

THE CULTURAL VACCUM IN ONLINE DISPUTE RESOLUTION

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Abstract

The blossoming of technology and particularly, the world of Internet, coupled with the desire for faster, cheaper and more efficient forms of Alternative Dispute Resolution (ADR) has spurred the development of Online Dispute Resolution (ODR). The trend of ever-expanding global markets and computer networks, coupled with the rapid integration of information technology into businesses may mean that eventually, ODR will become an indistinguishable part of the way people around the world resolve their disputes. ODR has been hailed as the tool that combines the efficiency of alternative dispute resolution with the power of the Internet to save businesses money, time and frustration.

If that is indeed true, and ODR is shaping the way we handle conflict in our modern technological age, then we must pay closer attention to examining its suitability as communication tool that can mediate human-to-human communication. Most scholars of conflict resolution agree that culture is an integral aspect of communication and consequently, dispute resolution. This paper will address the issue of the extent to which ODR sufficiently accommodates for and facilitates cultural issues between parties. This is a timely question in the context of the ongoing introspection and planning for the future growth of ODR that is taking place around the world as well as the trend in developing global networks to handle ODR. After examining the importance and role of culture in dispute resolution, the paper will look at how if at all, the virtual environment can support and facilitate cultural understanding and manage cross-cultural differences.

I. INTRODUCTION

The blossoming of technology and particularly, the world of Internet, coupled with the desire for faster, cheaper and more efficient forms of Alternative Dispute Resolution (ADR) has spurred the development of the concept of Online Dispute Resolution (ODR). It has been observed that ODR has “a tidal inevitability to it”¹ in the context of ever-expanding global markets and computer networks. This trend coupled with the rapid integration of information technology into businesses² may mean that eventually, ODR will become “...and indistinguishable part of the way people around the world resolve their disputes”³. ODR has been hailed as the tool which “...combines the efficiency of alternative dispute resolution with the power of the Internet to save businesses money, time and frustration.”⁴

If that is indeed true, and ODR is shaping the way we handle conflict in our modern technological age, then we must pay closer attention to the phenomenon to examine its suitability for the objectives for which it has been devised. Is it an adequate communication tool that can mediate human-to-human communication? This is a timely question firstly, given the current ongoing introspection as well as planning for the future growth of ODR that is taking place around the world⁵; and secondly, the trend in developing global networks to handle ODR.⁶ If this question is not examined in significant detail before we plunge headlong or accelerate the development of ODR, we may find in 5-10 years that we have created a monster in ODR.

Most scholars of conflict resolution and practitioners of the art of international negotiation now agree that “culture matters”.⁷ This paper will raise the issue of whether ODR presently accommodates for and facilitates cultural issues between parties. Sections II and III of this paper will examine the role of culture in dispute resolution. Section IV will explore the nature of negotiations in the context of cyberspace and current features of ODR. In the final section, the paper looks at initiatives in the virtual environment to support and facilitate cultural understanding as well as minimize conflict resulting from cross-cultural differences. I will argue that the central role of the neutral in ODR demands a high level of cultural competence and training in this area must be given more emphasis.

II. WHAT IS CULTURE?

Raymond Williams writes, “Culture is one of the two or three most complicated words in the English language”.⁸ About 60 years ago, two eminent American anthropologists, A.L. Kroeber and Clyde Kluckhohn, surveyed the field for definitions of culture and came up with 164 definitions of culture.⁹ Part of the difficulty of applying the concept of culture to conflict resolution is that the notion of culture comes from the field of social sciences which have imputed different meanings to the word.

¹ COLIN RULE, *ONLINE DISPUTE RESOLUTION (2002)* at pg. vii

² See supra note 1 at pg.3

³ *Id.*

⁴ *Id.*

⁵ In October 2000, the first conference of ODR service providers convened in Phoenix, Arizona; in November 2000, the World Intellectual Property Organization held a conference focusing on ODR in Geneva and this was followed by a joint conference between OECD, the Hague Conference on Private International Law and the International Chamber of Commerce that was attended by more than 300 experts on e-commerce, privacy and dispute resolution from around the world. In the climate of this discussion, there has also been a call for e-commerce companies to integrate online dispute resolution into their business practices. See supra note 1 at 30

⁶ *Id.* For instance, “[t]he Better Business Bureau, the largest consumer-focused dispute resolution organization in the United States, announced a partnership with Eurochambres, the network of the European Chambers of Commerce, and FEDMA, the European Direct Marketing Association, to build a transatlantic ODR system for handling business-to-consumer disputes. Following this announcement in early spring 2001, several countries in Asia and South America have signed on to participate in the network.” The International Chamber of Commerce has announced its plan to serve as a clearinghouse for B2C ODR cases around the world, which means that it would accept case submissions from consumers and organizations from around the world and refer them to appropriate ODR service providers. The NAFTA 2002 ADR Committee has decided to set up a pilot program using online dispute resolution to resolve transboundary disputes between companies in Mexico, US and Canada.

⁷ KEVIN AVRUCH, *CULTURE AND CONFLICT RESOLUTION*, (1998) at pg. ix

⁸ R. WILLIAMS, *KEYWORDS* (1983), 87

⁹ A.L. KROEBER AND C. KLUCKHOHN, *Culture: A Critical Review Of Concepts And Definitions* (papers of the Peabody Museum of American Archaeology and Ethnology, vol. 47, Harvard University, 1952). Kroeber and Kluckhohn provide the following definition, “Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievement of human groups, including their embodiments in artifacts; the essential core of culture consists of traditional (i.e., historically derived and selected) ideas and especially their attached values; culture systems may, on one hand, be considered as products of action, on the other as conditioning elements of further action.”

Definition

Edward Tylor pioneered one of the foundational definitions of culture in 1870, which is “that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities.”¹⁰ However, this has been criticized as being laden with “evolutionist and developmental assumptions”¹¹ because the definition was given in the context of human social groups which could be arrayed on a development continuum from “savagery” through “barbarism” to “civilization”. This reflected the ideological demands of the age of colonialism, where it was assumed that social groups would move “up” from being savage to the civilized “Church of England Oxbridge gentlemen”.¹² The work of Franz Boas and his students of the 20th century instead argued for plurality of diverse cultures rather than their universal attributes and for the moral equivalence of cultures and that classification of cultures as savage or civilized inherently carried value judgments.

For our purposes then, given the wide-ranging, highly debated notions of the concept of “culture”, we need to have a clear working definition as a starting point for discussion that will allow us to understand its impact on dispute resolution. Clearly, we must avoid the evolutionist thinking of the 19th century and adopt the more progressive Boasian approach to culture. Black and Avruch refer to two orders of culture; generic and local culture.¹³

*Generic culture is a species-specific attribute of Homo sapiens, an adaptive feature of our kind on this planet for at least a million years or so. Local cultures are those complex systems of meanings created, shared and transmitted (socially inherited) by individuals in particular social groups.*¹⁴

Cultural variability must be acknowledged and at the same time, generic culture cannot be ignored otherwise we will “lose sight of the possibilities of *intertranslatability* across local cultures, or to put it at the level of individuals, of the potential for social and experiential learning.”¹⁵ Hence, for this paper, I will assume generic culture as foundational (to assume otherwise will lead to the conclusion that cultural outsiders can never intervene in a conflict involving another culture), and focus on the implications and dynamics of local cultures.

It must be borne in mind that culture is not monolithic in a given society¹⁶ and changes over time¹⁷. The observable elements of any culture are “cultural history, cultural personality, material culture, role relationships, art, language, cultural stability, cultural beliefs, ethnocentrism, nonverbal behavior, spatial relations, time, recognition and reward, and thought patterns.”¹⁸ One definition of culture is that it is “the total accumulation of many beliefs, customs, activities, institutions and communication patterns of an identifiable group of people”¹⁹, and another is that it is “...enduring norms, values, customs and behavioral patterns common to a particular group of people.”²⁰ The common denominator seems to be that it is an identifiable set of behaviors particular to an identifiable group of people. It has been suggested that references to culture contain three components: 1) a patterned way of thought or behavior of (2) a group (3) that is based on certain values.²¹ With this working definition then, we can proceed to explore the impact of culture on a society in terms of its communication.

Impact of Culture

One of the most frequent and obvious patterns of behavior is language, where the use of verbal and non-verbal messages represents a feature of daily life²² and hence, “culture is also reflected in thought, speech and action”.²³

¹⁰ E. TYLOR, PRIMITIVE CULTURE (1870, reprint, New York: Harper and Row, 1958), 1.

¹¹ See supra note 7 at 8. It is argued that “At its most generous (attached to the idea that movement “up” the evolutionary ladder is possible for anyone, given sufficient ambition and instruction), it could underscore the “civilizing missions” of different and competing empires.”

¹² *Id.*

¹³ P.W. Black and K. Avruch, *Some Issues in thinking about Culture and the Resolution of Conflict*, Humanity and Society 13, no.1 (1989); 189-194

¹⁴ See supra note 7 at 10

¹⁵ *Id.*

¹⁶ William P. Alford, To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization 9 (1995) at 6

¹⁷ Sally Engle Merry, Law, *Culture and Cultural Appropriation*, 10 YALE J.L. & HUMAN (1998) 575, at 602

¹⁸ Dodd, Carely H., Intercultural Communication and the Organizing Facets of Culture, DYNAMICS OF INTERCULTURAL COMMUNICATION, (1987) , 36-45

¹⁹ *Id.*

²⁰ BERNARD MAYER, THE DYNAMICS OF CONFLICT RESOLUTION (2000)

²¹ Ilhyung Lee, *Culturally-based Copyright Systems?: The U.S. and Korea in Conflict*, 79 WASH. U. L.Q. 1103 at 1108

²² See supra note 18.

Since culture is group-oriented, it is accepted that it is learned, not inherited²⁴ and cultural cues are transmitted through teaching from a young age.

In addition, culture frequently shapes the perceptions of that particular group of people in regards of what is socially acceptable behavior, for instance, attitudes toward time, property, clothes, food and even the proper distance between people talking to each other. Culture also forms the moral fibre of a community; concepts of good and evil, privacy, competition, fair play as well as family values are all determined by culture. What follows is that because culture makes up such an integral aspect of social conditioning, one community may tend to judge others using the yardsticks set by their culture.

III. WHAT IS THE ROLE OF CULTURE IN NEGOTIATIONS?

The relationship between communication and culture was observed by Alfred Smith (1966) as follows:

Our perception is behavior that is learned and shared, and it is mediated by symbols. Culture is a code we learn and share, and learning and sharing require communication. And communication requires coding and symbols, which must be learned and shared. Communication and culture are inseparable.

Culture is inextricably linked to the way people communicate because communication is largely dependent on perception. Our culture forms our frame of reference through which we interpret events, feelings, thoughts and information. Hence our interpretation of reality is determined by the way we view the world, our beliefs and values. Culture forms the backdrop, if you will, of any interaction between people.

Different cultures process information differently. In some cultures, members are expected to know about situations and how to respond, and this type of culture where information about procedure is rarely communicated is called a high-context culture.²⁵ On the other hand, in low-context cultures, “information is abundant, procedures are explicitly explained, and expectations are discussed frequently.”²⁶ Hence it is clear that in a cross-cultural communication, if one operates from a high-context mind-frame, expecting the other person, from a low-context mind-frame to understand, there will be a breakdown in communication because there is no reciprocal understanding of the underlying assumptions in the interaction. For instance, Americans tend to provide cues for the conversation and expected behavior (“Could you please wait a few minutes so that I can check with my boss and give you an answer in a few minutes after we have had a chance to discuss the proposal?”); whereas Japanese tend to expect others to sense the context and act in the appropriate manner, e.g., by bowing or nonverbal expression.

The way in which information is processed can also be influenced by whether a particular culture’s time orientation; it can either be ‘monochronic’²⁷ wherein “people have a strong sense of doing one thing at a time”²⁸ or ‘polychronic’²⁹ wherein “[t]he configurational pattern of thought follows a nonlinear order of attention to stimulus”³⁰, i.e., where the individual does and thinks about a number of things simultaneously. Some characteristics of monochronic individuals include highly structured, sequential, segmented thinking as well as scheduling appointments linearly. Much importance is given to being punctual and orderly. Whereas polychronic individuals may have a more fluid version of time, and in trying to do many things at a go, they may experience procrastination. Hence in a negotiation between monochronic and polychronic individuals, issues of time, deadlines and setting the agenda are potential areas of misunderstanding.

The third variant affecting negotiations which is a function of culture is dominance behavior. In human social existence, pecking orders vary from one society to the other. Some societies have “elaborate and formal systems of dominance; others go to great lengths to de-emphasize dominance”³¹, and these “...stratification systems are

²³ Id.

²⁴ Id.

²⁵ See supra note 18 at 86-89. Examples of such cultures include China, Japan and Korea.

²⁶ Id. Examples of such cultures include China, Japan and Korea. The United States of America is one such example of a low-context culture.

²⁷ E.g. of monochronic cultures are American, British, Canadian and German.

²⁸ See supra note 25. Examples of such cultures include China, Japan and Korea

²⁹ E.g. of polychronic cultures are African, Latin American, Middle Eastern and Southern European cultures.

³⁰ Id.

³¹ Hofstede, G., *Cultures Consequences: International Differences in Work-Related Values*. (Beverly Hills, CA: Sage Publishing, 1980) 92 – 152.

extremely culturally dependent...”³² Hence the extent to which a person of authority can influence the behavior of his or her subordinate varies from one culture to another. This brings us to the concept of power distance. Hofstede defines the term as follows:

*The power distance between a boss B and a subordinate S in a hierarchy is the difference between the extent to which B can determine the behavior of S and the extent to which S can determine the behavior of B.*³³

The Hermes Power Distance Index has been used to identify the extent of power distances in different countries. Some Asian countries have higher PDI scores, i.e., there is greater social acceptance of observing formal hierarchy and greater tolerance of power inequality whereas other cultures, such as Scandinavian countries have lower PDI scores.³⁴ This has important consequences for the negotiation behavior of different cultures. For instance, cultures that have a high PDI will tend to be characterized by strict vertical hierarchies, and consequently, it would be inappropriate to negotiate with someone of a significantly different rank or stature. It will also affect the choice of negotiators who are sent to the negotiation table. It has been observed that the token appearance of a high-ranking Japanese official may signal the level of importance that the Japanese organization has given to the dispute or matter.³⁵ Without a corresponding symbolic gesture from the American counterpart, the negotiations may be at risk. Mandate and authority of the negotiation representative will also be determined by considerations of power distance; the real decision-making power may lay in the many layers of management behind the negotiation representative.

IV. VIRTUAL CONFLICT?

Thus far, our discussions of culture and negotiations have been limited to the physical setting. Before proceeding to see how cultural dynamics play out in the virtual world, or ‘cyberspace’ as it is commonly known, it is pertinent to examine the nature of the cyber-environment in which online dispute resolution (ODR) takes place.

Prior to the close of the 20th Century, disputes were most commonly handled face-to-face, or through alternative media such as an exchange of letters, teleconversations or faxes. The advent of email and development of cyberspace opened up new much cheaper and faster (at least in more developed countries) channels of communication. Some estimates project an expansion in the number of worldwide Internet users from less than 200 million people in 1999 to over 900 million estimated for 2005.³⁶ A natural constituent of greater human interaction is conflict, and so disputes began to take place across continents and timezones at a much more rapid pace. This section will look at the onset of ODR, key types of ODR as well as important consequences for communication between parties.

(A) Background

Efforts in creating an online mechanism to deal with disputes began as early as 1995³⁷ with the launch of Mediate.com. In fact, the development of ODR has been seen in three stages³⁸; until about 1995, it consisted of specialized dispute resolution in specific contexts, then the stage between 1995 – 1998, coincided with the growth of Internet, especially as a medium for business. From the 1997 boom in Internet, venture capitalists began pouring money into Internet start-up companies to get their foot into the fast-expanding e-commerce industry. With this expansion, there was a corresponding “appetite for new ideas”³⁹; websites began selling a wide range of items online from food to philosophy. During this time also, there was increasing concern that the cyberspace required institutions for its regulation, and academics and non-profit organizations sponsored

³² *Id.*

³³ *Id.* Hofstede goes on to use the Hermes Power Distance Index (PDI) to point out how different cultures behave in respect of power inequality. Countries such as Philippines, Mexico, Singapore and India have higher PDI scores than USA, Great Britain, Switzerland, Scandinavian countries and Israel. Hofstede also provides a list of consequences for the political systems, religious life, philosophical and ideological thinking as well as organizations for both high and low PDI countries.

³⁴ See supra note 33

³⁵ David A. Victor, *Cross-cultural Awareness*, in THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS (James R. Silenat & Jeffrey M. Aresty, eds. 1994) 15-22, at 21

³⁶ eMarketer, The eGlobal Report 65 (2001), at <http://www.ifc.org/sme/acrobat/eGlobal.pdf> (last visited May 1, 2003)

³⁷ However, research on how to integrate information technology and ADR had arguable begun even earlier. Around 1993, this very issue was discussed at the National Conference on Peacemaking and Conflict Resolution. For a more detailed history of the ODR, see supra note 1 at pg. 21 – 29.

³⁸ KATSH E. & RIFKIN J., ONLINE DISPUTE RESOLUTION, (2001)

³⁹ See supra note 1 at 29

many experiments in ODR. New companies were founded to provide ODR services for e.g. Cybersettle, ClickNsettle, SquareTrade and eResolution.⁴⁰

The third period is the present stage where commercial entities as well as government and international institutions have begun showing more interest in ODR. The interest stems from the need to set standards and regulate the use of ODR. For instance, in June 2000, the US Federal Trade Commission (FTC) and Department of Commerce (DOC) jointly convened a conference in Washington to discuss ODR in e-commerce, which attracted over 300 participants from the fields of dispute resolution, business, non-profits and government.

The economic downturn and slow down of the Internet boom, coupled with a fall in investor confidence after the September 11 terrorist attacks in the US, has resulted in a corresponding slowdown in the plans for global expansion of ODR. Nevertheless, the Internet has made such a radical and arguably permanent impact on businesses that an economic turnaround will undoubtedly encourage further development in the field of ODR.

(B) *Nuts and Bolts*

ADR has traditionally been a face-to-face meeting of disputants attempting to resolve conflicts without going to court. Some of this face-to-face techniques and concepts have been translated into the online environment⁴¹ while others have not. ADR techniques such as mediation, arbitration, neutral evaluation and hybrid forms have been incorporated into cyberspace in varying degrees.

There is a wide spectrum of the style of dispute resolution that can be employed in ODR, some of which are listed below, from the most basic to the most sophisticated:

- (i) using email to set up face-to-face meetings with a neutral
- (ii) involving automated negotiation processes administered by a computer;
- (iii) online experts to arrive at binding arbitration procedures; or
- (iv) assembling an online jury to hear formal arguments from both parties or their attorneys in the case.⁴²

In fact, any use of technology to “complement, support, or administer a dispute resolution process falls into the world of ODR”.⁴³ In addition, depending on what parties require, ODR can be legalistic and precedent-based or flexible enough to act as a form of customer service. Some forms of ODR have tried to replicate the face-to-face interaction between the neutral and the parties by using audio-conferencing or video-conferencing.

In terms of the role that the third party neutral plays, it is similar to an offline mediator or arbitrator. For instance, an online mediator would have to reframe issues, keep track of the discussion and reality-test proposed solutions, whereas an arbitrator would have to read submissions on the evidence and render a decision.

The main difference between ADR and ODR is the role of technology in mediating the communication between the parties. In a face-to-face setting, the neutral has less control over the communication between the parties because parties look at each others’ expressions and behavior; whereas online, the neutral has more control over the process. Video and audio conferencing limit the extent to which parties observe each other’s behavior, and in some cases, only static pictures of the parties are communicated. In addition, mathematical algorithms may be used to help parties focus on their underlying needs, and access to reference materials may also be provided during the session to better inform them about the relevant facts relating to the dispute. It is really up to the neutral to create the environment for the parties, whereas previously, the neutral could only re-design the environment in terms of the layout of the room. This creates a new framework for which parties move towards resolution.⁴⁴

⁴⁰ See supra note 1. Refer to Appendix 1 for a brief survey of current ODR service providers in the United States and a list of all ODR service providers as of 2002.

⁴¹ See supra note 1 at 36

⁴² See supra note 1 at 44

⁴³ See supra note 1

⁴⁴ See supra note 1 at 46

There are a variety of online communication methods that can be employed in ODR that can impact the way in which the dispute is dealt with. The two methods of communication are “synchronous”⁴⁵ such as chat rooms or video conferencing when the parties are communicating in ‘real-time’, and “asynchronous”⁴⁶ when parties are not communicating at the same time such as bulletin boards or discussion fora. The latter involves a longer time-span in which messages from the parties are relayed and responded to. This has a significant impact on the parties’ notion of time⁴⁷. In email and listserv environments, the receiving party is in control of when to reply, unlike in the case of a face-to-face meeting where the expectation is that the recipient of the communication is ready to respond. There is no expectation that the recipient of an email will reply immediately or even that they are constantly waiting to check new messages. However, when there are more than two parties involved, email exchange can become confusing and particularly across time-zones, messages may cross each other and there may be confusion over which issue is active.

To overcome these problems, multiparty conversations often take place over a discussion environment where messages are posted, and listed according to the time that they were sent. To allow parties to keep track of the issues, ‘threaded discussion environments’ were created where it is possible for many different topics to co-exist and grouped separately. Threaded discussions keep a record of an entire line of conversation relating to a specific issue so that anyone who enters the conversation can review the past information exchange and bring themselves up-to-date about that particular issue.

The fastest interaction takes place in a chat room or through instant messaging (IM) such as MSN, Yahoo Messenger or ICQ where the sender and recipient read each other’s messages in a few seconds of their being sent. IM programs run in the background of a user’s computer system and so the user can either choose to leave it open and read the messages or can wait for a message alert to be given once a new message appears. In addition, there are features which can show the status of the other party e.g. “not at the desk”, “out for lunch”, “busy” etc. As a result of the speed of communication, there are more possibilities for an in-depth conversation and information exchange in IM than email or listservs. However, one drawback of more synchronous communication methods such as IM or chat rooms is that the speed of communication makes for shorter replies rather than fully thought-out and developed exchanges.

Given using different communication methods will influence parties’ interaction with each other, it becomes crucial for the neutral to assess the advantages and disadvantages of each mode and to decide the type of environment that is most appropriate for the interaction for the dispute at hand. In fact in ODR, the technology has such a crucial function that it has been called “the fourth party”⁴⁸ because it plays “...a major role in managing the process and setting the agenda...”⁴⁹

(C) *Important consequences for communication*

As seen in the above section, cyberspace is not merely a “mirror world”⁵⁰, a place where physical institutions are represented in digital form and we can replicate our interactions with the physical institutions digitally.⁵¹ Its properties of time and space are different⁵² and one’s presence is based entirely on electronic communication.⁵³ Online communication is textual-based which is different from personal interaction. Cyberspace currently “comes without all five senses attached.”⁵⁴ Hence the impact of electronic communication in ODR must be examined. I propose to examine some key areas that may be affected by culture (which will be examined in a later section).

⁴⁵ See supra note 1 at 47

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See supra note 38

⁴⁹ See supra note 1 at 55

⁵⁰ DAVID H. GLERNTER, MIRROR WORLDS, OR THE DAY SOFTWARE PUTS THE UNIVERSE IN A SHOEBOX...HOW IT WILL HAPPEN AND WHAT IT WILL MEAN (1989)

⁵¹ M. Ethan Katsh, *Dispute Resolution in Cyberspace* 28 Conn. L. Rev. 953 (1996) at 954

⁵² M. Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace* 39 Vill. L. Rev. 403 (1993) at 414- 415

⁵³ Tamir Malz, Customary Law & Power in Internet Communities, available at <http://www.ascusc.org/jcmc/vol2/issue1/custom.html> (last visited May 1, 2003)

⁵⁴ Blair Kamin, Spatial Relations: The Internet Brings Us Together, But Is It The “New Town Square”? CHI. TRIB., Dec 11, 1997 § 5, at 1 (quoting Anders Nereim, School of the Art Institute of Chicago)

(i) *Concept of time*

The Internet is available 24 hours, 7 days a week. This means that parties to a dispute are able to obtain resources and services instantaneously, whenever they want. Thus ODR can be much faster than traditional methods of dispute resolution because meetings or travel plans need not be scheduled to begin an online process. Parties will have higher expectations of efficiency.

However, in some situations where asynchronous interaction takes place, parties cannot expect immediate responses. Some argue that this allows parties to reflect on their responses, do more research and consult with others before responding, thus avoiding reacting emotionally to a surprise issue.⁵⁵ However, it has also been argued that just because parties have the benefit of the time lag, it need not necessarily mean that they will use the time effectively to contemplate on the issue.⁵⁶

(ii) *Power differentials*

As noted earlier, power plays an important role in relationships and consequently on disputes. There is usually a power equation that is present in relationships such as employer and employee, teacher and student or husband and wife. The more powerful party may exert his or her influence through aggressive behavior, or through speaking for the other party and may not be used to having his or her point of view questioned. This power dynamic is changed when parties are in an online environment because parties are often able to break out of these patterns through textual communication⁵⁷, parties that previously had relationships based on power differentials would be able to communicate on a more level playing field. Related to this issue is that online interaction can minimize bias, it enables parties to self-represent and parties can choose what they want to disclose.⁵⁸

(iii) *Text-based communication*

Text-based communication forces parties to put into writing their thoughts and intentions from the outset of the negotiations, thereby reducing the difficulties of reducing the oral agreement reached in face-to-face negotiations into writing at the end. People often speak differently from how they would write and so there are potential problems for a neutral to translate the meaning of the parties during oral discussions into writing at the end of the mediation. In text-based communication, the neutral has the advantage of referring to past postings and simply “cutting and pasting” the language into the final document. In addition, parties are required to be more specific in their written communication because of the difficulties of relying on generic language.

However, it has been argued that neutrals require significant skills at evaluating written information in online text-based communication such as making judgment calls on, for e.g., how to edit an email message that she may regard as lengthy or irrelevant or not to broadcast it to the other party.⁵⁹ Reading text is unlike listening skills because listening with empathy requires “...understanding the sum total of the speaker’s verbal and nonverbal communication...”⁶⁰ and further to identify the effect of the nonverbal cues on the speech. Hence,

⁵⁵ See supra note 1 at 63-64. Another potential benefit that is raised is there is “cooling distance” between the parties, that “online communication is often less likely to escalate to accusations, name calling, and violence than face-to-face communication...the emotional heat generated by face-to-face confrontation is less intense in online interaction.” See infra note 55 at 66. This view has been criticized because there is no evidence to support this claim. See Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 B.Y.U. L. Rev. 1305 at 1328, where Eisen argues that, “the ability to reflect on this anger in private might intensify it, not lessen it. The written character of the proceeding would encourage this. Email messages would be kept in a written archive which would allow parties to reflect on past messages, to look at them frequently and to become more angry.” According to him, anger is a common feature of disputes and that parties to a dispute have a legitimate right to express it to other participants.

⁵⁶ Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 B.Y.U. L. Rev. 1305 at 1327. Eisen argues that they may do the reverse of responding quickly to each other’s mails and that “[a] party might be deliberately deceptive with a well-rehearsed justification.” Further, he argues that just because parties have had time to reflect, it does not necessarily mean that their responses or positions will be more constructive.

⁵⁷ See supra note 1 at 65. Rule reports that “[r]esearch into the use of email in organizations has found that lower-level employees are willing to send emails to upper management with comments and observations that they would be uncomfortable saying in person.” He adds, “I’ve spoken with parents who have had a very difficult time communicating with their children when they are in the same house, yet after they send their children off to college, a rich email correspondence began.”

⁵⁸ See supra note 1 at 67

⁵⁹ See supra note 56 at 1330

⁶⁰ MADELYN BURLEY-ALLEN, *LISTENING: THE FORGOTTEN SKILL* (1995) as quoted in Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 B.Y.U. L. Rev. 1305 at 1330

while a particular neutral may be skilled in mediation in a physical setting, the demands of online communication are different and that mediator may be ill-equipped to handle communication in such a context.

(iv) *Dropping out and stonewalling*

In a physical setting, the neutral usually holds the parties' attention. However, online, the neutral has no way of forcing the parties to log onto the chat room and making them stay engaged in the process. If parties are no longer interested in the process, it is easier for them to simply drop out or stonewall by delaying in posting their messages.

(v) *Lack of body language and non-verbal cues*

It has been noted that nonverbal communication is learned well before language is acquired⁶¹, and that six key areas of non-verbal communication include "...kinesics (body movement and facial gestures); proxemics (distance); oculosics (eye movements and eye contact); haptics (touching behavior); paralanguage (tone of voice and non-language sounds) and appearance (dress and grooming).⁶² Needless to say, non-verbal body cues are lost in the online process, because the communication is primarily textual (except in the cases of videoconferencing). When people shake their head, sigh in fatigue or frustration, nod in agreement, and give quizzical looks, important communication is taking place although not articulated in words. Oral expressions of feelings in a face-to-face setting have a richer and more meaningful context than written expressions in for instance, an email exchange.⁶³

V. PUTTING IT ALL TOGETHER: CULTURE IN THE VIRTUAL WORLD

It can be observed that ODR has some potential advantages for cross-cultural communication. For instance, as discussed in the earlier section, online venting of frustration or anger can be potentially useful for the upset party because as feelings are written out in email or a posting, the author has time to reflect, re-phrase and re-consider the statements before sending them. In some cultures, such as Thai, it is not considered polite to show anger, and in the Japanese culture, much emphasis is placed on harmony. In other cultures, such as the American culture, emotions are expressed more freely. Hence, in a negotiation between an American and a Thai, whereas the American may have otherwise shown anger or frustration in a face-to-face negotiation, would now have to communicate through email, and while typing out his emotions, would have time to reconsider his feelings or at least the intensity of the feelings as they are being written, before spontaneously lashing out at the other party. Hence some cultures may find it more comfortable communicating via email or discussion postings where emotions are somewhat diffused or muted.

(A) Cultural Drawbacks in ODR

However, there are a number of areas in ODR where potential cultural misunderstandings can arise and impede dispute resolution. Firstly, a lack of face-to-face interaction means that parties and the neutral cannot process non-verbal cues or behavior. Since every bit of communication needs to be typed out by the neutral and the parties, the communication becomes much more deliberate and calculated. Some have argued that videoconferencing will adequately address this concern. However, videoconferencing may actually complicate non-verbal cues because even with this technology, it is not possible to make eye contact properly as the camera and the display screen cannot be in the same spot.

This leads to deadend and form affect in interactions, eye contact being a nearly ubiquitous subconscious method of affirming trust. Furthermore, participants aren't able to establish a

⁶¹ David A. Victor, *Cross-cultural Awareness*, in THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS (James R. Silenat & Jeffrey M. Aresty, eds. 1994) 15-22, at 21

⁶² *Id.*

⁶³ Blair Kamin, *Spatial Relations: The Internet Brings Us Together, But Is It The "New Town Square"?* CHI. TRIB., Dec 11, 1997 § 5, at 1. Also see discussion in Llewellyn Joseph Gibbons, Robin M. Kennedy & Jon Michael Gibbs, *Cyber-Mediation: Computer-Mediated Communications Medium Massaging The Message*, 32 N.M.L. Rev. 27 at 48, where the media is ranked according to its richness as follows (from most rich to least): face-to-face, telephone, electronic mail, personal written text (letters, memos), formal written text (documents, bulletins), and formal numeric text (computer output). "The richer the media, the greater the capability to reduce ambiguity. This characterization of communication media would seem to argue for employment of the most cue rich medium."

*sense of position relative to one another and therefore have no clear way to direct attention, approval or disapproval.*⁶⁴

In a culture where direct eye contact is necessary to build rapport and trust, it is arguable that it may not be possible to reach the ideal level of comfort for parties to work together. On the other hand, cultures where it is not polite to make direct eye contact would find it easier to use video-conferencing.

Another cultural issue arises through the extensive use of text in communication. In fact, email relies entirely on written language, as does IM or discussion environments.

*Language may divide communicators into the 'in group' of those who understand and the 'out group' of those who do not. To the extent that language differences increase, mistrust, concealment, and inflexibility also increase, as does the risk of communication breakdown.*⁶⁵

Given that text is the only means of communication, as we have seen earlier, while a low-context person will have no difficulty articulating in great detail her point of view or demands, a party from a high-context culture is likely to be at a disadvantage because of the lack of ease of using text. Simply put:

*Communications break down because the underlying assumptions or the 'context' of the communication are rarely understood by both parties, much less discussed or explicitly stated. The high-context individual assumes that the low context individual understands and would, in fact, perhaps be insulted if she filled in the contextual gaps, while the low-context individual waits in frustration for the additional information necessary to understand the task.*⁶⁶

It is then recommended that this is an area where the neutral can use technology to “insure that the parties are sharing common assumptions and bridge the high/low context cultural issues without unnecessarily offending either party.”⁶⁷ However, I would argue that this might not be possible because the neutral may not realize that this is an issue. Ordinarily, a misunderstanding could be gleaned from the parties’ non-verbal behavior, either showing signs of displeasure or frustration. Whereas online, this cannot be done by the neutral because she is at a similar disadvantage as the parties in respect of not being able to observe behavior. The neutral can, in obvious cases of misunderstandings betrayed by the language of the parties, clarify to some extent the understanding between the parties by posing questions; however, these questions may again go unanswered or misunderstood by a high-context party. This, coupled with the fact that the neutral may not have had sufficient time to build rapport with the parties, may mean that parties may not trust each other or the neutral or lead further confusion. In addition, the isolation provided by online interaction may contribute to stereotyping or mistaken assumptions about the other side’s cultural background.

The effect of silence in online communication poses a significant problem. For instance, some East Asian cultures believe it is respectful and appropriate on occasion to remain silent. It is considered rude in some cultures to openly disagree or confront another party, and courtesy demands silence (which does not necessarily signify agreement or consent). However, online, silence can be misinterpreted as a lack of interest, stonewalling or dropping out of the conversation. In addition, since communication is largely text-based, ODR does not accommodate for the use of silence.

Yet another area of potential impediment in ODR is how the parties and the mediator process time. Where one party is monochronic and the other is polychronic, the mediator will be faced the issue of how to effectively manage issues of time. It has been suggested that:

*Online mediation permits the mediator to create an environment that mediates between these two orientations. For example, email allows for multiple topics to be discussed simultaneously, yet threading the topics focuses each thread on only one issue.*⁶⁸

While this may be so, the issue becomes more complicated when parties from different time orientations are made to engage in dispute resolution across time-zones. Consider this scenario; a monochronic individual, for e.g. in America, negotiates online with a polychronic individual from Malaysia. At the close of the American’s business day, at 6pm, the Malaysian would still probably not be at work (since most workdays begin at 9am or

⁶⁴ Jaron Laner, *Virtually There*, Scientific American, April 2001, at 66

⁶⁵ Llewellyn Joseph Gibbons, Robin M. Kennedy & Jon Michael Gibbs, *Cyber-Mediation: Computer-Mediated Communications Medium Massaging The Message*, 32 N.M.L. Rev. 27 at 32

⁶⁶ *Id.* at 27

⁶⁷ *Id.* at 46

⁶⁸ *Id.*

10am). Once that individual checks his email or discussion group posting, even then he may not respond when the American wants because he believes that (based on the cultural norm in his country of leaving the office by 5pm or 6pm at the latest) the American has left the office and reasonably expects an answer by the next working day. The American may see it as an issue of efficiency and commitment to attend to the negotiations as fast as possible, whereas the Malaysian would regard time-frames more fluidly and not see it as an issue of time but socially acceptable behavior. Add to this equation, the presence of a third party in a completely different time zone, with a different time orientation, and one can see how potentially complicated the issues may become.

Finally, the assumption that removal of power differentials will necessarily benefit the parties is an ethnocentric assumption based on a culture that has a low PDI score. In cultures where a high power distance is the social norm, there may be reluctance to negotiate with another party whose status is not known (or at the worst, misrepresented, since there is no clear way of verifying the identify of the other party) or even distrust between the parties. Not knowing the other party's status could even be regarded as disrespectful.

(B) *Coping Culturally in ODR*

The next question then that logically follows is whether cultural considerations can be factored into ODR and to take it a step further, whether ODR can facilitate cross-cultural communication effectively? The following is a suggested proposal for initiatives to implement in ODR so as to better facilitate cultural considerations in managing online disputes.

(i) *Training of Neutrals*

The role of the neutral is crucial to proper management of disputes online because as we saw earlier, they have a bigger role to play in reframing, managing the agenda, choosing the environment for discussion etc. The burden of facilitating cultural differences then must also rightly fall on the neutral, since the neutral will be the focal point of communication. Given the important cultural nuances, it is imperative that neutrals intending to participate in ODR are given adequate training in cross-cultural communication and negotiations. Just as computer literacy is a precondition⁶⁹ to handling online disputes, cross-cultural competency must also be given similar importance. Given that the bulk of ODR matters will relate to international parties, a neutral must be able to demonstrate a high level of knowledge of cultures. Presently, this does not appear to be a prominent feature of training.⁷⁰

Another important aspect of cross-cultural training is teaching neutrals to avoid stereotyping because stereotypes are misleading. One of the biggest pitfalls would be for the neutral, having done some research on the background of the parties, and having had a teleconversation with them, stereotypes the cultural characteristics of the parties. As previously mentioned, cultures are not monolithic, and throughout the process, the neutral needs to be alert to the individual characteristics of the parties as well as glean information from the parties that could suggest variances in cultural backgrounds.

(ii) *Intake interviews*

Following from the above, another recommendation is for the neutral to conduct an intake interview with the parties over the telephone prior to handling the dispute. While this may be less important where the dispute is a minor one, it is particularly important where the dispute appears to be a complex one because it is likely that there will be potential difficulties and misunderstandings arising from cross-cultural differences. It has been advised that

Face-to-face negotiation usually enables the parties to resolve many open questions difficult to resolve by correspondence or conference calls... a lack of face-to-face contact may in some cultures be interpreted as a sign of disrespect or lack of sincerity, particularly in those cultures that value protocol and formality, such as Russia.⁷¹

⁶⁹ See supra note 1 at 245, where he says that “[t]he neutrals need to understand the technology backward and forward, and they need to have an articulated strategy in their heads for how they want to direct the process.”

⁷⁰ See for e.g. Jeff Krivis, Ten Tips for Online ADR (visited May 1, 2003) available at <http://www.mediate.com/aba/abaten.cfm> where none of the 10 tips provided touch on cultural issues. In addition, Rule's section on “empowering neutrals” discusses the importance of knowledge of technology but neglects to discuss the importance of training in cultural understanding.

⁷¹ Robert C. Ciricillo, Adam Fremantle, Jeanne M. Hamburg, *International Negotiations: A Cultural Perspective* in THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS (James R. Silenat & Jeffrey M. Aresty, eds. 1994), 5-14 at 8

In the absence of face-to-face interaction, there needs to be, at the minimum, an initial teleconversation, firstly, for the neutral to gain a better understanding of the parties by listening to their tone of voice, speech, gleaned whether there are or could be any potential language difficulties and learning about their background. This is much better facilitated in a teleconversation rather than by email. Secondly, if the parties have only ever interacted online (this is not uncommon), the teleconversation will be an important initial meeting because it gives the other party a human face (rather than an intangible online entity) and allows for an oral exchange of expressions about their dispute.

(iii) *Use of more interactive and appropriate technology*

Cultural issues will play a role in the design of the technology to be used for the dispute at hand.⁷² Some possibilities of facilitating communication include enabling multi-language capacity, making the site available in different languages and having multilingual customer support.⁷³ Further, in assigning neutrals to disputes, factors that must be considered are whether the neutral can speak the native language of the parties, and whether the neutral has been exposed to and understands the cultural landscape of the parties.⁷⁴

In addition, neutrals should screen the type of disputes and determine which ones can be resolved without face-to-face interaction and in which cases the use of web-cams and videoconferencing should be encouraged. What should be the criteria for deciding? The obvious requirement is that parties must have the requisite resources of technology to hold, e.g., a videoconference. Secondly, if the dispute is a multiparty one, involving disputants from different cultures, then it is advisable to use web-cams and videoconferences. At present, the technology is far from ideal; hopefully in the future, issues such as time lags between responses will be minimized and there can be a more accurate replication of face-to-face interaction.

In any event, ODR may not be the appropriate media for every dispute, particularly where physical presence is required to bring closure to the conflict⁷⁵, and it must be left to the neutral to evaluate the case at hand and make a judgment.

(iv) *Choice of online environment*

Finally, the neutral must take into account cultural considerations in deciding on the type of online environment that will be appropriate for the parties. The following considerations are important:

1. Whether parties are from high- or low-context cultures;
2. An estimation of the power distance in their cultures;
3. Whether the parties are monochronic or polychronic.

For instance, parties from low-context cultures may be more comfortable with postings or discussion environments (the neutral will also have to ensure that it is a threaded discussion environment because of the likely possibilities of having to manage extensive explanations and explorations of different issues). For cultures with high PDI scores, it may be more appropriate for parties to attach their computer signatures (which will often give the person's full title and position in a company) to their emails so that the parties can verify each other's positions and mandate. Whether parties are monochronic or polychronic will determine whether IM is more appropriate or email. One caveat to the above analysis is that, to reiterate, there is an imminent danger of falling into the habit of stereotyping disputants based on their cultures, which is why it is important to conduct an intake interview and understand the individual's own unique background and cultural landscape. Further, the neutral needs to be aware of her biases about different cultures and must be prepared to test her assumptions. The above considerations are merely guidelines that a neutral must pay attention to in making the judgment call about what is the most appropriate mode of communication for a given set of parties.

⁷² See supra note 1 at 245

⁷³ *Id.*

⁷⁴ *Id.* Rule suggests that in the event such a neutral is not available, then a panel of neutrals whose combined capacities can assist in the dispute should be assembled.

⁷⁵ See supra note. 65 at 70

VI. CONCLUSION

The above discussion of cultural implications on ODR reflects the need and urgency of cultural considerations to be addressed to ensure the effective management of disputes online. As it presently stands, there is a cultural vacuum in ODR that may lead to potential difficulties and misunderstandings and impede the use of ODR. Part of the problem is the inadequate the training of ODR neutrals to manage disputes with cultural sensitivity. ODR has increased the burden on the neutral to try to bridge the cultural gap between parties, and hence, there is a greater need for more culturally competent neutrals to handle international ODR. In addition, there is also a need for better, cheaper technology to allow some face-to-face interaction because we cannot completely divorce the element of human interaction from dispute resolution.

Not only must we develop greater sensitivity towards local cultures, but also become aware the online community is beginning to develop its own unique culture. For instance, regular chatroom and IM users employ “emoticons” to express their feelings e.g. a smiley face (☺) to indicate joy, a downturned smile to indicate unhappiness (☹), teary-eyed face to indicate crying, a red-face to show anger etc. Other terms include “LOL” (laugh out loud) to show appreciation for humor, or state “BRB” (be right back) to indicate that they are leaving their computer momentarily. Further, it is commonly accepted among chat users that the use of ALL CAPS indicates that the speaker is shouting. Chatroom users also agree to abide by certain rules of behavior in their chatroom, and any violation of the rules can result in the culprit being “blocked” access to the chatroom. In addition, the culprit’s email identification can be reported to the chatroom host who will take steps to prevent that culprit from using the service. By developing their own lingo and modes of behavior, by our own definition of culture, online users have begun their own culture. Hence the neutral, while being sensitive to national cultures, must ultimately also be able to understand the culture of technology that cyberspace communities possess today.

THE CULTURAL VACCUM IN ONLINE DISPUTE RESOLUTION

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