Kluwer Mediation Blog

Civil justice online: mediating transactional and public disputes

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Sunday, April 27th, 2014

The UK's Civil Justice Council has recently reported (http://www.lawgazette.co.uk/law/civil-justice-council-explores-online-dispute-resolution/5040975.article) on an initiative to promote online dispute resolution, through setting up an Advisory Group. Heading that group is Dr Richard Susskind, one the strongest promoters of ODR and of the role information communication technology (ICT) in the practice of law. In line with the EU's Directive on Mediation (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF) the aim is to facilitate the resolution of cross-border consumer and commercial transactional disputes, which are by and large in the high volume, low value category. "Low value" is bound to have a subjective element to it, as the Advisory Group will be looking at the resolution of disputes of a value that may be significant to many potential users. By way of comparison, for example, Dr Susskind notes that the Money Claim Online system of Her Majesty's Courts and Tribunals Service has handled claims up to 100,000 pounds in value.

While this a UK response and an EU-wide initiative, it has wider implications than this, not least as the essential driver of this is the facilitation of cross-border, arm's length transactions where the combination of transactional costs in litigation and physical distance – themselves a function of burgeoning online commerce – means that disputants can be literally anywhere. Again, while the starting point for these initiatives is in, first, the easing of transaction costs and the facilitation of access to justice (or at least to dispute resolution) within the EU legal and commercial community, and second, in developing a UK-specific response, the questions raised are, I think, generic for those of us in the mediation world.

Readers will be familiar enough with the options in ODR for it not to be necessary to rehearse them here, save to say that they include at least three options:

1. algorithm-driven settlement, in which there is in effect an automated bidding system;
2. online communication options, such as email, Skype, video conferencing; and
3. online mediation – typically also available as a backup to the first option, should the parties not be able to arrive at an agreement or get close enough to the figure automatically generated.

The last decade at least has also seen a significant growth in private and commercial providers in ODR, many of which have been written about elsewhere (and the history of which also shows a

reasonably high attrition rate, as service providers disappear or become absorbed by others). There are also success stories, not the least of which is the system used by eBay, and a private provider developed by Colin Rule and his colleagues, Modria [http://www.modria.com].

But this is all the descriptive part. What interests me for our conversations about mediation are some of the questions that are still being raised about "conventional" mediation (see Nadia Alexander's previous post in this blog series) and now, a fortiori, about mediation being taken into the online world. I should preface these questions with one of those "disclosure" statements that seems to have become commonplace in US-based online journalism: I am a member of the "National Center on Technology and Dispute Resolution", and have been closely involved in the development of an online graduate degree in online dispute resolution – so these are the questions of an enthusiast, not a Luddite.

In an article on the CJC's Advisory Board, "Virtual courts for the internet generation" at http://www.thetimes.co.uk/tto/law/columnists/article4070943.ece [this requires subscription], Dr Susskind seems to ask two questions about the development of ODR:

1. are the courts a service or a place; and
2. must people go to court to settle disputes?

Assuming an answer that reinforces the practical potential and efficiency of non-court based dispute resolution (which, after all, has been our bread and butter for the last few decades), it seems but an easy step to say that if we don't need to be in court, we can readily embrace the communicative potential of the online world – which of course wasn't imagined when the mediation "movement" kicked off in the mid-70s.

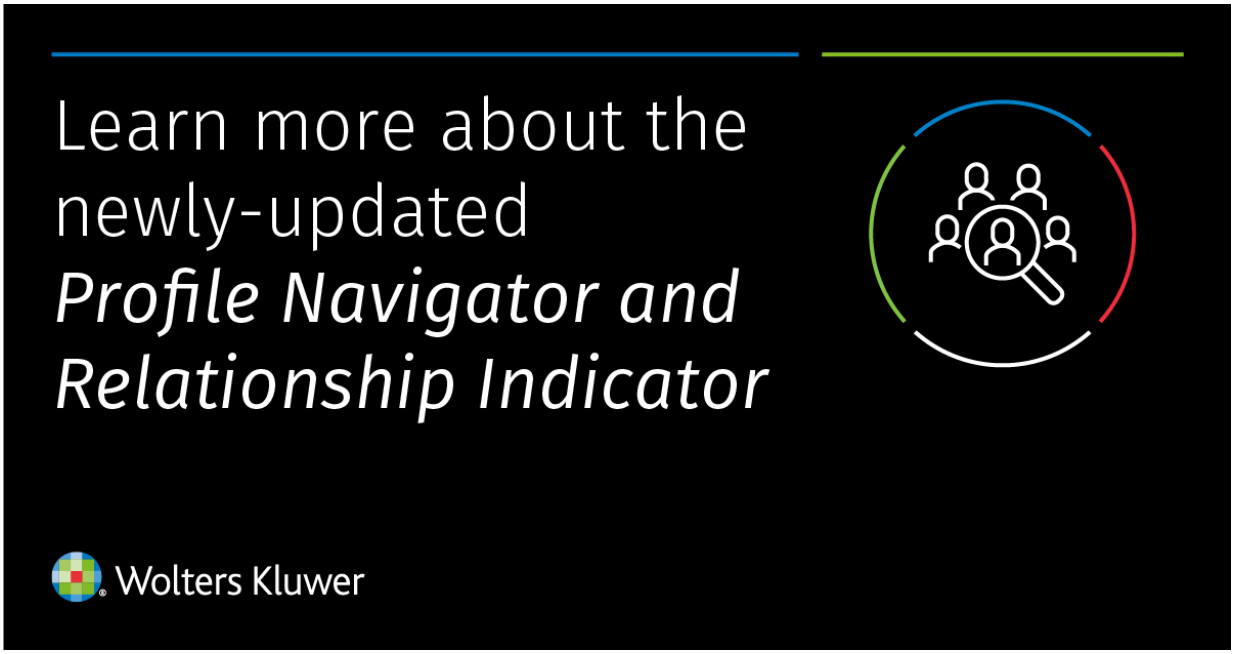
While embracing this development, less for its efficiency (which seems a minimalist argument for any civil justice development) than for its capacity building potential, I still have a few additional questions which I'd like to throw out to this mediation community:

1. Is it important that disputes are settled according to public norms and values: a question I raised in an earlier blog entry concerned the relation – or tension – between the values of private settlement and public justice; and it seems to me that this remains a concern, perhaps amplified by the absence of knowledge and precedent in this emerging online jurisdiction. I may be tilting at windmills here, but it again seems likely that a significant body of disputes will be – indeed are being – settled through the anonymous, increasingly automated, process of ODR; and, while that certainly resolves our problems of the disposition of cases – that is, it solves the problems for the parties – it leaves a potential information gap, which is not so much information about the specific cases but rather about the body of principles and norms by which we settle our disputes.

2. Conversely, we might argue – as indeed we have for the past 4 decades – that it is just as important that they can be settled by agreement. And here I am going to seem to contradict myself: having worried about the problem of public and shared knowledge of the principles on which decisions are made and disputes are resolved, I find myself equally committed to the potential that we each have to resolve our own disputes. It may be that there's a simple linguistic or descriptive resolution to this, and we may distinguish "access to justice" from "access to resolution", in which the former still implies improving access to the institutions, protections and rules of law, and the latter is the field of play in which parties are encouraged, facilitated to find their own pathway. The issue may only be that we've been somewhat loose in our conflating the two forms of access.

3. This third and final question heads in a different direction, and it's a question to which I hope to return: one of the most promising and interesting fields of work in mediation has been and will be in the resolution of public issue and policy disputes. For many years, we've seen great work being done in environmental, planning, resource management and infrastructure development mediation. The whole field of consensus building, negotiated (or mediated) rule making has seen a sea-change in participation in decision making and governance. Now, here's the question: if mediation in the face to face world has this capacity to move beyond private settlement into the arena of public policy and decision making, especially with a solid principle of public access and participation behind it, what is the potential to do this same work online? After all, the agora was, for the Ancient World, the place not only of dispute resolution but also – indeed more so – of public decision making. And what we have is the makings of the electronic agora. What's more, it's beginning to look like a networked agora and, if that's the net in which private disputes are increasingly settled, is it reasonable to see a greater role of mediation in the facilitation of public decision making online? At the very least, we might hope for a better quality of conversation than we seem to have in those exchanges where anonymity seems to bring out the worst in people!

As Douglas Rushkoff has suggested: "In short, the interactive mediaspace offers a new way of understanding civilisation itself, and a new set of good reasons for engaging with civic reality more fully in the face of what are often perceived (or taught) to be the many risks and compromises associated with cooperative behaviour." ["Open Source Democracy: How Online Communication is Changing Offline Politics", www.demos.uk]



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