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Online dispute resolution

Cybercourts, the future of governmental online dispute resolution? Part 1

Bjorn Johansson

In Part 1 of this two-part article, Bjorn Johansson discusses the nature of the internet and how this impacts on the resolution of disputes occurring in the online environment. He looks at particular problems that arise with online disputes and their resolution in traditional legal fora or by ADR. He suggests the establishment of a Cybercourt system as a way to simplify dealing with disputes on the internet. In Part 2, which will appear in the next issue of the ADR Bulletin, he addresses legal, technological, practical and political issues to consider in establishing and functioning of a future Cybercourt. He then turns his attention to procedural issues and draws his conclusions about the desirability and practical likelihood of an internationally accepted Cybercourt system becoming a reality.

Introduction

The borderless nature of the internet and the principle of national sovereignty regarding jurisdiction have proven to be increasingly irreconcilable. This is because each state has its own private international law rules regarding jurisdiction and choice of law, while the internet is a global phenomenon.¹ During the last couple of years there have been cases both in Australia,² US,³ and other countries, where courts have tried to deal with the issues of jurisdiction and choice of law that the internet creates on a national level. By comparing cases between different nations one soon finds that the principles that have been established by the different courts regarding applicable forum are different not only between jurisdictions, but also in their interpretation in later decisions within the same jurisdiction. Even if parties may enter into an agreement on the internet regulating these issues, their agreement

may not always be valid due to how it came into force or depending on the parties themselves.⁴

There are also the questions of enforcement regarding commercial disputes and vindication regarding defamation cases. There is little use in winning a case if there is no possibility of enforcing one's right. A good example of this is the Yahoo case where a US court refused to enforce a verdict by a French court.⁵ The lack of understanding between nations regarding enforcement may lead to actors on the internet disregarding courts decisions and verdicts. This could result in the authority of the courts never reaching

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the borders of the internet. Why should a defendant care about a decision in another country if they know that it will not affect them, or their business in practice anyway? Conversely, why should a person want to sue if he or she knows that there is nothing to gain by doing so? If the decision is not enforceable, the judgment will only be a piece of paper.



Alternative dispute resolution and the internet

When considering this brief description of the legal issues and the internet, it becomes obvious that there is a need for more effective and internationally accepted procedures for solving online disputes than the offline courts can present today. However, the

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question is whether it is necessary for governmental bodies such as courts to be involved in internet disputes or whether the disputes are better solved by the actors themselves using private means with no government sanctioned dispute resolution involvement? Non-government sanctioned online ADR courts seem to have some benefits in relation to internet disputes that conventional ADR procedures can not provide either in relation to the parties and in relation to a more socio-legal perspective.

A big difference between courts and conventional ADR procedures is that court proceedings are not voluntary while ADR is. This is a very important distinction. If a party files a complaint in a court, the other party must respond, or may suffer the consequences of having a ruling against them. To be applicable, all other forms of dispute resolution regarding civil matters must be agreed upon by the parties before, or after the dispute is at hand, that is, they are built on consent.⁶ In some disputes, at least one party may not be interested in finding a solution. The other party is then forced to go to court to seek remedy.

If the parties don't settle, the court procedure will achieve a result in the form of a judgment, as will an

arbitrary procedure.⁷ As is common in negotiation, mediation and non-binding arbitration, proceedings may not lead to a solution and even so, the solution is not binding as a judgment and the parties still may go to court.⁸ As the outcomes do not carry the power of *res judicata* and cannot be used for summary proceedings, the procedure may have been of no use.

Without the option to go to a court in these cases, the dispute may stay unresolved.

A court procedure may also have a perceived legitimacy of process that a private dispute resolution procedure may not. This may lead to people placing more trust in the court process than in private proceedings, depending on factors such as culture and problems with corruption.⁹

When contemplating the advantages of courts in relation to ADR and the internet, it becomes, in my opinion, obvious that there is a need for the courts to be able to handle certain online disputes. As Thomas Schultz describes it:

Courts and extra-judicial ADR both exist to resolve disputes. But courts go further; they provide legal certainty and have the power to create rules, features that extra-judicial ADR does not have.¹⁰

A big problem for e-commerce is the lack of confidence arising from the intangible nature of the transactions. The problem is the same for ADR. Thomas Schultz stresses that the only way to solve this issue is by implementing a sense of control and that this can only be done by governmental initiatives. He summarizes by stating that:

... most people think that courts are principled, that government in general is to be trusted in dispute resolution, and that it is sufficiently legitimate to do so. Private dispute resolvers receive this level of recognition much less frequently.¹¹

Even if certain characteristics of online ADR may be well suited for solving online disputes, as long as these are not accepted governmental procedures, their power will be built on consent between the disputing parties which may lead to an unfair and uncertain online environment.



Possible solutions to the issues

The issues for the courts regarding jurisdiction could be solved in two ways. Either by technically placing borders on the internet by using geo-location technologies, allowing only designated users from a controlled number of states to access a certain homepage¹² or by creating a mandatory forum for internet disputes.¹³

The appearance of geo-location technologies has increased in the past few years, placing something similar to offline borders on the internet. These technologies are not perfect however, and can be circumvented.¹⁴ An actor on the internet might to some extent avoid getting into disputes on the internet by knowing which nations could possibly claim jurisdiction.

Another way for actors on the internet to find security where a dispute would be settled by a court is by creating one or many mandatory governmental sanctioned dispute resolution forums. All kinds of disputes would then be solved by one, or possibly many specialised Cybercourts.¹⁵ With a mandatory forum for online disputes, all other courts would be able to dismiss cases regarding online disputes on strictly formal grounds. Parties doing business online would not have to worry about enforceability of choice of forum clauses or the risk of being sued in many different jurisdictions.

There is at present no real definition of what a Cybercourt is. Some courts call themselves Cybercourts because they have an information homepage and handle filing online or because they have evidence technology systems.¹⁶ One definition of Cybercourt made by Gabrielle Kaufmann

Kohler and Thomas Schultz is, however, that Cybercourts are courts with proceedings that take part mainly online.¹⁷ One example of a court piloting an online forum is the Federal Court of Australia. The Federal Court has an online procedure that is named eCourt. Justice Brian Tamberlin has defined the eCourt as:

... a virtual courtroom that assists in interlocutory matters and allows for

directions and other orders to be made online. It may also be used in mediations, where these are directed by the Court and conducted by one of the registrars. The eCourt was designed for when:

- it is inconvenient or expensive to physically attend court;
- a party is in a remote location, interstate or overseas, so that it is impractical or inefficient to come to Court for every pre-trial issue;
- there are a large number of parties or overlapping claims or interests to co-ordinate, as is the case in native title claims ...
- there are lengthy pre-trial interlocutory matters, particularly in intellectual property, commercial, trade practices, and other disputes where all the parties are represented ...
- there is a large volume of documentary material.¹⁹

What can be said about these reasons is that they seem to be primarily of a practical nature, aiming to facilitate the process of the Federal Court itself rather than to solve issues related to international transactions or the internet.

Another initiative is the Michigan Cybercourt.²⁰ This court was meant to be functioning from 2002, but is still not operating because it has not

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received adequate funding.²¹ The Bill implementing the court describes the purpose of it as 'to allow disputes between business and commercial entities to be resolved with the speed and efficiency required by the information age economy'.²² All hearings in the court are supposed to function by means of electronic communication as for example video, audio and internet conferencing.²³



Cybercourts and cross-border transactions

What seems to be common for the online courts described, is that their main focus is to make the procedure work more smoothly from primarily a practical point of view by using technological equipment. This may solve some issues regarding disputes arising on the internet, for example so parties do not have to travel between countries or continents to reach the court. However this is not enough, as there is still no common understanding in regards to jurisdiction, choice of law and enforcement. In my opinion, to be effective for online disputes these are the most important questions to solve. Solving these issues will take a lot of effort and there will be some particular issues to solve before this will be possible. ❖

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Endnotes

1. For an explanation of the issues regarding jurisdiction and choice of law on the internet see Dan Svantesson, *Jurisdictional Issues and the Internet – A brief overview* (paper published in relation to the Cyberspace 2003: Normative Framework Conference, Brno Czech Rep, October 2003).
2. See for example the *Gutnick* case, *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, examined in above note 1 and Dan Svantesson, 'The *Gutnick v Dow Jones* Decision – which questions were answered and which were not' (2002) 4(7) *Internet Law Bulletin* 73–78.
3. *Zippo Mfg Co v Zippo DOT Com*, 952 F, 1119, 1997.
4. See above note 1.
5. *Yahoo! Inc v La Ligue Contre Le Racisme et L' Antisemitisme*, DC No CV-00-21275-JF (9th Cir), 2004.
6. T Schultz, G Kaufmann-Kohler, D Langer and V Bonnet, *Online Dispute Resolution: The State of the Art and the Issues*, E-Com Research Project

of the University of Geneva, Geneva, 2001, <www.online-adr.org/reports/TheBlueBook-2001.pdf> p 13 [4 November 2005].

7. Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution Challenges For Contemporary Justice*, (2004), p 42.

8. Above note 7.

9. Above note 7.

10. Thomas Schultz, 'Does online dispute resolution need governmental intervention? The case for architectures of control and trust', *North Carolina Journal of Law & Technology*, vol 6, (2004) at p 85.

11. Above note 10 at p 92.

12. For a description see Dan Svantesson, *Geo-Location Technologies – A Brief Overview* <www.svantesson.org/svantesson20040906.doc> [5 November 2005].

13. Susan Nauss Exon, 'The Internet meets Obi-Wan Kenobi in the court of next resort', (2002) 8 *Boston University Journal of Science and Technology Law* at 9 and following.

14. Above note 12.

15. Above note 13.

16. Above note 13 at 5–6.

17. Above note 7 at p 40.

18. <www.fedcourt.gov.au/ecourt/ecourt_slide.html> [7 November 2005]. The page contains a tutorial that shows how the eCourt is meant to work and how the procedures take place.

19. Justice Brian Tamberlin, 'Online dispute resolution and the courts', paper presented to the United Nations Third Annual Forum on Online Dispute Resolution, held in Melbourne on 5–6 July 2004, <www.odr.info/unforum2004/tamberlin.htm> [8 November 2005].

20. <www.michigancybercourt.net>.

21. <<http://michigan.craintech.com/cgi-bin/article.pl?articleId=2163>> [8 November 2005], although this article was published in 2002, no signs are showing on the Michigan Cybercourt's homepage that it is up and running.

22. Michigan House Bill 4140, Public Act 262 of 2001 (Effective: 9 January 2002) <www.legislature.mi.gov/mileg.asp?page=getObject&objName=2001-HB-4140&userid=> [8 November 2005].

23. Above note 22.