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ODR evolution

A discussion of Online Disputes Resolution, from self-regulation to consumer safety

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Introduction

There are a number of issues related to Online Disputes Resolution ("ODR") that prevent parties from seeing the system as reliable and enforceable. Authors since 2005 have speculated and discussed the possible need for regulation of ODR to help parties gain assurance from the process. However, these authors are also quick to point out the jurisdictional problems associated with such regulation.[1] Other authors have argued that self-regulation is perfectly adequate and that the public need to simply trust in the process; while others still have focused on the flexibility of the environment through what they call "Soft law",[2] non-binding solutions that help to get systems on the road quickly. Regardless of how authors have framed the issues, ODR has proven that it is here to stay and that it provides significant benefits for the resolution of problems.

This paper will focus on those benefits and how the law already provides a structure for parties to be bound by the settlement they create. Further, it will attempt to evolve the regulation argument and deal with a solution to the jurisdictional issues discussed by many of the leading authors in the field.

The purpose of litigation

To begin the discussion it is important that I begin with a quick look at the main principle that drive parties to litigate then move to how Alternative Dispute resolution ("ADR") can facilitate the same purpose. The purpose of litigation is to provide an end to the dispute. This end is designed to be final and prevent parties from re-addressing the arguments through the principle called *res judicata* (A rule that: a final judgment on the merits by a court having jurisdiction is conclusive between the parties).[3] In ADR, the standard can be easily upheld through parties agreeing to a binding contract for settlement. This contract then becomes enforceable in any Court of competent jurisdiction through the contractual principles of fulfillment. However, the environment is reliant on the ability of the mediator/arbitrator to skillfully draft a binding contract. In ODR the problems of jurisdiction and contractual agreement, becomes more problematic due to the "soft Law"[4] approach. This is due to many ODR practitioners being ill-versed in contractual law which can result in parties being opened to further costs in litigation to readdress misunderstandings formed at settlement. These misunderstandings are heightened when parties get tired and agree just to move things along. Further, tensions arise when litigants obtain a solution in the soft law approach but are unable to enforce that solution due to incorrect settlement of jurisdictional issues,[5] again resulting in repeated litigation.

The purpose of ADR

Unlike litigation, ADR is designed around communication and allows parties to address the hurts and focus on issues so that the dispute can be resolved with an aim to avoid litigation. Using trained

[1] Morek, "Regulation of Online Dispute Resolution: between law and technology" (University of Warsaw, Poland, 2005).
[2] Leigh, D., & Rule, C. "Communique on the ODR and Consumer Colloquium" (Vancouver, BC: Colloquium, 2010).
[3] Spiller, "Butterworths New Zealand LAW Dictionary, 6th ed." (Lexis Nexis, 2005).
[4] Ibid. 2, at pg 9.
[5] Ibid. 1, at pg 6.

arbitrators or mediators provides parties with an expert to evaluate the issues and help focus parties on problem solving the dispute.[6] These experts bring with them a range of communication skills and tools to help facilitate resolution and focus the parties on problem solving the dispute.[7] Further, they facilitate in expertly drafting the settlement agreement so that parties can be assured the settlement is final and binding on the parties. This is done in mediation through a participatory approach,[8] using consensus to come to a final agreement between parties that is then documented by the mediator and signed. Using this approach, participants are usually far more satisfied with the result as they have reached it with guidance rather than a forced ruling of which they had little control. This often ends in parties being more willing to bind themselves to compliance the results in far less cases being brought to the Courts for enforcement.

Further, parties are provided a controlled arena to communicate the reasons for their dispute without interruption. Sometimes these reasons are not understood by the other party, who may be hearing them for the first time due to the breakdown in communication that has resulted in the dispute. Other times the disputants may gain an epiphany into the issue that caused the breakdown and was not previously observed due to the business environment. In both cases the neutrality of the environment and the ability to speak uninterrupted, helps parties to see the problem more clearly and understand the others points of view.

In this way parties begin to rebuild the relationship and learn from the mistake which creates healing. It has been argued by some authors that this relationship maintenance is unimportant in small transactions, where an automated process will suffice to resolve the dispute and put the parties back on track. While this may be correct in some instances, todays social networking environments make small transactions just as important as the larger ones. IBM learned this when some of its small customers began to flame the company for lack of problem resolution causing financial loss in revenue upwards of $500 Million.[9] The same principle applies to all manner of companies regardless of size as the word of mouth principle has global reaching ripple effects in Public Relations ("PR"), with the emergence of Facebook and other social media sites.[10]

Therefore, the role of the ADR professional in today's global environment is just as important in small transactions as it is in large ones. To a large extent this is why ADR practitioners are required to undertake courses in dealing with disputes. ADR practitioners undertake strict training to learn how to deal with conflict and help parties focus on the issues of resolution. Further, training provides insight into how parties communicate, use body language, and provides Emotional Intelligence techniques that

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[6] Spiller, P., "Dispute Resolution in New Zealand, 2nd ed." (Oxford, 2007); Rule, C., "Online Dispute Resolution for Business: for E-Commerce, B2B, consumer, employment, insurance, and other commercial conflicts" (San Francisco: Wiley & Sons, 2002).
[7] Spiller, P., "Dispute Resolution in New Zealand, 2nd ed." (Oxford, 2007), at pp 3-16.
[8] Ibid, 7 at pg 73.
[9] Barlow, J., & Moller, C., "A Complaint is a Gift: Recovering Customer Loyalty When Things Go Wrong, 2nd ed." (California: Brett-Koehler Publishing, 2008), at pg 43; Gallagher, L., "Gaming Change: Lessons for leadership through an appreciative inquiry and action learning approach" (University of Waikato, 2012), at pg 9.
[10] Harper, S., "The Ripple Effect: Maximizing the Power of Relationships for Life and Business, 2nd ed" (Austin: Swot Publishing, 2005), at p 41; ibid. 1, at pg 19.

help the practitioner see when things are about to go wrong. This training allows practitioners to guide parties and help them deal with the issues under dispute.

This power, and its potential for abuse, is the reason that ADR professionals must be members of registered institutes. The public needs to know that the person handling their dispute will do so to the highest ethical standards.

The importance of registering ODR practitioners

As in the world of ADR, ODR practitioners are not only provided the same power but arguably have more as these practitioners are in full control over the medium. Paperwork filed and held on servers, and control over communication is all at the whim of the ODR software owner. The power to manipulate, destroy, and release information into the public arena is one of the reasons that consumers have been wary about taking up the ODR opportunities outside simple online disputes.

In addition, traditional ADR techniques have been difficult to translate into the ODR environment due to the asynchronous nature of the medium.[11] This has resulted in further confidence issues from consumers due to an inability to understand how the ODR environment can effectively communicate the issues under dispute. In traditional ADR the use of whiteboards, paper drawing and other physical techniques of body language and tone allow parties and practitioners to provide clarity and comfort to the disputants in real-time. This is not possible in the asynchronous world of email and forums and can see matters escalate through poorly crafted communiques. A number of authors warn against these forms of communiques and the power struggles that can ensue.[12] Further, they warn of the power and influence that negotiators – for the purposes of this paper being in the form of ODR practitioner – can place on parties that result in ethical dilemmas and, for our context, potential litigation.

Another area of concern for consumers has been the need to feel they will be able to have their position fairly reviewed. Both parties have argued that they want to be able to review the information to be argued to avoid trial by surprise, but in the same breath have serious concerns that the mediator or arbitrator will act according to ethical standards as well as their opposition being bound in confidentiality. They want to be able to move to litigation without prejudice if that is the only option left and feel the current asynchronous forms of ODR do not provide these assurances.[13]

When all this consumer concern is coupled with the possibility of relationships being damaged and the PR implications on a global scale it is clear to see that an actual mediator/arbitrator presiding over a matter holds as vital a role in ODR as they do in traditional ADR forums. The levels of trust and confidence that is held within the ODR environment require that ODR practitioners take the same ethical steps as is required of ADR practitioners otherwise consumers will not trust the process or the system. Accordingly, I consider that non-registration of ODR practitioners invites speculation and diminished trust and membership in an ADR institute is a necessary ingredient to trusted ODR practice.

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[11] Ibid. 1.
[12] Lewicki, R., Barry, B., & Saunders, D., “Essentials of negotiation, 4th ed.” (New York: McGraw-Hill Irwin, 2007).
[13] Ibid. 1, at pg 20.

How registration is facilitated by ADR

As I have discussed there are a number of trust issues from consumers where ODR practitioners remain independent of professional institutes. I suggest that the solution to the issues of credibility lay within the confines of the ADR system itself. The current system of ADR institute membership requires ADR practitioners to go through an application process which, amongst other things, confirms that the practitioner will strictly adhere to the ethical codes and rules of the institute[14] designed to maintain consumer confidence in the system. Members are also required to undertake, or provide sufficient evidence that they have been trained in the art of arbitration/mediation to be accepted and before they are let loose on the public. This provides a high level of credibility to the process and confidentiality for disputants. Further, there is a clear procedure for complaint if practitioners step outside their duties which further develops consumer confidence in the environment.

Currently, ODR is not bound by these rules. As an emergent form of ADR, ODR falls outside the control of ADR and in many jurisdictions is a prickly subject that has yet to find resolution. I argue that this not need be the case. When ADR membership requirements are translated to the field of ODR, disputants can be assured of these same high standards of practice if ODR is brought under the folds of ADR institution membership.

To facilitate this, ODR practitioners should be required to provide evidence of the ethical standards and procedural contract that detail, within their terms of engagement, the ethical standards, complaints process, and confidential principles that the ODR practitioner and parties are bound by. This will form the binding contract between the parties and the practitioner that is enforceable for breach in any Court. Further, the ODR practitioner should be required to show how the technology invested helps facilitate the security of disputant data.

This will provide disputants with faith in the proposed system and the confidentiality of their data.

Dealing with information flow and security

As I have suggested, ODR practitioners need to invest in technology that shows compliance with the confidentiality expected of membership within an ADR institute. I expect that ODR practitioners will need to implement information flow software that helps to track and control the information from disputants and holds that information securely on the server with access only being granted to those parties involved. It will need to be secured by Secure Socket Layer (“SSL”) technology so that data cannot be easily intercepted. With the cost of SSL certificates being around $40 to $80 US dollars per year, the cost for this layer of security is minor but adds fundamental protections into the server design that provides confidence to the transmission of data.

Technology to facilitate this is already available and can be licensed, rented, or purchased allowing for easy tracking of case management, documents and notes associated with a matter. Parties and practitioners are freely able to access, update, submit, manage and review information at all times

[14] See adrcanada.ca under rules and codes; also see ADR membership requirements and training.

during the dispute. A number of organizations, including my own,[15] offer software that is at easy reach of even the smallest practitioner in any jurisdiction.

A further need, identified by Morek and other authors, is the need for the traditional tools of ADR to be available in the technology of ODR. As I have discussed above, the traditional forms of ADR need to be available in the ODR environment to maintain relationships and defuse tensions. In today's environment much of the technology Morek discusses is available for use by practitioners. Video conferencing tools with whiteboards, desktop sharing, file upload, voice and video now exist to allow ADR tools to be used in ODR. Cameras are easily found in our mobile devices and most laptops allowing for the conference room environment to now be present in ODR practice at low cost and delivered via any standard web browser. When this is combined with the information flow software the entire ADR process can now be handled online across multiple countries.

The prickly law of jurisdiction

However, the ability to handle the processes in multiple countries brings us back to the issues of whose jurisdiction will rule the dispute? The rules regarding conflict of laws have been developed over many years and are complex to say the least. Therefore, ODR practitioners must be trained to easily facilitate against these issues. I suggest that the best way to handle such training is to deal first with the terms and conditions of the sale ("TOS"). If the TOS stipulate a jurisdiction for disputes then that should be the jurisdiction used in the ODR process. Where it does not the most cost effective approach is to have the parties agree on the law to which they will be bound. However, in this case the ODR practitioner must be versed with the law of that jurisdiction and it is suggested that access to the legal databases of the country will be a necessity to facilitate proper resolution of the dispute.[16]

Once the dispute is resolved the ODR practitioner will need to carefully draft a contract between the parties that outlines the terms agreed with the inclusion of the jurisdiction agreed and the correct Acts that bind the parties in contract. Upon signing this will then provide an enforceable agreement that the Courts will uphold.

Funding

Once the jurisdictional issues have been resolved the issue of costs must be dealt with. Database access is expensive and so are running servers, certificates, insurance and staff. In traditional ADR mediums this system of quasi-judicial process, is directly supported by the parties paying the fees 50/50 in a sense of equal unbiased resolution. Like any business, clients provide the balance sheets with the appropriate income to support the business model. In traditional times the costs associated with running this ODR environment where substantial. However, today the invention of systems like c-justice.com,

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[15] See www.c-justice.com for details; also see modria.com; smartsettle.com

[16] ODR practitioners will need to be provided training in this area. Further, access to legislation and common law rulings, both reported and unreported, will be a must to determining the correct resolution that the Courts will not strike down as unworkable and binds the parties in contract. I have found Lexis Nexis to be the best resource for this.

modria.com, and smartsettle.com the licensing fees are well within the reach of even the most modest firm.

These systems are provided on a rental basis per dispute, monthly basis for larger firms handling multiple disputes per month or by license that allows for use of the software based on the license purchased. Further, packages often allow for scalability allowing firms to grow at their own pace and quickly upscale as required. Database access can be secured direct through Lexis Nexis as part of the normal licensing or through packaged licensing arrangements as with c-justice.com.

The result is a low cost smart way to facilitate resolution in a global market place.

Conclusion

The world of Online Disputes Resolution ("ODR") provides a number of opportunities to resolve disputes in a low cost manner. However, ODR also creates a number of issues in jurisdiction and security that I argue are only resolvable through practitioners being members in ADR institutions and formalizing clear and easy to follow rules within contract.

The process of Alternative Disputes Resolution ("ADR") to help resolve disputes is moving into the realms of global importance as Online Dispute Resolution ("ODR") technology opens the doors to international dispute resolution. However, I have argued that ODR cannot replace the need for arbitrators and mediators to maintain relationships and deal with the finer points of negotiation. Further, I argue that the ethical standards provided in ADR must be present for ODR to truly foster trust in the settlement process. I suggest that the only way this trust can be assured is through ODR practitioners being members in recognized ADR institutes with specific rules being applied to the contract that parties and practitioners bind themselves to. In addition ODR practitioners must maintain high levels of security and confidentiality while dealing with the dispute in a professional manner.

Further, the need for ODR practitioners to be skilled in contract drafting is as necessary in online resolutions as it is in offline ones. An inability to effectively enforce a contract through poor drafting skills sets ODR up for failure as parties return to the litigation path. If ODR is to be the future of international commercial disputes, or any other form of dispute, then the consumer must feel confident in its security, process, ethics and enforcement. Failure to do so will only see ODR doomed to failure.

I suggest that if ODR is to become the global form for dispute resolution, then it must be held to the same standards as any quasi-judicial system such as ADR or confidence in its ability to resolve disputes and act professionally will come into question that may have an impact on the entire ADR system as a whole. Therefore, monitoring through and membership in ADR Institutes seems an appropriate model to resolve the issues faced by lack of regulation and consumer confidence.

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