Law and technology: what does the future hold for ADR?

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Introduction

This paper addresses what the future holds for ADR when law meets technology. The overview provides a discussion of the nature of the technology and the 'virtual' aspects of e-ADR and how there already are practitioners online. The advantages and disadvantages of e-ADR are also discussed together with the policy and regulatory issues arising from such processes. Think tanks and regulatory bodies are evaluated in regard to their contributions to e-ADR internationally. E-ADR in practice is showcased together with the role of courts and courtrooms of the future. A concluding section suggests that while e-ADR is both a tool and a process its development is still in its infancy and it remains to be seen whether it can help or hinder the mediation process. What remains is that e-ADR will evolve as an important venue for the resolution of certain types of conflict in future.

In attempting to answer the rhetorical question in the title of this paper it seems that one must write by looking forward into the future with hindsight. A better metaphor seems to be that it is like driving a vehicle forward looking through the rear view mirror. The point is that there may be some lessons to be learned from reviewing the past which may provide the foundations for the future. Predicting the future is a hazardous exercise as one could be proved so wrong. But, as Robert Goddard, one of the pioneers of the space industry and after whom a space centre has been named, once said 'it is difficult to say what

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is impossible, for the dreams of yesterday is the hope of today and the reality of tomorrow'.

Conflict resolution outside mainstream judicial adversarial systems is now seen as part of an 'holistic' approach to seeking satisfactory answers to any conflict. Some advantages of such a philosophy are that the parties have an opportunity to reassess their respective relationships; to determine alternative possible outcomes; and to address the management of potential future conflicts. Parties also benefit from a feeling of empowerment and being in control of decisions, in addition to a significant reduction of costs, time and resources. Thus, it begs the question: How well does electronic alternative dispute resolution (e-ADR) fulfil these roles vis-à-vis traditional ADR?

This paper is about e-ADR also abbreviated as e-DR and sometimes called online mediation. E-ADR is both a tool and a process and is still in its infancy. It remains to be seen whether it can help or hinder the mediation process but one thing is sure. It will evolve as an important means for future resolution of certain types of conflict. It is here that we wish to explore the interface between law and technology and how one might characterise the future of e-ADR.

This paper is organised in four distinct sections. The first gives a very broad overview of the nature of e-ADR in terms of its 'virtual' aspect as well as the processes involved in the resolution of conflict. Policy and regulatory issues are also canvassed here as are developments internationally. In the second section we examine think tanks and regulatory bodies that may be influential in the development of e-ADR. Section three deals with e-ADR in practice with a survey of recent developments and section four is about how courts can and have responded to the advent of e-ADR. A short conclusion attempts an assessment of what the future really holds for e-ADR.

Overview

Before outlining the nature of the technology some of the assumptions governing e-ADR may be in order. It is assumed that the parties are willing participants to the proceedings and that the 'virtual' mediator is a neutral third party. Both parties are willing to accept and act on a virtual mediator's decision. Finally it is assumed that the parties have access to the tools needed to conduct the mediation over the internet.

Nature of the technology

The nature of the technology requires that for cyber-mediation and e-ADR to

work there are both a delivery mechanism and a medium for discussion and information sharing. At its base this means access to the internet or variants thereof, and to an electronic mail facility both to send and to receive mail and documents. Thus, the technology can involve the internet, intranets, various hybrid technologies such as the mobile phone, video conferencing and satellites. The whole process may be online or only part of it. This technology can be either stand alone or connected with an official body such as a court.

Moreover the technology can be text only or sound or video and text. At the extreme end, a virtual environment involving 3D, taste, sound, touch can be represented. The cost of the technology is coming down dramatically and rental schemes are emerging that makes such a method of resolving conflicts increasingly available.

There are also various group decision-making tools, negotiation software, blind bidding, gaming and other forms of mediation and bargaining. For example, in blind bidding the parties make various demands. The software records the demands, determines the overlap and recommends a settlement figure. For example, Online-Disputes.org uses a fully automated system that allows member businesses to specify automatic dispute handling rules, so that the consumer can get an immediate response from the business tailored to the specific complaint. Also, at the extreme end, artificial intelligence systems may create cyber-judges.

These digital communication media and internet-based systems have therefore added new dimensions and tools to the dispute resolution process. There may now be little or no need for face to face meetings in a confidential setting. This new medium has given birth to virtual meetings for dispute resolution and by extension has made the 'ether' a virtual courtroom with mediators and acting like magistrates in the real-world.[1]

The virtual aspect

As the process is conducted online the first real problem is that of identity. The question is: How do you prove virtual identity? This is a difficult issue to deal with because people do not act the same as when they are in a face to face situation. For example, it has been observed that in virtual chat rooms, men assume the role of women, older people pretend they are young and so on. A

1 Widdison R 'Electronic law practice: An exercise in legal futurology' (1997) *Modern Law Review* 60(2) p 144.

whole online culture has developed where people assume identities that they do not do in real-life.

There is some evidence emerging that internet communications may be more confrontational and that a more masculine style of communication dominates. It seems to be a more male-dominated medium. Also, younger people, who have grown up with the technology, are more likely to use it.

It may be claimed that the internet is anarchy. It seems that no one can control it enough to be confident in the medium as a neutral tool for dispute resolution. As will be noted later there are a wide variety of e-ADR services that are now becoming available online and the fear is whether an ordered regime may be achieved, assuming it is desirable.

Process of e-ADR

There is no uniform process for e-ADR. Most forms of e-ADR involve the similar stages as those in video conferencing. Thus, text-based ADR will usually involve the following:

- initial contact;
- initiation of adr process, terms of use, introduction to the system;
- assessment and checklists to be used to determine suitability of the dispute for e-ADR;
- information exchange in which parties exchange data and information;
- formal lodgement where parties can lodge formal documentation such as pleadings, records, and other material;
- questions and answers by the parties;
- facilitation (usually by shuttle negotiation) through a third party; and
- if there is a third party resolution, a decision is rendered.

Uptake of online technology

So far the disputes settled online tend to emerge from the online environment itself, for example, domain name disputes, intellectual property disputes, online consumer purchases. One might well ask whether the medium can be readily extended to other contexts?

To date online mediation tends to be a form of 'shuttle diplomacy' with offers and counter offers relayed through the email system. There has been some dispute counselling about the role of ADR and the nature of ADR processes.

Despite the early promises of e-ADR, the uptake has been modest. There seems to be a need for more research on the factors that may encourage the greater use of e-ADR. Some of the possible reasons for the modest uptake include: preference for face to face, distrust in the technology, technical phobia, access problems, unfamiliarity with the technology, mistrust of advisers such as lawyers.

E-ADR may be inappropriate where it involves violence, fraud or allegations of illegality or in cases where a legal precedent may be required. It is wholly in appropriate where there may be a gross inequality of bargaining power between the parties. Yet, the linchpin of mediation is the unpacking of the needs and concerns of the parties involved.

Advantages

There are a number of possible advantages: speed, convenience, ease of access, efficiency, cost savings, easy storage of digital data and easily crossed international borders. Each party may dictate when and where to respond to a mediation procedure. This time-lag allows participants to absorb the materials and documents and reflect on a position. A spatial and temporal separation also permits 'distance mediation' where hostility and rage is reduced and forces each of the parties to focus on the substantive issues at hand.

E-ADR gives a party control of the proceedings absent in a face to face situation and allows for honest communication of thoughts and feelings. The mediator has the opportunity to redress any power imbalance and to control the emotional temperature. Moreover, in domestic conflicts, for example, the trauma of personal involvement is much reduced. The communication media also is useful for keeping records given that a log of the proceedings is almost always available. Overall, therefore it is cost effective in time, space and resources.

Disadvantages

Negotiation and dispute resolution is fundamentally a 'people' oriented task. E-ADR misses out on non-verbal clues: body language, touch and smell. It is not as holistic or interactive as face to face. The nuances of expression, timing, communication, framing and persuasion often make the difference between success and failure in bargaining and mediation.[2] Some of these shortcomings

2 Perritt HH 'Electronic dispute resolution' NCAIR Conference 1996 <www.law.vill.edu/ncair/disres/perritt.htm>.

may be overcome through the use of high bandwidth, but this is not yet readily available. Moreover, the withdrawal of the parties is too easy.

The lack of physical cues, including those of race and gender, pose great challenges to e-ADR. To date however, the environment remains uncertain there being no certain fixed or familiar boundaries with which to meet a person's emotional needs. Also this lack of personal relationship diminishes the act of cooperative problem-solving where the mediator traditionally builds trust through agenda setting, discussion, enforcing the rules and reacts positively by observing body language and tone and inflection of voice.

While the technology has given a high degree of flexibility of delivery, there are practical problems of process. Legal representation and input, for example, are difficult to build in during the entire mediation process. Moreover, in terms of confidentiality and privacy issues there is no assurance that the material will not be forwarded to other interested parties or copied without authorisation. These raise policy and regulatory issues which are discussed next.

Policy and regulatory issues

Access

On the one hand, e-ADR may enhance the access to isolated areas and to those who are homebound. But, at the same time, there is a concern about an emerging digital divide between those who have access to e-ADR and those who do not. Barriers may be financial, educational, language, cultural, age, physical disability or simply a phobia in using information technology.

Fairness

The online medium may require further thought about input processes, assessment of suitability, need for counselling about ADR processes, problems of unfamiliarity and imbalances in IT literacy. It is important that organisations work together with stakeholders to ensure that online processes are fair and impartial. While courts are usually perceived as impartial, when a firm such as eBay offers an online dispute resolution service, it is likely to perceived differently. Another element of fairness is transparency. The rules of operation and nature of the ADR process should be explained to the parties so that they know what to expect and those expectations are met. Some feel that transparency also requires an upfront and public disclosure of the ADR provider's track record.

Security

In part this is a standards and IT problem. Digital data can be manipulated and hard to verify. Records are stored automatically and people are not aware of its storage. The speed of transmission is such that widespread damage (for example, fraud) can be done before people realise what is happening. Electronic records are easily recovered, even if the files have been deleted. It is also a management issue. How can we ensure that the online environment is sufficiently secure so that there will be sufficient trust to use the system on a wide scale?

Confidentiality

How is this ensured in an online environment?

Privacy

In the US alone there are over 40 different laws dealing with privacy. Australia also has many laws relevant to privacy as well as a whole new regime that will soon apply to much of the private sector.* Yet, notwithstanding these laws, the record of online privacy protection is not good. Most sites do not comply with basic privacy standards.

Need for standards

What are the ethics that should govern this new environment? Is self regulation the answer or must government play a role? How do you deal with the international dimension and the need to cater for the diversity of ADR contexts.

Education

Businesses, consumers, the community – there is a great need to promote knowledge and understanding of ADR processes generally and e-ADR in particular.

Cooperation

Organisations need to cooperate with each other. In the case of fraud and criminal conduct, there must be cooperation with law enforcement bodies.

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* Editor's note: *The Privacy (Private Sector) Amendment Act 2001* (Cth) become effective on 21 December 2001. This Act amended the *Privacy Act 1998* (Cth) and extends privacy laws to the private sector. For more information go to <www.privacy.gov.au>.

There is also the need for international cooperation, given the borderless nature of e-ADR.

Jurisdiction

While the 'net' and cyberspace are magical places to be in, there are jurisdictional problems to contend with especially if one does not possess the right 'mantras'. In this arcane world of legal systems with different laws, different conceptions of public policy and residing in different political climates, conflicts arise advertently or otherwise. In the virtual world of dispute resolution there can be no specific jurisdiction. This environment is able to provide fast, accessible resolution to disputes submitted online and provided by neutral arbiters.[3] E-ADR appears to be a viable proposition where the parties in dispute are geographically separated. Moreover, disputes may be accepted and decided upon without the need to resolve complex conflict of law issues as there may be no legal precedent or governing law acceptable to both parties. On the internet such problems as cyber-squatting, domain name conflicts with trade mark holders and so on have arisen as demonstrated below.

- Cybersquatting: *Panavision International v Toeppen et al* 141 F.3d 1316 (9th Cir 1998).
- Companies with identical name one with a registered trade mark and the other with a registered domain name: *Cybersell Inc v Cybersell Inc* 130 F.3d 414 (9th Cir 1997).
- Domain name registrant against a federally registered trade mark owner *Maritz Inc v Cybergold Inc* 947 F.Supp 1328 (ED Mo 1996).
- Personal jurisdiction: *Inset Systems Inc v Instruction Set Inc* 937 F.Supp 161 (D Conn 1996).

Arbitration — international commercial contracts

The main instruments promoting arbitration in international commercial contracts are the 1958 Convention on the Recognition of Foreign Arbitral Awards (NY Convention) and the United Nations Commission on International Trade Law (UNCITRAL) which include a model set of *ad hoc* arbitration rules.[4]

3 Donahey MS 'Dispute resolution in cyberspace' (1998) *Journal of International Arbitration* 15(4) p 127.

4 Howell D 'Arbitration gains acceptance—international contracts benefit' (2001) *Asia Pacific Bulletin* vol 15 no 4 p 1.

The jurisdiction of an arbitral tribunal is based upon the agreement of the parties. This agreement typically also provides for the rules of arbitration procedure and the place and language of arbitration.

The UNCITRAL Model Law is a template that has been adopted by a number of jurisdictions that have developed arbitration statutes. The model law provides in Art 19(2) that, in the absence of an agreement being reached by the parties, the tribunal is to be give a wide discretion to 'conduct the arbitration in such a manner as it considers appropriate'. The UNCITRAL Working Group on Arbitration is investigating amendments to make it clear that the agreement may be in electronic form.[5]

The rules of arbitration may be *ad hoc* or institutional. The place of arbitration will usually determine the procedural law to be applied to the arbitration. An international arbitration will take place within a framework of the law of the contract, any relevant international treaty or convention, the procedural law of the place of arbitration, any supervening national laws and public policy, and as per any arbitration rules agreed upon by the parties.

Arbitration was slow to be adopted by Asian countries, but has grown in popularity. It is certainly preferable to trying to enforce an obligation in a foreign court. Arbitration allows the parties to choose the tribunal. It gives them privacy and flexibility. By agreement, the parties can also determine what rules will apply.

In Australia, domestic arbitration is governed by the Commercial Arbitration Acts. International arbitration is governed by the *International Arbitration Act 1974* (Cth).

Also there is the Australian Commercial Dispute Centre (ACDC) established in 1986. It offers the full range of dispute resolution. In 1990 it was appointed the London's Court of International Arbitration's regional registry for the Asia-Pacific region. The ACDC is a non-profit organisation aimed at introducing non-adversarial dispute resolution processes in Australia. Use of this centre saves time and money and prevents conflicts from escalating. It seems that parties are now more ready to take decisions into their own hands rather than having them made by a third party. A mediator carefully maps out for the parties exactly what will happen stressing confidentiality and impartiality. Once the ground rules are set the parties need to listen and to respect each other. The parties have then the authority to 'sign off' on any agreement reached without referring the decision to someone else.

5 See <www.uncitral.org>.

The NY Convention is the most important with over 120 signatories. This Convention aims to promote the recognition and enforcement of foreign arbitration awards. It also specifies the grounds on which recognition and enforcement of foreign arbitral awards may be refused. Hong Kong, Australia, Japan, South Korea, Philippines, Singapore, Thailand, Sri Lanka, India, Cambodia, China, Pakistan and Bangladesh are just a few of the countries that have adopted the NY Convention.

Arbitration — New York Convention & AAA Reform

Article II of the 1958 NY Convention provides that a signatory government 'shall recognize an agreement in writing under which the parties undertake to submit to arbitration.'

'Agreement' is defined as including 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'

The American Arbitration Association (AAA) is also developing a protocol so that its arbitration services can be provided in an online environment.

Many legal uncertainties

The legal framework for e-commerce and dispute resolution is highly fragmented. Internationally, the legal scene is a mix of international conventions, legal instruments, and local laws governing both substance and/or procedure. Even in the EU, the legal regime is quite diverse with some countries prohibiting any system that would prevent consumers from taking their disputes to a court. Others would restrict the use of ADR to contexts where the ADR mechanism was notified only after the dispute arose, where consumers had full notice and where consumers are given the same basic procedural rights as from a court. Other problems arise from doubts about the validity of online contracts. For example, in some jurisdictions any clause demanding that a method of dispute resolution or forum selection be made, must be in 'writing'. Some laws in some countries limit the use of encryption or authentication that might undermine security needs in online contracts. There are also legal problems with enforcement. Even in regard to the NY Convention, not all nations have become signatories and others have done so with reservations that might apply.

A middle ground might be to offer parties the chance at ADR with courts left as a last resort to work for a solution.

Differing regulatory philosophies

We see in the ADR debate the same philosophical differences between the EU and North America that was noted earlier. Europeans generally are not trusting of private regulation. They are accustomed to more government intervention to get these matters right. In the US and Australia, there is much more faith in and reliance on industry to lead the way and govern itself.

Philosophical differences about ADR

Also, consumers are understandably reluctant to give up many of the rights to courts that have been won after a century of reform. A complaint mechanism or customer service centre or industry code will not give the same level of assurance as an impartial and publicly funded institution like a court.

Cultural differences

An online system going across national borders is also likely to encounter significant cultural differences that must somehow be negotiated and taken into account.

Languages differences

Another major issue is the different languages that may be used. While technology is rapidly improving so that real-time online translation may soon be available, we are not there yet.

Practical issues

Other practical issues involve concerns about proof of consent, use of personal data, privacy, inadequate self-regulation, inappropriate industry codes that are not trusted by consumers, and intellectual property ownership of data.

International ADR as a cross-border solution?

Business groups generally hold out great hope for e-ADR as a way to overcome the problem of having to negotiate so many different legal systems that may apply to an online transaction.

OECD-EU co-operation

There is also great promise in international cooperation. For example, the EU and Canada have agreed to support the establishment of minimum requirements for a range of e-commerce issues, mutual recognition of certificates and certification authorities, procedures for the use of electronic signatures across borders and consumer protection for alternative dispute resolution mechanisms.[6]

US developments

In the US the Federal Trade Commission's Summary of Public Workshop on Alternative Dispute Resolution in the Electronic Marketplace discusses various options and the way ahead.[7]

Future?

- We see emerging a range of dispute resolution programs and initiatives. This is good because it means that people are working out the best ways to use IT and find ways of resolving disputes that best fit the needs of particular groups, whether they be business, consumer or government. There is thus an element of mass-customisation.
- These ADR developments are also providing answers to groups who are worried about the cost, inconvenience, language and cultural barriers and the risk of being subjected to other jurisdictions.
- E-ADR seems especially suited for global consumer disputes where the amount in controversy is small and jurisdiction and conflict of laws questions are prevalent. Such systems play a vital role in giving greater confidence in e-business.
- An important component in all of this is the need for consumer and business education about programs, codes, and the benefits as well as the limits of e-ADR.
- There is a common interest of all groups to cooperate with law enforcement and other regulatory agencies to combat fraudulent and deceptive practices.
- As courts go online, perhaps there is greater scope, too, for courts to be

6 Organisation for Economic Cooperation and Development. <www.oecd.org>.

7 See <ftc.gov/bcp/altdresolution/summary.htm>. See also Menkel-Medow C (ed) *Mediation* DartmouthPublishing 2000.

better connected to the network of various dispute resolution mechanisms and players involved.

- While it is recognised that some government regulation is probably necessary and desirable, this should not come at the expense of impeding innovation at the appropriate level, government had a role to play in ensuring fairness, low cost, transparency, efficiency and impartiality of various ADR systems.
- One area in which there is little agreement is the extent to which various ADR processes should be binding or mandatory.
- Disputes arise in a legal context and here there is a great need for harmony. There is an urgent need to look at telecommunications legislation, the *Privacy Act 1988* (Cth), contract law, law regarding confidentiality and privilege, enforceability issues, consumer law protection, use of digital signatures, proof of informed consent, insurance, risk management and so on.
- The prospect of dispute resolution across national borders poses even greater problems.

Think tanks and regulatory bodies

National Alternative Dispute Resolution Advisory Council (NADRAC)

In Australia NADRAC is turning its attention to the growing popularity of e-ADR.[8] This includes the use of IT to resolve disputes, including video conferencing, email, artificial intelligence systems, and the internet. It also includes the use of IT to resolve disputes in such areas as domain names, intellectual property, e-commerce and ISP services. Some of the issues raised by e-ADR include:

- confidentiality, privacy, security, recordkeeping, storage of information;
- access issues such as concerns about the growing digital divide between the IT haves and IT have-nots;
- appropriateness of e-ADR for particular types of disputes;
- training and IT requirements to make it work, that is, the development of standards; and
- development of ethical codes of practice.[9]

8 See <www.nadrac.gov.au>.

9 See the NADRAC 'Online ADR background paper' January 2001.

American Bar Association Taskforce

The ABA E-commerce and Alternative Dispute Resolution Task Force is studying standards for resolving disputes arising from e-commerce.[10]

Some OECD developments

OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, was adopted on 9 December 1999 by 29 OECD members.[11] These guidelines apply only to business to consumer (B2C) contexts and provide a blueprint for government as they formulate and implement consumer protection for e-commerce. The guidelines provide a blueprint for the private sector as it develops self-regulatory codes and best practice regimes. It is hoped that these guidelines will assist consumers to determine what fair business practices they should expect. Article VI of the Guidelines say that consideration should be given to whether existing dispute resolution frameworks should be modified or applied differently to ensure effective and transparent consumer protection in an e-commerce context.[12]

OECD Guidelines for Consumer Protection:[13]

- transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce;
- fair business, advertising and marketing practices — business should 'pay due regard' to consumers' interests and act accordingly;
- online disclosures that provide enough information to allow consumers to make informed choices — including information about online businesses, their goods and services, and the terms and conditions of sale;
- clear processes for confirming transactions;
- secure payment mechanisms;
- timely and affordable dispute resolution and redress processes — consideration should be given to whether existing dispute resolution frameworks for applicable law and jurisdiction should be modified or applied differently to ensure effective and transparent consumer protection in the context of the continued growth of e-commerce;

10 See <www.law.washington.edu/aba-eadr>.

11 See <www.oecd.org>.

12 See <www.oecd.org/dsti/sti/it/index.htm>.

13 See <www.oecd.org/dsti/sti/it/index.htm>.

- privacy protection according to recognised privacy principles that are appropriate and effective protection for consumers; and
- consumer and business education should be emphasised to foster informed decision making by consumers and to increase business and consumer awareness of the consumer protection framework applicable to online activities.

EU-ADR: Some legal implications

In the EU, Kuner argues there are a number of legal obstacles to the adoption of alternative dispute resolution techniques for B2C disputes.[14] First, there are a number of Guidelines and Directives that have application. For example the OECD Guidelines which contain provisions about dispute resolution.[15] The Brussels Convention of 1968 provides various default jurisdictional rules on the enforcement of judgments in civil and commercial matters involving consumers. For example, Article 13 gives consumer the right to bring suit in the Contracting State in which they are domiciled.

Similarly, the Convention on the Law Applicable to Contractual Obligations (The Rome Convention) provides default choice of law rules for consumer contracts. Article 4 of the Rome Convention provides for application of the law of the country of the consumer's habitual residence and Article 5 says that parties may not derogate from the mandatory rules of law of such country.

The Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts contains further restrictions on the use of ADR in consumer contracts. The Distance Selling Directive also gives consumer non-derogable rights that could limit the provisions of many standard ADR clauses.[16]

On the positive side, the new E-Commerce Directive[17] contains Article 17 which is designed to remove obstacles to e-ADR. It requires member States to 'encourage bodies, responsible for the out of court settlement of, in particular consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned' and to 'encourage bodies responsible for out-

14 Kuner C 'Legal obstacles to ADR in European business to consumer electronic commerce' (2000) *Electronic Commerce & Law Report* ISSN 1098-5190 Vol 5 No 28 July 19 p 773.

15 See <www.oecd.org//dsti/sti/it/consumer/prod/guidelines.htm>.

16 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 (The Distance Selling Directive).

17 See <europa.eu.int/eur-lex/en/dat/2000/c_128/c_12820000508en00320050.pdf>.

of-court dispute settlement to inform the Commission of the significant decision they take regarding Information Society services and to transmit any other information on the practices, usages, or customs relating to electronic commerce.' De Zylva (2001) analyses the impact of EU's Distance Selling Directive and suggests several reasons why one should attempt to resolve e-commerce disputes online.[18]

Implications

- If you are setting up an e-ADR service, check out the laws of the particular jurisdiction.
- There are particular sensitivities in B2C contracts where legislation may mandate particular substantive and procedural rules and provisions in relation to consumer contracts.
- An appropriate disclaimer will help.
- Regularly track legal developments in this area.
- Seek legal advice.

Hague Conference on Private International Law (HCPIL)

The HCPIL recommended the development of a dispute resolution mechanism for a world-wide context. It called for one system, operating within an independent control authority set up by public authorities, either directly or by delegation from representatives from industry, consumers and public authorities. It also recommends a system to accredit different regimes that meet the overall guidelines and principles. The principles of transparency, independence, reliability and legality should be at a minimum. The proposal is for one system with three arms made up of:

- a preventive method whereby sites would be labelled through a system of seals or trust marks;
- an ADR to which sites would give prior consent through the label, enabling rapid resolution at lower cost of any disputes that arise and which could not be resolved by preventive means; and
- a default rule of jurisdictional competence for any case in which the first two arms of the system have been unable to provide satisfaction, or for residual cases which cannot be brought within the first two arms.

18 de Zylva MO 'Why resolve e-commerce disputes online'(2001) *International Internet Law Review* 37 – 42.

The development of procedural rules, including uniform conflict of law rules are already in place. See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial matters adopted by the Hague Conference on Private international law (HCPIL) on 30 October 1999.[19]

E-ADR in practice

Recent Australian developments

Courts in Australia have for some time been active in their use of technology. One of the most recent developments is Australia's first permanent privately hosted electronic arbitration room located in Sydney, but able to be connected to everywhere. A joint venture between Auscript and Counsel's Chambers, this is a fully networked room with facilities for electronic evidence, document imaging, video conferencing, webcasting, chat facilities, real time transcription and point-to-point data lines to access external services.[20]

Singapore online mediation program

The Singapore Judiciary in late 2000 claimed to be the first in the world to introduce an online mediation facility, enabling commercial and internet-related disputes to be settled online and without the need of the parties to go to court. This development is consistent with Singapore's intention to be an e-commerce hub called e@dr.[21]

The system works this way:

- Complainant goes to the website.
- Complainant fills in the particulars, including contact details of respondent and proposes a solution to the problem; submits form.
- Complainant get an acknowledgment of receipt and case number.
- Moderator gets the request and emails the respondent.
- Respondent can either accept or reject use of e@dr.
- After moderator hears from respondent, moderator decides on proper court, for example, small claims.

19 See <www.hcch.net/e/conventions/draft36e.html>.

20 See <www.b2g.com.au/e-courtrooms/hearing.html>.

21 See <www.e-adr.org.sg>.

- Moderator refers the case there and informs the mediator.
- Moderator informs claimant and respondent of arrangements.
- Mediator contacts both parties.
- Online mediation process begins.
- Parties do not need to have links with Singapore to use this process — they need only submit to Singapore's jurisdiction.[22]

US Private sector initiatives

Numerous groups are devising ways to use new technologies to resolve disputes, especially those that occur in an e-business context.

WebMediate

Provides the full range of dispute resolution services — direct negotiation, mediation and binding arbitration to businesses in conflict. Their clients include insurance companies and Fortune 500 companies. It is proving popular because it is faster, easier and less expensive and avoids face to face conflict. The services are also used by insurance companies in settling claims and business-to-business (B2B) e-commerce disputes.

AAA Dispute Resolution Protocol

In the absence of readily available international courts to decide private disputes and given the high costs of litigation, most private international disputes are resolved by negotiation, mediation or arbitration. The American Arbitration Association (AAA), one of the largest such organisations in the world, announced in 2001 a dispute resolution protocol for e-commerce business to business (B2B) disputes. According to the new protocol, companies should follow five principles in developing online techniques for handling disputes in a B2B setting:

- fairness, that provides access to neutral dispute resolution providers;
- continuity of business, so that disputes are resolved with minimal disruption to business activity;
- a range of options, that includes a variety of dispute methods to resolve disputes as early as possible; and
- a commitment to technology that will aid the swift and economical management of disputes.

22 Wong K 'Judiciary launches online mediation' *The Sunday Times* September 17 2000 p 3.

The AAA model provides a technological platform that will address each of the principles and offer tools designed to manage disputes and provide mediation and arbitration online and via traditional means. The AAA model and supporting principles were developed in consultation with industry and a number of major companies have signed on, including Microsoft Corp, AT&T and others.

ClickNSettle is operated by the National Arbitration and Mediation Corporation, a US-listed company which has developed an interactive, online negotiation and mediation system.[23] Through a complex system of escalating payments on each offer or demand entered parties can 'up the ante' to the point where both may be unwilling to go any further. This puts a cap on the amount parties may be willing to pay and thus settle on the basis of what the parties perceive to be reasonable. Here the cost of the case is distributed almost equally between the parties.

Online Resolution is a US company and a subsidiary of a national body named mediate.com.[24] The company offers online evaluators, mediators and arbitrators for any form of dispute. Any value of dispute is catered for. The claimant may select the form of dispute resolution. Upon submission of the case, online resolution contacts the other party to ascertain whether they are willing to participate. If they are, charges calculated on the value of the claim are payable by both parties.

An innovative aspect of this service is the availability to the mediator of an online resolution 'room'. This virtual room is hosted on a secure server designed for use by the mediator as a private caucus room with the parties. In this way it appears to mimic real-world mediation and thereby 'humanises' the online mediation process.

SquareTrade is a US company providing dispute resolution services for online auctions. Squaretrade assigns a mediator who helps to resolve any dispute of any value. The principal feature of the system is that no charge is made to the claimant to enter the dispute resolution system. The service is quick and easily available to consumers. Squaretrade has been engaged by eBay to serve as its mediator in buyer seller disputes.[25] EBay has about 13 million users and 2 million transactions per week. For the moment, the service is free to eBay users with transactions of more than US$100 in dispute.

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23 See <www.clicknsettle.com>.

24 See <www.onlineresolution.com>.

25 See <www.squaretrade.com>.

InternetNeutral operates mostly for businesses.[26] Trained mediators are involved. The fee is US$250 for filing, two hours of mediation and two hours of preparation. If the case can be handled entirely by email the cost ranges from US$1 to US$6 per minute for the mediation, depending upon the amount of the dispute.

WEBdispute caters primarily to businesses in dispute.[27] Fees range from US$100 to US$900.

Mediation and Information Resource Centre through online mediators focuses on B2B disputes with a charge of between US$50 to US$100 per hour depending upon the amount involved.[28]

Electronic Commerce and Consumer Protection Group (ECCPG) released guidelines for Merchant-to-Consumer Transactions.[29] The purpose of the guide is to establish a global framework. The guidelines argue that dispute resolution mechanisms for consumers should be fair, timely, affordable, transparent and independent.

Other organisations and countries

The World Intellectual Property Organisation (WIPO) mediation rules of its Arbitration Centre may also be initiated by the election of the right holder. In the electronic environment, domain name disputes are heard online and challenges and decisions made public on the internet. To further this mode of mediation WIPO is working on technical infrastructure to provide real time communications, audio and tele-video capabilities as well as putting in place legal structures.[30]

Novafourm is a Canadian company that provides a range of live internet collaboration methods that makes the online dispute resolution process both effective and efficient. Business and clients log into a personalised part of the website and view all of the current and historical information on their case. Novaforum focuses on IT disputes and either mediates or arbitrates the dispute. Novaforum employs NetMeeting, video conferencing and digital wireless connectivity in the settlement process.[31]

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26 See <www.internetneutral.com>.

27 See <www.WEBdispute.com>.

28 See <www.onlinemediators.com>.

29 See <www.ecomercegroup.org/guidelines.htm>.

30 See <www.wipo.int>.

31 See <www.novaforum.com>.

Word&Bond is an arbitration system that provides it own loyalty standard for interactive sales by combining a universally applicable set of best practice principles known as Word&Bond Promises with an impartial arbitration procedure.[32] The promises in relation to sale of goods and services produce the following effect:

- the purchaser can be sure of what is bought;
- whatever was bought is delivered on time; and
- if the trader does not meet these obligations, it agrees to refer a dispute to the interactive arbitration system rules and abides by any decision of the i-arbitrator.

This combination of principles allows traders to represent that their word is their bond in the virtual marketplace. The e-arbitration system is easy to use and relatively quick. The complainant can have an award in hand within 22 days of filing an interactive claim. A claimant pays a small filing fee to begin arbitration in proportion to the amount claimed. Filing fees start at £40 (AUD$1200) where less than £500 (AUD$1500) is being claimed.

The trader, the licensee, pays the remainder of the cost of the arbitration. Even though both parties benefit from having access to the system, it seems right that traders should underwrite the majority of the cost of the arbitration, as they derive the greatest cost benefit from it. There is also the incentive for traders to provide the best goods and service in order to have to undergo this process of dispute resolution. The time saving in dealing with disputes and the fact that goodwill is maintained between the trader and the customer is paramount in this virtual marketplace.

This site allows a claimant to file any type of claim, except for claims involving consequential loss. In the explanations in the claim form, the broad nature of the remedies available are set out: money back or the difference between what was delivered and what was expected. These mechanisms are becoming standard practice both in Europe and elsewhere.

It is to be noted that all of the site's i-arbitrators are qualified legal persons. The cost of a Word&Bond licence to traders depends on their annual revenue and starts from £200 (AUD$600) a year.

32 See <www.wordandbond.com>.

Courts

The use of traditional courts to resolve disputes arising online is considered as a forum of last resort, that is, when all else fails. But, even here enough IT has crept into the courtroom that there is no reason not to include the court as an additional extension to the mediation process. However, we are at an early stage of such developments and there may be a need for more research in this area in which the courts may work in tandem with e-ADR to provide everyone with sufficient alternatives to aid resolution of conflicts of any kind.

On the negative side, it may be claimed that judges may not know enough about the internet to make intelligent decisions.[33] On the positive side, Australia is one of the leading nations in the use of IT by its court system. For example, most courts now have video links. In criminal custody and sentencing matters, the matter can be heard via direct link without the inmate having to leave prison. Video testimony by witnesses is also now common. Digital recording systems have replaced cassette tapes. Sensitive microphones now track a speaker automatically. This use of technology has also brought with it new rules for evidence and procedure.

An exciting international application IT by the courts is the WA/Singapore Co-mediation program in which a WA judge and a Singapore judge mediate and provide an early neutral evaluation of the strengths and weaknesses of each party's case.

In NSW, the NSW Law Society predicts that online chatrooms may replace pre-trial hearings in many Courtrooms within two years. This would save a lot of congestion and waiting around and substantially reduce the costs.[34]

Indeed, just as different arbitration systems have competed against each other for international dispute resolution business it is likely that we will see court systems offering their services to a global market place. This would be a natural extension of Australian legal services — a major export growth area for Australia.[35]

Virtual Magistrate and Online Ombudsman's Office

The Virtual Magistrate and Online Ombudsman are examples of consensual

33 Baynes J 'Internet is a challenge of courts, says judge' *The Australian* Tuesday 5 December 2000 p 38.

34 Johanson S 'Net challenges the high cost of justice' *Age Online* 4 January 2001 15:58.

35 Blaxell Judge P 'The Future Role of Australian Courts on Resolving International Disputes' (2000) *Reform* Issue 76, Autumn p 12.

online arbitration and mediation projects. The Virtual Magistrate project is a joint venture of the National Centre for Automated Information Research, the Cyberspace Law Institute, The American Arbitration Association and Villanova Centre for Information Law and Policy. This project was initiated in 1996.[36]

The Virtual Magistrate provides an online mediation service to regulate online disputes in diverse subject areas including intellectual property infringements through to defamation, fraud and deceptive trade practices. The Virtual Magistrate offers a more formal 'purpose' in dispute resolution and is often seen as an interim resolution to a judicial decision.

Established also in 1996 at the University of Massachusetts Centre for Information Technology and Dispute Resolution, the Online Ombudsman offers a dispute resolution service but on a more informal and flexible basis than the Virtual Magistrate. Mediation is conducted online at no cost to the user. This is presumably because the scheme is being developed by an educational institution. There are no set procedures for mediation and the determinations are neither final nor authoritative. Disputes heard here are usually those between members of news groups, list servers, cyberspace competitors, internet service providers, domain name disputes, spamming[37] allegations and copyright disputes.[38]

Courts of the future

The University of Canberra in partnership with William & Mary College in the US have established Courtroom 21 Australia. The purpose of the project is to develop a courtroom of the future, featuring all the latest technology. The project showcases the technology, provides training in its use, and in a multi-disciplinary setting conducts research regarding IT and legal issues.

Victoria has conducted a major study into the future of courts, the report, *Technology and the Law*,[39] was tabled before the Victorian Government in May 1999. Among the recommendations are:

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36 See Friedman G (1996) 'Virtual Magistrate established for the internet — voluntary dispute resolution for network conflicts' at <vmag.vcilp.org/docs/press/press.960304.html>.

37 Spamming occurs when a site broadcasts to everyone on their mailing list advertising and other material. Often these materials are unsolicited and has the effect of cluttering up the recipient's electronic mailbox.

38 See <www.ombuds.org>.

39 See <www.lawreform.org.au/tech>.

- the establishment of a centralised government entity to coordinate and implement a centralised approach to the introduction of technology across government;
- the amalgamation of the administration and registry functions of all victorian courts and tribunals;
- the establishment of a law and technology clearinghouse that collaborates internationally to promote best practice uses of new technologies;
- comprehensive training for judges and court administrators on the use of technologies; and
- the development of protocols and standards for justice information systems adopting world's best practice.[40]

The Report also recommends that courts be proactive in using technology to enhance the access to justice by providing multi-lingual services, services to remote areas and enhanced services to the disabled.[41]

The legal profession be more proactive in adopting technology to gain efficiencies, more international in scope and more competitive.[42]

Conclusion

This paper has canvassed the benefits and otherwise of e-ADR and how such a medium may develop further in future especially where the disputes both arise in the electronic media and are resolved there as well. Increasingly cyberspace will take centre stage where people in conflict or in a dispute require easy, quick and fair resolution. While online mediation minimises the face to face 'combat' e-ADR also offers solution without raising the temperature of either party in the conflict. Along the way e-ADR may have taken dispute resolution processes to a new level but has introduced more complexity both from the point of view of legal questions and conflict of law as well as the issue of jurisdiction *per se*. Some problems persist with e-ADR and it is to be hoped that in time such problems will disappear once practitioners in this field gain more experience in managing the technology and the processes. This method of dispute resolution offers a

40 Raman P 'Towards a 21st century legal system' (2000) *Reform* Issue 76 Autumn 19 at 20.

41 Raman P above note 40 at 20-23.

42 Raman P above note 40 at 21-22.

new, exciting and dynamic environment in which to practice and should be wholly commended to all. ⌘