On-Line ADR

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Introduction

Some years ago I discovered, to my surprise, that I had been mediating off-line for the past 12 years. I felt much like a literary character who discovers that he has been speaking prose all his life. Just as all of us have discovered that we have been banking, buying and off-line all our lives, so too we have had to adjust our thinking in the dispute resolution arena.

In this paper I look at some of the significant issues which arise out of the use of technological systems in ADR. In particular, I shall be looking at the cultural issues which on-line dispute resolution (ODR) raises; I use the term culture in a broad sense to include the legal and business 'hard' culture, as well as the aspects of 'soft' culture relating to ethnicity, race and national origin.

On-line dispute resolution refers to the processes of dispute resolution which use electronic means of communication instead of face to face interaction, whether they take place in real or asynchronous time. In practice, the main forms of dispute resolution offered on-line are negotiation, mediation and arbitration. However, it is conceivable that case appraisal, mini-trials and hybrid processes such as med-arb could also be offered through this medium. As we are coming increasingly to realise, if something can be done off-line it can, or will one day, be done on-line.

My own involvement in ODR has tended to be vicarious and indirect. I became interested in the concept through research for off-line mediation books and through various publications in the *ADR Bulletin*. Last year I taught a post-graduate course in ODR. The class developed an expansive bibliography of hard copy and electronic materials on ODR, and web-sites providing access to operating systems. They also used the platform of a commercial service-provider to undertake, and demonstrate, the use of on-line mediation, participating in the Cyberweek mediation competition. Later in the year I was involved in a subject, the Law of Technological Innovation, taught conjointly on-line at Bond and the University of Gotheburg, Sweden. This involved the negotiation of a Non-Disclosure Agreement (NDA) between the two sides in relation to a joint venture involving a new MP–3 player. When the NDA was breached [by the Australian students] we undertook six simultaneous on-line mediations among the various groups. This provided a good sense of the strengths and shortcomings of the system – some mediations succeeding and others encountering the predictable problems which caused them not to settle. Thus my introduction to virtual DR.

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Dispute Resolution Culture

All societies have their unique dispute resolution cultures, and while they may be resilient they also change and modify over time, albeit slowly. In Australia there is a plurality of dispute resolution cultures associated with diverse groups including:

- the dominant economic forces – exemplified in the legal and commercial arenas;
- indigenous cultures – exemplified by traditions of collective consensus-making; and
- self-defined groups of immigrants or church or community organisations and their received wisdom.

In some cultural contexts there is an insistence on the identification and application of legal rights, in others a search for collaboration on the personal and commercial interests of the respective parties, and in others an attempt to empower groups and communities, and enhance their relations over time.

The on-line environment can be used in all these contexts, but will impact on them in different ways. Within the dominant business and commercial cultures there is an expectation that dispute resolution interveners will be engaged in evaluative or adjudicative functions to greater or lesser degrees. Where it involves a so-called 'third party', such as an arbitrator or mediator, there is an expectation that he or she will play some sort of *umpiring* role in the resolution or determination of the dispute. This is evidenced in the shift in this environment from facilitative to evaluative mediation, something which has occurred not only in Australia and is documented in the literature.[2]

Information and computer technology can assist in all kinds of dispute resolution, such as negotiation, mediation, arbitration, case appraisal and adjudication. As a form of 'shuttle negotiation' it can play an automated role, such as in the Mediation Arbitration Resolution Services, but can also involve the use of artificial intelligence. It is used to assist with the mediation process, as with www.themediationroom.com where transnational commercial mediations can be undertaken from the comfort of home. It also supports arbitration, for example in relation to domain name disputes conducted under the Uniform Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers. The question these examples raise is whether the processes are true to the objectives and assumptions of the original off-line processes from which they derive, and, if not, the extent to which their new premises and assumptions are useful and desirable.

On-line Culture

On-line dispute resolution adds another dimension to that encountered in the off-line environment. Information and computer technology has its own culture, mannerisms, communication patterns and complexities. The dynamics of human interaction are significantly different in cyber-space. So too is the level of complexity or simplicity – while complex technology is designed to simplify transactions this promise is not always fulfilled. Below are examples of the relevance of ODR to some aspects of the dominant dispute resolution culture in Australia.

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2   Laurence Boulle, *Mediation; Principles, Process, Practice* (2nd ed, 2005) 328-9 and references cited there.

Factors of power

Power is always a factor in dispute resolution processes. Power itself is a multi-faceted concept and is as much a function of perceptions and circumstances as it is of commercial muscle and legal entitlement. While there have been concerns that in the mediation room power differences will be translated into outcomes favouring the stronger party, the complexity of power relationships often means that the stronger party cannot achieve their way through the use of strength alone, and the weaker party has an ability to have some interests accommodated in negotiated outcomes. Nonetheless, dominance behaviour has an influence in the face-to-face situation, and high status players can change the perceptions and behaviour of subordinates.

Hofstede refers to the concept of power distance, namely the difference between the ability of a first party in conflict to influence the second and the second to influence the first.[3] While there is not a big power difference in the dominant Australian culture, it is nevertheless true that when communication takes place on-line there is a tendency to reduce further the difference; dominance behaviour can be more mediated and mitigated by the technology, the impersonal nature of interaction and the frequent use of asynchronous interaction. In some respects the use of technology is in itself neutral in relation to power relations and does not exacerbate other issues occasioned by lack of neutrality and impartiality encountered off-line. However, where the technology is only an instrument in the hands of the third party, it clearly cannot negate any deviations from proclaimed values of independence and neutrality – it is not in itself a counter-balancing phenomenon. *The question for contemplation is: How are power dynamics modified in the environment of ODR?*

Communication

The internet has been referred to as both a megaphone and a hearing-aid. It is a megaphone in the sense that negative comments and observations are magnified by their visual presentation, and a hearing-aid in that it allows parties to pick up on every aspect of communication and ensure that nothing is lost, forgotten or misfiled. However, just as it is often quipped that language is the worst form of communication devised by humans, so it is true that on-line communication does not avoid ambiguity, obscurity, unintelligibility or nonsense. *The question for contemplation is: How does virtual communication assist or hinder the negotiation and dispute resolution processes?*

Timing

In many business cultures *delay* equates to *escalation* in dispute situations. Where there is tardiness in correspondence or responding to offers and counter-offers the conflict can, in the perceptions of one or both parties, be intensified. Asynchronous communication requires an adjustment to preconceptions along these lines as delay may be a function of the need to make decisions among members of dispersed groups, different time zones, or the breakdown of technology – a problem I have personally encountered in simulated on-line mediations. As Alexander points out, the timing of dispute resolution processes can also influence the negotiation and communication styles

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3   Gert Hofstede, *Cultures and Organisations* (rev ed, New York: McGraw-Hill, 1997) 27-48. See also Sharyna Rao,
     'The cultural vacuum in online dispute resolution', www.unisa.edu.au/cmrg/apmf/2003/rao.pdf.

that participants employ.[4] Tan, Bretherton and Kennedy have compared the negotiation styles of negotiators using face-to-face, synchronous computer conferencing (similar to instant messaging) and email. The results show that conversely to media richness theory, which postulates that integrative bargaining and co-operative problem solving are promoted by the richness of the communication medium and therefore work best in face-to-face negotiations, the highest ratio of integrative negotiation styles was achieved by the participants using synchronous computer conferencing. For participants using email, the ratio was almost balanced out with a slight dominance of distributive styles. In face-to-face negotiations distributive bargaining techniques clearly dominated over integrative styles.[5] *The question for contemplation is: To what extent do factors of timing in ODR impact on the attitudes and behaviours of participating parties?*

Identity, privacy and confidentiality

While off-line mediation presents few problems in relation to the identity of the individuals involved and the private nature of the undertaking, these qualities are more problematic in the virtual environment. In fact, it would probably be true to say that those who have grown up with email, chat-rooms and web-based video-conferencing at their finger-tips make no assumptions about privacy – for every device designed to provide virtual seclusion there is another which can hack into it. This insecurity raises issues of identity and concerns over who is communicating with whom in ODR processes. The potential for problems might be slightly exaggerated, given the unlikelihood of people wishing to step into the shoes of defendants just for the fun of it. The virtual environment also provides easy access to transcripts of communications, something not encountered in the off-line world. However, the confidentiality of off-line mediations and arbitrations has been seriously undermined by a series of cases in which oral evidence has been led, in some cases from the mediator, as to what transpired in the mediation process.[6] *The question for contemplation is: What are the implications of ODR for the perceived attractions of confidentiality and privacy provided by off-line ADR?*

Negotiation

One of the claims of the mediation movement is that face-to-face problem-solving is the most auspicious way to deal with disputes: the full range of legal, commercial and personal issues can be dealt with, enhancing the parties' ongoing relationship and increasing the chances of the settlement enduring over time. Some of the empirical evidence challenges these assumptions and suggests that parties will be less positional where they engage in on-line exchange of emails, or better still on-line chatting.[6] Automated 'double-blind bidding' through the internet provides an interesting means of depersonalising the negotiation process, and ridding it of unwelcome 'noise', where liability is not in contention and the parties are attempting to resolve the quantum issue alone. Just as some elements of ADR have influenced developments in the formal legal system, so too has this innovation suggested

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4   Nadja Alexander, *International Commercial Mediation* (forthcoming, 2006)

5   Jamie Tan, Di Bretherton, Gregor Kennedy, 'Using electronic medium of communication to negotiate', Paper delivered at International Perspectives on Peace and Reconciliation Conference, University of Melbourne, 14–17 July 2003.

6   Boulle, n2 above, 538-574.

opportunities for use in off-line mediation situations. *The question for contemplation is: To what extent are negotiation dynamics affected by on-line communication and who stands to benefit or lose from these changes?*

Critical Issues in ODR

At the very least, the advent of ODR challenges some of the cherished assumptions behind the development of ADR processes over the past 25 years, for example that it is necessary for mediating parties to sit physically around the same table, or for arbitration to deal with evidence in written and oral forms. There has been insufficient time and experience to examine in detail the relative effectiveness and desirability of the dispute resolution processes based on the emerging technologies vis-à-vis their off-line counterparts. There is, however, some predictability about the critical issues in ODR, many of them derived from those in off-line ADR. One of these concerns acceptance and legitimacy in the market-place. Despite its existence for more than 25 years in Australia there is still a societal resistance to ADR. Although this is less than what it was, there is still no substantial spontaneous demand for ADR services; it thrives where it is required, with greater or lesser degrees of compulsion, by courts, tribunals or legislation. Other topical issues relate to fairness, effectiveness, and the standards and competencies of service-providers. All these issues are destined to arise in the context of ODR.

Future Prospects for ODR: To What Extent Can the Cultures Coalesce?

In a recent meeting with Graham Ross, of www.themediationroom.com, we discussed some of the future prospects for ODR and saw it as an indispensable system in relation to small claims which extend over a large geographical area, and as an important supplement for many other disputes which might use a combination of written, digital and face-to-face communication. I think it is appropriate to see ODR in this light, as an inevitable part of broader conflict management systems. It is used in part in the Federal Court's e-court project, and by government agencies involved in consumer, fair trading, residential tenancy and like disputes. As a supplement to other forms of communication its future progress seems assured – as a stand-alone alternative to existing systems, only time can tell.

Given the criticisms often made of arbitration in relation to delays and expense, it may be that this becomes an area in which there is a coalescence. On-line arbitration can be conducted through the electronic submission of documents, in a digital version of 'on the papers arbitration', or by way of web-based video-conferencing where the traditional process is made accessible over any geographical distance. The virtual environment can be useful in *case managing* the arbitration process where there is an extensive documentary basis and preliminary skirmishes over pleadings, discovery and witness statements. This can be useful not only for the parties, but also for lawyers, insurers and others involved in the processes.

Melissa Conley Tyler has estimated that over 1,500,000 mediations have been conducted on-line in the last ten years.[7] This is not a passing fad. One of the well-known limitations on the growth of

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7   Melissa Conley Tyler, *'More than 1.5 million disputes resolved on-line'* (2004) 7(3) *ADR Bulletin* 58.

traditional ADR services has been a level of community ignorance as to the nature and accessibility of the processes. In 2002 the Victorian government undertook a needs assessment of likely demand, focusing on potential providers and users of ODR.[8] It found that more than 70% of respondents would be willing to consider ODR both for general disputes and disputes with an on-line company. This is a significant expression of interest in a largely undeveloped service. The message for service-providers, or prospective service-providers, is that they need to adapt their offerings to respond to the need for relatively quick and cost-effective dispute resolution methods involving information and computer technology.

Ultimately the same diagnostic question will come to the fore in this context as it has in other ADR environments – which disputes and parties are suited to having their issues dealt with on-line and which are not? As yet, it is not possible to identify the necessary or sufficient conditions for successful use of ODR. While there is a ready assumption that e-commerce disputes are naturally suited to this system there has been a surprising demand for on-line arbitration in family law disputes in some jurisdictions.

The *digital divide*, exemplified by the fact that the majority of Indians have never heard a dial tone, creates significant challenges of fairness and equity in relation to new technologies. Nonetheless, there is some evidence that in the future some individuals may move directly from an oral tradition to a digital one, essentially avoiding the paper tradition to which we are accustomed. In native title mediations in this country there is already a tradition of using sophisticated technology to assist claimant groups to participate in the process. New technology can disadvantage those on the wrong side of the digital divide, but it also has the capacity to empower.

The Law Council of Australia is currently looking at the promotion of ODR services among its members. There is wide-spread interest in it among tribunals, government bodies and international organisations – it is an auspicious time for ADR practitioners to begin looking virtual.

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* This paper was delivered at the IAMA 30th Anniversary Conference, "Celebrating ADR", Canberra, May 2005

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8   See Melissa Conley Tyler and Di Bretherton, 'Who wants on-line ADR? Report of a needs assessment in Victoria' (2003) 6(4) *ADR Bulletin* 77