

Technology, Alternative Dispute Resolution, And The Insurance Industry

The Future Has Arrived (Really This Time)

By George H. Friedman

George H. Friedman retired in 2013 as FINRA's Executive Vice President and Director of Arbitration, a position he held from 1998. In his extensive career, he held a variety of positions of responsibility at the American Arbitration Association, most recently as Senior Vice President from 1994 to 1998. He is an Adjunct Professor of Law at Fordham Law School, where he has taught a course on alternative dispute resolution since 1996. While at AAA, he was responsible for executive oversight of its insurance ADR program and online services and also spearheaded development of its first email system and web site. He played a similar technology role at FINRA, serving as lead senior officer for its online dispute resolution services program. Since early 2013, he has served as a member of the Board of Directors of Arbitration Resolution Services, Inc. ("ARS"). He is also on the Board of Editors of the Securities Arbitration Commentator, and is a member of the Securities Experts' Roundtable. Mr. Friedman holds a B.A. from Queens College, a J.D. from Rutgers Law School, and is a Certified Regulatory and Compliance Professional (Wharton-FINRA Institute).

The future seems destined to bring dramatic changes to the way online disputes are resolved, and ultimately affect the way arbitrations and mediations are administered for a wide range of disputes beyond the on-line realm. For parties and their representatives, the near future will bring about the development of virtual alternative dispute resolution, with all communications and information related to the case available through their computer at any time from any place.

— George H. Friedman (1996)¹

More than 20 years ago, an article by this paper's author evaluated emerging technologies and predicted how they might impact alternative dispute resolution ("ADR").² Four years later, after the emergence of the Internet, the author updated his predictions to gauge the impact of this new medium.³ Now the same author looks back to measure what really happened and look ahead to predict

1 Friedman, George, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 HASTINGS COMM. & ENT. L.J. 695, 716 (1996-1997), available at [2 Friedman, George, *Arbitration as an Effective Means of Resolving Construction Disputes*, in WILEY 1993 CONSTRUCTION LAW UPDATE \(O. Currie, N. Sweeney, eds.\) 169, § 9.24 pp. 201-2.](http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/hascom19&div=30&id=&page=(fee), <visited 12/28/2013>.</p>
</div>
<div data-bbox=)

3 Friedman, *supra* n. 1, at 716.

the future of emerging technologies on ADR in general and on insurance industry ADR in particular.

This paper discusses:

The past: how accurate were in prior predictions about email, imaging, electronic fund transfers, computerization, and the "new" fax technologies? What unforeseen technologies — like the web, digital audio recording, Wi-Fi, mobile apps, and videoconferencing — came on the scene and affected the ADR world?

The present: how is technology being used to improve the delivery of ADR services today in the insurance industry? What is the impact on the arbitration and mediation processes?

The Future: Where will we be 10 years from now? Will cloud-based arbitrations and mediations overtake "brick and mortar" case filings? Will the in-person hearing become a thing of the past? What new technologies will emerge and how will they impact ADR?

Some Background on Arbitration

Before delving into technology predictions, some review of arbitration in general is in order. In 1925, the Federal Arbitration Act ("FAA")⁴ was enacted. Prior to the FAA's passage, enforcing predispute arbitration agree-

4 See 9 U.S.C. §§ 1 et seq., available at [22 Journal of American Law // Fall 2014](http://codes.lp.findlaw.com/uscode/9/1 <visited 12/23/2013>.</p>
</div>
<div data-bbox=)

ments and arbitration awards was very difficult.⁵ The FAA abrogated the existing law, which was based on Common Law hostility to arbitration, as to transactions involving interstate commerce. The FAA made written promises to arbitrate specifically enforceable,⁶ and established very limited judicial review of arbitration awards.⁷ The legal basis of the FAA is as follows: the Constitution's Supremacy Clause⁸ provides that the Constitution is supreme, and states must follow it to the exclusion of contrary state laws:

This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Commerce Clause⁹ in turn vests in Congress authority to regulate interstate commerce:

The Congress shall have power to...regulate commerce with foreign nations, and among the several states"

Finally, the FAA is a Congressional enactment that is based on Congress' power to regulate interstate commerce. Specifically, section 2 of the FAA¹⁰ states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Over time, the Supreme Court has thrown its unwavering support behind the FAA. Below is a brief chronological review of some key cases.

*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*¹¹ (1967):

5 See *A Brief History of Commercial Arbitration* (12/28/2012), available at <https://dynalex.wordpress.com/2012/12/28/a-brief-history-of-commercial-arbitration/> <visited 12/26/2013>.

6 See 9 U.S.C. §§ 1 and 2.

7 See 9 U.S.C. § 10.

8 U.S. Const., Art. 6, Para 2, available at <http://www.law.cornell.edu/constitution/articlevi> <visited 12/26/2013>.

9 U.S. Const., Art. 1, Sec. 8, Clause 3, available at http://www.law.cornell.edu/wex/commerce_clause <visited 12/23/2013>.

10 9 U.S.C. § 2.

11 388 U.S. 395 (1967), available at <http://caselaw.lp.findlaw>.

The Court faced whether the trial court — and not the arbitrator — should decide whether a party's contention that an entire contract, including the arbitration clause embedded in it, was *void ab initio* because of fraudulent inducement. In this watershed case, the Court ruled that under a broad arbitration clause, the issue of fraud in the inducement of the contract in general, as opposed to fraud in the inducement of the arbitration agreement, is for the arbitrators to decide. This case established the so-called "separability rule" that the arbitration clause is a separate contract from the one in which it is embedded. So, even if the general contract can be revoked, the arbitration clause survives. The Court based its ruling on FAA section 2, which requires that arbitration agreements be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." In other words, the arbitration agreement *must* be given "equal footing" with any other contract.

*Gilmer v. Interstate/Johnson Lane Corp.*¹² (1991): The Court in this case dealt with the issue of arbitration of claims arising out of federal statutes, this one the Age Discrimination in Employment Act¹³ ("ADEA"). In upholding arbitration of ADEA claims, the Court laid out a three-prong test:

- 1) **Congressional intent:** The burden is on the resisting party to prove that Congress did not intend these disputes to go to arbitration. Nothing in the ADEA seemed to preclude arbitration.
- 2) **Fairness of process:** The Court goes on at length to review the NYSE's arbitration process, and concludes that it is "fair" (fair process, right to counsel, right to pick arbitrators, fair panel, fair amount of discovery, written award).
- 3) **Effective vindication of rights:** Parties must have the opportunity to recover the same relief in arbitration that they might otherwise be able to obtain in court. The Court here said *Gilmer* had in the NYSE arbitration system a "fair opportunity" to recover what he might have in litigation.

In the end, the Court says that if the three-prong test is met, then the issue is reduced to mere "forum shifting," meaning the employee is merely being required to resolve his/her dispute in another forum, with the same procedural fairness and outcome possibilities as in court.

*AT&T Mobility LLC v. Concepcion*¹⁴ (2011): The underlying case was a class action lawsuit brought by customers who were induced to sign up for cell phone service by getting a "free

[com/scripts/getcase.pl?court=us&vol=388&invol=395](http://www.courts.com/scripts/getcase.pl?court=us&vol=388&invol=395) <visited 12/26/2013>.

12 500 U.S. 20 (1991), available at <http://supreme.justia.com/cases/federal/us/500/20/case.html> <viewed 12/24/2013>.

13 29 U.S.C. §§ 621 et seq., available at <http://www.eeoc.gov/laws/statutes/adea.cfm> <viewed 12/24/2013>.

14 131 S.Ct. 1740 (2011), available at <http://www.supremecourt.gov/opinions/10pdf/09-893.pdf> <visited 12/24/2013>.

phone” for which they were charged sales tax. Their contracts had an arbitration clause and a class action waiver. The customers resisted arbitration on the ground that the arbitration clause/class action waiver was an unconscionable contract of adhesion and was unenforceable under California law. The Ninth Circuit held that California’s law on unconscionability of agreements barring class action participation was not preempted by the FAA. “The FAA does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause.”

The Supreme Court reversed, holding that California’s rule of law had a disparate impact on arbitration agreements and was preempted because “Although [FAA] § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”

Marmet Health Care Center, Inc. v. Brown,¹⁵ (2012). The Court here continued to eliminate any ambiguity about FAA preemption of state laws that impact negatively on arbitration. At issue was a West Virginia law that barred arbitration of certain claims against nursing homes. In a very strongly worded *per curiam* opinion the Court held that the statute was preempted by the FAA, stating: “As this Court reaffirmed last Term, [w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA’ [citing *Concepcion*]. That rule resolves these cases. West Virginia’s prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.”

*Oxford Health Plans, LLC v. Sutter*¹⁶ (2013): Picking up the class arbitration theme, the Court turned to some unfinished business from its 2010 *Stolt-Nielsen*¹⁷ decision. To review, in that case the Court held that an arbitrator can conduct a class-wide arbitration only if the parties agreed to so empower the arbitrator. The question presented in *Oxford* was whether the arbitrator exceeded his authority under the arbitration agreement by ordering a class-wide arbitration. If so, the award could be vacated under the “exceeding powers” ground in FAA §10(a)(4) (“where the arbitrators exceeded their powers...”)¹⁸

15 132 S.Ct. 1201 (2012), available at <http://www.supremecourt.gov/opinions/11pdf/11-391.pdf> <viewed 12/26/2013>.

16 133 S.Ct. 2064 (2013), available at http://www2.bloomberglaw.com/public/desktop/document/Oxford_Health_Plans_LLC_v_Sutter_No_12135_2013_BL_151235_US_June_ <visited 12/24/2013>.

17 *Stolt-Nielsen, SA v. AnimalFeeds Int’l Corp.*, 127 S.Ct. 2793 (2010), available at <http://www.supremecourt.gov/opinions/09pdf/08-1198.pdf> <visited 12/26/2012>.

18 See 9 U.S.C. § 10(a)(4), available at <http://codes.lp.findlaw.com/uscode/9/1/10> <viewed 12/25/2013>.

In a narrowly-focused, unanimous 9-0 decision, the Court upheld the arbitrator’s award. The arbitration clause before the Court provided “No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration...” Unlike the parties in *Stolt-Nielsen*, the Court found the parties by the inclusion of this language in the PDAA had authorized the arbitrator to decide whether there should be a class arbitration, and by making that determination, the arbitrator had not exceeded his authority. “In sum, Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration.”

*American Express Co. v. Italian Colors Restaurant*¹⁹ (2013): Staying focused on collective actions and the “effective vindication in arbitration” rule, the Court next addressed the validity of a PDAA that required an individual to waive the right to participate in a class action litigation and to individually arbitrate a claim arising out of a federal statute. In another in a series of pro-arbitration rulings, the Court enforced the PDAA even though proving the claim in an individual arbitration might be very costly compared to a class action litigation. The Court’s 5-3 decision rejected an argument that the high cost of an economic analysis needed to prove an individual’s antitrust claim in arbitration meant that the arbitration clause was not enforceable. Also, in this case, the parties expressly provided in their arbitration agreement that there would be no class wide arbitrations. Thus the plaintiffs’ sole recourse in this antitrust matter was an individual arbitration.

First, the Court affirmed its prior decisions holding that a challenger must show that Congress, in enacting the involved federal statute, intended to bar arbitration of claims thereunder arising. There was no such preclusion in the Antitrust Act.²⁰ Second, the Court held that as long as the claimant has the *opportunity* to vindicate their rights, arbitration was permissible. “As we have described, the exception [to PDAA enforcement under the FAA] finds in its origin the desire to prevent ‘prospective waiver of a party’s *right to pursue* statutory remedies,’... The class action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action rule for legal relief in 1938” [emphasis in original].

Past Predictions and Present Realities

Going back to check on past predictions — especially technology prognostications — is always fraught with peril and is often comical. On the latter, a magazine published in 1950 made some bold predictions about the future. It’s humorous to see not only how the authors overreached, but also what they didn’t

19 570 U.S. ___, No. 12-133 (June 20, 2013), available at http://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf <visited 12/25/2013>.

20 See 15 U.S.C. §§ 1 et seq., available at <http://www.law.cornell.edu/uscode/text/15/chapter-1> <visited 12/25/2013>.

see coming. For example, we must have missed the advent of jet-propelled turbo cars.²¹ On the other hand, it seems that we have exceeded greatly the prediction by former IBM chairman Tom Watson who in 1943 said, "I think there is a world market for maybe five computers."²² With those caveats, let's first take a look at some past predictions.

Overall Grade

Being an adjunct law professor,²³ the author must begin by handing out grades. Let's start with the overall prediction from 1996 that opens this article:

The future seems destined to bring dramatic changes to the way online disputes are resolved, and ultimately affect the way arbitrations and mediations are administered for a wide range of disputes beyond the online realm. For parties and their representatives, the near future will bring about the development of virtual alternative dispute resolution, with all communications and information related to the case available through their computer at any time from any place.²⁴

As demonstrated below, this is an "A" prediction, assuming one has a broad view of the term "near future." First, let's examine how general-purpose ADR providers are using technology to improve their services:

The American Arbitration Association²⁵ ("AAA") allows many aspects of cases to be handled online, using its Web-File service. This system "offers fast, convenient online claim filing... In addition to filing claims, clients can make payments, perform online case management, access rules and procedures, electronically transfer documents, select Neutrals, use a case-customized message board and check the status of their case."²⁶ AAA also recently launched ADR Community, "a social network for alternative dispute resolution interests."²⁷

21 Francis, Devon, *Will We Drive Turbo Cars?* 156:6 POPULAR SCIENCE 98 (June 1950), available at <http://www.rover.org/nz/pages/jet/jet2.htm> <visited 12/24/2013>.

22 See <http://www.rinkworks.com/said/predictions.shtml> <visited 12/24/2013>.

23 See <http://www.law.fordham.edu/faculty/2443.htm> <visited 12/24/2013>.

24 Friedman, *supra* n. 1, at 716.

25 See <https://apps.adr.org/webfile/> <visited 12/24/2013>.

26 See www.adr.org/aaa/faces/services/disputeresolutionservices/onlineServices?_afLoop=849135956917160&_afWindowMode=0&_afWindowId=utm#%40%3F_afWindowId%3Dutm%26_afLoop%3D849135956917160%26_afWindowMode%3D0%26_adf.ctrl-state%3D8ce0dbch6_4 <visited 12/25/2013>.

27 See <http://www.adr.org/aaa/ShowPD->

AAA has for decades administered insurance arbitrations,²⁸ principally uninsured and supplemental underinsured motorist claims, and no-fault auto claims in states such as New York²⁹ and Minnesota.³⁰ In 2012, it administered nearly 150,000 insurance cases.³¹ AAA provides electronic case filing for its insurance programs³² as it does for all of its cases, and recently launched an "Electronic Case Folder" system for New York No-Fault cases. The AAA web site states:

The ECF combines case and calendar information from the AAA's computer database with case documents submitted by the parties. For each case, the information and documents are made available online to the parties and the arbitrator.

More than 375 law firms and insurance carriers have enrolled in the AAA's ECF for Parties to obtain their case information and calendars online. Over 1,700 individuals at those organizations are registered to log into ECF.

No-Fault arbitrators obtain case and calendar information through a similar resource called the Neutrals' eCenter.³³

The AAA's application of technology to its caseload has already paid dividends. According to its 2012 Annual Report "[d]ue to computerization, the paperless hearings in No Fault, and other efficiencies, total AAA administrative costs (not including arbitrator compensation) in 2012 were lower than such

[F?doc=ADRSTAGE2015420](http://www.adr.org/aaa/faces/aoe/gc/automobileinsurance?_afLoop=1188658508190041&_afWindowMode=0&_afWindowId=1b9q73mlv3_1#%40%3F_afWindowId%3D1b9q73mlv3_1%26_afLoop%3D1188658508190041%26_afWindowMode%3D0%26_adf.ctrl-state%3D1b9q73mlv3_51) <visited 12/25/2013>.

28 See www.adr.org/aaa/faces/aoe/gc/automobileinsurance/mnofault?_afLoop=1189489106249983&_afWindowMode=0&_afWindowId=1b9q73mlv3_48#%40%3F_afWindowId%3D1b9q73mlv3_48%26_afLoop%3D1189489106249983%26_afWindowMode%3D0%26_adf.ctrl-state%3D1b9q73mlv3_120 <visited 12/25/2013>.

29 See <https://nysinsurance.adr.org/> <visited 12/25/2013>.

30 See www.adr.org/aaa/faces/aoe/gc/automobileinsurance/mnofault?_afLoop=1189489106249983&_afWindowMode=0&_afWindowId=1b9q73mlv3_48#%40%3F_afWindowId%3D1b9q73mlv3_48%26_afLoop%3D1189489106249983%26_afWindowMode%3D0%26_adf.ctrl-state%3D1b9q73mlv3_120 <visited 12/25/2013>.

31 See AAA 2012 ANNUAL REPORT, p.6, available at <http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTAGE2011201&revision=latestreleased> <visited 12/25/2013>.

32 See <https://nysinsurance.adr.org/login.jsp> <visited 12/25/13>.

33 See <https://nysinsurance.adr.org/public/ECFChangesToNo-Fault.jsp> <visited 12/25/2013>.

costs had been in 2007 for a much smaller volume of cases.”³⁴

JAMS (formerly known as Judicial Arbitration and Mediation Services) has an electronic filing system that it describes as “a secure, online case management website powered by Case Anywhere. The system is available to parties in a JAMS arbitration proceeding for the purpose of electronically transmitting documents to and communicating with counsel, parties, and neutral(s).”³⁵ The organization also has a Virtual Conference Room, which is “a browser-based web [video]conferencing service [that] offers parties in remote locations a practical, timely alternative to incurring costly delays and travel expense.”³⁶

FINRA has had a robust online filing system since 2004³⁷ and arbitration awards available online for more than a decade.³⁸ It is in the midst of rolling out a web-based portal that handles all the things in the middle, such as arbitrator selection, calendaring, and document uploads. With the latest release, which was deployed fall 2013, parties or their representatives can:

- File all case-related documents
- Retrieve a served claim and other case documents
- Rank and strike arbitrator and mediator lists, and review neutrals’ disclosure reports
- Collaborate with other counsel and neutrals on prospective hearing date
- View the status and details of their cases
- Provide access to others (such as support staff) to the Portal

34 See AAA 2012 ANNUAL REPORT, p.6, available at <http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTAGE2011201&revision=latestreleased> <visited 12/25/2013>.

35 See <http://www.jamsadr.com/electronic-filing/> <visited 12/25/2013>.

36 See <http://www.jamsadr.com/virtual-conference/> <visited 12/25/2013>.

37 See *Arbitration Online Claim Filing*, available at <http://www.finra.org/ArbitrationAndMediation/Arbitration/Process/FileClaim/P123990> <visited 12/24/2013>. Also *NASD Dispute Resolution Launches Online Arbitration Claim Filing and Notification System* (Aug. 5, 2004), available at <http://www.finra.org/newsroom/newsreleases/2004/p010890> <visited 12/24/2013>.

38 See FINRA *Arbitration Awards Database*, available at <http://www.finra.org/ArbitrationandMediation/FormsTools/p018127> <visited 12/24/2013>. Also *NASD Dispute Resolution to Provide Arbitration Awards Online* (May 10, 2001), available at <http://www.finra.org/Newsroom/NewsReleases/2001/P010078> <visited 12/24/2013>.

Arbitrators and mediators can:

- View and submit updates to their disclosure reports
- View the status and details of their currently assigned cases
- View the history of their past cases
- Retrieve case documents
- Collaborate with other counsel and neutrals on prospective hearing dates.³⁹

Arbitration Resolution Services, Inc., asserts it is the world’s first completely cloud-based alternative dispute resolution system.⁴⁰ ARS helps clients resolve disputes involving claims for monetary damages up to \$100,000 in a faster, more efficient and less costly way than traditional litigation. Unlike judicial processes, ARS arbitration hearings and mediations are scheduled for the convenience of the participants - they never have to leave their homes, offices or businesses. Hearings and mediations are conducted via phone and video conference.⁴¹ Parties, counsel, and arbitrators or mediators can conduct an arbitration or mediation from start to finish without leaving their home or office or licking a postage stamp. ARS provides online ADR services in several areas, one of which is its Vehicle/Property Damage Program.⁴² ARS recently announced the launch of the company’s Arb-IT™ software that fully automates the step-by-step process of arbitration and mediation.⁴³

It’s probably a good idea to define the term “the cloud.” A simple definition is:

The cloud is the Internet — in other words a network of servers... When you use the cloud, your computer communicates with a network of servers. Some of the servers are specialized for storage, while others use their computing power to run

39 Bullets paraphrased from FINRA web site. See <http://www.finra.org/ArbitrationAndMediation/FormsTools/P168183> <visited 12/24/2013>.

40 www.arbresolutions.com <visited 12/24/2013>.

41 See, e.g., *Dispute Resolution Revolutionized by New Cloud-based Arb-it™ System from Arbitration Resolution Services, Inc.* (Sep. 23, 2013), available at <http://www.ereleases.com/pr/dispute-resolution-revolutionized-cloudbased-service-arbit-arbitration-resolutions-services-173809> <visited 12/24/2013>.

42 See <https://www.arbresolutions.com/static/learnveh> <visited 12/26/2013>.

43 See, e.g., *Dispute Resolution Revolutionized by New Cloud-based Arb-it™ System from Arbitration Resolution Services, Inc.* (Sep. 23, 2013), available at <http://www.ereleases.com/pr/dispute-resolution-revolutionized-cloudbased-service-arbit-arbitration-resolutions-services-173809> <visited 12/24/2013>.

applications.⁴⁴

The cloud allows ease of data storage and sharing. A good example of the cloud is Google Docs,⁴⁵ where the user's files reside on Google's servers rather than the individual's computer. Of course, the cloud is a bit more nuanced than this simple definition. ARS technology head Don Law defines it as follows:

*The cloud is the confluence of several different ideas made possible by recent developments in both hardware and software. We will leave the technical details for the technical journals. Jumping to the end result: It facilitates substantial cost savings both for vendors of computing services and consumers of computing services, including P&C insurers, while simultaneously providing flexibility that just did not exist before. Cloud computing represents a whole new way of doing things. Getting more capability for less money is irresistibly attractive and compels industries to put a lot of energy into the adoption of cloud computing.*⁴⁶

Also, these organizations conduct training via the web. For example, the AAA recently conducted a webinar on "ADR and Emerging Technologies" where the panel discussed the very topics examined in this paper.⁴⁷ And of course many components of the court litigation process can now be accomplished online.⁴⁸

Insurance Industry Leading the Way

Several ADR providers focus heavily on resolving insurance-related disputes and, as discussed below, are making good use of technology to streamline the dispute resolution process. That the insurance industry is a leader in this area should come as no surprise. Most major insurers have for years offered online claim processing⁴⁹ and in recent years have facilitated claims processing by smartphone.⁵⁰ The author experienced this first-

44 *What is the Cloud?*, available at <http://www.gcflearnfree.org/computerbasics/extra/82> <visited 12/26/2013>.

45 See <http://whatis.techtarget.com/definition/Google-Docs> <visited 12/26/2013>.

46 See Law, Don, *Will Cloud Computing Rain on my Parade?* CLAIMS MAGAZINE (Apr. 2013), available at <http://www.propertycasualty360.com/2013/03/29/will-the-cloud-rain-on-my-parade> <visited 12/24/2013>.

47 See <https://www.aaau.org/courses/adr-and-emerging-technologies/13web013o/> <visited 12/24/2013>.

48 See, e.g. the federal court system's PACER system, available at <http://www.pacer.gov/> <visited 12/24/2013>.

49 A Google search for "insurance company online claim processing" conducted 12/26/2013 yielded more than 5 million results. See e.g., State Farm's online claim filing system, available at <https://www.statefarm.com/claims/file-a-claim> <visited 12/26/2013>.

50 See, e.g., *5 of the Coolest Insurance Apps*, available at

hand when he filed a homeowner's insurance claim for minor damage after Hurricane Sandy. He filed his claim online, uploaded photos and supporting documentation, scheduled an adjuster inspection (also done online), and received his payment by direct deposit to his checking account. Here's a snapshot of where things are today in the insurance ADR world:

Arbitration Forums, Inc. ("AF")⁵¹ is "a membership-driven, not-for-profit organization that exists to effectively and efficiently serve its over 4,700 members' recovery and resolution needs. AF is the nation's largest arbitration and subrogation services provider. Annually, its members file over 510,000 arbitration disputes and 770,000 subrogation demands collectively worth over \$5.5 billion in claims." The firm offers a robust online claim processing system.⁵²

National Arbitration and Mediation ("NAM")⁵³ "offers a cost-effective alternative to expensive and often time-consuming litigation. Founded in 1992, NAM has a nationwide panel of nearly 2,000 top-tier former judges and practicing specialists uniquely qualified to resolve legal matters in a private forum. NAM is one of the nation's leading dispute resolution institutions and maintains rosters in every major city in the United States, with specific expertise in the areas of Complex Commercial, Personal Injury, Professional Liability, Construction, Insurance, Employment and Real Estate Dispute Resolution." The firm offers a patented online case tracking and management system called "MyADR."⁵⁴

Resolute Systems, LLC, among other services, "serves as the independent program administrator for established Consumer Property Damage Arbitration and Mediation dispute resolution programs across the country. These programs are typically offered by insurance companies, voluntarily or at the direction of a state insurance commission, to give their policyholders an option to resolve an insurance coverage or property damage dispute outside of litigation." The firm also administers special ADR programs established in the wake of natural disasters.⁵⁵ The firm offers online claim filing⁵⁶ and a "My Resolute"

<http://tech.co/5-coolest-insurance-apps-2013-09> <visited 12/26/2013>.

51 See <https://www.arbfile.org/webapp/> <visited 12/26/2013>.

52 See <https://www.arbfile.org/webapp/pgStatic/content/pgOnlineFilingFAQ.jsp#1> <visited 12/26/2013>.

53 See <http://www.namadr.com/aboutus.cfm/> <visited 12/26/2013>.

54 See http://www.namadr.com/nam_myadr.cfm <visited 12/26/2013>.

55 See http://www.resolutesystems.com/ADR/consumer_property.asp <visited 12/26/2013>.

56 See <https://www.resolutesystems.com/SubmitCase/default.asp> <visited 12/26/2013>.

online document system.⁵⁷

Specific Past Predictions

Let's see how accurate were some specific prior predictions about what was to come. Twenty years ago the author wrote an article that marveled at how technology had already impacted the arbitration process.⁵⁸

*The technological changes of the 1980s impacted greatly on the way the American Arbitration Association administered its... disputes. As the 1980s dawned, the typical office used electric typewriters to produce correspondence, handled billing through a paper-driven, labor intensive manual system, and selected arbitrators from panel cards stored in a file box. As we enter the 1990s, correspondence is produced through computers, some linked in networks, the financial aspects of case administration are handled via computer, and arbitrator lists are produced from a computerized panel database. In 1980, time-sensitive documents were sent by special delivery or messenger. Now, fax communication speeds documents around the globe. ...If the 1980s are any indication, changes in communication technology in the 1990s will have a similar if not greater impact on improving administration.*⁵⁹

So, things admittedly had come a long way by the time the article was published in 1993. What then of the specific predictions?

Email: By the early 1990s, email was already in use in the workplace,⁶⁰ but it wasn't that easy to use. AAA's first email system was very basic, and at first was a closed system — users could only send emails to other AAA users. By the mid-1990s, users could send and receive emails to users outside the AAA, but this required special encoding and such. At that time there was talk that eventually one would be able to simply send emails across various email systems, like Prodigy,⁶¹ Compu-

Serve,⁶² and America Online⁶³ at speeds that were a bit faster than the 14.4 kb dial-up modems that were then prevalent.⁶⁴ Armed with this knowledge, the author predicted:

*While the fax revolution exploded virtually overnight in the mid-1980s,⁶⁵ a quieter revolution toward electronic mail is already underway. With the establishment of uniform communication protocols, the 1990s may well see the advent of electronic mail. Basically, documents would be sent from computer to computer, despite different operating systems, word processing programs, and the like. Hard copy would not necessarily have to be produced. If this occurs, fax may ultimately be viewed as having been a transitory technology. This trend away from using surface mail will improve case administration speed and accuracy.*⁶⁶

That prediction gets an "A," especially the spot-on prediction that fax technology would eventually come to be viewed as a transitional technology. And, let's be honest, when was the last time you wrote and mailed an actual paper letter to an insurer or ADR firm?

Imaging: By the early 1990s, scanning or imaging was very new, at least in the workplace. Scanners were relatively exotic and expensive, and not very simple to use. But, one could see where this would head someday. So, in 1993 the author boldly

62 See Donahue, Saun, *CompuServe is No More, but will E-mail Addresses Remain Active?* (Jul. 7, 2009), available at <http://sherpa.blog.marketingsherpa.com/email-marketing/compuserve-is-no-more-but-will-email-addresses-remain-active/> <visited 12/27/2013>.

63 See *25 Years of AOL: a Timeline*, WASHINGTON POST (May 23, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/23/AR2010052303551.html> <visited 12/24/2013>.

64 See <http://h10025.www1.hp.com/ewfrf/wc/document?cc=us&lc=en&dlc=en&docname=bph01927> <visited 12/24/2013>. The first modem I used was even slower, a whopping 2,400 *baud*. I think I first grew a beard waiting for a message to download.

65 The first fax machines were very expensive, costing thousands of dollars. See, Moore, Mary, *The Fax Systems: A Bright Outlook for Business Communications*, YALE-NEW HAVEN TEACHERS INSTITUTE (1989), available at <http://www.yale.edu/ynhti/curriculum/units/1989/7/89.07.05.x.html> <visited 12/24/2013>, in which the author in 1989 noted "the emergence of machines for small business and departmental use that cost under \$2,000." I recall vividly that, back in the mid-1980s when I was AAA's New York Regional Director, I had to make a presentation to the Executive Committee of the Board of Directors, for authorization to purchase two fax machines — one in New York and one in San Francisco — for a fax pilot program. And it was a close call! Some things you don't forget.

66 Friedman, *supra* n. 2, at 201.

57 See <http://www.resolutesystems.com/MyResolute/Default.asp> <visited 12/26/2013>.

58 Friedman, *supra* n. 2, at 201-2.

59 *Id.* at 201.

60 See, e.g., Miller, Steve, *E-mail's Popularity Poses Workplace Privacy Problems*, COLUMBUS BUSINESS FIRST (Oct. 6, 1997), available at <http://www.bizjournals.com/columbus/stories/1997/10/06/newscolumn2.html?page=all> <visited 12/24/2013>. The author reported that by 1997 every Fortune 1000 company was using email "in some capacity."

61 See Banks, Michael, *Prodigy: The Pre-internet Online Service that didn't Live up to its Name* (Dec. 18, 2008), available at <http://www.techrepublic.com/blog/classics-rock/prodigy-the-pre-internet-online-service-that-didnt-live-up-to-its-name/> <visited 12/27/2013>.

predicted:

*This technology is still in its early stages of development. When fully developed, it will permit virtually paperless case administration. Documents received will be scanned into a computer-driven optical scanning system. They can then be stored, retrieved, printed, transmitted, and filed with ease. The need for voluminous physical files will be eliminated. This, too, should improve the manner in which construction cases are handled.*⁶⁷

Of course, today one can use a smartphone to “scan” documents, and there are any number of programs and apps that eliminate paper. And of course ADR companies and insurers allow easy uploading of documents, images, and videos. AAA, for example, uses a “paperless hearing” system for its New York no-fault arbitrations.⁶⁸ That one gets an “A,” too.

Electronic Fund Transfers (“ETF”): When the article was written in 1993, payments were made by a physical check in response to receipt via surface mail of a paper invoice. But, the first ETF systems were already under development, and it didn’t take much imagination to envision where this might lead in terms of alternative dispute resolution administration:

*This technology is still in its early stages. Assuming any reasonable growth in its development, it may well be that most business remittances will occur by electronic fund transfers. This, too, would positively impact on construction case administration, because it would cut down drastically on paperwork for all concerned and would speed the crediting and payment of various administrative fees. Arbitrator compensation, for instance, would be paid much more promptly. Accuracy in accounting would improve, as well.*⁶⁹

Today, we use smartphones to scan checks and make deposits, ATMs are everywhere, customers hardly ever set foot in a brick-and-mortar bank, and ADR providers accept payments online. Straight “A”s so far.

Computerization: In 1993, the author summed things up by examining the overall state of computerization and how it might positively influence arbitration administration. Specifically, he predicted:

Already, the AAA is well on its way toward a completely computerized, networked case administration systems. This integrated program allows case administrators to generate correspondence, faxes, and arbitrator lists and to access the financial

*records related to the case without leaving the desk. This network will be completed in the mid-1990s, resulting in more uniform, prompt, and accurate case administration. This development, coupled with the expected improvement in electronic mail and fund transfers, should have a very positive impact on the processing of construction arbitrations.*⁷⁰

The first computerized arbitration case administration systems were internal; that is they were used by staff to track various aspects of cases and the arbitrator and mediator enrollment, training, and selection processes. This was certainly the situation at AAA and FINRA. Over time, ADR providers turned outward by developing web-based systems that allowed users to handle by themselves parts of the case administration process. And then in 2012, ARS put the entire process online. That’s another “A.”

What developments were missed?

While the author gets partial credit for sensing that we didn’t know what we didn’t know, there were many things he just didn’t see coming back in 1993. The author did see change coming, though:

*There will likely be improvements and new developments in technology that cannot be forecast at this time. Based on the experiences in the 1980s, however, improved speed and accuracy in construction arbitration case administration are in the offing.*⁷¹

Having said that, here are some developments we didn’t see coming:

The web: Honestly, that one just wasn’t on most radar screens back in 1993; who knew Al Gore would be inventing the internet?⁷² The web was, however, getting some attention by the mid-1990s. For example, the author in 1995 spearheaded development of the AAA’s first web site, making it the first ADR organization with a web site. And by 1996, he was certain the web would eventually have a huge impact on alternative dispute resolution:

As courts, lawyers, governmental agencies, businesses, and individuals go online in droves, use of this medium to accomplish a wide range of activities—including resolving disputes—will become commonplace. Given just the recent history of the development of the Web and the demonstrated ability of the law, courts, business world, and society in general to adapt to technological changes, it is a virtual certainty that online ADR will become widely used over time, both

67 Friedman, *supra* n. 2, at 202.

68 See AAA 2012 ANNUAL REPORT, p.6, available at <http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTAGE2011201&revision=latestreleased> <visited 12/25/2013>.

69 Friedman, *supra* n. 2, at 201-2.

70 Friedman, *supra* n. 2, at 202.

71 *Id.*

72 See, e.g., Carlson, Bernard, *Did Al Gore Invent the Internet? No, Nicholas Tesla Did* (Jul. 11, 2013), available at http://www.huffingtonpost.com/w-bernard-carlson/did-al-gore-invent-the-internet_b_3581391.html <visited 12/27/2013>.

for online disputes as well as business disputes in general. Some steps can be taken now to not only speed up this transition, but make it better.

The future seems destined to bring dramatic changes to the way online disputes are resolved, and ultimately affect the way arbitrations and mediations are administered for a wide range of disputes beyond the online realm. For parties and their representatives, the near future will bring about the development of virtual alternative dispute resolution, with all communications and information related to the case available through their computer at any time from any place. For years, commentators have predicted that the future would bring the benefits of online technology to our paper-laden method of resolving disputes.⁷³

Portable computing: While the first practical PCs had already appeared in the workplace in the early 1980s,⁷⁴ portable computing was a ways off. The first portable computers — which were derisively called “luggable computers” — weighed many pounds and were actually small pieces of luggage. IBM’s first portable computer weighed more than 50 pounds and cost almost \$20,000⁷⁵ — way too much to be called a laptop. The first true laptops had very basic computing power. The author’s first — a Compaq LTE⁷⁶ he got around 1990 — had a 20 mb hard disk, which at the time was a big deal, and using it for email required lugging around a bulky, slow dialup modem and phone cords.

Social media: We didn’t see that one on the horizon in 1993, but neither did Facebook founder Mark Zuckerberg, who was nine years old at the time.⁷⁷ Then again, maybe we should say we didn’t see social media making a comeback after 2,000 years.⁷⁸

Smartphones: Another thing we didn’t see coming. Prac-

73 Friedman, *supra* n.1, at 715, 716.

74 See *IBM PCs: the First Ten Years*, available at http://www-03.ibm.com/ibm/history/exhibits/pc25/pc25_tenyears.html <visited 12/24/2013>.

75 See Olanoff, Drew, *First Portable Computer: 55 Pounds and Costs More than a Car*, available at http://www-03.ibm.com/ibm/history/exhibits/pc25/pc25_tenyears.html <visited 12/24/2013>.

76 See *History of Laptop Computers*, available at <http://inventors.about.com/library/inventors/blaptop.htm> <visited 12/24/2013>.

77 See <http://www.biography.com/people/mark-zuckerberg-507402> <visited 12/27/2013>.

78 See Standage, Tom, *Social Media: It’s So First Century B.C.*, *THE RECORD* (Oct. 29, 2013), available at http://www.northjersey.com/news/opinions/social_103013.html <visited 12/27/2013>, in which the author makes the case that perhaps the social media revolution isn’t so revolutionary.

tical cell phones first came on the scene in the mid-1990s. The first analog cell phones were very basic, very clunky, and very expensive. They were called “bricks” because that’s what they resembled.⁷⁹ And absolutely no one in 1993 predicted the emergence of smartphone technology, tablet computers, and mobile apps, all of which are now commonplace in the dispute resolution world. The author certainly admits he didn’t foresee the day when his smartphone would have unimaginable computing power. In fact, he didn’t foresee the smartphone. Who knew that today’s smartphones would have more computing power than NASA had in 1969 when we went to the moon?⁸⁰

Apps for that: In 1993, no one had heard of an app, mainly because there was no such thing. There were computer programs, which were clunky things you loaded on your PC that inevitably came with a long, indecipherable paper manual you put away on your shelf and never consulted.⁸¹ Now, of course, we have robust, simple to use apps that reside on your smartphone and are capable of doing all sorts of things.⁸² Apps have found their way to the legal⁸³ and ADR worlds in general, and the insurance world in particular. For example, AAA⁸⁴ and JAMS⁸⁵ have apps allowing at least some aspects of the arbitration process to be done by smartphone or tablet, and most insurance companies have apps for claims filing and processing.⁸⁶ And, if more proof were needed that apps are everywhere in the legal community, you can now use a jury

79 Skeptical? Check this out: <http://doublehappiness.ilikenicethings.com/?p=575> <visited 12/24/2013>.

80 See Kaku, Michio, *Your Cell Phone has more Computing Power than NASA Circa 1969*, available at <http://knopfdouble-day.com/2011/03/14/your-cell-phone/> <visited 12/24/2013>.

81 See, e.g., <http://www.nuibooks.com/pfs--write--users-manual-for-selected-ms--dos-computers-PDF-1309615/> <visited 12/26/2013>.

82 See, e.g., *Apple Reveals Top Ten Downloaded Apps for 2013 for iPhone and iPad*, available at www.technobuffalo.com/2013/12/17/apple-reveals-top-ten-downloaded-apps-of-2013-for-iphone-and-ipad/ <visited 12/26/2013>.

83 The author is an adjunct professor of law at Fordham Law School, teaching alternative dispute resolution. He has a mobile app for his law class. See m.proffriedman.com <visited 12/27/2013>.

84 See *American Arbitration Association Develops New Mobile App (June 13, 2012)*, available at www.adr.org/aaa/ShowPDF;-jsessionid=m224QHwG83mb4T1SBKvXspLS2yMrqPyS1N-HtldvJ9t6P5SqHy4d4!637569759?doc=ADRSTG_018607 <visited 12/26/2013>.

85 See *JAMS Launches First-Ever ADR App for iPhone and iPad* (Mar. 15, 2011), available at <http://www.jamsadr.com/jams-launches-first-ever-adr-app-for-iphone-and-ipad-03-15-2011/> <visited 12/26/2013>.

86 See nn. 52 and 53, *supra*.

duty app in New Jersey.⁸⁷

Text and instant messaging: These technologies were just not foreseen in the early 1990s. At time time, most users thought email *was* both text and instant messaging because the only email you could send was text (no file attachments or images allowed), and it was a message that came pretty fast — in an instant.

Videoconferencing: In 1993, this was the stuff of science fiction. Dick Tracy used a wrist watch-based video system, but this was only in the comics.⁸⁸ Now, of course, these devices actually exist.⁸⁹ In real life, the first rudimentary videophone systems were unveiled at the 1964-5 New York City World's Fair.⁹⁰

The first video conferencing systems were rolled out in the 1990s, but were slow and of inferior quality, often resembling poorly dubbed foreign movies. The author recalls vividly a demo from around 1997 where he thought a colleague was warning that "Godzilla is near," when what he really said was "Gotta say I'm just thrilled to see you there." But over time, this technology has been perfected, and every major ADR service now provides videoconferencing technology.⁹¹

Digital technology: This one was also not predicted two decades ago. For example, FINRA rules require that hearings be audio recorded.⁹² For years, FINRA met this obligation by using analog tape recording systems. By 2008, it had replaced the old tape system with fixed and portable digital audio re-

ording equipment.⁹³

Wi-Fi: This was completely beyond the realm in 1993. It's a certainty that, if one inquired about Wi-Fi back in the day, the other person would have said "You mean Hi-Fi?" which was short for the "high-fidelity" sound system then in use with vinyl phonograph records.⁹⁴

The commoditization of storage: Hard to believe, but storage space on computers and other electronic media used to be very expensive. Two decades ago blank videocassettes used to cost \$10 on sale, CDs about the same, and DVDs even more.⁹⁵ In 1983 the author was the first non-technology executive at the AAA to have a personal computer with an internal hard drive — an IBM PC-XT⁹⁶ — that came with a whopping 10 mb of hard disk space, and he wondered how he would ever fill it. And, as far as we can tell, the first arbitration staff person in the world to use a PC to administer cases was Barbara L. Brady⁹⁷ then at the AAA who in the mid-1980s used an IBM PC-XT and DOS-based software called PFSs File/Write/Report⁹⁸ to track cases, generate correspondence, and prepare reports.⁹⁹

The scarcity and high cost of storage space meant that programmers watched every byte. This is what

93 See *Digital Recording of Hearings*, 2 THE NEUTRAL CORNER (2008), available at <http://www.finra.org/ArbitrationAndMediation/Arbitrators/CaseGuidanceResources/NeutralCorner/P038102> <visited 12/24/2013>.

94 See, e.g., Belluis, Mary, *Hi Fidelity*, ABOUT.COM, available at http://inventors.about.com/od/audiowaxrecordstomp3/a/High_Fidelity.htm <visited 12/24/2013>. As for phonograph records, I recall my then-teenage son and his friends being mystified by a 45 RPM record adaptor — a little disk that allowed one to play a 45 RPM record on a 33 1/3 RPM turntable. See if you recognize the device: <http://richd.com/2009/06/record-adapter.html> <visited 12/24/2013>.

95 See <http://answers.yahoo.com/question/index?qid=20080126145937AAuxTqn> <visited 12/24/2013> and <http://www.hometheaterforum.com/topic/278368-in-the-beginning-dvd-historical-timeline/> <visited 12/24/2013>.

96 See <http://www.vintage-computer.com/ibmpcxt.shtml> <visited 12/24/2013>.

97 See http://www.pli.edu/Content/Faculty/Barbara_L_Brady/_N-4oZ1z13f8x?ID=PE498085 <visited 12/25/2013>.

98 See <http://www.answers.com/topic/pfs-write> <visited 12/24/2013>.

99 I have to cite myself as the source. At the time, I was Regional Director of AAA's New York City office and Barbara was a case administrator there. We conducted a successful pilot program to test the feasibility of using computers to support case administration. Our careers have been intertwined ever since. She eventually moved to FINRA and rose to her present position of Vice President of Neutral Management.

87 See Cohen, Lynda *Called for Jury Duty? Now there's an App for that*, THE PRESS OF ATLANTIC CITY (Dec. 11, 2013), available at http://m.pressofatlanticcity.com/news/breaking/called-for-jury-duty-there-s-now-an-app-for/article_e97df1f0-6296-11e3-8ac1-001a4bcf887a.html?mode=jqm <visited 12/25/2013>.

88 See Johnson, James, *Dick Tracy's Wrist Radio* (Mar. 8, 2006), <http://www.dicktracymuseum.com/chester-gould/news-columns/dick-tracys-wrist-radio/> <12/24/2013>.

89 See Oremus, Will, *The Dick Tracy Watch is Real*, SLATE (Sep. 4, 2013), available at http://www.slate.com/articles/technology/technology/2013/09/samsung_smartwatch_galaxy_gear_is_the_dick_tracy_watch_for_real.html <visited 12/24/2013>.

90 See Hernandez, Daniela, *April 20, 1964: Picturephone Dials up First Transcontinental Video Call*, WIRED (Apr. 20, 2012), available at <http://www.wired.com/thisdayintech/2012/04/april-20-1964-picturephone-dials-up-first-transcontinental-video-call/> <visited 12/24/2013>.

91 See, e.g., *Videoconferencing Available in FINRA Regional Offices*, available at <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbion/documents/arbmed/p126233.pdf> <visited 12/24/2013>.

92 See FINRA Rule 12606, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4176 <visited 12/24/2013>.

in large part led to the Y2K problem, because programmers used only two spaces for the last two digits of a year instead of four for the full year.¹⁰⁰ Why waste space? Now, of course, space is cheap and is measured in gigabytes and even terabytes.¹⁰¹ And multi-gigabyte thumb drives — the stuff of science fiction twenty years ago — are now given away as promotions.

The Future

Now we come to the author's favorite part: predicting the future. Why? Because, while you can certainly disagree with him, you can't definitively say he's wrong unless you claim to be a visitor from the future. Bearing in mind that his predictions from 1993 were precisely on target, but that there were lots of things most of us just didn't see coming, here is what the author thinks the next five to 10 years will bring:

Overall: By the end of 2018, web-based ADR will overtake "brick-and-mortar" arbitration case filings. Why? The dramatic and rapid advances in technology will make the choice an easy one, much like Amazon and other web-based entities have challenged brick-and-mortar shopping as the preferred method of commerce.¹⁰² Put differently, why drag yourself to a hearing and wait around for snail-mail when you can accomplish the same things via the cloud in a fraction of the time and cost?¹⁰³

Consumer demand will drive the shift to cloud-based ADR: Events that will unfold over the next several years will fuel the shift to online ADR. Here's why:

Patient Protection and Affordable Care Act: A little-no-

100 See, e.g., Brain, Marshall, *How the Year 2000 Problem Worked*, available at <http://computer.howstuffworks.com/y2k.htm> <visited 12/24/2013>.

101 See, e.g., *On Track for Terabyte Discs: Making Computer Data Storage Cheaper, Easier* (Oct. 9, 2013), available at <http://phys.org/news/2012-10-track-terabyte-discs-storage-cheaper.html> <visited 12/24/2013>.

102 See *Retailers, Are You Ready? Cyber Monday Overtakes Black Friday* (Nov. 30, 2012), available at <http://blogs.teradata.com/teradata-applications/retailers-are-you-ready-cyber-monday-overtakes-black-friday/> <viewed 12/27/2013>. Also Cheng, Andria, *UPS, FedEx Forecasts Suggest Black Friday Weekend will Again be Key for Retailers*, MARKETWATCH.COM (Oct. 25, 2013), available at [HTTP://BLOGS.MARKETWATCH.COM/BEHINDTHESTOREFRONT/2013/10/25/UPS-FEDEX-FORECASTS-SUGGEST-BLACK-FRIDAY-WEEKEND-WILL-AGAIN-BE-KEY-FOR-RETAILERS/](http://blogs.marketwatch.com/behindthestorefront/2013/10/25/ups-fedex-forecasts-suggest-black-friday-weekend-will-again-be-key-for-retailers/) <viewed 12/27/2013>, and *Cyber Monday to be Busiest Day Ever for FedEx*, CNN MONEY (Oct. 24, 2013), available at <http://money.cnn.com/2013/10/23/pf/fedex-cyber-monday/> <viewed 12/24/2013>.

103 See Friedman, George, "Road Trips" in *Consumer Arbitration: there Must be a Better Way* (Sep. 15, 2013) available at <http://blog.arbresolutions.com/2013/09/15/road-trips-consumer-arbitration-must-better-way/> <visited 12/24/2013>.

ticed provision in the Act¹⁰⁴ (aka "Obamacare"), requiring that health insurers establish external review of claims decisions, will in the author's view lead to a massive number of claims with nowhere to be filed. At some point, the author believes that Congress will amend Obamacare to give patients the right to require "expedited online arbitration" of disputed healthcare claims with their insurers.¹⁰⁵ Case filings will soar.

Natural Disasters: If the climate change folks are to be believed, we are in for some rough sledding in terms of weather the next several years.¹⁰⁶ Given the positive experience with Hurricane Sandy claims, which were handled through mediation at AAA,¹⁰⁷ online ADR will become the preferred way natural disaster insurance claims get resolved. Just wait for the next major disaster.

In the author's futuristic view of things, a hypothetical Hurricane Ella will devastate the mid-Atlantic. Congress, which will have to be relocated after the storm, will pass the bi-partisan "Hurricane Ella Relief Act" giving insureds the right to require "expedited online arbitration" of property-damage claims with their insurers.

Financial Markets: While he prays he is not correct, the author fears that, for the first time in recent history, both the stock and bond markets will crash at the same time. Thereafter, as has happened in the past, FINRA will be inundated with crash-related claims. Case filings will ultimately break the old record of 8,945 set in 2003¹⁰⁸ in the wake of the "tech wreck." To address the growing post-crash caseload at FINRA, SEC will approve a rule giving investors the option of a completely web-based ADR system for

104 See, e.g., Pub. L. 111-148 (2010) sec. 2719, available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf> <visited 12/24/2013>.

105 See, e.g., Vukadin, Katherine, *Hope or Hype? Why the Affordable Care Act's New External Review Rules for Denied ERISA Healthcare Claims Need More Reform*, 60:5 BUFFALO L. REV. 1201 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230098 <visited 12/24/2013>.

106 See, e.g., Le Page, Michael, *Climate Change: It's even Worse than we Thought*, available at <http://www.newscientist.com/special/worse-climate> <visited 12/24/2013>.

107 See *Storm Sandy*, available at http://www.adr.org/aa/faces/aoe/gc/government/statenaturaldisasterprograms/sandy?_afLoop=871659751549087&_afWindowMode=0&_afWindowId=19czoplq3p_1#%40%3F_afrWindowId%3D19czoplq3p_1%26_afrLoop%3D871659751549087%26_afrWindowMode%3D0%26_adf.ctrl-state%3D19czoplq3p_41 <visited 12/24/2013>.

108 See <http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/> <visited 12/24/2013>.

“simplified” cases¹⁰⁹ involving under \$50,000.

JOBS Act: The JOBS Act¹¹⁰ allows crowdfunding portals such as Kickstart and Indiegogo to issue stock, once the SEC writes rules governing the process. The rules,¹¹¹ which were proposed October 23, 2013, say nothing about dispute resolution. This is a mistake, in the author’s view. While investor disputes with crowdfunding portals sponsored by broker-dealers will presumably be subject to FINRA arbitration, disputes involving non-broker portals will not. This gap presumably allows the portal to establish whatever dispute resolution system it desires, which may be to the investor’s detriment.¹¹² A July 2013 comment letter sent to the SEC observed that most disputes arising out of crowdfunding will be relatively small, and that traditional “brick-and-mortar,” paper-based arbitration is not a solution. It concluded:

*We urge the SEC to consider rulemaking that establishes an efficient, fair, inexpensive cloud-based means for resolving crowdfunding disputes.*¹¹³

The author predicts the SEC will eventually issue crowdfunding rules that will *permit* use of arbitration, including predispute arbitration agreements, but *require* that arbitrations be conducted online in view of the relatively small claims involved.

Fueled by these developments, plus ones we just can’t predict at this time, cloud-based ADR case filings will before the end of this decade for the first time eclipse paper-based filings. What does this portend?

Hearings will mostly be done online: Again, why go to a hearing in person if you can do it online? It doesn’t take a Nostradamus to see that improving videoconferencing technology will drive this change. At a minimum, the author sees

109 See FINRA Rule 12800, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4185 <visited 12/24/2013>.

110 See Pub. L. 112-106 (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf> <visited 12/24/2013>.

111 17 CFR 200, 227, 232, 239, 240 and 249, available at <http://www.sec.gov/rules/proposed/2013/33-9470.pdf> <viewed 12/24/2013>.

112 See, e.g., Welsberg, Herb, *Consumer Groups Rip Mandatory Arbitration Ruling* (Jan. 20, 2012), available at <http://www.nbcnews.com/business/consumer-groups-rip-mandatory-arbitration-ruling-1C7101029> <visited 12/24/2013>.

113 Letter sent by ARS EVP & General Counsel Mark Norych, available at <http://www.sec.gov/comments/jobs-title-iii/jobstitleiii-247.pdf> <visited 12/24/2013>.

virtual hearing rooms being established in different cities so participants don’t have to travel to a distant city.¹¹⁴ And, where party demand requires that parties, counsel, and arbitrators all convene in the same physical place for a hearing, they will conduct the hearing in a “wired” hearing room complete with Wi-Fi and videoconferencing.

Paper will become passé: As ADR providers expand their online services for case filing, case management, document, image and video uploading, arbitrator selection, calendaring, and bill payment, fewer parties and arbitrators will use paper. It’s just a matter of time before discounts are offered for using these systems, and sooner or later, extra fees will be assessed to those users who insist on using paper for correspondence or bill payment.

New challenges: The existing and emerging technologies come with their own challenges. But, like the challenges presented by early videoconferencing technology, they can and will be overcome. Here are just a few that come to mind:

Information Security: The Target credit card disaster¹¹⁵ reminds us that security challenges will always be present in cyberspace. What happens when an arbitrator’s laptop is lost or stolen? Phishing and counterfeit email scams will unfortunately continue, requiring that we remain vigilant in this area. For example, FINRA’s Board recently approved proposing a rule requiring parties to redact certain personal confidential information from their case-related documents.¹¹⁶

Social Media: The explosive use of social media comes with some challenges. For example, is it appropriate for a neutral to “friend” a party or counsel? The State of Florida said “no” as to judges,¹¹⁷ and FINRA said “no” as to ar-

114 This one is pretty much here already. See Wahdwa, Vivek, *The Scary and Amazing Future of Work*, FORBES (11/18/2013), available at <http://www.forbes.com/sites/singularity/2013/11/18/the-scary-and-amazing-future-of-work/> <visited 12/27/2013>.

115 See Dolmetsch, Chris, *Target Faces Lawsuits after Data-security Breach* (Dec. 25, 2013), available at <http://www.newsofserver.com/2013/12/25/3485386/target-faces-lawsuits-after-data.html> <visited 12/26/2013>.

116 See http://www.finra.org/Industry/Regulation/Guidance/CommunicationstoFirms/P401515?utm_source=MM&utm_medium=email&utm_campaign=DR_Monthly_120613_FINAL <visited 12/27/2013>: “Specifically, FINRA would amend Rules 12300 and 13300 (Filing and Serving Documents) to provide that, in an electronic or paper filing with FINRA, parties filing documents may include only the last four digits of an individual’s Social Security number, taxpayer identification number or financial account number.”

117 See *Florida Supreme Court Judicial Ethics Advisory Committee’s Opinion Number 2009-20* (Nov. 17, 2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2009/2009-20.html> <visited 12/26/2013>.

bitrators.¹¹⁸ If the arbitrator publishes by blog or another online method, should this be disclosed to the parties and the ADR provider? FINRA says “yes”, telling arbitrators “FINRA neutrals who maintain blogs primarily related to securities or finance-related matters should disclose the existence of their blogs on their FINRA disclosure report so this information can be provided to parties.”¹¹⁹

Judging Witness Demeanor: Videoconferencing is a wonderful tool, but it is not yet perfected. For example, how does the arbitrator know that a witness is not being coached by someone off camera? Can an arbitrator or mediator judge demeanor if he or she can't see the witness sweating or fidgeting? Again, the technology will keep improving, and 4K ultra high definition TV and 3-D video technology will eventually solve these problems.¹²⁰

Legal Issues: And of course, legal issues will need to be solved. For example, can an arbitration agreement be electronically signed? The U.S. Electronic Signatures in Commerce Act¹²¹ would seem to say “yes.” This issue is of particular interest to the insurance industry, which in recent years has warmly embraced the e-signature concept. How have courts applied the law? An illustrative case is *Barwick v. GEICO*,¹²² which dealt with whether the state's Uniform Electronic Transactions Act (“UETA”),¹²³ which permits e-signatures, trumped the state's no-fault auto insurance law, which required that agreements be “in writing.” A dispute arose as to whether the insured's online rejection of medical benefits coverage was valid. The court ruled for GEICO, focusing on section 25-32-103(d) of the UETA which states: “If a law requires a record to be in writing, an electronic record satisfies the law... If a law requires a signature, an electronic signature satisfies the law.” This,

the court held, decided that matter: “In the present case, Ms. Barwick rejected coverage for medical benefits when she completed the online application for insurance. She also expressed her intention to forego those benefits with her electronic signature. We hold that the electronic record memorializing her rejection of coverage qualifies as a written rejection of benefits under section 23-89-203 [of the Arkansas no-fault law].”

Have courts decided cases specifically determining the validity of electronically signed PDAA's? The short answer is yes, as long as there's clear, effective notice and good security. For example, *Campbell v. General Dynamics Gov't Sys. Corp.*,¹²⁴ is a First Circuit case involving the validity of an electronic PDAA that was communicated to at-will employees by email. The email did not specifically mention the PDAA, and did not require that employees acknowledge its receipt. This, the court held, was not enough to establish that the employee had agreed to arbitrate her ADA claim. “Under the peculiar circumstances of this case, we cannot say that the e-mail announcement would have apprised a reasonable employee that the Policy was a contract that extinguished his or her right to access a judicial forum for resolution of federal employment discrimination claims. In the absence of minimally sufficient notice, we conclude that it would not be appropriate to enforce the Policy's purported waiver of the right to litigate ADA claims.” The lesson learned here? Be clear that the other side is agreeing to arbitrate and request that they acknowledge receipt of the document. There are other courts that have also weighed in on the enforceability of an electronically signed PDAA.¹²⁵

Where is an award rendered when there's a hearing conducted by videoconference with participants – including the arbitrators — scattered throughout the globe?¹²⁶ What

118 See Brady, Barbara, *Use of Social Media Sites*, 5 THE NEUTRAL CORNER 10 (2011), available at <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtor/s/documents/arbmed/p124928.pdf> <visited 12/26/2013>.

119 Id.

120 See, e.g., May, Steve, *Ultra HD and 4K TV: Everything you need to know* (Dec. 3, 2013), available at <http://www.techradar.com/us/news/home-cinema/high-definition/ultra-hd-everything-you-need-to-know-about-4k-tv-1048954> <visited 12/26/2013>.

121 15 U.S.C. §§ 7001 et seq., available at <http://www.law.cornell.edu/uscode/text/15/chapter-96/subchapter-I> <visited 12/26/2013>.

122 2011 Ark. 128 (2011), available at <http://opinions.aoc.arkansas.gov/WebLink8/0/doc/58424/Electronic.aspx> <visited 2/12/2014>.

123 Ark. Code Ann. §§25-32-101 et seq., available at <http://law.justia.com/codes/arkansas/2010/title-25/chapter-32/25-32-101> <visited Fe. 12, 2014>.

124 407 F.3d 546 (1st Cir., 2005) available at http://scholar.google.com/scholar_case?case=17986375325521161223&hl=en&as_sdt=6&as_vis=1&oi=scholar <visited 12/26/2013>.

125 See, e.g., *Rosas v. Macy's, Inc.*, No. 2:11-cv-07318-PSG-PLA (C.D. Cal., 2011) (online PDAA enforceable where there are clear security measures to ensure the identity of the signer), available at <http://dockets.justia.com/docket/california/cacdce/2:2011cv07318/511334> <visited 12/26/2013>; *Martin v. Wells Fargo Bank, N.A.*, No. 12-6030 (N.D. Cal. Dec. 2, 2013) (PDAA not enforceable because of insufficient proof that a bank's customer actually saw and read the PDAA), available at <http://www.infobytesblog.com/wp-content/uploads/2013/12/Martin-v.-Wells-Fargo-Order-on-Motion-to-Compel-Arbitration-N.D.-Cal.-12-2-13.pdf> <visited 12/26/2013>; and *Kerr v. Dillard Store Services, Inc.*, No. 07-2604-KHV, 2008 WL 2152046 (D. Kan., 2009) (burden on employer of “proving by a preponderance of the evidence” that the employee knowingly executed the PDAA), available at <http://www.leagle.com/decision/In%20FDCO%2020090818810> <visited 12/26/2013>.

126 One suggested approach is to have the arbitrators decide the issue. See, e.g. WIPO Arbitration Rules, Arts. 34(a), 44(a),

arbitration law applies? Do e-discovery rules apply in arbitration? FINRA recently said “yes.”¹²⁷ Again, time and experience will produce solutions.

Hold the phone: And last, while phones will continue to continue to shrink in size and expand in functionality, the concept of a phone you hold in your hand will become viewed as a transitional technology, just like what happened with fax machines. The author predicts that one day soon, phones will be worn as wristwatches and the web will stream to “heads-up” displays on eyeglasses. And maybe audio will come with the glasses. Oh wait...that’s already happening!¹²⁸

Conclusion

More than 15 years ago the author made the following prediction:

*For years, commentators have predicted that the future would bring the benefits of online technology to our paper-laden method of resolving disputes. The future, quite clearly, has arrived.*¹²⁹

This time he really means it!

and 51(a), available at <http://www.wipo.int/amc/en/domains/rules/cctld/expedited.html><http://www.wipo.int/amc/en/domains/rules/cctld/expedited.html> <visited 12/27/2013>. See generally <http://www.state.gov/documents/organization/5965.pdf> <visited 12/26/2013>.

¹²⁷ See *FINRA Regulatory Notice* 13-40 (Nov. 2013), announcing new guidance and procedures for e-discovery, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p386572.pdf> <visited 12/26/2013>.

¹²⁸ *Id.* See also, Oremus, *supra* n. 92 (Dick Tracy watch), <http://gizmodo.com/5994737/here-are-google-glass-tech-specs-glasses> <visited 12/24/2013>, and <http://www.bloomberg.com/news/2013-10-24/samsung-pursuing-glasses-that-answer-calls-in-google-challenge.html> <viewed 12/25/2013>.

¹²⁹ Friedman, *supra* n. 1, at 716.