10 ODR and Culture

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1 Introduction

Few, if any, topics in the general field of alternative dispute resolution (ADR) draw more attention than the impact of culture on parties in conflict and the processes they use to resolve conflict. This is easy to understand if one begins with the conviction that all dispute resolution, at whatever level, is essentially an exercise in communication: active parties and third parties engage in interactions within one of a number of process models in order to exchange information and reach understanding. The reader will recognize that exchanging information and achieving understanding can be difficult when there are few overt differences in culture. Even when we are communicating with someone who looks like us, speaks the same language, shares many social rules, shares a national history, etc., the opportunity for misunderstanding is ever present. As technology shrinks the world and generates ever more opportunity for communicating with those of very different cultures, it would seem reasonable to assume that the opportunity for misunderstanding and cultural disconnects are also increasing.

In an essay prepared for the Fourth International Online Dispute Resolution Forum, Rainey and Jadallah argued that one key element driving intercultural misunderstanding in ODR was linked to the basic model of dispute resolution that was dominant at the time – the "North American Model" of dispute resolution.[1] In this chapter I will revisit that argument and add some observations about the evolution of ODR internationally over the past five years. This chapter will begin with some basic definitions of culture, then address the relationship between ODR technology and culture, and finally offer some observations about what may be the short term future of intercultural exchanges mediated by online dispute resolution tools.

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1 D. Rainey and A. Abdul-Hadi Jadallah, "The Culture in the Code", proceedings of the Fourth International Online Dispute Resolution Forum, May 22-23, 2006, Cairo, Egypt.

2 The Question of Culture

It is tempting to echo Justice Potter Stewart's famous declaration about definitions, and simply say that most people know cultural differences when they see them.[2] In fact, this is probably not true: most experienced third parties can probably recognize or anticipate gross differences in culture, and, to some degree, prepare for those differences in a way that does not compromise efforts to resolve conflict. But subtle differences and "micro-cultures" may be difficult or impossible to spot before they cause problems, if in fact they are going to cause problems.

So, what specifically is culture, or what do we mean when we talk about culture? The very question invites an almost uncountable number of very direct, and sometimes pithy, definitions. There are anthropological definitions, sociological definitions, psychological definitions, etc., *ad infinitum*, most of which share some common features relating to values and learned behavior. Peter Black and Kevin Avruch discuss at length the relationship between culture and conflict, warning that there are a number of "dead ends" inherent in looking at culture through a narrow lens.[3]

Most definitions of culture address norms, beliefs, behaviors, and values held by groups, usually large groups. For a third party engaged primarily in face to face dispute resolution, there are some immediately evident problems with anticipating parties' behavior based on group beliefs and values. One of the differences between the extremes of dispute resolution (face-to-face mediation among small numbers of parties on the one hand, and huge groups with access to ODR platforms on the other hand) is the number of individuals who may be involved directly in dispute resolution efforts. But regardless of whether there are a small number of proximate parties or a large number of parties gathered virtually, there are at least two immediately pressing problems with "reading" culture.

Although some cultural groupings have easily observed external markers, in many cases it is not possible to predict cultural reactions based on individual external appearances. I have a friend who physically looks as if she could come from any number of Mediterranean countries. She does not wear what most North Americans would assume is traditional Muslim garb, and in fact dresses in a very Western fashion-conscious way. She is, in social

2 The full statement from Justice Stewart related to the definition of hard core pornography. His comment about the definition of pornography in the film *The Lovers* is as follows: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Justice Potter Steward, concurring opinion in *Jacobellis v. Ohio* 378 US 184 (1964).

3 P. Black and K. Avruch, "Cultural Relativism, Conflict Resolution, Social Justice", available at <www.gmu.edu/programs/icar/pcs/BlackAvruch61PCS.html>.

settings, very direct and is very comfortable with Western verbal and nonverbal communication patterns. By all outward indications she behaves like and is a "normal" American businesswoman. Taking the overt cultural markers at face value, in a mediation setting one would expect her to exhibit the cultural attributes of an individualist, low context culture.[4] In fact, she is Muslim and holds dear the familial and social norms she learned as a child in her Palestinian family.

Even when the external signs appear to be clear, individual members of a group may, or may not, conform to stereotypes or cultural assumptions associated with the group. I have another friend who is Muslim, wears the hijab when in public, and who exhibits all the outward signs of having been socialized in the Middle East. Taking the overt cultural markers at face value, in a mediation setting one would expect her to exhibit the cultural attributes of a collectivist, high context culture. In fact, she grew up on a farm in Ohio, converted to Islam as an adult, and has a very good grasp of the Western, linear, individualist approach to problem solving.

In both of these cases, the mediator or the other party could expect one set of beliefs and behaviors based on external signs, and be very wrong. I refer to this dilemma as the "Colgate-Crest Caveat". If you have 300 million people in the statistical universe, it is possible to predict within a couple of percentage points which toothpaste they will buy. But if the statistical universe is one person – all bets are off.

As third parties, a problem is created when we assume that group culture is uniformly shared by all group members. In fact, we are all multi-cultural, and although our cultural identities are based in tradition or custom, cultural identification remains fluid, flexible and based on specific situations in which we find ourselves.[5] With the advent of e-commerce and routine interaction among individuals from many countries, legal systems, and cultural groups, one could assume that inter-cultural misunderstanding would be a major feature of dispute resolution online. However, what appears to be happening in the world of international e-commerce is the development of an online culture into which individuals from many local cultures "flex" when they are working online. So, the behaviors or reactions that one might expect from parties if they were sitting at the table together, involved in mediation over an issue related to family or community, are put aside and replaced by

4 Communication in a low context culture is direct, explicit and assumptions are clarified. Indirect nuanced communication and interactions that preserve relationships are valued in cultures that are considered high context. Additional information on this topic is presented later in this chapter.

5 K. Avruch, "Culture", in S. Cheldelin, D. Druckman, and L. Fast (eds.), *Conflict*, Continuum 2008.

appropriate behavior for the online commerce community the parties have joined voluntarily.[6]

Even in social contexts, the increasing exposure to "foreign" cultures through travel and international media has made it possible for individuals to be multi-cultural in a way that was not common a generation ago. A colleague suggests that his intercultural experience has created for him a "cultural supermarket" allowing him to pick and choose which cultural attributes are dominant depending upon the circumstances in which he finds himself.[7]

In addition to the cultural attributes of the parties, it is important to keep in mind the fact that third parties (and fourth parties) bring to the table their own set of values, norms, assumptions, etc., which we can refer to as the "culture of mediation". The focus here is not on the culture of the *mediator* as it would traditionally be defined: the race, age, ethnicity, socio-economic status, etc., of the third party. I refer instead to the *culture of mediation*, created by a complex of assumptions, values, processes, and expectations that the mediator brings to the table as a result of her or his training and interaction with a body of seemingly like-minded professionals. *The Culture in the Code* argued that the North American Model of mediation, and the culture of mediation that it spawned, was a driving force behind much ODR development around the world. In short, the US was exporting the North American culture of mediation in the ADR and ODR work in which US funded professionals were engaged. Six years on from *The Culture in the Code*, the situation seems at least a bit changed. The book for which this chapter is a part is evidence enough that third parties are working to create ODR platforms, and to adapt existing online tools to ODR work, in virtually every major international setting. To this work, they bring local and regional sensibilities and approaches to conflict that have stretched the boundaries of, and perhaps have basically redefined, the culture of mediation in online venues. Even so, it is still necessary to remember that each set of third parties, and developers of fourth party software, bring their own cultural biases to their work.

It is not possible to create a truly comprehensive list of cultural attributes to explain differences, and predict conflict, worldwide. But there are some general cultural tendencies that may cause or drive conflict, and which may be complicated by adding an ODR platform to the dispute resolution mix.

6 UNCITRAL, the United Nations Commission on International Trade Law, has created a working group to create an online extra-legal system that will address commercial disputes world-wide. See <www.uncitral.org/uncitral/en/index.html>.

7 Dr. Mohamed S. Abdel Wahab, in communication with the author.

First, a common way of conceptualizing cultural differences, on a very broad scale, is to think of the bundles of values, beliefs, and behaviors associated with the polar terms "individualist" and "collectivist". Individual and collective cultures bring broad assumptions to the table, and, importantly, dispute resolution practitioners bring individual and collective cultures of mediation to the table.

Using the United States as an example of an individualist culture, and countries in the Middle East or Asia as examples of collectivist cultures, it is easy to see some fundamental differences that could lead to difficulties in dispute resolution, and which could be affected by ODR system design.

Generally, the individualist US practitioner, approaching conflict from the North American culture of mediation, would approach the resolution of disputes by assuming that the process would:

- be a linear, rational process, moving from point A to settlement;
- seek outcomes that are results oriented and cost-effective;
- limit the importance of interpersonal relationships to practical issues related to the dispute (exceptions include family and to some extent workplace mediation);
- be based on positions and interests expressed by the parties at the table;
- be oriented toward open information sharing;
- attempt to "separate the problem from the people";
- conform to norms of the legal system, and;
- be guided by professionals with process expertise but no necessary subject matter expertise or relationship to the parties.

Generally, the collectivist Middle Easterner or Asian, coming from a very different set of cultural norms and a different culture of mediation, would approach the resolution of disputes by assuming that the process would:

- be relationship based;
- proceed holistically (not just be confined to a narrow issue);
- be based on experience and context;
- be based on parties representing the community;
- be focused on "the greater good";
- find it very difficult to separate the problem from the people;
- seek solutions based on social experience and tradition, and;
- be conducted by third parties chosen according to status and social stratification.[8]

8 See Mohammed Abu Nimer, "Conflict Resolution Training in the Middle East: Lessons to be Learned", *Journal of International Negotiation*, Special Issues on Conflict Resolution Training (Fall, 1997); and J. Laue

What would a problem in dispute resolution based on a cultural element related to individualist/collectivist cultural views look like? A common example relates to the individualist assumption that it is good, perhaps even necessary, to have the "decision maker" at the table during mediation. The individualist culture of mediation suggests that engaging in mediation with parties who cannot make final decisions and who are not prepared to settle may not be productive, and in the extreme may be a waste of time. In collective bargaining, the mediator often expresses this cultural value by insisting that the CEO of the organization be at the table or at least be fully briefed along the way, so that when those at the table make a deal, the person who has to sign it is fully supportive. The same impulse results in many mediators asking the parties at the start of mediation to confirm that they can make and implement a settlement deal. This can be very uncomfortable, even insulting, to parties from collectivist cultures.

In face-to-face sessions, if the mediation is going well, good options are on the table, and things seem to be moving toward a settlement, it is common for the collectivist party to slow things down, or in the eyes of the individualist mediator and the other party, to suddenly have doubts about items that they seem to have supported just moments before. This can cause a great deal of frustration, and it is common for the individualist party and the mediator to believe that the collectivist party is bargaining in bad faith, does not really want to make a deal, etc. In fact, it is highly likely that the sudden reluctance comes from the cultural requirements in a collectivist culture that "solutions" to problems, even problems that seem personal and individual to those of us from the Global North, be discussed and managed with family and possibly with other members of the community before agreements are made.

Rather than exacerbating this type of problem, ODR applications may be uniquely suited to addressing them. For example, an ODR platform established in text form, asynchronously, easily allows for slower paced discussion, and the opportunity for the "principal" parties to discuss issues with a broader community, seek consensus, and return to the online dialogue much more comfortably than if they had been pushed to a resolution in a face-to-face session.

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and G. Cormick, "The Ethics of Social Intervention in Community Disputes", in G. Bermant, H.C. Kelman, and D.P. Warwick (eds.), *The Ethics of Social Intervention* 1978.

Another way of broadly conceptualizing cultural tendencies and their impact on dispute resolution is to think of the values, beliefs, and behaviors associated with "high context" and "low context" cultures.[9]

Members of low context cultures tend to take the view that words have concrete meaning, and that a high level of specificity is important when making agreements to end conflict. Low context cultures like the United States prize written agreements, parsed and massaged by lawyers to nail down exact details in an immutable form. Of course, the courts are filled with disputes about the words that parties put on the page, but still we prize directness and specificity – we want it all spelled out in detail.

Members of high context cultures can be very uncomfortable with directness and specificity. In high context cultures, a word or a phrase can, and most often does, carry a complex of meanings, understood by the members of the culture but opaque to those outside the culture. Low context parties want a written agreement that is so specific and clear that anyone picking it up anywhere at any time can understand the issue and the agreement. In high context cultures, a nod of the head by a respected party, in the context of the community and the discussion, can carry as much or more weight and be understood perfectly by members of the community, just as the painstakingly crafted contract can be understood in low context cultures. In fact, requesting a written agreement can be perceived as an insult or an indicator of a lack of trust in a high context culture.

In an ODR environment, this cultural value is clearly seen in the desire on the part of many who are involved in dispute resolution, both as third parties and as active parties, for "enforceability" in mediation outcomes. If the parties are dispersed and the agreement is not codified in a carefully written agreement, with some external source of enforcement, the low context party may be very uncomfortable and see the process as a waste of time. If there is a written agreement, with an external enforcement mechanism, the high context party may find the process daunting, unnecessary, or even insulting.

Because high context cultures are often also collectivist cultures, a very common problem can be caused by simply naming the issue. The individualist, low context, culture of mediation suggests that the way to start a session is to establish what happened between party A and party B, clearly define the issue, begin to discuss responsibility, and brainstorm options for resolution. In high context cultures, it is often an insult to directly name bad

9 For additional information regarding low and high context cultural traits see various works by E.T. Hall including: *Beyond Culture*, Anchor (1989); and *The Silent Language*, Doubleday (1959) and *The Hidden Dimension*, Doubleday (1966).

or improper behavior, particularly when the bad behavior is attached to an individual. Instead, high context parties are more comfortable with general discussions in which there is little or no labeling of wrongdoing and no direct confrontation. High context parties would rather discuss the situation generally and let the context of everyone's actions make clear the responsibilities of the parties. In an individualist, low context culture, we want the specificity and the contract so that our agreements are enforceable. In high context cultures, the general discussion will lead to understanding: everyone will know what happened and who was at fault, and the agreement, in the context that everyone understands it, will be enforced by the community collectively. In collectivist, high context cultures, Global North parties and mediators might not see a deal at all, but the community in a high context culture may see a very clear deal that can be strongly enforced.

As web video and audio improve, and high definition images and sound are more commonly available, it will be more possible for ODR sessions to be conducted like ADR sessions, with face to face discussions, etc. This may be very good, culturally, in some ways. A synchronous session with non-verbal feedback gives the third party the ability to adjust process quickly based on party feedback. On the other hand, it perpetuates the individualist impulse to gather people at the table who can make a decision and keep them there until they do so. The increasing use of mobile technology to make text based, asynchronous ODR platforms available may be good for allowing collective input and problem solving, but still puts stress on the individualist cultural need for specificity and enforceability.

3 ODR Caveats

Given the persistence of cultural differences and their impact on dispute resolution generally, there are three caveats that ODR system designers should keep in mind.

First, there is no truly "uni-cultural" mediation or negotiation environment. The mediator and the parties may all be of the same race, from the same country, of the same age, of the same social class, etc., but no matter how homogeneous the group at the table (or online) may appear there will always be, at some level, cultural divergence. Obviously, the more heterogeneous the group, the more one would expect to find overt cultural elements at work in misunderstandings and confrontations. Unfortunately, what we assume to be obvious may, in fact, mask a level of complexity that could drive apparently homogenous groups to have more cultural conflict than apparently heterogeneous groups.

Second, the culture of mediation is as important as the culture of the parties, and in some cases more important. Design of ODR systems should be undertaken with the understand-

ing that creator biases will influence choices made in the design process, and designers should be aware that maximum flexibility in the configuration of online spaces will increase the "culture-friendly" nature of ODR applications.

Third, designers and practitioners should be aware that online communication in general, including ODR, has created a "third path" into which participants from divergent cultures may flex when working together online. To some degree, the continuing pervasiveness of the Internet, and access to it through ever more "smart" mobile technology, has created a new culture, shared by what have come to be known as "netizens".[10]

4 Definitions of Culture

Given the expansion of interest in and development of ODR internationally, there are two basic definitions of culture that are more prosaic, and perhaps more utilitarian, than most academic definitions, but which may be widely useful.

The first is a definition for which I have no seminal reference: *culture is the way we do things around here*. This definition of culture has been cited by many practitioners working in organizational change and development, and it is a good shorthand way of thinking about the behaviors that attend to mediation and negotiation.[11] The second relates to the extent that cultural habits and judgments are overt and conscious. Roy Wilkins has said, "culture is what happens when we stop thinking".[12] These definitions take the notion of culture far beyond race, gender, and ethnicity, putting culture squarely in the center of behavior, relationships, and ways of thinking. In the words of a colleague, Janet Murdock, culture is "the operating system on which we load the *software* of our experience".[13]

Avruch warns that there are caveats involved in analytical thinking about the influence of culture in conflicts. It is possible to overplay or overestimate the role of culture in interpreting what is happening in a given conflict. He defines these situations as Type I or Type II errors. In a Type I error, the third party undervalues culture in the analysis of the conflict and thereby appears to have what Avruch calls "a tin ear".[14] In Type II errors, one overvalues culture and its impact on the conflict and the disputants, seeing problems where none may exist.

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10 Netizen is a combination of InterNET and citIZEN, used to denote a person routinely using the Internet.
11 For example, this definition is used in T. Deal and A. Kennedy, *Corporate Cultures*, Perseus Books 1987.
12 This definition was offered during an NPR interview.
13 J. Murdock, *Culture in Mediation*, a training manual used by the Northern Virginia Mediation Service (2010).
14 Avruch (2008), p. 362.

It is impossible to create an exhaustive list of Type I and Type II errors, just as it is impossible to create a full list of cultural differences, but there is an example of a context in which these errors can occur that illustrates a problem of particular importance to ODR practitioners. In face-to-face interaction the third party is able to track communication, picking up cues regarding indicators of racial or ethnic bias. Leaving aside for the moment the issue of the growth of synchronous online exchanges with video components, ODR conducted in an asynchronous, text based environment makes picking up cues regarding attitudes and biases is much more difficult. Monitoring communication is a troublesome task for any intervener, but the skills necessary in an online environment are different from the ones needed in a face-to-face environment.

There has been what I perceive to be a "fork in the road" for ODR, particularly as it applies to research and development of ODR tools. This split, it seems to me, can be seen as a differing set of demands for e-commerce and for more "traditional" third party work in social settings (family mediation, community mediation, etc.), the models for which are drawn from standard ADR practice. E-commerce operates with huge input, disputes that are similar in nature, and disputes in which many cases need only access to information to resolve. This is a "wholesale" approach, and is based on the willingness and ability of large number of culturally diverse parties to flex into the fourth party's structure. This is, obviously, an ideal environment for the "netizen".

More traditional practitioners face fewer cases, more diverse cases, and cases in which there is often some expectation of an ongoing relationship among the parties. There are other differences, but these are the ones that I think really drive research and development in ODR. This is a "retail" approach to ODR, and one where, due to the number of participants and the nature of the issues, individual cultures are more likely to emerge as barriers or problems. I have dubbed this the "Algorithm vs. Art" divide.

On the one hand, e-commerce (and to some degree, government or large multi-party venues) is pushing development of algorithm driven systems that can deal with massive input, sort cases, automatically offer information, and channel cases to live mediators when necessary. On the other hand, traditional ADR, after spending a lot of time borrowing applications from other endeavors (*e.g.*, group and team software) is beginning to push development of analytic and process tools designed to give live mediators information that assists in traditional settings.

eBay has been the poster child for algorithm driven systems, but the work that is currently being done through UNCITRAL to put together an international ODR process for e-commerce may drive the acceptance of algorithm driven systems to new levels. At UMass

Amherst an NSF funded project is beginning that will attempt to use data mining processes to uncover interests and barriers in the conversations that occur across the table in mediation, and in Israel there is work on applying artificial intelligence to the mediation process. There, two questions are driving research – in the short term, are there tools that can assist the mediator, and in the long term, are there systems that can replace the mediator?

Again, the point I am making is that stepping outside the world of online commerce and communication and into the world of social disputes brings with it a change in the perceived need for parties to flex out of their own cultures, and brings a different set of concerns and responsibilities for the third party.

Given these observations, and the fact that a variety of trans-national dispute resolution processes, including a number of online processes, have been successful in handling a wide range of commercial and Internet-based disputes, I think insisting that cultural differences among commercial disputants will radically affect the willingness of parties to use ODR systems is almost surely a "Type II" error. That is to say, arguing that cultural differences will doom commercial ODR to high failure rates, even where the disputant's cultures are quite different, is probably a case of seeing problems where none exist. However, not recognizing the impact of cultural differences in the application of online technology to social disputes is, I think, a Type I error. It also seems clear that cultural influences on ODR will have an impact on international and trans-national disputes, but will perhaps be even more important in intra-national disputes where race, class, sex, tribal affiliation, etc., are important.

The urge to create algorithm driven systems, and to create 'bespoke' systems for e-commerce, is not surprising. The growth of online dispute resolution is, as has been noted by many, tied to the growth of commerce and communication on the Internet. Ethan Katsh observed that:

> The decision by the National Science Foundation in 1992 to lift its ban on Internet-based commercial activity was highly controversial and enormously significant. After the ban's removal, disputes related to online commerce began to surface.[15]

15 E. Katsh, "Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace", *Lex Electronica*, (2006) Vol. 10, No. 3 (<www.lex-electronica.org/articles/v10-3/katsh.htm>), p. 3.

A driving force behind the development of online systems was the inability of existing legal systems to cope with disputes among parties geographically dispersed and with no real hope of developing a proximate relationship. As Colin Rule argues:

> Legal systems are tied to geography almost by definition […] It is obvious that transaction partners who meet on the Web can take little comfort from the redress options provided in the face-to-face world. You can't merely recreate offline judicial mechanisms online and expect them to work, with e-judges making e-rulings enforced by e-police running e-jails. The model doesn't work, on a fundamental level […][16]

The elements of commercial and purely online disputes exist in a range that is narrower than disputes generated within the family or the community, or among political groups, and lend themselves more to bespoke, model driven, applications. For example, if party A buys something online from party B, it is likely that a dispute, if one exists, will fall into some predictable categories: I did not receive the item; it was not what you advertised it to be; it arrived broken or damaged; you did not pay me, etc. One may be a father, brother, son, elder, leader, etc., in one's home culture, but when operating as a seller or buyer of goods and services over the Internet there is a role one assumes that brings with it expectations and behaviors different from the ones at work in the home culture.

Finally, there is a tacit acknowledgment among most of the disputants involved in transnational online commerce that, in lieu of a set of universal e-laws, e-judges, and e-police, both parties must, in order to resolve their dispute, find some mutually agreeable process to follow. Both parties step into a process that may not be what either party would prefer, but which is seen by both as an expedient way to reach the goal of resolving their conflict.

By analogy, one could think of athletes competing in international venues. The sports attire may not be what the individual athlete's culture would dictate, and in fact may be somewhat scandalous in the context of the athlete's home culture. The drive for individual achievement and reward may be at odds with the collectivist nature of the athlete's home culture. But, if the athlete wants to play in the international sports arena, there is an understanding that all athletes from all cultures will flex into the expectations and norms established for the competition. In essence, the athlete willingly steps out of her or his home culture and, for a time, steps into the culture of international sports, adopting the rules and norms associated with that context. Individuals who enter into international or trans-national commerce face much the same situation. They can either flex into the norms

16 C. Rule, *Online Dispute Resolution for Business*, San Francisco, Jossey-Bass 2002, p. 5.

and rules associated with online commerce and communication across borders, and the dispute resolution venues that come with those norms and rules, or they can choose not to play. Of course, this is an impossible dilemma. Given the direction in which international commerce has been heading over the last decade, no party, anywhere in the world, can reasonably choose *not* to play in the growing global marketplace.

It would be reasonable to assume that many of the concerns expressed in discussions of the impact of culture on face-to-face dispute resolution would apply to the application of online dispute resolution tools. Kevin Avruch has been a leader in the discussion on the role of culture in conflict, representing a school of thought that has argued against the marginalization of culture in conflict resolution approaches.[17] He argues that culture is an important variable in conflict, and he criticizes theorists who relegate culture to the status of a mute variable in conflict. Avruch argues that culture is present in the parties' and interveners' worldviews, and impacts their analysis and understanding of disputes and social conflicts. He writes that practitioners who take what he calls the "cultural turn" have learned to conceive culture as a) constituting different norms, values and beliefs for socially appropriate ways to "process" conflicts and disputes; b) affecting significant perceptual orientations towards time, risk or uncertainty, affect (in self and others), hierarchy, power, and authority; and c) comprised of different cognitive representations of frames such as schemas, maps, scripts or images bound up in metalinguistic forms as symbols or metaphors. According to this view, to conduct an effective conflict analysis of a dispute requires a cultural analysis to include the perceptual and cognitive features that can impact the communication aspects of conflict both for the parties and interveners.

If one accepts this approach, movement into more culturally sensitive venues presents ODR interveners with questions regarding their readiness to deal with cultural issues and the impact of the technology on the cultural elements of conflict. Among other things, it may be necessary to redefine the notion of cultural competency as a skill that gains additional importance when dealing with intercultural disputes online, and which may look very different from cultural competency applied in face-to-face settings.

If, however, one takes the view that increasing online activity will lead to the creation of Internet citizens with a "third" culture, the cultural elements of conflict analysis may become less important than in traditional, face-to-face conflict analysis.

17 See K. Avruch, "Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice", *Conflict Resolution Quarterly* (2003) Vol. 20, No. 3, pp. 351-371.

5 Basic Demands on ODR Systems

Regardless of the willingness to flex into systems that are not totally compatible with the parties' own home cultures, there are some basic attributes that ODR systems must have in order to be successful, even with parties operating in an online commercial environment, and these basic attributes differ between platforms developed for e-commerce and those developed or used for social disputes.

The need for trust in conflict resolution systems is related directly to the fact that, in order to engage in conflict resolution at all, it is necessary to step forward and, on some level, expose one's self, identifying the issues causing conflict and identifying the other party in the conflict. This is not without risk. A range of fears running from anxiety at actually facing the other party to anxiety regarding information being gathered, stored, and possibly used to cause harm, affect the willingness of parties to use ADR/ODR systems. It is, then, first necessary that parties in dispute resolution trust that they will not be harmed, either by the other party or by the use of the dispute resolution process itself.

In some locations, the trust in law and established systems does not exist, and by extension there is a tendency to distrust any process run by a powerful third party. Two examples will illustrate the problem. In Eastern Europe an ODR project sought to offer dispute resolution, including arbitration, to individuals involved in land ownership disputes. When asked about a pool of arbitrators who would be acceptable to the parties, the response was quick and clear: "we want lawyers from anywhere in the world but here." In Sierra Leone, an access to justice project with an ODR component sought to create intellectual property contracts for artists involved in community building and peace building. The local artists' initial response to rule of law and access to justice was, "we do not want contracts – contracts are just for the big guys to take advantage of the little guys."

In some way, both for online commercial disputes and for social disputes, the ODR provider must establish in her or his service a basic sense of utility and safety for potential users. Without the basic ability to trust the system, commercial disputants may be less willing to flex into the system, and social disputants may not be willing to risk attempts at dispute resolution.

This raises the issue of how parties feel they are being treated by the process, the other party, and the third party. Basic willingness to use dispute resolution systems is enhanced when parties feel they are respected and treated appropriately by the third party and the process. In a commercial context, the buyer/seller relationship and the assumed roles of the parties, drives the perception of appropriateness or respect. In social contexts respect

may be related to social status, age, sex, or other factors that vary widely from culture to culture.[18] Online applications generally treat the parties as equals, with no deference given to either side. In a buyer/seller relationship where the primary issue is likely to be tightly focused and oriented toward a monetary exchange, this likely is not a problem, even across divergent cultures. However, when conflicts move outside the commercial context, treating every participant as an equal may cause discomfort or a feeling of inappropriateness.

The desire to feel that communication is possible and appropriate, is a third constant that all dispute resolution systems must meet, no matter the context. Appropriate communication goes beyond the ability to understand the language being used by the other party, although that is a large factor in international online dispute resolution. Also involved in the concept of appropriate communication is the need for parties to feel that their voices, and their ideas, actually are being heard and understood by the other party. In fact, in some conflict resolution efforts, the ability to convince one party that he or she has been heard and understood may be all that is necessary to open the way to resolution.

In a set of experiments with new software developed under a US National Science Foundation grant,[19] participants were divided into groups and asked to use an asynchronous online application to develop a problem statement, a set of interests, and a list of suggested options for resolving the problem. Afterwards, they were asked to complete a survey in which two of the questions sought to discover if they felt "heard" by the other party and the mediator. In these experiments, over 80% of the respondents indicated that they felt heard by both the other party and by the mediator. The overwhelming majority of the test subjects indicated that they would be willing to use this ODR application again for other conflict resolution efforts.

In these early tests of the ODR prototype software, the application was trusted, the participants felt they were treated appropriately, and they were heard by the other parties. The result was a high level of comfort and a strong willingness to use the ODR application further. The participants were comfortable with technology, and were from the North American culture that created the standard models of dispute resolution on with the ODR application was built. Their level of comfort and their willingness to use the application further may well have been different if they had not been so culturally homogenous.

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18 See Amr Abdallah, "Principles of Islamic Interpersonal Conflict Intervention: A Search Within Islam and Western Literature", *Journal of Law and Religion*, Vol. XV, Nos. 1 & 2; and Mohammed Abu Nimer, "Conflict Resolution Training in the Middle East: Lessons to be Learned", *Journal of International Negotiation*, Special Issues on Conflict Resolution Training (Fall, 1997).

19 The primary researchers for the University of Massachusetts at Amherst are Leon Osterweil, Ethan Katsh, and Norman Sondheimer. Significant contributions to the preliminary results cited here were made by Lori Clarke, Leah Wing, Alexander Wise, Alan Gaitenby, Matt Marzilli, and Jane Miller.

Even if one accepts the idea that there are constants across cultures, and constantly required attributes for online and offline dispute resolution systems, there is still the problem of figuring out how to define and achieve trust, respect, and communication across cultures. What looks safe and fair to me may look risky and biased to you. This is where local cultural knowledge is truly key to the creation of successful ODR, and ADR, systems.

5.1 ODR as a Communication Channel

Marshall McLuhan once said: "Today, each of us lives several hundred years in a decade." A decade ago, ICT was beginning to make inroads into the way we communicate, but in the "several hundred years" since 2001, mobile devices and an explosion of communication channels have continued to reshape the way we communicate, with whom we communicate, and to some extent, about what we communicate. As I write this, a colleague is attending an ODR conference in New York City. During the proceedings he is blogging, posting on Twitter, and carrying on a dialogue with students in an online class who are spread from California to Afghanistan. The students, and everyone in the world with an Internet connection, have the ability to get real time information about what is happening at the conference, delivered from the floor of the conference via mobile technology, and they have the opportunity to suggest questions or comments that can be passed along by my colleague. The conference is culturally diverse, the class is culturally diverse, and the audience for the blog and Twitter posts is culturally diverse in a way that is invisible to the individual producing the information that is being posted. If he were addressing a group of people in person, he could assess their cultural status, react to feedback if he got it wrong, and adapt his message to the specific audience. However, in his current situation, there is no way to know who is reading his messages, nor is there a way to judge how the language he uses, the assumptions he makes about common knowledge, etc., are being received. This, I think, is a good description of the impact of technology generally, and of ODR technology specifically.

The opportunities or advantages driving the development and use of ODR technology are pretty well known. ODR allows for participation by a large volume of parties, certainly offering redress or interaction for many who have traditionally been disenfranchised. ODR shrinks distances and makes direct contact possible among far-flung parties, reducing the cost of dispute resolution as it adds convenience. And, importantly, the use of ODR can reduce the risk of participating in dialogue for parties who might be in physical or psychological danger in a face to face dispute resolution environment.

All this would suggest that ODR takes the current state of ADR, expands the opportunity for participation, and adds some benefits related to cost, convenience, and safety. It would be wrong, however, to think of ODR as an analog of ADR, merely a set of processes for addressing conflict that happen to have been offered online. Earlier in this chapter I noted research under an NSF grant in which it became clear that ODR in fact creates new process models distinct from face to face ADR. The introduction of ODR as a channel of communication has its own impact on the process of dispute resolution, and on the cultural influences that attend to various dispute resolution processes.

In the classic "fight, flight, or flex" response to conflict, the creation of ODR channels offers the possibility, perhaps the necessity, for parties from a wide variety of cultures to flex into the norms created by the use of an online system. I wrote earlier in this chapter about the culture of the mediator, and I think it is appropriate to speak of the culture that is created by shared use of online communication channels. Colin Rule has observed:

> We haven't seen any large scale automated systems emerge for […] neighbor disputes, or landlord-tenant issues. I think one of the big differences is that for eBay, all opt-in – everyone on eBay has already indicated that they are comfortable interacting over technology simply by logging onto eBay and bidding or selling, so when ODR solutions are put in front of them they don't even blink – this is the redress channel they expected, so they just get to it.
>
> […] will there ever be streamlined, high volume, software-based systems for […] offline disputes? My answer is, yes, one day there will be. But it may take 10 years. Technology will so permeate our lives that we will come to expect that it will be available to us in every area, including f2f disputes.[20]

If he is right, we are in the process of creating an online culture that may be the default into which we flex when confronted with the possibility of dealing with conflict online.

This would suggest that, while Type I errors may occur in the realm of ODR, we should be mindful that Type II errors – assuming cultural problems exist where they do not – may be the more common mistake as ODR systems and online communication continues to pervade societies globally.

20 C. Rule, May 2011, in a discussion forum with a graduate class in Online Dispute Resolution at Creighton University.