

Preface

Online Dispute Resolution: Issues and Future Directions¹

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Any attempt to explore the distinct features of the emerging Internet economy must highlight three foundational elements. The first element is the decentralized nature of online information and the speed with which information can now be disseminated around the world. This pervasive, 24-hour, universal access to online information is a fundamental shift in the world community that is a direct outgrowth of the expansion of global information networks. Some existing powers have attempted to slow or control the spread of information in this new reality, but they have had little success. The challenge now is to shape these new capabilities so that they can work in harmony with, and not in opposition to, the social processes at work in the physical world.

The second element is the extent to which the Internet has become the primary channel for commercial and financial transactions. E-commerce is now the default arena for the delivery of many trade, investment and related services. While initially there was great concern that online environments offered less security than face-to-face channels for financial information, most now understand that financial and transaction data can be even better protected through secure technology. The emergence of fundamental online institutions to support these new realities, like e-banks and e-brokerages, is an example of the profound transformation that has taken place in the commercial world over the last decade.

Third is the emergence of new types of dispute resolution in cyberspace. In the face-to-face world, rule-based litigation is usually the default means of resolving disputes. Initially it was thought that the internet would follow the lead of the physical world, instituting cyber-courts with e-judges and e-police. Once that strategy was attempted, however, its shortcomings were starkly apparent. Rule-based adjudication systems are difficult to sustain in environments where identity is fluid, jurisdictions overlap, and enforcement is extremely difficult. As a result, new ideas about how to approach redress in cyberspace are emerging that leverage instead of combat the fundamental characteristics of information and communications technologies. These ideas have been broadly grouped into the new field of online dispute resolution, or ODR. ODR designers are working from the foundation of face-to-face alternative dispute resolution techniques, like negotiation, mediation, and arbitration, to build redress options for cyberspace that are enhanced by technology as opposed to undercut by it.

This new field of ODR has several different channels of development. At its inception ODR referred only to efforts to replicate face-to-face dispute resolution processes in cyberspace. The negotiation, mediation and arbitration tools built in this first wave of development mimicked face-to-face processes as closely as possible. If face-to-face mediators began with uninterrupted storytelling, for example, the online process was designed to begin the same way. The first ODR services focused primarily on consumer e-commerce disputes, and most platform designs fit neatly into this typology. The rationale behind these early ODR programs was to leverage the cost-efficiency, accessibility, detemporalization and depersonalization of online interaction while preserving all of the procedural advantages presumed to be perfected in existing forms of face-to-face dispute resolution.

¹ Exclusive views of the author and do not constitute those of the Secretariat.

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Over time, however, the ODR field slowly evolved beyond that initial philosophy to a second channel of development. It became clear that ODR offered new possibilities and potential for dispute resolution that were impractical if not entirely impossible offline. Some of these possibilities include not only detemporalization and depersonalisation but also dematerialization and deterritorialization of conflicts. Dispute types that were very difficult to handle in real-world courtrooms suddenly emerged as excellent candidates for ODR, such as data protection matters, digital rights management and e-taxation in transactional cases, and defamation or privacy infringement in non-transactional cases. This stage coincided with Ethan Katsh and Janet Rifkin's observation in their book *Online Dispute Resolution* that technology can play the role of a "fourth party" in a dispute, bringing wholly new capabilities and capacities to dispute resolution process designers.

It also became clear that some of the techniques that worked well in the online context could not be readily translated back into face-to-face contexts without compromising their basic effectiveness. This led many ODR scholars to abandon the notion that ODR techniques should simply mirror face-to-face techniques. In fact, there was a whole new spectrum of possibilities in the world of online redress, as there could be as many "fourth sides" (technology-based ODR platforms) as there are mediators or dispute types. It also became clear that ODR was a crucial capacity for the Internet if it was to continue to grow and develop as a trusted environment. The complexities of cross-border communication, language, and time difference required new solutions, and it became increasingly clear that ODR could offer effective answers.

The third channel in ODR's development grows out of rapid and expanding innovations in digital technology and online communications. At the field's inception many of the ODR platforms offered were quite primitive and difficult to use, with confusing user interfaces and user unfriendly instructions. In just a few short years, however, the technology undergirding the internet has evolved by leaps and bounds, and ODR has leveraged that rapid innovation to evolve at an equally rapid clip. One example of how technological improvements drive the development of ODR is the EU project on the specifications for XML-based ODR tools. XML was not developed exclusively for the ODR field, but its capacity to aid integration between ODR platforms and face-to-face judicial infrastructures is difficult to overstate. More advanced technologies are just over the horizon, such as in the area of artificial intelligence, which will undoubtedly propel ODR tools toward even more capacity and effectiveness.

What all this rapid progress in the area of ODR necessitates, then, is action on the part of international policy and law makers to pave the way for effective and efficient online dispute resolution, especially in the areas of cross-border jurisdiction and applicable law. The tools of ODR are emerging fast, but without a well considered foundation for how the tools can be utilized, how they should be regulated, and how they should interface with the law there is a risk that they will create more chaos than they remedy.

The abstract typology that begins this chapter posits three distinct layers to the internet economy: information exchange, secure transactions, and online dispute resolution. These layers are not at odds with one another; in fact, they should work seamlessly together and complement each other. The inevitability of ODR notwithstanding, the next generation Internet needs to understand this interconnected relationship and ensure that the systems are put in place to allow all three key components to take root and thrive.

The path and pace of development in technology and the evolution of the legal field are not occurring at the same pace. Moreover, the challenges of online redress do not necessarily warrant a complete convergence of technology and law.

In the same token, ODR may reside in cyberspace, but due to its process-oriented nature it also replicates the physical world. ODR shares a close relationship with the judiciary, and the emergence of ODR must be coordinated with the goals of the judiciary bodies around the world if it is to become ubiquitous. ODR is therefore a critical issue for e-policy in advancing the Internet economy, not only as a preoccupation of the judiciary with rights management, physical or digital, but as a global preoccupation of the cyber-judiciary community whose ultimate aim should be lowering barriers and increasing access to justice. In that regard, development of ODR may be essential to the continued expansion of the knowledge-based economy, which in return can impact the digital and justice divide.

One of the longer-term issues on the agenda for further development of ODR is therefore the need to set guidance standards for coping with technology failure and its implications for global development system. This translates into reasoning at the outset that the United Nations has an important role to play in shaping the development of global ODR. The United Nations will be a catalyst for the effective implementation of ODR around the world, both in addition to and as part of its support of the United Nations Charter, United Nations Millennium Development Goals and the vision of the World Summit on the Information Society.