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Eying the Horizon – The ODR way

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ABSTRACT

As long as humans exist, so will trade and disputes. It is not yesterday that ODR was invented. ODR is not an isolated phenomenon of recent times but a result of the evolution of disputes and dispute resolution. Initially, disputes occurred between parties with geographical proximity and for which traditional courts were the principal way of resolution. However, as people started to travel further distances and communicate from afar, disputes evolved as they increased in number, became more complex, and increasingly cross borders. Dispute resolution evolved in parallel and Alternative. ODR arose from the combination of ADR and the Information and Communication Technology (ICT) of the digital era. The article concentrates on explaining that what is Online Dispute Resolution. Further, if we start using this real yet intangible space, the various advantages it offers and the drawbacks related to practical challenges of communication, challenges regarding authenticity, data security, and confidentiality, and finally, challenges in enforcing ODR decisions.

I. INTRODUCTION

Since the evolution of mankind, it has taken roughly 1,95,000 years for the human race to colonize the planet and mark its presence in the farthest corners of the world. This long journey has witnessed massive developments in the field of transportation through different routes such as sea, road, and finally air. Once they have attained a sense of settlement, they desire to give rise to cultures, fight wars, form nations, raise families, and generally mingle and make merry.

Thus, the desire to conquer more space was only rivaled by the yearning to stay connected. The common carrier of these two contradicting wishes was the mode of transportation. In early times, physical presence was essential to communicate, which made transportation a crucial need of the hour. Numerous stories have been penned down about valorous riders and their loyal horses racing against time to deliver critical messages to ensure victory in war.

Thus, the mode of transportation was a context to a much larger need; the need to communicate. For agreements and disputes, for mundane conversations and diplomatic battles, everything was based on communication. Moreover, communication was based on physical presence.

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With the phenomenal progress of mankind, we arrived on the world stage with handy tools like phones and the internet, which really set us apart from other species. For the first time in history, the limitation to be physically present at a place to hold a conversation in real-time effectively ceased to exist.

People continued to go to offices, boardrooms, courtrooms, and meeting halls for decades despite this evolution. This physical presence was not borne out of the necessity to remain present, as was the case in the old times. People continued the old ways not because of changing environment but to embrace the change. We did it because we were accustomed to doing it. Internet is not a recent creation, and online meeting tools and techniques are not a result of last-minute readiness. These fascinating tools have been crafted for a long time. Yet, it took a pandemic to intrigue people and take notice of online mediums to conduct their business, including one of the most engaging activities humans indulge in, dispute resolution.

II. THE DIGITAL ERA

(A) What is Online Dispute Resolution?

It is difficult to attribute an autonomous definition to ODR because of the fast pace of development in the field of information technology and because of the peculiar balance of the synergy between traditional ADR and ICT. Moreover, the variety of terms used to describe the field of ODR might sound confusing even to the most familiar with the field; some include: "Technology mediated dispute resolution" (TMDR), "Electronic ADR" (e-ADR), "Online ADR" (o-ADR) and "Internet Dispute Resolution" (IDR). Related terms are "virtual ADR", "cyber mediation" and "cyber arbitration". ODR was created from the combination of ADR and ICT as a method of resolving disputes that were arising online, "and for which traditional means of dispute resolution were unavailable or inefficient".[2]

ODR has been a broad term that has covered many forms of dispute resolution incorporating the use of the Internet and other information technology as part of the dispute resolution process. Scholars initially defined ODR exclusively as ADR complemented with ICT tools; "however, part of the doctrine incorporates a broader approach including online litigation and other sui generis forms of dispute resolution that ICT assists".[3] In this context, the term "online ADR" is used to refer to those methods involving primarily ADR methods assisted largely by ICT. However, in a stricter sense, the term "Online Dispute Resolution" (ODR) is used

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[2] KATCH Ethan & RIFKIN Janet, Online Dispute Resolution: Resolving Conflicts in Cyberspace (San Francisco: Jossey Bass), 2001, p. 9

[3] KAUFMANN-KOHLER Gabrielle and SCHULTZ Thomas, Online Dispute Resolution: Challenges for Contemporary Justice (Kluwer Law International, The Hague), 2004, p.

internationally to describe different forms of online extrajudicial dispute resolution. The key difference between ADR and ODR is that the medium of interaction is via online[4] mode instead of physical presence. ODR is an advanced and evolved form of ADR fabricated to the Cyber-world's specific conditions, a branch of dispute resolution that differs from other non-judicial ways because of its innovative and advantageous use of application development and computer networks for the resolution of disputes[5].

ODR methods are "ADR provided online, meaning that they are alternatives to litigation and to state justice, but not all methods are online ADR".[6] ADR, too, is a debatable concept. In England and Wales, ADR is considered a method for resolving disputes other than litigation. By contrast, in the United States, ADR is generally referred to as "non-adjudicative" dispute resolution, excluding arbitration and other adversarial proceedings. In ODR, there is a wide range of ODR mechanisms, similar to that of ADR; however, ODR methods can be categorized in the same way as ADR methods.[7] Consequently, although in a broad sense of the term, there is a numerous selection of ODR mechanisms, amongst them negotiation, mediation and arbitration are the most commonly practiced as well as the basis for most platforms[8].

However, although ODR is based on ADR, the combination of ADR methods with technology is not a mere transplant but a transformation of the underlying ADR processes making ODR unique and with endless possibilities.

III. ADVANTAGES OF ONLINE DISPUTE RESOLUTION

A. Time savings

One of the most exceptional advantages of ODR is the remarkable amount of savings in terms of money and time. The traditional techniques in ADR were less time-consuming and costly than litigation. On the other hand, ODR is even less time-consuming and costly than traditional ADR. The parties can start the resolution process almost immediately instead of waiting months or at least weeks before their case goes to trial or before they agree to all the details (such as selecting the venue, the ADR professionals, and traveling to the meetings) for the

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[4] HANG Q. Lan, Online Dispute Resolution Systems: The Future of Cyberspace Law, Santa Clara Law Review, vol. 41, 2001, p. 846.

[5] CALLIESS Gralf-Peter, Online Dispute Resolution: Consumer Redress in a Global Market Place, German Law Journal, vol. 7, 2006, p. 647.

[6] SCHULTZ Thomas, Online Dispute Resolution: an Overview and Selected Issues, United Nations Economic Commission for Europe Forum on Online Dispute Resolution Geneva, 6-7 June 2002, p. 2

[7] SCHULTZ Thomas, BONNET Vincent, BOUDAOUD Karima, KAUFMANN-KOHLER Gabrielle, HARMS Jürgen and LANGER Dirk, p. 2.

[8] BETANCOURT C. Julia and ZLATANSKA Elina, Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward? International Journal of Arbitration, vol. 79, Is. 3, 2013, pp. 256-264.

ADR procedure to begin. ODR is much faster and can be initiated almost instantly after the dispute arises, "since a virtual meeting room can be opened instantaneously and a neutral can be engaged from anywhere around the world". In the current scenario, multiple and easily accessible options such as 'broadband connections', wire-less internet, and smartphones provide the ability to conduct instantly high-quality videoconferences, saving considerable time and money. ODR systems can instantly provide a virtual room for parties to communicate at any time and from anywhere in the world and work towards resolving their dispute.[9]

B. Cost savings

ODR systems are quite cost-effective. They can provide significant cost savings compared to litigation and traditional ADR, both of which can be quite expensive.[10] ODR is extremely economical, and this is often cited as an advantage in choosing these methods. The cost for those involved in an online dispute resolution varies depending on the nature of the dispute, the technology utilized, the complexity of the dispute, and the time needed to reach the resolution. There are no traveling expenses involved in ODR, which ultimately reduces the overall cost, making the entire process inexpensive. ODR processes subtly eradicate the complexities such as multiple geographic locations or different time zones, especially for those who find it difficult to agree upon a time and place to meet without travel and other related expenses.[11]

C. Access to justice

ODR is better suited for cross-border transactions, as it eliminates the problems of transition to certain places since it easily navigates between borders, with transactions made regardless of the distance, separating the parties to the dispute.

ODR provides access to justice by removing the problem of bias, a problem that cannot successfully be addressed in traditional face-to-face ADR. Although impossible in traditional ADR, online dispute resolution creates an environment where bias can be removed as a factor in building an agreement between two disputants since it is not immediately apparent in an online interaction if the other party or neutral is male or female or old or young. Finally, ODR provides access to justice by reducing power imbalances between the parties. Especially by communicating through the asynchronous and textual medium of e-mail, parties can overcome

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[9] MOREK Rafal, Online Arbitration: Admissibility within the current legal framework, 2007, available at www.odr.info/Re%20greetings.doc

[10] G. H. Friedman, (1997) Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities, Hastings Communications and Entertainment Law Journal, vol. 19 pp. 695- 712.

[11] WANG Fangfei Fa ye, Online Dispute Resolution - Technology, management and legal practice from an international perspective, (Chandos Publishing: Oxford · England), 2009. P.28

the power imbalances and communicate more freely than face-to-face communication. Furthermore, the internet medium provides a neutral forum for the procedure, and "the 'conference table in cyberspace' denies a dominating party the potential to exploit the 'home court advantage'"[12]

D. Convenience

Using ODR for the resolution of disputes is not only less time-consuming and inexpensive but also offers parties a solution in a way that provides convenience and ease. The role of technology replaces meetings with communication that relies on electronic transmissions, achieving a significant reduction in cost and time[13] and providing comfort and accessibility, giving easy access from home or the workplace, thereby eliminating time constraints. Convenience relates to availability. Initially, ODR makes it easier to start the process just by clicking a button. Users can initiate the process and be provided with all the necessary information without having to resort to visiting some office of the party providing it while being restricted to working hours. The entire process can be organized and regulated from the comfort of the party's home 24 hours a day, 7 days a week, by finding the appropriate site and filling out a web form or writing an e-mail.[14]

E. Flexibility

Besides the convenience and the faster decisions, ODR allows for greater flexibility and more creative solutions. Moreover, the informal nature of ODR builds a trusting environment that fosters settlement and encourages honesty, where parties start working on the resolution of their disputes immediately and consequently have a better chance of voluntary compliance.

The flexibility of ODR allows parties not only to choose the most convenient procedure but also, as in ADR, select the most convenient third neutral, who can also be an expert of a specific field. In addition, the flexibility of ODR relates to the use of various ICT tools for the resolution of the dispute, something which is not possible in offline dispute resolution.

Furthermore, there is greater flexibility during the resolution process. During the process, the parties have the ability to simultaneously conduct any necessary research by going online and

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[12] BORDONE C. Robert, Electronic Online Dispute Resolution: A Systems Approach - Potential Problems and a Proposal, Harvard Negotiation Law Review, vol. 3, 1998, p. 176.

[13] KLAMING Laura, VEENEN V. Jelle, LEENES Ronald, I want the opposite of what you want: summary of a study on the reduction of fixed - pie perceptions in online negotiation. ''Expanding the horizons of ODR'', Proceedings of the 5th International Workshop on Online Dispute Resolution (ODR Workshop '08), 2008, pp. 84-94

[14] MELAMED Jim and HELIE John, The World Wide Web Main Street of the Future is there Today, 1999, available at http://www.mediate.com/articles/jimmjohn.cfm

verifying any received information, and share the findings with the other parties.

Furthermore, the parties have the ability to use information processing tools such as electronic document management and information-retrieval systems, which allows them to process information faster, and more efficiently, reducing delay and costs and making the process more effective than it would be in the offline world. [15]

IV. THE CHALLENGES OF ODR

By substituting the real world with the virtual world, ODR also presents several new difficulties compared to traditional forms of alternative dispute resolution. This happens predominantly because ADR cannot easily be replicated online since Cyberspace is not an actual representation of the physical world. The drawbacks relate to practical challenges of communication, challenges regarding authenticity, data security, and confidentiality, and finally, challenges in enforcing ODR decisions.

A. Practical challenges

The practical challenges for ODR are related to the ability of the parties to participate in the online resolution just as they would in any of the traditional methods. These challenges include matters like the ability of the parties to have access to the necessary equipment, the ability to develop the skills to make proper use of that equipment, and finally, the ability of the parties and practitioners to adjust to the changes resulting from the transportation of the resolution to the virtual world.[16]

i. The literacy of participants

First of all, to take part in ODR, one must have access to a computer and the Internet. Although it becomes increasingly easier to gain that access, the unfamiliarity of the parties using the internet and the disparity in the level of infrastructure of communication and proper use of electronic equipment are a few of the significant disadvantages of ODR. This problem is also known as the digital divide.[17]

ii. Lack of face-to-face encounters

One of the greatest drawbacks of ODR is the lack of face-to-face encounters. It is argued that

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[15] COM (2002) 196 final, Alternative Dispute Resolution for Online Consumer Transactions, Public Workshop, Federal Trade Commission / Department of Commerce, June 6-7, 2000. Green paper on alternative dispute resolution in civil and commercial law, presented by the Commission.

[16] MOREK Rafal, Online Arbitration: Admissibility within the current legal framework, 2007, available at www.odr.info/Re%20greetings.doc

[17] RULE Colin, Online Dispute Resolution For Business: B2B, E-commerce, Consumer, Employment, Insurance, and other Commercial Conflicts, (John Wiley & Sons), 2002.

in traditional ADR, where the parties are physically present during the procedure,[18] the process is more efficient because there is a direct two-way information flow.[19] On the contrary, online communication cannot fully replace face-to-face conversations and therefore lacks the ability to promote important values of the dispute resolution process.[20]In an online setting, communication is distributed in time, and the asynchronous nature of some forms of online communication, such as e-mail, can create an uncertain rhythm. An e-mail sent by one party may be answered in a few minutes, days, or weeks without knowing when.[21]

B. Authenticity, data security, and confidentiality

Though an easy process, ODR also encompasses certain major concerns such as the authenticity of identities and documents, the security of electronic communication during the exchange of documents and data (for instance, through the exchange of e-mails)[22] or during discussions conducted through videoconference,[23] and the confidentiality of the procedure. The main concern is that users cannot be sure that the data sent and received in the virtual world will not be tampered with or become accessible to unwelcome eyes. In addition, ODR parties need to be assured that their communications are protected from external parties to encourage open participation.

ODR is not a neoteric invention. In many senses, ODR was not born out of the compulsions and challenges of the pandemic. However, at present, the system of Online Dispute Resolution is perfectly placed to supplant (if not replace) our existing dispute resolution frameworks.

Online space is unique. It offers something which was never available to us before. Unlimited Space with light speed access, online space is real and yet intangible. It is a value-neutral platform, and yet it can be used to resolve disputes. Moreover, the online platform has brought a paradigm shift to the notion of convenience as any person having access to the platform can have so from around the globe, 24 x 7 and, needless to say, instantly.

As long as humans exist, so will trade and disputes. So it only makes sense to carry the ODR

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[18] KATCH Ethan & RIFKIN Janet, Online Dispute Resolution: Resolving Conflicts in Cyberspace (San Francisco: Jossey Bass), 2001. p. 705, 714.

[19] EISEN Joel, Are we read y for mediation in cyberspac e, Brigham Young University Law Review, vol. 4, 1998, pp. 1305-1359.p. 1310.

[20] KATCH Ethan & RIFKIN Janet, Online Dispute Resolution: Resolving Conflicts in Cyberspace (San Francisco: Jossey Bass), 2001.

[21] The great paradox of ODR is that it requires an electronic distance for parties, while ADR is usually a verbal dispute resolution and is designed to engage participants in a direct face to face communication. See EISEN Joel, op. cit., p. 1310.

[22] CHOSH K. Anup, E-Commerce Security: Weak Links, Best Defenses, (John Wiley and sons), 1999, p. 98.

[23] ZEKOS I. Georgios, Issues of Intellectual Property in Cyberspace, Journal of World Intellectual Property, vol. 5, 2002, p. 233.

mechanism from strength to strength. Institutions that people look up to, like the Government, Big Corporations, and Organizations, should become the baton bearers for using ODR. Important stakeholders like Judiciary and Litigants should extensively use the platform. Finally, IT professionals should invest time and effort and make this platform a secure, impenetrable digital fortress.

As they say, no one can stop something from happening when the time is right.

Well, the idea of Online Dispute Resolution is waiting its turn for a long time to see it happen.

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