

Dispute Resolution for E-Government
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1. Introduction

Disputes are common phenomena arising under certain circumstances from the interaction between people and are known to have occurred since the early days of mankind. As a result, societies have created and continued to develop procedures, rules and means for the resolution of disputes initially informally but as people have become more sophisticated and the way of life has become more complex, formal procedures and rules and means have evolved.

E-Government has added to this sophistication and is posing new fundamental challenges whereby efficiency and response in a split of a second is the objective being pursued. However, the current conventional dispute resolution system is notorious for its slowness and it is not uncommon in many situations that the old maximum “justice delayed is justice denied” is recalled. Therefore, e-government calls for a different approach to the problem of dispute resolution especially that e-government has grown to become far more than re-jigging public sector web sites with the term now referring to the re-engineering of ways public services are delivered with efficiency and customer service as primary goals (1).

A more efficient way of resolving disputes is not only compatible with and necessary for a digital government, but would be necessary to promote e-government to attain its objectives and obtain return on the substantial investment required. The extent of the huge investment involved may be appreciated by reference to a recent report produced by the research company Gartner (1). Gartner reported that the governments of Western Europe will spend US\$ 67.8 billion on e-government and information technology in 2003 and that with this kind of expenditure, there will be pressure to show that it has been worthwhile. In the UK, research released recently from the analyst firm Kable (2) predicted that the cost of e-government could outweigh any saving to the public sector over the next 10 years. Kable reported that between 2001/2002 and 2005/2006, e-government projects would cost UK taxpayers a massive £7.4 bn (£3 bn for local government and £4.4 bn for central government).

2. Extent of Administrative Disputes

Administrative disputes form a large number of disputes heard before the courts in many countries. In the USA, it has been reported that administrative disputes form 20% of the cases in the federal courts (3). With the increasing sophistication of parties to the disputes and the increasing complexity of the potential disputes, especially those which are technology related, this large number of cases would be extremely demanding both in terms of time and cost. It will further impose a substantial burden on the court system and is a serious impediment to the economy due to the resulting inefficiencies. The extent of the cost burden in the USA may be appreciated by measuring it against the overall cost of civil litigation in the USA which was reported to exceed \$ 150 billion annually (4).

* The views expressed here are not necessarily those of the Directorate of Legal Affairs

Although the number of disputes that reach the court for resolution is substantial, it still does not reflect the true extent of the injurious experience of consumers. Commentators often refer to a pyramid of injurious experience or a dispute pyramid (5). At the base of the pyramid is unperceived injurious experience, moving up to perceived harms, grievances and complaints. At the very top of the pyramid, forming the smallest category, are disputes with a subset being disputes voiced to third parties and pursued through formal dispute resolution which would include ADR as well as lawsuits.

3. Methods of Dispute Resolution

Litigation and Arbitration are methods of resolving disputes whereby a solution is imposed on the parties either through a court judgment, in the case of litigation, or an arbitral award in the case of arbitration. On the other hand the alternatives are those whereby disputes are amicably resolved. These have come to be known as Alternative Dispute Resolution Methods (ADR). In recent years, many contracts make the use of one or more of such methods mandatory before resort to litigation or arbitration. Their advantages are mainly informality, speed and economy. Their success is dependent on many factors. These include the goodwill of the parties and their willingness to resolve the dispute, the skills and integrity of the third party they involve to help them resolve the dispute and the mutual trust they have in that third party. However as the parties are themselves responsible for reaching agreement, the decision is not imposed on them, both parties must, if they agree to a settlement, make such agreement binding by way of a written contract. In theory, at least, such an agreement would be easier to enforce compared to a decision obtained by a court judgment or through arbitration, because it was concluded by mutual consent and not imposed on the parties (6).

Pursuant to the Administrative Dispute Resolution Act of 1996 (7), all government agencies in the USA are required to adopt a policy addressing the use of ADR and case management. They are also required to review each of their standard agreements for contracts, grants and other assistance to determine whether to amend any such standard agreements to authorize and encourage the use of ADR. However, it is important to point out that the use of ADR is always consensual as in many countries the right to litigation is enshrined as an enshrined constitutional right. In some countries, the use of Arbitration even if consensually agreed as part of a contract may be considered illegal. For example, paragraph a (3) of Sec. 575 of the USA's Administrative Disputes Resolution Act of 1996 provides that an Agency may not require any person to consent to arbitration as a condition for entering into a contract or obtaining a benefit.

The use of ADR is particularly advantageous in multiparty disputes. For example, it was reported that ADR was used to settle the 1986 Dupont Plaza Hotel fire case in San Juan, Puerto Rico which involved more than 100 defendants and their insurers, thus saving an estimated \$60 million in legal cost (6).

Alternative means for resolving disputes have been initially developed and used in the USA by the private sector and in appropriate circumstances, have yielded decisions that are faster, less expensive and less contentious. The availability of such alternative methods could lead to more creative, efficient and sensible outcomes. Such methods are now widely regarded to have the potential for enhancing the operation of the government and better serve the

public (7). However, it is suggested that the use of ADR in e-government should be made mandatory so that the request for ADR by either party is not viewed as a sign of weakness by the other party. This echoes Bunnis's argument for the use ADR in the context of contracts (6). Another reason advanced by Bunni for making ADR mandatory is the avoidance of any possible blame being attached to the decision maker who pursues this approach instead of a more adversarial method.

As the word "alternative" in this context has come to be used to distinguish between litigation in the courts and any other method of resolving disputes, arbitration will be considered for the purpose of this discussion to be part of the ADR spectrum. This spectrum includes:

- Negotiation
- Mediation
- Conciliation
- Mini Trial
- Adjudication
- Arbitration.

The following is a brief summary of each of the above methods.

a- Negotiation:

The simplest way to resolve a dispute is through negotiation. However, this is often easier said than done. There are usually a number of obstacles to concluding a settlement through negotiation. These may include clash of personalities, a belief by either or both parties that there is a matter of principles at stake or just simply unwillingness to trade and bargain.

In many respects the success of negotiation to settle a dispute depends on the skills of the negotiator. Few of us are borne with such skills. We certainly acquire negotiation skills through practice but training is essential if we are to be effective and successful negotiators.

b- Mediation:

This is a form of a structured negotiation whereby a neutral third party (the mediator) or what has come to be known as a "the neutral " is called upon to assist in finding a common ground for compromise (6). The neutral acts as a conduit between the parties to assist them to reach a compromise. The neutral would be engaged in a form of shuttle diplomacy without actively initiating any ideas as to how the dispute might be settled. However, it is important for the success of the process that both parties are assured that in the event that a settlement is not reached, all what they have said and agreed to in order to conclude a compromise will not be presented or used in any legal proceedings. Therefore, the parties should make clear that all what they say or agree to is for the purpose of reaching a compromise and that it is not to be construed as an acknowledgement of their fault or a right to the other party. In countries where the law of evidence allows, the parties agree in advance that the entire process is confidential and that all documents and evidence presented is protected by privilege.

Although the process of mediation is fairly flexible, there would have to be certain rules to be agreed upon in advance. These rules may be either *ad hoc* rules or institutional rules such as those developed by the National Construction Industry Arbitration Committee in the USA and the Hong Kong Government Mediation Rules administered by the Hong Kong International Arbitration Center.

c- Conciliation:

Conciliation is similar to Mediation and the two terms are commonly used interchangeably and there is not universal agreement as to which of the two methods is Mediation and which is Conciliation (6). However, perhaps a point of distinction that can be said is that the conciliator plays a more active role in resolving the dispute. The conciliator would probe the strengths and weaknesses of the parties case, make suggestions, give advice, find persuasive arguments for and against each party's position, and create ideas which might induce them to settle their dispute and finally and as a last resort he would inform them of his opinion on the issues involved.

d- Mini-Trial:

The Mini-Trial procedure was developed by the Zurich Chamber of Commerce and at approximately the same time a similar procedure was developed in the USA by the Corps of Engineers. Despite its name and the fact that it seeks to replicate the court, the process is similar to Mediation and Conciliation in the sense that its outcome is not binding on the parties (6).

The procedure involves the appointment of a neutral to administer the process, ask questions to witnesses and provide comments if requested. The parties are represented by their senior management personnel, usually CEOs, and may be assisted by lawyers. The process involves verbal and written formal presentation by both parties and lasts few days or at most few weeks. After presentations by both parties are concluded, their representatives retire with the neutral to consider the issues involved in the presentations and work towards achieving a settlement. Rules for the conduct of Mini-Trial may be either *ad hoc* or institutional such as:

- a. The Rules of the Centre for Public Resources, New York.
- b. The Rules of the Zurich Chamber of Commerce.

e- Adjudication:

Under this process the neutral makes a determination on the issues of facts and law involved in the dispute. The determination should be made within a relatively short period of time and may be binding or non-binding according to whatever is agreed upon by the parties prior to, or during, the adjudication process. Adjudication is useful where each party considers that a decision of a third party could help in resolving the dispute. However, there is a statutory provision for adjudication in the case of construction disputes in the Housing, Grants, Construction and Regeneration Act 1996 (6).

f- Arbitration:

This is the most formal ADR method and it can be said that it is akin to litigation in many respects especially that it is unfortunate that many arbitrators have a tendency to emulate court procedures, as they believe this will be the safest option to avoid a challenge to their award. Having said so, Arbitration can be fairly flexible, and the procedural rules may be either *ad hoc* or institutional. The Arbitrator is either appointed by the parties themselves or the appointment is entrusted to a third party. Arbitration is regulated in the Middle East either in the Civil and Commercial Procedural Law or in a dedicated law as in Egypt for example. Under most legislation, the Arbitrator's award is final but under others e.g. Bahrain, the right to appeal in domestic arbitration is available unless excluded expressly by the parties in advance. However, legislation in almost all countries allows an application to be made to the court for the annulment of an arbitration award under usually some strict and limited conditions.

As already pointed out, certain countries prohibit the prescription of arbitration in contracts unless it is a truly consensual choice of the parties. There are many grounds the court may rule that an arbitration agreement or an arbitration clause is void such as in *USA v Visa USA Inc.* 750 App Div 1 (NTSC, 1998). The case involved the sale of software to a consumer whereby a clause in the vendor's standard terms and conditions requires disputes to be referred to the International Chamber of Commerce (ICC) for arbitration. The court held the clause to be unconscionable because it necessitated payment by each consumer of a \$4000 as administration fee (6).

4. On-Line Dispute Resolution

It is argued that the concept of ADR, suitably adapted to the cyber world, when performed fully or partially online could provide efficient means for resolving e-government disputes. This should yield in appropriate circumstance a more efficient and a relatively quick resolution of disputes but it has to be ensured that a secure IT system is used and a fair procedural rules suitable for the online environment is adhered to whereby due process is not compromised. As in the case of obtaining a government provided service through an e-government scheme, ODR would allow disputes to be resolved at a distance, without the need for the parties to be present. There are at present numerous variations of ODR schemes and the scene in this respect is progressing rapidly. The following are the most widely considered.

a) E-Negotiation

E-Negotiation may be either "Automated" or "Assisted". Automated Negotiation involves what has come to be known as "blind bidding". Both parties make a bid to settle in the form of a monetary sum (with some schemes allowing non-monetary terms). The proposed figures are kept confidential. When the two sums are sufficiently close, the case is settled for the arithmetic means of the two figures. Schemes differ with respect to determining when the two offers are sufficiently close as they vary from 5% to 30% . The number of bids allowed varies ranging between three times to unlimited. The bidding time also varies from 15 to 90 days (8). In "Assisted Negotiation", the ODR provider only provides a secure site and possible storage means and other facilities of this nature but no actual negotiation service.

b) E-Mediation

The E-Mediation emulates the procedure used for Mediation offline whereby the three-room concept is used. The mediator meets in a chat room with one of the parties and then meets in another room with the other party and subsequently meet with both parties in the same chat room. The mediator performs the same role that he would do offline except that all his communications with the parties are offline. Of course the process may involve using all the facilities provided by the Internet e.g. sound and picture.

c) E-Conciliation

The process here is similar to E-Mediation except that as the case with offline conciliation, the neutral will be playing an active role in achieving a settlement.

d) E-Arbitration

Electronic Arbitration differs from offline Arbitration only in the sense that e-mail communications or web-conference with or without audiovisual communication would be used. It has been reported that its use thus far has been mainly limited to Business-to-Business disputes (9).

Katsh and Rifkin argued that the challenges to online arbitration ‘lie more in the realm of law than technology’(10). Schultz et al (8) suggests that as arbitration is the private equivalent of a court and its awards are binding like judgments, arbitration is subjected to comparatively strict rules for it to have its desired effect.

e) UDRP

The Uniform Dispute Resolution Policy (UDRP) establishes a procedure for the online resolution of domain names disputes. UDRP has been set up by the Internet Corporation for Assigned Names and Numbers (ICANN). UDRP is operated by four ICANN approved providers. These are: WIPO, eResolution, the National Arbitration Forum and the CPR Institute for Dispute Resolution. The scheme has been reported to be extremely successful with WIPO alone handling more than 5000 cases up-to-date. Some of the reasons for the success of the scheme include its efficiency and the fact that the URDP clause is imposed by ICANN on every registrant. Other reasons are suggested in the report produced by Schultz et al (8).

UDRP cannot be classified under any of the previously discussed offline ADR methods. It is neither negotiation nor mediation or reconciliation and certainly not arbitration especially that it does not lead to a binding decision.

Under the scheme, a party who claims (the claimant) to be affected by the registration of a particular domain name files a written request with one of the ODR providers along with the prescribed fee. If the other party accepts the jurisdiction it must file its answer within 20 day. The ODR provider then selects a neutral, unless the parties requested a three-member panel. The neutral/neutrals then submit their decision

within 3 days. If the decision is in favor of the claimant the Registrar must then implement the decision and transfers the name to the claimant unless the Respondent shows that it has initiated a court proceedings.

5. Use of the Internet by the Courts for Dispute Resolution

Many courts around the world now have schemes for electronic filing of documents saving substantial time and cost for the court and parties to the disputes.

In Singapore, a scheme was established involving a judge to mediate and provide early neutral evaluation of the strengths and weakness of each party's case.

In Michigan, a cyber court was established for parties who consent to its use. The amount in dispute is limited to \$US 25,000. The court has jurisdiction to handle certain consumer and business matters (11). An Article by Lucille Ponte provides a detailed review and discussion of this experiment (12).

6. Barriers to ADR and its Shortcomings

Although under certain circumstances, ADR may be used with success, administrative bodies may still decide to resort to litigation. For example, the USA's Administrative Dispute Resolution Act of 1996 makes it mandatory for government agencies to consider not using ADR in certain situations. These include situations where:

1. A court ruling is required for its precedential value.
2. The matter significantly affects persons or organizations which are not parties to the proceedings.
3. Maintaining established policies is of special importance, so that variations among individual decisions are not increased and that such a proceeding would not likely achieve consistent results.

The primary ingredients to the success of ADR have already been pointed out. However, it is important to highlight some of the issues which should be addressed for ADR's potential to be realized. These issues are:

1. Resistance to change: ODR is still considered by the majority of people to be new especially that it involves technology which most has not tried. This attitude is particularly prevalent within the legal fraternity, as the people involved are known for being conservative in their attitude to change and experimenting with novel ideas. In general experience showed that whenever new technology is introduced into the workplace, there has been an initial downturn in attitude and productivity. The key to address this difficulty is to minimize the downturns. It was suggested that this may be accomplished through leadership, sponsorship and involving the stakeholders in the process of designing and implementing change as it is essential to change the environment from resistance to commitment.
2. Lack of established and widely acceptable guidelines or standards: In its report "Addressing Disputes in Electronic Commerce", the American Bar Association noted

that no guidelines or standards for ODR have emerged as a dominant code of practice within the ODR community. As a result, the ABA's Task Force on ODR has produced guidelines which have been described as a set of best practices that may be incorporated into a code of conduct. It is hoped that activities by a number of organizations especially the EU and OECD together with a number of professional institutions would progress this matter further.

3. Lack of institutional support: The ABA report, referred to above, pointed out that the ODR community is in most respects still in its infancy and that no strong or significant business or "trade" association has emerged, around which the ODR community can coalesce, particularly on a worldwide basis. Although not very recent, the appendix of the report produced by Schultz et al (8) included a list of surveyed ODR institutions. It is inferred from the list that most ODR providers are US based. Moreover, anecdotal evidence suggests that there is a serious shortage of expertise in providing and dealing with ADR in the Middle East. As most available software and providers do not cater for Arabic language, the speaker suggests that governments in association with professional institutions in the Middle East should play an active role in developing and promoting ODR in the Middle East.

Therefore, as far as disputes associated with e-government are concerned, there appears to be a strong argument for the establishment of a government operated ODR provider to cater for administrative disputes. A number of factors may be listed to support this idea including the leading role that governments plays in Middle Eastern societies especially compared to professional institutions, the substantially large proportion of administrative disputes and the dire need for an efficient system for resolving administrative disputes arising from e-government given the fairly antiquated and inefficient court system in most countries in the Middle East.

4. Lack of training and experience: Anecdotal evidence suggests that there is a serious lack of training and education in ODR. For ODR to be accepted and succeed, both administrative bodies and citizens must be educated and trained to use ODR. Given the current low computer literacy rate in the Middle East, this issue appears to be particularly challenging especially that pursuing the resolution of a dispute by ODR requires more sophistication than simply obtaining or providing a service on the web.
5. Willingness to settle a dispute: It has been argued that the success of ADR depends on the parties' willingness to reach a settlement. In general, government departments in the Middle East are not particularly known for their willingness to listen to ordinary citizens let alone have a positive attitude to amicable settlements of disputes. Those who provide public services often make their own individual decision on how best they serve a particular citizen. This culture would have to change especially in the spirit of e-government whereby the aim is to provide government services efficiently without favors or discrimination. Furthermore, government officials and their departments would have to embrace an attitude for minimizing the number of fully blown disputes and not to view themselves as a party with great bargaining powers. This attitude would render ADR wholly inappropriate.

In any event, it has to be pointed out that online transactions have a potential to involve identity theft and fraud. ODR would obviously not be a viable option for such disputes. ODR presupposes that the citizen is willing to engage in a process to resolve the dispute and possibly to achieve an agreed outcome. Internet fraudsters are unlikely to be such citizens.

6. Confidentiality: It has already been explained that as ADR may not yield a conclusion satisfactory to both parties, they would want some of what they said or agreed to in the process to be kept confidential. With an offline ADR, this may not be a problem as the entire process may be conducted orally but this is not the case with ODR. Nevertheless, ODR schemes involving a neutral should nevertheless if he deems it useful for the purpose of facilitating a compromise, supplement the ODR process by a face-to-face meeting with the parties to induce an oral discussion and hopefully an acceptable settlement.
7. Absence of face-to-face communication: ODR is not as holistic or interactive as face-to-face communication and would undoubtedly miss out on non-verbal and physical clues such as body language. Some of ODR's shortcomings in this respect may be overcome by the use of high bandwidth but this is at present readily available everywhere and to everybody.

7. Prevention of Disputes

It is important to appreciate that the use of ODR involves time, cost and would possibly result in dissatisfaction if the citizen does not receive a favorable decision. Especially in light of the dispute pyramid referred to earlier, it is essential that all government service providers have an effective and credible complaints handling system and that ODR is viewed only as a backup procedure to be used when the citizen is not able to obtain a satisfactory redress to his complaint. Dispute prevention is also essential and would probably require fewer resources compared to those required for the complaint and dispute resolution processes. Prevention may be achieved by effective education and publicity to citizens together with adequate advice and information to be given in a user-friendly manner to those who request e-government services.

8. Need for an Electronic Transactions Law

Regardless of whether a dispute arises or how a dispute is resolved, the digital world requires suitable legal rules corresponding to those that exist for conventional means of communications and concluding contracts. These would include things like rules on time of receipt and dispatch of electronic documents and their place of receipt and dispatch, validity of electronic contracts, electronic signatures, evidential weight of electronic documents and challenges to the authenticity of electronic signatures and documents. Up-to-date, very few countries in the Middle East have enacted such a law. Those countries, which have, include Jordan, Tunisia and Bahrain. Dubai, which is one of the UAE Emirates, has enacted an Electronic Transactions Law although a federal law for the UAE has not yet been enacted.

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