1

Introduction

It is the year 1532. Michael Kohlhaas, described as an honest and law-abiding Brandenburg merchant,[1] is on his way with his merchandise to an important trade fair, across the border, in the town of Leipzig. Unfortunately, he does not get beyond the border post to Saxony as the local squire has two of his horses seized and beats up his stable boy. Michael Kohlhass misses the fair and loses the opportunity to sell his merchandise. He seeks redress against the squire's arbitrary and unlawful conduct: however, the local court in the principality denies him any form of civil remedy. In his frustration, he gathers a gang of rebels and seeks revenge. He starts to burn down and pillage houses in the Saxon squire's town and eventually commits murder. As the story progresses, Michael Kohlhaas' crusade becomes more and more excessive. He loses his wife, his possessions and finally his life when he is arrested and executed some eight years later.

The story of Michael Kohlhaas and his frustrated quest for justice are proverbial in Germany, and reflect how, in an extreme case, an unresolved dispute can slowly and incrementally escalate to a cross-border bloodshed. If he had obtained a remedy at the outset, the bloodshed and destruction in the story could have been avoided. This story is relevant to the Internet, since the Internet brings a variety of persons interacting from different countries into conflict with each other, sometimes without access to redress through the state courts.

As the reader will be aware, Internet applications such as email, commercial websites (E-commerce) and marketplaces (e.g. online auctions), content-sharing websites (e.g. video- or photo-sharing websites), social networking sites (such as MySpace, Facebook or LinkedIn), collaborative websites (e.g. wikis and blogs) and virtual worlds (such as SecondLife or World of Warcraft) allow users to interact directly with each other and exchange and share information regardless of their physical, geographical

[1] The story is told in a novella by Heinrich von Kleist (1777–1811).

location. This allows individuals (whether as consumers or active participants) to make international transactions and to become international publishers. The Internet can thus be described as a powerful communications medium that allows data exchanges in various media formats between a wide range of different users situated in distant locations.

As such, the Internet has the potential to lead to a multitude of international cross-border disputes. The reader may imagine, for example, a defendant in state A collecting and using personal information uploaded on a social networking site by an individual in state B for advertising or harassment of the claimant, giving rise to a privacy infringement claim. The individual in state B may not have the means to pursue a claim in state A or to enforce it there. Another example would be an individual in state C uploading a video or photo on a website hosting and/or streaming this content worldwide, and a person in state D claiming that this activity infringed his or her copyright or that this content contained defamatory statements. A third example could be a consumer in state E buying goods or services from a website operated by a company established in state F, but the goods and services turning out to be defective. The reader may think of similar examples. A moment's search for other examples indicates that, in practice, an endless variety of cross-border Internet disputes can arise. Cross-border disputes pose a challenge for national courts, a challenge that this book is attempting to address.

This book examines how cross-border Internet disputes can be resolved fairly, outside the courts. The aim of the book is to develop a fair model for the resolution of such Internet disputes, piecing together different methods of dispute resolution into one jigsaw puzzle.

As a preliminary step to building this jigsaw puzzle, the book explores the meaning of fairness in dispute resolution. It then considers different methods and mechanisms for dispute resolution. It contains a detailed exploration of the role of payment service providers, and focuses on the roles played by mediation and arbitration. It considers the use of online technology for mediation and arbitration, obviating the need for the parties and lawyers to meet face-to-face and leading to more efficient information processing, thereby reducing cost and delay in dispute resolution (see Chapter 5 on online dispute resolution (ODR)). The book then describes existing ODR schemes and their advantages.

The next question is how ODR for Internet disputes should be structured. Binding dispute resolution and enforceability in cross-border cases are important for Internet disputes, and can be provided by online arbitration. Therefore this book proceeds to examine in great detail the legal

issues surrounding online arbitration. It looks at questions of applicable law and due process in arbitration, and covers the legal issues surrounding business-to-consumer (B2C) arbitration, comparing the European approach to that in the United States. The book also contains a detailed analysis of domain-name dispute resolution, and considers to what extent this dispute resolution model could serve as a model for other types of Internet disputes, and suggests improvements.

The reader will find in the concluding chapter a model of dispute resolution that encourages the use of online arbitration for Internet disputes but, where there exists a substantial power imbalance between the disputants (such as the traditional B2C paradigm), subjects traditional commercial arbitration to more stringent due process standards for disputes. Finally, the book concludes by discussing different options of how these stricter standards should be implemented in practice.

It is hoped that this book contributes to the existing debate on dispute resolution for the Internet by synthesising recent thinking on due process in arbitration with the problem of dispute resolution on the Internet and Internet regulation. The story is told from the viewpoint of Internet law and the specific challenges that the Internet poses for dispute resolution, but the reader will also find a very detailed, rigorous and practical analysis of ADR and arbitration law as relevant for the analysis of Internet disputes. The result is a theory of how the traditional arbitration model needs to be adapted to suit the challenges posed by the Internet, and how these adaptations can be implemented.

The research focuses mainly on English and US law.[2] These jurisdictions have been chosen as it is there that the debate on ADR and arbitration is most developed. In some instances the book also uses a wider comparative approach, drawing on the laws of other jurisdictions by way of example to illustrate particular points, where relevant. The law is up to date until 1 January 2008.

[2] Looking mainly at federal law and only some state law.

2

The concepts of fairness

> An appreciation of unfairness develops early. A child of five, perhaps younger, is likely to know the meaning of unfairness . . . What any child might have more difficulty in doing is to give expression to the converse notion, the idea of fairness. Unfairness shouts out. Fairness goes unremarked.
>
> (J. G. Riddall, *Jurisprudence* (London: Butterworths, 1999), 196)

2.1 Introduction

This book is concerned with the fair resolution of Internet disputes. It is therefore necessary to define procedural fairness at the outset.[1]

It is first necessary to distinguish procedural fairness from distributive fairness. The latter is concerned with the allocation of resources,[2] whereas procedural fairness is not concerned with the outcome of the allocation but rather the procedure of getting there.[3] Therefore, a theory on dispute resolution (such as the one set forth in this book) is about procedural fairness.

Fairness is an extremely amorphous and elusive notion, and it is frequently used in an emotive way. While most people have an instinctive idea about a procedure being 'unfair' or 'unjust', it is much more difficult to build a comprehensive concept of the converse: fairness in dispute resolution.

[1] The terms 'fair', 'just', 'fairness' and 'justice' are used interchangeably in this book – it seems that there is little difference in meaning; see also H. L. A. Hart, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994), 158: 'most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words "fair" and "unfair".

[2] Such as property rights and their limitation, contractual entitlements and obligations, social security, etc. Distributive justice is concerned with the fair allocation of resources.

[3] A. Tschentscher, 'The Function of Procedural Justice in Theories of Justice', in K. Röhl and S. Machura (eds.), *Procedural Justice* (Aldershot: Ashgate, 1997), 105–19, 105–6.

This chapter builds a concept of fairness using the building blocks of the traditional principle of due process,[4] and relates this to general theories of procedural fairness. In doing this, the theory of fairness adopted in this book leans heavily on Rawls' theory of justice. However, before looking at Rawls' theory and legal due process, the following section starts by deliberating on the elements of procedural fairness in a more general manner.

2.2 Definition of fairness in dispute resolution

By way of an overview, this section puts forward that procedural fairness in dispute resolution should consist of three main principles: (i) equal treatment; (ii) a rational approach to decision-making (adjudication,[5] such as litigation or arbitration) or to negotiation (and mediation); and (iii) effectiveness, which in turn consists of general access and mechanisms to counter-balance existing procedural inequalities between the parties (the 'counterpoise').

2.2.1 Equal treatment of the parties

The notion of equal treatment has been at the core of fair treatment.[6] A dispute resolution process that disadvantages one of the parties, that prevents only one of the parties from advancing any evidence or that involves a decision-maker who is biased towards one of the parties is self-evidently unfair.

While equal treatment is an obvious ingredient of fairness, it is only part of the picture. In addition, there must be a qualitative element to dispute resolution.

[4] The phrases 'due process' and 'natural justice' are used interchangeably with the same meaning. 'Due process' is more commonly used in the United States, and 'natural justice' more commonly in the English legal tradition; see H. J. Friendly, 'Some Kind of Hearing' (1975) 123 *University of Pennsylvania Law Review* 1267–317, 1276.

[5] The term 'adjudication' is used in this book as a neutral term to mean a form of dispute resolution involving a third party making a decision binding on the parties, and is to include arbitration, ombudsmen and litigation, rather than in the meaning of 'expert determination'.

[6] Riddall, *Jurisprudence*, 197.

2.2.2 A rational approach to dispute resolution

The second element of procedural fairness in dispute resolution is taking a rational approach to solving a dispute.

For Lon Fuller, the defining characteristic of adjudication, particularly compared to other forms of social ordering such as voting, is participation by presenting proofs and reasoned argument, and he therefore posits that the results from adjudication are subject to a high standard of rationality.[7]

Dispute resolution consists of fact-finding processes, problem-solving and law application.[8] These processes should be governed by logic and reason, so that no irrelevant considerations are taken into account.[9]

Applying the law in a rational manner also means that like cases should be treated in a like manner. Logic in applying and interpreting the law should determine when two factual scenarios are the same and should be treated the same and when two factual scenarios are different and should be treated differently.[10] Hence rationality implies a degree of regularity in the application of law.[11] This is encapsulated by the principle of the rule of law. H. L. A Hart points to this close connection between due process and proceeding by rule.[12]

Fact-finding processes should be in accordance with logic and be accurate, for a decision based on wrong facts is by definition unfair. Therefore a rational approach to dispute resolution additionally involves a degree of accuracy as to the factual basis of any decision.[13]

2.2.3 Effectiveness

A third element of procedural fairness in dispute resolution is the effectiveness of the procedure. Effectiveness means that a procedure leads to a decision or solution of a dispute. It consists of two elements: (i) access and (ii) the counterpoise.

[7] L. Fuller, 'The Forms and Limits of Adjudication' (1978–1979) 92 *Harvard Law Review* 353–409, 364, 366 and 370.
[8] As to the different types of dispute resolution and the processes they involve, see 4.2.
[9] W. Park, *Procedural Evolution in Business Arbitration* (Oxford University Press, 2006), 54.
[10] Hart, *The Concept of Law*, 159, 'Hence justice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated as "Treat like cases alike"; though we need to add to the latter "and treat different cases differently".'
[11] See also Fuller, 'The Forms and Limits of Adjudication', 380–1.
[12] Hart, *The Concept of Law*, 160.
[13] The *Oxford English Dictionary* accords the expression 'fair and square' the meaning 'with absolute accuracy, honestly and straightforwardly'.

Access

If a dispute resolution procedure is so cumbersome, drawn out and expensive that a decision or solution is never reached, or is reached only after excessive cost and delay, this would mean that such a procedure is not fair.[14] This is encapsulated in the saying 'justice delayed becomes justice denied'.

Counterpoise

While the principle of access looks at effectiveness of the procedure itself, the counterpoise takes into account obstacles to effective participation that are not inherent to the procedure but which arise from a party's inability to take part in the procedure on an equal footing. Thus the counterpoise is concerned with pre-existing power imbalances between the parties, and consists of measures to reduce them. Formal equal treatment of the parties by the judge/mediator/arbitrator and a rational approach to dispute resolution are necessary (but not sufficient) if the parties cannot participate in the dispute resolution process on an equal footing because of pre-existing procedural power imbalances. For example, if one party has no access to legal advice, no experience in litigation and no financial resources to fight a case, he or she would be less equipped to take part in a dispute resolution procedure than the other party.[15]

In particular, power imbalances are a problem for effectiveness since it is more likely that the dominant party imposes its terms on the weaker party.[16] Furthermore, the dominant party is less likely to agree to *binding* dispute resolution in the first place if the weaker party is the claimant.[17]

Therefore it must be recognised that there should be some counterpoise to pre-existing power imbalances for the purposes of dispute resolution to enable equal participation by both parties.[18]

[14] EU Recommendation 98/257/EC, Principle IV: 'Effectiveness'; see also the jurisprudence of the European Court of Human Rights (ECtHR) finding that excessive delay is a breach of the right to a fair trial under ECHR, Art. 6(1); see, for example, *Hentrich* v. *France*, A Series No. 296-A (1994) 18 EHRR 440.

[15] See 3.5 (power in dispute resolution). [16] See 6.4.2 (party autonomy). [17] See 8.2.

[18] M. Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide-Access-to-Justice Movement' (1993) 56 *The Modern Law Review* 282–96, 283; G. Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press, 2004), 128–9; L. Nader, 'Alternatives to the American Judicial System', in L. Nader, *No Access to Law* (New York, NY: Academic Press, 1980), 3–53, 29 and L. Nader and C. Shugart, 'Old Solutions for Old Problems', in L. Nader, *No Access to Law* (New York, NY: Academic Press, 1980) 57–102, 64–5.

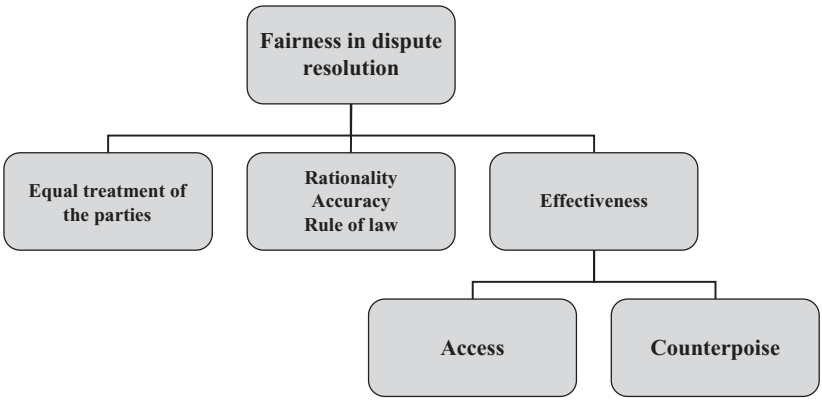

Fig. 1. Fairness definition: illustrating the main principles of fairness in dispute resolution.

2.2.4 Conclusion

This section has introduced a concept of fairness in dispute resolution consisting of three main principles, those being equal treatment, rationality and effectiveness. Effectiveness is concerned with access and a counterpoise to existing procedural inequalities, as illustrated in Fig. 1. All three principles must be met to some minimum level to achieve fairness in dispute resolution.

In the following sections, this conceptualisation will be deepened by synthesising the traditional notion of due process and Rawls' theory of justice and Habermas' ideas about fair participation.

2.3 Process values and forms of procedural justice

Having enumerated the principles that make up the concept of procedural fairness, it may be worthwhile to pause for a moment and consider process values more generally. Process values are legal principles governing procedures (such as a rule against torture, for example). Process values have been extensively discussed in literature under the question of whether they are important values in their own right or whether they are only important to the extent that they lead to a good outcome (such as a fair decision or a fair settlement). In other words, the question to be answered is whether process values are to be judged according to the results they produce or whether they have a value independent of any result they engender.

2.3.1 Process values

Some US scholars have argued[19] that particular features of legal processes are 'process values', independent of whether or not these features contribute to better outcomes of legal processes. They argue that an infringement against such values would be wrong, even if the infringement leads to a 'good outcome'. The rationale behind this argument is that its verity is reflected in the saying 'the ends do not always justify the means'. In other words, adherents to the theory of process values argue that certain features of legal processes must not be changed, even if they have no apparent positive effect on the outcome.

It is submitted that this vague concept of 'process values' is not particularly helpful.[20] The notion of 'process values', in fact, only describes the problem of balancing conflicting results caused by different processes. While the ends may not always justify the means, the means can *only* be judged by the effects they cause (balancing the intended results and the unintended effects). For example, if we imagine a (truthful) confession resulting from torture, it could (superficially) be argued that an unfair procedure (torture) has lead to a fair result (ascertainment of the truth), or that the apparently fair (intended) result does not make the unfair procedure fair. In fact, the torture has not only lead to a fair result but also to unintended unfair results, in the sense that the torture left the tortured person psychologically and physically injured, and upset the confidence in the legal system. Hence the positive and negative results of the procedure have to be carefully balanced. A recent case in 2003[21] has renewed the discussion about whether torture could ever be justified, and undermines the absolute nature of process values. The case involved a law student named Magnus Gäfgen, who kidnapped a boy from a banker's family for a ransom. When the police arrested and interviewed Gäfgen, they thought

[19] R. S. Summers, 'Evaluating and Improving Legal Processes – A Plea for "Process Values"' (1974) 60 *Cornell Law Review* 1–52; M. H. Redish and L. C. Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process' (1986) 95 *Yale Law Journal* 455–505, 482–91; G. Richardson and H. Genn, 'Tribunals in Transition: Resolution or Adjudication' [2007] *Public Law* 116–41, 120.

[20] D. J. Galligan, *Due Process and Fair Procedures* (Oxford: Clarendon Press, 1996), 9; even John Allison, who supports the notion of 'process values', admits: 'These values are a bit more slippery than instrumental ones such as accuracy, efficacy and efficiency . . . their amorphous nature also makes them less susceptible to consensus' ('A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest' (1995) 32 *American Business Law Journal* 481–540, 499).

[21] See the article by Jochen Bittner in *Die Zeit*: www.zeit.de/2003/31/urteil_280703?page=all [1 April 2008].

that the victim might still be alive and would have to be found very quickly to save his life. When Gäfgen showed reluctance to admit the location of his victim, the police threatened to cause him considerable pain. Gäfgen revealed the location of the victim and it turned out that he had murdered the boy. These illegal police tactics caused a loud outcry in Germany, and demands were made that torture should never be used, regardless of the circumstances. However, the discussion largely overlooked the fact that the threat of torture in this case was not used to obtain a confession for conviction (which would have been inadmissible in court) but in order to save another person's life. Balancing the boy's right to life with the right to bodily integrity of the accused may lead to the conclusion that torture could be justified in some very rare and extreme cases (albeit that it is far from clear whether torture is effective).

Legal processes are never an end in themselves but are designed to lead to particular results (such as, e.g., ascertaining the truth or the correct and fair application of the law to the facts). The aim of a fair procedure is not the process itself but the fact that it leads to a fair result, and it is the result by which the procedure is judged.[22] Where a process has been tainted with unfairness (e.g. a biased judge), the result will be unfair, since there is a *risk* that the outcome may have been affected, since it cannot be shown with certainty whether or not the outcome was in fact affected, and since trust in the integrity of the legal system has been undermined.[23] In other words, procedures have an instrumental or defining function: they serve the purpose of making the process and its result fair.[24] This cannot be more clearly expressed than through Rawls' concept of procedural justice, which will be discussed in the next section.

2.3.2 The Rawlsian concept of procedural justice

John Rawls has distinguished between four forms of procedural justice.[25] For the first two forms (perfect procedural justice and imperfect procedural justice) it is clear what the *fair* outcome of the procedure would be, and the purpose of the procedure is to achieve or approximate this outcome. In other words, for perfect and imperfect procedural justice it can be objectively ascertained *a priori* what a fair outcome is, and the procedure is *instrumental* in achieving this.

[22] See also Galligan, *Due Process and Fair Procedures*, 65.
[23] *R* v. *Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 (Divisional Court), and see 6.3.
[24] Galligan, *Due Process and Fair Procedures*, 62.
[25] J. Rawls, *A Theory of Justice*, revised edn (Oxford University Press, 1999), 74–5, 176.