1. Introduction

Arbitration is a form of alternative dispute resolution ("ADR"). The word alternative is important as parties have a choice as to how they wish to resolve matters of dispute when they arise. Arbitration, by the very concept, is intended to be an efficient and economical means of resolving disputes. Traditionally construction has been an industry that favoured ADR over formal litigation due to the complexity of technical issues not easily conveyed to or understood by a judge or jury. However, over the past decade construction arbitration has come under increasing attack for its rising costs and growing delays, and expansion of arbitration processes to the point that those processes are approaching the more complex and formal processes followed to resolve disputes through litigation. As a result, parties are looking for new methods of resolving their disputes in a more efficient and economical manner, such as originally promulgated by the arbitration process, including the use of Internet information and communication ("ICT"). However, a question arises as to whether construction disputes or certain types of construction disputes can be resolved through the means of using the ICT arbitration platform.

The benefits to ICT arbitration include reductions of the total cost, shorter total time to resolution, improved neutrality and more efficient document exchange. In spite of those expected improvements there are a number of issues that must be considered in the use of ICT and ADR for resolving construction disputes over the Internet including: confidentiality and security; authenticity; miscommunication; user-sophistication; and enforceability of the award. This paper explores the pros and cons of using ICT for binding arbitration in construction disputes; examines how the process might work; whether it may be appropriate for only some types of construction arbitration disputes, and how binding arbitration over the Internet might be administered.

* Dr Patricia D Galloway is the CEO of Pegasus Global Holdings, Inc (www.pegasus-global.com) and an international arbitrator and mediator. She can be reached at p.galloway@pegasus-global.com
2. What is online dispute resolution?

Online dispute resolution ("ODR") is a branch of dispute resolution which uses technology to facilitate the resolution of disputes and came about through the synergy between ADR and ICT for disputes that were arising between parties engaging in business solely through use of the Internet. ODR can essentially be defined as "the deployment of applications and computer networks for resolving disputes with ADR methods".1 As such, ODR is often misunderstood when used without context since ODR can actually be employed by using online technology to assist in the administration of resolving disputes, or by using online technology and communication as a platform within which to fully resolve those disputes from initial filing through the actual hearing process.2

Where ODR differs from ADR, however, is that while the characteristics of the space in which parties meet are not important for ADR, the nature and design of the virtual space in which ODR occurs are extraordinarily important and critical.3 Technology can be described as the "fourth party" which comes from the online space in which ODR takes place. The nature of the online space shapes how the experience will be delivered and the manner in which the parties will be able to interact. With ODR, the place is the process in the sense that the functions built into a site will structure what is possible and not possible to occur there.4

Arbitration, in addition to the disputing parties, involves a third party referred to as the neutral. However, with the advent of the computer, as Ethan Katsh and Janet Rifkin introduced in their book *Online Dispute Resolution* (2001), a fourth party entered the ODR arbitration process—the computer, simply because the technology itself plays such a major role in managing the dispute resolution process.5

ODR includes a range of technologies including6:

(a) E-mail
(b) Web forums
(c) Instant messaging
(d) Chat rooms
(e) Video conferencing
(f) Mobile and smart phone technology

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4 Katsh and Rifkin, p. 32.
5 Katsh and Rifkin, pp. 93–95
There are interesting ODR venues that have been established by various arbitration centres around the world. The Portuguese Ministry of Justice in collaboration with the Department of Communication and Art of the University of Aveiro and the Faculty of Law of the Lisbon New University developed an e-Justice Centre which provides mediation and arbitration services for all avatars in Second Life in the resolution of disputes resulting from consumer relations or any other contract-based relations signed between the parties.\(^7\)

ODR has evolved to hearing full arguments from attorneys representing disputants and involves automated negotiation processes administered completely by a computer or which can provide world-class neutrals a more efficient tool to administer binding arbitration procedures.\(^8\)

3. Why ODR makes sense

Typically, the favoured platform for resolving most construction disputes is through arbitration given the technical and complex nature of most construction disputes and the difficulty of conveying this complex information to a judge or jury in a manner which will be fully understood. In doing so, however, the parties agreeing to arbitrate also agree to do so because the process is presumed to be more efficient, economical, and private—meaning the parties do not file their demands and responses in a public forum, the hearings are not held in public, and the parties can further agree in writing to hold all outcomes and awards of the arbitration to be confidential.

It is from these basic tenets that the parties elect for arbitration rather than litigation; which then give rise to both the pros and the cons of conducting binding arbitration via an ODR process.

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\(^8\) Colin Rule, On Line Dispute Resolution for Business (San Francisco, CA: John Wiley & Sons, 2002), (hereafter "Rule"), pp. 43–44.
4. ODR Advantages

The advantages of ODR include:  

(a) Economically viable

Online ADR can best suit the financial demands of both parties. The majority of all document exchanges can be done online versus via post and electronic transmission of documents, which is easier, faster and cheaper when compared to document exchange used in litigation. In addition, the disputants do not have to travel lengthy distances to resolve disputes. It is thus unconcerned with the financial capabilities of the parties, especially when compared to offline litigation where deep-pocketed litigants may easily be able to afford travel and accommodations for their lawyers and witnesses while opposing litigants may not. In the event witnesses are required or face-to-face meetings are necessary, instant messaging, video conferencing, or chat room conferences can be used to further mitigate travel cost.

(b) Efficiency, speed, and flexibility

A virtual meeting room can be opened instantaneously and a neutral can be engaged from anywhere in the world. ODR does, in effect, meet the objectives of arbitration by means of keeping online dispute resolution simple, accessible, and affordable. The borderless nature of the Internet diminishes the communication problems faced by parties and counsel located in different time zones and most online ADR providers provide functions 24 hours/day. Parties can fill in certain electronic forms, obtain data and other information about their case in real time and simplify the task of scheduling ADR proceedings, thus avoiding email and phone tag.

(c) Asynchronous interaction

Where a response is not expected immediately, parties can consider an issue more in depth and communicate in a more considered way. While emotion may still play into the response, parties have the option of stepping back and reflecting before they respond.

(d) Non-confrontational/power differentials

With the nature of asynchronous communication, there is less likelihood of emotional outbursts and less emotional stress than can be generated in face-

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9 Rule, pp. 61–70.
to-face confrontations. This has become known in the ODR world as the “cooling distance”. Online communication has changed the way people behave in cyberspace versus how they might react to someone face-to-face partially because of the power dynamic between the two of them. While the intangible nature of the drawback is also a disadvantage to this process, these qualities could be advantageous. By removing the physical presence of the opponent, ODR providers provide the parties with a “dispassionate approach to the merits of the cause of the dispute”. Often in offline arbitration proceedings, a party that is more economically powerful, in reputation and in size, may intimidate the opponent and dominate the proceedings.

(e) Research

In an online dispute resolution process, it is a simple matter for participants to conduct research in the middle of the process and then share that research by providing a Web address to either confirm or disprove statements made.

(f) More reflective communication

In face-to-face communication, people often speak without elaborating further. Online communication in which exchanges are written, often allow people to ask the question “why?” as their comments are written.

(g) Self-disclosure

Race, sex, age-bias and prejudice are some of the hardest aspects of human nature to avoid. Different people are biased by different things whether it is race, sex, sexual orientation, age, etc. Unless video conferencing of some sort is used, ODR offers the opportunity for one to “Self Represent” eliminating any inherent bias one party may have towards the other or its counsel or witnesses.

(h) Convenience

One of the largest costs in the arbitration hearing process is logistics; whether that be the time for or the cost of travelling to the arbitration locale or the time and cost of bringing the arbitrator to the hearing, or simply setting up for the hearing where all parties must be conveyed in a single location.

(i) Access to better neutrals with more subject-matter expertise

Neutral availability is often determined by the arbitrator’s schedule, geographical proximity and expertise. By using ODR, the parties can retain a
neutral regardless of where he or she resides in the world, or other commitments, since it may be possible, given the nature and size of the dispute, for it to be handled more readily around other arbitral commitments.

\( j \) Facilitates record-keeping/data archiving

ODR facilitates the process of recording correspondence, pleadings, statements and any other written, oral or visual communication transmitted electronically. Instead of having to mail copies of large files or documents to several different parties, or having to change agreements, ODR can enable the parties to have access to all or most of their updated information in one convenient location.

\( k \) Full-search and document management

Full text capability is often invaluable in real time for all parties and the neutral to search on a particular document being used as an exhibit and/or in reviewing briefs, witness statements, etc. This can also be helpful when referring back to earlier used documents or arbitration-generated documents including briefs, arbitrator orders, drawings, etc. Online file folders can assure all parties that they are using the most up-to-date document.

\( l \) Neutral forum

Sometimes a traditional arbitration may take place at the office of either party or that party’s lawyer. This could signal who is in the position of power. A neutral location removes this power imbalance and the Internet offers this neutral location advantage.

5. ODR disadvantages

Reviewing the pros of ODR almost prepares one to “sign up” and question why we just do not move ahead with resolving the majority of construction disputes through the ODR process. However, before doing so, the disadvantages should be explored and assessed as to how the disadvantages can be overcome, at least in some types of construction disputes. The disadvantages of ODR, along with suggested solutions to those disadvantages, include\(^\text{11}\):

\( a \) Archived communication

The fact that every communication is recorded can be a liability. Putting sensitive confidential information into an e-mail or text form can be

\(^{11}\) Rule, pp. 80–85.
disconcerting to many parties. However, one solution to this concern is encryption which encodes a message so that no one can decode it without the appropriate “key”. The key is separately communicated to the parties/neutrals that are permitted to see the information. If the message is somehow intercepted before reaching the recipient, the message will be unintelligible.\(^{12}\)

\((b)\) Authenticity

In traditional ADR one party can be certain that the other party it is dealing with is actually the party involved in the dispute. However, in cyberspace, it is not easy to verify the authenticity of the messages received. It may be possible for a third party to impersonate or misrepresent one of the parties in dispute. Cyberspace makes copying easier, but guaranteeing the authenticity of the message is much harder. Similar to encryption, discussed above in Section 5 (a), there are software solutions to solve the authenticity issue. Digital signatures, for example, are codes that are embedded in a message that can be used to verify that a message was sent by a particular person.\(^{13}\)

\((c)\) Privacy and confidentiality concerns

If parties are not 100% confident that their communications will remain confidential they may be reluctant or refuse to participate in the process. E-commerce emerged and still largely exists as “stranger-to-stranger” commerce, thereby making transaction and communication security and confidentiality one of the biggest concerns.\(^{14}\) One solution which is used in consumer e-business is the Trustmark, sometimes known as a webseal, which is a logo or symbol displayed on the website of an e-business which informs the consumer that the e-business has committed to compliance with qualitative standards or best practices.\(^{15}\) Trustmark organisations must have a monitoring mechanism to ensure that their subscribers continue to comply. Another method of protecting a party’s information is by use of user names and passwords. Online providers should mandate that parties use digital signatures in their online communication. The purpose of the digital signatures is twofold: (1) it encrypts the online message or document, thereby providing security to the transmission, and (2) it allows the receiver to verify the authenticity of the message, i.e., whether it has actually been sent by the purported sender.\(^{16}\)


\(^{13}\) Katsh, p. 10.

\(^{14}\) Shah, p. 7.

\(^{15}\) Katsh and Rifkin, p. 66.

\(^{16}\) Shah, p. 12.
(d) Time collapse

In cyberspace, time collapses. Information travels rapidly on the Web and the harm of a complaint can do a great deal more damage in a short amount of time, especially in comparison to the “real world” of traditional administered arbitration. Unfortunately, there is no simple answer to “please don’t push the button yet!”

(e) Dropping out or stonewalling

There is the possibility that a party may become so frustrated with the process and/or with what is being communicated that they may drop out or stonewall the other side. This can be very difficult for a neutral to control online. Again, as is true with human nature, there is no way to prevent someone from simply disengaging from the process.

(f) Exhibits

Construction cases tend to be more document intensive than other disputes. Although the initial reaction to ODR being employed in the construction industry is that it would fail because there are too many documents to keep track of and view while the arbitration is proceeding, this concern should be diminishing as more and more arbitrators and tribunals are insisting on electronic data for submission of exhibits, even in large complex cases. When exhibits are already pre-marked and organised on a CD or flash drive, they can easily be sent via overnight delivery methods, or can be placed on a specific secured platform designed by the ADR provider with the appropriate firewalls allowing exhibits to be shown only when the party so instructs. Computers today allow split screens, thus allowing multiple documents to be up and visible at one time. Of course, should the arbitration be so document intensive that the multiplicity of documents will be the norm, then that particular case may not be appropriate for ODR resolution.

(g) Transcripts and notes

Although parties may at first believe there is a disadvantage in being able to track a witness’s testimony, again, as with electronic exhibits, software today, such as LiveNote allows all parties to be able to see a witness’s testimony in real time and provide the ability to either mark, take notes, or even to send notes between counsel with the ability to create a “firewall” between opposing counsel and/or the arbitrator/tribunal.

(h) Expert analysis

Construction cases are often replete with expert testimony and expert analysis. Delay analysis, for example, often results in the expert having to demonstrate delay to the critical path via the use of computer scheduling software, such as Primavera. What an expert may or may not have to use in order to convey his or her findings is an issue the parties should consider before agreeing to ODR. Delay analysis does not always have to be complex and can be communicated with simple charts and analysis which again, as with the discussion on exhibits, can be distributed via electronic transmission or a secured arbitral institution platform as discussed below in Section 7. As with all the disadvantages discussed, there are solutions to the concerns, but not all construction cases with expert analyses may be appropriate for ODR resolution.

(i) Strategic communication

Per Colin Rule:

“Research into online communication has also shown that people are more likely to lie during online communication. It takes a special kind of person to be able to look into his opponent’s eyes in a face-to-face interaction and to knowingly tell him something that is untrue. Most people are confident that they can tell when another person is lying if they can observe them face-to-face.”

Thus, because it is so much easier to lie online, people are less trusting of information they receive online. Again, human nature and the “mutual distrust” which forms the basis of construction contracts, [shows] there is no simple solution to the statement, “Trust me”. While video conferencing is still being “perfected”, it does offer a means to the arbitrator(s) to see the witness testifying and to be able to better ascertain the credibility of the evidence being given.

(j) Miscommunication/lack of body language and non-verbal cues

In a non-virtual world people communicate in much more than mere word: tone, effect, space and time to get out the message all convey messages to those receiving the information. The lack of face-to-face communication and the impersonal nature of the Internet could cause miscommunication between the parties. Even if a sender is able to express him or herself adequately in writing, the recipient may still misinterpret the message. This is especially true when parties are located in different countries and speak different languages. Since online communication can be primarily textual, most of the non-verbal communication cues that people use to communicate are lost. The fact that the parties may not trust one another may

18 Rule, p. 82.
19 Rule, p. 83.
increase the likelihood of misunderstanding. One party may frustrate the process by not responding to e-mails or chat requests. This makes the arbitrator’s role difficult in that he or she may have a difficult time distinguishing between a genuine technical difficulty and an unco-operative party. From one’s computer terminal it is difficult to understand the implication of cyberspace’s annihilation of distance and space on communication in relationships. It is so much easier to communicate a difficult or unpleasant message via e-mail or text than in person or even on a telephone. While video conferencing or “web cams” will offer some relief to this disadvantage, the subtleties of non-verbal communication may still be lost in a web cam session. The lack of face-to-face interaction also deprives the arbitrator of the opportunity to evaluate the credibility of parties and witnesses. One consideration in the preliminary management hearing is to instruct the parties that full body visuals must be made available in a video-conferencing setting, and not with simply a web-cam device. Skilled neutrals can learn a lot from the witnesses by observing how they sit, nervous reactions, eye expressions, body language, etc. The same is true of the neutral watching the others in attendance, including counsel. Thus, the video conferencing may also include a dual-screen thus allowing the neutral to view the entire room in addition to the witness providing testimony.

(k) Lack of human interaction/building rapport

Many of the discussions at the beginning of a hearing have little to do with the actual facts of the case and instead revolve around building rapport. In construction cases where parties may have a continued relationship, this rapport building can be crucial, especially when the parties are faced with resolving a dispute between them. Thus, parties entering into an ODR ADR process must be willing to make allowances for the likelihood of greater misunderstanding in communication due to the narrower and more constrained means of communication.

(l) Power corrupts

While the neutral has control of the hearing process, in the online process this power diminishes as it becomes more difficult for a neutral to direct a party to focus on a particular issue and the control of the arbitration process may revert to one of the parties. Again, there is no simple answer as to how to resolve this potential issue with ODR ADR.

20 Bordone, p. 3.
(m) Insufficient accessibility and user sophistication

While there is a presumption that in today’s age everyone has a computer, everyone is computer “savvy”, and everyone has unrestricted access to the Internet and e-mail, there are still limitations in both sophistication in the use of Internet tools and the capacity of internet service and in-house servers relative to the handling of large data files. Thus, prior to embarking on any decision to move forward with arbitration via an ODR process, the arbitral institution and arbitrator must ascertain whether both parties are equally equipped to participate in an ODR ADR process. Otherwise, the question there is raised of whether both parties were equally treated fairly since, under arbitration, most arbitration rules specifically state that a party is entitled to an equal and fair process.

(n) Enforceability

While questions of enforceability may arise, the most important set of rules concerning the enforceability of arbitration awards is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Most of the questions that might be raised concerning online arbitration concern the arbitration agreement, the arbitration process and the arbitration award. However, even if arbitration is conducted through the Internet, it meets the general requirements needed to enforce awards.\(^{21}\) As mentioned below in Section 13, the award is prepared, sent to the arbitral institution and processed in the same manner as any other award. An alternative might be for business suppliers joining an ODR site to set up a “judgment fund” to cover the outcome of ODR proceedings.\(^{22}\)

6. Designing the process

Considering that ODR is possible for selected construction disputes, how does one design an online dispute resolution cyberspace model? In 2000, the Center for Information Technology and Dispute Resolution at the University of Massachusetts was exploring how the nature of online environment affects disputes and dispute resolution.

Before designing an ODR system, three questions arise: (1) How is ODR implemented, or how is consent to ODR achieved, (2) what quality standards must ODR meet or what procedural rules must it apply, and (3) how effective are ODR outcomes, or how are they enforced?\(^{23}\)

\(^{21}\) Katsh and Rifkin, p. 139.


\(^{23}\) Kaufmann-Kohler, p. 443.
Before addressing these three questions, one must not confuse virtual spaces with virtual tools. Tools provide a means of doing a particular task and every online space will have tools such as e-mail. However, for ODR, one must have online spaces including a range of communication and information management tools that are easy to use, powerful and flexible. Online banks and online auctions are all virtual spaces, but designing a space for resolving a construction dispute can be significantly more complicated. Construction disputes are typically document intensive. While documents can certainly be uploaded to a particular site for all the parties and arbitrators to have access, what will be the process and procedure in the virtual space to show the documents to all the parties, arbitrator (s) and witnesses testifying? How does one see what highlighting counsel may wish to do to the document? How are demonstrable exhibits created and presented? All the tools to show and develop documents online and in the virtual space exist as was noted earlier by the Portuguese e-Center for parties’ avatars and “Second Life”, however, these virtual communities also require a certain degree of sophistication in how to manoeuvre through the virtual space in real time. This degree of sophistication of the virtual space either has to be developed by the ODR provider, or has to be developed and created by the parties—a cost and time element that may diminish the apparent cost and time savings of the more common ODR dispute resolution of e-commerce disputes and domain name disputes.

7. Implementing ODR

Parties want to know what procedural guarantees are afforded to the parties who chose ODR. To ensure fairness, a number of codes of conduct and guidelines have been drafted setting out the fundamental principles of online justice. The various initiatives have resulted in a consensus of five principles:

(a) Transparency: covering information given to users on the procedural rules and the outcome of the process.
(b) Accessibility: due to the delocalised nature of the online medium, accessibility is one of the main assets of ODR.
(c) Independence: traditional requirement.
(d) Timeliness: speed is another benefit of ODR.
(e) Fairness: with independence, this constitutes the essence of procedural guarantees.

One of the suggested solutions to the principles listed above was proposed by Robert Bordone in his Harvard Negotiation Law Review article that lays out a proposed framework in which ODR might be implemented.

24 Katsh and Rifkin, p. 139.
He suggests that the entry point would be a Web page similar to OOO called a Dispute Resolution Referral Center (“DRRC”). Under the model, the claimant would be referred to a Dispute Diagnostic Specialist (“DDS”), or a case manager, that would first create a private chat room for the dispute. The chat room would become the repository for all information related to the dispute during its history. Only the parties and any third party who becomes involved in the case (e.g., arbitrator) would be given a password to enter the chat room, creating a confidential environment for the exchange of information regarding the dispute.

Once the complaint is received, the DDS would offer the parties a number of options for resolving the disputes, according to the rules of the association which could include unassisted online negotiation, online mediation and/or online arbitration. When making the recommendations, the DDS would then direct the parties to the Web pages which would discuss the pros and cons of each process so the parties could take this information into consideration when evaluating the options.

Bordone goes further though, suggesting that the arbitration option represent the adjudicative, adversarial model of dispute resolution for the Internet and that decisions made in this arena not be confidential, but rather be logged into a case library which would be made accessible to all residents of cyberspace.

8. ODR quality standards

The challenge, as Bordone describes it, is the training and qualification of the arbitrators. The ODR arbitrators cannot merely be trained in the traditional forms of ADR processes, but must be trained in Netiquette and must include a broad familiarity and knowledge of cyberspace norms and customs. The DRRC would also publish a handbook describing how arbitrators and the DDS should function in their roles and could be modelled after the Virtual Magistrate’s Handbook which discusses the training requirements and filing and decision-handling procedures, including jurisdiction and enforceability.

As ADR providers prepare for handling disputes online, it will become imperative to provide disputants with a set of guidelines and instructions on how the entire online proceeding will be conducted. As part of this development, ODR providers should formulate and implement a privacy policy that informs the parties of privacy and data protection laws, regulations, standards and guidelines which the providers follow, as well as

26 Bordone, p. 5.
27 Bordone, p. 7.
28 Ibid.
29 Shah, p. 12
the remedies the parties will have in case the privacy policy were breached.\textsuperscript{30}

9. Administering ODR

While online companies exist to handle disputes such as EBay purchases, domain names, etc., these types of companies do not lend themselves well to handling construction disputes. Rather, ODR would best be administered by arbitral organisations already in existence such as AAA, ICDR, JAMS and the ICC.

How an arbitral institution might administer an ODR process can be evaluated by reviewing a study that was undertaken by the Department of Information Systems and Computing at Brunel University in the UK in 2003 called the “E-Arbitration-T” Project. The origins of the E-Arbitration-T Project date back to 1997 in accordance with the need to implement a dispute resolution system within the Global Trade Point Network of the United Nations Transaction Centre (“UNTPDC-UNCTAD”). The objective of the project was to promote an online negotiation and arbitration framework for the 144 Trade Points established in 117 countries.\textsuperscript{31} The project was conducted over the period January 2001 to February 2003 and established the technological requirements and regulatory framework for seamless operation of arbitral proceedings over technologies such as the Internet.\textsuperscript{32} The expectation of the project was that online technology would both speed up and reduce the cost of international arbitration proceedings and remove the need to send large quantities of paper through courier services and replace face-to-face meetings by cheaper and easier online video conferencing.

10. Compliance

In accordance with the advantages and disadvantages of the ODR process as discussed earlier in Section 4 and Section 5, the services to be provided by the ODR provider for resolution of disputes online must comply with all the following requirements\textsuperscript{33}:

(a) accessibility: visible, party control, traceable, availability and timeliness, multilingual services, affordable, interoperability and integrated services;

(b) trustworthiness: authentication, security, confidentiality;

\textsuperscript{30} Ibid.


\textsuperscript{32} http://www.brunel.ac.uk/~csstade/projects.htm (accessed 6 July 2012).

\textsuperscript{33} Op. cit. n. 31.
11. Summary of steps

The proposal put forth by the project study regarding case management or administration of the arbitration process was summarised in three steps\textsuperscript{34}:

(a) Initially the process is supervised by the arbitral institution but once the tribunal has been appointed the direct supervision of the process passes to the arbitrators.

(b) The initial procedure is defined by the arbitral institution’s rules but once the tribunal have apprised themselves of the issues and the parties’ agreements on procedure they publish a case-specific process.

(c) Once the tribunal has received or heard all the arguments and evidence it moves to making an award. At this point the institution and arbitration rules again become more specific in controlling the procedures.

The administration of the ODR arbitration would be primarily through a secured and dedicated platform and server designed by the ODR provider. In this manner, the arbitral institution would take responsibility for document distribution. All documents from the parties would go to the case administrator where they would be logged into the server on a secure site which could then be accessed by the parties and arbitrator through individual identities and passwords, including firewalls which can only be entered via authenticity logins.

12. Video conferencing

Once filing has taken place and documents posted, the arbitrator would then make use of video conferencing to\textsuperscript{35}:

(a) facilitate the discussion about incidences of the process (i.e., an advanced agreement or conciliation);

(b) take the evidence;

(c) bring in the witnesses (testimonies from possibly remote parties or a witness is located in the country but cannot attend the ODR centre because of infirmity or illness);

(d) enable the parties to consult at any stage of the arbitration procedure; and

(e) consult among the parties, neutrals or staff of the ODR centre or tribunal.

\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid.
The E-Arbitration-T Project through its studies and research over the three-year period did demonstrate significant savings in both time and cost to the parties using a binding ODR process to resolve their disputes. A final product was even developed that involved the design and development of a completely new ODR infrastructure from scratch using in a first step a free and OpenSource enterprise collaboration software (eGroupWares), and, in a second step, determined the specific user interfaces for the ODR processes.

The concept was for E-Arbitration-T to provide ADR tribunals and arbitral institutions with a set of integrated applications to give their neutrals and clients control over the procedures and operational processes with complete case management tools. The software platform would contain multiple modules, including online case document sharing between all arbitration parties, online case calendar, mail, arbitrator notes, video conferencing support and phone call linked to all parties and contacts, parties and contacts information, content management systems, ODR forum, and conflict management/dispute resolution WIKI. Unfortunately, the pilot having been done under a research grant appears to have dissolved sometime in 2009–2010 once the grant moneys ceased. However, ADR providers would be benefited by contacting the university and acquiring the platform, which would save significant development costs.

ADR providers should also provide guidelines and best practices for ODR arbitrations prior to embarking on an ODR program. The ABA’s task force on E-Commerce and ADR has formulated best practices which ODR providers are recommended to adopt in order to assist the ODR providers and users of the process.

13. Enforceability

Awards rendered under ODR are treated no differently than awards written by arbitrator(s) in the traditional arbitration process. The award is prepared, sent to the arbitral institution and processed in the same manner as any other award.

14. How can the parties be proactive in using ODR?

Parties involved in disputes could take the lead in promoting resolution of their disputes via ODR by adding verbiage to their contracts in the dispute resolution articles. The author’s proposed example of a contract clause that could be considered for construction contracts is:

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“If a dispute arises out of or relates to this Agreement, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by online mediation [or alternatively, insert another consensual method of Online Dispute Resolution (ODR)] administered by [insert forum]. If the parties do not reach a voluntary settlement through such ODR procedure within a period of [30] days or the period (if any) laid down by the ODR forum, then the parties shall have no further obligation under this clause and, upon notice by either party to the other, such dispute may then be referred to any adjudicative method of dispute resolution including but not limited to arbitration [or a statement noting it shall proceed to arbitration under a specific arbitral institute rules to be either administered by that particular arbitral institution or ad hoc].”

15. ODR providers for construction dispute resolution

In 2001, AAA created its “AAA Online Arbitration Supplementary Procedures” (to the AAA Commercial Rules) which were to permit, where the parties agree to arbitrate under the Supplementary Procedure, arbitral proceedings to be conducted and resolved exclusively via the Internet. The Supplementary Procedures provided for all party submissions to be made online, and for the arbitrator, upon review of such submission, to render an award and to communicate it to the parties via the Internet.38 In 2011 AAA began working with a technology start up called Equal Foot. Equal Foot has developed an online platform to meet the needs of contracting parties to negotiate, execute, manage and enforce their contracts. To use the Equal Foot platform, parties to a contract agree to resolve any disputes using an alternative dispute resolution process offered by and through Equal Foot.39 AAA is the exclusive provider of the mediation and arbitration services offered, which include online mediation in a chat room environment and documents-only arbitration on AAA’s WebFile platform. AAA’s ODR service offerings provide a very cost-effective option to Equal Foot customers. Furthermore, AAA’s online mediation service is available through its website for a low flat fee for any business-to-business or consumer-to-business two-party dispute in which no claim or counterclaim exceeds $10,000.

It is the understanding of the author through discussions with various Conflict Prevention and Resolution (“CPR”) arbitrators that in May 2012, CPR told its neutrals that it was in the preliminary stages of designing an ODR pilot program for lower values, high volume matters with the designer of the PayPal dispute resolution platform. All preliminary proceedings and paperwork will be handled online and a hearing will be held via telephone or video conference.

Another ODR provider providing online arbitration services related to the construction industry, primarily for construction and home improvement sector, is called internet-ARBitration or net-Arb. Net-Arb is a privately

39 https://www.equalfoot.com
held Georgia corporation founded in 2005 by Marty Lavine, an engineer, attorney, mediator and arbitrator. While the site is not set up to handle complex construction cases, the site specifically notes that parties can agree not to go through the AAA or National Arbitrator Forum (“NAF”) as may be included in their contracts, but instead agree to arbitrate their dispute through net-Arb. It purports to handle disputes in all 50 states and 144 nations with arbitrators from around the world. Unlike arbitrating under the law of the contract, or rules of the AAA or ICC or UNCITRAL or other arbitral associations, net-Arb says that under their arbitration agreement signed by the parties, that they forgo these “jurisdictional and economic barriers” and agree for the arbitrators to resolve the dispute based on four principles:

(1) what they believe is fair;
(2) general principles of equity and common law;
(3) common sense analysis of circumstance and content; and
(4) personal experience and expertise.

The website www.net-arb.com indicates the entire process is done over the e-mail and takes only as long as the parties take to make their case with decisions typically rendered within 48 hours of each party resting their case but could be quicker if time was of the essence.40 The hearing process is planned to be completed within no more than one week, although there is provision for setting longer hearing durations depending on the complexity of the dispute and how quickly the parties respond to the arbitration. During the hearing process all testimony and evidence is given by e-mail. Scheduling can be done at any hour of the day or night with the arbitrator working with the parties to accommodate schedules. The hearing is deemed to be closed once both sides finish presenting evidence and there are no more questions. The arbitrators will then review the dispute issues and positions presented over the next few days and render a written binding decision with reasons why the arbitrator(s) made their decision. Net-Arb has a Consumer Confidence Program seal of trust Trustmark.

16. Conclusion—can construction disputes be resolved through ODR?

A review of the history of ODR and the practical applications of ODR in use today lead to the conclusion that the concept of ODR for construction dispute resolution appears to be possible and realistic. The advantages seem to outweigh the disadvantages, especially given the solutions suggested to overcome many of the disadvantages.

Just like the choice parties have make between arbitration or litigation, the parties also have the ability to choose ODR arbitration instead of a face-

to-face arbitration, especially if cost and time are major considerations and the case is considered to be a simple case and not a large complex case. There are nuances and complexities specific to construction arbitrations, however, that are not seen in e-commerce and consumer business disputes which make up the bulk of ODR arbitrations to date. These nuances and complexities raise questions with respect to whom and how the ODR platform will be developed to facilitate ODR resolution of more complex construction disputes. As was noted with the CPR announcement, specific platforms must be developed and implemented for the process to work. This means that the arbitral institutions must make the upfront investment in the platform design before it can be offered to the users.

While ODR may not be a realistic venue for large complex construction cases, it may be just the ideal venue for smaller and simple construction disputes. For example, many low value construction disputes arise merely due to a payment dispute between a subcontractor and the general contractor regaining moneys owed, without reference to any disputed performance. Other disputes arise due to situations involving a determination of who is really responsible for paying for the alleged action that the other party does not believe is its responsibility to pay for or compensate the other party. In other situations, the dispute may simply be whether a particular delay, which both parties agree has occurred, is compensable or not—the amount being determined by contract if it is found to be compensable (e.g., liquidated damages).

In conclusion, given the advantages that ODR arbitration does offer, the most realistic use of ODR in the short term would involve disputes consisting of a simple, one-dimensional dispute within which the parties can stipulate to the facts in the case. In such simple disputes ODR may be not only an appropriate vehicle within which the dispute can be resolved; it might be more easily accepted by the parties as the preferred platform for resolution.

While it appears that the speed and cost of resolution under ODR would be significantly less than the construction arbitration process is today, without an arbitral institution taking the lead and designing a secure and accessible platform on which the parties can partake in the ODR process, the parties may be left to private ODR providers, such as net-Arb but by doing so, forfeit their rights to the very contract in which they agreed to be bound. The AAA and CPR appear to be taking steps that will provide users with other options than net-Arb.

Hopefully, both the AAA and CPR will be successful in their development of a platform for disputes that can be adapted for use in construction and will serve as the first step in developing ways to handle small construction claims, thereby allowing parties to resolve their disputes in a faster and more economical manner.