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Online dispute resolution

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In Part 1 of this two-part article ((2006) 8(7) ADR 137), Bjorn Johansson discussed the nature of the internet and how this impacts on the resolution of disputes occurring in the online environment. He looked 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 he addresses legal, technological, practical and political issues to consider in 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.

Issues specific to the implementation of Cybercourts

Legal issues

Jurisdiction and choice of law

Susan Nauss Exon has proposed two ways to achieve a more predictable internet environment regarding jurisdiction. By 'implementing a registration system whereby disputants select an appropriate forum' or by creating one internationally accepted Cybercourt that also becomes applicable by registration.[1]

Regarding the registration procedure, Nauss Exon proposes that a company doing business on the internet should register at an appropriate forum at a governmental body. All persons doing business with the company online would have to agree to that registered forum by entering into a contract in form of, for example, a click wrap agreement. As Nauss Exon herself points out, this still has the disadvantage that a plaintiff still may have to seek redress in forums all over the world.[2] In my opinion the only thing that differs from an ordinary choice of forum condition in an agreement is the fact that the preferred forum is registered. It does not solve any of the issues regarding the validity of contract or that other forums might claim jurisdiction due to national rules on jurisdiction.

However, this could be solved if the registration process was part of an international treaty between nations, identifying accredited Cybercourts. Nauss Exon proposes this approach for the international Cybercourt described here.[3] The treaty could then not only identify the accepted courts but also have the effect that a judgment from one of the internationally accepted Cybercourts would be enforceable in all the contracting states. This would reduce the risk of being sued all over the world, as there would be a limited number of forums that could come in question. As the disputes should be solved online, the physical location of the Cybercourts would become irrelevant.[4] The question about choice of forum could then be solved based on an area of law rather than physical factors. This would open up possibilities for judges to specialise in the area of law and lead to complex disputes on the internet being dealt with in a more legally secure manner. A jurisdictional system built on area of law instead of physical borders could be a better way to go in dealing with the borderless characteristics of the internet.

The other proposal that Nauss Exon has is similar to this but contemplates only one international Cybercourt combined with a registration approach.[5] Conducting business on the internet with a company or private person registered at the Cybercourt with a disclaimer advising this on its homepage would have the result that the Cybercourt would become the forum for a potential dispute.[6]

Having one or many international Cybercourts would solve many problems related to enforcement, as all treaty-signing nations could agree on the enforceability of a decision from a Cybercourt. As I believe this would be a good solution the rest of this article will

discuss the issues relating to establishing one or many internationally accepted Cybercourts.

Even if internationally accepted Cybercourt(s) were established and its (their) procedural rules applied, the identification of the applicable law regarding a dispute can create a lot of questions due to national principles. As national substantive laws can differ widely, a dispute may have a different outcome depending on which country's law the Cybercourt decides should be applicable for a particular dispute.

To create order relating to internet disputes, the most practical solution would probably be to make countries agree on treaties regulating the choice of law issues.[7] A common understanding of choice of law is probably not as hard to achieve as a common understanding of substantive legislation regarding the internet. Even if national legislation still comes into force, if countries were to agree on choice of law rules regarding the internet this would bring some order and predictability to internet disputes.

Fairness of process

A lot of a court's work is to prepare for the trial by ordering the parties to write petitions to sort out their case and make it as clear and understandable as possible. In many cases the parties find a solution themselves during this process. Filing petitions electronically would, from the court's perspective, therefore not make a particularly big difference to procedure. However, cases in an online court may be more accessible and easier to manipulate giving rise to issues of confidentiality and authentication of electronic communications.[8]

The questions regarding fairness of procedure may be more problematic where there are no oral proceedings.[9] Oral proceedings may make it easier for the courts to evaluate the parties' attitudes to the dispute and to reach a fair verdict. They also open up the process. Both parties will be aware of how the proceeding is advancing. A trial in a Cybercourt would be performed electronically and the parties would not be present in the court. This may create issues not only for the parties but also for the court in reaching a just judgment. It may for example be difficult to evaluate statements from witnesses and to perform cross-examination by video streaming as it may not be possible to evaluate voice and physical expressions. In many jurisdictions there is also a constitutional right to an oral proceeding which a Cybercourt may have a problem complying with.

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The ability of a Cybercourt to come to terms with these questions would to a great extent be dependant on technology. Nauss Exon states that a problem with the courts starting to develop online is that they rely too much on present day technology. She states:

> Simply enhancing the capability to view evidence in a courtroom or via an internet connection does not ensure that constitutional and other important trial rights remain intact … each fails to preserve any right of physical confrontation. Indeed, the contemporary Cybercourts promote isolation, as individuals participate in court proceedings while sitting at personal computers.[10]

She believes that a solution to these issues can be found by trying to look to technology solutions such as holography for creating a face-to-face illusion when this is appropriate.[11] This could perhaps ensure that the important role that witnesses play in a court trial could be transferred into an online environment. Until this technology becomes more developed maybe video or telephone conferences could be considered to be enough. Once there is a common international understanding that Cybercourts should be created, these questions could surely be solved.

Technological issues

As stated above, the same factors that create distrust in the internet and e-commerce will also create distrust in Cybercourts. The fact that they are governmental bodies may, to some extent, resolve this issue. However, for people to trust the Cybercourts they must also trust the technology behind them.

A big question is how to solve security issues related to the internet, as a fundamental idea behind the Cybercourts is that they communicate with the parties online. Spamming, hacking and computer viruses are problems for all actors on the internet and can cause great damage. How to ensure security and confidentiality, but still be open to the public to allow access to public documents is also an important issue for Cybercourts to address. One of the biggest problems with e-commerce is that the internet is an open network and not as secure as other channels of communication.[12] Some cases will involve trade secrets and other sensitive information that should be kept confidential. Other issues are related to identification and authentication; not only of the parties, but also of the electronic judgments so that they can be enforceable. The issues can, to a certain extent, be solved as cryptography technologies become more and more effective.[13] The court would then be sure that it is dealing with the right parties and that the message integrity is intact.

For the Cybercourts to be available for ordinary people it is important that they be able to secure justice. The technologies used by the Cybercourt must be simple enough so that ordinary people will be able to deal with it and have access to it.[14] It will probably take a while before holography becomes everyday practice. Maybe the future of the Cybercourts and their potential success is more dependent on technological evolution than

anything else. As long as not all cases can be solved online the incentive for the global community to create specific internationally accepted Cybercourts will probably not be great enough to make it happen. Until the technology evolves further, the Cybercourts will only be able to handle small and uncomplicated cases that do not require oral sessions. Maybe this will be enough for the time being, as many small disputes on the internet probably could be solved by communicating in written form via a secure internet platform.

Practical issues

In many countries not only the judges, but the employees lack knowledge in IT and how to use it. To make Cybercourts effective, functional and legally secure will therefore take a lot of effort, due in part to technological issues, but also to the need to educate the employees of the courts and other legal practitioners in how to use the technology. Also, the parties or counsel for the parties have to be educated in how to appear before the court. This will take a lot of training and it is probably important that IT courses at universities and law schools all over the world include appropriate training.

In Sweden many of the judges and other court employees are nearing retirement.[15] The time may be right for implementing Cybercourts as younger judges may be more likely to be used to IT and the internet.

Even when there is an international will to create Cybercourts, they still have to be funded. The Michigan Cybercourt should already be in operation, but as previously stated, is unable to operate due to financial constraints.

For a Cybercourt to be successful and to be able to replace national courts there must be a number of countries supporting it. A big issue will be for these countries to be able to reach consensus regarding certain fundamental matters such as funding and location of the court.

Political issues

The success of a future Cybercourt or Cybercourts is wholly dependent on how many nations support the idea and are willing to contribute and vest jurisdictional power in a Cybercourt. As a Cybercourt should be an intergovernmental body, this can not be achieved without some sort of treaty or agreement between the participating nations.[16] These kind of treaties have shown to take time and are difficult to negotiate.

Common law countries have often a 'forum non conveniens' rule meaning that a court, even if it could have jurisdiction, may decline jurisdiction if there is a more convenient forum.[17] Another option is for offline courts to find that they have jurisdiction but decline to exercise it in some cases in favour of the Cybercourt saying that this forum would be more suitable for the particular case. Individual countries would then not have to give up jurisdiction related to certain issues on the internet, as there would always be a more appropriate forum in the form of the Cybercourt. The party filing a suit would be made aware of this and would then file a suit in a Cybercourt. The Cybercourt, however, would still have to be internationally recognised so that it could claim jurisdiction in all cases. This solution could make it easier for countries to agree as declining national jurisdiction may be a sensitive question.

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As the internet is of a global importance, the question of who should have the power to regulate it is a sensitive question. The physical location of the Cybercourt may therefore be difficult for countries to agree upon. Implementing not one but several Cybercourts with jurisdiction based on particular legal areas may provide a solution enabling countries to agree as the power of passing precedence would then be divided.

Procedural rules for Cybercourts

The procedural systems existing today are divided into inquisitorial and adversarial systems with the adversarial system being more dominant in Anglo-American law systems and the inquisitorial more common in countries with a civil law system.[18] The literature and articles regarding Cybercourts seem to take for granted that the procedural system for such a court should be of an adversarial nature. If the international Cybercourt or Cybercourts handled disputes from all over the world a common understanding regarding the procedural rules would be important for creating just conditions for plaintiffs or defendants coming from different procedural systems. A court's main purpose is to ensure that justice is done. The procedural rules play an important part in achieving this. To simplify the difference between the procedural systems one could say that in an adversarial procedure the judge has a more passive role than the judge in an inquisitorial procedure.

To decide what system is the best for finding the truth and create justice in relation to online disputes in a Cybercourt is too complex a question to answer in this article. However Michael K Block and Jeffrey S Parker have performed an experiment dealing with the issue in a more general context.[19] In their experiment they found that 'the information structure profoundly affects the relative fact-finding efficiency of adversarial versus inquisitorial procedure'.[20] They found that the inquisitorial system resulted in a higher rate of revelation than the adversarial when there was an asymmetric allotment of information and one of the parties had access to hidden information.[21] The adversarial system on the other hand resulted in a higher level of revelation when both parties had access to hidden information.[22] It would seem that transactions on the internet are generally

characterised by one party having more information than the other, due to the anonymity and uncertainty between parties that the internet creates. This could imply that the inquisitorial procedures would be better for online disputes.

If a new kind of court should be created, it is important to not just make the Cybercourt accessible online, but to adapt the old procedural systems. Creating new Cybercourts would be a good opportunity to create the best procedural system for particular disputes. Perhaps there could even be different procedural systems for disputes arising in different areas of substantive law. For example, an inquisitorial system may be better for solving consumer disputes where an adversarial one may be better for solving disputes related to intellectual property. Different characteristics of the procedural systems could be forged into a totally new procedural system combining the benefits of both in relation to online disputes.

Conclusion

Governmental influence over disputes arising on the internet is probably essential given that the internet will continue to develop as a powerful tool for communication and economic transactions. Although online ADR may be a valuable supplement, the governmental influence that a court system represents creates a trust that no private initiatives would be able to match. However the current court system is not adequate to deal with issues related to the internet.

Creating an internationally recognised Cybercourt or several Cybercourts would probably solve many of the legal issues regarding jurisdiction, choice of law and enforcement. It could also solve some of the practical issues such as distance and cost. Judges would potentially have the opportunity to specialise in certain areas and so the issue of keeping up to date with certain technologies on the internet would also potentially be solved. However the establishment of a Cybercourt raises a lot of other issues. The main issues relate to political and technological considerations, for example getting a significant number of countries to agree to the treaties necessary to implement the Cybercourt and developing the technology needed for creating a fair online process that is both functional and readily available. The choice and implementation of suitable procedural rules would probably be a matter of conflict between participating nations. Further research to evaluate potential advantages and disadvantages of the different systems in relation to online disputes would also be necessary to resolve this conflict.

While Cybercourts will not be possible until there is an international consensus regarding jurisdiction on the internet, and the technology has developed so that online proceedings are as secure as offline proceedings, the initiatives with the present online courts are important. Probably a system of internationally recognised Cybercourts is a utopian ideal, but with the development of new technologies and a global understanding of the importance of the internet, maybe legal practitioners one day will be able to solve disputes smoothly and safely online without having to worry about jurisdiction, choice of law or enforcement. ●

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Endnotes

1. 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 4 and following.
2. Susan Nauss Exon, 'A new shoe is needed to walk through Cyberspace jurisdiction', (2000) 11 *Albany Law Journal of Science & Technology* at 46.
3. Above note 1 at 6–7.
4. Above note 1 at 10.
5. Above note 1 at 6.
6. Above note 1 at 7.
7. Above note 1 at 18.
8. Wiliam Krause, 'Do you want to step outside? An overview of online alternative dispute resolution' *The John Marshall Journal of Computer & Information Law*, Vol 19,(2001), p 489-490.
9. Above note 1 at 26.
10. Above note 1 at 6.

11. Above note 1 at 6.
12. Patrick Quirk and Jay Forder, *Electronic Commerce and the Law*, (2003), p 84.
13. For a description of encryption technologies see above note 35, p 89 and following.
14. Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution Challenges For Contemporary Justice*, (2004), p 149.
15. For example in the court where I used to work in Sweden, the Molndal state court, all the judges are more than 60 years old and will retire within five years. The situation is similar in many of the Swedish courts.
16. Above note 1 at 9.
17. In Australia forum non conveniens means that a court can only decline jurisdiction if the actual forum is clearly inappropriate.
18. Michael K Block, Jeffrey S Parker, Olga Vyborna 'An Experimental Comparison of Adversarial versus Inquisitorial Procedural Regimes', (2000) vol 2 N1 *American Law and Economics Review* 170–194, http://home.cerge-ei.cz/ldusek/Papers/blocketal2000.pdf [5 November 2005].
19. Above note 18.
20. Above note 18 at 189.
21. Above note 18.
22. Above note 18.

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- **IAMA** is holding its **National Conference** entitled **Drawing a Line in the Sand: New Approaches in ADR** at Palm Cove, Far North Queensland, from 26–28 May. For further information visit <www.iama.org.au/index.html>.
- The **Association of Family and Conciliation Courts** is holding its **43rd Annual Conference** entitled **Juggling Conflicts, Crises and Clients in Family Court** in Tampa Bay, Florida, US from 31 May–3 June. For further information visit <www.afccnet.org>.
- The **Third Asia Pacific Mediation Forum Conference** will be held from 26–30 June, convened by the University of the South Pacific at the Suva campus, Fiji. The theme for the conference is **Mediating Cultures in the Pacific and Asia**. For further information see <www.usp.ac.fj/apmf>.
- **ACDC** is holding a one-day course for those who handle complaints in organisations, entitled **Complaint Handling – A Complaint is a Gift**. The course is being held in Sydney on 17 May. **ACDC** is also holding **Stage 1–3 Certificate Courses**. **Stage 1 Accreditation Courses** are being held in Sydney on 21 June. **Stage 2 Accreditation Courses** are being held in Sydney on 9–12 May 2006 (with optional accreditation day at a later date); 6–9 June with optional accreditation day on 19 June; 27–30 June with optional accreditation day 17 July; and 11–14 July 2006 with optional accreditation day 24 July. **Stage 3 Accreditation Courses** are being held in Sydney on 13–15 June 2006. For further information on ACDC courses see <www.acdcltd.com.au>.
- The **Bond University Dispute Resolution Centre** in conjunction with the **Leo Cussen Institute** is holding a 4-day **Basic Mediation Course** on 12–15 October in Melbourne. For more information, phone 03 9602 3111 or email <lpd@leocussen.vic.edu.au>.
- The BUDRC will also be conducting independent **Basic Mediation Courses** (27–30 July and 30 November–3 December on the Gold Coast) and an **Advanced Mediation Course** (in Noosa on 21–24 September)**.** The basic courses also have a Foundation Family Mediation stream, run in conjunction with the Australian Institute of Family Law Arbitrators and Mediators. For further information email drc@bond.edu.au or visit <www.bond.edu.au/law/centres>.
- **CEDR** is holding three **Mediation Skills Training Courses**. Fast Track courses (five consecutive days with a weekend break in between) will be held on 17–19 and 22–23 May in London, UK. For further information phone +44 (0) 20 7536 6000 or email <training@cedr.co.uk>.
- **LEADR** is holding several 4-day **Introduction to Mediation** workshops around the country: Brisbane from 17–20 May and 18–21 October; Darwin from

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24–27 May; Sydney from 31 May–3 June, 23–26 August and 8–11 November; Hobart from 14–17 June; Newcastle from 5–8 July; Alice Springs from 19–22 July; Canberra from 16–19 August; Adelaide from 6–9 September; Perth from 4–7 October; and Melbourne from 11–14 October. For further information visit <www.leadr.com.au/training.html>.

- **MATA** is holding their **International Advanced Mediator Training Course** at Charingworth Manor, Gloucestershire, UK on 9–15 September. The **7-day residential course** is designed to develop skills of experienced commercial mediators. Numbers are limited to 12 delegates. For further information visit <www.mata.org.uk>.
- The **Professional Certificate in Arbitration** is being offered by the **Institute of Arbitrators and Mediators Australia** and the **University of Adelaide.** The course aims to qualify skilled practitioners in the field of arbitration. Tuesday evening classes are offered in several Australian capital cities. The course is also available as an online learning program. The **General Course** is being held on 19–20 May and the **Advanced Course** will be held on 15–16 September. For further information phone 08 8303 4777 or visit <www.adelaide.edu.au/arbitration/course>.
- **The Trillium Group** is conducting 4-day **negotiation and mediation workshops** in Sydney from 30 May–2 June and 17–20 October, in Melbourne from 18–21 July and 24–27 October, and in Perth from 15–18 July. For further information visit <www.thetrilliumgroup.com.au> or phone 02 9036 0333 or 1 800 636 869 toll free.
- **IFaMP** held a workshop at **AIATSIS** on 4–5 October 2005 for Indigenous mediators and facilitators, focusing on a fully-supported national network of accredited Indigenous mediators and facilitators to work in native title. The final report of the workshop, entitled *Making a Difference: towards establishing national networks of Indigenous process experts in a whole-of-government approach*, as well as two background papers, are now available to download in pdf format at <http://ntru.aiatsis.gov.au/ifamp/Latest_Updates.htm>.
- A British Probate and Family Court judge has recently ruled *in Eyster v Pechenik* that a spouse can enforce a pre-marital agreement in their divorce even when the agreement has been drafted by the couple themselves without the assistance of counsel. This case highlights the need for cautious consideration for couples considering marriage, and also for mediators who assist couples in negotiating the terms of pre-marital agreements. Mediation can play an important role in that process, helping couples make those decisions together. This case is not yet available for free online.
- *A website entitled* **Change This** *publishes what it calls manifestos which serve as 'a reasoned, rational call to action, supported by logic and facts'.* Currently, readers at the site are able to download 'Thinking through problem solving' a recently published article by Valarie Washington, CEO of 'Think6', a strategic consulting company. Washington's article offers some innovative ideas on problem solving. The article can be accessed through the ChangeThis website at <www.changethis.com>.
- A Directory of **ADR Blogs** is available at <www.myhq.com/public/a/d/adrblog>. This directory lists different types of ADR blogs, with links to each website. It has been compiled by mediation news online, a popular ADR-focused blog. You can visit mediation news online and subscribe for free at <www.mediationblog.blogspot.com>.
- Five international mediation service providers announced at the latest International Bar Association Conference in Prague that they would be joining forces to establish **MEDAL** (the International Mediation Services Alliance). The providers include JAMS from the US, ACBMediation in the Netherlands, ADR Centre in Italy, CEDR Solve in the UK and CMAP in France. MEDAL has been established to work on national and cross-border mediation and conflict management services and members will co-operate on individual client assignments requiring multinational and multilingual approaches. Members will promote and conduct international events including seminars and conferences.
- There is a number of reports and articles available to be freely copied for information and reference purposes (on the understanding that there is clear attribution of the author) on the **MATA** website. The papers provide a useful collection of mediation references for practitioners, and there is some focus on the role of lawyers in mediation processes and practice. The papers can be downloaded in pdf format at <www.mata.org.uk> from the 'Papers' section.

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