



Online Dispute Resolution – a practitioner’s view

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I have been asked to consider the “nuts and bolts” of online dispute resolution and to provide an overview of available schemes, particularly in Australia.

Introduction

My approach to this subject is that of a litigation lawyer for 38 years, 15 of them as a mediator. For the last 6 years I have been able to make a living primarily as a mediator, flouting Harvard Professor Frank E. A. Sander’s admonition: “don’t give up your day job”². I therefore approach the technology involved in ODR as a tentative user rather than as a techo³.

In commenting on the Treasury’s discussion paper “Dispute Resolution in Electronic Commerce”⁴, the ACCC says ODR is viewed with scepticism by dispute resolution experts because of the lack of personal contact, and by lawyers due to jurisdictional questions.⁵ Both of these statements are true. But all new developments in the law are attended by scepticism. Only just over 10 years ago ADR, which has now firmly taken hold, was similarly greeted. The answers are to develop new skills to overcome lack of personal contact, to put jurisdictional issues into perspective and to seek to address them beforehand by agreement.⁶

Those of us who are challenged by change and see change as affording opportunities already appreciate the advantages of face-to-face dispute resolution and recognise the communication possibilities which the ability to go online affords. We do not need to be reminded how many million users of the World Wide Web there are today nor of how many transactions take place daily over the Internet nor of their value. We do know that e-commerce is here to stay and that we might as well go with the flow. Who knows, we might even enjoy it!

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² "Paying for ADR", February 1992 American Bar Assoc. J., p. 105.

³ The real growth in the use of the Internet will come when the users understand the techos and vice versa, but I'm sure that day is still a long way off.

⁴ Consumer Affairs Division, the Treasury, October 2001.

⁵ ACCC submission to Department of Treasury, March 2002.

⁶ If agreement on a forum in which the parties may litigate and on the proper law to be applied cannot be reached beforehand, there is still merit in seeking to resolve the dispute by ODR because, if ADR is anything to go by, there is a good chance the dispute will be settled and that the settlement agreement will be honoured. Thus in most cases these particular jurisdictional issues will not arise.

For those having face-to-face skills and mediation training, face-to-face will always be the preferred method of conducting mediation. However, there is already significant demand for simple and cost effective dispute resolution methods where face-to-face is impractical or unaffordable. There is also significant supply of online dispute resolution service providers⁷. The challenge for the present generation of “pre-Techobaby-boom” mediators is to hone our skills so that we may mediate effectively without the benefits of meeting face-to-face. This is very difficult but unless the challenge is met, we’ll be left behind.

Overview⁸

“Online dispute resolution” can refer to:

- any method of resolving disputes arising from online transactions; and to
- the use of online methods of dispute resolution to resolve disputes arising either online or offline.

My focus is on the second meaning but we should bear in mind that online methods of dispute resolution sprang from the need to find quick and cheap ways of resolving disputes arising from large numbers of small value online transactions.

Where transactions involve participants in different countries, the attendant disputes raise important jurisdictional issues, the resolution of which by traditional methods could cost more than the value of the transactions themselves. The ICANN process for the arbitration of domain name disputes under the UDRP⁹, which takes place wholly or partly online, addresses the jurisdictional issues neatly by requiring domain name registrants (as a condition of registration) and trademark owners (as a condition of filing a complaint) to consent to the jurisdiction of the courts of either the registrant or the registrar, where either party is dissatisfied with the ruling of the arbitrator¹⁰. Arbitrators are authorised and required to decide complaints on the basis of any rules and principles of law that they deem applicable.¹¹

⁷ On April 9, 2002 there was a list of 39 ODR suppliers (excluding eResolution, in bankruptcy), at <http://www.ombuds.org/center/onlineadr.html>.

⁸ No overview I present could be a substitute for the two excellent and comprehensive papers by the National Alternative Dispute Resolution Advisory Council (NADRAC): *On-Line ADR Background paper* (January 2001) at <http://law.gov.au/aghome/advisory/nadrac/ADR.html> and *Dispute Resolution and Information Technology – Principles for Good Practice (Draft)*(March 2002) at http://www.nadrac.gov.au/aghome/advisory/nadrac/Technology_ADR2.htm. See also the recent book *Online Dispute Resolution – Resolving Conflicts in Cyberspace* by Ethan Katsh and Janet Rivkin (Jossey Bass, 2001).

⁹ The Uniform Domain Name Dispute Resolution Policy adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999 and the Rules for Uniform Domain Name Dispute Resolution Policy, approved by ICANN on October 24, 1999.

¹⁰ Policy paras 1 and 4(k); Rules 1 (definition of “Mutual Jurisdiction”) and 3(b)(xii).

¹¹ Rule 15(a).

Even within countries, potential customers need assurances of quality and of the truth of representations before they will freely shop online. Schemes such as the SquareTrade Seal of Approval with its associated online problem-solving service designed for e-Bay were amongst the first to attempt to redress this lack of confidence. SquareTrade handled its first cases in February 2000. Today it is the leading American online mediation service handling 10,000 cases per month.

SquareTrade and similar enterprises enable mediators to communicate separately by email with each party via password protected web pages. Boston-based WebMediate describes its process thus¹²:

“Our process involves secure, asynchronous message-board technology, so it is easy for parties (and neutrals) to check in on a piece of mediation or arbitration once every day or two, and to move the process forward at a pace that suits their particular schedule(s). There is of course no travel involved or need for formal correspondence, attractive conference rooms, etc”.

Thus many disputes are already being resolved by the use of online communications, whether the disputes arose from online transactions or not. Some available facilities offer "blind bidding" in which a computer programme calculates whether the parties' monetary bids and demands, not communicated to the other party, are within a set percentage of each other and, if so, determines a binding settlement figure in accordance with previously agreed participation terms. This is particularly useful in insurance claims where the parties have already recognized that some payment is to be made.

One such service recently introduced in Australia is Settlement Online Systems (SOS), a service conducted through the website <http://www.adronline.com.au> by ADRonline Pty Ltd, a company run by two Sydney lawyers, Bernadette Murray and Margot McKay¹³. Participants are required to enter into to the SOS User Agreement, which provides that if settlement is achieved, the agreed sum is to be paid within 30 days. Provision is also made (among other important things) for a fee to SOS, confidentiality, authority of participants and immunity from suit for the service provider.

My own impression, from running a “dummy” case through the SOS system, is that it is very efficient. Because I was not informed what the other side was bidding or why my demand had been rejected, I felt I was expected to bid against myself. Still, I was free to ensure that I did not settle for less or more than I thought appropriate and the entire process cut out any possibility of posturing or dancing around who goes first. There is clearly a significant role to be played by such a system, either as the sole means of resolving monetary claims, or as an adjunct to more traditional interest-based mediation (whether online or face-to-face). The ability to connect to SOS in seconds and to submit the monetary issue to the blind bidding process should be appreciated by all who find

¹² email to the author, April 10, 2002. See also <http://www.webmediate.com> .

¹³ <http://www.settlementonlinesystems.com.au> . See also McKay M and Murray B: *Online ADR comes to Australia* (2001) 4(8) ADR Bulletin.

money a sticking point. Lawyers, in particular, should become familiar with the SOS system so they may advise their clients when it may be appropriate.

Another of the services Bernadette and Margot provide is online mediation, which begins like a traditional mediation, with one party completing and submitting an online application. The service provider in this case (Mediateonline Pty Ltd) then contacts the other party, which also completes the application if it is prepared to mediate. The parties then complete an agreement to mediate and a mediator is assigned to the case. Fees are based on whether the mediation is face-to-face or online, the time taken and the amount in dispute.

The problem with teleconferencing, especially between countries, is that it is very expensive (about \$A800 per hour between Australia and the UK) and for this reason is little used. Inadequate bandwidth is a significant barrier to the most obviously desirable alternative to face-to-face, namely online television-quality videoconferencing, which must therefore be regarded as in its infancy and, in Australia, is confined to courts and educational institutions¹⁴.

While “live” chat rooms are available for social, business and educational purposes¹⁵, I am unaware of any site that offers real time chat mediation at present. It has been suggested that

*“the problem with this technology in resolving disputes is that it forces the parties to think and react quickly, taking away the ability to reflect and consider options that might, in the end, be more meaningful to them”.*¹⁶

I do not find this a very satisfactory explanation because face-to-face mediation sometimes also requires quick thinking! There seems to be no reason why one cannot take time out online for reflection just as one does face-to-face. Perhaps there is a heightened perception of pressure to respond instantly in the online environment that some find harder to resist.

Because email is widely used for everyday business and social communication and is cheap, it is presently the most commonly used method of ODR. Before considering some of the features and the pros and cons of this form of dispute resolution, it is worth noting that other methods presently being developed include:

- online (and therefore inexpensive) audio conference call facilities that enable a mediator to join up to 15 parties and to hold separate conversations with selected

¹⁴ NADRAC, *On-Line ADR Background paper* (January 2001), para 27; “no examples have been found in Australia or overseas of ADR video-conferencing with parties at home or at work, via the Internet”.

¹⁵ Such as at <http://www.icq.com>

¹⁶ Krivis J: *Taking mediation online: how to adapt your practice* (paper presented at the ABA Section on Dispute Resolution Conference, April 4, 2002, Seattle, WA)

groups or individuals without having to hang up or redial whenever changing the participants¹⁷;

- sending audio and combined audio and video messages by email;
- providing an online conference room where the parties and the mediator post their messages¹⁸
- providing online access to court documents for lawyers and judges¹⁹; and
- similarly providing password protected access for the parties and the arbitrator to complaints, responses and exhibits in domain name disputes²⁰.

While on the subject of domain name disputes, we should not ignore the opportunities available to Australian arbitrators to officiate online. Only 4 of the 100 gTLD domain name disputes in which I have acted as arbitrator have involved an Australian party.

Nuts and bolts

First let us compare some of the features of face-to-face and online dispute resolution²¹.

| Face-to-face features | Online features |
|--|---|
| <ul style="list-style-type: none"> • synchronous interaction – parties focus full-time, often make knee-jerk or emotional responses | <ul style="list-style-type: none"> • asynchronous interaction – parties can take their time, seek advice before responding |

¹⁷ See <http://www.j2global.com>: “As the call moderator, you can selectively place any participant on listen only or on hold simply by clicking by that person's name... Although you initiate and moderate the call from your PC, the actual call is carried over standard telephone lines... The cost is little as 10 cents [US] per minute for each leg of the conference call, excluding the moderator. In other words, if you call five people, it costs \$.50 per minute. The call to the conference moderator is free!

¹⁸ See eg. <http://www.webboard.oreilly.com>.

¹⁹ CaseHomePage “enables judges and lawyers to: (i) transmit, store, search, access, print and manage paper documents, (ii) access and print court orders and instructions from the Court, (iii) communicate more efficiently with the court and the other parties via bulletin boards and case calendars, and (iv) obtain news and other information pertaining to a case. Judges and lawyers access documents and information through a secure password protected homepage which is supported by an assigned case manager to provide the users with technical and administrative support.” See <http://www.casehomepage.com>.

²⁰ Introduced by the hitherto only fully online domain name dispute provider, eResolution (presently in bankruptcy), this technology has recently been purchased by the National Arbitration Forum, another domain name dispute provider. Since January 2000, about 5000 domain name disputes have been determined by online and by part-online/part-offline communication methods.

²¹ I focus on mediation but I do not intend to exclude the many other “traditional” processes: litigation, arbitration, early neutral evaluation, expert determination, med/arb, arb/med, mini-trial, fact-finding, baseball arbitration etc. Many of these do not require empathy or rapport building, so ODR should not pose the same problems as it does for mediators.

| Face-to-face features | Online features |
|--|--|
| <ul style="list-style-type: none"> • predominantly oral communication – tone, volume, intonation, emphasis convey meaning • non-verbal communication aplenty – conveys meaning, enables rapport building, empathy, good behaviour • no pre-communication reframing – parties communicate directly with each other, mediator left to reframe afterwards • sequential caucusing – leaves one party to own devices, sometimes for long periods • communication usually not recorded – participants records usually incomplete, often destroyed (but may be admissible in evidence under confidentiality exceptions) • blind bidding rare and cumbersome – mediator shuttles, keeps bids secret, may report whether parties within agreed range • only known participants involved - everyone can see and hear who is present and mediator may control who influences decision-makers • privacy assured – (save for bugging) | <ul style="list-style-type: none"> • predominantly written communication –BOLD TYPE MAY PROVIDE EMPHASIS AKIN TO SHOUTING • next to no non-verbal communication - !!!, ???, ☺ and ☹ just about exhaust the possibilities • pre-communication reframing possible – parties may communicate only with mediator who can negotiate to modify language or give own interpretation • concurrent caucusing possible – parties kept involved • communication usually archived – can be destroyed by agreement or remain accessible to privies (and available eg. on subpoena for evidence under confidentiality exceptions) • blind bidding available and efficient – software enables many rounds of bidding and determines settlement figure once agreed range achieved • participants not necessarily known – parties may consult others between messages and mediator cannot control who influences decision-makers • privacy may be in doubt - depends on integrity of system and participants |

The creation of a complete record by ODR has a bearing on the hotly debated question of complaints against mediators. I have long been concerned that, in relation to those mediations in which the mediator is not clothed with immunity from suit, the establishment of formal disciplinary systems for handling complaints against mediators could adversely affect the mediation process, because the mediator could have a heightened interest in taking notes for the purpose of future self-protection, rather than

solely to assist in the task of seeking settlement of the parties' dispute. The automatic record resolves this dilemma²².

Let us now consider some of the pros and cons of online dispute resolution:

| Online pros | Online cons |
|--|--|
| <ul style="list-style-type: none"> • connects parties unable to meet face-to-face • offers a process where litigation unaffordable or impractical • inexpensive • convened quickly • available worldwide 24/7 • all participants get time to think before sending messages, especially about choice of language and tone • messages may be sent at participants' convenience – minimal interruption of business and family affairs • mediator becomes especially sensitive to written expression/reading between lines • by concealing traits conducive to stereotyping by others, levels the playing field • enables frequent users (eg. insurers and mediators) to mediate many cases simultaneously | <ul style="list-style-type: none"> • harder to build rapport • no body language/voice cues • harder to reality check • mediator has less control over process • harder to clarify interests because medium promotes terseness and because questions in clarification cannot be interpolated during a narrative • misunderstandings easier, likewise giving offence, taking things out of context • harder to build/ maintain momentum • process may take much longer • harder to tell whether a party is not acting in good faith • harder to widen outcomes beyond settlement to include improving relationships, education about online transactions and the mediation process |

²² It remains to be determined whether a mediator may retain and rely on that record in disciplinary proceedings, absent the consent of all parties.

I have had one real life online mediation experience as mediator (which lasted several months and which involved parties in Australia and England) and one “mock” online mediation, playing the role of a party. Both experiences have given me some insight into the process and tend to support the views expressed above.

Most notable were:

- the ability of a party to communicate with the mediator while the mediator is in caucus with the other party, requiring the mediator to choose between possibly offending by failing to reply immediately or devising “holding” responses which themselves may become irritating to the recipient after a while
- the risk of a “flame war” breaking out between parties unless they agree that all communications should be between a party and the mediator
- the enormous amount of time devoted to selecting one’s words in order to convey only that which one intends
- the tendency for parties to be repetitive, stemming perhaps from the absence of face-to-face body language and audible signals to convey that their messages have been understood
- the ease with which misunderstandings arise and unintended offence is taken
- the need, when raising possible options for consideration (framed in “what might be the problems with this?” mode), constantly to assure the recipient that these are only the mediator’s thoughts and should not be interpreted as emanating from the other party
- the propensity for parties to brood over messages while waiting for something to happen, often leading to inappropriate, sinister interpretations of language that would be regarded as unexceptionable face-to-face
- the ease with which understanding was promoted and subsequent email messages were correctly interpreted after a single face-to-face meeting.

These factors must all be taken into account when choosing or conducting online mediation. In my view, none present an insurmountable obstacle to a successful outcome.²³ But as we develop new skills to accommodate the lack of person-to-person contact, we should recognise the possibility that, in the absence of online cues that signal inclusion, esteem, respect and dignity, disputants may emerge dissatisfied, feeling the process was unfair, and they may be less likely than face-to-face participants to comply

²³ “Success” does not always mean complete agreement. Narrowing issues, improving understanding and restoring civil relations may all count as success. Even if full settlement is not achieved at the mediation, it often follows soon after.

with the outcome or even to continue to do business online at all. Empirical research is needed to determine whether these theoretical consequences are being realized.²⁴

Conducting online mediation

Mediators should consider including in their usual mediation agreements additional provisions applicable to communications by email, such as:

- no direct party-to-party email communications without the permission of the mediator²⁵
- all email communications to be treated as and marked confidential²⁶ and to be disclosed only to persons who have agreed to be bound by the confidentiality obligations of the mediation agreement (eg. in-house and external lawyers, experts, witnesses etc.)
- if more than an agreed time (eg. 24 hours) is required before responding, (by reason of absence or the need to consult) the mediator to be notified and an estimate given (which the mediator should be free to communicate to the other party) as to when a response may be expected²⁷.

Once the mediation gets started, the mediator must be far more proactive than in face-to-face, since the parties depend on the mediator playing a role in every communication between them. However, the different medium does not alter the mediator's basic approach: to help the disputants find their own uncoerced solution, by ascertaining their interests, reality testing their positions, exploring their alternatives to settlement and brainstorming possible options.

In face-to-face, the mediator may be the only person in the room trusted by all the parties. Building trust online requires constant attention because of the propensity for parties online more readily to assume the worst in others precisely because they cannot see and hear them.

To build and maintain trust, I suggest:

²⁴ Nadler J: *Electronically-Mediated Dispute Resolution and E-Commerce*, Negotiation Journal, October 2001, 333-347.

²⁵ To prevent "flame wars".

²⁶ All mediation agreements contain a provision reflecting the "without prejudice" rule that, if the dispute be not settled at mediation, evidence may not be given in proceedings over that dispute of any communication made for the purpose of the mediation. However this is subject to the usual exceptions imposed by law whereby such evidence may be admitted into evidence in proceedings over a different dispute, eg. to enforce a settlement agreement (where the making of or the content of the settlement agreement is disputed) or in proceedings to set aside a settlement agreement on any of the usual grounds, such as duress, misrepresentation and misleading or deceptive conduct within the mediation. [These exceptions are always best explained to the parties beforehand by their lawyers, rather than by the mediator at the mediation, because their complexity tends to detract from the desired full and frank exchange of views].

²⁷ To avoid inappropriate inferences of bad faith being drawn from delay in replying.

- the mediator should be authentic, ie. should let his or her personality come across through polite and careful language, avoiding levity (which risks being misinterpreted as trifling with at least one of the parties' concerns);
- the mediator should explain the process and the mediator's role so as to forestall misunderstanding on that score;
- the mediator should act reliably so as to induce reliable behaviour from the parties;
- the mediator should affirm the process, eg. by frequently thanking the parties for their contributions;
- the mediator should reframe the parties' statements to demonstrate that they have been understood;
- the mediator should let the parties know what is going on, especially when there are delays between messages;
- the mediator should readily apologise for any failure clearly to express intended meaning (thereby modelling to the parties that it is acceptable to admit mistakes);
- the mediator should always treat the parties as if they are trustworthy, while recognizing that sometimes parties are stalling or are using the mediation for improper purposes (in which case the mediator should terminate the process).

All of this is hard enough face-to-face and doubly hard through email alone. The days of live online television-quality videoconferencing have not yet arrived. Until then, we must hone our skills with the written word. Perhaps we can draw some inspiration from Deborah Cook, a US expert on IT policy development and service issues, who uses text-to-voice software to receive her email and to explore websites because she is blind:

“any time we rely on one method of communicating, we leave someone out. We need to develop new skills, to think in terms of different ways of expressing ourselves and of improving the ways in which we communicate”²⁸.

²⁸ Remarks made by Ms. Cook at *Telephones and beyond: using technology in mediation*, ABA Section of Dispute Resolution Conference, Seattle WA, April 4, 2002.