products or occurs in a real or virtual world, courts have applied current laws and have recognized consumer rights in a variety of online environments.28

In Bragg v. Linden, a U.S. District Court held that people participating in virtual worlds, such as Second Life, have real property rights in any virtual property that they purchase and own.29

23 See infra notes 69-73 and accompanying text (discussing that as the popularity of virtual worlds, such as Second Life, continues to increase, so will the call for a ODR mechanism that matches the world in which the dispute occurred).
24 See infra notes 123-125 and accompanying text (discussing misunderstandings and errors that can occur in online arbitration).
25 See infra notes 25-55 and accompanying text (discussing the typical disputes that occur online).
26 For example, real world disagreements might include conflict over a tangible product purchased online. Virtual world disagreements might include conflict over a virtual product purchased online to be used in a virtual world, such as Second Life.
27 See supra notes 3-7 and accompanying text (discussing virtual worlds, such as Second Life, and the ways in which people create Avatars and conduct commerce in those worlds).
28 See infra notes 25-55 and accompanying text (discussing the ways in which courts have acknowledged property, intellectual property, and contract rights in online environments).
Linden Research Inc. and Chief Executive Officer, Philip Rosedale, operate Second Life,\(^30\) and in November, 2003, Linden announced that it would recognize intellectual property rights for all digital creations and digital ownership in Second Life.\(^31\) Relying on Linden’s announcement, Bragg began purchasing virtual property in Second Life and building a business, where he would sell virtual fireworks to other avatars for a profit.\(^32\) When Bragg bought a piece of virtual property named “Taessot” for $300, Linden informed Bragg that the property had been purchased through “exploit,” and it took away Taessot and all of Bragg’s other virtual property currency.\(^33\) Bragg sued Linden under a number of legal theories and argued that Linden unlawfully took his virtual property and denied him access to Second Life.\(^34\) In denying Linden’s motion to dismiss for lack of personal jurisdiction as well as its motion to compel arbitration,\(^35\) the court recognized that virtual property owners have real property rights and a right to argue their case in court.\(^36\) The court noted, “While the property and the world where it is found are “virtual,” the dispute is real.”\(^37\)

\(^30\) See supra notes 3-7 and accompanying text (discussing and defining Second Life as a massively multi-player online role-playing game).
\(^31\) Id. This meant that people could buy, own, rent, and sell land, and they could exclude other avatars from their land. Id. at 596. Linden advertised their recognition of property rights and movement toward make virtual worlds even more real in a variety of press releases and interviews. See Linden Lab Preserves Real World Intellectual Property Rights of Users of its Second Life Online Services (Nov. 14, 2003); Michael Learmonth, Virtual Real Estate Boom Draws Real Dollars, USA Today, June 3, 2004; Michael Fitzgerald, How Philip Rosedale Created Second Life, Feb. 2007. Rosedale even used his personal avatar to hold a virtual town hall meeting on Second Life, where he discussed new rights in virtual land purchases. Bragg, 487 F.Supp.2d at 596.
\(^32\) Bragg, 487 F.Supp. 2d at 596. Note that Linden imposes real taxes on virtual land, which virtual landowners pay. Id.
\(^33\) Id. at 597.
\(^34\) Id. at 596-597. Among the many claims included contracts claims – breach of contract, unjust enrichment, and tortuous breach of covenant of good faith and fear dealing. Id. at 597.
\(^35\) See infra notes 106-113 and accompanying text (discussing the procedural and substantial unconscionability of Second Life’s arbitration clause).
\(^36\) Bragg, 487 F.Supp. 2d at 611-612.
\(^37\) Id. at 595. The parties eventually settled outside of court, but the case was important for its recognition of virtual property rights and for its analysis of the unconscionability of online arbitration clauses. Adam Reuters, Linden Lab Settles Brigg Lawsuit, SECOND LIFE NEWS CENTER, Oct. 4, 2007, available at http://secondlife.reuters.com/stories/2007/10/04/linden-lab-settles-bragg-lawsuit/. See also infra notes 106-113 and accompanying text (discussing the procedural and substantial unconscionability of Second Life’s arbitration clause).

Another common type of property dispute involves “cyberproperty,” where “owners of network-connected chattels have absolute rights to exclude others from electronic interaction with their equipment.” Owners use a cyberproperty theory to prevent users from trespassing on their web and e-mail servers. Proponents of cyberproperty rights analogize cyberproperty to real property and argue that real world property laws should apply to cyberspace in order to prevent unauthorized entry and uphold ordinary trespass principles. Opponents of cyberproperty rights reject the comparison between the physical and virtual world and argue that trespass to chattels laws should not be applied to virtual property. Courts have applied cyberproperty rights in virtual spaces and have given virtual property owners tremendous power over their electronic chattels.

Virtual property issues often merge with virtual intellectual property issues when dealing with server communications and trademark issues, but when dealing with virtual creations,
intellectual property stands apart.\textsuperscript{44} In virtual worlds, avatars author music, poetry, and books, but the question arises as to whether artificial intelligence is protectable intelligence under copyright law.\textsuperscript{45} Although there have not been any court cases dealing with the intellectual property rights of avatars specifically, critics argue that the “smarter” users make their avatars, the more strained the current law will become to adequately respond to the unique virtual harms.\textsuperscript{46} Issues about copyright protection and avatar self-awareness, responsibility, and lack of human-like performance all come into play.\textsuperscript{47} In addition, issues about copyrighting an avatar’s appearance also stands at the forefront of potential legal disputes.\textsuperscript{48} As avatars become smarter, more human-like, and more sophisticated, the legal system needs to be ready for greater intellectual property disputes surrounding the virtual personas.\textsuperscript{49}

Contract disputes are another common type of online conflict.\textsuperscript{50} People enter into contracts in a variety of settings online, ranging from virtual worlds to electronic commerce websites. Although traditional contract law applies in online environments, online contracting poses some unique complications.\textsuperscript{51} The parties do not typically meet in person or negotiate the contract terms, and in many instances, they are strangers to one another.\textsuperscript{52} In addition, rather than

\textsuperscript{44} See supra notes 4549 and accompanying text (discussing the unique intellectual property concerns when dealing with virtual creations).


\textsuperscript{46} Id. at 657. In addition, it is not clear which law should be applied in a virtual world where avatars come from different countries—“only 30% of users are U.S.-residents.” Max Vern, Second Life- A New Dimension for Trademark Infringement, 90 J. PAT. & TRADEMARK OFF. SOC’Y 51, 53 (2008).

\textsuperscript{47} Barfield, supra note 45, at 668-669.

\textsuperscript{48} Id. at 678-689.

\textsuperscript{49} Id. at 694.

\textsuperscript{50} See infra notes 5155 and accompanying text (discussing common online contract disputes).

\textsuperscript{51} PONTE & CAVENAGH, supra note 8, at 7.

\textsuperscript{52} Id.
signing verifiable documents, parties often click “I agree,” and all terms are accepted. When the traditional written contract formation is absent, disputes can arise when one party challenges the authenticity of the contract or believes that someone has tampered with the order. The lack of business relationship and absence of trust can result in increased online contracting claims.

B. Online Arbitration

As more people spend time online, the number of disputes increases, and the number of disputants looking for faster dispute resolution mechanisms increases. Online arbitration is a process that is supported by online technology in which a third-party neutral renders a binding or non-binding decision to resolve a dispute. Online arbitration is a dispute resolution mechanism, housed within online dispute resolution (ODR). Because ODR involves the practice of ADR methods, online arbitration bears many similarities to offline arbitration in theory and in practice. However, differences emerge when the parties (who may have met online) are more likely to be strangers and face-to-face contact is lacking. Therefore, ODR neutrals have to be

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53 Id. at 7-8. Both Federal and state digital signature laws allow parties to make binding agreements through digital signatures. Id. at 8.
54 Id. at 8.
55 Id. at 9. See Caspi v. Microsoft, 732 A.2d 528 (N.J. 1999) (addressing the enforceability of a forum selection clause in Microsoft’s on-line computer service agreement).
56 See supra notes 8-14 and accompanying text (discussing how parties are drawn to ODR when their conflict occurs online).
57 See Ponte & Cavenagh, supra note 8 at 84 (noting that online arbitration uses technology to support the process, but in theory, it “borrows some of the general characteristics of offline arbitration.”). See also Gabrielle Kaufmann-Kohler & Thomas Schultz, Online Dispute Resolution: Challenges for Contemporary Justice (2004).
58 Id. at xiii (noting that some refer to online arbitration as “online dispute resolution.”). ODR practices include negotiation (where information exchange and negotiation occurs online); mediation (where mediation occurs via e-mail, list svrs, chat rooms, conferencing software, or instant messaging); arbitration (where arbitration occurs via e-mail, videoconferencing, Web video, or chat rooms); and hybrid med-arb (where the same technologies are utilized and mediation occurs first and then arbitration if the mediation is not successful). Id. at 21-24.
59 Id. at 19 (noting that “ADR principles and practices are the foundation for ODR practice). See also infra notes 74-75 and accompanying text (discussing the similarities which require a written agreement, confidentialities, party-selected arbitrators, optional counsel representation, and binding or non-binding decisions).
60 Id. (discussing the new challenges that ODR practices present).
carefully trained in order to use the technology productively and to ensure that the process is as interactive as possible.\textsuperscript{61}

\textit{i. Why and How People Choose Online Arbitration}

Very few litigants actually go through the full litigation process, and many choose arbitration as a way to resolve their dispute.\textsuperscript{62} People may choose to solve their disputes through online arbitration versus offline arbitration for a variety of reasons, including efficiency, ease, and type of dispute.\textsuperscript{63} First, online arbitration is efficient, especially when the dispute involves low dollar amounts\textsuperscript{64} or the parties live far from one another.\textsuperscript{65} Arbitration can be an efficient way for parties to solve their dispute, without having to travel and without having to spend additional money that would not ordinarily make the complaint worth filing.\textsuperscript{66} Second, online arbitration is easily adaptable to the online environment because most records are already in writing and can be easily transferred electronically.\textsuperscript{67} Because arbitration involves a large number of documents being transferred among the parties and the arbitrator, online arbitration allows the process to flow with ease.\textsuperscript{68} Third, when the dispute occurs online, people often want an arbitration process that matches the environment in which the problem occurred.\textsuperscript{69} Although not all disputes that are

\textsuperscript{61} Id.  
\textsuperscript{62} See Ponte & Cavenagh, supra note 8 at 19 (noting that “[a]bout 90 percent to 95 percent of all lawsuits are settled without a trial).  
\textsuperscript{63} See infra notes 64-73 and accompanying text (discussing the benefits of arbitrating claims online).  
\textsuperscript{64} See Ponte & Cavenagh, supra note 8 at 12 (noting that many online disputes involve low dollar amounts).  
\textsuperscript{65} Id. (discussing the expenses involved in traveling to foreign courts).  
\textsuperscript{66} Id. See also Arno R. Lodder & Gerara A.W. Vreeswijk, Online Arbitration Services at a Turning Point, in ICC International Court of Arbitration, Using Technology to Resolve Business Disputes 35, 37 (2004) (arguing that arbitration is suited for the internet because “parties are often far apart and may even be on opposite sides of the globe. Such physical separation become insignificant online.”).  
\textsuperscript{67} See Lodder & Vreeswijk, supra note 66 at 37 (arguing that “[o]f all existing dispute resolution mechanisms, arbitration seems to be the most natural to conduct online.”).  
\textsuperscript{68} Id.  
\textsuperscript{69} See Fambien Gelinas, Taking Stock of ODR: From Concept to Business Reality, in ICC International Court of Arbitration, Using Technology to Resolve Business Disputes 7, 8 (2004) (arguing that it makes the most sense to use the internet to deal with problems that arise on the internet).
settled through online arbitration originated online, those that did arise online find a familiar home in a process that utilizes the internet. Parties often want a dispute resolution mechanism that reflects “the speed and convenience of the Web,” and because the mechanism can be tailored to the commercial practices of the online activity, online arbitration becomes an extremely effective way to handle particularized disputes.

Parties can choose to use online arbitration much the same way they might choose offline arbitration – either by contracting for online arbitration before the dispute arises or by agreeing to use online arbitration after the dispute arises. Like offline arbitration, the parties must enter into a written agreement, the process is confidential (unless otherwise agreed), the parties can select the arbitrators (unless otherwise agreed), counsel can represent parties, and a decision can be binding or nonbinding (as agreed). Unique to online arbitration, the parties file and answer complaints online, and then the ODR provider may e-mail or post further forms to complete or directions for guidance. Generally, the parties present their case and try to persuade the arbitrator either through the use of e-mail (the most common form for online arbitration), chat rooms, listservs, or instant messaging. In some instances, the ODR center may even provide videoconferencing or Web video.

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70 See infra notes 79-103 and accompanying text (exemplifying ODR centers that offer online arbitration to parties with both regular and online disputes).
71 See Gelinas, supra note 69 at 8 (asking “So, why not use the medium itself to solve the problems it appears to create?”).
72 PONTE & CAVENAGH, supra note 8 at xiii.
73 See Gelinas, supra note 69 at 17 (arguing that the dispute resolution mechanism becomes more effective when its process is particularized to the online practice that gave rise to the dispute).
74 See PONTE & CAVENAGH, supra note 8 at 84 (discussing the process of online arbitration).
75 Id. Most ODR centers, such as ICANN's Uniform Dispute Resolution Policy for private ODR providers, offer either binding or nonbinding online arbitration. Id.
76 Id. at 86.
77 Id. at 86-87.
78 Id. at 87. Video technologies are sometimes used, but e-mail, chat rooms, and list servs remain more common. Id. Video can be expensive and/or inadequate. Id.
ii. Online Arbitration in ODR Centers

Online arbitration services are generally housed in ODR centers that resolve both online and offline conflicts.79 The duties of an online arbitrator are similar to those of an offline arbitrator whose authority is generally contracted by the terms and conditions of parties’ online arbitration agreement.80 There are numerous ODR centers across the world, but only a few have established solid reputations with continued success in online arbitration.81 In 1995, the National Conference of Automated Information Research (NCAIR) and the Cyberspace Law Institute (CLI) worked with AAA and the Villanova Law School to start the first online arbitration system – Virtual Magistrate.82 Virtual Magistrate used e-mail to exchange documents and a listserv (called the “grist”) to post messages about the conflict.83 Although this setup is now common among online arbitration services, the first version of Virtual Magistrate was ahead of its time and likely failed because e-mail and list servs were primitive and non-secure.84 The second version was revived in 2000 by Chicago-Kent College of Law and has enjoyed more long-standing success.85 The second version still uses e-mail and the grist to exchange information, but it has expanded to handle contract, property, and torts disputes.86 In addition, Virtual Magistrate is now free, non-binding, and public, and the administrator selects the arbitrator based on expertise for the type of dispute.87 The system is much more popular now in part because the results are free and

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79 See PONTE & CAVENAGH, supra note 8 at 18 (noting that although ODR originated as a response to online disputes, many ODR centers also work to resolve offline disputes through the use of online technology).  
80 Id. at 87 (discussing the duties of the online arbitrator).  
81 See infra notes 82-103 and accompanying text (discussing the development of ODR centers with the rise of technology and online disputes).  
82 See PONTE & CAVENAGH, supra note 8 at 88-89 (discussing the origination of Virtual Magistrate).  
83 Id. at 89.  
84 Gelinas, supra note 69 at 9 (discussing the failure of the first version of Virtual Magistrate).  
85 See PONTE & CAVENAGH, supra note 8 at 89.  
86 Id.  
87 Id.
published, but also because decisions are rendered within 72 hours after the parties agree to arbitrate.\footnote{Id. at 90. In 2001 report in \textit{Disputes in Cyberspace}, Consumers International indicated that Virtual Magistrate scored high in “independence, transparency, affordability, convenience, speed, due process and liberty.” \textit{Id.}}

Another online arbitration experiment was launched by the University of Montreal’s \textit{Center de recherché en droit public} (CRDP) in 1996 – CyberTribunal.\footnote{Gelinas, \textit{supra} note 69 at 10 (discussing the origination of CyberTribunal).} CyberTribunal was a groundbreaking med-arb center that worked on dispute prevention and resolution.\footnote{Id.} CyberTribunal enjoyed more early success than Virtual Magistrate because it offered services in both French and English as well as facilitative mediation and then arbitration when necessary.\footnote{Id. at 10-11. For example, if a party wrote to the arbitrator, the name of the other party appeared automatically in the carbon copy line. Parties did not even have to know that the other party was procedurally supposed to be copied on the e-mail. The other party just automatically was copied. \textit{Id.} at 11.} CyberTribunal used United Nations Commission on International Trade Law (UNICITRAL) and International Chamber of Commerce (ICC) rules, and its procedure was user-friendly.\footnote{Id. at 12.} In its three year history, CyberTribunal resolved more than 100 disputes, and it was the first center to use mediation and arbitration in online delivery software.\footnote{Id. at 12.}

CyberTribunal ended when eResolution began around 2000.\footnote{Gelinas, \textit{supra} note 69 at 12 (discussing the origination of EResolution).} eResolution was developed by university researchers and the World Intellectual Property Organization (WIPO) to handle domain name disputes.\footnote{Id. at 12. Note that WIPO went on to develop a separate WIPO ODR center. \textit{See infra} notes 100-103 and accompanying text (discussing the development of WIPO and its success).} eResolution was a completely document-based procedure, meaning there was no videoconferencing (which at the time was too expensive and primitive).\footnote{Gelinas, \textit{supra} note 69 at 13.} The registration, complaint and response filing, exhibit uploading, corresponding, and decision-rendering were all conducted online in a system that made document exchanges much easier.\footnote{Id.}
At the time, eResolution was used by more parties than any other ODR provider. However, after research showed that WIPO and the National Arbitration Forum (NAF) interpreted texts more openly (increasing complainants’ chances of winning) and eResolution interpreted texts more narrowly (decreasing complainants’ chances of winning), people began forum shopping, and eResolution was forced to close its doors in 2001.

One of the most prominent and long-standing online arbitration providers is the WIPO Arbitration and Mediation Center, founded by the Internet Corporation for Assigned Names and Numbers (ICANN) for its Uniform Domain Name Dispute Resolution Policy (UDRP). Complaints and responses are filed with WIPO, arbitrators and parties communicate via e-mail, and then WIPO panels review the information and resolve the cases. WIPO only handles domain name disputes and does not apply the Convention because the decision either upholds the situation (meaning the respondent keeps the domain name) or gives the domain name to the respondent, in which case the registrar makes the change. WIPO continues to handle a large number of cases and enjoys a solid reputation.

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98 Id.
99 Id. at 14.
100 See PONTE & CAVENAGH, supra note 8 at 11-12.
101 Id.
102 See Lodder & Vreeswijk, supra note 66 at 38 (noting that there is no need for cooperation from the opponent to enforce the award since the registrar makes the change, so Convention does not need to be adopted).
103 Id. at 38. Lodder and Vreeswijk personally find the WIPO instructions to be too complex – “overburdened with details and instructions.” Id. at 39. Nonetheless, WIPO remains successful. See supra notes 100-102 (discussing WIPO’s success).

Other popular ODR centers include NovaForum, SquareTrade, and Resolution Forum. NovaForum is a Canadian ODR center that offers med-arb as the standard but also offers mediation, arbitration and early neutral evaluation. PONTE & CAVENAGH, supra note 8 at 90. It enjoys popularity because of its varied processes, language options, video conferencing options, security, 72-hour turn-around time, and secure archiving and storage. Id. at 91-92. SquareTrade was founded in 2000 in partnership with eBay to resolve consumer-to-consumer electronic commerce disputes. Gelinas, supra note 69, at 15. The center only offers negotiation and mediation, but it has enjoyed much success in demonstrating that electronic commerce disputes can be resolved online. Id. Resolution Forum, housed at the Center for Legal Responsibility at South Texas College of Law, has its own groupware program called CAN-WIN. PONTE & CAVENAGH, supra note 8, at 87. When the parties request conferencing, the case manager assigns them usernames and passwords, so that they can log into the system. Id. They can see who is present, and they can engage in instant messaging to the entire group or privately to the counsel in another virtual room. Id. The arbitrator saves the transcript as a permanent record and issues a decision. Right now, the system is
iii. Court Treatment of Online Arbitration

Courts have generally been as supportive as online arbitration as they have been of offline arbitration. Parties can contract for arbitration before a dispute arises, and both state and federal courts apply the Federal Arbitration Act (FAA) when analyzing an arbitrator’s decision – i.e., only fraud, misconduct or corruption, clear lack of due process or fundamental fairness in the arbitration process, or an arbitrator exceeding his authority will render an arbitration award unenforceable. When determining whether a dispute shall be compelled to arbitration, courts also analyze substantial and procedural unconscionability. Bragg v. Linden was an important case for determining procedural and substantial unconscionability in a virtual world arbitration clause. The court held that the arbitration clause was procedurally unconscionable because it was part of an adhesion contract, there were not other reasonably available market alternatives (Second Life only virtual world that gave virtual property rights), and the clause was buried in a length paragraph without a distinguishable heading. The clause was substantively unconscionable because there was no mutuality of agreement (Linden had a unilateral right to modify), Bragg would have had the greater burden of arbitration costs, San Francisco was an unreasonable venue because of the small amounts in dispute and the national participation in Second Life, and the confidentiality of arbitration rules compromised the fairness of the agreement. As a result of Bragg, Linden modified the Second Life arbitration clause,
which now falls under a distinguishable, bolded section, titled “Dispute Resolution.”110 The clause now more clearly explains the governing law of California and the United Nations Convention on the International Sale of Goods (CISG) as well as the parties’ option for arbitration for claims less than $10,000.111 The claimant can elect binding, non-appearance arbitration with a mutually agreeable ADR provider, according to the following rules:

(a) the arbitration shall be conducted, at the option of the party seeking relief, by telephone, online, or based solely on written submissions; (b) the arbitration shall not involve any personal appearance by the parties or witnesses unless otherwise mutually agreed by the parties; and (c) any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.112

Linden’s revised clause certainly seems to address the court’s concerns about procedural and substantive unconscionability, as evident by its flexibility for choosing arbitration (online or in person) as well as its consideration for party convenience.113

iv. Advantages and Disadvantages of Online Arbitration

Online arbitration has many advantages that speak to the interests of both the disputing parties and society.114 Providing disputing parties from different states and nations an online forum to meet saves the parties both time and money, as well as gives parties more control over the ODR process.115 Parties can resolve their disputes from the comfort of their homes with lower costs, speed, and convenience.116 In addition, the online environment of the dispute resolution process matches the environment in which the dispute arose, which seems more

111 Id.
112 Id.
113 See Bragg 487 F.Supp.2d at 605-6111 (addressing the Bragg’s court’s concerns with Linden’s arbitration clause).
114 PONTE & CAVENAGH, supra note 8, at 24.
115 Id.
116 Id. at 18.
logical and party-satisfying. Overall, online arbitration becomes another increased ODR option and helps to reduce caseloads in overburdened court systems.

Unfortunately, some of the same advantages of online arbitration are also disadvantages. The lack of personal meetings, limited discovery, loss of public access, and absence of specific ODR standards and regulations all become complications for online arbitration. Skeptics remain concerned about the loss of face-to-face meetings, which can hamper trust. In order for ODR and online arbitration to be successful, there has to be trust between the parties and the arbitrator. The distance between the parties as well as hesitancy about electronic sharing and web-based communications can undermine trust. Technology can be unreliable, and when parties do not feel technologically savvy, communications could actually lead to “misunderstandings, omissions or even errors.” When nonverbal communication is lost, parties could lose important information or completely misinterpret important information.

In addition, just because people are skilled at buying, selling, and communicating online does not mean that they are necessarily equipped to participate in online dispute resolution mechanisms, such as online arbitration. The more powerful tools likely associated with online

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117 Gelinas, supra note 69 at 17.
118 PONTE & CAVENAGH, supra note 8, at 24.
119 Id. at 31.
120 Gelinas, supra note 69 at 16 (noting that “[t]he reservations that are expressed most often . . . are related to the physical presence of the parties during legal proceedings.”).
122 Id. (arguing that success “depends not only on the availability of technology but also on an adequate level of trust in its use.”).
123 Id. Note that WIPO seems to do the best job of ensuring confidentiality and building trust. Id. at 48. It has the most comprehensive confidentiality clause among the ODR centers. Id.
125 See Colin Rule and Craig Villamor, The Importance of Language in Online Dispute Resolution, in ICC INTERNATIONAL COURT OF ARBITRATION, USING TECHNOLOGY TO RESOLVE BUSINESS DISPUTES 21, 21 (2004) (noting that losing important information is the most common concern they hear because the loss could seriously “hamper progress toward resolution.”).
126 See Katsh & Rifkin, supra note 43, at 22.
arbitration may require a higher level of skills that participants do not possess.\textsuperscript{127} Even more business and technologically-savvy internet users may shy away from online arbitration when they become “reluctant to acknowledge that their transactions lead to disputes.”\textsuperscript{128} Participating or supporting online arbitration in an online marketplace may constitute an admission that online disputes exist, and people may fear online transactions.\textsuperscript{129} Therefore, it becomes an additional challenge to support online arbitration as a positive that adds value to the marketplace.\textsuperscript{130}

C. Virtual Arbitration – The New Frontier

Like online arbitration centers, virtual arbitration centers resolve party disputes in an online forum, without the parties having to travel or meet in person.\textsuperscript{131} The arbitrator’s duties remain determined by the parties’ contracted arbitration clause, and documents are exchanged via electronic means, such as e-mail or listserv.\textsuperscript{132} The primary difference between online arbitration and virtual arbitration is that online arbitration occurs in a text-based format,\textsuperscript{133} while virtual arbitration occurs in a virtual, image and text-based format.\textsuperscript{134} In text-based formatting communications, the only interaction that parties and arbitrators have with one another is through the text that they exchange (claims, responses, questions, etc.).\textsuperscript{135} On the other hand, image-

\textsuperscript{127} Id.
\textsuperscript{128} Id. at 22-23.
\textsuperscript{129} Id. at 23.
\textsuperscript{130} Id.
\textsuperscript{131} See supra note 115 (discussing the cost-saving advantages of parties not having to travel for online arbitration).
\textsuperscript{132} See infra notes 131-156 and accompanying text (discussing virtual arbitration systems). See also supra notes 56-125 and accompanying text (discussing online arbitration systems).
\textsuperscript{133} See supra notes 79-103 and accompanying text (discussing online arbitration as a text-based format). Note that an exception may arise when videoconferencing or Web cameras are used. However, text-based only is the typical online arbitration format.
\textsuperscript{134} See infra notes 141-156 (discussing Portugal’s Department of Justice’s e-Justice Centre).
\textsuperscript{135} See supra notes 79-103 and accompanying text (discussing online arbitration and its system of document exchange and communication).
based formatting allows parties to virtually meet with one another in a virtual world, such as
Second Life, where they communicate and see one another through avatars.\textsuperscript{136}

\textit{i. The Call for Virtual Arbitration}

Virtual arbitration centers have been created to enhance communication and to allow people
more face-to-face interaction.\textsuperscript{137} Many misunderstandings and errors can occur in the text-based
format of online arbitration because “body language, facial expressionisms, sighs and moans
[which] all play a key role in transferring information,” are missing.\textsuperscript{138} Video conferencing and
Web cams have proven to be inadequate or too expensive (considering the cost-effective goals of
arbitration), so most online arbitration centers function in text-based only formats.\textsuperscript{139} Virtual
arbitration attempts to remedy these downfalls by giving people an opportunity to express
important body language communications through their avatars, who can move around, speak,
and show facial expressions.\textsuperscript{140}

\textit{ii. Virtual Arbitration Centers}

Like image-based virtual worlds (Second Life) which originated from text-based worlds,
(MUDs and MOOs), image-based virtual arbitration is developing from online arbitration.\textsuperscript{141} In

\textsuperscript{136} See infra notes 141-156 and accompanying text (discussing virtual arbitration and its system of document
exchange and communication).

\textsuperscript{137} See infra notes 141-156 and accompanying text (discussing Portugal’s e-Justice Centre). See also infra notes
138-140 and accompanying text (discussing the need for people to have more visual interaction in arbitration).

\textsuperscript{138} Rule & Villamor, supra note 125, at 21 (arguing that sometimes non-verbal communication is “more informative
than the actual words exchanged.”). Although facial expressions and emotions can be conveyed through popular text
language that indicate smiles, sighs, or eyebrow raises, effective communication through a keyboard remains a
challenge. Id.

\textsuperscript{139} See supra note 78 and accompanying text (discussing the expenses of video conferencing and Web cams online
arbitration centers’ choice to function without them).

\textsuperscript{140} See supra notes 141-156 and accompanying text (discussing virtual arbitration proceedings and avatar
communication).

\textsuperscript{141} See supra note 6 and accompanying text (discussing how MUDs and MOOs were predecessors for Second Life,
where communications and virtual life took place solely within the text).
2007, Portugal’s Ministry of Justice, the University of Aveiro, and the Faculty of Law at Lisbon New University joined together to announce they were creating the e-Justice Centre in Second Life. Aiming to promote quick and efficient dispute resolution on a global scale as well as demonstrate the Portuguese government’s support of ODR processes, the e-Justice Centre offers mediation and arbitration to resolve a variety of conflicts, including contract interpretation and consumer transactions disputes.

The e-Justice Centre conducts virtual arbitration in an informal manner, but it follows the Second Life adaption of the UNCITRAL Model Law on International Commercial Arbitration. Users can choose to apply Portuguese law or impartiality criteria, and virtual arbitrators are assigned from the law faculty of Lisbon New University. Any party within Second Life can submit a request to arbitrate to the e-Justice Centre, and e-Justice notifies the other party and asks if they are willing to arbitrate. If both parties agree, they must pay e-Justice 1% of the value of the dispute, and they must deposit an escrow of up to 5% of the value of the dispute. The parties and a panel of one to three arbitrators meet at the center through

145 Id.
146 e-Justice Centre, supra note 142 (discussing the e-Justice Centre’s mediation and arbitration services).
147 See Hipólito, supra note 143 (discussing plan for the e-Justice Centre).
148 Id.
150 e-Justice Centre, supra note 142 (discussing how the e-Justice Centre operates).
151 Id.
152 Id. The escrow aims to ensure that the parties will submit to the arbitrator’s decision. Id. If one party does not follow the decision, the escrow money is given to the other party. Id.
their avatars, and the arbitrators render a decision after meeting with and hearing both parties.\textsuperscript{153}

Although the question remains whether any binding arbitration agreements will be legally enforceable outside of Portugal,\textsuperscript{154} the creation of a virtual arbitration center in Second Life sends strong messages about European involvement in virtual environments, and it paves the way for similar virtual arbitration centers.\textsuperscript{155}

\textbf{III. Discussion}

Virtual arbitration is the next step in ODR processes offered online to resolve online conflicts.\textsuperscript{157} As more people begin living and conducting business in virtual worlds, such as Second Life, the more the need increases for the development of corresponding virtual dispute

\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} See Hipólito, supra note 143 (noting that the e-Justice Centre was created when Portugal presided to the European union, as a demonstration about its support of ODR and technology).

Note that although the e-Justice Centre is the first virtual arbitration center, virtual trials have been conducted in Second Life before. See Charles Nesson, \textit{Cyber Trial in Second Life}, Independent Clinical Proposal in Conjunction with the Berman Center Clinical Program, available at http://cyber.law.harvard.edu/cyberone/wiki/CYBER TRIAL IN SECOND LIFE (discussing a clinic he offered at Harvard Law where students were able to try real cases in Second Life, using a virtual courtroom, avatars, evidence, jurors, and judges). Professor Nesson divided his winter evidence class into nine groups, and he assigned all parts of the trial, from jury selection to closing arguments. See Steen J. Horowitz, \textit{Bragg v. Linden’s Second Life: A Primer in Virtual World Justice}, 34 OHIO N.U.L. REV. 223, 226 (2008). Although his students gained credit for their participation, the class was actually part of the broader “CyberOne” project, which aimed to “open Harvard classrooms to the world at large.”

\textsuperscript{156} This is the e-Justice Centre in Second Life. See Nino, supra note 144. It was created by the University of Aveiro’s Department of Communication and Art, inspired by the Torre de Belem in Lisbon. Id. The building has a mediation and arbitration center as well as three additional rooms for conferencing and simulating decisions and arbitration centers.

\textsuperscript{157} See infra notes 131-156 and accompanying text (discussing the virtual arbitration movement).
resolution mechanisms. Many people choose online arbitration when their dispute arises online in order to more accurately match the environment in which the conflict occurred. Likewise, it seems reasonable that people will seek a virtual arbitration forum when their dispute arises in a virtual world. When a property, intellectual property, or contract dispute occurs through avatars, the resolution of that dispute may best be handled through avatars in the virtual environment that the parties are most familiar with. Unlike transactions that occur outside of virtual worlds, parties have likely met one another during the transaction through their avatars, so meeting once again through their avatars would be a useful way to resolve the dispute.

The transition from online arbitration to virtual arbitration is natural and beneficial for parties whose dispute arises in a virtual world. When online arbitration developed, it was responding to the increased interaction and conflict in online environments. Online arbitration has given people an opportunity to engage in more efficient, and less-costly proceedings, and it has allowed them participate in the same forum in which the conflict arose. However, like other text-based experiments, such as MUDs and Moos, text-based online arbitration suffers from downfalls due to its lack of visual contact. When parties and arbitrator’s lose visuals on body language and facial expressions, important communications can be lost. Virtual arbitration is a step in the right direction for ODR arbitration movements because it allows

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158 See supra note 5 and accompanying text (discussing the increased number of people functioning online and in environments, such as Second Life).
159 See infra notes 117-118 and accompanying text (discussing the need for an online forum for arbitration that matches the online nature of the disputes).
160 See infra notes 131-156 and accompanying text (discussing the ways in which virtual arbitration functions).
161 See infra notes 142-156 and accompanying text (discussing the e-Justice Centre in Second Life).
162 See supra notes 25-55 and accompanying text (discussing how online disputes are unique when parties have never met). See also supra note 4 and accompanying text (discussing the ways in which parties use avatars to interact with one another in virtual worlds, such as Second Life).
163 See infra notes 164-171 and accompanying text (discussing the benefits of virtual arbitration).
164 See supra notes 56-61 and accompanying text (discussing the initial development of online arbitration).
165 See supra notes 114-130 and accompanying text (discussing the benefits of online arbitration).
166 See supra note 6 and accompanying text (discussing the early text-based virtual worlds of MUDs and MOOs).
167 See supra notes 119-125 and accompanying text (discussing the downfalls of online arbitration).
168 See supra notes 123-125 and accompanying text (discussing the importance of visual contact in arbitration).
parties to reconnect in an image-based format. Although parties and arbitrators still do not see one another’s physical presence, they are able to view one another’s avatars, which can relay important facial and body language expressions. As disputes continue to move beyond simple online interactions into virtual world interactions, the creation of virtual arbitration centers, like the e-Justice Centre, will likely increase in order to address parties desire to settle virtual conflict in a virtual arbitration setting.

Courts will likely support virtual arbitration just like they support offline and online arbitration. Courts have continually enforced online arbitration awards, according to the FAA, and this would likely continue in any virtual arbitration where the parties have agreed to arbitrate. It is also likely that courts will analyze any virtual arbitration clause the same way they would analyze an online arbitration clause, ensuring that there is no procedural or substantive unconscionability. Parties would not necessarily have to contract to participate in “virtual arbitration.” For example, Second Life’s arbitration clause allows parties the flexibility to choose “online arbitration,” and with the creation of the e-Justice Centre, parties could agree to arbitrate in Second Life. In addition, because virtual arbitration is actually closer to real arbitration in that the parties have to meet at a certain place and time and have some sort of visual contact with one another, it is likely that courts would be even more supportive of virtual arbitration. As long as the arbitration clause is substantively and procedurally sound, the

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169 See supra notes 131-156 and accompanying text (discussing virtual arbitration proceedings).
170 See supra note 4 and accompanying text (discussing avatars and their movements in virtual worlds).
171 See supra notes 141-156 and accompanying text (discussing the e-Justice Centre).
172 See supra notes 104-113 and accompanying text (discussing court reactions to online arbitration).
173 See supra note 105 and accompanying text (discussing the FAA).
174 See supra notes 106-113 and accompanying text (discussing procedural and substantive unconscionability rules in arbitration clauses).
175 See supra notes 112-113 and accompanying text (discussing Second Life’s revised arbitration clause).
176 See supra notes 141-156 and accompanying text (discussing the proceedings for virtual arbitration).
parties agree to virtual arbitration, and none of the FAA guidelines are breached during the arbitration, a court will be likely to uphold any binding virtual arbitration agreement.\textsuperscript{177}

Although virtual arbitration may be a natural transition for those living and conducting business in virtual worlds, such as Second Life, it may be more difficult and less efficient for those dealing with real-life disputes or those with less sophisticated technological skills to use virtual arbitration.\textsuperscript{178} Virtual arbitration requires more powerful tools and a higher technological skill set from its participants.\textsuperscript{179} Because many people may opt not to use virtual arbitration, it is unlikely that arbitration in traditional settings will suffer from less use. Virtual arbitration is not meant to completely replace traditional in-person arbitration, but rather it is intended to offer an atmosphere that is responsive to the environment in which virtual disputes occur. Although it may make sense for virtual world participants who already possess a higher technological skill set to seek virtual arbitration, it may not make sense for non-virtual world participants to do the same.

Nonetheless, with the large number of people living, interacting, and disputing in virtual worlds, like Second Life, it is likely that more virtual arbitration centers will be developed.\textsuperscript{180} Second Life has already housed virtual trials with virtual juries, and it is currently housing a complete mediation and arbitration center (e-Justice).\textsuperscript{181} With more than 8 million Second Life participants, the opportunity for more virtual arbitration centers is clearly present.\textsuperscript{182} It is imperative that virtual arbitration remains sponsored by credible and experienced dispute

\textsuperscript{177} See supra notes 104-113 and accompanying text (discussing the requirements for an enforceable arbitration award).
\textsuperscript{178} See supra note 5 and accompanying text (discussing those functioning online and conducting business in virtual worlds, such as Second Life).
\textsuperscript{179} See supra notes 125-130 (discussing disadvantages of online arbitration).
\textsuperscript{180} See supra note 5 and accompanying text (discussing Second Life).
\textsuperscript{181} See supra notes 141-156 and accompanying text (discussing e-Justice and CyberOne, Professor Nesson’s trial practice clinic).
\textsuperscript{182} See supra note 6 and accompanying text (discussing the large number of Second Life participants).
resolution centers and arbitrators in order to ensure credibility and trust.\textsuperscript{183} If virtual arbitration can ensure credibility and fair resolutions, then people will likely be attracted to the centers in order to save money and time as well as enjoy a space where they can fully express themselves, textually and visually.\textsuperscript{184} As long as people continue to function in virtual worlds, there will be conflict, and there will be a need for virtual dispute resolution. Virtual arbitration is a natural transition from online arbitration, and it is a new frontier that alternative dispute resolution providers should embrace.

\textsuperscript{183} See supra notes 79-103 and accompanying text (discussing how successful ODR centers are sponsored by reputable organizations). See supra notes 144, 150 and accompanying text (discussing how e-Justice is run by experienced law professors and arbitrators).

\textsuperscript{184} See supra notes 137-140 and accompanying text (discussing the text and image-based benefits of virtual arbitration).