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## New Challenges for Consumers and Businesses in the Cyber-Frontier: E-Contracts, E-Torts, and E-Dispute Resolution

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# ***FEATURE ARTICLE***

## **New Challenges for Consumers and Businesses in the Cyber-Frontier: E-Contracts, E-Torts, and E-Dispute Resolution**

*John W. Cooley*<sup>1</sup>

### **Introduction**

The purpose of this article is to describe the types of e-contract and e-tort disputes that online buyers and sellers of products and services should expect to encounter in e-commerce.<sup>2</sup> The article additionally addresses important considerations in choosing between traditional litigation and methods of alternative dispute resolution to resolve e-disputes.<sup>3</sup>

### **I. The E-Revolution and Its Implication for E-Dispute Resolution**

The Industrial Revolution transformed the world from agrarian-based societies to modern industrialized nations. The Electronic Revolution, or "E-Revolution," may have an even greater impact on the world than the Industrial Revolution.<sup>4</sup> It most definitely will have a faster impact. Consider how long it took for these technologies to be used by 50 million people:

Radio – 38 years

Television – 13 years

Cable television – 10 years

The potential of the Internet for commerce began to be realized about five to six years ago.<sup>5</sup> It is estimated that in those first five years over 200 million commercial users have connected to the Internet in more than 100 countries worldwide.<sup>6</sup> Today, there are approximately 15 million sites worldwide.<sup>7</sup> The U.S. Commerce Department estimates that by 2005, there will be more than one billion commercial users worldwide. By that same year, it is estimated that e-commerce will generate \$3.2 trillion in revenue.<sup>8</sup> The growth of Internet use is unparalleled by usage of any other communication or commercial innovation in history.

This enormous quantity of commercial transactions is bound to generate millions of disputes and much new thinking about how to resolve them efficiently and effectively. Some traditional legal concepts and old ways of doing things may have to be discarded in favor of more cyber-apropos methods. The newer and faster ways to conduct commerce via the Internet will also present a wide variety of risks and exposures for companies and consumers alike. Traditional insurance policies may not adequately address these new types of exposures. Lawyers and their clients need to focus on some of the new legal issues that may arise in e-contract and e-tort and insurance coverage disputes. They may also need to consider new ways of resolving these disputes in order to best satisfy the economic and business interests of their clients.

## **II. E-Contracts**

From basic contract law, standard contracts are formed when an offer is made and accepted and some form of consideration is exchanged. Consideration is a benefit – some satisfaction of an interest – which a party receives which reasonably and fairly induces the party to make the contract. Problems in formation can render contracts void, voidable, or unenforceable. In addition to

the terms of the contracts themselves, statutory and common law principles guide the interpretation of contracts. Also assisting in interpretation of commercial contracts is the Restatement of Contracts, published by the American Law Institute and the Uniform Commercial Code ("UCC"), a body of statutory law that has been adopted by nearly every state.<sup>9</sup> Article 2 of the UCC speaks to principles governing the sale of goods and is helpful when addressing the electronic sales of tangible goods. It provides little guidance, however, for the sale of services and other intangibles exchanged over the Internet.

Several legal issues may arise in e-contracts that are not fully addressed by traditional notions of contract law.<sup>10</sup> For example, in traditional contract law, the mailbox rule provides that an offer is accepted at the time of mailing an acceptance.<sup>11</sup> It is not known whether or how this applies to e-contracts. What if a seller places a general offer to sell and several intended respondents accept by email? Assume that the e-mail of the first to respond is diverted through no fault of that e-mailer and arrives to the offeror last. Who is entitled to buy, the first to send the e-mail or the e-mailer whose e-mail is received first by the seller? The rule relating to faxes is that acceptance occurs when the fax is received, not when it is sent.<sup>12</sup> Should the fax rule apply?<sup>13</sup>

How do you verify the authenticity of an electronic signature?<sup>14</sup> How can you prove that an electronic signature has been forged?<sup>15</sup>

How do you prove or disprove the integrity of a document? How do you prove that electronic document was unilaterally modified after it has been formally executed? What steps does a company take to ensure that its electronic documents are securely stored?

Are clickwrap agreements (I accept; I agree) legal?<sup>16</sup> To what extent are they enforceable – especially since no signature is required, and since no paper record is produced?<sup>17</sup> What if the terms and conditions of the

clickwrap agreement are not on the web site and do not have to be viewed in order to assent?

The Uniform Computer Information Technology Act ("UCITA")<sup>18</sup> addresses some of these issues, but does not definitively resolve them.<sup>19</sup> That task will be left to the courts. The Act attempts to distinguish manifesting assent from an authentication – which is a good start.<sup>20</sup> But anonymity of web users is a problem that does not seem to be completely resolved by the Act. One means of manifesting assent under the UCITA is by electronic agent.<sup>21</sup> Under the Act, an electronic agent manifests assent to a record or term if, after having an opportunity to review it, the electronic agent "engages in operations that in the circumstances indicate acceptance."<sup>22</sup> Lawyers will predictably have a field day with this principle.

Typically, an electronic agent ("EA") can create a contract without human involvement. An EA is a software program that can be programmed to automatically reorder supplies or renew contracts at set intervals. It can also be instructed to do mundane tasks like mining the web to find the cheapest office supplies and ordering them. An EA or similar electronic device can automatically accept the offer of a contract as long as certain conditions are met.

An EA can create problems with respect to clickwrap agreements. It can be programmed to place a standard offer containing standard contract language. However, it cannot analyze a clickwrap agreement to determine whether it implies the same set of conditions. The use of an EA raises many contract law issues for courts:

- Can an EA legally be a party to a contract?
- Is an EA a legal agent of the party?
- Can the programmer be a party to a contract or a party to litigation about the contract?
- If an EA accepts the terms and conditions of a clickwrap agreement, is a contract created?

Apparently, under UCITA, an EA and a human can enter a valid contract.<sup>23</sup> However, if the human adds terms to the contract and has reason to know that the EA would not comprehend the changes, the contract is deemed formed without the additional terms.<sup>24</sup> Unreliable contracts place greater risk of loss on any contracting party and impede full use of the Internet. Consumers and businesses (as sellers and buyers) can feel more comfortable with forming online contracts if they stay abreast of evolving legislation, obtain good legal advice, and keep current on technology that enhances the effectiveness of online contracting.

### **III. E-Tort and Insurance Coverage Disputes**

An area of concern for many e-commerce businesses is that standard commercial general liability ("CGL") policies are unlikely to cover most cybertorts. This should be a concern of consumers as well as online businesses. Examples of typical cybertorts include: a hacker invading a business's website and obtaining consumers' personal information for other uses; a business libeling another business by information posted on its website; consumers contracting a data-destroying computer virus when they attempt to link from one business site to another.<sup>25</sup> The lesson here for online businesses and their lawyers is to read CGL insurance policies carefully and contact the insurance company or insurance agent, as appropriate, to clarify coverage and negotiate new policies if necessary.

Insurance companies normally issue CGL policies to cover unexpected and unintended occurrences or claims, arising out of property damage, personal injury or advertising injury.<sup>26</sup> From the policyholder's point of view, although they may have specialist policies to cover specific risks, policyholders need CGL policies to cover potential liability to third parties (such as consumers). Traditional CGL claims include those alleging liability for

premise damages or for alleged negligence of a policyholder in manufacturing a product that causes injury to a third party. In the Internet environment, policyholders may find themselves subject to third party suits for a variety of alleged injuries, which may or may not be covered under their existing policies.

CGL policies are either occurrence or claims made.<sup>27</sup> Internet businesses need to determine which type of policy best suits their needs for the broadest coverage within their insurance budgets. Occurrence policies provide coverage for any injury which occurs during the policy period. The date of the actual injury or damage triggers coverage. With a claims-made policy, on the other hand, the date on which the policy holder or insurer receives the claim triggers the coverage question and – this is important – and the claim will be deemed coverable only if it is received within the policy period. Internet businesses who opt for an occurrence policy may have some concern that a substantial injury occurring to a third party before a policy is purchased will not be deemed covered. This could be a serious concern in light of the short life span of some e-commerce and technology companies operating in the e-commerce industry.

The definition of “occurrence” in a CGL policy should be carefully examined. Many CGL policies treat multiple exposures as a single occurrence where the exposure or injury results from the same “harmful conditions.”<sup>28</sup> In the Internet context, this could mean that a single error on a web page, in a database, or in a computer chip could be treated as a single occurrence, even where multiple injuries to a variety of claimants results. This might allow an argument for an Internet business that would want to bring consumers’ delayed claims within the coverage of a policy. Or, in order to limit its exposure, an insurance company may contend that all claims are part of a single early occurrence where coverage is limited and insufficient.

Definitions of “property damage” in CGL policies

usually include the term "tangible property."<sup>29</sup> Courts have generally held that while microchips, diskettes and other component parts are tangible, the information stored on them is not.<sup>30</sup>

Online businesses and their lawyers should also carefully review policy exclusions. Contractual liability exclusions are common in standard commercial general liability policies. Most such provisions exclude coverage for liability assumed by policyholders via contract.<sup>31</sup> Thus, if companies have links between websites to provide joint services or products, and one of them contractually assumes all tort liability for the joint venture, it is quite likely that the policyholder company would not be covered for any tort liability of its partner.

Most of the litigation arising out of e-commerce to date has concerned copyright infringement, licensing of software, and the dissemination of private information in cyberspace. While these types of torts are apparently covered under the definition of "advertising injury" – a typical covered risk in CGL policies – lawyers representing e-commerce companies should know that certain standard CGL exclusions may prevent coverage. One particular exclusion to watch for is one that reads to the effect: "This insurance does not apply to an offense committed by an insured whose business is advertising, broadcasting, publishing, or telecasting."<sup>32</sup> Theoretically, any policyholder disseminating information about its products and services by means of its own website is arguably in the business of publishing and therefore might not be covered for torts arising from the use of its website.

Notice requirements are also important items for lawyers to examine in their clients' CGL policies. Many CGL policies require policyholders to report or give notice of losses "as soon as practicable."<sup>33</sup> This language is vague and gives wide latitude to both insurers and policyholders to argue for and against the timeliness of notice. Some courts have found notice untimely where



there has been a delay of only a few days.<sup>34</sup> In e-commerce, events move quickly so that if injury is not detected timely and reporting is not timely done, consequential damages may occur. If a policyholder negligently delays reporting a loss or an occurrence injurious to a third party, and further injury occurs, a court may find that the policyholder company itself, not the insurer, is liable or that the insurer is liable for only part of the loss.

Finally, lawyers should be aware that some recently issued CGL policies actually contain a specific exclusion for liability arising out of electronic communication such as e-mail and the Internet, as well as network transmissions.

#### **IV. Utility of Traditional Litigation for E-disputes**

For several reasons, consumers and online businesses should carefully examine the appropriateness of using traditional court litigation to resolve e-commerce disputes. Reasons to take special care in regard to traditional court litigation involve considerations of jurisdiction,<sup>35</sup> forum,<sup>36</sup> discovery,<sup>37</sup> and experts.<sup>38</sup>

##### **A. Jurisdiction**

The prospect of millions of commercial transactions and related disputes occurring daily across state lines and national boundaries raises the specter of difficult issues as to the appropriate jurisdiction to file or defend against a claim. Determining which court – local, state, or federal, or indeed which judicial system in which country – a complaint should be filed will, in many cases, consume much attorney time and expense.<sup>39</sup> After determining the judicial system, then other complex legal questions might come into play. For example, whose laws should apply (the jurisdiction of the buyer or

the seller)?<sup>40</sup> The answer to this question may be particularly problematic where the substantive contract or tort laws of one or more foreign countries may be involved and conflict with each other and/or with those of the United States.<sup>41</sup> If the dispute occurs transnationally, language differences might exist that would require the hiring of a local attorney to proceed in court, thereby increasing the costs of litigation.

## **B. Forum**

If legal research determines that any one of several forums are appropriate within a particular jurisdiction, then one must decide which forum would be the optimal one in which to litigate.<sup>42</sup> This decision may turn on which forum has law that most favors your legal position at the time of prosecuting or defending against an e-contract or e-tort claim. While legal precedent in e-commerce is in its early states of development, the choice of forum may be easily reached. It may become much more difficult, however, when more precedent is available in cases having different shades of facts. Appellate court decisions involving e-commerce cases might be unpredictable. There may also be a significant issue as to whether a judge alone or a jury would be more advantageous to hear and decide the case. Traditional reasoning in making choices between a jury or judge – indeed between filing in state or federal courts – may not be helpful in e-commerce disputes. It might be more advantageous to opt for a state court jury in a jurisdiction where the jury pool is young and the jurors are computer savvy – instead of filing in federal court traditionally considered to be a better forum. In federal court, there may be a higher risk of having a judge with no computer knowledge or an older jury pool where the potential is for resistance or outright hostility to Internet use. On the other hand, federal courts are normally more efficient in their operation.<sup>43</sup> For example, Judge Penfield Jackson

was able to bring the Microsoft case to trial in less than a year after the government's complaint was filed. Defendants wanting to delay a decision in an e-commerce case may want to choose the slower or slowest case-processing forum.

### **C. Discovery**

Discovery can be a minefield for consumers and online businesses. E-mails and databases, even when created in ongoing litigation, are often discoverable.<sup>44</sup> E-mails serve as a discoverable record of conversations and are normally subject to discovery.<sup>45</sup> The Rules of the Illinois Supreme Court, for example, define the word "document" to include "all retrievable information in computer storage."<sup>46</sup> Merely passing documents through a lawyer is usually insufficient protection from disclosure for e-commerce documents. The attorney-client privilege will normally not attach in such situation. Also, if the client seeks and receives business rather than legal advice, related communications, or parts of them, may not be protected by the attorney client privilege.<sup>47</sup> Depending on the circumstances of the lawsuit, a defendant business in an e-commerce dispute might be ordered to disclose confidential business information under court seal. Attorney work product immunity applies to documents prepared by the lawyer in anticipation of litigation.<sup>48</sup> However, where a party has proved that there are no other sources for the documents sought, courts have sometimes ordered the attorney's work product produced.<sup>49</sup> This might include instructions or codes describing how electronic information should be stored or protected from disclosure. E-mail and other electronic evidence might also create a troublesome "paper trail" for any witness.

## D. Experts

In a large percentage of e-commerce cases, the parties will have to hire computer or software experts to prove their cases. Guidelines recently established by the U.S. Supreme Court might pose a substantial hurdle for parties in selecting an appropriate expert witness for an e-commerce case. In *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court held that whether expert testimony would be relevant and reliable would be guided by an evaluation of four factors: (1) testing; (2) peer review; (3) error rates; and (4) "acceptability" in the relevant scientific community.<sup>50</sup> In *Kumho Tire Co v. Carmichael*, the Supreme Court held that the *Daubert* "gatekeeping" exercise should be applied to all expert testimony.<sup>51</sup> If an expert is selected in an e-commerce case, care must be taken to assure that the expert's opinion will be based upon repeatable testing, that any technological testimony is peer reviewed, and that the expert's testimony is accepted in the particular technology community of which the expert is a member.<sup>52</sup> *Daubert* may increase the time and expense of hiring an expert in an e-commerce case.

## V. Utility of Alternative Dispute Resolution for E-commerce Disputes

There are many ways to resolve disputes besides resorting to the traditional court system. The most popularly recognized alternative dispute resolution ("ADR") processes are mediation and arbitration, but there are many others.<sup>53</sup> Mediation is a process in which a disinterested third party (or "neutral") assists the disputants in reaching a voluntary settlement of their differences through an agreement that defines their future behavior.<sup>54</sup> The essential ingredients of classical mediation are: (1) its voluntariness – a party can reject the process or its outcomes without repercussions; and (2) the mediator's neutrality, or total lack of interest in the outcome.<sup>55</sup> There

are two principal models or styles of mediation: facilitative and evaluative.<sup>56</sup> In a facilitative mediation, the mediator facilitates communication between the parties and in a non-directive way helps them reach a mutually satisfactory solution.<sup>57</sup> In an evaluative mediation, in contrast to a facilitative one, the mediator plays an active role in helping the parties to reality test, to accurately assess the strengths and weaknesses of their respective cases, and to predict what a likely result of an adjudication of the matter might be.<sup>58</sup> Often, the parties request the evaluative mediator to provide them with an opinion of the fair settlement value of the case or with a recommended solution.<sup>59</sup>

Arbitration, on the other hand, is a process in which one or more neutrals render a decision after hearing arguments and reviewing evidence.<sup>60</sup> In arbitration, the parties to a dispute relinquish their decision-making right to the neutral party, or arbitrator, who renders a decision for them.<sup>61</sup> By pre-agreement, the neutral's decision is either binding or non-binding.<sup>62</sup> If binding, the neutral's decision is final, and the winning party may enforce it against the losing party.<sup>63</sup> If non-binding, the neutral's decision is advisory in aid of settlement.<sup>64</sup>

Attorneys and their clients now have the ability, working with their opposing parties and counsel to design the appropriate ADR process best suited to the needs of the parties and to the nature of the dispute.<sup>65</sup> Because of the particular needs of the e-commerce environment to resolve disputes swiftly and because of the general ineffectiveness of court systems to provide efficient and economic justice, ADR is normally the best choice to resolve any type of e-commerce dispute. A basic advantage of the use of ADR processes is that most of them can be used online.<sup>66</sup> This has great significance in the area of interstate and international e-dispute resolution.

At this writing, there are approximately 15 companies that provide online dispute resolution services

through websites.<sup>67</sup> Some of these dispute resolution providers require parties to submit electronic settlement offers to a neutral website that uses software to compare the amounts of the confidential bids submitted by them. If the bids are within a certain range, the software will resolve the matter by splitting the difference. If the bids are far apart, the software keeps the offers secret and negotiations can continue in the future.<sup>68</sup> At least one company assembles mock juries online to provide lawyers feedback as to the merits of their cases.<sup>69</sup> At least three online companies provide services to resolve cyberspace domain name disputes.

Some of the basic alternative processes for resolving disputes are discussed below.

**Co-Mediation.** An ADR hybrid that has gained widened use over the past few years is co-mediation.<sup>70</sup> Simply defined, co-mediation is a process in which more than one person serves as a mediator.<sup>71</sup> It involves the concepts of team mediation and interdisciplinary problem solving, and it can be tailored to the needs of a particular dispute.<sup>72</sup> Depending on the ethnic, cultural, gender, or age characteristics of the disputants, two or more mediators having characteristics matching those of the adverse parties may be able to facilitate rapport-building and communication more easily than a single mediator with whom the disputants have difficulty identifying.<sup>73</sup> Multiple mediators are commonly used in complex disputes where there are multiple parties, sometimes on each side of the case, and an intricate configuration of claims, cross-claims, and counter-claims.<sup>74</sup>

**High-Low Arbitration.** A form of arbitration that is becoming widely used in many types of commercial disputes is high-low arbitration, also called bracketed arbitration.<sup>75</sup> It is commonly used where liability is not an issue, though that condition is not a prerequisite.<sup>76</sup> In this process, the parties negotiate to impasse, and then proceed to arbitration.<sup>77</sup> Plaintiff's last settlement demand and defendant's last offer establish a bracket defining the

limits of the arbitrator's award in the case.<sup>78</sup> The arbitrator conducts the arbitration without knowledge of the endpoints of the bracket.<sup>79</sup> The parties are free to make any evidence based arguments they wish regarding damages, and assuming that the arbitrator determines the defendant to be liable, he or she makes a decision on damages as if it were ordinary arbitration.<sup>80</sup> When the arbitrator renders an award, neither party will be liable for a figure outside the agreed-to bracket.<sup>81</sup> For example, assume that in a particular case, the plaintiff last demand was \$100,000, and the defendant's last offer was \$50,000. The parties then proceed to an arbitration hearing at which the plaintiff argues entitlement to damages in the amount of \$150,000, and the defendant argues that the plaintiff is entitled, at most, to \$20,000. If the arbitrator renders an award of \$125,000, the defendant will pay no more than \$100,000. If the arbitrator renders an award of \$35,000, the plaintiff will receive \$50,000. If the arbitrator renders an award of \$75,000, the plaintiff will receive \$75,000 because that figure falls within the pre-agreed bracket.

There are several advantages to high-low arbitration. First, it reduces the risk of allowing a third party to decide your fate.<sup>82</sup> Going into the arbitration, both parties know the lower and upper limits on the award. Secondly, it encourages vigorous bargaining, the plaintiff wanting to establish the highest minimum award possible, and the defendant seeking to fix the lowest maximum award possible.<sup>83</sup> This situation usually forces the parties to find a reasonable settlement range and, at the same time, a reasonably narrow bracket.

**Baseball Arbitration.** Baseball arbitration is a type of "last best offer" arbitration in which the disputing parties agree in writing to negotiate to only one position—their last and best offer—and then submit the dispute to arbitration.<sup>84</sup> In baseball arbitration, the arbitrator must choose the last best offer of one of the parties and may not find a different result in any circumstance.<sup>85</sup> This type

of last best offer arbitration had its origin in player salary negotiation in major league baseball, but now is an ADR method adaptable to practically any type of dispute involving a monetary solution.<sup>86</sup> A quick decision is a valuable feature of the classic version of baseball arbitration.<sup>87</sup> The arbitrator must pick one figure or the other and is encouraged to render his or her decision within twenty-four hours.<sup>88</sup> The decision is binding, and there can be no compromise.<sup>89</sup> Also, the arbitrator may give no explanation for the decision.<sup>90</sup> The risk of having to resort to the process often convinces parties to resolve their monetary differences.<sup>91</sup>

**Mini-trials.** When two or more businesses are engaged in an e-dispute, the mini-trial might prove to be a helpful resolution tool.<sup>92</sup> The mini-trial, as apparent from its name, is an abbreviated trial or hearing.<sup>93</sup> This method of dispute resolution is a relatively new approach.<sup>94</sup> It has two major advantages. First, mini-trials require much of the discovery process to be curtailed.<sup>95</sup> Second, mini-trials involve high-level businesspersons in the dispute resolution process early.<sup>96</sup> Because the discovery is limited, and because the hearing itself is, in fact, a miniature hearing, this method of dispute resolution can be dramatically less expensive than traditional litigation. However, compared to other methods of dispute resolution, the mini-trial is relatively more expensive.<sup>97</sup> The mini-trial method is best suited to large disputes and complex litigation.<sup>98</sup> Cases involving breaches of complex contracts, particularly if there are complex technical issues; patents cases; antitrust cases; major commercial cases; and products liability cases may be most appropriate for mini-trial resolution.<sup>99</sup> This is because the panel asked to decide the case will include the business experts in the field – a high-level management executive of each party.<sup>100</sup>

Knowing which ADR process to use in light of the nature of the dispute and people involved is the skill that every lawyer will have to develop in order to effectively assist clients in resolving e-disputes.<sup>101</sup>



## VI. Conclusion

As we proceed into the twenty-first century with the availability of instantaneous communication and the prospect of ever-expanding, international consumerism, the world's need for practical and efficient dispute resolution methods will increase exponentially. Litigation will continue to have its place, particularly in disputes in which binding precedent is necessary to define the law; but increasingly, alternative methods will play a significant role in resolving consumer and commercial disputes. The utility and effectiveness of these alternative dispute resolution methods will only be limited by the innovation of the consumers, the business people, and the lawyers who use them.

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## Endnotes

1. John W. Cooley is a former United States Magistrate and commercial litigator in Chicago. He is currently a full-time mediator and arbitrator of commercial disputes and is a founding member of Judicial Dispute Resolution, Inc. in Chicago. This article is an adaptation of a presentation he made at the Direct Sellers Education Foundation's International Consumer Conference: "Online Transactions & Dispute Resolution" in Chicago in June, 2000. This author would like to acknowledge the excellent research assistance provided by Christopher Wadley and editing assistance provided by Charles M. Watts, both Loyola University Chicago law students, who helped convert this speech into an article for presentation.
2. For purposes of this article, "e-contract" means a contract for products or services entered into by a consumer (individual or business) and an online business in a transaction occurring on the Internet. "E-tort" means a harm to a person or to property occurring as a result of use of the Internet. "E-commerce" refers to sales or business transactions affected by means of Internet communication.
3. For purposes of this article, "e-dispute" means a dispute arising out of online business transactions or online usage. "E-dispute"

resolution refers to solving e-disputes face-to-face, by telephone, by use of the Internet, or by a combination of these means.

4. See Sharon Pian Chan, *The Internet Effect: Addiction Tales Overblown, Says Northwesterners*, SEATTLE TIMES, Sept. 24, 2000, at A1, available at 2000 WL 5556028. See also @RISK: INTERNET AND E-COMMERCE INSURANCE AND REINSURANCE LEGAL ISSUES (Robert Hemmesfaur, ed., 2000).

5. See Pian Chan, *supra* note 4, at A1.

6. Grace Chng, *Widen the Web*, COMPUTER TIMES, Dec. 8, 1999, available at 1999 WL 26717059.

7. Gail Stolzenburg, *E-Business in Minerals Manufacturing*, ROCK PRODUCTS, Oct. 30, 2000, available at 2000 WL 14067726.

8. Tricia McGinnis, *Old Dogs, New Tricks: Established Companies May Be Better Positioned Than New Dot-Coms to Sell in an Online World. Here Are Some Nimble But Cheap Old-Timers*, FORBES, Oct. 30, 2000, at 394, available at 2000 WL 25963897.

9. EDWARD J. MURPHY ET AL., STUDIES IN CONTRACT LAW 5-12 (5th ed. 1997).

10. See generally, Daniela Ivascanu, *Legal Issues in Electronic Commerce in the Western Hemisphere*, 17 ARIZ. J. INT'L & COMP. LAW 219 (2000).

11. RESTATEMENT (SECOND) OF CONTRACTS: TIME WHEN ACCEPTANCE TAKES EFFECT § 63(a) (1981) ("an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror").

12. RESTATEMENT (SECOND) OF CONTRACTS: ACCEPTANCE BY TELEPHONE OR TELETYPE § 64 ("Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other").

13. See generally Paul Fasciano, Note, *Internet Electronic Mail: A Last Bastion for the Mailbox Rule*, 25 HOFSTRA L. REV. 971 (1997) (arguing that, because e-mail is neither substantially instantaneous nor two-way, the mailbox rule should apply to acceptances communicated via e-mail).

14. An electronic signature is "a mathematically generated, probabilistically unique, data string that can be associated with digitized information in order to demonstrate the authenticity of that information and the identity of the signer." A. Michael Froomkin, *Article 2B as Legal Software for Electronic Contracting – Operating System or Trojan Horse*, 13 BERKELEY TECH. L.J. 1023, 1027 (1998). On June 30, 2000, President Clinton signed into law the "Electronic Signatures in Global and National Commerce Act." As a result of this legislation, online contracts have the same legal force as equivalent paper contracts. Mary Mosquera, *President Makes Digital Signatures Legal*, TECHWEB NEWS, June 30, 2000.

15. See generally W. Everett Lupton, Comment, *The Digital Signature: Your Identity by the Numbers*, 6 RICH. J.L. & TECH. 10 (1999) (discussing the form and function of electronic signatures as well as authentication techniques).

16. Clickwrap agreements are web pages that prevent consumers from proceeding without clicking on an "I agree" or "I decline" button at the bottom of an agreement. Jerry C. Liu et al., *Electronic Commerce: Using Clickwrap Agreements*, 15(12) COMPUTER LAW. 10, 10 (1998). They are typically used before allowing consumers to download software programs marketed on a website or before allowing consumers to browse through a website. *Id.* The term "clickwrap" agreement originates from the term "shrink wrap" agreements which routinely accompany software.

17. See, e.g., *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (holding that personal jurisdiction can be found by participation in a clickwrap agreement where there is purposeful availment); *Hotmail Corp. v. Van\$ Money Pie*, 47 U.S.P.Q.2d BNA 1020 (N.D. Cal. 1998) (holding a clickwrap agreement enforceable where a user agrees online to the terms of service for the use of an e-mail account).

18. UCITA was approved and recommended for enactment at the Annual Conference of the National Conference of Commissioners on Uniform State Laws in July, 1999. For a time what is now UCITA was going to become a new article of the UCC, Article 2B. Originally, the American Law Institute ("ALI") was involved in the UCITA drafting process. As the drafting process neared its end, ALI ceased to be part of the effort. As a result, UCITA is no longer proposed as a new article of the UCC. Virginia became the first state to enact UCITA in March 2000 (with an effective date of July 1, 2001); Maryland enacted it in April 2000 (with an effective date of October 1, 2000). See generally, Charles H. Fendell and Dennis M. Kennedy, *UCITA is Coming!!! Part One: Practical Analysis for Licensor's Counsel*, 17(8) COMPUTER LAW. 3 (2000).

19. U.C.I.T.A. (1999).

20. *Id.* at §§ 107, 112 (1999).

21. Under UCITA, an electronic agent is defined as “a computer program, or electronic or other automated means, used by a person to initiate an action, or to respond to electronic messages or performances, on the person’s behalf without review or action by an individual at the time of the action or response to the message or performance.” *Id.* at § 102 (a)(28).

22. *Id.* at § 112(b)(2).

23. *Id.*

24. *Id.* at § 112 cmt. 3c (“Manifesting assent requires an opportunity to review. Subsection (e)(2) provides that, for an electronic agent, that opportunity occurs only if the record or term was presented in such a way that a reasonably configured electronic agent could react to it. The capability of an automated system to react and an assessment of the implications of its actions are the only appropriate measures of assent”).

25. Ineffective security of information and Internet communication systems is a major impediment to e-commerce. Security involves the protection of availability, confidentiality, and integrity of internet communication systems and the data transmitted and stored on them. Availability is the characteristic of such systems to be accessible and to function on a timely basis in the required manner. Confidentiality means protection of data and information from disclosure to unauthorized persons, entities, and processes. Integrity means that the data and information is accurate and complete, unmodified and unaltered. Daniela Ivascanu, *supra* note 10, at 226.

26. Jeffrey W. Stempel, *A Mixed Bag for Chicken Little: Analyzing Year 2000 Claims and Insurance Coverage*, 48 EMORY L.J. 169, 196 (2000).

27. See generally JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES 2.06(g) (1999) (regarding the claims-made and occurrence triggers generally). See also *id.* at 14.09(a) (regarding claims-made and occurrence triggers of liability insurance).

28. The majority of federal and state courts define an occurrence as encompassing all injuries and damages stemming from the same cause. Michael P. Sullivan, Annotation, *What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer’s Liability*

*to a Specified Amount Per Accident or Occurrence?*, 64 A.L.R. 4th 668, 673 (1988). See also *Hyer v. Inter-Insurance Exch. of the Auto. Club of So. Cal.*, 246 P. 1055 (Cal. Ct. App. 1926) (applying the causation view). A minority of courts base the number of occurrences on the effect, which usually means the event triggering liability. Sullivan, *supra*, at 673-74.

29. Tangible property is “[p]roperty that has physical form and substance and is not intangible. That which may be felt or touched....” BLACK’S LAW DICTIONARY 1456 (6th ed. 1990).

30. See, e.g., *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 820-21 (3rd Cir. 1994) (stating that “by making “tangibility” the touchstone of coverage, the CGL excludes a significant class of property for which liability insurance reasonably could be provided — property like system designs or computer software.”); *Retail Sys., Inc. v. CNA Ins. Cos.*, 469 N.W.2d 735 (Minn. Ct. App. 1991) (holding that a computer tape that stored information was tangible property covered under a liability policy; however, the court limited the coverage to the considerable value of the computer tape as a storage medium, disallowing recovery for the value of the data it stored).

31. See, e.g., *Sapp v. State Farm Fire & Cas. Co.*, 226 Ga. App. 200, 203-04 (Ga. Ct. App. 1997) (holding that CGL policy excluded liability on contractual obligations).

32. INSURANCE SERVICES OFFICE, INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM 4 (1992) (stating that coverage does not apply to “advertising injury arising out of. . . [a]n offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting”).

33. SUSAN J. MILLER & PHILIP LEFEBVRE, MILLER’S STANDARD INSURANCE POLICIES ANNOTATED 415-16 (4th ed. 1995). For example, the standard commercial general liability (“CGL”) form promulgated by the Insurance Services Office, Inc., provides:

2. Duties in the Event of Occurrence, Offense, Claim or Suit.
  - a. You must see to it that we are notified as soon as practicable of an “occurrence” or offense which may result in a claim....
  - b. If a claim is made or “suit” is brought against any insured, you must:
    - (1) Immediately record the specifics of the claim or “suit” and the date received; and
    - (2) Notify us as soon as practicable. You must see to it that we receive written notice of the claim or “suit” as soon as practicable.

- c. You and any other involved insured must:  
(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit."

34. *See, e.g.*, Haas Tobacco Co. v. American Fidelity Co., 123 N.E. 755, 755 (N.Y. 1919) (ten day delay); Gullo v. Commercial Casualty Ins. Co., 235 N.Y.S. 584, 588 (App. Div. 1929) (thirteen days); Rooney v. Maryland Casualty Co., 67 N.E. 882, 883 (Mass. 1903) (twenty-two days).

35. *Infra* Part IV.A.

36. *Infra* Part IV.B.

37. *Infra* Part IV.C.

38. *Infra* Part IV.D.

39. Indeed the law in this area is far from settled, especially when considering personal jurisdiction and the long-arm statutes of states. For a good overview of traditional notions of personal jurisdiction, consult John A. Lowther IV, Comment, *Personal Jurisdiction and the Internet Quagmire: Amputating Judicially Created Long-Arms*, 35 SAN DIEGO L. REV. 619, 623-29 (1998). The threshold test is whether a defendant has the required "minimum contacts" with a forum state as to render the defendant amenable to the forum's courts. *Id.* at 625-28. It has been held that electronic contacts with a forum state may be considered in finding personal jurisdiction over a party, despite the intangibility of these contacts. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264-1265 (6th Cir. 1996) (citing *Plus System, Inc. v. New England Network, Inc.* 804 F.Supp. 111, 118-119 (D. Colo. 1992) (finding personal jurisdiction on the basis of a nonresident defendant's use of plaintiff's computer system); *cf.* *United States v. Thomas*, 74 F.3d 701, 706-07 (6th Cir. 1996) (upholding an obscenity conviction arising out of the computer transmission of images across state lines, even though the defendant claimed that they were intangible)). Generally, courts have recognized a spectrum of Internet contacts. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). At one end of the spectrum are cases in which "a defendant clearly does business over the Internet. . . [by] enter[ing] into contracts with residents of a foreign jurisdiction. . ." *Id.* At the other are situations where a defendant has "simply posted information on an Internet website which is acces-

sible to users in foreign jurisdictions." *Id.* The passive maintenance of a Web site accessible to foreign jurisdictions is the least indicative of jurisdiction. Roger J. Johns, Jr. & Anne Keaty, *Caught in the Web: Websites and Classic Principles of Long Arm Jurisdiction in Trademark Infringement Cases*, 10 ALB. L.J. SCI. & TECH. 65, 120 (1999). See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419-20 (9th Cir. 1997) (holding that the maintenance of a purely passive website accessible to the forum state, without any other conduct aimed at the forum state, is insufficient to confer jurisdiction over the site operators). *But see* *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (holding that the defendant subjected itself to jurisdiction in the forum state by maintaining a website and an 800 number which were accessible to persons in all states). However, the likelihood of finding jurisdiction increases "as the nature of activity moves from passivity, through increasing interactivity, to specifically targeted activities." Johns, Jr. & Keaty, *supra*.

40. Traditional choice of law principles are challenged in Internet cases because the Internet is "not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of computers." Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547, 575 (1999) (quoting *CompuServe v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1018 (S.D. Ohio 1997). Under the UCC, the buyer and seller may agree on which state's laws will apply to any dispute, so long as the state chosen bears a reasonable relation to the state. U.C.C. § 1-105 (1998). Thus, this issue may be avoided by agreeing on the applicable law at the time of purchase. However, if such a provision is contained in a "clickwrap" agreement, is it valid? See *supra* Part II. The UCITA also allows parties to choose the applicable law. U.C.I.T.A. § 109(a) (1999). In the absence of such an agreement, the UCITA attempts to resolve the issue with the following language:

- (1) An access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor is located when the agreement is made.
- (2) A consumer contract that requires delivery of a copy on a tangible medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer.
- (3) In all other cases, the contract is governed by the law of the jurisdiction having the most significant relationship to the transaction.

U.C.I.T.A. §1.09(b).

41. Choice of law is “particularly difficult in the case of international computer networks where, because of dispersed location and rapid movement of data, and geographically dispersed data processing activities, several connecting factors could occur in a complex manner involving elements of legal novelty.” Dan L. Burk, *Patents in Cyberspace*, 68 TUL. L. REV. 1, 5 (1993) (quoting ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *Explanatory Memorandum*, in GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER DATA FLOWS OF PERSONAL DATA 13, 36 (1980)). Choice of law rules should facilitate commercial intercourse between jurisdictions and make international systems function well. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. D (1971). Three consequences of the absence of a proper choice of law regime are forum shopping, diminished predictability due to the difficulty in ascertaining what law will apply, and reduced deterrence because uncertainty as to the applicable law leads to inefficient risk taking. Helen Shin, *Oh, I have Slipped the Surly Bonds of Earth: Multinational Space Stations and Choice of Law*, 78 CALIF. L. REV. 1375, 1383-84 (1990).

42. For a comprehensive discussion of issues generally presented in “forum shopping” for the most advantageous court and law, please consult George D. Brown, *The Ideologies of Forum Shopping – Why Doesn’t a Conservative Court Protect Defendants?*, 71 N.C.L. REV. 649 (1993).

43. George T. Conway III, *The Consolidation of Multistate Litigation in State Court*, 96 YALE L.J. 1099, 110 (1987) (considering factors such as a state court’s caseload, experience, and rules of procedure in determining the optimum forum).

44. Carey Sirota Meyer & Kari L. Wraspir, *E-Discovery: Preparing Clients for (and Protecting Them Against) Discovery in the Electronic Information Age*, 26 WM. MITCHELL L. REV. 939, 941-44 (2000). See also *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1995 WL 649934, at 2 (S.D.N.Y. 1995) (“Today it is black letter law that computerized data is discoverable if relevant.”); 7 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 34.12[3][a], at 34-37 (3d ed. 1999) (“Computer records and other electronically stored data are clearly within the permissible scope of discovery.”).

45. *Id.* at 949-50.

46. ILL. SUP. CT. R. 201(b)(1).



47. *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) (holding that the attorney must give legal advice, not business advice, for a communication to be protected).

48. FED. R. CIV. P. 26(b)(3).

49. To fulfill the undue hardship requirement, and thus compel discovery of work product material, "a party must: try but be unable to obtain the information contained in requested documents without going to great lengths; lack knowledge of where else to obtain the information; or show that the information is completely unavailable elsewhere." Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 801 (1983).

50. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592-94 (1993).

51. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-50 (1999).

52. See generally Miles J. Vigilante, Note and Comment, *Screening Expert Testimony After Kuhmo Tire Co. v. Carmichael*, 8 J.L. & POL'Y 543 (2000).

53. Other processes include private judging, neutral expert-fact finding, minitrial, ombudsman, and summary jury trial. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION 4-5* (3d ed. 1999) (displaying a chart comparing the various dispute resolution techniques and their characteristics).

54. JOHN W. COOLEY, *MEDIATION ADVOCACY 2* (1996) [hereinafter *MEDIATION ADVOCACY*]. See also GOLDBERG, *supra* note 53, at 123.

55. *MEDIATION ADVOCACY*, *supra* note 54, at 2.

56. *Id.* at 18-20.

57. *Id.* at 18. See also GOLDBERG, *supra* note 53, at 124.

58. *MEDIATION ADVOCACY*, *supra* note 54, at 18-19. See also GOLDBERG, *supra* note 53, at 138-40 (considering the appropriateness of evaluative tasks in mediation).

59. *MEDIATION ADVOCACY*, *supra* note 54, at 18.

60. JOHN W. COOLEY & STEVEN LUBET, *ARBITRATION ADVOCACY 2* (NITA 1997) [hereinafter *ARBITRATION ADVOCACY*]. See also GOLDBERG, *supra* note 53, at 233-37.

61. *ARBITRATION ADVOCACY*, *supra* note 60, at 2.

62. *Id.*

63. *Id.*

64. *Id.*

65. GOLDBERG, *supra* note 53, at 337-57.

66. See generally Peter H. Ney, *The Internet Offers Alternative Dispute Resolution Options*, *COLO. LAW.*, May 29, 2000, at 75. Another significant benefit of online ADR is that the cost is minimal. *Id.* At Cybersettle.com, the initiating party pays a \$25 registration fee, and each party pays from \$100 to \$200 if the case is settled. The respondent is not charged if there is no settlement. *Id.*

67. See, e.g., CYBERSETTLE.COM, at <http://www.cybersettle.com> (2000); CLICKNSSETTLE.COM, at <http://www.clicknsettle.com> (2000); ICOURTHOUSE, at <http://www.i-courthouse.com> (2000); SETTLEONLINE, at <http://www.settleonline.com> (2000).

68. Ney, *supra* note 66, at 75.

69. At ICOURTHOUSE, two types of juries may be used. A "Peer Jury" case is open to the public. Anyone who registers can serve on a jury, ask questions of the parties, and render a verdict. Anyone with a dispute, whether the other side cooperates or not, can file a Peer Jury case. No lawyers or specialized knowledge is required. In contrast, a "Panel Jury" case is private. The parties choose their jurors from the jury pool by desired demographics, and the total number of jurors is limited. The jurors can deliberate in a chat room, and the parties or their attorneys can watch the deliberations. The case is only open to the parties and the selected jurors. The Panel Jury system can be used for mock trials, training purposes, or for private resolution of a case. ICOURTHOUSE, at [http://www.i-courthouse.com/main.taf?area1\\_id=front&area2\\_id=faqs](http://www.i-courthouse.com/main.taf?area1_id=front&area2_id=faqs) (2000).

70. *MEDIATION ADVOCACY*, *supra* note 54, at 164.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *See generally* ARBITRATION ADVOCACY, *supra* note 60, at 218-19; GOLDBERG, *supra* note 53, at 274-75.

76. ARBITRATION ADVOCACY, *supra* note 60, at 218.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*; GOLDBERG, *supra* note 53, at 275.

82. ARBITRATION ADVOCACY, *supra* note 60, at 218; GOLDBERG, *supra* note 53, at 275.

83. ARBITRATION ADVOCACY, *supra* note 60, at 218.

84. *See generally id.* at 219; GOLDBERG, *supra* note 53, at 274. Baseball arbitration is also known as "final-offer" arbitration. GOLDBERG, *supra* note 53, at 274.

85. ARBITRATION ADVOCACY, *supra* note 60, at 218; GOLDBERG, *supra* note 53, at 274.

86. ARBITRATION ADVOCACY, *supra* note 60, at 218.

87. *Id.*

88. *Id.*

89. *Id.*; GOLDBERG, *supra* note 53, at 274.

90. ARBITRATION ADVOCACY, *supra* note 60, at 218.
91. *Id.*; GOLDBERG, *supra* note 53, at 274.
92. *See generally* ARBITRATION ADVOCACY, *supra* note 60, at 224-26; GOLDBERG, *supra* note 53, at 281-86.
93. ARBITRATION ADVOCACY, *supra* note 60, at 224; GOLDBERG, *supra* note 53, at 281.
94. ARBITRATION ADVOCACY, *supra* note 60, at 224.
95. *Id.*; GOLDBERG, *supra* note 53, at 281.
96. ARBITRATION ADVOCACY, *supra* note 60, at 224; GOLDBERG, *supra* note 53, at 282-83.
97. ARBITRATION ADVOCACY, *supra* note 60, at 224-25.
98. *Id.* at 225.
99. *Id.*
100. *Id.*
101. For assistance in developing this skill, see "Hybrid ADR Process Selection Chart" in JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK* 259-63 (2000). *See also* GOLDBERG, *supra* note 53, at 290-305.

