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Disputes solved in cyberspace and the rule of law.

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1. Introduction: the need for Online Dispute Resolution (ODR)

In this introduction I argue that there is a need for Online Dispute Resolution (ODR), combining information technology with networked computer power:

In essence, legal dispute resolution is a complex and highly sophisticated form of information management and processing. For this reason, it lends itself to the use of sophisticated information technology. Furthermore, a crucial advantage of ODR is that it allows dispute resolution at a distance, without the physical presence of the parties.

The rapid growth of electronic commerce has brought with it an increasing number of distance (or even cross-border) transactions-and thus, disputes between parties located far from each other. Litigating and enforcing such disputes through the courts can be enormously expensive due to added costs (such as hiring local lawyers, travel and translation costs). This means that only the larger claims can be pursued in this way.[1] A rough and only indicative figure given by practising lawyers for the value of the claim at which it would be economic to pursue foreign enforcement (e.g. between a jurisdiction in Europe and a jurisdiction in the US) would be US$ 3,000. Other estimates were even higher.[2]

Another problem specific to distance litigation is the difficulty to determine the appropriate forum. There is an inevitable conflict between the claimant and the respondent. ODR mechanisms can provide a forum convenient and accessible to either party and therefore help to avoid this conflict, cost and uncertainty.

Because of this need for ODR mechanisms, within Europe and in North America several private sector initiatives are developing with increasing rapidity online dispute settlement systems. The call for ODR comes not only from the private sector/industry but also by governments and international agencies such as the European Union and the OECD.[3]

In this paper, I shall briefly outline the different forms of ODR, mainly focusing on ODR for consumer disputes, as here the critical points (cost efficiency for small claims, problem of power imbalance between the parties) are most prominent. This will be followed by a discussion of the quality standards ODR schemes have to comply with. I shall then evaluate the impact of ODR on the role of the courts and consider the use of ODR by the courts themselves. I will conclude this paper by speculating on the future relationship between ADR, ODR and court litigation.

2. What is ODR?

Online dispute resolution is dispute resolution using information technology conducted at a distance, usually via the Internet, independent from the physical location of the parties.

The first experiments in ODR were made during 1996/1997 in the US and Canada. At present, the main application for ODR is extra-judicial dispute resolution, outside the ordinary court system. This is based on the use of offline ADR, more prevalent perhaps in the Anglo-American legal tradition. Such ADR systems are now being developed into ODR systems. In effect they are a kind of self-help to justice by private parties.

However, albeit lagging behind, the court services around the world are also considering the incorporation of elements of ODR into the ordinary court system. The aim is to provide increased access to justice at a lower cost. I shall look at these initiatives in chapter 6.

2.1 Extra-judicial ODR (Out-of-Court Settlement Systems)

It is important to keep in mind that ODR is not a single approach to dispute resolution. There is an enormous variety in the emerging landscape of ODR providers with varying experimentation and much creativity and novelty.[4]

Arbitration

Arbitration is the most formal of all extra-judicial dispute resolution systems. The arbitrator reaches a usually binding decision after having considered the representations and evidence of both parties. Online arbitration relies mainly on written documents. Once the parties have freely agreed to submit a dispute to arbitration neither party can unilaterally withdraw from the arbitration.

Mock Juries

This involves assembling a group of arbitrators who consider the online representations of the parties and then render a binding decision. By spreading the decision-making responsibility over several individuals, the risk of bias is reduced. However it may be more difficult to screen such jurors for impartiality and independence.[5]

Mediation

In mediation, the neutral third party actively attempts to broker a settlement between the parties. Essentially, the mediator's job is to "help the parties to talk".[6] Therefore the richer the process of communication the more effective mediation will be. Mediators use the techniques of active listening, remaining impartial, summarising, reframing and agreement writing.[7]

The classic form is the "three room procedure" whereby the mediator speaks to each party in a separate room on a confidential basis and the parties then negotiate in a third room. This three room procedure is being simulated in virtual reality by having three password-protected chatrooms.[8]

The first step in the mediation process is the filing of a complaint. The mediation organisation will then inform the respondent of the complaint and ask whether the respondent is prepared to take part in mediation. Sometimes a mediation agreement is drawn up. If successful the parties will sign a settlement agreement.[9]

The mediator can recommend solutions to the parties but will not impose a binding resolution. Mediation is essentially a voluntary process- each party can "walk away" at any time before a

settlement has been reached. Therefore, in cases where there is a clear and deliberate breach of an obligation mediation may not be appropriate.

One major difference between offline and online mediation is that in traditional offline mediation the parties have had an ongoing relationship. Indeed the wish to preserve that ongoing relationship might well determine the parties wish to choose mediation over other forms of dispute resolution. Consequently, traditional mediation practice has been formed around this goal. By contrast in online mediation, the parties mostly have no previous and ongoing relationship. This means that some of the traditional mediation practices need be adapted.[10]

Furthermore, mediation is usually conducted in face-to-face meetings. ODR is (with the exception of video-conferencing) mainly based on written communications. The mediator cannot use the intuitive cues of body language, facial expression and verbal tonality. The challenge in the future will be to enhance software with features that will allow the mediator to include non-verbal communication and that will support various mediator styles.[11] For example software providing for animation, whiteboards, charts, figures, tables, pictures, maps and graphics can present ways to obtain a richer communication environment.[12]

For some mediation confidentiality is vital. In offline mediation this is not so much a problem, as many of the discussions are conducted orally. By contrast online mediation relying on written communications (albeit encrypted and password protected) will leave an audit trail.

Automated Systems

This form of dispute resolution is suitable for monetary disputes only. It involves the parties making successive "blind" bids. Once the bids are within a range of each other (e.g. 30%) a settlement will be reached, splitting the difference. The process is driven by software so that no human third party is directly involved and is therefore particular cost-effective. The software keeps offers confidential until they come within the range, at which point a binding settlement will be reached. This process can be very useful in some disputes, e.g. insurance company disputes where settlement out of court has always been expected.

Facilitated Negotiation/Complaints Handling

Facilitated negotiation provides the disputants with tools allowing for effective communication. It can also mean that the third party intervenes to negotiate a solution. At a minimum it allows a party to make a complaint and communicate a demand for redress to the respondent.

Complaints Assistance

This involves the provision of general assistance (mainly for consumers) such as the forwarding of complaints to the respondent and the provision of information for the purpose of self-help.

Credit card charge back

Credit card chargebacks may de facto serve as a dispute resolution mechanism in consumer disputes where a credit card has been used to pay. This is particular useful for the consumer as it is a cost free and effective mechanism. Merchants will be aware that repeated chargeback claims will threaten their relationship with the credit card company and will therefore be pressurised to avoid disputes. Many countries regulate when charge back mechanisms should be available to consumers.[13] The problem is that the process is not transparent.[14] Credit card companies are free to adopt any process they consider appropriate.

2.2 ODR in Consumer Disputes

The first question one may ask is do consumer disputes really matter? They often only involve small amounts of money and are trivial. Why care about complaints about trivial, everyday consumer injustices?

The first reason is that even small claims disputes can have a substantial impact on everyday living. We all are consumers and make consumer purchases every day. The second reason is that ignoring such complaints would encourage bad quality products or even fraud and other criminal behaviour. Effectively it would allow suppliers stealing small amounts of money from a very large number of people.[15]

Offline consumer arbitration schemes on documents only set up by various sector trade associations have been commonly used in the UK for many years. In the UK, the Chartered Institute of Arbitrators runs over 60 such schemes.[16] However in addition, online systems are now being developed in the context of e-commerce.

Consumer ODR systems have mainly been used in the following three environments[17]: online market places (such as web based shopping malls, auctions sites), in connection with trustmark schemes and independent schemes.

Online marketplaces

Such marketplaces create a common context for transactions. Often there will be a set of rules (Code of Conduct, etiquette, business practices) providing for standards to be observed by the parties. Such marketplaces often allow feedback and rating of buyers and sellers on the site. This puts pressure on the parties to comply with such standards. Furthermore, such marketplaces may offer escrow[18] or insurance services. All of these measures will help to avoid disputes in the first place and enhance consumer confidence.[19]

Trustmark schemes

Trustmark schemes require suppliers to subscribe to a Code of Conduct. In return for being bound by the Code and in return for the promise to co-operate in dispute resolution, suppliers are allowed to use a trustmark (or seal) enhancing their branding by improving consumer confidence. Often the trustmark provider also offers ODR. Businesses not complying with ODR risk losing the trustmark so that there is added pressure to comply. The provider may additionally offer insurance ("money back guarantee") which further improves the ODR service.[20]

Independent ODR schemes

Some ODR service providers offer their services to claimants regardless of how the dispute has arisen and regardless of any membership in a trustmark scheme.

For independent arbitration schemes, it will be more difficult to determine which law governs the dispute. This problem is especially acute in consumer disputes where the parties are located in different jurisdictions. Consumers will expect not to be deprived of the protection offered by the laws of their own jurisdiction.

Furthermore it will be more difficult to ensure compliance with ODR. Enforcement through the courts is expensive and would partly negate the advantages gained by ODR. It has therefore been suggested[21] that independent ODR providers should set up a compensation fund. Consumers could then be paid out of that compensation fund if businesses fail to comply with the ODR ruling.

Finally, a third issue more acute with independent ODR providers is funding. If the service is not financed by membership fees but by the users of the service, the ODR service may be too costly for

small consumer claims.

3. ODR under scrutiny of the rule of law and justice: which criteria should ODR schemes have to comply with?

Extra-judicial dispute resolution is obviously not a new concept and to an extent, the issues regarding extra-judicial ODR are not too different from those which have been discussed in relation to Alternative Dispute Resolution (ADR) over the last thirty years. However, to the extent that extra-judicial ODR is becoming increasingly common and in some instances is the only affordable or viable redress mechanism, it is important that ODR schemes comply with certain minimum standards as to quality and fairness.

Article 6 (1) of the European Convention on Human Rights states that "in the determination of his civil rights and obligations [ ] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....". This article imposes an overriding obligation on the state to ensure that proceedings are fair. For this, the proceedings must comply with certain standards.[22] These standards apply primarily to the state provided court system. However, it is also possible that some dispute resolution procedures sponsored by the state which adjudicate and award compensation and which exclude access to the courts like some procedures adopted by ombudsmen may potentially violate the Convention because of the absence of public hearings.[23] Here is perhaps not the space to go into the details of the intricate question as to whether and when human rights should apply to the private sector. Nevertheless, private sector providers of extra-judicial ODR should follow certain minimum requirements pertaining to the concepts of fair trial and justice.

Such minimum requirements are also contained in the EC Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes (98/257/EC). The seven principles are independence, transparency, respect of the adversarial principle, effectiveness, legality, liberty and representation. Although this Recommendation only applies to what I have termed arbitration procedures, some of these principles might be applicable more generally.

3.1 Independence and impartiality

This is a concept at the very heart of civil justice: both the ODR service provider and the individual arbitrator/mediator must be, and must be seen to be, independent and impartial, free from any vested interests.[24]

For ODR service providers this means in particular that their funding and their board structure must be neutral.[25] In practice this might be difficult to achieve. The business usually pays directly (subscription fees, user fees for the actual dispute) or indirectly (membership fee) for the dispute resolution service. On the other hand, schemes imposing significant fees on users may not be affordable to consumers. Therefore it is perhaps unavoidable that the funding is provided by business, but there should be additional safeguards, such as supervision by an independent third party, representation of consumer organisations on their board and publication of results.[26] Unfortunately, these requirements are not implemented in the existing schemes: Consumers International found in their survey on consumer ODR service providers that most service providers gave no indication of their governing structure nor did they publish case results so that interested persons could assess their impartiality.[27]

Furthermore, the individual arbitrators/mediators should be screened as to any vested interests they might have. They should be obliged to observe a code of conduct and professional ethics. Such a code should oblige them to disclose any personal interests and to avoid conflicts of interest. Furthermore, they should be drawn from a variety of backgrounds to prevent any systemic bias. The

job security and pay of third parties must be sufficient to guarantee impartiality.[28] Finally, the allocation of third party adjudicators/mediators should be made randomly- one party should not be allowed to choose the individual adjudicator/mediator. The importance of this can be underlined by the criticism voiced against ICANN. Under the ICANN Uniform Dispute Resolution Procedure for the resolution of domain name disputes, the claimant is choosing the dispute resolution service provider. Statistics show that the two providers who obtain most cases are more likely to decide in favour of the claimant.[29]

Mediators/arbitrators should be competent, both regarding their training and regarding their skill and experience.[30] As a minimum they should be familiar with the relevant law, codes or standards. Unfortunately, however, the question of competence is directly related to the question of cost.

3.2 Publicity and transparency

This principle is an old principle of the common law. Lord Diplock cites Bentham in the case of Home Office v Harman[31]: "Publicity is the very soul of Justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."

Firstly, in an ideal world, ODR results should be published.[32] Here a distinction must be made between mediation and arbitration. In mediation confidentiality of the party communications and the settlement is often crucial. Therefore, publication probably has to be limited to general statistics such as the number and kind of disputes. In the case of arbitration, however, the decisions should be published. This is necessary to assess the impartiality of the ODR service. It is also valuable to assess the quality of the decisions and to ensure that there is a certain degree of consistency. However this is a thorny issue. Respondents will be reluctant to have the results published. The reason for this may be that the respondent does not wish to establish a precedent in the case of a generous settlement. Or alternatively, the respondent does not wish details of any malpractice to become public. In fact this might be the very reason why the respondent agrees to ODR in the first place. For this reason it is not surprising that Consumers International found in their survey that most ODR providers do not publish results.[33]

Secondly, the principle of transparency implies that the rules on procedure should be published beforehand so that they are available for public scrutiny and comment and to allow users of ODR services to make an informed choice.[34] Regarding the making of an informed choice between different services, the plethora of different ODR service providers will be confusing for users, and for consumers in particular, as they are usually one-time users.[35].

Also, ODR does not operate in a vacuum. It operates in the "shadow of the law"[36]. The law is the backdrop against which negotiation, mediation and arbitration take place. The law shapes the parties' expectations and their strategy for dispute resolution.[37] It will also determine the parties' bargaining position. Therefore, for the reason of transparency, the ODR scheme should also make clear the type of rules, standards or law (such as legal provisions, equity, codes of conduct) serving as the basis for the settlement or decision.[38]

It is clearly easier to establish which law casts its shadow if the parties are contracting on a marketplace governed by certain rules such as express codes or etiquette specific to that marketplace. For trustmark schemes, the code adopted under the trustmark scheme provides the necessary applicable law. As Katsh puts it "it is possible to take advantage of the context of the particular marketplace and the rules for participating in the marketplace".[39] Therefore, by joining particular communities, users choose the law which governs them.[40]

Recommendation 98/257/EC furthermore states[41] that the consumer must not be deprived of the "mandatory" consumer protection provisions in his state of residence.[42] The idea behind this is that even where the consumer opts for arbitration he should be entitled to the standard of consumer

protection of his place of residence.

3.3 Access and the principle of effectiveness

Coercion

One important limitation of extra-judicial ODR services (with the exception of arbitration under a binding arbitration agreement) is that ODR requires the co-operation of the parties. Thus, for mediation or negotiation assistance, if the supplier refuses to co-operate, the dispute resolution will not work. It is therefore not surprising that Consumers International found in their survey that "only few ODR services help to deal with uncooperative merchants and those few provide limited assistance"[43]. If the supplier refuses to co-operate and if litigation is too expensive, since, for example, the parties are located in different jurisdictions, the consumer is effectively denied any avenue of redress. The only pressure which can be exercised against uncooperative respondents is negative publicity. This can be of some assistance in consumer ODR schemes associated with a trustmark or associated with a certain marketplace. In this situation the supplier may even be under a contractual obligation (in its contract with the trustmark scheme or the marketplace) to co-operate.

By contrast, in case of arbitration, contractual arbitration clauses are generally enforceable as against non-consumers.[44] However it is important to note that in the UK (and other jurisdictions) an arbitration agreement which has been entered on the supplier's standard terms cannot be enforced as against a consumer, where the claim does not exceed a certain amount.[45]

Flexible approach

This is one of the major advantages of ODR over offline court action. ODR allows for various methods of ODR to be used incrementally: if negotiation/mediation does not work, the parties can move on to binding arbitration. Some ODR providers have already adopted this scaleable approach.[46] Furthermore, ODR may be more flexible as to the remedies and solutions adopted. A survey carried out by the UK National Consumer Council in 1995 found that out of 100 people involved in a civil dispute only 32 are primarily seeking financial compensation- 25 people answered that they were mainly trying to prevent the same thing from occurring again.[47] Therefore, the courts providing damages as the main remedy will be unsuitable for some disputants and ODR schemes might be in fact more appropriate. ODR can provide the opportunity for the parties to discuss and air grievances, not considered to be relevant in a court.[48]

Language Barriers

At present most ODR services on offer are conducted in English and only very few offer a bilingual or multilingual service.[49] Consumers International state that only few ODR providers have given sufficient attention to the problem of cultural and linguistic differences.[50]

Cost efficiency

For access to justice to be ensured, the cost of dispute resolution should be proportionate to the amount at stake. For ODR the cost factor is one of the important advantages. It is generally assumed that the use of networked technology and general accessibility (i.e. avoidance of travelling costs) makes dispute resolution much cheaper. However, for consumer disputes over relatively small amounts even ODR might be too expensive, since, obviously, skilled and experienced mediators and arbitrators will charge for their services. This might explain Consumer International's finding that "the paucity of affordable ODR options for consumers in low value cross-border disputes with merchants is notable".[51] They conclude that the only viable business model for independent consumer ODR providers is a business subscription model.[52] I have discussed above the implications of this for independence of the scheme.

Speed and convenience
One of the major aspects of effectiveness is speed and convenience of use.[53] Again, this factor is one of the advantages of ODR compared to offline court action. This is confirmed by the Consumers International survey which concludes that most ODR providers meet the criteria of timeliness and convenience.[54]

Enforceability

Access to justice is only meaningful where the outcome of the proceedings can be enforced. Non-binding procedures generally lack teeth.[55] The results of mediation are only binding once a settlement agreement has been concluded. Arbitration decisions are normally binding. However, perhaps obviously, compliance with a settlement or an arbitration decision must be enforced through court action, which may be a more or less expensive procedure. Many countries, including England, have provided a summary procedure for enforcement of arbitration awards.[56] An arbitration agreement can be enforced against a consumer if he agreed in writing after the dispute has arisen. [57] If the respondent is a member of a marketplace or a trustmark scheme this will be an incentive for compliance. Negative publicity or the threat of expulsion can put some pressure on recalcitrant respondents.[58] One example for this is the feedback rating system implemented by eBay, the online auction site.[59]

3.4 Due Process and the Adversarial Principle

Right to be heard, right to respond, fair hearing

The right to a fair hearing means that each party must be given an opportunity to state their case and to hear and respond to the other party's submissions.[60] ODR schemes usually rely on written (web-based or e-mail) submissions by the parties. In addition technology facilitating video-conferencing is also emerging.

To ensure the fairness of the procedure in cross-border disputes, it is important that linguistic and cultural differences are taken into account. As far as linguistic differences are concerned, these may partly be solved by translation software. However such translations will have to be checked and this may be expensive.

Cultural differences are more difficult to address. Ideally, the arbitrator/mediator should have an understanding of the cultural backgrounds of both parties. For instance, to illustrate one such cultural difference, in individualistic societies conflict is seen as a necessary result of individuals establishing their place in society. A complaint is seen as a legitimate act and therefore individuals are prepared to voice their complaints. By contrast, in collectivist societies authorities are respected and the individual is used to subordinate her needs to those of the group. In such a society the consumer may view a merchant as the more powerful and thus respected entity against whom a complaint would be futile and humiliating. Femenia argues that such social paradigms must be considered in the design of an ODR process. For example, she recommends that-to take into account the reluctance of customers from a collectivist background- merchants should always apologise to legitimise the customer's complaint and to prevent the customer to turn away from the process.[61]

Fairness of evidence

To the extent that the "hearing" is conducted in writing only, signs of non-verbal communication will be lost.[62] This may have an impact on the fairness of the evidence and fact-finding process.

For example, it is easier to lie in writing your submissions while not being seen than to stand up in court and do so. Also, differences in education may be more pronounced in written expressions than they are in oral speech. The inexperienced or inarticulate claimant will be disadvantaged against the

professionally presented case of the respondent. In such a situation, the arbitrator must be very careful not to be biased. However, Rutherford argues that increased awareness about consumer rights has diminished such imbalances: "the reality is that most consumers are not only aware of their rights but are readily able to set out their claims fully and professionally...".[63]

Also in written proceedings, it is impossible to inspect real evidence such as physical objects. If they are documents (e.g. a signature on a hand-written document) they might be scanned. Likewise, objects may be photographed or filmed.

Legal representation or not?

Generally, the right to legal representation is seen as one of the requirements for justice.[64] However in some types of disputes, such as small value consumer claims legal representation might be too expensive. Therefore, for example Commission Recommendation 98/257/EC provides that the proceedings should be conducted in such a way that there is no need for a legal representative but that the parties should not be deprived of being represented by a third party.[65] On the other hand it could be argued that in certain instances the rules should exclude legal representation.[66] To allow legal representation in consumer disputes may lead to further inequality of arms, as the supplier would be represented whereas the consumer would not. Genn concludes on the basis of statistical evidence that lack of representation of one party only (in industrial tribunals) brings with it a lack of justice. Where the respondent was legally represented and the applicant was not, the applicants' success rate was reduced by 10%.[67] As a matter of fact, most consumer ODR providers allow legal representation, but do not require it.[68]

It should be pointed out that the more user- friendly the ODR system is designed the more the information balance will be neutralised. Therefore, for example, ODR service providers should use intelligent automation forms able to respond to the consumer complaint instantly providing real time responses. [69]

Security of communications

ODR technology must ensure that communications are secure and that the parties authenticate themselves properly.[70] This can be achieved by password protection and digital signatures. According to the Consumers International Survey security varies substantially.[71]

4. Extra- judicial ODR: opportunities and possible dangers

It would perhaps be too provocative to talk of extra-judicial ODR as a pandora's box full of opportunities but also of potential dangers. The benefits of ODR are obvious and should not be understated.[72] ODR allows parties located at different locations to solve their disputes at a distance thereby obviating the need for travelling. Furthermore the use of Information Technology on networked computers combined with intelligent software and translation robots will make ODR procedures quick, easy and convenient to use. The solutions reached may be more flexible and not limited to legal remedies such as damages. Therefore ODR has the potential of significantly reducing the costs of dispute resolution and thereby enhancing access to justice. This is clearly a chance for the private sector.[73]

However I would like to sound a -possibly provocative-word of caution- and I think this is even more important as the benefits of ODR are so obvious but the dangers are not. Technology is not a panacea. As has been discussed above, there are problems undermining the fairness of ODR. There is essentially the question whether justice has been done in an extra-judicial ODR settlement. The main problems with consumer schemes are a potential lack in the independence of the ODR schemes and the lack of "teeth" of many non-binding ODR schemes. Another problem making ODR difficult, if not expensive, are linguistic barriers.

More generally, an inequality of power between the parties, as is often the case in consumer disputes, involves a risk that one party will be bullied into accepting disadvantageous terms. "Without trial a party might lack the only bulwark against being forced by necessity or threats into accepting a disadvantageous settlement."[74] These thoughts have prompted the American jurist Owen Fiss to his slightly provocative article on ADR "Against Settlement". He states that "like plea bargaining, settlement is a capitulation to the conditions of mass society and should neither be encouraged or praised."[75] Furthermore, Fiss points to another reason why public adjudication is important. The job of publicly appointed and impartial judges is not only to solve a conflict between private parties but also to interpret the values of a society and to bring reality into accord with them. [76] For these reasons, extra-judicial ODR is not the only answer to overcoming the problems of work overload and diminishing access to the courts.

In the field of e-commerce ODR is sometimes presented as the superior alternative to the court system, making the "old" court system obsolete. This approach is, in my opinion, dangerous. ODR has to operate not only "in the shadow of the law" but also "in the shadow of the courts". This topic I will explore further in the next section.

5. Is the power of the courts further dwindling?

The courts have been criticised for a long time for restricting access to justice by the excessive costs of litigation and inordinate delay. For this reason there has been a respectable and growing body of opinion seeking to challenge the fundamental assumption that the civil publicly provided courts are the best placed to adjudicate civil disputes.[77] The courts legal monopoly over adjudication has (rightly) been challenged over the last thirty years (or longer) by ADR (offline Alternative Dispute Resolution). This challenge has now been augmented with the introduction of networked computer technology and ODR. At present, the private sector seems to be in a better position to provide efficient dispute resolution in certain areas.

Nevertheless, the question arises what policy conclusions should be drawn from these developments. In particular the question arises whether these developments ultimately lead or should lead to a "privatisation of the courts" (my own terminology) and whether such a "privatisation" is desirable. It should be borne in mind that great issues are at stake. The civil justice system is so central to our society's well-being that cost-savings and considerations of efficiency should be carefully weighed against other values such as public scrutiny and accountability. Therefore this issue should be briefly discussed in the context of the privatisation debate generally. Proponents of privatisation in cyberspace often rely on notions of empowerment of newly formed cyber-communities. However they overlook that the power is in reality transferred to private, unaccountable entities.[78] They also overlook that for-profit institutions do not necessarily demonstrate a greater sensitivity to individual needs or values.[79] Wider policy issues are often hidden as mere technological problems. However, the manipulation of "technical" choices often underlies an issue of public policy. In conclusion, the rhetoric of privatisation in cyberspace should be treated with caution. Efficacy and profit should not be elevated to shut down discussion, accountability and public scrutiny.

The call for the private sector to use the opportunity presented by ODR is, in my view, only half the answer. Government should ensure that the court system speedily introduces ODR. Progress in this area has been slow. The reason for this (apart from funding constraints) may be that the state is seen as not being competent to manage computer-driven developments.[80] Such characterisations are then used to justify the retreat and non-interference of governments from digital operations. This should be resisted. Access to the courts must be augmented by the introduction of ADR.

6. Use of ODR by the courts

6.1 The UK Consultation Paper

In the UK, the courts have been introducing computers to assist judges since the early 1990.[81] The Court Service in England and Wales issued a Consultation Paper in January 2001 setting out more ambitious plans to overhaul the civil courts in England and Wales by a novel use of information technology and significant re-organisation.[82] The government has set aside £43 million for this task over the next three years. The reforms proposed envisage electronic filing and case management with public access (via the Internet) to court files, interactive online services and courtroom technology. This includes remote video conferencing facilities, digital audio recording and technology to present documents electronically. One of the declared goals of the reforms is to reduce court attendance by using technology. One important factor to achieve this is the use of video facilities. The paper mentions that there are two main benefits. Obviously the use of a video link saves time and cost for example for an expert witness in a personal injury claim. But it also has the potential to increase access to justice, by, for example avoiding that a small claimant has to take time off work and travel a long distance to pursue her claim.[83]

The Paper also introduces what it calls "Gateway Partnerships". This is a facility allowing a party to visit an advisor and link to the court at the same time.[84] As far as re-organisation is concerned the closure of some of the County Courts is envisaged. The Paper points out that one third of annual expenditure is the cost of the estate.[85] Twenty percent of all court buildings are listed and the introduction of technology is made difficult by their age and nature.[86]

The Paper concludes that the citizen has contact with the court face to face for relatively few procedures and that the range of services required locally is restricted to a core set of procedures such as the issue of straightforward claims, document filing and applications to the court. The Paper therefore proposes a clear separation of administration, which should be centralised, from hearing centres. In addition, the Paper envisages the creation of regionalised business centres providing the core customer services.[87]

As the first step, the Court Service has introduced pilot systems and is developing prototype systems. For example, in Preston, Lancashire solicitors can now make applications per e-mail and where appropriate, judges have the option to conduct and dispose of these online. Furthermore, the courts have already been experimenting with video-link between video-conferencing suites at Leeds Combined Court Centre and the Royal Courts of Justice in London. A small network of video-conference suites has been launched, including Leeds, London, Cardiff and Manchester.

6.2 Courtroom 21 and virtual courts

In the US the College of William & Mary in Williamsburg, Virginia has run a joint project called "Courtroom 21" with the National Center for State Courts to create the "most technologically advanced courtroom in the world" since September 1993.[88] Courtroom 21 has experimented with and analysed various technologies. It was this experience with Courtroom 21 which recently led the Governor of Michigan, John Engler to call for Web-based specialised virtual courtrooms in his state dealing with Intellectual Property matters and other issues in high technology cases.[89]

The director of the Courtroom 21 project, Frederic Lederer points out that we are on the way to the "virtual courtroom" and most of the technology is already commercially available[90]. A virtual courtroom has no connection to any physical location (other than jurisdiction) and only exists at the interconnection between the communication links between the judge(s), counsel, the witnesses and the parties. Each person can see and hear all the other persons on his monitor, but none of them is in the same location. A real time multi-media record transcript with digital audio, video and evidence is available instantaneously, transmitted onto the computer monitor of each person. Oral evidence is given via video-conferencing. Evidence such as documents or physical objects are filmed and streamed to each computer monitor.

The obvious advantage of such a (future) virtual court is that noone has to travel- there are cost-

savings and increased efficiency. Hearing times may be reduced. The use of both speech and visual aids (such as a simultaneous transcript) will make the evidence more comprehensible.[91] Obviously, decreasing the time and cost necessary to resolve a dispute is in the interests of justice. Likewise, improvement in presentation of the evidence and improved accuracy is in the interest of justice.[92] Therefore the benefits are enormous.

However new issues arise, in particular regarding evidence. Oral evidence given by witnesses via a video-conferencing link might be problematic in two respects. Depending on the quality of the video the physical demeanour of the witness may not be as easily detectable. For example, it might not be as apparent if a witness blushes because the colour resolution of the monitor is not sufficient.

Nevertheless in civil trials the US Federal Rules of Civil Procedure now expressly provide for the use of video-conferencing for oral testimony: "The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location."[93]

Also, the Florida Supreme Court upheld a conviction for robbery based mainly on the two-way video oral testimony of the main prosecution witness from Argentina.[94] The Court held that the procedure must satisfy the three elements of confrontation- oath, cross-examination and observation of the witness' demeanour. Furthermore the Court said that an oath is only effective if the witness can be subjected to prosecution for perjury on making a knowingly false statement.

Another concern in this respect is the place where the witness gives his oral video-link testimony. As Lederer points out that transmission from commercial video-conferencing centres or business surroundings lack the traditional judicial surroundings thought to convey the seriousness of court testimony.[95] Arguably, a witness should do so from his local court. This would make it easier to administer the oath. But it would also ensure that the ceremonial function of the court proceedings is not lost. Bermant argues that there are important cultural and psychological investments in physical "brick and mortar" buildings.[96] Court buildings express particular values embodied in the jurisprudence and civic life and contribute to the respect the citizen has for the authority of the courts. These structures are an important symbol of governmental presence and are to inspire a sense of warning, respect and reassurance. In cyberspace this particular cultural and psychological aspect may be lost.[97] Standing in a physical witness box, a witness may be more aware of the gravity of the situation.

For documentary and physical evidence streamed by a digital camera the question arises whether it is easier to manipulate or even falsify or fabricate evidence if all the fact-finder (be it judge or jury) sees is a picture or video taken by a camera. However, as Lederer points out that the possibility of falsification of evidence has always been a problem- not specific to virtual courts.[98]

Electronic filing and virtual courts in general raise the issues of security, both in the sense of breach of confidence (e.g. in the communication between a lawyer and her client) or in the sense of authentication. These issues can probably solved by technology (encryption, digital signatures, passwords). Another open question in this regard is the question of access to the court. Virtual courts obviously could be made accessible via a website on which the public could follow the proceedings. However, opening up the proceedings in such a convenient manner to a large audience raises, at least in the UK, the whole debate about televising trials and in particular what influence streaming might have on the conduct of counsel. Furthermore the question arises to what extent the public should have Internet access to the electronic court file.

Finally another issue is one of public acceptance. If we use too much technology and too much efficiency we risk minimising the human face to trials. The virtual courtroom is almost intangible, the human actors only appear on screens and the whole procedure is very sanitised and distant. This factor could lead to a decreasing acceptance of the authority of the courts.[99]

7. Conclusion: the future relationship between ODR, ADR and the courts

ODR supported by sophisticated information technology such as translation robots and intelligent software leads to cheaper, quicker and more convenient dispute resolution, in and out of court. The main advantage, as mentioned, is that ODR avoids the inconvenience and cost of travelling of judges, witnesses, lawyers and the parties. However, as has been discussed, technology is not a panacea and ODR systems must be scrutinised as to their compatibility with the requirements of justice and accountability.

For this reason, it will be important to further develop international standards for extra-judicial ODR. This must build on the work in this field of the European Commission, the US Federal Trade Commission, the Trans-Atlantic Consumer Dialogue, the Global Business Dialogue, Consumers International and others. However, ODR systems are still developing and it is perhaps too early to introduce framework legislation, e.g. in the form of a Convention, although this should not be excluded for the future. In any case, ODR, like ADR can only operate if supported by a court system with the power to enforce settlements and with the power to counteract deliberate wrongdoing such as fraud. Also it is to be expected that high value claims will continue to be litigated in the courts.

Virtual courtrooms will probably eventually replace the traditional courtroom. However there is still a long way to go. Courts in the western world are tentatively introducing distance technologies such as video-conferencing into the court procedure. As discussed, this will have an impact on evidential rules and perception of the courts. Another interesting question for the future will be whether virtual courts could solve the problems of jurisdiction. In the future, virtual courts bound to no specific territory and truly international in composition can be envisaged. Such international, virtual courts could be the result of inter-governmental co-operation. Interesting developments lie ahead of us.

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[1] Reed, p.264

[2] Reed, p.259, FN 16

[3] Katsh, Dispute Resolution Magazine, p.6

[4] Katsh, Dispute Resolution Magazine, p.6

[5] Consumers International, p. 10

[6] Katsh, p.713

[7] Katsh, p.713

[8] Van den Heuvel, p.11

[9] Van den Heuvel, p.12

[10] Katsh, p.714; Van den Heuvel, p.14

[11] Katsh, p.718

[12] Katsh, p.723

[13] See e.g. the UK Consumer Credit Act 1974, ss. 75 and 84, covering fraudulent use and defective goods, Distance Selling Directive 1997/7/EC, Article 8 covering fraudulent use of the credit card. It is not clear whether this protection applies where the supplier is located outside the jurisdiction.

[14] See further Consumers International, p.15

[15] Nader, p.1000

[16] Rutherford, Margaret, in Bernstein/Tackaberry/Marriott, p.473

[17] See further Consumers International, pp.11 and 12, Joint Research Centre Report, p. 11

[18] Escrow services hold the payment in trust until delivery (or other performance) is confirmed. Therefore escrow services protect a party from loss in the event that the contractual obligations are not fulfilled.

[19] Katsh, p. 727, Joint Research Centre Report, pp. 12-13

[20] Joint Research Centre Report, pp. 12-13

[21] Ibid, p.12

[22] Wadham/Mountfield, p. 76 et sequi

[23] Wadham/Mountfield, p.90

[24] Principle I of Recommendation 98/257/EC, TACD paper, GBD Paper, Andrews, p.16

[25] See Nader, p.1010, TACD paper

[26] See Nader, p.1010, GBD paper

[27] Consumers International, pp. 23 and 24

[28] Recommendation 98/257/EC, GBD paper

[29] ADOR website, http://www.ador-doc.org/wipoletter.html and Letter from Professor Michael Froomkin at http://www.icannwatch.org/archive/post_froomkin_udrp_letter.htm

[30] Recommendation 98/257/EC, GBD paper

[31] [1983] AC 280 at p. 303, mentioned in Andrews, p.23

[32] Recommendation 98/257/EC, GBD paper

[33] Consumers International, p.24

[34] TACD paper, Recommendation 98/257/EC, GBD paper

[35] Joint Research Paper, p. 17

[36] Katsh, p. 707

[37] Katsh, p. 708

[38] Recommendation 98/257/EC

[39] Katsh, p.727

[40] see further Katsh, p.724 et sequi

[41] V. Principle of Legality

[42] Recommendation 98/257/EC

[43] Consumers International, p.22

[44] Section 9 (1) Arbitration Act 1996

[45] Sections 89,90,91 Arbitration Act 1996

[46] e.g. Squaretrade

[47] mentioned by Smith, Roger, pp.26-27

[48] TACD paper

[49] Consumers International, p.22

[50] Consumers International, p.25

[51] Consumers International, p.23

[52] ibid

[53] TACD paper, Recommendation 98/257/EC, GBD paper

[54] Consumers International, p.25

[55] TACD paper

[56] Section 66 of the Arbitration Act 1996: if certain conditions are fulfilled "an award made by the tribunal pursuant to an arbitration agreement may by leave of the court be enforced in the same manner as a judgement or order of the court to the same effect", see further Bernstein/Tackaberry/Marriott, p. 260

[57] Rutherford, Margaret in Bernstein/Tackaberry/Marriott, p. 476

[58] Katsh p. 728, see also Joint Research Centre Report, pp.11-13

[59] Katsh, p.729

[60] Recommendation 98/257/EC, GBD paper

[61] Femenia, pp. 6,10

[62] Katsh, Dispute Resolution Magazine, p.8

[63] Rutherford, Margaret in Bernstein/Tackaberry/Marriott, p. 483

[64] Recommendation 98/257/EC, GBD paper

[65] Principles IV and VII

[66] Consumers International, p. 19, TACD paper

[67] mentioned by Smith, Roger, p.15

[68] Consumers International, p.26

[69] Femenia, p.11, Recommendation 98/257/EC

[70] Joint Research Centre Report, p.19

[71] Consumers International, p.25

[72] see Andrews, pp. 25 and 26

[73] Marriott, Arthur in Bernstein/Tackaberry/Marriott, p.595

[74] Andrews, p.26

[75] Fiss, p.1075

[76] Fiss, p. 1085

[77] Smith, Roger, p. 7

[78] O'Connell, p.11

[79] O'Connell, p.5

[80] O'Connell, p.8

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[83] Consultation Paper, p.67

[84] Consultation Paper, p.50

[85] Consultation Paper, p.49

[86] Consultation Paper, p.53

[87] Consultation Paper, pp. 55-56

[88]http://www.courtroom21.net/

[89] See CNN website: www.cnn.com/2001/TECH/internet/03/01/wir.../index.htm

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[91] Lederer, The Road to the Virtual Courtroom, pp.17 and 18; Lederer, Introduction, p. 7

[92] Lederer, The Road to the Virtual Courtroom, p.34

[93] Fed.R.Civ.P.43(a)

[94] Harrell v State, 709 So. 2d 1364 (Fla. 1998)

[95] Lederer, The Road to the Virtual Courtroom, p.24

[96] Bermant, pp. 528, 530

[97] Bermant, p. 530 et sequi, also Lederer, The Road to the Virtual Courtroom, p. 48

[98] Lederer, The Road to the Virtual Courtroom, p.20; Lederer, Introduction, p.13

[99] Lederer, The Road to the Virtual Courtroom, pp.40 and 48