Volume 8 | Number 9 Article 1

6-1-2006

Mediators without borders: how technology is leading the charge to globalised dispute resolution

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ADR *bulletin*

The monthly newsletter on dispute resolution

ADR and the new technologies

Mediators without borders: how technology is leading the charge to globalised dispute resolution

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Mediation has made it to Hollywood. The opening scene of the romantic comedy *The Wedding Crashers* (2005) features a hilarious attempt at divorce mediation. The mediation scene does not demonstrate any mediation skills to be emulated and the film itself, apart from the opening scene, has nothing to do with mediation. Nevertheless one cannot ignore the power of the borderless dream machine called Hollywood. The Hollywood film industry does more than export films and fantasies around the world; it is a driving force in the globalisation of the themes with which it deals. When mediation becomes one of those themes — albeit fleetingly — it is on its way to becoming a globalised concept.

The globalisation of mediation raises many themes such as the ethics of exporting mediation, how globalisation affects the principles of mediation, the challenges for dispute resolution practitioners moving between cultures, and how the design of conflict management systems can accommodate different social, legal and cultural imperatives. What is frequently overlooked in the ADR arena is the impact of technology on the globalisation of ADR services and in particular mediation.

In terms of dispute resolution, technology has influenced the globalisation of ADR in two ways. First, technology has facilitated the rapid transfer of information and know-how between national and transnational actors and accelerated the dispute resolution export explosion. ADR programs for the Global South are being funded through Global North institutions as part of economic and legal reform.[1] In this context western mediation is frequently introduced to reforming countries by well-intentioned consultants as a culturally-inclusive and value-free process[2] — which, of course, it is not. However this is a pressing topic for another article.

The second way in which technology has influenced the globalisation of ADR is through the emergence of online dispute resolution (ODR). ODR has many forms — from automated blind-bidding procedures and e-mediators without borders, to online mediation platforms with a human facilitator and online filing and case management in court-connected programs. Its continuing development and integration into larger transactional and conflict management systems reflect its growing acceptance and utility. The focus of this article[3] is the impact of ODR on the globalisation of ADR.

Technology and globalisation

The process of globalisation has created a new geography which challenges the conceptual solidity and the sovereignty of the nation state. It has introduced a range of new transnational — as distinct from international — actors, identities, connections, perspectives and borders, including e-commerce traders, non-governmental organisations (NGOs), multinational corporations, political groups and virtual alliances. Power and influence traditionally attributed to the nation

state now flow among polycentric connection points, which extend to these transnational actors. The blended term 'glocalisation' refers to the new boundaries between local and global villages, between affluent and poor communities, and between virtual and face-to-face relationships.[4]

Globalisation is a double-edged sword. On one hand, it produces globalism: a way of thinking about the world as a single marketplace in which political, legal and economic distinctions begin to blur. The process of globalisation aims to create a level playing field in which players have the same opportunities, although they do not necessarily share the same strengths and resources. Globalism views the political, economic, cultural, environmental and societal dimensions of the process of globalisation through one lens — economic rationalism — or as Beck suggests 'economic imperialism'.[5] Much of the criticism of globalisation relates to the perceived misuse of power by those actors with economic strength, such as multinational corporations, over economically disempowered actors with limited choice and bargaining power. On the other hand, the process of globalisation frees up previous notions of state-defined citizenship and power to encourage expressions of identity based on individualism, ethnicity, socioeconomics, religion, ideology and other factors.

The development of technology has gone hand in hand with the process of globalisation. Despite its earliest beginnings in the late 1960s and its varied academic and scientific applications, it was not until the 1990s that the potential of the internet's commercial applications began to be realised. When the internet gave birth to e-commerce in 1992, it opened up a 24–7 world beyond conventional business hours, geographical boundaries and face-to-face business relationships. Among other things, the internet challenged traditional conceptions of territoriality by allowing users to transcend national borders, thereby generating a new era of transnationality in business.[6] E-commerce soon gave birth to e-conflict which then required e-conciliation or, as it is widely known, ODR. Where parties had developed business relationships

and transacted online, it was only a small step to resolve disputes using the same technology. However ODR is not limited to settling e-commerce disputes. It is also used in a variety of ways to manage disputes generated by face-to-face transactions, irrespective of whether the dispute is international or localised.[7] The capability to access instantly the most up-to-date information, know-how and news through the internet has augmented telephony technology to make inexpensive and informal dispute resolution a reality for those with access to online resources. This, in turn, has encouraged the sourcing of dispute resolution providers from a global marketplace. Disputants located in Brisbane and Minneapolis, for example, can elect to use an online mediator from Europe or Africa.

Conley Tyler points out that despite the plethora of ODR programs — as at July 2004 she had counted 115 ODR services worldwide — 'there is a wide variability in the number of cases dealt with by ODR sites: from only one case to over one million disputes.'[8] The identified programs deal with many disputes covering areas such as consumer,[9] business-to-business,[10] family law,[11] internet[12] and workplace disputes,[13] as well as political peace negotiations.[14] While the initial growth of ODR was focused in North America and then Europe, there are now ODR services on all continents.[15]

ODR offers challenges to the globalisation of ADR

As the previous section demonstrates, ODR has encouraged and assisted the globalisation of ADR, however, ODR systems also pose a number of challenges to the process of globalisation in a dispute resolution context. To be effective ODR technology must enjoy the confidence and trust of potential users. Here, issues of accessibility, literacy and cultural appropriateness become important. Technology must be easily accessible and affordable. Further, in order to be sustainable, technology systems require maintenance and support from real people with a high level of skill. The next section addresses the role that culture plays in ODR and how it affects the development of global dispute resolution.

Culture in cyberspace

ODR systems operate largely in cyberspace. However cyberspace is not a vacuum, in the sense that it is a space where cultural factors are irrelevant. Cultural differences do not automatically disappear when ADR goes online. They remain, and in addition different cultural issues appear. Rainey and Jadallah, for example, write of culture being in the code.[16] By this they mean that technology is shaped by the culture of its designers. Embedded in the codes of computer software programs are the cultural values, attitudes, assumptions and biases of the designers that are often overlooked. For example, the principles of western mediation, as outlined above, can manifest themselves in ODR through the manner in which the role of the mediator and the parties are integrated into the software code. In highly structured online processes, parties may be guided through a linear multi-step online mediation which only moves forward in an interest-based sequence, such as identification of individual interests, setting of agenda, generation of options by parties (not mediator), bargaining and outcome; neither the mediator nor the participants are able to revisit, change or skip any parts of the sequence. This process reflects the principles of party autonomy, linear logic, interest-based problem-solving and low intervention/process-orientation on the part of the mediator. In addition, the perceived appropriateness of 'naming' a dispute by producing an online issue statement and thereby boldly stating the nature of the dispute may not be appropriate in all cultures. Another example emerges where parties may be required to accept specific confidentiality requirements before they can use dispute resolution software. While confidentiality is a feature of most western forms of mediation, this is not the case in all cultures. As a result of culture being integrated into the code, online mediators possess considerably less process power than off-line mediators whose intervention techniques are adaptable to the cultural needs of the parties and include transformative, interest-based, settlement-oriented, wise counsel and expert advisory styles.[17] In this way ODR program designers can wield enormous cultural power — sometimes unwittingly — over third party mediators and other participants in the guise of neutral technology. In a world where ODR design is owned and controlled largely by Global North interests, dominant western ADR cultures become omnipresent.

The relationship between technology and culture flows in both directions. Technology is not only influenced by culture, it also influences cultural practices. Much has been written about the advantages and disadvantages of the absence of non-verbal communication such as body language in ODR. It is generally accepted that body language lends a contextual quality to communications not available through text-based ODR.[18] Some commentators consider this to be an advantage in highly antagonistic or emotive disputes; others highlight the loss of potentially valuable meaning in online processes.[19] Where in face-to-face mediation paralinguistics such as intonation, inflexion, voice volume or verbal pitch provide information that helps to reduce ambiguity of messages, text-based communication culture has developed its own paralinguistic cues. When used in good faith, emoticons (that is ASCII text characters that express emotions such as :) for smiling) can provide information similar to vocal information gathered in physical meetings. Email programs offer the option of using different fonts, colours or styles for text which can also be administered to send non-verbal messages. The advance of these online-specific forms of communication could promote familiarity with online communication and the virtual environment. Familiarity and convenience will assist in the building of trust in technology, thereby reducing fear of ODR processes and encouraging a culture where virtual meetings for dispute resolution are seen to be the global norm.

Another example of how technology shapes the cultures with which it interacts is provided by the following anecdote. Colleagues of mine from Germany, a country known for its high power differentials, have commented on the extent to which online communication changes the dynamic of their interaction.

Editorial: Mediators approve national mediator accreditation system

Mediators at the National Mediation Conference in Hobart from 3–6 May 2006 unanimously approved, on the motion of Sir Laurence Street, the establishment of a national mediator accreditation system.

The system, which is not a licensing arrangement, allows mediators to be accredited to a national mediation standard on a voluntary basis. This standard will be recognised across organisations and areas of mediation practice and prospectively by government, courts and tribunals (the Federal Court of Australia has already accepted it) and industry bodies.

The system will operate through bodies recognised as having the capacity to accredit to the national standard: membership organisations, government agencies, community organisations, courts and other recognised bodies. Provision is made for experienced mediators to be 'grandparented' into the system.

An implementation body was established at the Conference to co-ordinate the establishment of the system over the next two years and report back to the next National Mediation Conference in 2008.

*For more information see <*www.mediationconference.com.au/html/Accreditation.html*>.*

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Published by ePublications@bond, 2006

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Differences in status and power — even between two parties from Germany — are reduced in online contexts, thereby opening up the way for freer and less status-oriented communication. The anecdote suggests the development of a new culture which is not rooted in a geographical sense of place or culture. It is driven by the spiraling development of mobile phones, blackberries, internet cafes, wireless technology and voice-over-internet working protocol. For the first time in history people can take their culture — or at least one of their cultures — with them.

The complex and dynamic relationship between culture and ODR has direct repercussions for the globalisation of ADR. Does the future promise a globally mobile e-culture or is the continued extension of dominant Global North cultures through technology a more likely prognosis? One of the most concerning illustrations of the persistent power of the Global North is the personal computer (PC) domination of the ODR movement which is discussed in the next section.

PC culture dominates

The premise that ODR needs to be PC-based is a cultural assumption of the Global North. Conley Tyler and Hattotuwa identify two primary reasons for the inappropriateness of PC-based ODR in much of the Global South. The first explanation relates to the differences in systems architecture and technological infrastructure; the second to the social-political context of the Global South.

Systems architecture, especially in non-metropolitan regions of the Global South where hundreds of millions of people live, is inappropriate for a PC-based approach to ODR. Prerequisites for a PC-dominated ODR marketplace include access to PCs by the majority of the adult population in terms of locality and cost,[20] computer and internet literacy or access to people with such literacy, a high level of trust, confidence and familiarity with the technology; and a technologically sophisticated and sustainable infrastructure to support PCs and their networks.[21]

In addition to a lack of PCs, much of the Global South has insufficient human and technical resources to sustain PC infrastructure. Therefore attempts by the Global North to introduce more PCs into these regions without training, education and technological support are shortsighted and arguably self-serving. When working in the Solomon Islands in 2005 I was proudly told by one paramount chief from a very remote region that his village would be getting a PC within the year. He had seen a computer before but had never touched one. He was not sure about internet access but was nevertheless convinced that the introduction of one PC could only be beneficial to his village despite the absence of technological literacy and support. Hattotuwa and Conley Tyler comment that such an approach can lead to jealousies and inter- and intra-community conflict, not to mention frustration and disappointment.[22]

Furthermore legal and political instability permeates many jurisdictions of the South, accentuating the problems of access. Governments are under-resourced and unpredictable which frustrates attempts to develop sustainable infrastructure and long-term education programs to establish and improve technological literacy. Moreover there is a need to address the issues that surround legal and political stability such as violence, corruption, human rights violations, development issues and so on. For the most part, the ODR is narrowly focused on private dispute settlement. Deeper processes such as conflict transformation are not yet on the ODR radar. Yet there seems to be a futility in addressing superficially well-articulated and neatly-

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packaged disputes through a settlement procedure when much deeper social-political issues are at stake.

The North's PC-based crusade into ADR is not only culturally insensitive and therefore inappropriate, it effectively escalates the dimensions of the digital divide between those able to afford, access and utilize PC-based e-technology and those without sufficient resources to do so. Moreover the persistent PC push of the dominant culture inhibits the effective global growth of ODR, particularly to the Global South.[23] Despite the fact that there are more suitable technologies and applications widely used in the Global South, economic interests continue to drive the lobby for PC-dominance in the ODR market. Transnational PC-oriented corporations whose influence has spread — sometimes invisibly — with the globalisation movement have an economic interest in the proliferation of this form of technology.

Alternatives are available

Alternative e-technology already exists and is beginning to be used in ODR fora. Thus far I have built on the arguments of Parlade, Hattotuwa and Conley Tyler to suggest that a real transformation of real world conflict resolution practice to incorporate ODR can only occur if it builds on culturally

and regionally specific infrastructure and accessible and affordable forms of technology. Parlade points to the internet and e-commerce booms in affluent first world countries as the transformative period of time during which ordinary people discovered the global village through their home and office PCs. Conversely PC penetration in the Global South is low. However other forms of e-technology such as community radio and mobile telephony are pervasive.[24]

In the context of the Philippines, Parlade explains how SMS technology may be used as an integral part of an ODR program.

Simplified message service (SMS) usage in the Philippines, at 100 million messages a day, is easily the highest in the whole world, and is indicative of the Filipinos' receptiveness towards use of technology when affordable. What these statistics suggest is that although computer access is limited, the mobile phone may be utilized to link the public into any ODR system. Simple communications functions for the ODR process may therefore rely on mobile phones, while moving intelligent functions (such as software-aided negotiations, videoconferencing, extensive real-time or asynchronous communications, and case management) into selected public access points. Among the suggested venues for the public access points are government offices (for example, office of the executive judge in each city, office of the Bureau of Consumer Affairs, office of business associations), and other community access points established under existing government programs.[25]

Mobile telephony has been integrated into the blind-bidding service at Philippine Online Dispute Resolution, a facility established primarily to facilitate simple monetary claims between disputing parties.[26] Parties may also opt to receive SMS notices with respect to other online services offered by the organisation, including neutral evaluation, mediation and arbitration. It is not envisaged that SMS technology

operates as a standalone; rather it is viewed as a complement to other forms of technology providing an important direct link to participants. The globalisation process of ADR would be well served if ODR providers looked to the successful and innovative technology applications that are popular in the Global South.

In terms of expanding ODR applications beyond private economic disputes, other developments in the conflict management field include EDD and OCT. EDD refers to electronic direct democracy.[27] While currently used in governmental contexts, online participatory processes can also be applied to processes in the establishment of joint ventures, alliances, partnering arrangements and political negotiations.

In short it is applicable to multi-party mediation and other dispute resolution processes involving decision-making by multiple parties and groups.

OCT is the acronym for online conflict transformation and refers to e-applications of conflict transformation in peace-building initiatives.[28] Infoshare's one text negotiation technology, which continues to provide the framework for the Sri Lankan peace process negotiations, is an excellent example of OCT.[29]

The histories of OCT, EDD and ODR are surprisingly independent of one another. There is no reason, however, for such a narrow approach to continue, especially in a forum which boasts the seamlessness and potential limitlessness of its reach. Expanding the ODR mindset to include public and political

dispute resolution would better serve the real needs of many citizens of the global village in which we now live.

Conclusion

ODR technology has influenced the globalisation of ADR in contradictory ways. It has both hindered and facilitated the push towards an inclusive globalised dispute resolution marketplace. I have suggested in this article that one of the primary obstacles lies in the dominance of the Global North, in terms of its dispute resolution culture and technology preference for PC-based ODR. If globalism is to aspire to a truly open marketplace, then the process of globalising ADR must be inclusive and fair. It must accommodate culturally appropriate dispute resolution processes, and familiar and accessible technology. SMS-assisted ODR provides a convincing illustration of how technology can change the path of globalisation. By empowering participants with familiar and accessible ODR applications, technology can facilitate a fairer globalisation process in the world of ADR. ●

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Endnotes

1. See, for example, 'ADR: A practitioner's perspective' which reports on five case studies of ADR reform in developing countries available at <www.

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Published by ePublications@bond, 2006

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usaid.gov/our_work/democracy_and_ governance/publications/pdfs/pnacp335. pdf>. See also by way of example, the report *USAID Supports Alternative Dispute Resolution In Latin America and the Caribbean*, 2004 available at <www.usaid.gov/locations/latin_ america_caribbean/democracy/adr/index. html>.

2. On the value crisis and confusion in mediation see Dorothy Della Noce, 'Mediation theory and policy: the legacy of the Pound Conference', (2002) 17(3) *Ohio State Journal on Dispute Resolution* 545.

3. This article is a shortened version of the original: Nadja Alexander, 'Mobile mediation: how technology is driving the mobilisation of ADR' (2006) *Hamline Journal of Public Law and Policy*.

4. Mohamed Wahab, 'Online dispute resolution and digital inclusion: challenging the global digital divide', paper presented at the *Third Annual UN Forum on Online Dispute Resolution*, Melbourne, 2004.

5. Ulrich Beck, *Was ist globalisierung?* (Frankfurt am Main: Suhrkamp, 1997) at 27 (from the German *Imperialismus des Ökonomischen*, translation by the author).

6. Alejandro E Almaguer and Roland W Baggott I, 'Shaping new legal frontiers: dispute resolution for the internet' (1998) 13 *Ohio State Journal on Dispute Resolution* 711 at 712.

7. Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* San Francisco: Jossey-Bass, 2001 at p 9.

8. Sanjana Hattotuwa and

Melissa Conley Tyler, 'An Asian perspective on online mediation', 1 (2005) *Asian Journal of Mediation*, available at <hellsdireagent.blogsome. com/2006/02/02/an-asian-perspective-on-online-mediation>; Melissa Conley tyler, '115 and Counting: the state of ODR 2004', paper presented at the *Third Annual Forum on Online Dispute Resolution*, Melbourne, 2005, available at <www.oderinfo/unforum2004/ Conleytyler.htm>.

9. For example, the biggest online auction provider eBay uses an ODR service called SquareTrade. More information can be found at <www. squaretrade.com>.

10. For example <www. themediationroom.com>.

11. For an example visit Family Mediation Canada at <www.fmc.ca>.

12. For example, the Asian Domain Name Dispute Resolution Centre, <www.adndrc.org>.

13. For example, Online Resolution <www.onlineresolution.com>.

14. For example, <www.info-share. org>.

15. Hattotuwa and Conley Tyler, above note 8.

16. Daniel Rainey and Alma Abdul-Hadi Jadallah, 'The culture is in the code', paper presented at the *Fourth Annual UN Forum on ODR*, Cairo, 2006, forthcoming at <www.odr.info>.

17. Nadja Alexander, 'Mediation: Ein Meta-Modell' (2004) 2 *Perspektive Mediation* 72–81.

18. Gibbons, Robin M Kennedy and John M Gibbs, 'Cyber-mediation: computer-mediated communications' (2002) 32 *New Mexico Law*

Review 27 at 43–54.

19. National Dispute Resolution Advisory Council (NADRAC) *Online ADR Background Paper* (2001), available at <www.nadrac.gov.au> at 12. Some research indicates that miscommunication and impasse are more likely to occur in online mediation than in off-line mediation. On communication see, for example, J B Eisen 'Are we ready for mediation in cyberspace?' (1998) *Brigham Young University Law Review* 1305. On impasse see M Morris, J Nadler, T Kurtzberg and L Thompson, 'Schmooze or lose: social friction and lubrication in e-mail negotiation' (2002) 6 *Group Dynamics* 89. However, compare recent findings to the contrary: J Tan, D Bretherton, G Kennedy, 'Negotiating online', paper presented at the *Third Annual UN Forum on Online Dispute Resolution*, Melbourne, 2004.

20. Sourdin suggests that the digital divide can still exist in the developed countries of the Global North in Tania Sourdin, 'ODR — an Australian perspective on the digital divide', paper presented at the *Third Annual UN Forum on Online Dispute Resolution*, Melbourne, 2004 available at <www. odr.info/unforum2004/Sourdin1.doc>.

21. Hattotuwa and Conley Tyler, above note 8.

22. See Hattotuwa and Conley Tyler, above note 8.

23. Claro V Parlade, 'Challenges to ODR implementation in a developing country', paper presented at the *Second UN Forum on Online Dispute Resolution*, 2003, available at <www.odr. info/unece2003/pdf/parlade.pdf,at.1>.

24. Sanjana Hattotuwa, 'Untying the gordian knot: ICT for conflict transformation and peacebuilding', paper presented at the *Third Annual UN Forum on Online Dispute Resolution*, Melbourne, 2004.

25. Above note 23 at 14–15.

26. <www.disputeresolution.ph>.

27. See the Wikepdia entry for e-democracy at <en.wikipedia.org/wiki/ E-democracy>.

28. Sanjana Hattotuwa, above note 24.

29. Another example is the Cultures of Peace News Network referred to in Hattotuwa and Conley Tyler, above note 8.