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Mobile mediation: How technology is driving the globalization of ADR

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MOBILE MEDIATION: HOW TECHNOLOGY IS DRIVING THE
GLOBALIZATION OF ADR[1]

By Nadja Alexander

I.   INTRODUCTION

Mediation has made it to Hollywood. The opening scene of the romantic comedy, *The Wedding Crashers* (2005), features a hilarious attempt at divorce mediation. The mediation scene does not demonstrate any mediation skills to be emulated, and the film itself, apart from the opening scene, has nothing to do with mediation. Nevertheless one cannot ignore the power of the borderless dream machine called Hollywood. The Hollywood film industry does more than export films and phantasies around the world; it is a driving force in the globalization of the themes with which it deals. When mediation becomes one of those themes – albeit fleetingly – it is on its way to becoming a globalized concept.

How appropriate then of the *2005 Symposium on Advanced Issues in Alternative Dispute Resolution (ADR)* at Hamline University to recognise the early stages of the globalization phenomenon in ADR. Entitled, *Intentional Conversations about the Globalization of ADR*, the two–day Symposium invited participants to grapple with issues such as the ethics of exporting ADR, how globalization affects the principles of ADR, the challenges for dispute resolution practitioners moving between cultures, and how the design of ADR systems can accommodate different social, legal and cultural imperatives. One topic that was not canvassed – and upon reflection, I am amazed that it was not raised throughout the two day meeting – was the impact of technology on the globalization of ADR.

The persistent ubiquity of technology is reflected in virtually every aspect of the lives of people in developed countries. Even the least technologically–oriented among us will have found it difficult to resist automatic teller machines, email, google and

mobile phones. The new technology infrastructure promises seamless 24–7 transacting, whereas face–to–face encounters are frequently fraught with time delays and expense. In addition to text–based applications such as email and SMS (Short or Simplified Message Service), users of PCs, mobile phones and laptops can make video phone calls, download music clips, transmit photographs, scan documents and video clips and edit them.

In the international business context, the e-revolution has influenced the nature of relationship-building, negotiating, transacting and resolving disputes. It has created a new geography where national boundaries are much less relevant and in which previously unthinkable – or at least difficult – connections and communications have been made possible. Here I am thinking of e-bay transactions between individuals on different sides of the world and the growth of international small business and internet entrepreneurs working from their homes. In a political context, the Sri Lankan peace talks among diverse stakeholders such as political leaders, local and international NGOs and community interest groups have been advanced through the use of online negotiation software.[2]

In terms of dispute resolution, technology has facilitated the globalization of ADR in two ways. First, technology has assisted in the rapid transfer of information and know–how between national and transnational actors and accelerated the dispute resolution export explosion. ADR programs for the 'third world' are being funded through 'first world' institutions as part of economic and legal reform.[3] In this context, western mediation is frequently introduced to reforming countries by well–intentioned

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[2] For an explanation of the one text software, see ODR Cyberweek 2005, *at* www.odr.info/Cyberweek2005/activities.php (last visited May 22, 1006).

[3] *See, e.g.*, "ADR: A Practitioner's Perspective," which reports on five case studies of ADR reform in developing countries, *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ pnacp335.pdf; *see also* by way of example, the Report entitled "USAID Supports Alternative Dispute Resolution In Latin America and the Caribbean," (2004), *available at* http://www.usaid.gov/locations/latin_america_caribbean/democracy/adr/index.h tml (last visited May 19, 2006).

consultants as a culturally–inclusive and value–free process[4] – which, of course, it is not. However, this is a pressing topic for another paper.

The second way in which technology has influenced the globalization of ADR is through the emergence of online dispute resolution (ODR). From automated blind–bidding procedures and e–mediators, to online mediation platforms with a human facilitator and online filing and case management in court–connected programs, ODR has many faces. Its continuing development and integration into larger transactional and conflict management systems reflect its growing acceptance and utility.

This essay will focus on how ODR has influenced the globalization of ADR. It will begin with an exploration of the relationship between technology and globalization, providing some examples of the features of ODR technology that have facilitated the globalization process and revolutionized the mediation process. However, technology may also hinder globalization insofar as it promotes certain technologies prevalent in the Global North at the expense of others that are arguably more accessible and suitable to the Global South. Accordingly, the challenges that technology poses to the globalization of ADR are also canvassed in this paper. They include the creation of new boundaries between the technology–literate and illiterate, the accessibility and availability of technology infrastructure, and the appropriateness of the selected technology for the legal, political, cultural and linguistic context. The essay concludes with a plea for a culturally–inclusive globalization process. To this end, ADR practitioners and scholars are encouraged to look beyond the standard online applications of the Global North to the broader culturally–variable world of electronic technology.

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[4] On the value crisis and confusion in mediation, see Dorothy Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545 (2002).

II. TECHNOLOGY AND GLOBALIZATION

The process of globalization has created a new geography which challenges the conceptual solidity and the sovereignty of the nation state. It has introduced a range of new *trans*national – as distinct from *inter*national– actors, identities, connections, perspectives and borders including e–commerce traders, non-governmental organizations (NGOs), multi-national corporations, political groups and virtual alliances. Power and influence traditionally attributed to the nation state now flow among polycentric connection points, which extend to these transnational actors. The blended term 'glocalization' refers to the new boundaries between local and global villages, between affluent and poor communities, and between virtual and face-to-face relationships.[5]

Globalization is a double–edged sword. On one hand, it produces globalism – a way of thinking about the world as a single marketplace in which political, legal and economic distinctions begin to blur. The process of globalization aims to create a level playing field in which players have the same opportunities although they do not necessarily share the same strengths and resources. Globalism views the political, economic, cultural, environmental and societal dimensions of the process of globalization through one lens – economic rationalism or as Beck suggests 'economic imperialism'.[6] Much of the criticism of globalization relates to the perceived misuse of power by those actors with economic strength such as multi-national corporations over economically disempowered actors with limited choice and bargaining power. On the other hand, the process of globalization frees up previous notions of state-defined citizenship and power to encourage expressions of identity based on individualism, ethnicity, socio-economics, religion, ideology and other factors.

The development of technology has gone hand in hand with the process of globalization. Despite its earliest beginnings in the

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[5] Mohamed Wahab, Online Dispute Resolution and Digital Inclusion: Challenging the Global Digital Divide (2004) (Paper presented at the *Third Annual UN Forum on Online Dispute Resolution*, Melbourne).

[6] ULRICH BECK, WAS IST GLOBALISIERUNG? 27 (Frankfurt am Main: Suhrkamp) (1997) (from the German 'Imperialismus des Ökonomischen', translation by the author).

late 1960s and its varied academic and scientific applications, it was not until the 1990s that the potential of the internet's commercial applications began to be realised. When the internet gave birth to e-commerce in 1992, it opened up a 24-7 world beyond conventional business hours, geographical boundaries and face–to–face business relationships. Among other things, the internet challenged traditional conceptions of territoriality by allowing users to transcend national borders, thereby generating a new era of transnationality in business.[7]

E–commerce soon gave birth to e–conflict which then required e–conciliation or, as it is widely known, ODR (online dispute resolution). Where parties had developed business relationships and transacted online, it was only a small step to dispute resolution using the same technology. However ODR is not limited to settling e-commerce disputes. It is also used in a variety of ways to manage disputes generated by face–to–face transactions, irrespective of whether the dispute is international or localised.[8] The capability to instantly access the most up–to–date information, know–how and news through the internet has augmented telephony technology to make inexpensive and informal dispute resolution a reality for those with access to online resources. This, in turn, has encouraged the sourcing of dispute resolution providers from a global marketplace. Disputants located in Brisbane and Minneapolis, for example, can elect to use an online mediator from Europe or Africa.

Conley–Tyler points out that despite the plethora of ODR programs – as at July 2004 she had counted 115 ODR services worldwide – 'there is a wide variability in the number of cases dealt with by ODR sites: from only one case to over one million disputes.'[9] The identified programs deal with a range of disputes

[7] Alejandro E. Almaguer and Roland W. Baggott III., 'Shaping New Legal Frontiers: Dispute Resolution for the Internet' (1998), 13 *Ohio State Journal on Dispute Resolution* 711 at 712.
[8] Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco: Jossey-Bass, 2001) at 9.
[9] Sanjana Hattotuwa & Melissa Conley Tyler, *An Asian Perspective on Online Mediation*, ASIAN JOURNAL OF MEDIATION, (Feb. 2, 2006), *available at* http://hellsdireagent.blogsome.com/2006/02/02/an-asian-perspective-on-online-mediation (last visited May 19, 2006); Melissa Conley Tyler, 115 and Counting: the state of ODR 2004 (2005) (Paper presented at the *Third Annual Forum on*

covering areas such as consumer,[10] business–to–business,[11] family law,[12] internet[13] and workplace disputes[14] as well as political peace negotiations.[15] While the initial growth of ODR was focused in North America and then Europe, there are now ODR services on all continents.[16]

III.   ODR – A TERM OF ART

In the literature, ODR is also referred to as online-ADR, e-ADR, eDR, cyber-ADR or automated ADR, with the last term referring to processes which are fully automated and use computer programs or other forms of artificial intelligence instead of a 'human' mediator. Examples of these include blind-bidding and decision-making trees.[17] The terms 'online'-, 'e'- and 'cyber-ADR' all recognize the fact that *online* dispute resolution has grown out of the *alternative* dispute resolution phenomenon. One might even speak in terms of traditional offline ADR, on one hand, and online–, e– and cyber–ADR applications, representing the new generation of ADR processes, on the other. Both online- and cyber- ADR highlight the use of internet-based applications in ADR, while e-ADR and eDR are broader terms referring to electronic applications of ADR.[18] Electronic applications extend

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Online   Dispute   Resolution,   Melbourne),   *available   at* http://www.odr.info/unforum2004/ConleyTyler.htm (last visited May 19, 2006).
[10] *See, e.g.,* The Square Trade, *at* www.squaretrade.com (last visited May 19, 2006). Square Trade is an ODR service which is used by the world's biggest online auction provider, eBay.
[11] *See, e.g.,* The Mediation Room, *at* www.themediationroom.com (last visited May 19, 2006).
[12] *See, e.g.,* Family Mediation Canada, *at* www.fmc.ca (last visited May 19, 2006).
[13] *E.g.* The Asian Domain Name Dispute Resolution Centre www.adndrc.org (last visited: 19 May 2006).
[14] *See, e.g.,* Online Resolution, *at* www.onlineresolution.com (last visited May 19, 2006).
[15] *See, e.g.,* Infoshare, *at* www.info-share.org (last visited May 19, 2006).
[16] Hattotuwa and Conley Tyler, *supra* note 9.
[17] Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace.* (San Francisco: Jossey-Bass, 2001) at 61.
[18]   *See* the Wikipedia entry for Online Dispute Resolution, *at* www.en.wikipedia.org/wiki/Online_Dispute_Resolution (last visited May 19, 2006).

beyond online applications to include the use of video-conferencing, mobile telephony and community internet radio.[19]

While the term 'online dispute resolution' (ODR) itself suggests that the process of resolving disputes is conducted online, ODR has extended its reach more broadly than cyberspace. It is also much more than dispute resolution in the strict sense of the term; it includes preventative and strategic mediation strategies and conflict transformation.[20] In the same way that the acronym ADR no longer accurately describes the nature and range of processes that fall under its ever-expanding umbrella, so too ODR applications have already outgrown their e-commerce beginnings.

ADR and ODR have become terms of art in their own right and have replaced the words they originally intended to represent. The meanings they convey, like many ADR and ODR processes themselves, are both flexible and developmental. ODR is used in this essay in a broad sense to encompass not only ADR conducted predominately using online technology such as email[21] or specifically designed email-based platforms[22] but also the integration of all electronic technology whether computer, community internet radio, telephone or video-based into dispute resolution processes.

IV. THE REVOLUTIONARY FOURTH PARTY IN ODR

There are many features of ODR which impact upon the processes and practices of forms of ADR such as mediation. These include the creation of a written record or transcript, the loss of non–verbal communication, the choice of asynchronous or synchronous communication, reduction in travel and related costs and potential reduction in time required for resolution. In addition, new issues of identity, authenticity, confidentiality, privacy, accessibility and suitability arise, all of which affect the dynamics

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[19] Hattotuwa and Conley Tyler, *supra* note 9.

[20] *See, e.g.,* Julian Gresser, 'Strategic Alliance Mediation – Creating Value from Difference and Discord in Global Business; (2000) 2 (4) *European Journal of Law Reform* 651 at 679. See also Hattotuwa and Conley Tyler, *supra* note 9.

[21] National Alternative Dispute Resolution Advisory Council, *ADR Terminology: A Discussion Paper* (Commonwealth of Australia, 2002) at 34.

[22] *E.g.,* for an email-based platform, see The Claim Room, *at* www.theclaimroom.com (last visited May 19, 2006).

of the dispute resolution process. While these features are all worthy of academic discussion, they have been amply dealt with in the literature and those discussions will not be repeated here.[23] Rather, this section will deal with one revolutionary feature of ODR, namely the role of the e–technology itself, the so–called 'fourth party' and its impact on the globalization of ADR.[24]

The term 'fourth party' is used to describe technology as more than a means of delivering a service through the use of information and communication technology. The fourth party concept advocates that technology changes the dynamic of the dispute resolution process, thereby providing new opportunities and risks for users.[25]

ODR has introduced a number of potentially revolutionary process interventions not available in traditional offline environments, the benefits of which are numerous. By way of illustration, the asynchronous nature of many online mediation applications allows mediators to engage in a technique called pre-communication reframing. Rather than reframe immediately after a statement has been made from one party to another – which occurs in face–to–face mediations – asynchronous text–based ODR applications provide opportunities for messages to be directed through the technology to the dispute resolution practitioner before being passed onto the other party. This process feature enables dispute resolution practitioners to coach parties with respect to the further framing of their communication and potentially prevent destructive statements reaching the other party.

Further illustrations of the fourth party element include the use of automated procedures to provide assisted decision–making and negotiation support and threaded discussion technology. Assisted negotiation systems are able to render expert advice or decision-making on cases where to date human intelligence has been required to process the factual information. They use what is called sophisticated 'branching' technology to create elaborate decision trees that can help to find outcomes for disputes. The

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[23] *See, e.g.*, COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS, 61 (San Francisco Jossey-Bass) (2002).

[24] The term 'the fourth party' was first coined by Ethan Katsh and Janet Rifkin; *see* Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*. (San Francisco: Jossey-Bass, 2001).

[25] Katsh and Rifkin, *supra* note 24, at 93.

system asks the user a number of questions about the dispute to enable an accurate description to be built up. The system then applies the respective law or other benchmarks to the dispute description and thus formulates a conclusion by applying rules for specific sets of facts.[26] This information provides disputes with access to legal information about the likely outcome of their litigation/dispute — known in negotiation jargon as BATNA or 'best alternative to a negotiated agreement' — thus encouraging better advice from lawyers to clients, more informed negotiations and settlement decisions as well as greater access to justice, particularly for unrepresented clients. Software which enables the threading and structuring of discussions as well as record-keeping,[27] enables participants to review statements made by a particular party over a period of time, or statements made by all parties on a particular theme, or on all themes on a given date. The dispute resolution practitioner can easily reintroduce language of the parties into conversations to demonstrate, for example, the extent to which parties' interests have been met by the options generated.

These technological features provide access to expert and structured information based on information fed into the system by the parties and provide parties with a strong source of information power not available in traditional face–to–face contexts.

The fourth party also makes its presence felt through concurrent caucusing: the conduct of one or more private meetings at the same time as a joint mediation session. Dispute resolution practitioners do not need to concern themselves with party reactions to the amount of time they spend separately with each party. There is no downtime for the party not in caucus and parties will be spared the shuttle experience where the mediator moves between parties in separate rooms in order to caucus. Separating parties and meeting with them individually can also be disruptive and break the flow of negotiations. In online applications, caucuses

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[26] Tania Sourdin, 'ODR - An Australian perspective on the digital divide' (Paper presented at the *Third Annual UN Forum on Online Dispute Resolution*, Melbourne, 2004) at 4-5.

[27] *E.g.*, Smart Settle, *at* www.smartsettle.com (last visited May 19, 2006) (offers sophisticated negotiation support).

can occur throughout the entire process without interrupting its flow. Concurrent caucusing allows for continuous contextual interventions throughout the dispute resolution process unlike face–to–face caucusing which typically takes place only after communication between the parties becomes difficult.

Finally, the use of avatars to simulate conflict responses of participants is a technology initially developed for online gaming.[28] It is now being used in ODR applications such as Conflict Lab. Conflict Lab uses avatars and other functions of the gaming world to teach conflict resolution skills.[29] Current research is investigating how the use of avatars and humanoids affects the communication dynamics.[30]

Whereas ODR began by emulating offline ADR processes using a different medium, the so–called fourth party has played a significant role in establishing ODR as its own forum. In other words, the electronic medium has influenced and altered the ADR process. ODR processes have access to technology–facilitated interventions not available in offline situations and the result is the emergence of borderless forms of dispute resolution with their own dynamics and, arguably, culture. Through the creation of, virtual meeting spaces and virtual worlds,[31] the electronic medium, especially internet technology, has contributed to the globalization of dispute resolution. However, despite ODR's developmental beginnings in the international arena of e–commerce and its expanded application to international and localized face–to–face disputes, ODR is not a globalized process. Moreover, its impact on the globalization of dispute resolution is complex. While, as indicated earlier, technology and globalization processes have complemented and supported each other throughout their

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[28] B. Noveck, *State of Play*, 49 N.Y.L. SCH. L. REV. 1, 10, (2004), *available at* www.nyls.edu/pdfs/v49n1p1-18.pdf (last visited May 19, 2006).

[29] For more information, see Conflict Lab, *at* www.conflictlab.com (last visited May 19, 2006).

[30] *See, e.g.*, M. Garau, M. Slater, S. Bee, M. Sasse, 'The impact of eye gaze on communication using humanoid avatars' *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems* (Seattle, Washington: 2001).

[31] *See, e.g.*, Brad Stone, *Second Life*, NEWSWEEK, October 2005 at 17 (on the online virtual world).

development, technology has also posed challenges to the process of globalization. The next section considers these challenges in the context of ADR.

V.   ODR OFFERS CHALLENGES TO THE GLOBALIZATION OF ADR

Current ODR systems pose a number of challenges to the globalization of ADR. To be effective, ODR technology must enjoy the confidence and trust of potential users. Here, issues of accessibility, literacy and cultural appropriateness become important. Technology must be easily accessible and affordable; potential users must be literate in the ODR technology; and technological systems need to be culturally specific. Finally, in order to be sustainable technology systems require maintenance and support from real people with a high level of skill. These issues are dealt with in more detail below.

A. Technological Systems Need to be Culturally Specific

ODR systems operate largely in cyberspace. However, cyberspace is not a vacuum in the sense that it is a space where cultural contexts are irrelevant. Cultural differences continue to be underestimated by many international players. For example, where the parties all share a common language and speak it well, wear western attire and meet only in business contexts and not in personal situations, cultural differences are easily overlooked. Where, for example, the mediator and at least one of the parties speak English as a mother tongue and the other party does not, subtle but significant differences frequently manifest themselves later in the context of the meaning of the terms of an agreement between them. Bühring-Uhle provides the example of a German and an Egyptian referring in French to a construction project completed 'clef en main' (key in hand or lockup stage as it is referred to in Australian jurisdictions). Depending on the legal and technical meaning of the German and Arabic linguistic translations of the French term and the law of Germany and Egypt respectively, the parties to the transaction may well have envisaged quite different arrangements as they entered into the contract.

Cultural misunderstandings typically reflect differences in:[32]

- language context (on a continuum from high context to low context language),
- power differentials (the ability to interact with people of a higher status or with greater power),
- the degree to which we are comfortable with uncertainty and ambiguity, that is specificity (preferring explicit definitions, breaking down wholes into component parts, and measurable results) and diffuseness (focusing on patterns, the big picture, and process over outcome)
- inner direction (seeing virtue in individuals who strive to realize their conscious purpose) and outer direction (where virtue is outside each of us in natural rhythms, nature, beauty, and relationships);
- synchronous time (cyclical and spiralling) and sequential time (linear and unidirectional).
- identity orientation (from an individualistic orientation to a group or collective orientation),
- negotiation process orientation (from short-term outcome to long-term relationship orientation)
- universalist (preferring rules, laws, generalizations and evaluation according to objective criteria) and particularist (preferring exceptions, relations, intuitive and contextual evaluation).

In other words, culture drives people's values, beliefs, perceptions and behaviours. Cultural characteristics are a question of degree rather than category and their definition and meaning depend on the culture of the definer. For example, in the dominant Australian culture, mediation is underpinned by the particularist principles of choice, party autonomy, self–determination, privacy and confidentiality. The flexibility of the process allows a skilled practitioner to explore differences and create a forum culturally

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[32] Based on the work of Hofstede; *see* GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES (Sage Publications) (1984); CHARLES HAMPDEN-TURNER & FONS TROMPENAARS, BUILDING CROSS CULTURAL COMPETENCE: HOW TO CREATE WEALTH FROM CONFLICTING VALUES (Yale University Press) (2000).

acceptable to the range of participants with a view to agreeing on appropriate norms for a future relationship.[33] Conversely, litigation represents a universalist rule of law, a stare decisis approach to dispute settlement. However, this distinction is culturally specific. For example, in socialist China 'Maoist mediation' relied on the Confucian 'ideology of harmony' to achieve politically correct mediation outcomes. Rather than being used as a facilitative tool to assist in the resolution of disputes between private economic actors, mediation was and continues to be applied as a proactive policy tool to maintain social control. Mediators encourage settlements that conform to the political values represented by legal norms of the state, thereby fulfilling an ultimately universalist approach to dispute resolution in mediation.[34]

These cultural differences do not automatically disappear when ADR goes online. They remain, and in addition different cultural issues appear. Rainey and Jadallah, for example, write of culture being in the code.[35] By this they mean that technology is shaped by the culture of its designers. Embedded in the codes of computer software programs are cultural values, attitudes, assumptions and biases of the designers that are often overlooked. For example, the principles of western mediation, as outlined above, can manifest themselves in ODR through the manner in which the role of the mediator and the parties are integrated into the software code. In highly structured online processes, parties may be guided through a linear multi–step online mediation which only moves forward in an interest–based sequence such as identification of individual interests, setting of agenda, generation of option by parties (not mediator), bargaining and outcome; neither the mediator nor the participants are not able to revisit, change or skip any parts of the sequence. This process reflects the principles of party autonomy, linear logic, interest–based problem solving and low intervention/process–orientation on the part of the mediator. In addition, the perceived appropriateness of 'naming' a dispute by producing an online issue statement and thereby boldly

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[33] I am grateful to Daniel Rainey for this insight.
[34] S. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO, 302-304 (Stanford University Press) (1999).
[35] Daniel Rainey & Alma Abdul-Hadi Jadallah, *The Culture is in the Code* (forthcoming at www.odr.info) (Paper presented at the *Fourth Annual UN Forum on ODR*, Cairo, 2006).

stating the nature of the dispute may not be appropriate in all cultures. Yet another example emerges where parties may be required to accept specific confidentiality requirements before they can use dispute resolution software. While confidentiality is a feature of most western forms of mediation, this is not the case in all cultures. As a result of culture being integrated into the code, online mediators possess considerably less process power than offline mediators whose intervention techniques are adaptable to the cultural needs of the parties and include transformative, interest–based, settlement–oriented, wise counsel and expert advisory styles.[36] In this way, ODR program designers can wield enormous power over third party mediators and other participants in the guise of the fourth party.

However, it is important to note that the relationship between technology and culture flows in both directions. Technology is not only influenced by culture, it also influences cultural practices. Much has been written about the advantages and disadvantages of the absence of non–verbal communication such as body language in ODR. It is generally accepted that body language lends a contextual quality to communications not available through text–based ODR.[37] Some commentators consider this to be an advantage in highly antagonistic or emotive disputes; others highlight the loss of potentially valuable meaning in online processes.[38] Where in face–to–face mediation paralinguistics such as intonation, inflexion, voice volume or verbal pitch provide information that helps to reduce ambiguity of messages, text based communication culture has developed its own paralinguistic cues.

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[36] Nadja Alexander, *Mediation: Ein Meta-Modell*, 2 PERSPEKTIVE MEDIATION, 72-81 (2004).

[37] Llewellyn Joseph Gibbons, et al., *Cyber-Mediation: Computer-Mediated Communications*, 32 N.M.L. REV. 27, 43-54 (2002).

[38] National Dispute Resolution Advisory Council (NADRAC), 'Online ADR Background Paper' (2001), *available at* www.nadrac.gov.au at 12 (last visited May, 19, 2006). Some research indicates that miscommunication and impasse are more likely to occur in online mediation compared with offline mediation. On communication *see e.g.*, J. B. Eisen *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 4, 1305 (1998); On impasse, *see* M. Morris, J. Nadler, T. Kurtzberg and L. Thompson, *Schmooze or Lose: Social Friction and Lubrication in E-mail Negotiation*, 6 GROUP DYNAMICS, 89 (2002). *But see* J. Tan, D. Bretherton, G. Kennedy, Negotiating Online (2004) (Paper presented at the *Third Annual UN Forum on Online Dispute Resolution*, Melbourne).

When used in good faith, emoticons (i.e. ASCII text characters that express emotions such as :) for smiling) can provide information similar to vocal information gathered in physical meetings. Email programs offer the option of using different fonts, colours or styles for text which can also be administered to send non-verbal messages. The advance of these online specific forms of communication promotes familiarity with online communication and the virtual environment. Familiarity and convenience will assist in the building of trust in technology, thereby reducing fear of ODR processes and introducing a culture where virtual meetings to resolve disputes are seen to be the norm.

Another example of how technology shapes the cultures with which it interacts is provided by the following anecdote. Colleagues of mine from Germany, a country known for its high power differentials, have commented on the extent to which online communication changes the dynamic of their interaction. Differences in status and power – even between two parties from Germany – are reduced in online contexts, thereby opening up the way for freer and less status–oriented communication. The anecdote suggests the development of a new culture which is not rooted in a geographical sense of place or culture. It is driven by the seemingly spiraling development of mobile phones, blackberries, internet cafes, wireless technology and voice over internetworking protocol. For the first time in history, people can take their culture – or at least one of their cultures – with them.

The complex and dynamic relationship between culture and ODR has direct repercussions for the globalization of ADR. The most concerning of these is the personal computer (PC) domination of the ODR movement which is discussed in the next section.

VI.   THE PC CULTURE DOMINATES

The premise that ODR needs to be PC–based is a cultural assumption of the Global North. Conley–Tyler and Hattotuwa identify two primary reasons for the inappropriateness of PC–based ODR in much of the Global South. The first explanation relates to the differences in systems architecture and technological infrastructure; the second to the social–political context of the Global South.

Systems architecture, especially in non–metropolitan regions of the Global South where hundreds of millions of people live, is inappropriate for a PC–based approach to ODR. Prerequisites for a PC–dominated ODR marketplace include access to PCs by the majority of the adult population in terms of locality and cost,[39] computer and internet literacy or access to people with such literacy, a high level of trust, confidence and familiarity with the technology and a technologically sophisticated and sustainable infrastructure to support PCs and their networks.[40]

In addition to a lack of PCs, much of the Global South has insufficient human and technical resources to sustain PC infrastructure. Therefore attempts by the Global North to introduce more PCs into these regions without training, education and technological support are short–sighted and arguably self–serving. When working in the Solomon Islands in 2005 I was proudly told by one paramount chief from a very remote region that his village would be getting a PC within the year. He had seen a computer before but never touched one. He was not sure about internet access but was nevertheless convinced that the introduction of one PC could only be beneficial to his village despite the absence of technological literacy and support. Hattotuwa and Conley–Tyler comment that such an approach can lead to jealousies and inter– and intra–community conflict not to mention frustration and disappointment.[41]

Furthermore, legal and political instability permeates many jurisdictions of the South, accentuating the problems of access. Governments are under–resourced and unpredictable – a factor which frustrates attempts to develop sustainable infrastructure and long–term education programs to establish and improve technological literacy. Moreover, there is a need to address the issues that surround legal and political stability such as violence, corruption, human rights violations, development issues and so on. For the most part, ODR is narrowly focused on private dispute

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[39] Sourdin suggests that the digital divide can still exist in the developed countries of the Global North in Tania Sourdin. 'ODR - An Australian Perspective on the Digital Divide' (Paper presented at the *Third Annual UN Forum on Online Dispute Resolution*, Melbourne, 2004) *available at* http://www.odr.info/unforum2004/Sourdin1.doc (last visited May 19, 2006).
[40] Hattotuwa, *supra* note 9.
[41] *See id.*

settlement. Deeper processes such as conflict transformation are not yet on the ODR radar. Yet there seems to be a futility in addressing superficially well–articulated and neatly–packaged disputes through a settlement procedure when much deeper social–political issues are at stake.

The North's PC–based crusade into ADR is not only culturally insensitive and therefore inappropriate, it effectively escalates the dimensions of the digital divide between those able to afford, access and utilize PC–based e–technology and those without sufficient resources to do so. Moreover, the persistent PC push of the dominant culture inhibits the effective global growth of ODR, particularly to the Global South.[42] Despite the fact that there are more suitable technologies and applications widely used in the Global South, economic interests continue to drive the lobby for PC–dominance in the ODR market. Transnational PC–oriented corporations whose influence has spread – sometimes invisibly – with the globalization movement have an economic interest in the proliferation of this form of technology.

VII.   ALTERNATIVES ARE AVAILABLE

Alternative e–technology already exists and is beginning to be used in ODR fora. Thus far I have built on the arguments of Parlade, Hattotuwa and Conley–Tyler to suggest that real transformation of real world conflict resolution practice to incorporate ODR can only occur if it builds on culturally and regionally specific infrastructure and accessible and affordable forms of technology. Parlade points to the internet and e–commerce booms in affluent first world countries as the transformative period of time during which ordinary people discovered the global village through their home and office PCs. Conversely, PC penetration in the Global South is low; however

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[42] Claro V. Parlade, Challenges to ODR Implementation in a Developing Country (2003) (Paper presented at the *Second UN Forum on Online Dispute Resolution*) *available at* http://www.odr.info/unece2003/pdf/parlade.pdf (last visited May 19, 2006).

other forms of e–technology such as community radio and mobile telephony are pervasive.[43]

In the context of the Philippines, Parlade explains how SMS technology may be used as an integral part of an ODR program.

'Simplified message service (SMS) usage in the Philippines, at 100 million messages a day, is easily the highest in the whole world, and is indicative of the Filipinos' receptiveness towards use of technology when affordable. What these statistics suggest is that although computer access is limited, the mobile phone may be utilized to link the public into any ODR system. Simple communications functions for the ODR process may therefore rely on mobile phones, while moving intelligent functions (such as software-aided negotiations, videoconferencing, extensive real-time or asynchronous communications, case-management) into selected public access points. Among the suggested venues for the public access points are government offices (e.g., office of the executive judge in each city, office of the Bureau of Consumer Affairs, office of business associations), and other community access points established under existing government programs.'[44]

Mobile telephony has been integrated into the blind-bidding service at Philippine Online Dispute Resolution, a facility established primarily to facilitate simple monetary claims between disputing parties.[45] Parties may also opt to receive SMS notices with respect to other online services offered by the organisation including neutral evaluation, mediation and arbitration. It is not envisaged that SMS technology operates as a stand alone; rather it is viewed as a complement to other forms of technology providing an important direct link to participants. The globalization process of ADR would be well-served if ODR providers looked to the

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[43] Sanjana Hattotuwa, Untying the Gordian Knot: ICT for Conflict Transformation and Peacebuilding (2004) (Paper presented at the *Third Annual UN Forum on Online Dispute Resolution*, Melbourne).

[44] Claro V. Parlade, Challenges to ODR Implementation in a Developing Country, 14-15 (2003) (Paper presented at the UNECE Second Forum on Online Dispute Resolution).

[45] Philippine Online Dispute Resolution, *at* www.disputeresolution.ph (last visited May 19, 2006).

successful and innovative technology applications which are popular in the Global South.

In terms of expanding ODR applications beyond private economic disputes, other developments in the conflict management field include EDD and OCT. EDD refers to electronic direct democracy.[46] While currently used in governmental contexts, online participatory processes can also be applied to processes in the establishment of joint ventures, alliances, partnering arrangements and political negotiations. In short, it is applicable to multi-party mediation and other dispute resolution processes involving decision-making by multiple parties and groups.

OCT is the acronym for online conflict transformation and refers to e-applications of conflict transformation in peace-building initiatives.[47] An example referred to earlier is Infoshare's one text negotiation technology which continues to provide the framework for the Sri Lankan peace process negotiations.[48]

The histories of OCT, ODDM and ODR are surprisingly independent of one another. There is no reason, however, for such a narrow approach to continue, especially in a forum which boasts the seamlessness and potential limitlessness of its reach. Expanding the ODR mindset to include public and political dispute resolution would better serve the real needs of many citizens of the global village in which we now live.

VIII. CONCLUSION

As a tool in international and domestic dispute resolution, ODR continues to evolve. Despite an initial focus on inexpensive and fast dispute settlement for e-commerce disputes, dispute resolution technology is gradually becoming more sophisticated, innovative, accessible and flexible. It is no longer seen as a tool only suitable for settling e–commerce–generated B2C disputes.

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[46] *See* the Wikipedia entry for e-democracy, *at* http://en.wikipedia.org/wiki/E-democracy (last visited May 19, 2006).

[47] Sanjana Hattotuwa, Untying the Gordian Knot: ICT for Conflict Transformation and Peacebuilding (2004) (Paper presented at the *Third Annual UN Forum on Online Dispute Resolution*, Melbourne), *available at* http://www.odr.info/unforum2004/Hattotuwa.pdf (last visited May 19, 2006).

[48] Another example is the Cultures of Peace News Network referred to in Hattotuwa, *supra* note 9.

Moreover it is increasingly used to supplement face–to–face ADR processes; a basic example is provided by email which can be the primary link between offline ADR meetings.

ODR technology has influenced the globalization of ADR in contradictory ways. It has both hindered and facilitated the push towards an inclusive globalized dispute resolution marketplace. I have suggested in this essay that one of the primary obstacles lies in the dominance of the Global North, in terms of its dispute resolution culture and technology preference for PC–based ODR. If globalism is to aspire to a truly open marketplace, then the process of globalizing ADR must be inclusive and fair. It must accommodate culturally appropriate dispute resolution processes, and familiar and accessible technology. SMS–assisted ODR provides a convincing illustration of how technology can change the path of globalization. By empowering participants with familiar and accessible ODR applications, technology can facilitate a fairer globalization process in the world of alternative dispute resolution.