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Alternative Dispute Resolution – The Features and the Future

1 Introductory remarks

During the past few years there has been a growing interest in different alternative dispute resolution models capable of working through the Internet (for a definition of the term ADR-online, see section 2.1). The discussions are not confined to Internet enthusiasts: interest is growing among decision-makers as well. One example of this is the Directive on electronic commerce, Article 17 of which addresses alternative dispute resolution.[1] Another is the Swedish government, which in its plan of action for consumer policy between 2001 and 2005 highlighted alternative dispute resolution as a possible solution to upcoming problems on the consumer market due to new technology.[2] Similar questions are discussed by WIPO, which already has operational alternative dispute resolution services functional through the Internet. On example is the WIPO Internet Domain Name Processes.

The question of alternative dispute resolution and its prerequisite was furthermore discussed during WIPO's conference "Forum on Private International Law and Intellectual Property" in Geneva, January 30th 2001. Among the reports from the conference, which can be found on-line at http://www.wipo.org/pil-forum/en/, I would like to mention the one performed by H. H. Perritt, "*Electronic Commerce: Issues in Private International Law and the Role of Alternative Dispute Resolution*".

In Geneva there is also an ongoing research project, the Geneva E-law project (http://www.online-adr.org/), conducted by the Private International Law Department of the Geneva University Law School with the aim of evaluating existing ADR-online systems and formulating recommendations for the improvement of upcoming dispute settlement mechanisms using information technology.

When glancing through the sources mentioned above, it is easy to conclude that the Internet society demands alternative dispute resolution. It is easy to promote the development of different resolution services, but it is also quite easy to forget the question of whether or not an average Internet

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1 See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market, OJ L 178, 17/07/2000.

2 See Government bill 2000/01:135, *Handlingsplan för konsumentpolitiken 2001-2005*.

user really demands all these different alternatives. Is it conceivable that a private-based dispute resolution might prevent individuals from getting their rights judged before a competent court? Is it possible to think that the development of private-based dispute resolution might lead to a veritable jungle of different dispute resolution systems impossible for the average Internet user to comprehend? Just as I believe alternative dispute resolution in many cases to be *necessary* for the development of the Internet marketplace, so I believe it to be *possible*, not least because of the development of a wide range of different dispute resolution services reaching out to consumers. However, there are problems in the consumer sphere. They are highlighted by Consumers International in a report about alternative dispute resolutions available online to consumers in cross-border disputes. In part this report supports the conclusion that consumers are not likely to be able to count on ADR-online systems offering adequate redress.[3]

As a consequence of the problems mentioned above I think that the development of new dispute resolution systems must be demand-based. The question whether or not there is a demand for an alternative (to traditional administrative and judicial procedures) is, in my opinion, sometimes forgotten or omitted in the on-going discussion about alternative dispute resolution. This short essay is an attempt to highlight this potential problem. I will not be particularly consumer-oriented in my presentation though. Instead I'm going to use a present Swedish example, the suggested introduction of an ADR-online system for the Swedish top-level domain .se. My hopes are however that the findings will be applicable on a more general level, for instance to the problems on the consumer area mentioned above.

2 The features and the future

2.1 What is ADR-online?

Before going into any further detail about my thoughts on this subject, it might be appropriate to mention something about what ADR-online is, or more correctly how I define the term for the purpose of this paper. I have no intention of presenting a new "wall-to-wall" definition, but still there has to be some kind of common starting point. To begin with, alternative dispute resolution can be considered to be something other than traditional administrative and judicial procedures. Furthermore, resolution has to be based on electronic communication to be regarded as ADR-online. This adds up to the following definition:

> Alternative dispute resolution online is a procedure different from traditional administrative and judicial procedure, in which disputes can be solved through the Internet or any other similar network.

This definition embraces numerous variations of proceedings. For instance, systems related to arbitration, mediation and various forms of evaluations or negotiations with the intention of binding the disputing parties on a

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3 The report can be found on-line at www.consumersinternational.org.

voluntary basis. I will neither have the time nor the space to evaluate the differences in this paper though. Instead I refer, for further reading, to the comprehensive report from the Geneva E-law project *"Online Dispute Resolution: The state of the Art and the Issues"* conducted by T. Schultz, G Kaufmann-Kohler, D. Langer and V. Bonnet.

2.2 What is a successful ADR-online?

Even though the proceedings differ, I think that they have certain points in common.

The parties who are expected to use the ADR-online system must have confidence in the system. There are various ways of building confidence into an ADR system. One can talk about due process and openness, one can talk about the competence and independence of the mediators/arbitrators but nothing, in my opinion, is as crucial as the preceding discussion about demand. If there is no demand for a planned or newly launched ADR-online system, I can guarantee that success will fail to appear.

Demand can be a lot of things, and therefore the way of extracting it may differ. To simplify matters I have chosen to extract the most impending demand to a discussion about sanctions. In line with that I think quite a good demand-estimate would be accomplished by answering the following questions:

- Are the dispute resolution demands as regards sanctions fulfilled in the traditional judicial and administrative proceedings?
- If not – what is missing – what are the sanctions demanded?
- Is it possible for the ADR-online system to cure this unsatisfactory state of affairs; i.e. is it possible for the ADR-online system to decide upon those sanctions?

2.2.1 Are the dispute resolution demands as regards sanctions fulfilled in the traditional judicial and administrative proceedings?

The starting point in a discussion about ADR-online must, as mentioned above, be what kind of demands this alternative is supposed to fulfil. This demand ought to be derived from a shortage in the existing systems of judicial and administrative proceedings.

In the area of domain name registration there has been a history of name-napping and trademark infringement. This is an activity mainly concentrated to top-level domains with the characteristics of openness, that is top-level domains where domain names can be registered without any preceding control of intellectual property rights.

In January 2000 a dispute resolution service aimed, among other things, to solve problems with name-napping was introduced. The procedure was named "the Uniform Domain Name Dispute Resolution Policy" (UDRP) and was meant to be used mainly for solving problems in the generic top level domains .com, .net and .org. By now the system has

proven to be a great success. At the time of writing more than 4,000 cases have been decided, thanks to the UDRP.

In Sweden there is an on-going discussion as to whether or not a system like the UDRP shall be adopted for the Swedish top-level domain .se. In line with my observations stated above, the first question must be whether there is a demand for that kind of system for the Swedish top-level domain and whether the demand can be met within the frames of the traditional judicial proceedings. Ultimately the demands in a domain name dispute are the transfer of the domain name from the holder to the plaintiff. This kind of transfer is easily accomplished in a traditional judicial procedure and therefore one can argue that there is no demand of an ADR-online system. The truth might be more nuanced, though.

In the introduction to the report mentioned above, Perritt points out a variety of demands, i.e. arguments promoting ADR-online. For the purpose of this paper I have chosen the three demands I conclude to be most imminent:

1. The transaction cost of a traditional administrative judicial procedure is high. In a world where the value of the underlying transaction is low, victims tend to be less likely to seek vindication. ADR-online can be inexpensive, at least by comparison with traditional judicial proceedings, and thereby satisfy the interests of the victims in getting a dispute resolved with transaction costs not outweighing the value of the underlying transaction.
2. The Internet is by nature global and an Internet user can easily be anonymous in a world without borders. Traditional judicial proceedings often depend on localisation to determine jurisdiction. This makes the questions of jurisdiction somewhat unpredictable. A more foreseeable situation might be created by the help of ADR-online.
3. Another problem with the traditional judicial proceedings is that the decisions are difficult to enforce outside the jurisdiction of the deciding court. Enforcement between nations requires some kind of agreement, agreements which are quite uncommon. If private parties mutually agree to abide by the decision of the ADR-online system there might definitely be a demand to satisfy.

As regards the development of an UDRP for the Swedish top-level domain I am not certain whether or not such circumstances are at hand. If one suspects a lot of upcoming problems with name-napping in the .se domain it is likely that there will be disputes. In that sense there might be a demand for alternative dispute resolution services. Considering the low price of domain names and the following low cost of the transaction there might at least be arguments in favour of the first condition stated above.

2.2.2 What are the sanctions demanded?

As mentioned above, the parties are likely to demand an enforceable decision. The question of whether or not a decision is enforceable is influenced by which sanction the parties are demanding. The sanctions relevant here are of course private-law-based, but even when this is the case there are a variety of possibilities. The problems could be illustrated with a

consumer buying an object that leads to product liability. If the essence of the dispute is whether or not the consumer should be given replacement goods, it might very well be solved by an ADR-online system, but the question of product liability lies, in my opinion, outside the possible range of an ADR-online system. This last question must be solved in a traditional judicial procedure because of the far-reaching nature of the sanction and, consequently, an increased requirement of due process.

When it comes to domain name disputes the plaintiffs are, as mentioned above, mainly interested in a transfer of the domain name. The "sanction" in this case would in other words be a domain name transfer.

2.2.3 Is it possible for the ADR-online system to decide upon those sanctions?

In general the main problem for ADR-online systems is that the sanctions demanded are not at the disposal of the dispute resolution service. In such a situation you are dependent on the good intentions of the losing party. There are various ways to bind the losing party to the decision of an ADR-online system, but in a situation where you are dependent on the voluntary compliance of the parties you always risk defectors. Defectors tend for their part to undermine the confidence of the dispute resolution service and thereby threaten the future success of the ADR-online system.

This is not the case, however, with the "sanction" demanded in our example. A transfer of a domain name is enforceable within the framework of the ADR-online system. It is easy to accomplish as long as the actors in control of the domain name servers comply with the decisions. A transfer of a domain name means, putting it simply, that the stated domain name holder in the domain name server alters and you do not need the consent of the prior holder to do so. In other words it is perfectly possible to create an ADR-online system which really can satisfy the demand of an enforceable decision in this field.

I think that the reason why the UDRP has proven to be so successful is the fact that it is possible to get what you want within the frames of the system even if the losing party does not respect the outcome of the dispute. Conversely, this is the biggest threat to the development of functional ADR-online – the difficulties of meeting the demand for enforceable decisions.

3 Final remarks

As you have probably already concluded, this paper is not a comprehensive documentation over ADR online. Nor is it a thorough investigation of the judicial risks at stake, but rather a few thoughts on the road to a more balanced discussion about ADR-online, which no doubt is a important part of the future dispute resolution regime.

In general I agree with most of the findings in the reports from the WIPO conference in Geneva and the Geneva E-law project. We cannot only discuss details about how to build functional ADR-online systems though. In my opinion, which is in no way contrary to the reports, there must be a preceding discussion about whether or not the alternative dispute resolution

is demanded in the first place. Demand in this sense is a prerequisite for a functional ADR-online system. The demand ensures that the ADR-online system will be used and a frequent use builds confidence.

When it comes to my example, the introduction of an ADR-online system for the Swedish top-level domain, I do not think that the demand is high enough to motivate a new dispute resolution system. For the purpose of this paper that is of minor interest, however. The important thing is that the questions of demand should be raised and examined before an ADR-system is introduced.