Kluwer Mediation Blog

Digital Justice: Between Enthusiasm and Caution

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Saturday, November 25th, 2017

This blog was written in response to several recent meetings with different audiences, which illustrated for me the diverse perceptions of and responses to the role of digital technologies across the practices of dispute resolution. On the one hand, I hear of a cautious judicial recognition that the courts need to develop (and develop soon) a digital strategy; on the other, practitioners in the fields of mediation or restorative justice express the understandable apprehension that digital 'intermediations' may undermine the core ethos of their intensely human interactions; and (on yet another hand) recent meetings with people at the heart of the IT industry reflect a sense of enthusiasm for the potential of digitally facilitated access to legal information and services.

A version of this paper will also appear in the New Zealand Bar Association newsletter, for an audience of mixed exposure to and engagement with digital technologies. My intention in writing this, and adding it the Kluwer blog, is to normalise this emerging world of digital technologies in dispute resolution. Some of the information will, of course, be well known to readers of this blog; but my interest in bringing these points together was piqued by the apprehension in some quarters that the irresistible juggernaut was coming down the line . . . while it also became clear that many were already engaged, even if unwittingly, in some form of digital practice.

Some forty years ago, at the original "Pound Conference" in St Paul, MN, the founding ideas for the modern "access to justice movement" were sketched out. Critically, the concern was that the law was too costly, culturally unfriendly, and incomprehensible to anyone other than the initiated. Two core themes laid the groundwork for the last four decades of what was – and no longer is – "alternative" dispute resolution: these were, first, the prospect of going to where the disputants were, rather than obliging them to come to a Court or centralised location; and second, Professor Frank Sander's enduring metaphor of the "multi-door courthouse".

Little could any of the original participants at that conference imagine the ways in which modern digital technologies would help realise those aims. While the prospect of anything digital, and especially the prospect of artificial intelligence as part of the practice of law and dispute resolution, might fill many with a sense of foreboding, or a wish for an early retirement before this all comes to pass, the reality is that most of the readers of this note are already engaged in some aspects of digitally-enabled practice.

The modern history of mediation and other alternatives to litigation has been paralleled, for at least the past 20 years, by the exploration of ways of doing this same work through digital means. There are two main threads to this development of ODR. The first involves those disputes that arise

online and, for reasons of distance, technology and jurisdiction, require responses through the same medium. This is very much in line with the original imperative of going to where the disputants are – all the more so if, as was and is the case, the disputants are linked only by technology with no prospect of face to face resolution. This first thread can also be broken into two parts. First, there are those disputes that arose from the invention of the Internet, as it turned out that the digital world was no less prone to conflict, bruising communication, mistrust and "flaming" than the face to face world. The early hopes for a peaceful world that could be mediated by fostering enhanced digital communication turned out to be illusory. Indeed, early observers such as Ethan Katsh, one of the "founding fathers" of ODR, predicted that the Internet would not be a peaceful place. Second, the opening of the Internet to commercial activity in the early 1990s equally opened that domain to all of the same disputes that commerce in the offline world creates, exacerbated by problems of distance, jurisdiction, enforcement and – typically – the "high volume, low value" nature of most of the transactions. At the G20 summit in Hangzhou, China, it was projected that cross-border e-commerce will involve 2 billion customers by the year 2020. In correlation with the growing number of cross-border commercial transactions, another recent projection is that the number of disputes will continue to rise sharply, reaching a peak of one billion e-commerce disputes annually by 2017, and a million disputes a day by 2020. (odr.info)

While the first main imperative for the development of ODR was created by the online world per se, the second line of development involves the application of those online resources to disputes that arise in the offline, face to face world. The availability and increasing accessibility of online platforms, plus the enhancement of computing speed, reliability of connectivity, and the spread of digital resources meant that it has become more realistic to contemplate a transition of at least some of the world of dispute resolution into digital spaces. Beyond the more obvious commercial applications in cross-border transactions (still the main area of potential in ODR), we are now seeing the use of digital technologies in, for example, small claims, family, employment, trusts, relationship property and other fields of law and disputes that might, at first sight, seem better suited to interpersonal, direct and "real time" communication. However, as the technology improves, as our facility with that technology also improves, and as a generation of "digital natives" emerges for whom it may be more normal to communicate asynchronously by text, the "new normal" will be the digital mode.

There are, I suggest, two principal drivers for this development, apart from the technological imperative itself. The first is the same concern that has been with the modern ADR movement for at least four decades, and that is the question as to how to enhance access to legal and public resources for those who are typically disadvantaged by costs, distance, language and familiarity. Of particular concern for the Courts in recent years has been the increased numbers of self-represented litigants (SRLs) who, typically for reasons of cost, do not come to courts with counsel and are, therefore, disadvantaged in both substantive and procedural terms. Equally, those SRLs take more of the Courts' and judges' time and, to the extent that they may require more assistance in Court, risk placing the Bench in the invidious position of appearing to offer too much of a helping hand.

The second driver comes from the administration of justice itself, made clear in the ominous title of a 2015 report by the group JUSTICE, entitled "Delivering Justice in an Age of Austerity" . In simple terms, many governments find that they simply cannot afford to run justice systems that offer the full menu of resources we associate with the administration of justice.

Digital resources – including online dispute resolution – thus offer options to disputants, practitioners and governments that were hitherto unimaginable. Two caveats need to be entered at

this stage: first, not all uses of digital resources necessarily qualify as “online dispute resolution” but are rather simply the application of digital technologies to more conventional tasks; and second, not all ODR is ADR in digital form (“e-ADR”). On that second point, there were and are parallels between the development of mediation and its online counterpart, notwithstanding reservations about the loss of immediacy and intimacy of face to face communication. But, as will be noted below, it is increasingly the case that digital technologies are being applied – for reasons of efficiency and economy as much as disputant convenience – to the formal institutions of law and administration. Digital technologies have very rapidly made the transition from marginal to mainstream in justice systems.

Dr Richard Susskind, the IT Adviser to the Lord Chief Justice, Chair of the Advisory Board of the Oxford Internet Institute, and most recently Chair of the Advisory Group on Online Dispute Resolution for the Civil Justice Council (UK), has – in several places – asked the rhetorical question: are the courts a location or a service? The contexts in which, and the regularity with which, he asks that question, suggest what the answer must be. As the author of several books on the future of lawyers and law practice, which stress the shift from conventional structures of practice and a greater reliance on ICTs, at least for communication and information management, and increasingly as the way in which we’ll practice, Susskind is clear that we’re shifting to a more networked mode of work and access to justice. The Courts as a “location” area at being at least supplemented, and in some cases supplanted, by forms of digital access that underscore the “service” aspect of the delivery of justice.

There are three ways in which we can think about these changes, three tiers of digital “intermediation” in which we might be able to identify our own current or future levels of engagement with digital technologies. The first is “imitative”: that is, the use of technologies such as smart phones, tablets and of course computers to enhance and in many ways, simplify the things we already do, ranging from diary management through to more complex document management and e-discovery – and in this respect, we already see instances of counsel using tablets rather than paper in Court. This is not, strictly speaking, ODR; but it is a precursor by way of an incremental step towards digital working platforms.

The second level of working digitally is “innovative”: that is, moving beyond our normal work but in a digital way, we see practitioners migrating practices online, for example, in online arbitration (usually on the papers) and mediation; the creation of portals through which prospective clients and counsel can engage, often wholly online, with shared and secure document sharing, video conferencing, and asynchronous text-based communication; the creation (of course) of “Apps” to provide access to online resources and, most significantly, the emergence of online courts. This last development needs separate discussion; but suffice to say that it is illustrated through examples such as British Columbia’s Civil Resolution Tribunal, the EU’s Regulation (EU) No 524/2013 providing for the establishment of an online dispute resolution platform at Union level; the recent formation of the Hangzhou Internet Court; and the moves towards “Her Majesty’s Online Court” in the UK. This last example follows the recommendations of the Report of Lord Justice Briggs , in turn reflecting the work of the Civil Justice Council Working Party, in finding ways to meet both the needs of would-be (and possibly self-represented) litigants and of fiscally-strapped justice systems through enhanced access to legal information and an algorithm-driven first stage of case-management; through a second stage (if needed) of online mediation; to a (hopefully limited) third stage of judicial determination by the online court.

The third and “disruptive” stage of development in digital justice is one that most of us are – at

least at this stage – less likely to engage in, and it involves a more intensive use of artificial intelligence, data-driven decision making, and, following the example of online trading platforms such as e-Bay, the development of predictive and preventive strategies through the accumulation of dispute-derived data. The prospect of "predictive justice" might fill some with a sense of Orwellian foreboding, but at least the experience of e-Bay, in managing some 60 million disputes annually, indicates the possibility of changing commercial and financial transactions in ways that anticipate and prevent disputes.

In all of this, the essential drivers remain those of founders of the modern 'access to justice' movement, but rather than relying only on the alternatives of mediation and arbitration, themselves now mainstream, there is a growing reliance on and enthusiasm for the prospects that information communication technologies can, as Briggs LJ noted, offer "[f]reedom from the tyranny of paper giv[ing] rise to a wholly new range of choices about the geographical location of all aspects of the civil justice system." Support for at least innovation, if not yet disruption, comes from the more conventional voices in the judicial system when Lord Justice Neuberger, President, UK Supreme Court observed "Now justice can be seen to be done at a time that suits you."

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