Leaving disputants to their own devices

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The title of this blog is not as harsh and heartless as it might seem at first sight. True, mediation proceeds largely on assumptions of disputant autonomy and participation; and the expectation is that the outcomes will be those designed by, and with the commitment of, the participants. This comment, however, picks up on two threads: first, the previous entry by Charlie Irvine on his experience of online dispute resolution [http://kluwermediationblog.com/2014/07/12/to-see-ourselves-as-others-see-us-the-surprising-potential-of-online-dispute-resolution/] as well as earlier discussions on this blog site and in the burgeoning literature on ODR; and second, more specific commentaries on the potential of mobiles – smart phones, tablets or other "devices" – in dispute resolution and conflict management.
Little did Frank Sander imagine that, when he proposed the "multidoor courthouse", that the idea would not only come close to being literally true, with the development of court-linked mediation programmes in many jurisdictions, but that the "doorways" would, in our highly wired age, become portals, platforms and portables. Prof Sander has also observed that the trajectory of ADR tends to follow a pattern of experimentation, incorporation and institutionalisation [http://www.mediate.com/articles/sanderdvd03.cfm] which is certainly reflected in the degree to which mediation, having started out as "alternative" (remember the original meaning of the "A" in ADR?) and marginal, has now become mainstream and – with some reservations – mandatory.

Similarly, in commenting on the now well-established role of information technology in dispute resolution, Marta Poblet notes a pattern of development from experimental, alternative, and hobbyist to entrepreneurial to institutional. With the expansion and diffusion of providers of ODR services, in addition to the well-established consumer-oriented resources on online trading platforms such as eBay, in turn reflecting the substantial volume of cross-border commerce conducted online, we seem to have arrived at the entrepreneurial stage of development very rapidly. At the same time, initiatives such as the EU Directive on Mediation [Directive 2008/52/EC "on certain aspects of mediation in civil and commercial matters"] take very deliberate steps towards the institutionalisation of mediation, with specific reference to facilitating online mediation to accommodate the needs of those high volume-low value trades that many consumers are involved in.

But it's a step beyond this "conventional" development of the online counterpart to mediation to now look at the potential of mobiles. ODR has already substantially changed our thinking about "location" and dispute resolution, given the reality that the parties are increasingly likely to be living in different jurisdictions and time zones. What began as a strategic inquiry about "your place or mine" in negotiation and mediation practice" [see J W Salacuse and J Z Rubin, "Your Place or Mine? Site Location and Negotiation," Neg Jnl, 6: 5 (1990)] now seems quaintly anachronistic, as do the discussions as to the shape and furnishing of the mediation room. The potential of remotely located and asynchronous communications has opened up not only new ways of working for mediators – beyond the earliest uses of document exchange and scheduling through, for example, email; but also now seems to offer more options for institutional, state-based users of mediation.

At present, these mobile-based developments in dispute resolution seem to follow two lines, in turn reflecting the various pathways that ADR has taken in the last few decades. I'll distinguish these lines of development for the moment by suggesting that one follows the imperatives of **necessity**, the other, the interests of **efficiency**. In both cases, the objectives of access to justice, resolution, information etc remain the common thread.

On the necessity side, the use of mobiles in many parts of the world, as preferred forms of communication is based on relatively the poor infrastructure for and high cost of PCs and – at the same time – the greater accessibility of mobile technology, such that large parts of the Global South have skipped the stage of infrastructure development for landlines and witness a burgeoning use of mobiles. As Colin Rule and Chittu Nagarajan comment in their chapter "Crowdsourcing Dispute Resolution Over Mobile Devices" [in Poblet, (ed) Mobile Technologies for Conflict Management: Online Dispute Resolution, Governance, Participation, [Springer, Dordrecht, 2011]], "It has become clear in the last few years that the future of the internet is mobile devices. . . . What is also obvious is that mobile is not only the future of the internet in the developing world, but increasingly it is apparent that mobile is the future of the internet in the developed world as well." There isn't space here to develop this line of discussion, but readers may be interested to follow the pioneering work of Sanjana Hattotuwa in Sri Lanka where the combination of mobiles (usually for simple text messaging), local radio, and trilingual open websites became important resources in the latter years of the civil conflict. The further imperative in the use of mobiles here – beyond economic necessity – was that of personal safety: mobile communication not only allowed for on-the-ground reporting of security incidents; it also preserved a safe distance between those held apart by conflict and mistrust.

A second and very different imperative now appears to be shaping an experimental yet promising use of mobiles in civil justice systems. As in the first case, the reality is that most people carry with them, most of the time, a mobile phone – and increasingly, this is going to be a smart phone capable for far more than mere phone calls and text messages. At the very least, this emerging development in ODR echoes the ongoing work of the UK Council on Civil Justice [http://www.lawgazette.co.uk/law/civil-justice-council-explores-online-dispute-resolution/5040975.article] in exploring the role of ODR, and reflected in the Council's chair, Richard Susskind's open question as to whether we should now see the courts as a place or as a service – with the answer heavily weighted towards the latter.

If then, dispute resolution – not just the court – is a service, then access is likely to be obtained through a variety of portals, not least of which will be the mobile phone. In Singapore, this development has been foreshadowed by the Chief Justice in his 2013 Workplan for the Subordinate Courts [https://app.supremecourt.gov.sg/data/doc/ManagePage/4621/Keynote%20Address%20by%20the%20Honourable%20the%20Chief%20Justice%20Sundaresh%20Menon%20at%20Subordinate%20Courts%20Workplan%202013.pdf] in which he notes "The Subordinate Courts will be working with AXS to explore the feasibility of allowing offenders to plead guilty using smart phones and personal computers through mobile AXS." [§40 (a)], and "A similar initiative being piloted by the Civil Justice Division is the hearing of short civil matters via smart phones. Under this initiative, litigants or lawyers can "phone into" their hearings remotely via the video conferencing features that are now more commonly found on smart phones." [§44] The apparent success of a trial programme means that this is now going to be implemented as a permanent feature of "access to justice". If, in a relatively small country like Singapore, the convenience of phoning into court proceedings offers cost and time advantages (especially for those hearings that might typically involve more waiting time than actual appearance in court), all the more so in geographically larger jurisdictions.

In the same vein:
– the 2014 ABA's National Meeting of Access to Justice Chairs has given special consideration to the use of technology for access: http://www.americanbar.org/calendar/2014/05/natl-mtg-of-access-to-justice-cmm-n-chairs/schedule.html;
– the US Legal Services Commission has published proceedings of the "Summit on the Use of Technology to Expand Access to Justice" http://www.lsc.gov/sites/lsc.gov/files/LSC_Tech%20Summit%20Report_2013.pdf; and
– Australian Government Productivity Commission has undertaken "a 15-month inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law." http://pc.gov.au/__data/assets/pdf_file/0005/135284/access-justice-draft-from-chapter11.pdf on making more use of ICT to enhance access, primarily in terms of improving efficiencies

Whether the drivers are efficiency or personal safety or distributive economics, what does have potential for us as mediators is the use of the "office in our pockets". At its simplest, the text and voice functions of the mobile phone facilitate easy communication; and bearing in mind that the computing power of our smart phones far exceeds that of the first lunar landing module, we're far from knowing where this device may take us. We may not go along with the wide-eyed optimism of Frances Cairncross in the first edition of The Death of Distance (Boston, Harvard Business School Press, 1997: p. xvi) in claiming that this new technology that it will "increase understanding, foster tolerance, and ultimately promote worldwide peace". [That comment does not appear in the 2001 edition.] But we can be sure that it will change how – and indeed where – we work. And we will always have to work with that final gap between the mobile device and the hearts and minds of the disputants.

"As ODR builds on the ADR experience, it is important to understand that processes that migrate to cyberspace often change as they discover and begin to employ new capabilities for communicating and processing information. Despite resolution online, therefore, may not take the same route and end up in the same place as dispute resolution has offline. The first attempts to establish online models of dispute resolution tended to mimic offline approaches but new capabilities for communicating and processing information using devices like smartphones can be expected to generate new models and approaches."
E. Katsh and D. Rainey, "ODR and Government in a Mobile World," in M. Poblet Ch 7, p 87]