

Digitalized Disputes for Online Dispute Resolution and their Legal Basis

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Annotation: The jurisdiction of online dispute resolution may involve the application of the conflict of laws rule to the server location or registration of the corresponding domain. If it is a company, then the place of registration is that of the company. It is ideal if the arbitration centre associated with the ODR platform uses its jurisdiction and the approval of the decision by the centre itself to ensure its execution. ODR can gain the most popularity and relevance within the framework of smart contracts. In this regard, it is necessary to adopt an international convention or amend the New York Convention as well as recognise national laws and the UNCITRAL Model Law, a rule on the recognition and enforcement of ODR awards. Also, online arbitration needs to be described, the procedure is only online, and there are parties and arbitrators in it. In digital arbitration, everything is done by a computer and through artificial intelligence.

Keywords: ODR, ADR, E-commerce, WIPO, SIAC and ICC, Arbitration and Conciliation Act, Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 and the Rome Convention on the Law Applicable to Contractual Obligations, Electronic Consumer Dispute Resolution (ECODIR).

ODR procedures involve the filing of electronic documents in which the parties can use encryption or electronic signatures to protect the integrity of documents and authenticate transactions. Typically, when parties turn to ODR for help, a service provider allows for the appointment of a neutral panel of judges or panelists. Parties generally prefer structured and clear procedures where the authorisation process is simple and well defined. Institutions such as WIPO, SIAC and ICC have positive track records in resolving online disputes through mediation or other alternative methods of dispute resolution.

When filing a complaint, the applicant seeks compensation or another remedy, and the defendant, if he agrees to participate in the process, provides his detailed response. The process may or may not include an oral hearing via teleconference software or video conference rooms. Sometimes, automated software could be used to resolve a dispute without the need to appoint a third party.

Typically, the ODR service provider serves as the administrator and infrastructure provider rather than a judge who resolves disputes. ODR is known for its efficient and cost-effective dispute resolution that also reduces irritability between parties.¹

The origins of ODR can be traced back to 1996, when the Virtual Magistrate Project was created to offer an online arbitration system for resolving electronic defamation issues. For instance, the University of Massachusetts Online Ombuds Office resolved a website dispute with the owner of a local newspaper

¹ Rustambekov I. (2020). Some Aspects of Development of Private International Law in the CIS Countries. *LeXonomica*, 12(1), 27-50. <https://doi.org/10.18690/lexonomica.12.1.27-50.2020>.

associated with a copyright infringement through mediation.² Since 1999, many ODR service providers have actively addressed disputes in both the public and private spheres involving public and commercial entities.³

To provide another example, in India, ODR originated from alternative dispute resolution (ADR) processes in which family disputes were resolved by srenis (businessmen doing the same business) and parishads (a group of men with legal knowledge). In other jurisdictions, ODR was also based on ADR practices, adding technologies to the ADR process to make it more efficient and convenient for the parties. In India, the use of ADR techniques is explicitly encouraged in the Nyaya Panchayat, Lok Adalat, Arbitration and Conciliation Act 1996, based on the UNCITRAL Model Law on Arbitration, providing statutory arbitration among other initiatives. The Indian legal framework supports ODR, including Section 89 of the 1908 Civil Procedure Code, which promotes the use of alternative dispute resolution between parties. Likewise, Rule 1A of Bylaw X empowers the court to direct the litigants to select any ADR method to resolve disputes. In addition, the Information Technology Act 2000 legally recognises the use of electronic signatures and electronic records. Recently, in the State of Maharashtra v Dr Praful B. Desai,⁴ the Indian Supreme Court ruled that video conferencing is an acceptable method of recording witness statements. In the case of Grid Corporation of Orissa Ltd v AES Corporation,⁵ the Supreme Court ruled: 'When effective consultation can be achieved through electronic media and remote conferencing, there is no need for two people who need to act in consultation with each other to necessarily sit together in one place unless required by law or by the basic agreement between the parties'.⁶

Thus, the legal framework, as well as the precedents set by the Supreme Court of India, support the use of technology to resolve disputes and encourage the use of ODR practices.⁷

Cost and time efficiency are typical characteristics of ODR, as opposed to litigation, which is a time-consuming and expensive method of resolving disputes. Brams, S.J. and Taylor, have clearly stated: 'The difficulty of using traditional dispute resolution methods in low-value cross-border disputes has led to an interest in cheap cases, methods of resolving disputes between jurisdictions'.⁸

Jurisdictional issues have been studied in depth by western experts. In particular, Johnson examined the topic of borders on the Internet, countries in which the domain name is registered under the jurisdiction of the court.⁹

In cyberspace, there are no uniform laws for ODR, which creates challenges regarding the application of substantive and procedural law to the resolution of electronic disputes. To decide on the jurisdiction that applies to online disputes, the effects test and the Zippo sliding scale approach can be used. In private international law, the place of performance of a contract is an important parameter for determining the substantive law or jurisdiction that will be relevant to the circumstances of the case. Consumer protection law provides stronger consumer protections in Europe and the enforcement of binding legal regulations in lex

² See Centre for Technology and Dispute Resolution, Online Ombud's narrative 1: website developer and the newspaper at <http://www.ombuds.org/narrative%201.html>

³ See United States ODR provider at <https://www.adr.org> In Australia ADR online at <http://www.adr.online.org> etc.

⁴ Maharashtra v Dr Praful B. Desai (2003) 4SCC 601

⁵ Grid Corporation of Orissa Ltd v AES Corporation 2002 AIR SC 3435

⁶ See also Maruti Udyog Ltd vs Maruti Software Pvt Ltd Case No. D2000-1038 at <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1038.html>.

⁷ B Mokhinur A THOROUGH REVIEW OF THE COMMON LAW CONCEPT OF " ARBITRARY TERMINATION" AND " UNFAIR DISMISSAL"(including DIFC&ADGM- Review of law sciences, 2020.

⁸ Brams, S.J. and Taylor, A.D 1996, Fair division from cake cutting to dispute dispute, Cambridge university press, Cambridge.

⁹ Johnson, D.R. (1996) Law And Borders – The Rise of Law in Cyberspace // Stanford Law Review. pp. 34. <https://files.grimmelman.net/cases/JohnsonPost.pdf>

situs, some of the challenges stemming from the lack of uniform cyber laws. Could there ever be an International Court of Justice that resolves disputes of any nature by enacting homogeneous cyber laws regulating the ODR process and procedures? Here, I draw an analogy between ODR and the application of *lex mercatoria* to international trade. It will be beneficial, though homogeneous, to formulate laws on ODR or the basic legal principles of ODR legislation and practice. Major international legislative texts, treaties, conventions and national initiatives can add certainty to ODR law and practices in cyberspace. In fact, this mission is thought to be halfway complete, as several initiatives have been implemented to bring more clarity to ODR. These initiatives include the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 and the Rome Convention on the Law Applicable to Contractual Obligations 1980. In 1999, the Organisation for Economic Co-operation and Development (OECD) published its guidelines for consumer protection in the context of electronic commerce. The guidelines stipulate that the consumer should have access to fair and cost-effective means of resolving disputes and explain the importance of information technology when using ADR systems.

In the European Union, letter E of Article 17 of the Trade Directive provides that, in the event of an electronic dispute, Member States are required to ensure that parties are not prevented from using ADR procedures, 'including appropriate electronic means', to resolve a dispute. The National Alternative Dispute Resolution Advisory Board developed standards for ADR in 2001 and established ODR guidelines in 2002.

Thus, some legislative initiatives aimed at promoting ADR and the use of technology to provide rapid dispute resolution services already exist. This is an issue of introducing new ideas and solutions to promote and optimise ODR laws, including the legal principles proclaimed by international initiatives and fair adaptation, which will lead to the unification of ODR legislation and practices.

Some critics, such as Drake and Moberg and Wilson, Aleman and Leatham, have expressed fears arising from a lack of personal interaction between the parties of the dispute. Physical presence, body language and tone of conversation are important when resolving a dispute. Along these lines, Goffman developed 'face theory', which explains that the process of resolving a dispute and its success directly depend on the communication between the parties and any negative or positive statements made during communication.

Nevertheless, in most cases of ODR, the parties are not familiar with one another, and a face-to-face meeting between the parties may reduce the likelihood of a dispute resolution. In ODR, multiple technical methods, such as automated software, are used to resolve disputes between the parties, and the parties may not be required to participate in person or even in video conferencing hearings in which the parties can exchange negative comments. If the theory of faces can be correctly applied to ODR, hostility between the parties diminishes, as in many cases, automated online processes help to resolve disputes. Additionally, if any language or cultural barriers exist, it is common practice to use translation and interpretation services during ODR. In terms of enforcement, critics may be of the opinion that when ODR is not binding, it is useless. However, in my opinion, if the optional ODR is successful and results in a binding settlement agreement, it is enforceable in court. ODR also offers fair solutions, as it recognises the principles of fairness and natural justice in addition to statutory rules for resolving a dispute.

Over time, discussions about 'self-regulation versus government interference' in ODR have arisen. Self-regulation has been challenged by consumer groups due to a lack of credibility, leading to the role of government in the ODR process. Initially, the American Arbitration Association, ICC and Better Business Bureau laid out principles for ODR regulation and emphasised the use of the seal of confidence.

Companies such as Verisign and TRUSTe were then formed, and SquareTrade and BBB Online implemented the concept of trust marks as a self-regulatory initiative in ODR practice. At the government level, Electronic Consumer Dispute Resolution (ECODIR) and other ODR projects were implemented as measures of e-governance, as ODR proved to be an effective means of dispute resolution. Schultz was of the opinion that the role of the state is more important than the self-regulatory approach. According to Schultz, 'symbolic capital' – that is, the social reputation of the ODR provider – lends credibility and authenticity to the ODR process that the government is able to provide. The government also provides financial assistance to ODR projects and assists in setting up the technical and administrative infrastructure needed to perform ODR. In addition, Schultz suggests that accreditation is imperative when providing ODR services, as well as acting as a certifier and clearinghouse, helping parties select a service provider, facilitating electronic filing of forms and overseeing the ODR process. He also advocated for an online appeal system of verifying decisions by ODR providers that will provide greater transparency and accountability in the ODR system. Likewise, Rule states: 'To a large extent, the government is the ideal place to resolve disputes because the government has a strong incentive to resolve disputes so that society can function normally. The government is also a good place to resolve disputes, as it is usually not interested in the outcome of most of the issues that are entrusted to it'.

In the Netherlands, the e-commerce platform is a joint initiative of the business community and the Dutch Ministry of Economy, which developed a Code of Conduct for Electronic Commerce.

In Singapore, e-ADR has been launched and is jointly administered and controlled by the lower courts of Singapore, the Ministry of Law, the Singapore Mediation Centre, the Singapore International Arbitration Court Centre, the Trade Development Council and the International Economic Development Council to resolve commercial disputes. Electronic courts in India also seek to promote ODR, judicial review and judicial ODR using online resources, and the CBI (Central Bureau of Investigation) is in the process of establishing electronic courts.

An analysis of the issue of digital arbitration and its jurisdiction in electronic dispute resolution showed that digital arbitration can be considered on the basis of artificial intelligence and become an effective mechanism for resolving disputes arising primarily on the Internet and with regard to smart contracts. Additionally, a proposal on digital arbitration jurisdiction has been developed to introduce special conflict-of-law rules on the subordination of the relevant domain to the law of the place of registration. It was also concluded that the introduction of digital arbitration by existing arbitration centers and their subordination to their jurisdiction is an ideal situation, and the formalization of decisions by the arbitration center will facilitate its implementation.

After reviewing above mentioned approaches, we have come to believe that ODR growth can be realised to its fullest potential through public-private partnerships. The role of government will be to instill trust and credibility, and the private sector will contribute to cutting-edge technology. In public-private partnerships, ODR best practices can be successfully established and implemented, and greater awareness and participation in the ODR process can be realised. In the US, Australia, New Zealand, Singapore, Canada and the UK, special funding provided by the government may help to initiate ODR projects. Conflicting rules regarding 'law of location', 'law of structured place' and 'law of damaged place', which are usually used to define rights in private international law, have different meanings when applied to legal disputes arising on the Internet in accordance with the criterion 'server location'.¹⁰ Server location is the location of the physical

¹⁰ Leanovich, E.B. 'Problems of legal regulation of Internet relations with a foreign element'. Electronic resource: http://evolutio.info/index.php?option=com_content&task=view&id=385Itemid=51

communications system (hardware and software), and the physical location of the server hosting the information (website) cannot be considered as a criterion for this type of dispute. The location of the equipment qualifies as the location of the server if the tools and software installed on it belong to a specific person and are used to perform activities that are critical to legal disputes that arise on the Internet.¹¹

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