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Online Dispute Resolution: The “New Normal”

By Marcy Einhorn

It may come as a surprise that online dispute resolution has been around for more than 20 years. Described as “the application of information and communications technology to the practice of dispute resolution,”¹ this digital technology emerged in the U.S. in the 1990s “in tandem with the proliferation of e-commerce.”²

The first players in the field were some of the big online retailers that most of us are very familiar with now: eBay and Paypal are the best examples. Early on these online vendors realized that they needed a means of resolving disputes involving small amounts of money between parties who were separated by great distances.

An early designer of these dispute resolution programs, Modria, Inc., spearheaded by tech guru Colin Rule, launched a quick, easy, low-cost dispute resolution model, using automation, that is capable of handling millions of disputes seemingly effortlessly.

eBay, Paypal and other large online retailers quickly realized that a low-cost means of resolving customer disputes would be a key component to the growth of online retail. They didn’t waste any time in launching platforms that were user friendly and were programmed to be neutral, providing the parties with human input if the online process proved less than satisfactory.

As successful as the ODR process has been for big online retailers, the road to online dispute resolution was quite a rocky one at first.³ Computer mediated disputes when first created were thought to dehumanize communication and create a shortcut to problem solving that was only for the wealthy.⁴

However, since its first appearance, online dispute resolution has expanded rapidly with the increased digitization of society.⁵ Today, online dispute resolution, or ODR, has taken off, with thousands of ODR neutrals and supporting technicians, designers, developers and managers offering their services to the ODR community around the globe. We’ve even seen the launch of ODR conferences, websites that serve the ODR community, and the creation of ethical standards and principles that address ODR practices and procedures exclusively.⁶

With its extensive impact, it’s not hard to understand why technology has been referred to as the “Fourth Party,” along with the disputants and any neutrals, or to agree with the prediction that the range of techniques will inevitably continue to expand as technology continues to evolve.⁷

If you were surprised to learn how long ODR has been around, you may be even more surprised to learn that Europe and Canada are on the cutting edge when it comes to integrating ODR platforms into all sorts of disputes. In Europe, where ODR was originally made

available for resolving commercial disputes, it now goes well beyond that initial use, and is available as a resource in resolving housing issues, divorce proceedings, family violence and other emotionally fraught disputes across Europe. The Netherlands implemented an ODR platform for complex relational disputes, such as divorce and landlord-tenant disputes, more than a year ago. That platform involves a three-step process: Intake, Negotiation and Review, with optional mediation and arbitration services, an optional free diagnosis, a compulsory intake procedure and a mandatory dialogue phase that is based on model solutions, with compulsory review by a legal professional. The parties can request mediation or adjudication at any point in the process and the platform makes use of user surveys to continually innovate the service.

In Canada, British Columbia’s Legal Services Society launched a do-it-yourself legal services website for the middle class, and others, regardless of economic status, just last year.⁸ The new site provides free tools and solutions for everyday legal problems including family issues, family violence conflicts, wills, powers of attorney and personal planning, and foreclosure. The website’s stated purpose is to empower BC residents to accomplish legal tasks on their own while providing reliable online help, up-to-date information, links, downloadable worksheets, documents, and plans. The site represents a shift in focus from “a system designed to support the inside stakeholders to becoming more focused on what the user needs.”

The site was financed with \$775,000 in non-government funding, costs \$60,000 annually in maintenance and requires only sixth grade literacy skills. For anyone who can afford a lawyer, the site will point out where they will get the most value for their money. Under their model, triage and the unbundling of legal services are viewed as a reliable tool for lawyers and clients to start working together. It’s interesting to see how the site works: couples can negotiate a separation agreement using a chat box, at their own pace, in privacy without meeting face to face. Then, if they agree on the terms, the site produces an agreement.

The plusses of the website are that its tools are not tied to geography or jurisdiction; it has the capability of improving access to justice; providing speedier and better outcomes, and maintaining a high degree of relevance with its customers. The minuses are the potential for

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perpetuating power imbalances, and enabling parties to avoid difficult emotional conversations that could promote a transformative negotiation experience.

In another cutting-edge development, the Ministry of Justice in British Columbia has created the Civil Resolution Tribunal, or CRT, as it is commonly known, which, according to Colin Rule, “may be the most forward-thinking court ODR system in the world.” CRT is Canada’s first online tribunal, and the Justice Ministry is considering making it mandatory in all civil cases, which would be a most aggressive, game-changing development.⁹

In 2013 The European Commission launched a website for alternative dispute resolution of consumer disputes over goods or services purchased online.¹⁰ The site explains that ADR includes all the ways of resolving a complaint which do not involve going to court, such as mediation, conciliation, arbitration, ombudsmen or complaints boards. It goes on to explain that Online Dispute Resolution is an ADR procedure that is conducted entirely online. The EU’s ODR platform is designed to allow for maximum geographical and sectoral coverage across the European Union.

The EU’s authorizing directive provides the legal basis for ADR as a whole and ensures that EU consumers can turn to ADR for all contractual disputes in all economic sectors, across borders, whether online or offline purchases. It assures respect for the core principles of ADR which are identified as impartiality, transparency, effectiveness and fairness. The legislation established an EU-wide platform to facilitate ODR of contractual disputes between EU consumers and traders over purchases made online; links all the ADR entities notified by the member states, and requires that traders must provide a link to the EU ODR platform on their website

The benefits of cross-cultural ADR/ODR services include increased confidence in trading online and across borders; disputes can be settled online in a simple, fast, low-cost way; the development of a new culture of out-of-court dispute resolution between consumers and traders in the EU; and the ability to maintain good business reputations and good customer relations based on the efficient, fair resolution of disputes.

One measure of that coverage is the number of ADR tribunals that have been approved to participate in the platform: there are almost 600 pages of providers across almost the whole of the European Union who are available to facilitate the EU Commission’s ADR program.

The website explains that “the platform is user-friendly, multilingual and accessible to everyone.” Accessibility is the key to the success of the platform. It doesn’t take much computer literacy to make use of the program. According to the website, any dispute can be resolved in four simple steps, with a final resolution issued in 90 days.

According to the website, 60 percent of EU vendors do not sell online to other countries due to the perceived difficulties of solving a problem from such sales; 40 percent of EU traders do not know about ADR; 30 percent are aware and willing to use it; 15 percent would like to use it but it’s not available in their sector.

On the consumer side, 45 percent of consumers think it is easy to resolve disputes through ADR and 70 percent are satisfied with how their complaint was handled by ADR.

In the U.S., the expansion of ODR into court systems is still in the exploratory stage in New York,¹¹ while states like Michigan, Texas, and Utah are using ODR to deliver services to their constituents and improve case management statistics.¹²

Following the lead of the ODR platforms that are de rigeur in European online trading, and the platforms that are already performing dispute resolution functions in several states in the U.S., it is easy to foresee the time when we won’t have to pick between online and offline dispute resolution for a broad array of disputes and will be able to move back and forth between various methods of dispute resolution. Although we’re not there yet, we can expect that ODR will become the new normal in the near future.

Endnotes

1. *Technology and the Future of Dispute Resolution*, Colin Rule, Dispute Resolution Magazine, Winter 2015, p. 5.
2. JTC Resource Bulletin, “Online Dispute Resolution and the Courts,” Joint Technology Committee, Version 1.0, adopted November 30, 2016, p. 7. “This document is a product of the Joint Technology Committee (JTC) established by the Conference of State Court Administrators (COSCA), the National Association for Court Management (NACM) and the National Center for State Courts (NCSC).”
3. For a survey of early ODR websites and their effectiveness see *The Pros and Cons of Online Dispute Resolution: An assessment of Cyber-Mediation Websites*, 2 Duke Law & Technology Review, 2003, p. 1-16.
4. *Technology and the Future of Dispute Resolution*, p. 6.
5. *Technology and the Future of Dispute Resolution*, p. 5.
6. For a comprehensive discussion of ethics and ODR see *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, Leah Wing, Original Publication, International Journal of Online Dispute Resolution, Vol. 3, No. 1, 2016, pgs. 12-29.
7. *Technology and the Future of Dispute Resolution*, p. 6.
8. MyLawBC (<http://www.mylawbc.com/>). The British Columbia Legal Society was established in 1979. The website had 1.4 million hits last year.
9. See <https://civilresolutionbc.ca/> for a complete explanation of CRT and how it works.
10. ec.europa.eu/consumers.
11. JTC Resource Bulletin, “Online Dispute Resolution and the Courts,” Joint Technology Committee, Version 1.0, adopted November 30, 2016, p. 7.
12. *Id.*