

ENHANCING ACCOUNTABILITY AND LEARNING IN DISPUTE RESOLUTION THROUGH TECHNOLOGY

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ABSTRACT: *This paper invites the readers to rethink the relationship between online dispute resolution (ODR) and traditional dispute resolution mechanisms: alternative dispute resolution (ADR) and courts. To date, ODR has been viewed as a niche area, appropriate where traditional avenues are unavailable or inefficient. This paper explores the potential role of ODR even where traditional avenues for dispute resolution exist. In particular, the paper highlights the qualitative contribution ODR can have. Even where ODR is not employed as a means for resolving conflict, it can inspire change in the design of traditional means for dispute resolution. These traditional avenues have suffered from an accountability deficit and have tended to adopt rigid molds that resist learning and improvement. ODR, in particular due to its automatic recording of rich data on resolution communications in digital format, has the potential for enhancing both accountability and learning. The paper explores these qualities and suggests some of the ways in which traditional dispute resolution mechanisms could amend old habits and ingrained practices to strengthen their accountability and drive learning in the spirit of ODR.*

KEYWORDS: Accountability, Learning, Dispute Resolutio, Technology

INTRODUCTION

The relationship between online dispute resolution (ODR) and traditional dispute resolution avenues (alternative dispute resolution (ADR) and courts) is typically viewed as substitutive. This article offers an alternative understanding, one in which ODR and traditional processes not only co-exist, but where ODR can actually inform the way litigation and ADR mechanisms are structured. The unique features of ODR, in particular the automatic recording of all information exchanged during the resolution efforts in digital format, enhance accountability and learning, fairness and effectiveness, breaking away from traditional molds and policies that have serves as barriers to promoting these goals.

The Role and Contribution of ODR

Experimentation with ODR began in the mid-1990s soon after the ban on commercial activity on the internet was lifted. This development was naturally accompanied by a growth in the number of users and scope of activities online, which, in turn, generated a growing number of conflicts for many of which traditional dispute resolution avenues provided no satisfactory response (Katsh & Wing, 2006).

Interestingly, the early experiences with online conflict and the pioneering attempts to develop online dispute resolution systems are a good illustration of the different roles and contributions ODR systems can and do in fact occupy. As detailed by Professors Ethan Katsh and Janet Rifkin, there were three principal attempts to introduce ODR systems in the 1990s: the Virtual Magistrate online arbitration system for disputes with internet service providers (ISPs), the University of Maryland's online mediation program for family disputes, and the University of Massachusetts' Online Ombuds Office's (OOO) online mediation program which did not target

particular dispute types but is most strongly associated with the eBay dispute resolution pilot it launched in 1999 (Katsh & Rifkin, 2001). As we can see, both the Virtual Magistrate and the OOO identified areas associated with new types of disputes resulting from the proliferation of internet communication (the rise of new middlemen such as ISPs and the spread of e-commerce transactions between strangers). A similar example can be found in the later development of the ICANN dispute resolution system that resolved domain name disputes through an online administrative process (<http://www.icann.org/en/udrp/udrp.htm>). Unlike these examples, the third pioneering ODR program led the University of Maryland focused on a traditional dispute type, one that may seem at first blush as being too complex and emotional for ODR, certainly when contrasted with the simple, small-scale nature of eBay disagreements.

Around the same time the ICANN system was developed, additional ODR ventures emerged, some differing substantially from the earlier experiments with ODR. Cybersettle developed an online bidding system that allowed for the efficient resolution of monetary disputes through several rounds of distributive bargaining conducted on its online platform (www.cybersettle.com). By contrast, Smartsettle, focused on multi-issue negotiations, developing a more complicated system for ranking interests and generating win-win outcomes (<http://www.smartsettle.com/>). Both Cybersettle and Smartsettle have not focused on conflicts that arose online. On the contrary, they target traditional-offline disputes, and, in the case of Smartsettle, the ODR system can even be used offline for simulation purposes.

These days, a decade and a half since the early experiments with ODR, there are several impressive examples of the contribution ODR can have, with systems belonging to eBay and Wikipedia demonstrating creativity and diversity in process and system design and drawing a substantial, some would say striking, number of users to employ these systems (Rule, 2009).

If we carefully examine the examples of ODR systems and processes presented above, we can see that the rationale for using ODR and its potential contribution are multi-dimensional. Generally speaking, we can discern three principal reasons for introducing ODR. The first would be that there is no other route since courts and ADR are unavailable. An obvious example is those cases in which the dispute does not constitute a legal cause of action but nevertheless is disruptive and could harm the surrounding online activity or community. One such case would be a fierce argument over the content of an article on Wikipedia or disputes between the virtual personas of online neighbors on Second Life. In other instances, a legal course of action may be formally available, but could be too complex in terms of jurisdiction or of choice of laws, rendering such an option *de facto* unavailable.

A second rationale for employing ODR is its potential for enhancing efficiency, mainly due to the ability to communicate from one's own home or office without having to schedule face-to-face meetings, which are typically time consuming and can be associated with substantial added costs. In these instances, the complainant would have sufficient incentive to pursue the complaint through traditional avenues but technology is introduced because of the added efficiency associated with it. One example for this category of cases is the Cybersettle insurance cases. Some of the eBay cases would fall under this category while others (those in which the sum in dispute is particularly low and the parties are from different jurisdictions) would fit the previous rationale.

Finally, over the years, we can see more and more demonstrations of the qualitative advantages offered by the introduction of technology into dispute, and the adoption of ODR processes and systems in particular. One demonstration of these advantages is Smartsettle's optimization

feature. The program, which is privy to each party's confidential preferences, can examine whether the resolution reached can be optimized so as to better reflect each party's real preferences and interests. Another example is eBay's automated negotiation processes, in which automated processes substitute for a human mediator's intervention, allowing for critical information to be exchanged between parties. In this way, parties are able to overcome cognitive barriers to dispute resolution, while eBay is able to do this in an effective manner while handling astronomic numbers of such disputes, recently estimated at 50 million a year. A more recent example is eBay's use of Crowd Sourcing, a technique that uses technology to draw on large crowds in an attempt to reach a single decision. In this case, eBay's community court draws on various eBay users to resolve feedback disputes (<http://www.ebaycourt.com>).

While focus has typically been on ODR's potential for enhancing the efficiency of dispute resolution efforts, it is the qualitative advantages offered through technology that I find intriguing. These qualitative advantages emerge from two features associated with ODR processes and systems: (1) instantaneous and rich documentation of communication, and (2) the ability to detect patterns – both problematic and positive ones – that are embedded in the rich data collected through dispute resolution communications. Both of these traits enhance accountability (the ability to ensure that the dispute resolution process is fair and effective) and learning (the ability to systematically remedy failures and to replicate successes) (Rabinovich-Einy, 2006). The potential for enhancing accountability and learning through documentation and pattern detection carries important implications for traditional dispute resolution mechanisms, as I explain in the following sections.

Implications for ADR

The broad move to institutionalize ADR in recent decades in the U.S. and elsewhere has been met with only limited success. Despite a multitude of mediation and arbitration schemes offered in courts, administrative agencies and in private settings, ADR programs have had real difficulties in attracting disputants. While a common explanation to this failure is that people are unaware of these options, there seems to be at least some evidence, certainly with respect to mediation, that the reluctance to use ADR is related to program quality. Writings on ADR programs institutionalized in courts present a grim picture of mediation schemes that fail to present a real alternative to the court system, offering a "quick and dirty" version of mediation, one in which the mediator seeks compromise, while parties' rights remain unprotected (Welsh, 2001). Aside from claims regarding the low quality of ADR (in particular, mediation) programs and the actions of particular mediators, a fierce attack has been voiced against the general move to institutionalize ADR. These critics have claimed that by adopting ADR, we are limiting the role courts can play in developing the law, in protecting human and civil rights, and in declaring society's values (Fiss, 1974). Informal processes, the claim goes, are particularly harmful to members of disempowered groups who are systematically disadvantaged by informal, flexible and confidential processes (Grillo, 1991; Delgado *et al.*, 1985).

While there is clearly a crisis in the ADR world, there are also many examples of successful ADR programs, such as the U.S. Postal Services' REDRESS program for addressing discrimination claims and the NIH Ombuds office (Bingham, 1997; Sturm & Gadlin, 2007). While there are certainly several reasons for their success, a close examination of these programs reveals that both programs place an emphasis on quality control and improvement, often employing unique and extensive measures to that end. This is not trivial in the case of ADR. Because these processes are typically flexible and confidential, it has been very difficult to employ quality control measures and set goals for evaluation and improvement. Typically,

accountability measures require clear rules of conduct for decision-makers and transparency that allows review of such decision makers' conduct and decisions. In the case of mediation, mediators are not decision-makers, there are few, if any, rules that govern their interventions, and the resolution attempts remain veiled. Those details that are recorded and which can be used to track and review the process are typically too "thin" to shed any light on the question of the effectiveness and fairness of the process that took place (Rabinovich-Einy, 2006). Where it is difficult to evaluate quality, it is naturally even more difficult, nearly impossible, to aim at improvement.

While most ADR centers and practitioners have tended to view the accountability deficit of these processes as inherent, experience with ODR has uncovered creative ways in which the goals of accountability and learning can be met despite the informal, flexible and confidential nature of these processes. Because in ODR processes all communications are automatically stored in digital format, a rich searchable database is created instantaneously, at no added cost. This data, which includes all communications between the third party and the mediator as well as any resolution reached, is broad enough to uncover third party misconduct or incompetence. At the same time, by detecting and analyzing cases that were successfully resolved, effective mediator techniques and relevant training techniques can be identified. In addition, the analysis of data collected across cases according to suspect categories of parties can reveal systematic biases embedded in the process and offer insight into the conditions under which such bias can be lifted. In these ways, documentation and data analysis can promote better, more effective and fair processes, or, in other words, enhance the accountability of ADR processes. What are the implications for ADR processes? Naturally, recording all exchanges in digital format is unlikely and undesirable as it carries both financial and other costs. We can however use the ODR experience as an inspiration to rethink the way in which traditional ADR programs and practitioners think about accountability and learning, and in particular, by relaxing some of the practices related to confidentiality and flexibility which have served as a barrier towards change and improvement. A preliminary step would be to rethink current practices about internal data collection on mediation processes, requiring some form of real-time supervision in at least some of the cases through such measures as random selection.

The data collected would have to be stored and systematically analyzed in ways that would generate learning about the effectiveness and fairness of the processes and would allow for changes to be introduced. This would illuminate not only the ways in which particular third parties operate, but also the impact of choice of process and of different variants of the same process. In addition, when ADR is embedded in a closed-organizational setting, such learning could reveal recurring types of disputes. Addressing the root cause of such patterns would assist in preventing the eruption of disputes *ex ante*, beyond the resolution of individual problems *ex post*.

Implications for Courts

Courts are facing mounting pressures to become more efficient. While there is an argument as to whether courts in the U.S. Americans are over-litigious or whether there are in fact too few cases being brought to court (certainly tried and decided without being settled), there seems to be agreement that the system is ineffective in addressing its caseload (Refo, 2004). Among the various measures that have been launched to remedy the current state of affairs, the introduction of technology, it is typically suggested, could make courts more efficient by speeding up the delivery of documents, minimizing the instances in which paperwork is misplaced or lost and allowing attorneys and judges to work on their cases from afar, without having to rely on access

to their workplace or being restricted to formal work hours. In addition, the employment of technology can enhance efficiency by allowing for early screening of cases for ADR and ODR, which offer quick resolutions and take some of the caseload off the court system.

But technology can do much more for courts than merely improve their efficiency. A fully digitized court system could enhance learning about the effectiveness and fairness of the court system by limiting judicial discretion, studying patterns of outcomes across case types and disputant characteristics, and the evaluation of court procedures and internal policies (Rabinovich-Einy, 2007).

In terms of discretion, technology can ensure consistency on such matters as alimony, amount of damages and sentencing by feeding relevant criteria and examining past decisions under such conditions.

Patterns can be studied through the production of fine-grained reports. Such reports can allow in depth analysis of, and comparison among different types of proceedings; the manner in which they are handled; the allocation of judicial time to their resolution; and the need for further development and refinement of the system. For example, a study of how judges perform specific functions (conduct pre-trials, conduct hearings, write decisions) could underscore areas in which further training is needed (running a courtroom, ascertaining under what circumstances and in what ways to encourage settlement, developing writing skills, etc.)

Reports can also help evaluate the effectiveness and appropriateness of different court policies and rules. One example is the criteria adopted for referral of cases to mediation. The effectiveness of these criteria could be studied over time by linking such factors as resolution in mediation, satisfaction of the parties and durability of agreement reached to the criteria employed in the decision to refer the case to mediation. Another example could be the evaluation of court policies on the internal allocation of cases among judges. Where sufficient data is recorded in digital format, the possibilities for studying the impact of court procedures, policies and intervention are vast. Nevertheless, to date, the learning potential of technology has typically been grasped in terms of efficiency (how to minimize time spent from case filing to case closure, and how to curb costs spent by parties and the state on court cases), missing the much broader potential for learning and consequently for the improvement of the system.

CONCLUSION AND FUTURE DIRECTION

Both courts and ADR have been slow to adapt to new technologies. ODR specifically has been viewed as a niche area, suitable for disputes that result from online activity for which there are no effective face-to-face dispute resolution avenues. As I have shown, the domain of ODR is much broader. For one, ODR can (and in some cases already is) employed even where traditional dispute resolution processes are available and where the dispute is not related to online activity. But ODR is also relevant to a wide spectrum of disputes on another level. It offers hope for curing some of the deep-rooted problems of traditional dispute resolution arenas. Typically, ODR enthusiasts focus on ODR potential for enhancing efficiency in dispute resolution, which is of course a real and substantial advantage. ODR, however, can also offer important lessons to other, more traditional mechanisms for dispute resolution in terms of enhancing accountability and learning. This happens both when ODR is employed for the resolution of disputes, due to its qualities of automatic documentation in digital format, but also indirectly, where ODR serves as a model for dispute system design. The ways in which

data collection and analysis in ODR have helped promote quality control and improvement can induce those offering traditional dispute processes to rethink their practices and policies so as to enhance accountability and learning, areas that have been the Achilles heel of ADR and, to a certain extent, of courts. As privatization increases and both ADR and courts face a legitimacy crisis, ODR can help strengthen traditional means for dispute resolution both directly (by incorporating ODR as another option alongside traditional methods) and indirectly, inspiring new ideas in the design and improvement of courts and ADR.

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