



**Electronic Arbitration**

**Litigation and Dispute Resolution**

**Technology, Privacy, and eCommerce**

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Fifty percent of all litigants, at some point, believe their judge is an idiot.

At the end of a trial, disgruntled losers rarely blame themselves. More often than not, they conclude that the judge either made a mistake or is a moron.

Of course, the vast majority of judges are smart, rational professionals. However, they are a special kind of professional, with very thick skin. They are used to low, grumbling criticism. Because they deal with human foibles all the time, they are painfully aware of their own limitations.

If you had a choice, would you rather have a computer as your judge?

Consider, for example, the eBay electronic dispute resolution process. As an online marketplace, consisting mainly of casual sellers and buyers, conflicts are inevitable. Product quality may not be properly advertised or payments may be missing. For eBay to maintain its successful business model, it has to address these disputes promptly and fairly. Data from the company suggests that if buyers wait more than 14 days to resolve a dispute, they have only a three percent chance of using the service again.

To deal with these disputes quickly, eBay uses a highly automated self-service system it calls the Resolution Center. It starts with a simple questionnaire to help users understand the rules of eBay and the various ways they can resolve disputes amicably. When independent self-help is not possible, an automated system then helps facilitate the case, still limited to the parties involved. For cases beyond the capabilities of the system, a human being can step in to assist.

eBay tackles over 60 million cases a year using the Resolution Center. Data shows that even when

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participants lose a dispute, their use of eBay will increase after the experience.

With that kind of success as an example, should we consider using automated dispute resolution for civil claims? Professor Richard Susskind proposed that very idea. As the United Kingdom's leading expert on disruptive technology in the law, he led a panel to consider automated dispute resolution. The panel's report concluded unequivocally that online automation would dramatically improve litigant satisfaction and court efficiency in England and Wales.<sup>1</sup>

1 Online Dispute Resolution for Low Value Civil Claims, Online Dispute Resolution Advisory Group, Civil Justice Council (UK), February 2015.

Professor Susskind did not limit his advice to eBay-style self-help systems. He considered all forms of electronic resolution, including virtual solicitors and courtrooms. All the necessary technology is available. The only things missing are willing jurists and litigants.

Since these automated systems work for small civil disputes, they may also address high-value or complex litigation. The true barrier is not the amount at issue, but the willingness of the litigants to use an alternative model to solve disagreements themselves.

But should we go a step further? Should computers completely take the place of judges in real disputes? We could, theoretically, teach a computer to apply statutes or even interpret common law. They could decipher a complex fact pattern and compare the case on hand to thousands of precedents. Automated jurisprudence is possible.

Before you roll your eyes at the suggestion, consider the COMPAS system now used for criminal sentencing in Wisconsin. COMPAS stands for "Correctional Offender Management Profiling for Alternative Sanctions" and is a proprietary computer algorithm that judges and the state department of corrections use to implement criminal sentencing and reduce recidivism. Where a human being used to determine if a prisoner could benefit from alternative sentencing methods, now a computer recommends the appropriate sanction based on an analysis of the prisoner's history. Computers are not determining guilt, but they are helping set the punishment.

Earlier this year, in a breakthrough opinion, the Wisconsin Supreme Court sanctioned the use of COMPAS, with caveats, in a first for electronic jurisprudence.<sup>2</sup> You may think the future is a long way off, but if you are on eBay or stand as a defendant in the state of Wisconsin, tomorrow is already here.

2 *Wisconsin v Loomis*, 2016 WI 68.

So the next time you think the judge is an idiot, feel free to speak your mind. A computer won't take offense.

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