



**THE FEASIBILITY OF IMPLEMENTING ONLINE DISPUTE RESOLUTION AS A DISTINCT  
METHOD OF DISPUTE RESOLUTION ON THE AFRICAN CONTINENT**

**By**

**Robin Vicky Cupido (CPDROB003)**

**Thesis Presented for the Degree of**

**DOCTOR OF PHILOSOPHY**

**in the Department of Commercial Law**

**Faculty of Law**

**UNIVERSITY OF CAPE TOWN**

**Supervisors: Professor Caroline Ncube & Professor Alan Rycroft**

**Date of Submission: 30 June 2023**

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## DECLARATION

I, Robin Vicky Cupido, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

Signature:

Signed by candidate

Date: 30 June 2023

## PLAGIARISM DECLARATION

1. I know that plagiarism is a serious form of academic dishonesty.
2. I have read the document about avoiding plagiarism, am familiar with its contents and have avoided all forms of plagiarism mentioned there.
3. Where I have used the words of others, I have indicated this by use of quotation marks.
4. I have referenced all quotations and properly acknowledged other ideas borrowed from others.
5. I have not and shall not allow others to plagiarise my work.
6. I declare that this is my own work.
7. I am attaching the summary of the Turnitin match overview.

Signature:

Date: 30 June 2023

## ACKNOWLEDGEMENTS

There have been so many contributions to the success of my PhD journey that it is impossible to capture them all here. However, the following thanks must be given:

First, thanks be to the Lord for His continued blessings over my life.

Thank you to my knowledgeable and patient supervisors, Professor Caroline Ncube and Professor Alan Rycroft, for their insight, wisdom, and guidance throughout the writing of this thesis. I appreciate you both, and you have played an invaluable part in my scholarly development.

Thank you to my academic mentors, most notably Professor Jan Neels and Professor Michael Martinek, who fostered my interest in and studies of Online Dispute Resolution. Special acknowledgment must be made of Professor Daniel Girsberger, who sparked my interest in ODR so many moons ago.

Thank you to my academic colleagues and friends at various institutions across South Africa, particularly Dr Allison Anthony, Professor Bradley Slade, Gino Frantz and Chavonne Cupido. You have been sounding boards, booster squads and peer reviewers as needed, and I appreciate you all.

A special thank you to my family, the Cupidos, Roberts, Besters, Rhodas, Le Rouxs and Kobe. Your unconditional love and support have meant the world to me. Stephen and Josephine Cupido, your years of hard work, sacrifice and prayers laid the foundation for my academic life, and I appreciate that more than words can say.

Finally, immeasurable thanks must go to Sean Rhoda. I would not have been able to finish this project without you. Your love, patience and encouragement carried me through, and I am endlessly grateful.

## ABSTRACT

In a relatively short time, the internet has become woven into the fabric of society, leading to an unprecedented number of commercial and social transactions occurring across physical geographical borders. Together with this increase in online interactions comes an increase in disputes arising online, and a reliable system to resolve these issues is needed. Online Dispute Resolution (ODR) has been identified as such a system, a dispute resolution process which is in large part conducted through online systems or through the use of technology. The majority of the development, research, and scholarship of ODR has taken place and is still taking place in developed nations, often to the exclusion of the developing world. While it is acknowledged that African countries have been slow to engage with ODR as a result of various challenges, it requires investigation whether it would not be possible to promote and implement ODR in the countries that are recognised technological leaders in Africa. Through the lens of the Technology Acceptance Model, this thesis aims to explore the current state of ODR in Africa, assessing the benefits it has provided as well as the challenges that stand in the way of further adoption.

South Africa, Nigeria and Kenya have been identified as technological leaders on the continent and are the subjects of a comparative study aimed at assessing their legal and technological frameworks to determine if they are ODR-ready. This study has been conducted by means of an analytical literature survey, including an analysis and exploration of legal texts, academic writing and the recommendations and reports of professional bodies. It finds that the implementation of ODR is indeed feasible in Africa, but in a different form than it is used in the Global North, using more accessible forms of technology, and expanding the use of ODR to resolve disputes arising in areas other than commercial law. The research provides guiding principles for African countries to use in assessing their readiness to adopt ODR and contributes to the ongoing scholarship of ODR with its focus on Africa, which is an aspect that has so far been relatively neglected as pre-existing scholarship centres other parts of the world.

**LIST OF ABBREVIATIONS**

4IR	Fourth Industrial Revolution
ADR	Alternative Dispute Resolution
AfCFTA	African Continental Free Trade Agreement
AFSA	Arbitration Foundation of Southern Africa
AI	Artificial intelligence
APEC	Asia-Pacific Economic Cooperation
ASAPCP	ASEAN Strategic Action Plan for Consumer Protection
ASEAN	Association of Southeast Asian Nations
B2B	Business-to-business
B2C	Business-to-consumer
CCMA	Commission for Conciliation, Mediation and Arbitration
CEU	Council of the European Union
CLI	Cyberspace Law Institute
COMESA	Common Market for Eastern and Southern Africa
CPA	Consumer Protection Act
EC	European Commission
ECA	Electronic Communications Act
ECC-Net	European Consumer Centres Network
ECODIR	Electronic Consumer Dispute Resolution
ECTA	Electronic Communications and Transactions Act
EEJ-Net	European Extra-Judicial Network
EP	European Parliament
EU	European Union
GDP	Gross domestic product
GDPR	General Data Protection Regulation
ICANN	Internet Corporation of Assigned Names and Numbers
ICSID	International Centre for Settlement of Investment Disputes

ICT	Information and Communications Technology
ISP	Internet service provider
JITPO	Judiciary Information Technology Policy
NCAIR	National Conference of Automated Information Research
NEPAD	New Partnership for Africa's Development
NITDA	National Information Technology Development Agency
OADR	Online Alternative Dispute Resolution
OAS	Organization of American States
ODR	Online Dispute Resolution
OECD	Organisation for Economic Co-operation and Development
OOO	Online Ombuds Office
POPI	Protection of Personal Information Act
SADC	Southern African Development Community
SAIPL	South African Institute of Intellectual Property Law
TAM	Technology Acceptance Model
UDRP	Uniform Domain Name Dispute Resolution Policy
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic and Social Commission for Europe
US	United States
USA	United States of America
VM	Virtual Magistrate
WTO	World Trade Organisation
ZADNA	.za Domain Name Authority
ZADRR	ZA Domain Name Dispute Resolution Regulations

## TABLE OF CONTENTS

<b>DECLARATION</b> .....	i
<b>PLAGIARISM DECLARATION</b> .....	ii
<b>ACKNOWLEDGEMENTS</b> .....	iii
<b>ABSTRACT</b> .....	iv
<b>LIST OF ABBREVIATIONS</b> .....	v
<b>CHAPTER 1: INTRODUCTION</b> .....	1
1.1. Background of the research problem .....	1
1.2. Overview of the research topic.....	5
1.3. Research questions .....	11
1.4. Rationale for the study .....	11
1.5. Theoretical framework .....	12
1.6. Research methodology .....	15
1.7. Structure of the research.....	15
1.8. Conclusion.....	17
<b>CHAPTER 2: HISTORICAL DEVELOPMENT AND GROWTH OF ONLINE DISPUTE RESOLUTION</b> .....	18
2.1. Introduction .....	18
2.2. The history of ODR .....	20
2.2.1. The ‘hobbyist’ phase: pre-1995 .....	21
2.2.2 The ‘experimental’ phase: 1995-1998 .....	25
2.2.3. The ‘entrepreneurial’ phase: 1998-2002 .....	32
2.2.4. The ‘institutional’ phase: 2002-2020 .....	37
2.3. The way forward for ODR?.....	47
<b>CHAPTER 3: INTERNATIONAL AND REGIONAL INSTRUMENTS GOVERNING ONLINE DISPUTE RESOLUTION</b> .....	50
3.1. Introduction .....	50
3.2. The EU Regulation on consumer ODR.....	51
3.2.1. Background and context .....	51
3.2.2. Structural overview of the Regulation on consumer ODR.....	52
3.2.3. Analysis of the Regulation on consumer ODR .....	53
3.2.4. Evaluation of the Regulation on consumer ODR .....	62
3.3. The UNCITRAL Technical Notes on Online Dispute Resolution.....	63
3.3.1. Background and context .....	63
3.3.2. Structural overview of the Technical Notes.....	64
3.3.3. Analysis of the Technical Notes .....	65

3.4. Other international ODR initiatives, reports and proposals .....	77
3.4.1. OECD Recommendation on Consumer Protection in E-commerce .....	78
3.4.2. OAS Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes .....	79
3.4.3. ODR initiatives in Asia .....	80
3.4.4. ODR initiatives in Africa .....	83
3.5. Concluding observations.....	85
<b>CHAPTER 4: OBSTACLES TO THE SUCCESSFUL IMPLEMENTATION OF ONLINE DISPUTE RESOLUTION IN DEVELOPING COUNTRIES .....</b>	<b>87</b>
4.1. Introduction .....	87
4.2. The economic divide .....	88
4.3. Technological challenges .....	90
4.3.1. The ‘digital divide’ .....	90
4.3.2. Readiness of ICT infrastructure.....	99
4.4. Cultural and social obstacles.....	104
4.4.1. National legal culture.....	105
4.4.2. Cultural differences in cross-border interactions .....	111
4.4.3. Trust, privacy, and confidentiality concerns .....	113
4.4.4. Jurisdictional concerns and enforcement of ODR outcomes.....	117
4.5. Conclusion.....	132
<b>CHAPTER 5: ASSESSMENT OF THE CURRENT ONLINE DISPUTE RESOLUTION LANDSCAPE ACROSS AFRICA .....</b>	<b>135</b>
5.1. Introduction .....	135
5.2. South Africa.....	136
5.2.1. ICT Legislation and Policy.....	136
5.2.2. Existing ODR providers.....	143
5.3. Nigeria.....	146
5.3.1. ICT Legislation and Policy.....	147
5.3.2. Existing ODR initiatives .....	152
5.4. Kenya.....	153
5.4.1. ICT Legislation and Policy.....	154
5.4.2. Existing ODR initiatives .....	158
5.5. African Continental Free Trade Area (AfCFTA) Agreement .....	159
5.6. Comparison and concluding remarks .....	161
<b>CHAPTER 6: RECOMMENDATIONS FOR AN AFRICA-CENTRED APPROACH TO ONLINE DISPUTE RESOLUTION` .....</b>	<b>164</b>
6.1. Introduction .....	164

6.2. ODR 'best practice': Principles for successful ODR.....	165
6.2.1. Fairness .....	168
6.2.2. Transparency.....	170
6.2.3. Due process.....	173
6.2.4. Accountability .....	174
6.3. Using foundational principles to address the regional challenges .....	175
6.4. Recommended guiding principles for Intra-African ODR .....	179
6.4.1 Guiding Principles for ODR in Africa.....	180
6.5. Concluding remarks .....	182
<b>CHAPTER 7: CONCLUSION .....</b>	<b>185</b>
7.1. Findings of the study.....	185
7.2. Future questions to be considered.....	194
7.3. Concluding observations.....	195
<b>BIBLIOGRAPHY.....</b>	<b>197</b>

## CHAPTER 1: INTRODUCTION

*'ODR provides an exciting frontier for access to justice that moves at the pace of technology, thus surpassing current imagination and allowing for innovation.'*<sup>1</sup>

### 1.1. Background of the research problem

Since its inception, the online environment has expanded exponentially and the use of the internet has become ubiquitous. This expansion has been promoted by increased globalisation, which has advanced cross-border interactions in an unprecedented manner,<sup>2</sup> leading to the creation and growth of the international digital economy. Such accelerated globalisation has been fostered by the use of electronic communications, which allows parties to interact with each other cheaply and in some instances instantaneously. Creating this avenue for parties to interact easily without needing to be in each other's physical presence has made it possible for online communication to become an integral part of modern life, promoting easy and regular cross-border interaction.<sup>3</sup> This increased possibility for interaction outside of physical borders has also led to the proliferation of e-commerce, which has become a main contributor to the international economy.<sup>4</sup> Although the increased participation in the global digital economy has had its advantages, it has also led to the creation of new challenges. A notable example of such a challenge is the increase of cross-border disputes arising from and in the online environment.<sup>5</sup>

---

<sup>1</sup> Amy J Schmitz 'There's an 'app' for that: Developing online dispute resolution to empower economic development' (2018) 32 *Notre Dame Journal of Law, Ethics and Public Policy* 1.

<sup>2</sup> Larissa D'Angelo 'A comparison between American and Italian Online Dispute Resolution systems' in VK Bhatia, CN Candlin & M Gotti (eds) *Discourse and Practice in International Commercial Arbitration: Issues, Challenges and Prospects* (2012) 209-24.

<sup>3</sup> Laura A Wasser 'Design challenges in applying online dispute resolution to divorce' (2021) 59(2) *Family Court Review* 268 at 269.

<sup>4</sup> 'The phenomenon of electronic commerce on the web is rapidly expanding and existing data indicates that it can be expected to continue to grow. Together with the growth of e-commerce, there has been growth of other phenomena as well, namely, the controversies that were created around this commerce (mainly involving the issues of price, quality and time of delivery).' Dafna Lavi 'Three is not a crowd: Online mediation-arbitration in business to consumer internet disputes' (2016) 37 *University of Pennsylvania Journal of International Law* 871 at 875.

<sup>5</sup> Eddie Hurter 'Disputes resolution in cyberspace: A futuristic look at the possibility of online intellectual property and e-commerce arbitration' (2000) 12 *South African Mercantile Law Journal* 199 at 202.

As with offline interactions, online interactions will sometimes result in disputes.<sup>6</sup> These disputes could arise from contract, delict, or other areas of the law.<sup>7</sup> However, there are a number of factors which could make disputes arising online more difficult to resolve than traditional offline disputes. Firstly, there is the distance between parties. This distance could be physical, linguistic or cultural, as parties to online transactions are often in different countries and would not always be able to communicate with each other effectively.<sup>8</sup> The distance between parties in different countries also has implications for choice of law and jurisdiction, as there would then be a question about the applicable legal system.<sup>9</sup> If, for example, there is a consumer contract where the supplier is a South African company and the consumer is an Australian citizen, and a dispute arises over goods ordered and paid for online, there would be the question of whether to apply South African or Australian law.

Choosing to seek recourse using traditional litigation in such a matter would be unnecessarily time-consuming and complicated. Pursuing litigation could also be costly, which may lead parties to avoid traditional dispute resolution mechanisms altogether, especially in instances where there is a large economic and power imbalance between parties or where the value of the claim is small.<sup>10</sup> Thus it is argued that having access to an alternative method of dispute resolution specifically tailored to online disputes would be more beneficial to the parties involved.<sup>11</sup>

To address the unique challenges that online disputes present, it has previously been suggested that alternative dispute resolution (ADR) measures such as mediation and negotiation could be well suited for resolving disputes that

---

<sup>6</sup> Ethan Katsh, Janet Rifkin & Alan Gaitenby 'E-commerce, e-disputes and e-dispute resolution: In the shadow of 'eBay law' (2000) 15 *Ohio State Journal of Dispute Resolution* 705 at 734.

<sup>7</sup> Graf-Peter Calliess & Simon Johannes Heetkamp 'Online Dispute Resolution: Conceptual and regulatory framework' (2019) 22 (2019) *Transnational Law Institute Think!* 1 at 2.

<sup>8</sup> Joseph W Goodman 'The advantages and disadvantages of Online Dispute Resolution: An assessment of cyber-mediation web sites' (2006) 9:11 *Journal of Internet Law* 10 at 12.

<sup>9</sup> Lucille M Ponte 'Boosting consumer confidence in e-business: Recommendations for establishing fair and effective dispute resolution programs for B2C online transactions' (2002) 12 *Albany Law Journal of Science and Technology* 441 at 442-4; David Menthe 'Jurisdiction in cyberspace: a theory of international spaces' (1998) 4 *Michigan Telecommunications and Technology Law Review* 69.

<sup>10</sup> Schmitz (2018) op cit at 1.

<sup>11</sup> Angelica Roşu 'Electronic commerce – An international phenomenon, generating commercial litigations' (2012) 7 *EIRP Proceedings*.

originated online.<sup>12</sup> However, there are certain elements of online transactions and disputes that are not addressed by the existing ADR rules.<sup>13</sup> The borderless nature of online interactions means that parties to a dispute are not always geographically close to each other, leading to questions around choice of law, the suitable forum to hear a dispute in and the various cost implications of resolving disputes across physical borders. These issues are especially problematic when it comes to small-value claims, as the cost of pursuing legal recourse often outweighs any potential awards made as a result of successful dispute resolution. A system is thus needed which is designed to address the specific issues arising from disputes originating online and those which can be resolved online.<sup>14</sup> This system, originally based on the traditional ADR methods,<sup>15</sup> has come to be known as online dispute resolution (ODR).<sup>16</sup>

Initially, ODR was only used to resolve conflicts that arose from wholly online interactions or those which were directly related to the internet in some way.<sup>17</sup> These early endeavours were closely linked to traditional ADR measures, such as negotiation, mediation and (to a lesser extent) arbitration,<sup>18</sup> as in the early stages of ODR, the internet was simply used to facilitate negotiation, mediation, and arbitration. The sole function of ODR was to use the internet and technology to make these traditional ADR proceedings easier, and it had not yet developed into its own separate dispute resolution method. There was thus very little disruption to the existing dispute resolution framework.<sup>19</sup>

However, at that time it was also predicted that 'in an ideal world, the dispute resolution model of Cyberspace may become so attractive that real world disputants

---

<sup>12</sup> Zheng Sophia Tang *Electronic Consumer Contracts in the Conflict of Laws* 2 ed (2015) 150.

<sup>13</sup> Donna M Bates 'A consumer's dream or Pandora's box: Is arbitration a viable option for cross-border consumer disputes?' (2004) 27 *Fordham International Law Journal* 823 at 827.

<sup>14</sup> Ethan Katsh & Orna Rabinovich-Einy *Digital Justice: Technology and the Internet of Disputes* (2017) 16-17.

<sup>15</sup> Ethan Katsh & Janet Rifkin *Online Dispute Resolution. Resolving Conflicts in Cyberspace* (2001) 19.

<sup>16</sup> Ethan Katsh 'Online Dispute Resolution: Some implications for the emergence of law in cyberspace' (2007) 21 *International Review of Law Computers & Technology* 97.

<sup>17</sup> Katsh 'Some implications for the emergence of law' op cit at 3.

<sup>18</sup> Katsh & Rifkin *Online Dispute Resolution* 19.

<sup>19</sup> Ethan Katsh 'ODR: A look at history' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) 21-33.

might be moved to take their disputes online for resolution'.<sup>20</sup> This prediction seems to have come to pass, as ODR has now expanded to include the resolution of both online and offline disputes.<sup>21</sup> As Lavi states: 'ODR includes, therefore, a broad ensemble of tools and technological means...intended to enable the resolution of disputes in cases in which the traditional alternatives are less viable and at times impossible.'<sup>22</sup> ODR has thus grown to accommodate fully automated procedures<sup>23</sup> as well as those only partially facilitated by technology in its scope of dispute resolution processes.<sup>24</sup> The latter type of ODR is also called 'facilitative ODR' as it mainly uses information and communications technology (ICT) to bring all parties to a dispute together and to allow the neutral to facilitate the dispute through a digital forum.<sup>25</sup>

Another categorisation of ODR can be found in the work of Turel and Yuan, who have attempted to classify the various types of ODR based on the level of support provided by each process.<sup>26</sup> In terms of this classification, ODR services can use technology to support the ODR process, support the decision-making itself or entirely automate the ODR process. Process support ODR refers to those services that use technology to facilitate dispute resolution communications between parties, including electronic record-keeping, case-management software and electronic

---

<sup>20</sup> Robert C Bordone 'Electronic Online Dispute Resolution: A systems approach - Potential, problems, and a proposal' (1998) 3 *Harvard Negotiation Law Review* 175.

<sup>21</sup> 'Without neglecting the need to respond to disputes arising online, ODR has also been focusing attention on traditional kinds of disputes occurring offline...the boundary line between the online and offline worlds is, as "the digital world merges with the physical world", much less clear than it used to be. As a result, the challenge of ODR currently is less focused on where the disputes originated than it is in finding tools and resources that can be as effective in any dispute regardless of where it originated.' Katsh (2012) op cit at 24.

<sup>22</sup> Lavi op cit at 879; G Kaufmann-Kohler & T Schultz *Online Dispute Resolution: Challenges to Contemporary Justice* (2004) 7.

<sup>23</sup> Edwards and Wilson describe the use of ODR procedures as a direct method of solving conflicts as 'hard ODR'. Lilian Edwards & Caroline Wilson 'Redress and alternative dispute resolution in EU cross-border e-commerce transactions' (2007) 21:3 *International Review of Law Computers and Technology* 315 at 315.

<sup>24</sup> Colin Rule *Online Dispute Resolution for Business: B2B, ECommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (2002) 142-143; Rafal Morek 'The regulatory framework for Online Dispute Resolution: A critical view' (2006) 38 *University of Toledo Law Review* 163 at 180.

<sup>25</sup> Oladeji M Tiameyi 'The impending battle for the soul of ODR: Evolving technologies and ethical factors influencing the field' (2022) 23 *Cardozo Journal of Conflict Resolution* 75 at 84.

<sup>26</sup> O Turel & Y Yuan 'Online dispute resolution services: Justice, concepts and challenges' (2010) *Handbook of Group Decision and Negotiation* 425 at 431.

messaging systems.<sup>27</sup> Decision support ODR includes all those services that use technology to suggest optional solutions in an attempt to improve the resolution of the dispute,<sup>28</sup> for example blind bidding ODR platforms where a facilitator selects an outcome from a predetermined set of outcomes. Automation support is seen in instances where the entire dispute resolution process is automated without need for a human facilitator.<sup>29</sup> This categorisation is not absolute, but serves as a good indicator of the types of processes typically included under the umbrella of ODR. It is also possible to adopt a typology based on the nature of the technology used. For instance, Sourdin identifies supportive, replacement and disruptive technologies.<sup>30</sup>

As ICT has advanced, so the types of online transactions available to individuals have advanced, with many aspects of everyday life now taking place online via websites or mobile apps. ODR has correspondingly become more popular, as it is necessary to have reliable dispute resolution mechanisms in place for online users to have certain recourse to redress in the event of a dispute arising from their online transactions. ODR is thus not just a means of settling disputes, it can also be used as a tool for building trust in the online environment<sup>31</sup> and providing another viable avenue for those seeking access to justice.

## 1.2. Overview of the research topic

Based on the ability that ODR has to be adapted to fit different types of disputes, and the potential cost savings that it presents,<sup>32</sup> it has been suggested that ODR could be an especially attractive dispute resolution option for the developing world.<sup>33</sup> This suggestion is admittedly an optimistic one, as developing countries still have less

---

<sup>27</sup> Amy J Schmitz 'A blueprint for Online Dispute Resolution system design' (2018) 21 *Journal of Internet Law* 1 at 4.

<sup>28</sup> Turel & Yuan op cit at 431.

<sup>29</sup> For more detail on how technology has been used to automate dispute resolution processes see the discussion at 2.2.4.3 below.

<sup>30</sup> Tania Sourdin 'Justice in the age of technology: "The rise of machines is upon us"' (2017) 139 *PrecedentAULA* 4 at 4.

<sup>31</sup> Katsh op cit at 4.

<sup>32</sup> Amy S Moeves & Scott C Moeves 'Two roads diverged: A tale of technology and alternative dispute resolution' (2004) 12 *William & Mary Bill of Rights Journal* 843 at 853-854.

<sup>33</sup> Schmitz op cit at 2; Maria Mercedes Albornoz & Nuria González Martín 'Feasibility analysis of Online Dispute Resolution in developing countries' (2012) 44 *University of Miami Inter-American Law Review* 39 at 41.

access to ICT and less digital literacy than developed countries, a discrepancy which continues to grow. This 'digital divide' between developed and developing nations is a big obstacle to overcome when discussing the potential implementation of ODR.<sup>34</sup> However, this obstacle is not insurmountable, and the positive effects of ODR would help to ameliorate some of the existing issues with traditional litigation identified in the developing world.

One of these issues is that individuals in developing countries who wish to use the traditional litigation system are often faced with both financial and temporal constraints.<sup>35</sup> The typical litigant would have to pay for the services of a legal representative and eventually attend a physical courtroom to resolve their matter, which could involve travel and taking time off work, both of which can take a financial toll. Many developing countries also have a backlog of cases,<sup>36</sup> meaning that the litigation process is often drawn out and costly. Potential litigants may not have the resources to afford such a protracted process, and so many often fail to resolve their disputes at all. It is suggested that ODR has the potential to circumvent these obstacles, providing efficient, affordable, and accessible dispute resolution outside of litigation to individuals in developing countries.<sup>37</sup>

Historically, more developed regions like the United States of America (USA) and the European Union (EU) have been at the forefront of ODR scholarship and

---

<sup>34</sup> CV Parlade 'Challenges to ODR implementation in a developing country' (2003) *Proceedings of the UNECE Forum on ODR* available at <http://www.odr.info/unece2003>, accessed on 5 June 2023.

<sup>35</sup> Albornoz & Martín op cit at 43.

<sup>36</sup> 'Many African citizens have lost faith in their judicial system's ability to provide timely or proper access to justice. As a result of backlogged court dockets, claimants may wait years, or even more than a decade, before going to trial. Consequently, African citizens have lost faith in their courts' formal channels, which may lead to societal conflict or political instability.' Catherine Price 'Alternative dispute resolution in Africa: Is ADR the bridge between traditional and modern dispute resolution' (2018) 18 *Pepperdine Dispute Resolution Law Journal* 393 at 395. Also see Grace Wangui 'Factors influencing performance of the judicial system in Kenya, the case of delayed court rulings' (2017) 1(1) *International Journal of Law and Policy* 64 at 66; B Faturoti 'Institutionalised ADR and access to justice: The changing faces of the Nigerian judicial system' (2014) 1(1) *Journal of Comparative Law in Africa* 1 at 4-5; Ijeoma Ononogbu 'Transformation of dispute resolution in Africa' (2015) 2 *International Journal of Online Dispute Resolution* 77 at 80.

<sup>37</sup> Peter Cashman & Eliza Ginnivan 'Digital justice: Online resolution of minor civil disputes and the use of digital technology in complex litigation and class actions' (2019) 19 *Macquarie Law Journal* 39 at 54.

development.<sup>38</sup> This is understandable to some extent, given that the USA is the birthplace of the internet and ODR consequently originated there in response to the growing number of online interactions and disputes.<sup>39</sup> In the EU, ODR has found official recognition in the Directive on Alternative Dispute Resolution<sup>40</sup> and Regulation on Online Dispute Resolution.<sup>41</sup> These are official legislative instruments introduced to safeguard the rights of consumers in e-commerce disputes throughout the EU. The rules contained in these instruments were imposed on all member states,<sup>42</sup> and it has become compulsory for European consumers and suppliers to first try ADR or ODR processes to resolve e-commerce disputes.<sup>43</sup> Establishing ADR and ODR as the compulsory first step in resolving e-commerce disputes has had the effect of implementing ODR across the EU, inspiring more academic engagement with and development of ODR in Europe.<sup>44</sup> This growing recognition of ODR is also seen on an international scale, with the ongoing development of various instruments and initiatives promoting ODR.<sup>45</sup> These instruments will be examined further in

---

<sup>38</sup> Katsh & Rifkin *Online Dispute Resolution* 56; Rule *Online Dispute Resolution for Business* 22; Katsh & Rabinovich-Einy *Digital Justice* 25-38; Karolina Mania 'Online Dispute Resolution: The future of justice' (2015) 1 *International Comparative Jurisprudence* 76 at 77.

<sup>39</sup> Morek op cit at 163.

<sup>40</sup> Council Directive (EC) 2013/11 on alternative dispute resolution for consumer disputes [2013] OJ L165/63.

<sup>41</sup> Council Regulation (EC) 524/2013 on online dispute resolution for consumer disputes [2013] OJ L165/1.

<sup>42</sup> Fernando Esteban De La Rosa & Cátia Marques Cebola 'The Spanish and Portuguese systems: Two examples calling for a further reform – Uncovering the architecture underlying the new consumer ADR/ODR European framework' (2019) 6 *European Review of Private Law* 1251 at 1253.

<sup>43</sup> Ononogbu op cit at 81.

<sup>44</sup> For examples of this academic engagement see P Cortés 'Developing Online Dispute Resolution for consumers in the EU: A proposal for the regulation of accredited providers' (2011) 19 *International Journal of Law and Information Technology* 1 at 20; Maxime Hanriot 'Online dispute resolution (ODR) as a solution to cross border consumer disputes: The enforcement of outcomes' (2015-2016) 2 *McGill Journal of Dispute Resolution* 1 at 2-3; Michael Bogdan 'The new EU Regulation on online resolution for consumer disputes' (2015) 9 *Masaryk University Journal of Law & Technology* 155 at 156; M Bakhramova 'Theoretical and legal regulation of ODR in the European Union countries' (2022) 2(1) *European Journal of Innovation in Nonformal Education* 299 at 299; M Martinek & R Cupido 'Online dispute resolution for B2C controversies: the first European regulations and experiences' in D van der Merwe (ed) *Magister: Essays for Jannie Otto* (2020) 124-145; Giesela Rühl 'Alternative and Online Dispute Resolution for cross-border consumer contracts: A critical evaluation of the European legislature's recent efforts to boost competitiveness and growth in the internal market' (2015) 38 *Journal of Consumer Policy* 431 at 446.

<sup>45</sup> Chapter 3 below.

subsequent chapters in an attempt to understand how they have contributed to the shaping of the current ODR landscape.<sup>46</sup>

ODR must also be considered in the context of the international digital economy. As a result of the rapid growth and spread of the internet, it has become essential for individual countries to maintain a presence in the global online marketplace, allowing them to keep up with trends in international trade and promoting foreign investment in their respective economies.<sup>47</sup> Establishing a strong online presence is thus especially important for developing countries with emerging economies, as these nations are dependent on foreign investment and trade to strengthen and grow their economies.<sup>48</sup> This is true for most of the countries on the African continent. However, when it comes to the availability of ICT and the ability to participate in the digital marketplace, there is still a large gap between developed and developing countries, the aforementioned 'digital divide'.<sup>49</sup> This is an ongoing problem, especially since ICT readiness and capacity has become a key determinant of a country's success in participating in international trade. By extension, ICT readiness and capacity will also determine whether the implementation of an ODR system in a particular country is feasible,<sup>50</sup> and must thus be considered in an accurate assessment of ODR readiness in any given area.

Despite the existence of this digital divide between the Global North and South, there are some African countries that have historically been recognised as continental leaders in the introduction and implementation of ICT.<sup>51</sup> These include South Africa, Nigeria and Kenya, which are often described as the most advanced

---

<sup>46</sup> See especially Chapters 3 and 5 below for a critical analysis of some of the most influential ODR instruments and projects.

<sup>47</sup> Schmitz op cit at 1; Jolanta Kowal & Narcyz Roztocki 'Information and communication technology management for global competitiveness and economic growth in emerging economies' (2013) 57(1) *The Electronic Journal of Information Systems in Developing Countries* 1 at 2.

<sup>48</sup> Doug Leigh & Frank Fowlie 'Online Dispute Resolution (ODR) within developing nations: A qualitative evaluation of transfer and impact' (2014) *Open Access Laws* 106-16.

<sup>49</sup> More information about the digital divide and the socio-economic effects of such divide can be found in Chapter 4 below.

<sup>50</sup> Mohamed S Abdel Wahab 'ODR in Africa' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution Theory and Practice* (2012) 561-583 at 582.

<sup>51</sup> Ononogbu op cit at 77.

countries when it comes to availability and use of ICT on the African continent.<sup>52</sup> However, South Africa, Nigeria and Kenya are still subject to many of the same challenges that face less technologically developed African nations, providing an interesting dichotomy between their technological readiness and their sometimes debilitating socio-economic problems.<sup>53</sup> These countries thus provide interesting subjects for study when determining whether it is indeed feasible to implement ODR in ICT-ready African countries given the unique challenges and opportunities that they each face.

It is argued that implementing ODR in the ICT-ready African countries would be advantageous for these nations. Schmitz argues that doing so would serve as a contributor to these countries' economic growth and development, as ODR provides individuals with an easily accessible extra-judicial dispute resolution system to use in online cross-border disputes, encouraging trust in and facilitating international trade.<sup>54</sup>

It is further submitted that the implementation of ODR in Africa would serve to promote access to justice,<sup>55</sup> and thus it warrants deeper exploration and study.<sup>56</sup> The use of ICT in dispute resolution provides more flexibility for disputing parties and provides an easier way to seek recourse in disputes. This is due to the reduced costs associated with ODR, and the possibility of conducting the dispute resolution process asynchronously, allowing parties to deal with matters in their own time. This aspect

---

<sup>52</sup> Morenike Obi-Farinde 'ODR in Africa: The emergent face of dispute resolution post COVID-19' available at <https://mediate.com/odr-in-africa-the-emergent-face-of-dispute-resolution-post-covid-19/>, accessed on 21 June 2023; Ononogbu *ibid* at 78; Abdel Wahab (2012) *op cit* at 583; Laura Best & Miemie Struwig 'Online business practices to enable consumer protection in the African context' (2020) 4(10) *International Journal of Economics, Business and Management Research* 118 at 123.

<sup>53</sup> Schmitz *op cit* at 3.

<sup>54</sup> *Ibid* at 2; Masood Ahmad & SM Ali 'Online Dispute Resolution - An emerging Alternative Dispute Resolution tool' (2019) 9(3) *IUP Law Review* 36 at 41; Patricia Audrey Ruslijanto 'Transforming landscapes: How ODR reshaping the prospect of dispute settlement in a connected world' (2018) 16 *Indonesian Journal of International Law* 84 at 96; Fahimeh Abedi, John Zeleznikow & Emilia Bellucci 'Universal standards for the concept of trust in online dispute resolution systems in e-commerce disputes' (2019) 27(3) *International Journal of Law and Information Technology* 209 at 223.

<sup>55</sup> Schmitz (2018) *op cit* at 6.

<sup>56</sup> Ayelet Sela 'The effect of online technologies on dispute resolution system design: Antecedents, current trends, and future directions' (2017) 21 *Lewis & Clark Law Review* 635; Schmitz (2018) *op cit* at 25; Leigh & Fowlie *op cit* at 109.

of ODR is especially attractive for developing countries,<sup>57</sup> as individuals are often barred from accessing the court system, either due to prohibitive costs or the backlog of cases experienced across the developing world.<sup>58</sup>

This need for alternate methods of dispute resolution that are easily accessible from a distance has been thrown into sharp relief by the recent COVID-19 pandemic.<sup>59</sup> Across the globe, humanity was forced to respond to the new challenges imposed by this disease, including extreme lockdown in some cases. The pandemic forced the digitisation of services and innovation in the field of communication as a result of the isolation necessary to prevent the spread of the virus.<sup>60</sup> Legal services were also affected by national lockdowns, with court proceedings in South Africa, Nigeria and Kenya being delayed by the lockdown imposed by each country's government.<sup>61</sup> The lockdown and subsequent delay in returning to in-person operations have created an even bigger backlog in the judiciary's unresolved cases, and so alternative methods of dispute resolution have become even more of a necessity. ODR provides a good alternative under the current circumstances, as parties can use it to resolve their disputes whilst adhering to social distancing guidelines.<sup>62</sup>

This study is thus aimed at considering the factors identified above and determining whether ODR could find successful application in the ICT-ready African

---

<sup>57</sup> Abdel Wahab op cit at 582.

<sup>58</sup> Lorato Motsaathebe & Nathan Mnjama 'Managing court records: a survey of record-keeping practices in selected countries' (2009) 27 *Mousaion: SA Journal of Information Studies* 132 at 133; Tshepo Lydia Mosweu & Olefhele Mosweu 'Electronic court records management systems: A review of literature in selected African countries' (2018) 36 *Mousaion: SA Journal of Information Studies* 3 at 3.

<sup>59</sup> Kim M Rooney 'The global impact of the covid-19 pandemic on commercial dispute resolution in the first seven months' (2020) 14(2) *Dispute Resolution International* 83; Mark L Shope 'The international arbitral institution response to COVID-19 and opportunities for Online Dispute Resolution' (2020) 13 *Contemporary Asia Arbitration Journal* 67; Kristi J Paulson 'Mediation in the covid-19 era: Is online mediation here to stay?' (2021) 51 *Southwestern Law Review* 142.

<sup>60</sup> J McIntyre, A Olijnyk & K Pender 'Civil courts and COVID-19: Challenges and opportunities in Australia' (2020) 45(3) *Alternative Law Journal* 195 at 198; K Rosa de Almeida & M Vetis Zaganelli 'Adequate treatment of conflicts online: Realising the right to health in the context of the covid-19 pandemic' (2021) 17(96) *Direito Público* 152 at 158; Henrique da Silveira Zanin & Pedro Henrique Dias Alves Bernardes 'Technology and access to justice during the pandemic: Online Dispute Resolution development in Brazil and Japan' (2022) 18(50) *Revista Tecnologia e Sociedade* 1 at 7.

<sup>61</sup> Obi-Farinde op cit.

<sup>62</sup> Ibid.

countries, namely South Africa, Nigeria, and Kenya. Amongst other questions, this study will contain a consideration of whether such application should mirror that in the USA and EU or whether it would be better to create unique systems of ODR tailored to the individual contexts of the selected African countries. This will be determined by considering whether South Africa, Nigeria and Kenya have the necessary legislative, physical, and technological infrastructure to support the successful adoption of ODR. Attention will also be paid to the similarities and differences between ODR implementation in each selected jurisdiction to see whether a general framework or general principles can be compiled to assist other African countries in constructing their own ODR systems.

### 1.3. Research questions

The main research question is to investigate whether it would be feasible to use ODR systems to resolve various types of disputes on the African continent using South Africa, Nigeria, and Kenya as case studies. To answer this effectively, the following questions must be considered:

1. What are the hallmarks of successfully implemented ODR?
2. What are the obstacles that have traditionally impeded the development of ODR?
3. How could ODR find application in the selected African countries given the unique circumstances in each?

These questions and others are examined in the following chapters, with especial attention paid to the ways in which ODR is already finding application in Africa.

### 1.4. Rationale for the study

The idea of developing ODR to serve as a viable alternative to traditional ADR and litigation as dispute resolution methods is not a new concept.<sup>63</sup> It has been recognised that having a reliable system to resolve issues arising online is becoming

---

<sup>63</sup> Katsh & Rifkin op cit at 19; Bates op cit at 827; Moeves & Moeves op cit at 853; Katsh, Rifkin & Gaitenby op cit at 734; Goodman op cit at 12.

increasingly necessary, due to the proliferation of the internet and online transactions as well as the growing need for socially distanced yet accessible dispute resolution avenues created by the spread of COVID-19.<sup>64</sup> However, the majority of the development, research and scholarship of ODR has taken place and is still taking place in developed nations, to the exclusion of the developing world. This exclusion cannot continue, given the widening gap between the developed and developing worlds,<sup>65</sup> with the Global North being technological leaders while the Global South lags behind.

Despite the growing recognition of the importance of ODR, South Africa and the rest of Africa have been slow to engage with dispute resolution in the context of online disputes. This is problematic, given the fact that the unprecedented technological boom over the past thirty years has changed multiple aspects of human interaction, with humans becoming increasingly reliant on ICT and technology becoming an integral part of modern life. Although South Africa, Nigeria and Kenya have stayed abreast of many technological developments, there is still a gap when it comes to regulating some aspects of online life, especially when it comes to resolving any disputes that may arise online. Undoubtedly, these types of disputes will increase in number as more and more African citizens begin to participate and trade in the digital marketplace. By focusing on South Africa, Nigeria and Kenya as the technological leaders and the homes of some of the biggest online marketplaces in Africa, this research aims to provide a guideline for African countries to use in assessing their readiness to adopt ODR and contribute to the ongoing scholarship of ODR as it develops in new ways across the region.

### 1.5. Theoretical framework

Although ODR was initially based on theoretical understandings gleaned from ADR, it is worth noting that this has changed as ODR has grown into a *sui generis* system of

---

<sup>64</sup> Rooney op cit at 83; Shope op cit at 68; Paulson op cit at 143; McIntyre, Olijnyk & Pender op cit at 197; AP Supriyadi, SKW Amnesti & S Zulaicha 'The online-based economical dispute resolution for 4.0 industry in the new normal era' (2022) 12(2) *Jurisdictie: Jurnal Hukum dan Syariah* 145 at 157.

<sup>65</sup> Amy J Schmitz 'Addressing the class claim conundrum with Online Dispute Resolution' (2020) *Journal of Dispute Resolution* 361 at 387; Albornoz & Martín op cit at 44.

dispute resolution.<sup>66</sup> The criteria most often used to evaluate ODR can broadly be grouped into cost reduction criteria,<sup>67</sup> legal and regulatory concerns,<sup>68</sup> questions of access to justice,<sup>69</sup> considerations of fairness and ethics<sup>70</sup> and technological criteria.<sup>71</sup>

It has been posited that the current approach to ODR has largely been atheoretical, with much of the discussion of ODR focusing on its potential benefits and pitfalls at the expense of any deeper theoretical analysis.<sup>72</sup> Amongst the theoretical frameworks often suggested for analysing ODR are negotiation and bargaining theory<sup>73</sup> and communication theory,<sup>74</sup> both of which find their roots in

---

<sup>66</sup> Ojiako et al explains this saying that ‘the philosophy of ODR is quite different to litigation and ADR philosophies. While the latter (sic) emphasises the need for all parties to assume that the design intelligence reflected within the technology is adequate and, by its nature, impartial, the latter is more focused on the conceptual, physical, professional and psychological constraints associated with human-centred mediation between disputants.’ U Ojiako et al ‘An examination of the “rule of law” and “justice” implications in Online Dispute Resolution in construction projects’ (2018) 36 *International Journal of Project Management* 301 at 306. Also see Shamaise Peters ‘The evolution of Alternative Dispute Resolution and Online Dispute Resolution in the European Union’ (2021) 12(1) *CES Derecho* 3 at 8.

<sup>67</sup> Katsh & Rifkin *Online Dispute Resolution* 26; Arno R Lodder & John Zeleznikow ‘Developing an Online Dispute Resolution environment: Dialogue tools and negotiation support systems in a three-step model’ (2005) 10 *Harvard Negotiation Law Review* 287 at 297; Lan Q Hang ‘Online Dispute Resolution systems: The future of cyberspace law’ (2001) 41 *Santa Clara Law Review* 837 at 855.

<sup>68</sup> Louise Ellen Teitz ‘Providing legal services for the middle class in cyberspace: The promise and challenge of Online Dispute Resolution’ (2001) 70 *Fordham Law Review* 985; Eugene Clark, George Cho & Arthur Hoyle ‘Online Dispute Resolution: Present realities, pressing problems and future prospects’ (2003) 17 *International Review of Law, Computers & Technology* 7 at 17; E Casey Lide ‘ADR and cyberspace: The role of Alternative Dispute Resolution in online commerce, intellectual property and defamation’ (1996) 12 *Ohio State Journal on Dispute Resolution* 193 at 201; Hang op cit at 856.

<sup>69</sup> Llewellyn Joseph Gibbons ‘Creating a market for justice? A market incentive solution to regulating the playing field: Judicial deference, judicial review, due process and fair play in online consumer arbitration’ (2002) 23 *Northwestern Journal of International Law and Business* 1 at 7.

<sup>70</sup> Orna Rabinovich-Einy ‘Technology’s impact: The quest for a new paradigm for accountability in mediation’ (2006) 11 *Harvard Negotiation Law Review* 253 at 253.

<sup>71</sup> Mohamed S Abdel Wahab ‘The global information society and Online Dispute Resolution: A new dawn for dispute resolution’ (2004) 21 *Journal of International Arbitration* 168 at 168.

<sup>72</sup> ‘First, the majority of the criteria used to evaluate ODR are atheoretical. Much of the evaluation of ODR is developed in the form of a discussion of the advantages and disadvantages of ODR compared to dispute resolution in the physical world. Although assessing ODR’s advantages and disadvantages is obviously an important endeavor, we believe that such efforts would be strengthened if they were founded on solid theoretical frameworks.’ David B Lipsky & Ariel C Avgar ‘Online Dispute Resolution through the lens of bargaining and negotiation theory: Toward an integrated model’ (2006) 38 *University of Toledo Law Review* 47 at 47.

<sup>73</sup> Ibid at 49.

<sup>74</sup> Nicole Gabrielle Kravec ‘Dogmas of Online Dispute Resolution’ (2006) 38 *University of Toledo Law Review* 125.

traditional ADR. Lipsky and Avgar propose that ODR is best evaluated using negotiation theory, saying that doing so would add 'a more fine-grained analysis of and an expanded set of criteria by which to evaluate ODR's benefits and drawbacks.'<sup>75</sup>

While an approach based in negotiation theory would have its benefits, it is submitted that ODR scholarship should be approached differently, given that there are many unique elements that distinguish ODR from ADR. The hallmark of ODR is arguably the fusion of technological processes and human approaches to dispute settlement. As such, it is necessary to create a framework that acknowledges both the technological component of ODR (whatever its form) and the potential socio-economic impact that the use of ODR and any subsequent outcomes flowing from such use could have. As this research is focused on assessing the extent to which ODR has been adopted in Africa and questioning whether further adoption should be promoted, it would be interesting to approach the research questions through the lens of the Technology Acceptance Model (TAM),<sup>76</sup> a theory that models how individuals come to accept and use technology.<sup>77</sup> This theory suggests that when individuals are presented with new technology, there are various factors that influence their decision of how to use it.<sup>78</sup> The focus is thus on the attitudes of the users themselves as opposed to a consideration of ODR as a process, based on the

---

<sup>75</sup> Lipsky & Avgar op cit at 28.

<sup>76</sup> FD Davis 'User acceptance of information technology system characteristics, user perceptions and behavioral impacts' (1993) 38(3) *International Journal of Man-Machine Studies* 475.

<sup>77</sup> 'TAM posits that IT usage is a direct function of behavioural intention to use, which is in turn a function of perceived usefulness and attitude towards usage. Attitude towards usage is jointly determined by perceived usefulness and perceived ease of use.' Chao-Min Chiu, Hua-Yang Lin & Szu-Yuan Sun & Meng-Hsiang Hsu 'Understanding customers' loyalty intentions towards online shopping: an integration of technology acceptance model and fairness theory' (2009) 28:4 *Behaviour & Information Technology* 347 at 348.

<sup>78</sup> Younghwa Lee, Kenneth A Kozar & Kai RT Larsen 'The Technology Acceptance Model: Past, present, and future' (2003) 12(50) *Communications of the Association for Information Systems* 752 at 752; Lucky Oghenetega Urhiewhu & Daniel Emojorho 'Conceptual and adoption of Technology Acceptance Model in digital information resources usage by undergraduates: Implication to higher institutions education in Delta and Edo of Nigeria' (2015) 6(21) *Journal of Education and Practice* 82 at 85.

reasoning that these attitudes are the main determinant in whether technology and ODR can be successfully adopted.<sup>79</sup>

Using this user-focused theory as a basis, this study will include an examination of the various factors that affect the feasibility of ODR adoption in Africa. Attention will be paid to those factors that directly affect users (i.e., user trust and security concerns) as well as larger external factors such as technological readiness and the digital divide.

#### 1.6. Research methodology

This study has primarily been conducted by means of an analytical literature survey. This survey includes an analysis and exploration of various legal texts, including domestic, regional, and international legislation and case law, international legal instruments, regional legal instruments, electronic sources, textbooks, academic journals and articles, textbooks and the recommendations and reports of professional bodies practicing ODR. The discussion also contains a comparative study of the existing ODR mechanisms in South Africa, Nigeria, and Kenya, including an investigation of each country's legal framework to assess its readiness for the expansion of ODR. The information gathered from the literature survey has been collected and critiqued in this work, and it is proposed that the findings will be of use to any African countries wishing to create their own guiding principles to facilitate the implementation of ODR.

#### 1.7. Structure of the research

Chapter 1 is entitled 'Introduction' and begins with a general introduction to ODR. It includes background and overview of the research topic, an identification of the research questions, a statement of the theoretical framework and research methodology and a brief outline of each chapter's structure.

---

<sup>79</sup> Urhiewhu & Emojorho op cit at 85. This approach has also been taken by those who design ODR systems, an example of which is seen in Luke Thomas, Sarah Kaur & Simon Goodrich 'Making ODR human: Using human-centred design for ODR product development' (2018) 5 *International Journal of Online Dispute Resolution* 146.

Chapter 2 is entitled 'Historical development and growth of Online Dispute Resolution'. This chapter provides historical context for the research problem, introducing the reader to the historical development of ODR to date and the different factors that played a role in such development. This chapter highlights the fact that ODR originated in the Global North, focusing on the development of ODR in the USA and the EU. The idea of the digital divide is introduced in this chapter, as is the potential for growth of ODR in other regions.

Chapter 3 is entitled 'International and regional instruments governing Online Dispute Resolution'. This chapter contains an analysis of the existing international and regional legislation and soft law instruments which currently govern ODR and highlights their strengths and omissions. The chapter includes brief observations about the current global trends in ODR development, making reference to how it has changed since ODR's inception.

Chapter 4 is entitled 'Obstacles to the successful implementation of Online Dispute Resolution in developing countries'. This chapter examines the various challenges faced in ODR implementation. It includes an exploration of the various conceptual and practical challenges faced by countries in the developing world that could pose obstacles to ODR recognition and implementation.

Chapter 5 is entitled 'Assessment of the current Online Dispute Resolution landscape across Africa'. This chapter contains the main comparative study and focuses on ICT-ready African countries, namely South Africa, Nigeria, and Kenya. The chapter includes an investigation of the ICT legislative framework in each country and an assessment of ODR programs currently operational in each of these jurisdictions.

Chapter 6 is entitled 'Recommendations for an Africa-centred approach to Online Dispute Resolution.' This chapter contains an exploration of the generally accepted norms and principles which govern ODR. It also includes a discussion of how these norms and principles could find practical application and be tailored to the regulation and implementation of ODR in Africa.

Chapter 7 is entitled 'Conclusion'. This chapter serves as the conclusion to the study, drawing together the results of the abovementioned analysis and providing a final assessment of the feasibility of developing ODR in selected African countries.

### 1.8. Conclusion

As Hurter identified in 2000, '(t)he velocity of development and the pace of technological advancement leaves the legal fraternity with little or no choice but to seek workable solutions for future demands by sculpting a legal landscape to meet the needs of society in the next century.'<sup>80</sup> The rate of technological development has only increased since this statement was made, as has the need to create a legal landscape that can accommodate and regulate such development.

ODR has consistently been identified as one of the tools that can be used to create a legal system that meets current societal needs,<sup>81</sup> allowing for a dispute resolution system that incorporates technology and uses it to overcome typical dispute resolution constraints like geographical location and litigation costs. ODR is a particularly attractive option for developing countries, even though there are certain technological and infrastructural challenges that could stand in the way of successful implementation. The following discussion will investigate the feasibility of implementing ODR in Africa despite these challenges, tracing ODR from its inception to its current use across Africa.

---

<sup>80</sup> Hurter (2000) op cit at 199.

<sup>81</sup> Sanjana Hattotuwa 'Transforming landscapes: Forging new ODR systems with a human face' (2006) 23(3) *Conflict Resolution Quarterly* 371 at 373.

## CHAPTER 2: HISTORICAL DEVELOPMENT AND GROWTH OF ONLINE DISPUTE RESOLUTION

*'The Internet is one of the largest and best-connected communities the world has ever seen; as a result, there is a natural need for a tailor-made dispute resolution model.'*<sup>1</sup>

### 2.1. Introduction

Before assessing whether ODR can be implemented successfully in various contexts across the African continent, it is necessary to gain an understanding of how ODR came to be and how it has found application since its inception.

Initially, ODR was viewed as the online version of traditional ADR methods, with these methods simply being transposed to the internet.<sup>2</sup> ODR was originally envisioned as being a way to bring ADR to the internet space, with it being described as 'the use of ADR techniques and processes online'<sup>3</sup> or 'information technology and telecommunication via the Internet (together referred to as 'online technology') applied to alternative dispute resolution.'<sup>4</sup> These types of descriptions seem to have been aimed at relating ODR to an existing method of ADR, drawing an equivalency that would make ODR less alien and less threatening to the *status quo*.<sup>5</sup> By focusing on its alignment with ADR instead of seeing ODR as a separate, *sui generis* method of dispute resolution, dispute resolution authors attempted to provide some semblance of certainty and familiarity when it came to the resolution of online disputes.

---

<sup>1</sup> Jeffrey M Aresty 'The internet and ADR: Educating lawyers about Online Dispute Resolution' (2006) 23 *GPSolo* 30 at 30.

<sup>2</sup> William J Clinton 'A framework for global electronic commerce' available at <http://www.ecommerce.gov/framework.htm>, accessed on 21 November 2020; American Bar Association Task Force on E-commerce & Alternative Dispute Resolution available at <http://www.law.washington.edu/ADA-eADR>, accessed on 21 June 2023; Gerard L Chan 'Getting to yes online: A look at the history, concepts, issues and prospects of Online Dispute Resolution systems (ODRS)' (2009) 83 *Philadelphia Law Journal* 528 at 531; Katsh & Rabinovich-Einy *Digital Justice* 30; Ethan Katsh 'Online Dispute Resolution: Some implications for the emergence of law in cyberspace' (2007) 21 *International Review of Law Computers & Technology* 97 at 99.

<sup>3</sup> Chan op cit at 531.

<sup>4</sup> Julia Hörnle 'Online Dispute Resolution: The emperor's new clothes' (2003) 17 *International Review of Law Computers and Technology* 27 at 29.

<sup>5</sup> As recently as 2008, Haloush and Malkawi emphasised the similarities between ADR and online ADR, stating that 'OADR is essentially a change in venue rather than in approach. The online ADR process does not differ very much from the offline process, except for the fact that another form of communication, i.e. the internet, is used rather than face-to-face procedures...Online ADR would thus not represent a major shift...' Haitham A Haloush & Bashar H Malkawi 'Internet characteristics and Online Alternative Dispute Resolution' (2008) 13 *Harvard Negotiation Law Review* 327 at 332.

However, as time went by and technology progressed, it soon became clear that ODR encompassed something greater than 'ADR in cyberspace'.<sup>6</sup> Since its inception it has grown into its own separate form of dispute resolution arising from the relationship between ADR and ICT and has since been used to resolve disputes that could not be resolved through traditional dispute resolution means.<sup>7</sup> Although there are still differing definitions of ODR, many of the definitions from the mid-to-late 2010s seem to cater for its unique nature, technological heart and applicability to online disputes, offline disputes and any hybrids of the two.<sup>8</sup>

Perhaps the best definition to use for purposes of this discussion is presented by Katsh (often referred to as 'the father of ODR') and Rule, who describe ODR as 'the application of information and communications technology to the prevention, management and resolution of disputes'.<sup>9</sup> This broad definition highlights the use of ICT as the key element of ODR, making no prescriptions about its form or scope of application beyond saying that it should be used to prevent, manage and resolve disputes. Framing ODR in this way makes it clear that it is applicable to both online and offline disputes and can be used at various stages of the dispute resolution process. As such, the current understanding of ODR is much broader than was originally envisioned, and it must be considered how this change came about.

By examining the historical development of ODR and trying to understand the societal factors that contributed to its growth, this chapter will investigate how the current form of ODR came to be. This investigation will begin by demonstrating how the growth of ODR is inextricably linked with technological development and will show how ODR has grown alongside the internet. This chapter will also highlight the various attributes and drawbacks that have traditionally accompanied ODR and will

---

<sup>6</sup> Julia Hörnle *Cross-Border Internet Dispute Resolution* (2009) 74.

<sup>7</sup> Pablo Cortés *Online Dispute Resolution for Consumers in the European Union* (2010) 55-56.

<sup>8</sup> Hörnle *Cross-Border Internet Dispute Resolution* 74; Cortés *Online Dispute Resolution for Consumers* 53; Albornoz & Martín *op cit* at 44; Robert J Condlin 'Online Dispute Resolution: Stinky, repugnant or drab' (2017) 18 *Cardozo Journal of Conflict Resolution* 717 at 723-724; Noam Ebner & Elayne E Greenberg 'Strengthening Online Dispute Resolution justice' (2020) 63 *Washington University Journal of Law & Policy* 65 at 70.

<sup>9</sup> Ethan Katsh & Colin Rule 'What we know and need to know about Online Dispute Resolution' (2016) 67 *South Carolina Law Review* 329 at 329. This is confirmed in Colin Rule 'Technology and the future of dispute resolution' (2015) *Dispute Resolution Magazine* 4 at 5.

identify certain hallmarks of ODR that will affect its reception in Africa, whether positively or negatively.

## 2.2. The history of ODR

When compared to other methods of dispute resolution like litigation and ADR, ODR is a relative newcomer to the legal sphere.<sup>10</sup> This is, of course, due to its being tied so closely to the internet, ICT, and technological development. Prior to the creation and growth of the internet, there were some technologies widely used to increase and expedite communications between people (telephones, fax machines etc), but the way in which human beings interacted was still largely synchronous and face-to-face. This way of relating to each other in society faced a major disruption in the late 80s and early 90s, when computers and the internet were introduced. ODR was born in response to the proliferation of online disputes that followed when the internet became more widely accessible to different types of users and began being used for diverse types of interactions.<sup>11</sup>

The development of ODR can thus be traced along the same lines as the development of the internet, making it only a couple of decades old. However, despite its short lifespan, ODR has already grown by leaps and bounds and is applied in many contexts across the globe.<sup>12</sup> To understand the various contexts in which ODR has been used, it would be instructive to trace the different phases of ODR's development since its inception.

In 2001, Katsh and Rifkin provided a classification of the history of ODR, tracing its development through different eras marked by the level of engagement and the ways in which ODR was used.<sup>13</sup> Other authors have referenced these eras and expanded on them in their own way, describing them as the 'hobbyist' phase (pre-1995), the 'experimental' phase (1995-1998) and the 'entrepreneurial' phase (1998 – 2001).<sup>14</sup> Following this classification a further stage of development was

---

<sup>10</sup> As Rule says, '(t)he history of ODR has just begun to be written'. Rule *Online Dispute Resolution for Business* 22.

<sup>11</sup> Katsh 'Some implications for the emergence of law' op cit at 99.

<sup>12</sup> Noam Ebner & John Zeleznikow 'Fairness, trust and security in Online Dispute Resolution' (2015) 36 *Hamline University's School of Law's Journal of Public Law and Policy* 144.

<sup>13</sup> Katsh & Rifkin *Online Dispute Resolution* 56.

<sup>14</sup> Cortés *Online Dispute Resolution for Consumers* 56; Mania op cit at 77.

identified, namely the ‘institutional’ stage, which is the current stage of ODR development.<sup>15</sup> These broad stages of ODR’s development will be explored here, specifically looking at the hallmarks of each. As the earliest forms of ODR originated in the USA, the discussion will begin with a focus on the approach taken in the USA, with other significant developments that occurred in the EU being explored within each designated time period below.

### 2.2.1. The ‘hobbyist’ phase: pre-1995

Authors have identified this as the first phase in ODR development, during which ODR as an established form of dispute resolution was not yet in existence.<sup>16</sup> This ‘pre-ODR’ time period began before the creation of the internet and lasted until 1995.<sup>17</sup> It is included in the developmental phases of ODR because it was during this time of the internet’s infancy that the first online disputes arose, as well as a recognition of the need for a reliable method of resolving them. Katsh traces ODR’s origins back to the early 1990s and states that it can be linked

‘to a prediction and an observation made at the time. The prediction was that the Internet, as it continued to evolve and as its use increased, would not be a harmonious place...The observation...was that dispute resolution, wherever and however it occurred, involved the communication and processing of information.’<sup>18</sup>

As evidenced by the modern state of affairs, this prediction indeed came to pass, and on a much grander scale than was anticipated at the time of ODR’s inception. Many aspects of everyday life are now conducted on the internet, as people have grown to rely on computer programs and mobile apps for food,<sup>19</sup>

---

<sup>15</sup> Melissa Conley Tyler ‘Evaluating recent developments in Online Dispute Resolution’ *Presentation on 22 March 2006 to the Fourth International Forum on ODR, Cairo*; Cortés *Online Dispute Resolution for Consumers* 55-56; Mania op cit at 77; Paul Stylianou ‘Online Dispute Resolution: The case for a treaty between the United States and the European Union in resolving cross-border e-commerce disputes’ (2008) 36 *Syracuse Journal of International Law & Commerce* 117 at 118.

<sup>16</sup> ‘The initial hobbyist phase was characterized by a smaller group of individuals promoting the concept and working on the development of online dispute resolution.’ S Kumar ‘Virtual venues: Improving Online Dispute Resolution as an alternative to cost intensive litigation’ (2009) 27(1) *John Marshall Journal of Information Technology & Privacy Law* 81 at 82. Also see Cortés *Online Dispute Resolution for Consumers* 55.

<sup>17</sup> Cortés *Online Dispute Resolution for Consumers* 55.

<sup>18</sup> Ethan Katsh ‘ODR: A look at history’ in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) 21.

<sup>19</sup> This is done through means of food and grocery delivery apps such as UberEats, MrD, Checkers Sixty60 and many other retailers’ online versions in South Africa.

transportation,<sup>20</sup> shopping,<sup>21</sup> gaming,<sup>22</sup> news publication and dissemination,<sup>23</sup> photography<sup>24</sup> and making romantic connections.<sup>25</sup> There has thus been a complete revolution in the ways in which human beings interact with each other and the world. The notion that there would be mobile computers strong enough to carry out all of these functions and light enough to be transported everywhere would have seemed unthinkable in the early 1990s, and those writing about ODR at that time could not possibly have foreseen the juggernaut that the internet would become.<sup>26</sup> As such, they could not possibly have foreseen the complexity of the network itself, that security and regulation of the internet would one day become a necessity or that so many disputes would arise from online interactions. There was thus little attention paid to how this technology and interconnectedness could create disputes or to how these disputes, once in existence, would be resolved.<sup>27</sup>

The ‘hobbyist’ phase is so named because most of the people who had access to the internet in these early days were computer hobbyists or working professionals

---

<sup>20</sup> The Uber and Bolt apps have revolutionised the transport industry, allowing customers to make use of e-hailing to arrange transportation.

<sup>21</sup> The biggest South African online retailer is Takealot.com, with similar sites like Loot.co.za also finding a lot of popularity.

<sup>22</sup> Collaborative online gaming has grown in popularity, thanks in large part to games like CounterStrike, World of Warcraft, Red Dead Redemption, and others. These online worlds and players’ ability to navigate them have led to them being used in interesting ways, with one company choosing to use Red Dead Redemption as a venue to host meetings and staff get together, instead of other more traditional videoconferencing tools. For more detail, see Christine Roger ‘People are using Red Dead Redemption 2 to have work meetings for those who work from home’ available at <https://www.techtimes.com/articles/249792/20200521/people-are-using-red-dead-redemption-2-to-have-work-meetings-for-those-who-work-from-home.htm>, accessed 2 June 2023.

<sup>23</sup> Most news outlets now have online versions of their daily print newspapers, as well as their own Twitter feeds to provide their followers with breaking news stories as they happen. International outlets such as CNN, the BBC, the New York Times, and The Guardian have broad online readerships, as do South African outlets eNCA, News24, SABC News and others.

<sup>24</sup> Michael Sankey ‘From rags to riches: Democratisation of the photographic art’ in V Garnons-Williams (ed) *Photography and Fictions: Locating Dynamics of Practice* (2014) 79-84.

<sup>25</sup> Mobile dating apps like Tinder, Bumble, Grindr, and Hinge have become increasingly popular, supplanting the original online dating websites like Match.com. For a picture of how the usage of these apps has increased, see <https://www.businessofapps.com/data/dating-app-market/>, accessed 18 June 2023.

<sup>26</sup> Katsh & Rabinovich-Einy *Digital Justice* 8; Lauren B Edelman, Howard S Erlanger & John Lande ‘Internal dispute resolution: The transformation of civil rights in the workplace’ (1993) 27 *Law & Society Review* 497.

<sup>27</sup> Katsh & Rabinovich-Einy *Digital Justice* 8; Greg Berman & John Feinblatt ‘Problem-solving courts: A brief primer’ (2001) 23 *Law & Policy* 125 at 126; Bruce J Winick ‘Therapeutic jurisprudence and problem-solving courts’ (2003) 30 *Fordham Urban Law Journal* 1055 at 1056.

whose jobs required them to have access to computers.<sup>28</sup> Despite this limitation, online communication between the few with access to the internet in the late 1980s and early 1990s was possible, if not entirely user friendly. There were already avenues that early computer users had to reach out to like-minded individuals, albeit in a limited form. The main mode of communication was through online bulletin boards, and the connection was dependent on telephone lines, thus restricting these online communities to specific regions.<sup>29</sup> Despite the slow modem speeds and limits of only using text to communicate, online communities started to grow around the users of these bulletin boards. Together with the increase in online communities came an increase in interpersonal conflicts, which is not altogether surprising given that bulletin boards were used to discuss users' common areas of interest and thus created the space for different opinions to be discussed. There were no guidelines for how to resolve these conflicts, and no formal dispute resolution services existed. Indeed, having disputes arise in the online space was still a novelty, and there was no precedent for how such disputes should or could have been handled.

Even at this early stage of online life, there were fields of operation other than personal and professional where users had access to centralised computer networks.<sup>30</sup> One such area was academia. A number of universities and colleges across the USA were linked by a central computer network which allowed researchers and academics to communicate with each other.<sup>31</sup> The other area that relied on computer networks was the military, who had their own secure network for military applications (MilNet) and who had developed their own precursor to the internet in the 1970s known as ARPANet.<sup>32</sup> In these academic and military local area networks, parties could communicate with others on the network. However, these spaces were

---

<sup>28</sup> Rule *Online Dispute Resolution for Business* 22; Melissa Conley Tyler & Di Bretherton 'Seventy-six and counting: an analysis of ODR Sites' in Ethan Katsh & Daewon Choi (eds) *Online Dispute Resolution (ODR): Technology as the Fourth Party Papers and Proceedings of the 2003 United Nations Forum on ODR* (2003).

<sup>29</sup> Rule *Online Dispute Resolution for Business* 22.

<sup>30</sup> Katsh 'ODR: A look at history' op cit at 21.

<sup>31</sup> Rule *Online Dispute Resolution for Business* 23.

<sup>32</sup> Rule *Online Dispute Resolution for Business* 23.

still relatively contained and had their own internal set of rules for online conduct, which became customary for the users.<sup>33</sup>

The advent of the internet and the introduction of the first internet service providers (ISPs) changed this state of affairs by providing a way to connect a number of networks together to provide one overarching network that stretched across the USA.<sup>34</sup> In the early days of the internet, this network was often referred to as an 'information superhighway', a term that former Vice President of the USA Al Gore has been credited with coining.<sup>35</sup> This term generally described the use of computer networks for economic, social, governmental and other activities,<sup>36</sup> hinting at its many future users and the sheer volume of information that is now available to be accessed by modern internet users. The increased interconnectedness provided by the internet naturally led to an increase in user interactions and it was soon apparent that customary self-regulation would not be sufficient to resolve the growing number of disputes that arose from the new pool of online users.

By the end of this phase, the scope and level of online interaction had already grown exponentially, and by 1994 the online space was being described in the following way:

'People in virtual communities use words on screens to exchange pleasantries and argue, engage in intellectual discourse, conduct commerce, exchange knowledge, share emotional support, make plans, brainstorm, gossip, feud, fall in love, find friends and lose them, play games, flirt, create a little high art and a lot of idle talk. People in virtual communities do just about everything people do in real life, but we leave our bodies behind.'<sup>37</sup>

This description is very close to how the internet currently operates, despite the fact that it limits the vast range of available interactions to people in specific online communities. Despite this limitation, it was clear that the growth in the types of online interactions available also resulted in more disputes between the users in

---

<sup>33</sup> Henry H Perritt Jr 'Dispute resolution in electronic network communities' (1993) 38 *Villanova Law Review* 349.

<sup>34</sup> Katsh 'ODR: A look at history' op cit at 22.

<sup>35</sup> George H Friedman 'Alternative dispute resolution and emerging online technologies: Challenges and opportunities' (1997) *Hastings Communications and Entertainment Law Journal* 695 at 699.

<sup>36</sup> George H Friedman & Robert Gellman 'An information superhighway 'on ramp' for alternative dispute resolution' (1996) *New York State Bar Journal* 38 at 39.

<sup>37</sup> Howard Rheingold *The Virtual Community: Homesteading on the Electronic Frontier* (1994) 3.

the respective online communities, and users began paying more attention to the ways in which such disputes could and should be regulated. The era of customary self-regulation had come to an end and a new phase, the 'experimental' phase, was ushered in.

### 2.2.2 The 'experimental' phase: 1995-1998

The internet landscape had already changed so much over the course of the 'hobbyist' phase that by 1996 more than 130 countries had some kind of presence on the internet, with some reports estimating user numbers of 37 million.<sup>38</sup> This widespread internet usage led to an increase in online disputes and a corresponding increased interest in resolving them. This phase is notable for the various initiatives undertaken by academics and non-profit organisations in an attempt to find a dispute resolution mechanism that fit the unique environment of the internet.<sup>39</sup>

As various authors observed,<sup>40</sup> the internet (or 'Cyberia' as it was referred to by one writer)<sup>41</sup> has unique characteristics which distinguish it from the real world.<sup>42</sup> It was thus argued that these differences should inform the construction of an effective dispute resolution system. For example, the internet allowed for communication to occur asynchronously, cross geographical borders and take place in the absence of physical contact.<sup>43</sup> The proposed dispute resolution systems developed during this time thus had to accommodate and incorporate the same aspects and provide both flexibility and enforceability, which is difficult to achieve simultaneously.

---

<sup>38</sup> Bordone op cit at 175.

<sup>39</sup> Conley Tyler & Bretherton op cit.

<sup>40</sup> Katsh & Rifkin *Online Dispute Resolution* 60; Clark, Cho & Hoyle op cit at 9-10; Rule *Online Dispute Resolution for Business* 61-86; Chan op cit at 564.

<sup>41</sup> Bordone op cit at 179.

<sup>42</sup> The unique characteristics of the online environment were best described by Katsh, who described the online space as '...a highly active arena of exchanges and encounters...an environment where one's informational activities are not limited by many of the temporal or spatial constraints of the physical environment. This leads to an expansion of economic and creative interactions, a largely beneficial consequence of an electronic environment, and, inevitably, an expansion of disputes involving the acquisition, use, possession, processing and communication of information.' Ethan Katsh 'Dispute resolution in cyberspace' (1996) 28 *Connecticut Law Review* 953 at 956.

<sup>43</sup> 'The development of the Internet spawned the use of asynchronous technologies, including email, the World Wide Web, file sharing and instant messaging.' Lipsky & Avgar op cit at 56.

One approach to the resolution of online disputes was that of ADR. It was thought that using existing ADR measures to resolve online disputes would be advantageous in that these types of dispute resolution measures are less adversarial in nature, are often more affordable to conduct (unlike traditional litigation) and could be more easily adapted to take place in the online space without physical or geographical restraints. As such, the earliest forms of ODR that were developed were often referred to as Online Alternative Dispute Resolution (OADR), as they involved merely transposing ADR methods to the online space.<sup>44</sup> At the time, there was not much consideration of how the internet could be used more effectively, to streamline and facilitate dispute resolution processes instead of simply replicating them. Because of this, early OADR programs followed the structure of offline mediation and arbitration,<sup>45</sup> with the parties negotiating with each other to reach a settlement or a guided dispute resolution co-ordinated by a human third party.<sup>46</sup> This replication of traditional mediation and arbitration models on the internet meant that a similar amount of effort went into resolving internet disputes as would have gone into resolving offline disputes, although the online nature of the proceedings admittedly had the advantage of removing both the financial and temporal costs of travelling to physical arbitration sites.

The first significant OADR/ODR initiatives were developed in the USA in 1996<sup>47</sup> by the National Conference of Automated Information Research (NCAIR) in conjunction with the Cyberspace Law Institute (CLI) and other organisations. Together, these organisations developed and funded three separate OADR programs, namely the Online Ombuds Office (OOO) based at the University of Massachusetts,<sup>48</sup> the Virtual Magistrate (VM) and the online mediation project run by the University of

---

<sup>44</sup> Katsh 'Some implications for the emergence of law' op cit at 99; Katsh & Rule op cit at 329; Julio César Betancourt & Elina Zlatanska 'Online dispute resolution (ODR): What is it, and is it the way forward?' (2013) 79 *Arbitration* 256.

<sup>45</sup> Albornoz & Martín op cit at 44.

<sup>46</sup> Ethan Katsh 'Dispute resolution without borders: Some implications for the emergence of law in cyberspace' (2006) 11 *First Monday* available at <https://doi.org/10.5210/fm.v11i2.1313>, accessed 24 June 2023.

<sup>47</sup> Katsh (1996) op cit at 964.

<sup>48</sup> Katsh (2012) op cit at 22.

Maryland Law School known as mediate.net.<sup>49</sup> Each of these programs was aimed at resolving different types of online disputes and thus used different ADR measures to do so, with varying results.<sup>50</sup> Each program will be discussed briefly here, noting the success of each, as these initiatives have been described as ‘the beginning of the online dispute resolution movement.’<sup>51</sup>

#### 2.2.2.1 *The Virtual Magistrate (VM)*

Described as the first proper ODR scheme to be launched,<sup>52</sup> this experimental project was aimed at using voluntary online arbitration to resolve disputes that involved users of online systems and anybody else who was affected by the posting of harmful messages or the sharing of files with questionable content.<sup>53</sup> Disputes involving system operators also fell within the scope of the VM project.<sup>54</sup> These system operators were the owners or administrators of different systems that conducted information distribution.<sup>55</sup> This included ISPs and bulletin and message board operators, who typically processed large amounts of information, including messages posted or sent by their users. As such, there was the potential for disputes to arise regarding the content of such messages and other files that users shared, especially those where the content of the messages could potentially cause harm to a third party. VM created the opportunity for such a third party to approach the system operators to remove the content from their system, thus lodging the dispute.

The proposed method of resolving these disputes was through a system of online arbitration.<sup>56</sup> The envisioned process was that the aggrieved party would contact the VM project managers via email to describe their complaint. VM would

---

<sup>49</sup> Lucille M Ponte ‘Throwing bad money after bad: can online dispute resolution (ODR) really deliver the goods for the unhappy internet shopper’ (2001) 3 *Tulane Journal of Technology and Intellectual Property* 55 at 60-61.

<sup>50</sup> Susan Schiavetta ‘The relationship between e-ADR and Article 6 of the European Convention of Human Rights pursuant to the case law of the European Court of Human Rights’ (2004) 1 *Journal of Information Law and Technology*.

<sup>51</sup> Katsh & Rabinovich-Einy *Digital Justice* 32.

<sup>52</sup> Cortés *Online Dispute Resolution for Consumers* 55.

<sup>53</sup> Frank A Cona ‘Application of online systems in alternative dispute resolution’ (1997) 45 *Buffalo Law Review* 975 at 987.

<sup>54</sup> Lucille M Ponte ‘Michigan Cyber Court: A bold experiment in the development of the first public virtual courthouse’ (2002) 4 *North Carolina Journal of Law & Technology* 51 at 66.

<sup>55</sup> Katsh (1996) *op cit* at 964.

<sup>56</sup> Ponte (2001) *op cit* at 60.

then contact the defendant (also via email) and invite them to participate in the proceedings. Once this was agreed to, the parties and the selected arbitrator would participate in the proceedings online, mostly using email. The arbitrator then undertook to email parties with the outcome of the matter within 3 days.<sup>57</sup> Due to the focus on arbitration, VM was seen as a more formal or official means to seek redress, and the decisions made were envisioned as being interim resolutions to problems that later went for judicial decisions.<sup>58</sup>

However, the project only ran for a short space of time, with very little success.<sup>59</sup> Only one case was decided by VM,<sup>60</sup> and various reasons have been proposed as to why this is.<sup>61</sup> One proposed reason was lack of interest,<sup>62</sup> another the fact that the process was entirely voluntary, and there was thus no way to enforce the arbitrators' decisions.<sup>63</sup> Yet other reasons relate to accessibility and a lack of public awareness about the project,<sup>64</sup> and it is clear that although the supply of an ODR system was there, the public demand was not. Although the site is now defunct,<sup>65</sup> the VM program paved the way for future ODR endeavours and has been described as being ahead of its time.<sup>66</sup>

#### 2.2.2.2. *The Online Ombuds Office (OOO)*

The OOO has been described as the 'beta version' of VM<sup>67</sup> and was an attempt to bring the resources of a traditional ombuds office online.<sup>68</sup> It aimed to do so by

---

<sup>57</sup> Robert Gellman 'A brief history of the Virtual Magistrate project: The early years' (1996) available at <http://www.umass.edu/dispute/ncair/gellman.htm>, accessed 12 June 2023.

<sup>58</sup> Clark, Cho & Hoyle op cit at 9-10.

<sup>59</sup> Sarah Rudolph Cole & Kristen M Blankley 'Online Mediation: Where we have been, where we are now, and where we should be' (2006) 38 *University of Toledo Law Review* 193 at 199; Ponte (2002) op cit at 66.

<sup>60</sup> *Tierney v Email America* VM Docket No 96-0001 (8 May 1996).

<sup>61</sup> For a full breakdown of the various problems identified with VM, see Karim Benyekhlef & Fabien Gélinas 'Online Dispute Resolution' (2005) 10 *Lex Electronica* 1 at 4.

<sup>62</sup> Rule *Online Dispute Resolution for Business* 28; Ponte (2001) op cit at 64.

<sup>63</sup> Karen Stewart & Joseph Matthews 'Online arbitration of cross-border, business to consumer disputes' (2002) 56 *University of Miami Law Review* 1111; Katsh, Rifkin & Gaitenby op cit at 709.

<sup>64</sup> Henry H Perritt Jr 'Dispute resolution in cyberspace: Demand for new forms of ADR' (2000) *Ohio State Journal on Dispute Resolution* 675 at 686; Katsh & Rifkin *Online Dispute Resolution* 56; Ponte (2001) op cit at 64; Hang op cit at 861.

<sup>65</sup> Hang op cit at 845.

<sup>66</sup> Cortés *Online Dispute Resolution for Consumers* 55.

<sup>67</sup> Hang op cit at 846.

<sup>68</sup> Cona op cit at 988.

providing mediation services for all internet disputes.<sup>69</sup> Its scope of application included such wide-ranging matters as domain name disputes, disputes between discussion group members, disputes with ISPs and intellectual property disputes.<sup>70</sup> The OOO provided users with two potential avenues for resolving their disputes. One option was for the user to navigate the site themselves to find information that could assist them in resolving their matters on their own. The other option was for users to use the site to find an online ombudsman who could provide them with more extensive assistance.<sup>71</sup> The OOO thus offered the option of a more informal and flexible dispute resolution system that VM did, relying on mediation instead of arbitration. This mediation was voluntary, free to conduct online and did not provide an authoritative outcome, relying instead on party goodwill to enforce the agreement reached.<sup>72</sup>

Despite (or perhaps because of) this flexibility and informality, this project was more successful than its predecessor VM,<sup>73</sup> even though it also mostly relied on email to facilitate its dispute resolution process.<sup>74</sup> OOO truly found success when it was implemented by eBay to resolve disputes between buyers and sellers using their online auction site.<sup>75</sup> In these instances, a single mediator used email to assist parties in resolving their disputes, successfully resolving more than half of the disputes submitted to OOO.<sup>76</sup> Of the three initiatives discussed here, OOO is the only one that still has some online presence.<sup>77</sup> The successful implementation of OOO to solve small business-to-consumer (B2C) disputes paved the way for OOO to form the basis of the SquareTrade project, a subsequent for-profit ODR venture that continued to be a strong dispute resolution presence until 2008.<sup>78</sup>

---

<sup>69</sup> Katsh & Rifkin *Online Dispute Resolution* 56.

<sup>70</sup> Benyekhlef & Gélinas op cit.

<sup>71</sup> Cona op cit at 988.

<sup>72</sup> Clark, Cho & Hoyle op cit at 10.

<sup>73</sup> Ponte (2001) op cit at 60-61.

<sup>74</sup> Teitz op cit at 1001.

<sup>75</sup> Perritt (2000) op cit at 689.

<sup>76</sup> Katsh & Rabinovich-Einy *Digital Justice* 32.

<sup>77</sup> Their webpage can still be viewed at [ombud.org](http://ombud.org)., accessed 6 June 2023.

<sup>78</sup> Further detail on this project will be provided at 2.2.3 below.

### 2.2.2.3 Mediate-net

Another online mediation program, Mediate-net was created by the University of Maryland in conjunction with the NCAIR. Mediate-net focused on resolving real-world family disputes, functioning both as an online information resource and as a mediation service,<sup>79</sup> providing a dual function like that of the OOO. The entire dispute resolution process was to take place online using a mixture of real time meetings and video conferencing for the parties to communicate,<sup>80</sup> as Mediate-net was aimed at providing parents who were located at a distance from each other with an appropriate forum in which to resolve their disputes.<sup>81</sup>

However, this program was very limited in scope, as in addition to only being used for family dispute resolution, it was also only for use by residents of Maryland whose disputes were governed by Maryland law.<sup>82</sup> This project did not find widespread application, and it is thus not surprising that very little information is available on Mediate.net. Despite this, it is consistently named with VM and OOO as one of the pioneering ODR programs, providing an early glimpse of the ways in which ODR could develop and the types of disputes that could be resolved in this manner.

### 2.2.2.4. What can be learned from these early ODR initiatives?

From the above, it is evident that during the experimental phase the types of disputes that were submitted to be settled online tended to be limited to conflicts that arose directly from online interaction,<sup>83</sup> with the exception of the family disputes regulated by Mediate.net. Early ODR initiatives were driven by non-profit and educational organisations whose contributions to ODR development were varied.<sup>84</sup> During this time, strides were made in experimenting with different technological methods, collecting data on the successes and failures of the ODR processes already implemented and in beginning to consider the ideal framework for sustainable and

---

<sup>79</sup> Ponte (2001) op cit at 61.

<sup>80</sup> Ponte (2001) op cit at 61.

<sup>81</sup> Katsh (2006) op cit.

<sup>82</sup> Ponte (2001) op cit at 61.

<sup>83</sup> Ponte (2001) op cit at 60-61.

<sup>84</sup> 'In the mid-1990s, on-line dispute resolution (ODR) was probably something of a curiosity, an idea rather than a new area of practice. ODR was something for the hobbyists, innovators and experimenters...' David Syme 'Keeping pace: On-line technology and ADR services' (2006) 23 *Conflict Resolution Quarterly* 343 at 343.

successful ODR platforms.<sup>85</sup> Domain name disputes, intellectual property disputes and e-commerce disputes emerged as the main types of issues sought to be resolved by ODR and the pilot programs managed to engage with them with varying degrees of success.

A popular opinion seemed to be that these pilot ODR programs were too ambitious for the time in which they functioned<sup>86</sup> and that there were too many limitations on their successful implementation. In 1998, Eisen argued that

‘Online mediation is an unwise idea until at least two substantial developments take place. First, the mediation profession must fundamentally reorient itself to take account of the different demands of the online medium. Second, and no less important, technology must progress to the point where replicating face-to-face interaction is universal, inexpensive, and easily understood by every participant.’<sup>87</sup>

Although Eisen validly identified that the technology available during the experimental phase was not yet advanced enough to meet the requirements of ODR, it is his other prerequisite for successful implementation of online mediation that must be examined. Eisen called for a fundamental reorientation of the mediation profession to acknowledge and adapt to the differences and novel situations presented by the internet and online life. To date, this has arguably not happened, with many mediators, ADR practitioners and other law practitioners and academics still not taking the vast technological strides that human society has made over the past 30 years into account in their conception of the law. Despite the reluctance of some to consider the intersection of law and technology and begin to examine the impact that the latter must necessarily have on the former, ODR’s development has pushed on.<sup>88</sup>

A key factor in this development was the sudden growth of e-commerce that began during the mid-to-late 1990s and has continued since then. Until 1992, there

---

<sup>85</sup> Ponte (2001) op cit at 65.

<sup>86</sup> Ponte (2001) op cit at 61.

<sup>87</sup> Joel B Eisen ‘Are we ready for mediation in cyberspace’ 1998 *Brigham Young University Law Review* 1305.

<sup>88</sup> This development was recently given a renewed boost following the advent of the COVID-19 pandemic in 2020. For examples of how the pandemic has impacted and, in some instances, accelerated our current approach to ODR, see the comparative study in Chapter 5 below.

was a US governmental prohibition of commercial activity on the internet.<sup>89</sup> Following the lifting of this ban, economic activity began to flourish, especially with the launch of sites like Amazon and eBay in 1995.<sup>90</sup> With the increase in e-commerce transactions, there was a corresponding increase in online disputes, and it was clear that more efficient dispute resolution systems were needed to accommodate the volume of new commercial disputes generated online. ODR seemed poised to fill that role.

From the experimental phase, ODR entered the entrepreneurial phase, where the first successful ODR initiatives emerged and the industry truly began to grow.<sup>91</sup>

### 2.2.3. The 'entrepreneurial' phase: 1998-2002

During this phase, much of ODR's development in the USA was driven by commercial entities,<sup>92</sup> moving away from the more academic focus seen in both the 'hobbyist' and 'experimental' phases.<sup>93</sup> Described as a period of 'significant entrepreneurial activity',<sup>94</sup> this period coincided with an economic and technological boom<sup>95</sup> and companies were thus well-placed to develop and implement ODR processes for use by online consumers.<sup>96</sup> It was also during this time that those working with ODR programs began to shift their thinking and consider the versatility of the technological tools that they now had at their disposal, instead of just focusing on replicating offline processes. There was thus the beginning of a movement away from OADR towards an online dispute resolution system that was markedly different from its offline

---

<sup>89</sup> Jay P Kesan & Rajiv C Shah 'Fool us once shame on you - fool us twice shame on us: What we can learn from the privatizations of the internet backbone network and the domain name system' (2001) 79 *Washington University Law Quarterly* 111 at 113-14.

<sup>90</sup> Ethan Katsh & Leah Wing 'Ten years of online dispute resolution (ODR): Looking at the past and constructing the future' (2006) 38 *University of Toledo Law Review* 19 at 26.

<sup>91</sup> Cortés *Online Dispute Resolution for Consumers* 55.

<sup>92</sup> Rule *Online Dispute Resolution for Business* 28; Bruno Deffains & Yannick Gabuthy 'Efficiency of Online Dispute Resolution: A case study' (2005) 60 *Communications & Strategies* 201 at 202; Conley Tyler & Bretherton op cit.

<sup>93</sup> Cortés *Online Dispute Resolution for Consumers* 55.

<sup>94</sup> Katsh & Rifkin *Online Dispute Resolution* 57.

<sup>95</sup> Mania op cit at 77.

<sup>96</sup> 'The real driver for the expansion of ODR was and is commerce.' Louis Del Duca, Colin Rule & Zbynek Loebel 'Facilitating expansion of cross-border e-commerce – developing a global online dispute resolution system (Lessons derived from existing ODR systems – Work of the United Nations Commission on International Trade Law)' (2012) 1 *Penn State Journal of Law and International Affairs* iv at 61; Andrea M Braeutigam 'Fusses that fit online: Online mediation in non-commercial contexts' (2006) 5 *Appalachian Journal of Law* 275 at 277.

counterpart.<sup>97</sup>

The seeds for this ‘commercialisation’ of ODR had already been planted when eBay partnered with the creators of OOO to great effect during the ‘experimental’ phase.<sup>98</sup> eBay aimed to provide their consumers with an efficient and cost-effective dispute resolution service for them to use when they had a grievance arising from an interaction with the site. Together with OOO, eBay ran a pilot program of online mediation which fit their needs and was well received by eBay consumers,<sup>99</sup> filing over 200 complaints for resolution within a two-week period.<sup>100</sup>

This success inspired eBay to partner with a bigger ODR start-up known as SquareTrade.<sup>101</sup> In the initial pilot program, disputes were resolved by one mediator using email to communicate with the disputing parties. However, this would not work for the scale of eBay and would not allow for the smooth processing of a large number of cases. For efficiency, thus, it was suggested that ‘technology needed to be a resource that provided at least some of the expertise of a trained third party’.<sup>102</sup> Starting in 1999, eBay’s partnership with SquareTrade aimed to make use of technology in this way, automating part of the dispute resolution process.<sup>103</sup> One of the driving forces of their development of a novel ODR system was eBay’s determination to create an online space for its users where communication was centred as a way to work through any problems that arose.<sup>104</sup> Established as a two-stage process, SquareTrade offered consumers a way to resolve their online disputes that could not be settled using traditional negotiation.<sup>105</sup> The first stage of the process, known as ‘Direct Negotiation’, was a technology-assisted negotiation where

---

<sup>97</sup> Katsh ‘Some implications for the emergence of law’ op cit at 100.

<sup>98</sup> See the discussion at 2.2.2.3 above.

<sup>99</sup> Cole & Blankley op cit at 200.

<sup>100</sup> Katsh ‘Some implications for the emergence of law’ op cit at 100-101; Rebecca Brennan ‘Mismatch.com: Online Dispute Resolution and divorce’ (2011) 13 *Cardozo Journal of Conflict Resolution* 197 at 207.

<sup>101</sup> Katsh ‘Some implications for the emergence of law’ op cit at 100-101; Mania op cit at 77.

<sup>102</sup> Katsh ‘Some implications for the emergence of law’ op cit at 100-101.

<sup>103</sup> Orna Rabinovich-Einy ‘Technology’s impact: The quest for a new paradigm for accountability in mediation’ (2006) 11 *Harvard Negotiation Law Review* 253 at 257.

<sup>104</sup> Katsh & Rabinovich-Einy *Digital Justice* at 34.

<sup>105</sup> Cole & Blankley op cit at 201.

parties used online forms to lodge their claims and exchange their demands.<sup>106</sup> If no settlement could be reached in this way, then the next step for disputing parties would be that of online mediation facilitated by a human mediator.<sup>107</sup>

In this way, SquareTrade successfully combined the human element with the technological one, using the technology in a way that expedited the processing of information and allowed for a larger number of cases to be resolved. This development and its success signified a major shift in the approach to ODR, which could no longer be considered as a mere replication of offline ADR processes. Rather, the unique nature of ODR was beginning to be felt, and it was realised that ODR could indeed function effectively as a *sui generis* means of dispute resolution.<sup>108</sup> Although it stopped providing dispute resolution services in 2008,<sup>109</sup> SquareTrade was a pioneer in using technology to perform part of the ODR process,<sup>110</sup> giving it a bigger role than merely facilitating communication between the parties. It thus laid the groundwork for the subsequent creation and development of other ODR providers.

The success of SquareTrade was also a catalyst for the proliferation of other ODR start-ups, which quickly appeared during the emergence of the so-called 'dot-com bubble' that took place between 1999 and 2000.<sup>111</sup> One of the most successful of these was Cybersettle,<sup>112</sup> a web-based ODR process that built on the increased technological reliance introduced by SquareTrade. Cybersettle was an online

---

<sup>106</sup> Brennan op cit at 207; Steve Abernethy 'Building large-scale Online Dispute Resolution and trustmark systems' in E Katsh & D Choi (eds) *Online Dispute Resolution: Technology as the 'Fourth Party'* (2003) 253.

<sup>107</sup> Katsh & Rabinovich-Einy *Digital Justice* 34; Brennan op cit at 207; Abernethy op cit at 253.

<sup>108</sup> 'It was no longer considered necessary to mimic labor-intensive offline processes. Instead, the differences between communicating face to face and online were embraced, ultimately producing a new type of software- assisted process that had not existed in the physical environment. By substituting software for a human, and breaking down the mediation process into small components, technology- assisted negotiation could perform many of the tasks previously performed by a human facilitator and could easily scale to an extraordinarily large numbers of cases. These component tasks included: identifying dispute types; exposing parties' interests; asking questions about positions; reframing demands; suggesting options for solutions; allowing some venting; establishing a time frame; keeping parties informed; disaggregating issues; matching solutions to problems; and drafting agreements.' Katsh & Rabinovich-Einy *Digital Justice* 34.

<sup>109</sup> Brennan op cit at 207; Cortés *Online Dispute Resolution for Consumers* 66.

<sup>110</sup> Dusty Bates Farned 'A new automated class of online dispute resolution' (2011) *Faulkner Law Review* 338.

<sup>111</sup> Katsh (2012) op cit at 21; Albornoz & Martín op cit at 43.

<sup>112</sup> A general assessment of the success of Cybersettle can be found in Russell Weiss 'Some economic musings on Cybersettle' (2006) 38 *University of Toledo Law Review* 89.

negotiation site that used software to a greater degree than any of its predecessors, allowing disputing parties to use a completely automated system to resolve their monetary disputes through negotiation.<sup>113</sup> Claimants had to register with Cybersettle, which would then use the information provided to contact the defendant and invite them to participate in the ODR process.<sup>114</sup> If the defendant accepted the invitation, they would follow up by filing a response to the complaint made against them. Once this was completed, the parties would submit sealed offers to the site, where the software would do the work of accepting the offers and determining whether reaching a settlement would be possible.<sup>115</sup> This would be done by using a predetermined bargaining rule to create a settlement range between the plaintiff's claim and the maximum possible settlement amount. The parties were then emailed to let them know whether their respective offers fell within the determined range of settlement or whether there was no overlap between the claimant and defendant's offers,<sup>116</sup> meaning that no settlement was possible. The program only allowed for three rounds of bidding<sup>117</sup> and if no settlements were reached in this way, the information already provided would remain confidential and the parties would be able to consult another avenue to resolve their dispute.<sup>118</sup>

The creation, use and success of this automated system encapsulated the shifting attitude towards ODR that took place during the entrepreneurial stage. Instead of just using ICT to facilitate communication between disputing parties and a human mediator or arbitrator as seen in the earliest OADR initiatives, ICT was now playing the role of a party to the dispute resolution, taking over some or all of the aspects of the ODR process. Based on this realisation and the success that ODR found in the commercial sphere, private entities began to question whether ODR could be used to resolve other types of disputes besides those which arose online about

---

<sup>113</sup> Deffains & Gabuthy op cit at 203.

<sup>114</sup> Mania op cit at 77.

<sup>115</sup> Deffains & Gabuthy op cit at 202.

<sup>116</sup> Joseph W Goodman 'The pros and cons of online dispute resolution: An assessment of cyber-mediation websites' (2003) 2 *Duke Law & Technology Review* 1 at 3.

<sup>117</sup> Ponte (2001) op cit at 69; Goodman (2003) op cit at 3.

<sup>118</sup> Goodman (2003) op cit at 3; Brennan op cit at 208.

commercial concerns. This interest in expanding ODR was also displayed by official bodies, who began to investigate how their institutions could implement ODR.

This involvement of official bodies in developing and regulating ODR was already under way in the EU during this 'entrepreneurial' phase.<sup>119</sup> Whilst the development of ODR in the USA was largely driven by private parties, in the EU there was a push by the regional government to promote the use of ODR as a means of supporting the growth of the internal market.<sup>120</sup> There were thus a number of European initiatives introduced during this phase that aimed to spread awareness of ODR and begin its regulation.<sup>121</sup>

The first development on the part of the EU government in acknowledging the potential use of ODR was the E-Commerce Directive of 2000,<sup>122</sup> which required that the laws of each Member State be made compatible with the use of ODR techniques.<sup>123</sup> In the same year, the European Commission (EC) set up the European Extra-Judicial Network (EEJ-Net)<sup>124</sup> with the aim of creating 'a network of national bodies for the extra-judicial settlement of disputes in order to resolve cross-border consumer disputes quickly and effectively, making use of the new means of communication, particularly the Internet.'<sup>125</sup> This network eventually became the European Consumer Centres Network (ECC-Net),<sup>126</sup> and provided assistance for

---

<sup>119</sup> 'The year 2000 can be seen as marking the beginning of the EU's formal interest in ODR.' Pablo Cortés & Arno R Lodder 'Consumer dispute resolution goes online: Reflections on the evolution of European law for out-of-court redress' (2014) 21(1) *MJ* 14 at 20; Pavel Loutocký 'Online Dispute Resolution to resolve consumer disputes from the perspective of European Union law: Is the potential of ODR fully used' (2016) 10 *Masaryk University Journal of Law & Technology* 113 at 115.

<sup>120</sup> Cortés & Lodder op cit at 16; Marta Poblet & Graham Ross 'ODR in Europe' in D Rainey, E Katsh & M Abdel Wahab (eds) *Online Dispute Resolution: Theory and Practice* 2 ed (2021); Katsh (2012) op cit at 23; Stylianou op cit at 121.

<sup>121</sup> Ursa Jeretina 'Consumer Online Dispute Resolution (ODR) - A mechanism for innovative e-Governance in EU' (2018) 16 *Central European Public Administration Review* 45 at 54.

<sup>122</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce'), [2000] OJ L 178.

<sup>123</sup> Recital 51 [2000] OJ L 178.

<sup>124</sup> Mirèze Philippe 'ODR redress system for consumer disputes: Clarifications, UNCITRAL works and EU Regulation on ODR' (2014) 1(1) *International Journal of Online Dispute Resolution* at 67; Stylianou op cit at 121.

<sup>125</sup> Poblet & Ross op cit; Loutocký op cit at 116.

<sup>126</sup> This transition happened in 2005. For more detail see Cortés & Lodder op cit at 22; Cortés *Online Dispute Resolution for Consumers* at 8.

consumers in cross-border transactions to identify and contact the best ADR provider to resolve any disputes which could arise from those transactions.<sup>127</sup>

It was also during this phase that the EC launched a project called Electronic Consumer Dispute Resolution (ECODIR), which was one of the earliest publicly funded ODR providers.<sup>128</sup> Although this project was sponsored by the EC, it was in fact a collaboration between European and Canadian partners, and was aimed at offering European consumers an electronic platform where they could resolve disputes with online traders.<sup>129</sup> The first iteration of ECODIR went live in 2001,<sup>130</sup> and provided a free, voluntary dispute resolution process.<sup>131</sup> The project lasted three years and handled only twelve cases,<sup>132</sup> causing it to come to an end in 2004.

Despite these promising initiatives, the consensus on the EU ODR projects at the time was that they did not live up to expectations, with a lack of awareness being cited as a major hurdle.<sup>133</sup> Although they were not as successful as hoped, they laid the foundation for much further development in the ‘institutional’ phase.

#### 2.2.4. The ‘institutional’ phase: 2002-2020

Beginning in the early 2000s, US governmental institutions and other public organisations started to pilot and adopt their own ODR systems<sup>134</sup> following the success of ODR in resolving e-commerce disputes. Described as a ‘phase of development that is characterised by increasing integration of ODR technologies in private and government ventures’,<sup>135</sup> this phase is marked by rapid development. These areas of development include the expansion of ODR into fields outside of

---

<sup>127</sup> Calliess & Heetkamp op cit at 13.

<sup>128</sup> L Edwards & C Wilson ‘On-line dispute resolution in cross-border consumer e-commerce transactions: lessons from eBay and ICANN’ (2007) available at <https://era.ed.ac.uk/bitstream/handle/1842/2382/ADRinODRecommerce.pdf?sequence=>, accessed on 13 June 2023.

<sup>129</sup> Brian Hutchinson ‘ODR and the future of ADR: Lessons learnt from ECODIR’ *Conference on Consumer ADR in Spain and the EU, Madrid, 11–12 December 2006*; Benyekhlef & Gélinas op cit at 5.

<sup>130</sup> Benyekhlef & Gélinas op cit at 5.

<sup>131</sup> Benyekhlef & Gélinas op cit at 100-102.

<sup>132</sup> Cortés & Lodder op cit at 21; Hutchinson op cit; Kaufmann-Kohler & Schultz *Online Dispute Resolution* 339.

<sup>133</sup> ‘So, while both legal and practical initiatives have envisioned good ODR prospects for the last 10 to 15 years...ODR did not actually take off as expected.’ Cortés & Lodder op cit at 17.

<sup>134</sup> Conley Tyler & Bretherton op cit.

<sup>135</sup> Braeutigam op cit at 281.

commerce,<sup>136</sup> the adaptation of existing ODR services to resolve offline disputes as well as those which originate online,<sup>137</sup> the increased role of technology as the 'fourth party'<sup>138</sup> and the increased scholarship of and interest in ODR shown by governmental agencies and other public organisations.<sup>139</sup> Each of these factors will be discussed in turn to illustrate how far ODR has come since its inception.

#### *2.2.4.1 Expansion of ODR's scope of application*

Although the growth of ODR as a form of dispute resolution began because of the increased commercial activity brought about by the internet,<sup>140</sup> it has not been limited to the commercial world. Following the collapse of the dot-com bubble in the early 2000s,<sup>141</sup> many of the early ODR providers failed,<sup>142</sup> being specifically devoted to the resolution of disputes arising from e-commerce. The surviving ODR providers stayed viable by diversifying, and it was thus during this institutional phase that ODR began to be used to resolve many different types of disputes. Interestingly, it was the ODR programs that became successful during the entrepreneurial phase (like SquareTrade and Cybersettle) that drove this expansion of the scope of ODR's application, using their platforms to resolve disputes that arose from causes other than commercial.

During the institutional phase, SquareTrade continued to provide online mediation services but was no longer limited to resolving B2C disputes as it was at its inception. First it expanded to include the resolution of business-to-business (B2B) disputes and then to disputes about real estate arising between homeowners and potential buyers.<sup>143</sup> SquareTrade was later incorporated into eBay as its in-house dispute resolution mechanism,<sup>144</sup> and has 'since relinquished its ODR systems to eBay

---

<sup>136</sup> Brennan op cit at 209.

<sup>137</sup> Katsh (2012) op cit at 27-28.

<sup>138</sup> Katsh & Rifkin *Online Dispute Resolution* 93; Cortés (2011) op cit at 3.

<sup>139</sup> Brennan op cit at 209. One example of the increased interest in ODR scholarship is the launch of the International Journal of Online Dispute Resolution in 2014, edited by Ethan Katsh, Daniel Rainey and Mohamed Abdel Wahab.

<sup>140</sup> Braeutigam op cit at 277.

<sup>141</sup> Albornoz & Martín op cit at 43; Jason Krause 'Settling it on the web: New technology, lower costs enable growth of online dispute resolution' (2007) 93 *ABA Journal* 42 at 43.

<sup>142</sup> Cole & Blankley op cit at 200.

<sup>143</sup> Braeutigam op cit at 277.

<sup>144</sup> Danielle Linneman 'Online Dispute Resolution for divorce cases in Missouri: A remedy for the justice gap' (2018) *Journal of Dispute Resolution* 281 at 283.

and now focusses on gadget warranty, which has been dubbed as the best online protection plan for electronic devices.’<sup>145</sup> CyberSettle conducted a similar expansion, moving beyond their initial application to disputes arising from insurance claims and malpractice instances to a partnership with the City of New York, providing a system to resolve monetary claims against the city.<sup>146</sup> Although CyberSettle is no longer in existence,<sup>147</sup> their partnership with the City of New York shows how ODR was capable of being adapted to a broader range of disputes, and its potential for use by other governmental institutions and public bodies was beginning to be seen.<sup>148</sup>

This potential was also recognised in the EU, where governments of various Member States began to promote ODR.<sup>149</sup> Europe played an integral role in early ODR efforts, both in relation to scholarship and early ODR initiatives.<sup>150</sup> Regarding ODR scholarship, Europe was the site of the International Forum on ODR. Beginning in 2002, this forum was the result of collaboration between Daewon Choi of the United Nations Economic and Social Commission for Europe (UNECE) and Ethan Katsh, the founder of [www.odr.info](http://www.odr.info) and the ‘father’ of ODR.<sup>151</sup>

ODR efforts were also under way in the individual Member States, albeit with mixed results. One of the most well-known examples is that of Rechtwijzer, which was a Dutch initiative introduced in 2007. This platform was one of the earlier dispute resolution platforms operational in the EU; an ‘internet application through which Dutch citizens seek advice on legal help’.<sup>152</sup> The website ran until 2017, when it was shut down because it was no longer financially sustainable.<sup>153</sup> Rechtwijzer served as an online platform, providing legal information and support to potential litigants. As such, although it was conducted online, the dispute resolution itself did not take

---

<sup>145</sup> SO Omoola & UA Oseni ‘Towards an effective legal framework for online dispute resolution in e-commerce transactions: Trends, traditions and transitions’ (2016) 24(1) *IJUM Law Journal* 257 at 270.

<sup>146</sup> Katsh (2012) op cit at 27-28.

<sup>147</sup> Katsh & Rabinovich-Einy *Digital Justice* 36.

<sup>148</sup> Cortés *Online Dispute Resolution for Consumers* 65.

<sup>149</sup> Poblet & Ross op cit; Hörnle *Cross-Border Internet Dispute Resolution* 75-76.

<sup>150</sup> Poblet & Ross op cit. Also see Melissa Conley Tyler ‘Seventy-six and counting: An analysis of ODR sites’ in E Katsh & D Choi (eds) *Online Dispute Resolution: Technology as the “Fourth Party”* (2003).

<sup>151</sup> Poblet & Ross op cit; Katsh (2012) op cit at 23.

<sup>152</sup> Jelle van Veenen ‘Online integrative negotiation tools for the Dutch Council for Legal Aid’ in Marta Poblet (ed) *Expanding the horizons of ODR: Proceedings of the 5<sup>th</sup> International Workshop on Online Dispute Resolution* (2008) 23 at 23.

<sup>153</sup> Calliess & Heetkamp op cit at 3.

place online, causing Ortolani to state that it was not a real ODR program,<sup>154</sup> merely a clearing house of sorts. Despite this critique, this platform was ground-breaking, being ‘the first platform to develop automated negotiation tools (and mediation) for the most intimate and sensitive disputes’.<sup>155</sup> Rechtwijzer thus paved the way for subsequent endeavours, most notably the EU ODR Platform created in terms of the EU Regulation on Consumer ODR.<sup>156</sup>

Apart from these instances, ODR has also been used to resolve internet domain name disputes,<sup>157</sup> disputes arising from family conflicts,<sup>158</sup> issues relating to consumer protection,<sup>159</sup> insurance disputes,<sup>160</sup> copyright disputes and other banking issues.<sup>161</sup> This expansion in the scope of ODR has been accompanied by a growing acknowledgment that ODR can be used to resolve more than just online disputes.<sup>162</sup> Authors during the institutional phase began to explore how ODR systems could be used to resolve disputes that arose offline as well, positioning it as a viable alternative for dispute resolution based on its efficacy and relatively low cost. The extension of ODR’s scope of application was thus in both content and type of dispute, encompassing disputes from both the private and public sector.<sup>163</sup> As one author puts it, ‘(h)aving honed its act in private, small-scale, online, commercial disputes, ODR now seems set on expanding into the world of public, civil disputing generally...’.<sup>164</sup>

---

<sup>154</sup> Pietro Ortolani ‘Self-enforcing Online Dispute Resolution: Lessons from Bitcoin’ (2016) 36 (3) *Oxford Journal of Legal Studies* 595 at 601.

<sup>155</sup> Orna Rabinovich-Einy ‘The past, present and future of Online Dispute Resolution’ (2021) 74 *Current Legal Problems* 125 at 133.

<sup>156</sup> Council Regulation (EC) 524/2013 on online dispute resolution for consumer disputes [2013] OJ L165/1.

<sup>157</sup> Braeutigam op cit at 280.

<sup>158</sup> Braeutigam op cit at 280.

<sup>159</sup> Albornoz & Martin op cit at 41; Braeutigam op cit at 281.

<sup>160</sup> Braeutigam op cit at 281.

<sup>161</sup> Mimoza Sadushi ‘The theory and practice of dispute resolution in the digital age’ (2017) 5 *Global Journal of Politics and Law Research* 57 at 60.

<sup>162</sup> Kananke Chinthaka Liyanage ‘The regulation of Online Dispute Resolution: Effectiveness of online consumer protection guidelines’ (2012) 17(2) *Deakin Law Review* 251 at 256.

<sup>163</sup> Katsh (2012) op cit at 27-28.

<sup>164</sup> Condlin op cit at 719-720.

#### 2.2.4.2. From online to offline disputes

This shift in ODR application from online to a more traditional offline dispute resolution was noted by Katsh and Wing in 2006.<sup>165</sup> They described the growth of ODR during this time as a natural consequence of the unprecedented technological growth experienced in the period, saying that ‘the boundary between the real and virtual worlds has considerably blurred...offline activities are routinely touched by technology.’<sup>166</sup>

The application of ODR to disputes arising offline has been mentioned by many scholars and appears to be the next step in ODR’s evolution.<sup>167</sup> Whereas ODR was initially just used to resolve disputes that arose from online interactions, it is now being offered for the resolution of disputes originating offline<sup>168</sup> such as family and divorce disputes<sup>169</sup> and landlord-tenant disputes.<sup>170</sup> A potential reason for this extension of ODR’s reach is the current state of traditional litigation. The costs of legal representation, the increased length of average trials and the difficulties faced by courts in maintaining their records efficiently have all fed into the trend of considering alternative approaches to traditional litigation.<sup>171</sup>

Another potential reason for the increased adoption of ODR in offline disputes is the ease with which some types of claims can be resolved using automated dispute resolution mechanisms. The best example is that of insurance claims, where the administrative costs of resolving claims are high. Using technological processes to resolve these claims is relatively simple, seeing as doing so mainly involves the

---

<sup>165</sup> Katsh & Wing op cit at 30.

<sup>166</sup> Katsh & Wing op cit at 30.

<sup>167</sup> Katsh & Wing op cit at 30; Orna Rabinovich-Einy & Ethan Katsh ‘Lessons from online dispute resolution for dispute systems design’ in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) 52; Deffains & Gabuthy op cit at 207; Amy J Schmitz & Leah Wing ‘Beneficial and ethical ODR for family issues’ (2020) *Family Court Review* 1 at 2; Rabinovich-Einy (2021) op cit at 139.

<sup>168</sup> Rabinovich-Einy & Katsh (2012) op cit at 52.

<sup>169</sup> Schmitz & Wing op cit at 2. For a specific example of such a site, see <https://uitelkaar.nl/>, an initiative of the Dutch Legal Aid Board.

<sup>170</sup> This is an initiative by the British Columbia Ministry of Justice, Canada and is available online at [www.civilresolutionbc.ca/](http://www.civilresolutionbc.ca/).

<sup>171</sup> Ebner & Zeleznikow (2015) op cit at 144.

determination of monetary values and negotiation, both of which can be partly or fully automated.<sup>172</sup>

It is this 'simplifying' of the dispute resolution process that has led to ODR moving beyond the online world and finding successful application in offline disputes. The ease of communications, efficiency of processing information and automatic record keeping that is apparent in ODR has made it appealing to those wishing to solve smaller-value offline claims or those claims which require relatively few steps. ODR has even been applied to more complex matters like divorce and other family disputes<sup>173</sup> and it will be interesting to look at how it continues to develop in this area. This move from online to offline is not the only shift in ODR's application since its introduction in the 'hobbyist' phase. Two other significant shifts are the changing use of technology in the ODR process and the gradual move of ODR from the private sphere to the public sphere.<sup>174</sup>

#### 2.2.4.3. *Technology as the 'fourth party' in ODR*

Early in ODR development, Katsh and Rifkin identified technology as the 'fourth party' to any ODR process.<sup>175</sup> This phrase arose from the recognition that software and technology could play a more active role in the ODR process, either serving to assist the neutral third party or replacing them entirely.<sup>176</sup> Initially, the fourth party referred to the technology that enabled a human third party to communicate with parties online.<sup>177</sup> Although this is a simple use of technology, it provided the participants in the ODR process with a cheaper method of communication, removing

---

<sup>172</sup> Deffains & Gabuthy op cit at 207.

<sup>173</sup> Schmitz & Wing op cit at 1.

<sup>174</sup> Sela (2017) op cit at 670.

<sup>175</sup> Katsh & Rifkin *Online Dispute Resolution* 93–116; Orna Rabinovich-Einy & Ethan Katsh 'Blockchain and the inevitability of disputes: The role for Online Dispute Resolution' (2019) *Journal of Dispute Resolution* 47 at 51; Alyson Carrell & Noam Ebner 'Mind the gap: Bringing technology to the mediation table' (2019) *Journal of Dispute Resolution* 1 at 5; Ayelet Sela 'E-nudging justice: The role of digital choice architecture in online courts' (2019) *Journal of Dispute Resolution* 127 at 132.

<sup>176</sup> Katsh & Rabinovich-Einy *Digital Justice* 11-12; Damian Clifford & Yung Shin van der Sype 'Online dispute resolution: Settling data protection disputes in a digital world of customers' (2016) 32 *Computer Law & Security Review* 272 at 282.

<sup>177</sup> Taleh Abbasli 'Can Online Dispute Resolution prevail over the traditional methods of resolution?' (2022) 8 *Baku State University Law Review* 21 at 27-28; Lavi op cit at 879.

the need for travel and allowing parties to communicate at a time that was suitable for them.<sup>178</sup>

The role of the fourth party has changed over time, moving away from the simple use of technology as a mere facilitator of communication. As ICT has become more sophisticated, so too has the function of the fourth party.<sup>179</sup> Instead of using technology solely to communicate, ODR processes are increasingly employing algorithms and artificial intelligence (AI) to process information.<sup>180</sup> Much like ODR, AI can be defined broadly, as it includes a variety of technologies designed to analyse data sets and use such analysis to help computers understand relationships and complexities, training computers instead of just programming them.<sup>181</sup> AI can thus be used to identify patterns in ODR processes, as it can analyse large amounts of data faster than a human would be able to.<sup>182</sup> It has been argued that AI is currently being used in two different ways in ODR, either in a supporting role or as a substitute for existing ODR functions.<sup>183</sup> As Carneiro states, AI can be used ‘on the one hand, as a tool to help the parties and the decision makers to obtain the best possible results in solving commercial disputes and, on the other hand, considering a new way of autonomous dispute resolution through the use of autonomous and intelligent software, supported by a knowledge base and decision capabilities.’<sup>184</sup>

It is clear that AI grows ever more sophisticated and presents many new opportunities in ODR.<sup>185</sup> However, this growth means that it also warrants further

---

<sup>178</sup> Katsh & Rabinovich-Einy *Digital Justice* 12.

<sup>179</sup> Colin Rule ‘Online dispute resolution and the future of justice’ (2020) *Annual Review of Law and Social Science* 277 at 287-288; Katsh & Rabinovich-Einy *Digital Justice* 47; Julien Chaisse & Jamieson Kirkwood ‘Smart courts, smart contracts, and the future of Online Dispute Resolution’ (2022) 5 *Stanford Journal of Blockchain Law & Policy* 62 at 68.

<sup>180</sup> ‘This is what we refer to as the shift from human intervention to one assisted by software, and from a process that simply facilitates communication of information to one that processes it.’ Katsh & Rabinovich-Einy *Digital Justice* 47. Also see Rabinovich-Einy (2021) op cit at 126.

<sup>181</sup> Darren Gingras & Joshua Morrison ‘Artificial intelligence and family ODR’ (2021) 59(2) *Family Court Review* 227 at 227.

<sup>182</sup> Calliess & Heetkamp op cit at 6; Jeremy Barnett & Philip Treleaven ‘Algorithmic dispute resolution—The automation of professional dispute resolution using AI and blockchain technologies’ (2018) 61(3) *The Computer Journal* 399–408; Rabinovich-Einy (2021) op cit at 147.

<sup>183</sup> Hibah Alessa ‘The role of Artificial Intelligence in Online Dispute Resolution: A brief and critical overview’ (2022) 31:3 *Information & Communications Technology Law* 319 at 326.

<sup>184</sup> D Carneiro et al ‘Online dispute resolution: an artificial intelligence perspective’ (2014) 41 *Artificial Intelligence Review* 211 at 214.

<sup>185</sup> K Rastogi, R Bahuguna, S Kathuria et al ‘Technical intercession of Artificial Intelligence in solving Online Dispute Resolution’ 2023 *IEEE Devices for Integrated Circuit (DevIC)* 194 at 198.

consideration and scholarship, as the increasing use of AI in ODR could have a large impact on the integrity of the ODR process.<sup>186</sup> This potential impact of AI application on the values underlying ODR will be discussed further in Chapter 6 below.<sup>187</sup>

Another significant technological development that could play a role in ODR is the blockchain. Initially developed in 2009, blockchain technology is a decentralised ledger system, allowing for transactions to take place securely and anonymously across a sophisticated system of nodes.<sup>188</sup> Blockchain is thus aimed at removing the 'middle man'<sup>189</sup> and functions as a decentralised, immutable and anonymous database of transactions.<sup>190</sup> Although these qualities are typically listed as the basic qualities of blockchain, it has been observed that they 'are less absolute than they are typically described, and reality is often more nuanced than it appears at first blush.'<sup>191</sup> This nuanced nature of blockchain and its decentralised quality naturally gives rise to questions about governance and enforcement,<sup>192</sup> given that there is no central authority.<sup>193</sup> As such, 'It should come as no surprise that the blockchain setting, used most commonly for cryptocurrency transactions, would become a candidate for ODR,'<sup>194</sup> as blockchain technology provides a similar flexibility to ODR, both operating across traditionally defined borders.

---

<sup>186</sup> 'Turning our attention to the risks helps elucidate how the incorporation of AI within ODR systems design can reduce access to procedural and substantive justice.' Leah Wing 'Artificial intelligence and Online Dispute Resolution system design: Lack of / access to justice magnified' (2017) 4(2) *International Journal on Online Dispute Resolution* 16 at 18.

<sup>187</sup> See discussion at 6.3 below.

<sup>188</sup> MM van Eck 'The disruptive force of smart contracts' in W Doorsamy et al (eds) *The Disruptive Fourth Industrial Revolution* (2020) 21 at 26; R Koulu 'Blockchains and online dispute resolution: Smart contracts as an alternative to enforcement' (2016) 13:1 *SCRIPTed* 40 at 49.

<sup>189</sup> Rabinovich-Einy & Katsh op cit at 52; Valentina Gatteschi et al 'Blockchain and smart contracts for insurance: Is the technology mature enough?' 2018 *Future Internet* 1 at 2.

<sup>190</sup> Rabinovich-Einy & Katsh op cit at 52; Gatteschi op cit at 2; R Koulu *Law, Technology and Dispute Resolution: Privatisation of coercion* (2019) 183.

<sup>191</sup> Rabinovich-Einy & Katsh op cit at 54.

<sup>192</sup> Matija Kontak 'Modern Tools to Lower the Costs of Disputes: Digitalisation and the New Venues of Online Dispute Resolution' (2021) *Harmonius: Journal of Legal and Social Studies in South East Europe* 113 at 116.

<sup>193</sup> For an investigation of the various international law instruments that could be used to regulate blockchain and ODR, see Tonya M Evans 'Role of international rules in blockchain-based cross-border commercial disputes' (2019) 65:1 *Wayne Law Review* 1.

<sup>194</sup> Rabinovich-Einy & Katsh op cit at 58. Tiamiyu agrees with this, saying that 'Blockchain ODR seeks to address some of the costs of centralization in the judicial system, particularly in the context of cross-jurisdictional disputes, low monetary value disputes, or disputes in need of fast resolution.' Tiamiyu op cit at 95.

For ODR to be truly effective, there must be some way of enforcing the outcome of the process. This element of private enforcement is the commonality between ODR and blockchain technology; given that both tend to be driven by private actors and lend themselves to self-enforcement.<sup>195</sup> The use of blockchain as a method of enforcing ODR outcomes is discussed in more detail in Chapter 4 below.<sup>196</sup>

It is thus evident that the fourth party is becoming more sophisticated as technology advances and is now regarded as being ‘foundational to the practice of ODR’.<sup>197</sup> As the fourth party continues to evolve, the impact of that evolution must be investigated, as it could have wide-ranging consequences for the future of ODR development and implementation.

#### 2.2.4.4. Institutional development of ODR

As stated above,<sup>198</sup> both public and private institutions have begun to incorporate ODR systems and processes into their interactions with citizens and customers. Local governments around the world have introduced public ODR systems to resolve civil disputes and have largely been successful in doing so. Examples range from the resolution of small claims<sup>199</sup> and traffic cases<sup>200</sup> to tax disputes.<sup>201</sup>

It has been opined that ODR is ideal for governments to use in engaging with their citizens, as many interactions between citizens and their governments are simple administrative proceedings that the government must typically deal with in high volume.<sup>202</sup> ICT could assist in streamlining these processes and removing the need for citizens to visit the premises of state departments to have their

---

<sup>195</sup> Koulu (2016) op cit at 45-46.

<sup>196</sup> See 4.4.4.2 below.

<sup>197</sup> Leah Wing et al ‘Designing ethical Online Dispute Resolution systems: The rise of the fourth party’ (2021) 37(1) *Negotiation Journal* 1 at 3; Morek op cit at 181; Elayne E Greenberg & Noam Ebner ‘What dinosaurs can teach lawyers about how to avoid extinction in the ODR evolution’ 2019 *St John’s University School of Law Faculty Publications* 1 at 11-12.

<sup>198</sup> See 2.2.4.2 above.

<sup>199</sup> For a good example of this, see Money Claim Online (MCOL) in the United Kingdom (available at <https://www.gov.uk/make-money-claim>, accessed 2 June 2023). This site is run by Her Majesty’s Courts and Tribunals Service and has been used successfully since 2001.

<sup>200</sup> This is seen in British Columbia, where the Civil Resolution Tribunal was launched to address smaller civil claims that the state has with the citizens of British Columbia. Available at <https://civilresolutionbc.ca/>, accessed 2 June 2023.

<sup>201</sup> Sela (2017) op cit at 655.

<sup>202</sup> Anita Ramasastry ‘Government-to-citizen Online Dispute Resolution: A preliminary inquiry’ (2004) 79 *Washington Law Review* 159 at 162.

administrative issues resolved. The South African government already allows for e-filing of tax returns,<sup>203</sup> e-registration of motor vehicles<sup>204</sup> and has digitised some of the functions of the Department of Home Affairs.<sup>205</sup> It would stand to reason that the government could also use ICT to provide ODR services to resolve any disputes that may arise as a result of these online administrative interactions, limiting the need for face-to-face interactions and unnecessarily protracted dispute resolution procedures. Such adoption of ODR would be especially beneficial in light of the ongoing COVID-19 crisis and the social distancing imperative that it presents.<sup>206</sup>

The growing acceptance of ODR as a viable method of dispute resolution can also be seen in the increase of legislative instruments specifically providing for ODR that have been introduced in recent years. In the EU, an attempt has been made to regulate ODR through the introduction of the EU Directive on Alternative Dispute Resolution<sup>207</sup> and Regulation on Online Dispute Resolution.<sup>208</sup> These instruments serve to legitimise and regulate the use of ODR platforms in the EU and are thus important steps in ODR's growth internationally. Similarly, the United Nations Commission on International Trade Law (UNCITRAL) has developed their own guidelines for ODR<sup>209</sup> in response to the exponential increase in disputes arising from online cross-border transactions. These developments are indicative of a shifting attitude towards ODR in the legal world and show that it is slowly being accepted as a viable method of dispute resolution that allows us to resolve disputes in a novel and interesting way.

The expansion of ODR's scope and field of application has also led institutions to pay more attention to the study and promotion of this method of dispute resolution.<sup>210</sup> Various governmental agencies and private organisations have begun

---

<sup>203</sup> <https://www.sarsefiling.co.za/>.

<sup>204</sup> <https://online.natis.gov.za/>.

<sup>205</sup> <https://ehome.dha.gov.za/>.

<sup>206</sup> See brief discussion of the impact of the pandemic at 2.3 below.

<sup>207</sup> Council Directive (EC) 2013/11 on alternative dispute resolution for consumer disputes [2013] OJ L165/63.

<sup>208</sup> Council Regulation (EC) 524/2013 on online dispute resolution for consumer disputes [2013] OJ L165/1.

<sup>209</sup> United Nations Commission on International Trade Law (UNCITRAL) *UNCITRAL Technical Notes on Online Dispute Resolution* (2017).

<sup>210</sup> Katsh & Rabinovich-Einy *Digital Justice* 38.

to research ODR and provide reports on its development.<sup>211</sup> Interest in ODR has spread from the USA and Europe, where the first steps in ODR scholarship took place. Regional organisations devoted to ODR scholarship are already active in South America (ODRLatinoAmerica)<sup>212</sup> and Africa (ODR Africa Network),<sup>213</sup> signifying a shift away from the traditional idea that ODR is centred in and designed for the Global North.

This spread of ODR to the Global South is an interesting one, as it is beginning to be used in contexts and countries that are not as technologically advanced as those in the USA and Europe. In South America, Africa, and Asia, there are large disparities between developed and developing countries, and even greater wealth disparities between the citizens of such countries. These unique contexts give a new dimension to how ODR would find application and could be the location of the next phase of ODR development: ODR as a means of increasing access to justice and strengthening the economies of the developing world. This potential development gives rise to many questions, which will be investigated later in this work.<sup>214</sup>

### 2.3. The way forward for ODR?

In 2002, Rule predicted that:

‘If wireless access becomes the norm, people may have the ability to engage in dispute resolution procedures on their handheld devices or cellular phones. If artificial intelligence advances rapidly, we may witness a growth in the use of non-human mediators and arbitrators. Translation technology may eventually allow for seamless interactions between people who do not speak the same language. All of these what-ifs may sound like science fiction, but their development will play a crucial role in determining the future of ODR. The only sure thing is that technology will continue to evolve, and in a few years our current tools and techniques will look primitive.’<sup>215</sup>

---

<sup>211</sup> Brennan op cit at 209.

<sup>212</sup> For more detail about the organisation’s projects, see <http://odrlatinoamerica.com/>.

<sup>213</sup> For more information about the ODR Africa Network, see <https://odrafrica.com/>. The organisation has regular seminars to educate the public on ODR and is involved in other projects and ODR scholarship.

<sup>214</sup> The role of ODR in developing countries is discussed in more detail in Chapters 4 and 5 below. Chapter 4 refers to the various challenges posed to ODR implementation in developing countries and Chapter 5 considers the approach to ODR in selected African countries.

<sup>215</sup> Rule *Online Dispute Resolution for Business* 300.

Since the early 1990s, with the leaps and bounds since taken in technological development leading to the exponential growth of the ODR industry,<sup>216</sup> Rule's prediction has become reality. More advanced technology, software that facilitates ODR and even artificial intelligence resources are available in today's dispute resolution landscape. There has also been increased interest in ODR from the computer science field,<sup>217</sup> hinting at further development of ODR-facilitating ICT. Innovation, expansion, regulation, and scholarship of ODR continue to grow,<sup>218</sup> and more legal practitioners are becoming aware of ODR's possibilities.

Coupled with this increased awareness of ODR is the current necessity of providing ways to resolve disputes that will keep parties at a physical distance, due to the COVID-19 pandemic. Unforeseen by anyone, the pandemic has had an overwhelming impact on human beings' relationship with the internet, leading people to conduct even more of their lives online due to lockdown regulations in various countries.<sup>219</sup> Many traditional courthouses were closed during the lockdowns in various countries, leading to even more backlogs than before. The introduction of social distancing imperatives also meant that the courts could not operate at the same capacity as they did before the pandemic struck. New ways of resolving disputes and allowing citizens access to justice thus had to be explored,<sup>220</sup> and ODR was identified as one of the mechanisms that could be used to address these new problems presented by the pandemic. It is thus worthy of more study, especially in the developing world.

---

<sup>216</sup> Sela (2017) op cit at 636.

<sup>217</sup> Katsh (2012) op cit at 27-28.

<sup>218</sup> Sela (2017) op cit at 639.

<sup>219</sup> For reports on how ODR has been used during the coronavirus pandemic see Ryan Abbott and Hiro Aragaki 'Three tips for international online dispute resolution in the age of COVID-19' available at <https://businesslawtoday.org/2020/10/three-tips-international-online-dispute-resolution-age-covid-19/>, accessed 24 June 2023; David K Friedland 'Resolving disputes online during the covid-19 pandemic' available at <https://www.inta.org/resolving-disputes-online-during-the-covid-19-pandemic/>, accessed 24 June 2023; Lexisnexis 'When you can't meet in court: Pros and cons of online dispute resolution' available at <https://www.lexisnexis.com.au/en/COVID19/blogs-and-articles/when-you-cant-meet-in-court-online-alternative-dispute-resolution-during-coronavirus-covid19>, accessed 24 June 2023.

<sup>220</sup> 'Following a decade of a slow infiltration of ODR into the public-formal domain and adoption in various court systems, Covid-19 buoyed the widespread institutionalization of court (and private) ODR as well as pushed our definitions and understandings of what constitutes ODR...' Rabinovich-Einy (2021) op cit at 126.

The importance of studying and developing ODR and exploring its potential to be used in different contexts and to achieve multiple aims must thus not be underestimated, and it will be instructive to consider the legislative steps taken to date to ensure its continued growth internationally.

### CHAPTER 3: INTERNATIONAL AND REGIONAL INSTRUMENTS GOVERNING ONLINE DISPUTE RESOLUTION

*'A reasonable policy, resulting in creation of a solid and coherent legal environment for ODR, is increasingly needed to allow for the proper growth of online dispute resolution, along with its norms, market, and technology.'*<sup>1</sup>

#### 3.1. Introduction

Having conducted an overview of the historical development of ODR,<sup>2</sup> the focus must shift to an analysis of the current international and regional legal instruments that govern ODR, including legislative and soft law instruments. This analysis will include an assessment of the current state of ODR regulation and identify the areas of the law that still need development, making specific reference to applicable policy initiatives.

Ebner and Zeleznikow note that ODR has 'hitherto developed largely unregulated from a public policy standpoint.'<sup>3</sup> This is still the case, and there is very little agreement on accepted standards of practice in the ODR field.<sup>4</sup> There is also no overarching authority to impose general rules on those who participate in ODR processes. The governance of ODR is thus very fragmented, but there have been some attempts to standardise the rules that ODR creators, users and practitioners should follow.<sup>5</sup> This chapter will explore the most successful of these regulatory attempts, focusing on the existing legislation and international guiding documents.

This section will contain an examination of the EU Regulation on Online Dispute Resolution in consumer disputes (hereafter 'Regulation on consumer ODR')<sup>6</sup> and the UNCITRAL Technical Notes on Online Dispute Resolution (hereafter referred to as 'the Technical Notes').<sup>7</sup> At present, these are the only published regulatory

---

<sup>1</sup> Morek op cit at 192.

<sup>2</sup> A detailed historical overview is provided in Chapter 2 above.

<sup>3</sup> Noam Ebner & John Zeleznikow 'No sheriff in town: Governance for online dispute resolution' (2016) *Negotiation Journal* 297 at 307.

<sup>4</sup> 'Whether ODR should be regulated is an ongoing debate in the ODR literature.' Liyanage op cit at 259. The regulation of ODR and the debate around creating accepted standards for ODR implementation is discussed in more detail at Chapter 6 below.

<sup>5</sup> Ebner & Zeleznikow (2016) op cit at 307.

<sup>6</sup> Council Regulation (EC) 524/2013 on online dispute resolution for consumer disputes [2013] OJ L165/1.

<sup>7</sup> United Nations Commission on International Trade Law (UNCITRAL) *UNCITRAL Technical Notes on Online Dispute Resolution* (2017).

instruments that are specifically aimed at governing ODR, one as legislation and one as a soft law instrument. However, it is likely that this will change as more governments and regional organisations begin to consider ODR as a viable option for dispute resolution. As such, a short discussion on the existing regional ODR research projects and policy discussions will also be included.

### 3.2. The EU Regulation on consumer ODR

#### 3.2.1. Background and context

Although the study and practice of ODR has taken place in a fragmented way since its inception, the awareness and implementation of ODR has been growing internationally. The next step in ODR development is its recognition by regulatory bodies and the introduction and implementation of legislative instruments that can provide some guidance as to ODR 'best practice'. The most prescriptive example of this can be seen in the introduction of the EU's Regulation on consumer ODR,<sup>8</sup> which establishes an ODR platform at the Union level to facilitate cost-effective and flexible dispute resolution between EU citizens in different member states.<sup>9</sup>

Prior to the introduction of the Regulation on consumer ODR, there was scant regulation of ODR processes in the EU.<sup>10</sup> Most of the regulations and initiatives that were in place were designed to govern offline methods of dispute resolution,<sup>11</sup> and there was no overarching set of rules that was used to regulate ODR in the EU. Following the recommendations of commentators<sup>12</sup> and the growth in the number of consumer disputes arising from e-commerce and cross-border transactions, the Council of the European Union (CEU) adopted both a directive on ADR and a regulation on ODR which were published on 18 June 2013.<sup>13</sup> The ODR regulation

---

<sup>8</sup> Council Regulation (EC) 524/2013 on online dispute resolution for consumer disputes [2013] OJ L165/1.

<sup>9</sup> Para 18 Preamble OJ L165/1.

<sup>10</sup> Cortés (2011) op cit at 20; Hanriot op cit at 2-3.

<sup>11</sup> Cortés (2011) op cit at 20; J Hill *Cross-Border Consumer Contracts* (2008) 379.

<sup>12</sup> Cortés (2011) op cit at 20; Morek op cit at 167; Thomas Schultz 'Does Online Dispute Resolution need governmental intervention? The case for architectures of control and trust' (2004) 6 *North Carolina Journal of Law and Technology* 71 at 74.

<sup>13</sup> Philippe op cit at 67.

completes the ADR directive, and the two instruments must be read together.<sup>14</sup> This legislation was aimed at resolving disputes arising from cross-border e-commerce transactions<sup>15</sup> and creating a supranational ODR platform to assist national dispute resolution bodies in doing so.<sup>16</sup>

The Regulation on consumer ODR is the first regional legislative instrument that exclusively addresses the regulation of ODR and, despite criticism,<sup>17</sup> has often been used as a blueprint for other countries to develop their own ODR regulations. The Regulation on consumer ODR thus bears further examination, both due to its extensive reach and because it could provide some insight as to why these particular rules are deemed to be so effective in regulating ODR processes and systems.

### 3.2.2. Structural overview of the Regulation on consumer ODR

The Regulation is comprised of twenty-two sections divided into three chapters. Chapter I contains the general provisions, Chapter II details the rules relating to the ODR platform and Chapter III contains all other relevant considerations.

The structure of the Regulation on consumer ODR is logical, providing the scope of the instrument and all relevant definitions before it moves on to the practicalities of establishing a regional ODR platform. Attention is also paid to administrative issues such as reports to the CEU,<sup>18</sup> dates at which various parts of the Regulation will enter into force<sup>19</sup> and the penalties that will be imposed for contravening the listed provisions.<sup>20</sup> The inclusion of these aspects make this Regulation very comprehensive, which is perhaps why it has been referred to by other jurisdictions as a guide for governing their own ODR programmes.

---

<sup>14</sup> 'The main goal of this European legal framework is to increase the availability of high quality ADR entities, ensuring that they meet some minimal quality standards (mostly a reformulation of the principles that were formulated by the 1998 and 2000 recommendations), as well as to encourage their awareness and their use.' De La Rosa & Cebola op cit at 1252. Also see Loutocký op cit at 117; Bogdan op cit at 156.

<sup>15</sup> Article 2 Regulation on Consumer ODR; M Bakhranova op cit at 299.

<sup>16</sup> Martinek & Cupido op cit at 124-145; Rühl op cit at 446.

<sup>17</sup> Loutocký op cit at 119-124; Martinek & Cupido op cit at 127-128; Jeretina op cit at 53.

<sup>18</sup> Article 21 OJ L165/1.

<sup>19</sup> Article 22 OJ L165/1.

<sup>20</sup> Article 18 OJ L165/1.

It will be instructive to consider each chapter of the Regulation on consumer ODR more closely and examine the contents of each article. This will provide some insight on the most pressing aspects of ODR that need to be regulated and could also highlight the gaps that will require further legislative intervention.

### 3.2.3. Analysis of the Regulation on consumer ODR

#### 3.2.3.1. Chapter I - General Provisions

This chapter contains four articles, each of which contributes to laying the foundation for the more practical rules which follow in Chapter II. Article 1 is ostensibly about the subject matter of the Regulation on consumer ODR but reads as a statement of purpose. In terms of this Article, the aim of the Regulation is to contribute to the digital aspect of the internal market by providing an ODR platform for Europe that would facilitate the resolution of disputes between consumers and traders online.<sup>21</sup> The Regulation's application is limited to those disputes which have arisen from online transactions,<sup>22</sup> and allows for parties in different member states to resolve their dispute via the European ODR platform.<sup>23</sup> This limitation is criticised by Rühl, who questions the exclusion of offline disputes from the Regulation, noting it as strange considering that no such distinction is made in the ADR Directive, the 'partner' legislation to the ODR Regulation.<sup>24</sup>

Article 2 is devoted to the scope of the Regulation and provides strict limits on the types of disputes that are to be resolved by the proposed ODR platform. The application of the Regulation is limited to disputes concerning contractual obligations that arise from online contracts for sale or the provision of services.<sup>25</sup> There is also a

---

<sup>21</sup> Article 1 OJ L165/1. 'The European ODR platform does not act as a dispute resolution service itself, but merely as a 'clearing house' that brings together consumers, businesses and ADR or ODR providers.' Calliess & Heetkamp op cit at 14.

<sup>22</sup> 'It is thus the on-line conclusion of the contract rather than the on-line performance that is decisive for the applicability of the Regulation.' Bogdan op cit 158. Also see Loutocký op cit at 118; E van Gelder 'The EU approach to consumer ODR' (2019) 6(2) *International Journal of Online Dispute Resolution* 219 at 222; Hanriot op cit at 3; Fernando Esteban de la Rosa 'Scrutinising access to justice in consumer ODR in cross-border disputes: The Achilles' heel of the EU ODR platform' (2017) 4(2) *International Journal on Online Dispute Resolution* 26 at 28.

<sup>23</sup> Julia Hörnle 'Encouraging Online Dispute Resolution in the EU and beyond- Keeping costs low or standards high?' (2013) 38 *European Law Review* 200 at 200; Omoola & Oseni op cit at 270.

<sup>24</sup> 'Why the ODR platforms will not be available for contracts concluded offline is unclear, especially since the ADR-Directive is also not limited to online contracts'. Rühl op cit at 448.

<sup>25</sup> Article 2(1) OJ L165/1.

geographical limitation, as the provisions listed in this instrument are only applicable to disputes between a consumer resident in the EU and a trader established in the EU.<sup>26</sup> It is questioned what the meaning of ‘established’ is in this context, as it could refer to businesses who are registered in the EU, but who do not necessarily have their principal place of business there.

Article 4 answers this question, by referring readers to the Directive on consumer ADR<sup>27</sup> for the complete explanation of what ‘establishment’ would entail for each of these entities. According to this Directive, the trader’s place of establishment is their place of business (if they are a natural person) or, if they are a company or other legal person, wherever they have their statutory seat, central administration office or place of business.<sup>28</sup> This casts a wide net and allows for traders who are not citizens of one of the EU member states to fall under the scope of the Regulation if they conduct business within the EU internal market.

This broad definition of ‘establishment’ is beneficial to the consumers, as it could make foreign traders subject to the EU provisions and thus ensure that the consumer is adequately protected if an online dispute should arise. It is also arguably beneficial to the traders, as abiding by the Regulation on consumer ODR and Directive on consumer ADR allows them to operate within the EU internal market and creates trust amongst potential consumers, one of the aims of the Regulation.<sup>29</sup> This consumer trust is an important part of the success of ODR and will be discussed in more detail in Chapter 4 below.<sup>30</sup>

Article 4 also provides definitions for various terms used throughout the Regulations. It defines the various parties to the dispute,<sup>31</sup> the types of contract that could give rise to online consumer disputes<sup>32</sup> and concepts like ‘electronic means’<sup>33</sup>

---

<sup>26</sup> Article 2(1) OJ L165/1.

<sup>27</sup> OJ L165/63.

<sup>28</sup> Article 4(2) OJ L165/63.

<sup>29</sup> MBM Loos ‘Enforcing consumer rights through ADR at the detriment of consumer law’ (2016) 1 *European Review of Private Law* 61 at 67; Sara Hourani ‘Mind the gap? A critical analysis of the recognition and enforcement of cross-border consumer ODR outcomes in the EU’ (2022) 1 *Revista Ítalo-Española de Derecho Procesal* 73 at 81.

<sup>30</sup> Ebner & Zeleznikow (2015) op cit at 144.

<sup>31</sup> Articles 4(1)(a),(b),(f),(i),(j),(k),(l) OJ L165/1.

<sup>32</sup> Articles 4(1)(c),(d),(e) OJ L165/1.

<sup>33</sup> Article 4(1)(g) OJ L165/1.

and 'personal data',<sup>34</sup> indicating that the treatment of these types of data will be discussed later in the Regulation.

An interesting inclusion in Chapter 1 is the provision that the Regulation shall apply without prejudice to the Directive on aspects of mediation in civil and commercial matters.<sup>35</sup> This serves as an indication that ODR is intended to function as a separate branch of dispute resolution in the EU, working alongside general ADR, mediation, and the court system. ODR is thus not seen as supplanting existing dispute resolution methods; rather, it appears to fulfil a supplementary role.

### 3.2.3.2. Chapter II – ODR Platform

This chapter focuses on the rules relating to the creation and functioning of a supranational ODR platform for the EU. It details the procedure for establishing the platform, the functions of the various parties in the ODR process and the rules for handling the information that will be processed on the platform.<sup>36</sup> The most notable provisions will be highlighted with the aim of assessing how well they give effect to the purpose of the Regulation.

Articles 5 and 6 contain detailed provisions for the establishment and testing of the ODR platform. According to these sections, the EC is tasked with developing the ODR platform and is the body which governs its operation,<sup>37</sup> receiving regular reports about the functioning of the platform.<sup>38</sup> These reports cover various aspects of the platform's functionality, including the number of ADR entities represented on the platform, the number of unique visitors and the number of submissions per month.<sup>39</sup> This information assists in the assessment of the platform's success and can be used to improve its overall functionality in the future.

---

<sup>34</sup> Article 4(1)(m) OJ L165/1.

<sup>35</sup> Article 3 OJ L165/1.

<sup>36</sup> P Cortés 'A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward' (2015) 35(1) *Legal Studies* 114 at 120.

<sup>37</sup> Article 5(1) OJ L165/1; Bogdan op cit at 159.

<sup>38</sup> Article 6 OJ L165/1.

<sup>39</sup> European Commission *Functioning of the European ODR Platform Statistical Report December 2021* available at <https://commission.europa.eu/system/files/2021-12/2021-report-final.pdf>, accessed on 4 June 2023.

It is expressly stated in Article 5 that the ODR platform must be user-friendly, accessible and that it must ensure the privacy of all users.<sup>40</sup> This is the first reference to privacy in the text and is an indication of the importance placed on this concept by the EU. This focus on privacy is in line with the provisions of the General Data Protection Regulation (GDPR),<sup>41</sup> which imposes a minimum standard of data protection to be applied in the EU.<sup>42</sup> As such, provisions relating to privacy are present throughout the Regulation on consumer ODR,<sup>43</sup> encouraging consumer trust<sup>44</sup> in both the platform and the provisions of the Regulation.

The Regulation expressly provides for accessibility of the ODR platform, stating that the website should be interactive, easy to access electronically<sup>45</sup> and free of charge.<sup>46</sup> The fact that the Regulation only establishes one ODR platform to serve all member states of the EU is a key part of this accessibility, as it gives potential users a single entry point for dispute resolution.<sup>47</sup> This removes any confusion about where to file a claim and provides a central source of information if more help is sought in the dispute resolution process.<sup>48</sup>

---

<sup>40</sup> Article 5(1) OJ L165/1; Tran Viet Dung, Lea Leveau & Khuu Hong Linh 'Developing an online consumer dispute resolution platform in the field of e-commerce in Vietnam: Lessons from the European Union' (2021) 5(2) *Vietnamese Journal of Legal Sciences* 31 at 43.

<sup>41</sup> EU General Data Protection Regulation (GDPR) Regulation (EU) 2016/679 OJ L119/1. The GDPR has been described as 'the most important change in data privacy regulation in 20 years'. Juliana De Groot 'What is the General Data Protection Regulation? Understanding & complying with GDPR requirements in 2019' (2019) *Digital Guardian* available at <https://digitalguardian.com/blog/what-gdpr-general-data-protection-regulation-understanding-and-complying-gdpr-data-protection>, accessed on 4 June 2023.

<sup>42</sup> Schmitz (2020) op cit at 382.

<sup>43</sup> Articles 12, 13 and 14 OJ L165/1.

<sup>44</sup> Consumer trust is a necessary requirement for the success of an ODR process, as they must have confidence in both the process and the outcome for it to be a viable method of dispute resolution. A more detailed discussion about building trust in ODR systems can be found at 4.4.3 below.

<sup>45</sup> Contributing to this aim of accessibility is the free electronic case management system contained in the ODR platform, as provided for in Article 5(4)(d) OJ L165/1. Also see Calliess & Heetkamp op cit at 15; E van Gelder & A Biard 'The Online Dispute Resolution platform after one year of operation: A work in progress with promising potential' available at <http://dx.doi.org/10.2139/ssrn.3169254> accessed on 15 June 2023 for more detailed explanations of the accessibility measures found in the ODR Regulation.

<sup>46</sup> Article 5(2) OJ L165/1; Cortés (2015) op cit at 120; Pavel Loutocký 'Practical impacts of the EU Regulation on Online Dispute Resolution for consumer disputes' in Klára Drličková & Tereza Kyselovská (eds) *COFOLA INTERNATIONAL 2016: Resolution of international disputes* (2016) 254 at 258.

<sup>47</sup> De la Rosa op cit at 27.

<sup>48</sup> Emilia Miščenić 'The effectiveness of judicial enforcement of the EU consumer protection law' in Z Meškić et al (eds) *Balkan Yearbook of European and International Law* (2020) 129 at 135.

The platform and the surrounding documentation should also be available in all official EU languages, ensuring that it is available to the majority of people living within the EU internal market.<sup>49</sup> To promote the use of the ODR platform to people of all nationalities, the site includes an automated translation service.<sup>50</sup> However, this service is not fully functional and there is still some difficulty with the translation of certain language pairs.<sup>51</sup> As such, language has been identified as a key challenge for low-value cross-border transactions,<sup>52</sup> as parties may not be comfortable enough with a foreign language to participate in a dispute resolution process run solely in that language.<sup>53</sup>

Another interesting aspect of the platform that promotes user trust and boosts the reliability of the ODR process is the party feedback system,<sup>54</sup> which allows parties to express their opinions on how the platform functions and on the ADR entity that facilitated their dispute resolution. This gives parties the freedom to provide their input on the ODR process applied in the EU, enabling the Commission to develop the platform in accordance with user needs and expectations.

The Commission also has an obligation of disclosure, and must inform the public about ADR in general, ADR entities, information about ODR contact points and statistical data about the outcomes of the disputes submitted to the ODR platform.<sup>55</sup>

---

<sup>49</sup> Article 5(2) OJ L165/1. Bakhranova is of the opinion that '(i)t is obvious that the platform's multi-language capability makes it easy to use at the very beginning of the process, when filing a complaint.' Bakhranova op cit at 302.

<sup>50</sup> This is provided for in Article 4(4)(e) but has found limited success. Also see Van Gelder & Biard op cit; Pablo Cortés *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (2017) 122; Joanna Page & Laurel Bonnyman 'ADR and ODR – achieving better dispute resolution for consumers in the EU' (2016) 17 *ERA Forum* 145 at 156; Wasser op cit at 270.

<sup>51</sup> Cortés *The Law of Consumer Redress* 123.

<sup>52</sup> 'The ability to access and benefit from ODR systems will also depend on the language of use. Systems that use English exclusively will alienate members of communities who do not speak, read, or write English. From simultaneous translation to multilingual interfaces, new-generation ODR systems need to abandon monolingual approaches and design systems with the flexibility to operate in several languages seamlessly.' Hattotuwa (2006) op cit at 379. Also see Xandra E Kramer 'Access to justice and technology: Transforming the face of cross-border civil litigation and adjudication in the EU' in K Benyekhlef et al (eds) *eAccess to justice* (2016) 351 at 374; De la Rosa op cit at 29; Dung, Leveau & Linh op cit at 48.

<sup>53</sup> Cortés (2015) op cit at 122. 'Another challenge posed by language differences is that '(w)hen the linguistic levels of customers and traders differ, incidents of power imbalance are almost inevitable' Bakhranova op cit at 302; Cortés & Lodder op cit at 35.

<sup>54</sup> Article 5(4)(g) Re OJ L165/1.

<sup>55</sup> Article 5(4)(h) OJ L165/1.

This obligation promotes transparency in the ODR process, which is arguably one of the key attributes for a dispute resolution system to possess. Transparency allows the public to see how the ODR platform functions and allows them to make an informed choice as to the process that will be suitable for them.<sup>56</sup> The public having the right to access so much information about the platform and the proceedings also provides a good incentive for the Commission to comply with the provisions of the Regulation, as the public will then be in a position to challenge any perceived irregularity on the part of the Commission.<sup>57</sup>

In addition to the creation of the overarching ODR platform, the Regulation also requires that each member state designate an ODR contact point which hosts at least two ODR advisors.<sup>58</sup> This creates a network of ODR contact points within the EU internal market, which is intended to provide support for the resolution of disputes submitted to the ODR platform.<sup>59</sup> The ODR contact points are only required to provide such support when parties are not habitually resident in the same member states,<sup>60</sup> but individual member states may choose to make it obligatory even when parties are habitually resident in the same member state.<sup>61</sup> There is thus an acknowledgement that parties in different EU member states might not be aware of the other states' consumer law, and an attempt is thus made to educate parties throughout the dispute resolution process.

The EC is required to convene a meeting of ODR contact points across the EU at least twice a year,<sup>62</sup> to 'permit an exchange of best practice, and a discussion of any recurring problems encountered in the operation of the ODR platform'.<sup>63</sup> This legally mandated discussion allows for the member states to create a uniformity of

---

<sup>56</sup> See further Van Gelder & Biard op cit.

<sup>57</sup> Transparency is an important principle in ODR as it allows internet users to understand the process and to challenge it if it seems like there has been a procedural irregularity. For a more detailed explanation of the importance of transparency in ODR, see 6.2.2 below.

<sup>58</sup> Article 7(1) OJ L165/1; Jeretina op cit at 56.

<sup>59</sup> Article 7(2) OJ L165/1. Such support includes facilitating communication between the disputing parties and the relevant ADR entity as well as informing the consumers about the rights that they have in their respective member states.

<sup>60</sup> Article 7(3) OJ L165/1.

<sup>61</sup> Article 7(4) OJ L165/1.

<sup>62</sup> Article 7(6) OJ L165/1.

<sup>63</sup> Article 7(6) OJ L165/1.

approach<sup>64</sup> and a system of constant monitoring. This continuous assessment of the platform's functioning is another way of encouraging consumer trust, as it provides reassurance that the ODR platform is routinely being improved and that the member states are trying to provide the best possible ODR service.

Articles 8 and 9 set out the procedure that parties must follow to submit a complaint to the ODR platform and outlines how such a complaint will be processed and transmitted.<sup>65</sup> Consumers must submit their complaints electronically via the ODR platform using a 'user friendly' and 'easily accessible' complaint form.<sup>66</sup>

An important feature that Article 8 provides for is the limitation of the type of data that can be collected from the consumer. The ODR platform is only allowed to collect data that is accurate, relevant, and not excessive,<sup>67</sup> a means of ensuring that users' privacy is not unduly infringed.<sup>68</sup> This is in keeping with the requirements of the GDPR<sup>69</sup> which provides that any company marketing goods or services to EU residents is subject to the regulation,<sup>70</sup> regardless of whether the company is itself located in the EU. As such, any ODR platform having an effect in the EU must also comply with the minimum requirements of the GDPR.<sup>71</sup>

Once all necessary sections of the electronic complaint form have been completed, then the processing and transmission of a complaint can begin.<sup>72</sup> Once this form has been received, the ODR platform submits the complaint and other

---

<sup>64</sup> 'As a result, we should not overlook the fact that the purpose of this Regulation is to raise awareness of ADR and ODR schemes, regardless of whether the transaction occurred within the home Member State or beyond borders.' Bakhramova op cit at 301.

<sup>65</sup> MJ Schmidt-Kessen, R Nogueira & M Cantero Gamito 'Success or failure? – Effectiveness of consumer ODR platforms in Brazil and in the EU' (2020) 43 *Journal of Consumer Policy* 659 at 669.

<sup>66</sup> Article 8(1) OJ L165/1; Loutocký (2016) op cit at 261.

<sup>67</sup> Article 8(5) OJ L165/1. Bogdan criticises this provision, calling it 'rather peculiar' and saying that '(t)he legal value of this provision is in my view doubtful. When there is a conflict between the parties, they usually hold diverging views about the accuracy and relevance of submitted data. In any case, these matters cannot be left to the electronic ODR platform to decide.' Bogdan op cit at 160.

<sup>68</sup> 'Privacy and security are top of mind when it comes to ODR.' Schmitz (2018) op cit at 42; Schmitz (2020) op cit at 382.

<sup>69</sup> EU General Data Protection Regulation (GDPR) Regulation (EU) 2016/679 OJ L119/1. The GDPR has been described as 'the most important change in data privacy regulation in 20 years' by De Groot op cit.

<sup>70</sup> Article 3 OJ L119/1.

<sup>71</sup> Schmitz (2020) op cit at 382.

<sup>72</sup> Article 9(1)(2) OJ L165/1; Schmidt-Kessen, Nogueira & Cantero Gamito op cit at 670.

relevant data to the respondent.<sup>73</sup> The respondent must then indicate whether they agree to the process or not<sup>74</sup> and, if they do, they must confirm the selection of the ADR entity.<sup>75</sup> The ODR platform must then communicate this information to the complainant.

It must be noted here that the ADR entity is not required to conduct the ODR process through the ODR platform,<sup>76</sup> which emphasises the fact that the platform is not the centre of the ODR process. Rather, it is a facilitative and administrative tool for parties to use for communication, data storage and organisation of the ODR proceedings;<sup>77</sup> functioning as a platform and not a procedure.

Articles 11 to 14 bear further consideration as they contain the provisions relating to parties' information and the data that is stored and processed on the ODR platform.<sup>78</sup> This level of detail about the data protection aspect of ODR is unique so far, and it is hoped that it will be emulated in future ODR regulation initiatives. To this end, some noteworthy provisions in these articles have been identified here.

Article 11 provides for the establishment of an electronic database for disputing parties' information, to be created and maintained by the EC. Article 12 governs the processing of personal data, identifying the parties who will have access to this information. The information may only be used for purposes of dispute resolution and is only to be given to the selected ADR entity and the ODR contact points, if necessary.<sup>79</sup> Perhaps to prevent the abuse of parties' personal data, the Regulation also imposes a time limit on how long the parties' information can be stored, providing that the information be deleted automatically six months after the resolution of the dispute.<sup>80</sup> This reduces the risk of parties' personal information being available online indefinitely and allows for some level of privacy protection. This Article also outlines which parties are authorised to serve as data controllers,

---

<sup>73</sup> Article 9(3) OJ L165/1.

<sup>74</sup> Article 9(3)(c) OJ L165/1.

<sup>75</sup> Article 9(3)(d) OJ L165/1.

<sup>76</sup> Article 10(d) OJ L165/1; Loutocký (2016) op cit at 262.

<sup>77</sup> Loutocký op cit at 121.

<sup>78</sup> Bakhramova op cit at 302.

<sup>79</sup> Article 12(1) OJ L165/1.

<sup>80</sup> Article 12(3) OJ L165/1.

setting clear boundaries for who can access the information provided during dispute resolution.<sup>81</sup>

Article 13 concerns data confidentiality and security, entrusting the regulation of these aspects to the individual member states. ODR contact points must comply with whichever duties of confidentiality are imposed by their respective member states,<sup>82</sup> which could lead to a divergence of approaches.<sup>83</sup> However, provision is also made for a central body (the EC) to ensure the security of information, both technically and organisationally.<sup>84</sup>

Article 14 imposes a duty of disclosure on traders, mandating them to include a link to the ODR platform on their respective websites.<sup>85</sup> This link must be easily accessible to consumers,<sup>86</sup> allowing them to be informed about the procedure to be followed in the event of a dispute.<sup>87</sup> This duty also applies to online marketplaces established in the EU, even if they are not European businesses.<sup>88</sup> Each member state is also responsible for encouraging their respective consumer and business associations to provide consumers with a link to the ODR platform, but it is not imperative that these associations do so.<sup>89</sup> It has been noted that compliance with this duty has been overwhelmingly positive,<sup>90</sup> and thus the public is consistently being made aware of the availability of the ODR platform.

### 3.2.3.3. Chapter III – Final Provisions

The Regulation concludes with provisions governing administrative issues and powers not included in Chapters I and II. Committee procedure,<sup>91</sup> exercise of

---

<sup>81</sup> Article 12(4)-(6) OJ L165/1.

<sup>82</sup> Article 13(1) OJ L165/1.

<sup>83</sup> Cortés (2015) op cit at 132.

<sup>84</sup> Article 13(2) OJ L165/1.

<sup>85</sup> Poblet & Ross op cit.

<sup>86</sup> Article 14(1) OJ L165/1.

<sup>87</sup> Cortés questions the practical benefit of this article in the following way: ‘Since only a small proportion of these traders will be legally required to participate in an ADR process, this requirement could create ‘false expectations’ for consumers, misleading them into transactions with unreliable traders. Therefore, it is submitted that if online traders do not participate in any ADR process, the information obligation would run counter to the rationale of the new legislation.’ Cortés (2015) op cit at 132.

<sup>88</sup> Article 14(1) OJ L165/1; Rühl op cit at 446.

<sup>89</sup> Article 14(6) OJ L165/1; Cortés & Lodder op cit at 29.

<sup>90</sup> Bakhramova op cit at 302.

<sup>91</sup> Article 16 OJ L165/1.

delegated power<sup>92</sup> and penalties for non-compliance<sup>93</sup> are all introduced in this chapter, as are the dates when the Regulation must enter into force.<sup>94</sup>

Article 21 stipulates that the Commission is required to provide yearly reports to the European Parliament (EP) and EC on the functioning of the ODR platform,<sup>95</sup> a resource that will allow for the ongoing assessment of the platform's efficacy. The 2021 report includes a summary of the engagement on the ODR platform in 2020.<sup>96</sup> The information published includes statistics about the number of ADR entities that are active on the platform, number of platform visits, the types of claims lodged and the number of submissions that were lodged. The report states that 50% of the complaints lodged are cross-border, which is an encouraging sign that the platform is being applied across the EU. However, only 2% of the complaints lodged on the platform reached an ADR entity. This low figure seems to indicate that the ODR platform, although mandated by the CEU, has not found widespread acceptance and use in the EU.<sup>97</sup> It will be interesting to see whether the COVID-19 pandemic will have any long-term effect on these statistics, which can only be determined by consulting the 2021 and 2022 reports.

#### 3.2.4. Evaluation of the Regulation on consumer ODR

Despite the existence of this framework for ODR regulation in the EU, it would seem as though there is still some reticence on the part of the Member States when it comes to compliance with the provisions of the Regulation.<sup>98</sup> At the time the study on compliance was published by the EU in 2018,<sup>99</sup> there was still a 72% non-compliance with the requirement that traders provide a link to the ODR platform on

---

<sup>92</sup> Article 17 OJ L165/1.

<sup>93</sup> Article 18 OJ L165/1; Bogdan op cit at 161.

<sup>94</sup> Article 22 OJ L165/1.

<sup>95</sup> Article 21(1) OJ L165/1; Calliess & Heetkamp op cit at 16.

<sup>96</sup> European Commission *Functioning of the European ODR Platform Statistical Report December 2021* available at <https://commission.europa.eu/system/files/2021-12/2021-report-final.pdf>, accessed on 4 June 2023.

<sup>97</sup> Van Gelder & Biard op cit.

<sup>98</sup> 'It seems that the European legislator chose for now not to further incentivize the alternative and online resolution of disputes, patently ignoring technological driven social changes of which the tip of the iceberg is the fourth party' De la Rosa op cit at 30. Also see Poblet & Ross op cit and 3.2.1.3 above.

<sup>99</sup> European Commission, Directorate-General for Justice and Consumers, *Online Dispute Resolution: Web-scraping of EU traders' websites: Final report* (2018) available at [doi/10.2838/128916](https://doi.org/10.2838/128916), accessed on 4 June 2023.

their websites, which Poblet and Ross opine ‘shows gross lack of effort by member governments in creating awareness’.<sup>100</sup>

Although there is still a slow uptake of ODR in the EU,<sup>101</sup> it is commendable that this legislative framework has been introduced, as it creates a region-wide ODR platform and provides consumers with an alternative to traditional litigation especially in relation to small-value claims. The Regulation can thus be instructive to other countries wishing to create their own ODR platforms, providing a comprehensive blueprint for them to use in doing so. It is suggested that such a framework would be very valuable in the African context, providing a central ODR platform for parties to use when resolving cross-border disputes between African countries.

### 3.3. The UNCITRAL Technical Notes on Online Dispute Resolution

#### 3.3.1. Background and context

The UNCITRAL Technical Notes on Online Dispute Resolution (hereafter ‘Technical Notes’) were created by UNCITRAL in response to the recognition of the need for a cost and time-effective manner of dispute resolution.<sup>102</sup> The project began in 2010 when UNCITRAL established a Working Group to undertake work and research in the field of ODR,<sup>103</sup> which led to the draft of the Technical Notes on Online Dispute Resolution. On 13 December 2015, the United Nations (UN) General Assembly passed a resolution in which they adopted the Technical Notes.

The development of the Technical Notes is in keeping with UNCITRAL’s stated mandate to ‘further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade.’<sup>104</sup> Described as ‘an extensive effort to generate an international

---

<sup>100</sup> Poblet & Ross op cit. This lack of promotion of the consumer ODR platform in the EU is a critique echoed in Marianne Stegner ‘Online dispute resolution: The future of consumer dispute resolution’ (2017) 5 *Yearbook on International Arbitration* 347 at 357.

<sup>101</sup> Koulu *Law, Technology and Dispute Resolution* 187; Cortés & Lodder op cit at 31.

<sup>102</sup> Claudia M Gross ‘News from the United Nations Commission on International Trade Law (UNCITRAL): UNCITRAL towards the end of 2016’ (2016) 21 *Uniform Law Review* 720 at 722.

<sup>103</sup> Cortés (2015) op cit at 122.

<sup>104</sup> Preamble, UNCITRAL Technical Notes; Shope op cit at 76.

ODR system for cross-border consumer disputes’,<sup>105</sup> the Technical Notes are intended to serve as a guideline for member states, organisations, and individuals in developing their own ODR processes, platforms and regulations.<sup>106</sup> They are not prescriptive in nature,<sup>107</sup> which indicates that these guidelines are intended as a tool to support development instead of providing a mandatory basic standard for ODR systems to comply with.<sup>108</sup>

This section will analyse the various provisions of the Technical Notes and evaluate whether they can play a meaningful role in the development of ODR on a global scale. By comparing the Technical Notes to other similar instruments and bearing in mind UNCITRAL’s stated aims in creating the Technical Notes, an assessment of their potential effectiveness will be made.

### 3.3.2. Structural overview of the Technical Notes

The Technical Notes are composed of twelve sections. Section I introduces the Notes, while Section II lists the foundational principles of the Technical Notes and provides guidance on how each of these principles should find application. Sections III and IV contain the proposed form that ODR proceedings should take and outline the scope of these procedures. Section V contains the definitions of various terms used in the instrument and sets out the roles and responsibilities of the parties. Section VI states how ODR proceedings should be instituted, while Sections VII and VIII provide for two specific forms of ODR, namely negotiation and facilitated settlement. Section IX

---

<sup>105</sup> Katsh & Rabinovich-Einy *Digital Justice* 180.

<sup>106</sup> Section 1 Note 3 UNCITRAL Technical Notes; Preamble, UNCITRAL Technical Notes. Cortés (2015) op cit at 116; Cemre Kadioglu ‘Bricks and clicks: Online Dispute Resolution mechanisms and implementation of online arbitration in Turkey for cross-border business to consumer e-commerce disputes’ (2019) 1(1) *ASBU Digital Law Review* 113 at 123.

<sup>107</sup> Sampani describes the Technical Notes as ‘descriptive and non-binding’ in Constantina Sampani ‘Online dispute resolution in e-commerce: is consensus in regulation UNCITRAL’s utopian idea or a realistic ambition?’ (2021) *Information & Communications Technology Law* 1 at 2. Also see Stegner op cit at 360; A Balcha ‘Online Dispute Resolution for electronic commerce under Ethiopian legal framework: The need for reform (2022) 11(1) *Oromia Law Journal* 103 at 119.

<sup>108</sup> It has been suggested that the reason for the Technical Notes not being a binding prescriptive document is the difficulty that drafters from different legal systems had in reaching consensus on procedural rules. For more discussion of this see Z Bin ‘Legal system of ODR for CBEC among the B&R countries’ (2021) 4(6) *Contemporary Social Sciences* 67 at 72; Lifan Yang & Jianzheng Yang ‘The drafting idea of UNCITRAL ODR rules and ODR enforcement practice in China’ 145 available at <http://klri.re.kr:9090/bitstream/2017.oak/6480/1/The%20Drafting%20Idea%20of%20UNCITRAL%20ODR%20Rules%20and%20ODR%20Enforcement%20Practice%20in%20China.pdf>, accessed on 27 June 2023.

provides for the final stage of the proceedings. Section X governs the appointment, powers, and functions of the neutral party (in this case the ODR facilitator). Section XI is a language provision and Section XII contains guidelines on governance.

The Technical Notes must be evaluated further in an attempt to determine whether they can indeed be effective and whether they make a significant contribution to the ongoing development of ODR on the global stage.

### 3.3.3. Analysis of the Technical Notes

#### 3.3.3.1. Section I – Introduction

This section highlights the benefits of ODR as a system of dispute resolution, emphasising its simplicity, efficiency, and flexibility.<sup>109</sup> Section I also states that ODR is a ‘secure manner’ of dispute resolution, an assertion that has been debated.<sup>110</sup> In the current climate of data mining, data breaches and the sale of internet users’ and consumers’ information, it has been proven that ‘no communication method [even in an offline environment] can provide absolute security’.<sup>111</sup> The security of online or offline communications encompasses a range of elements, among them confidentiality, trust and the question of secure storage of personal information.<sup>112</sup> Without any indication in the Technical Notes of how these issues will be handled in the ODR proceedings, it is difficult to see how consumers will voluntarily elect ODR as a viable dispute resolution mechanism, given the sensitive nature of the information submitted and discussed during ODR proceedings.<sup>113</sup>

By contrast, and despite being an earlier instrument, the Regulation on consumer ODR makes explicit provision for the safe processing of parties’ personal

---

<sup>109</sup> Section 1 Note 2 UNCITRAL Technical Notes.

<sup>110</sup> Ebner & Zeleznikow (2015) op cit at 156-157; Elisabeth Wilson-Evered et al ‘Towards an on-line family dispute resolution service in Australia’ in Marta Poblet (ed) *Mobile Technologies for Conflict Management* (2011) 125-140; Sarah Rogers ‘Online Dispute Resolution: An option for mediation in the midst of gendered violence’ (2009) 24 *Ohio State Journal of Dispute Resolution* 349.

<sup>111</sup> Hörnle (2003) op cit at 27-37.

<sup>112</sup> F Abedi & J Zeleznikow ‘Developing regulatory standards for the concept of security in online dispute resolution systems’ (2019) 35 *Computer Law & Security Review* 2; Ebner & Zeleznikow op cit at 144.

<sup>113</sup> This concern about security of the proceedings is strongly linked to the issue of consumer trust discussed at 4.4.3 below.

data and data confidentiality and security,<sup>114</sup> and it is unclear why this was not emulated in the Technical Notes. Although the EU Regulation must include these provisions to ensure that ODR processes are GDPR-compliant, and no such imperative exists in respect of the Technical Notes, this omission is still a notable one given the growing recognition of the importance of data protection and the Technical Notes' own description of ODR as 'secure'.

Section I establishes the purpose of the Technical Notes and provides a limitation on the scope of its application, stating that they are only to be used in the resolution of cross-border small-value claims conducted through electronic means.<sup>115</sup> This excludes their application when ODR is being used as a dispute resolution mechanism for other types of disputes, limiting the scope of application of the Technical Notes in the same way as the scope of the EU Regulation on Consumer ODR.

### 3.3.3.2. Section II – Principles

Section II elaborates on the principles which should form the basis of any ODR process created in line with the Technical Notes. The four principles identified in the beginning of this section are fairness, transparency, due process, and accountability, which are described as underpinning any ODR process.<sup>116</sup> However, the section is then broken into the subheadings of transparency, independence, expertise, and consent, which leads to some confusion about what the true foundational principles are.<sup>117</sup>

Under the heading of 'transparency', the drafters have included a few provisions to govern the disclosure of information to the various parties in the ODR

---

<sup>114</sup> Article 12 OJ L165/1 contains the rules relating to the processing of personal data that may be submitted in ODR proceedings. Article 13 OJ L165/1 contains the provision governing data confidentiality and security.

<sup>115</sup> Section I Note 5 UNCITRAL Technical Notes; Serkan Kaya 'Access to justice for consumers in Turkey: The need for enhancing consumer dispute resolution through online dispute resolution' (2022) 26(1) *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* 225 at 234; Calliess & Heetkamp op cit at 20.

<sup>116</sup> Section II Note 7 UNCITRAL Technical Notes; Ronald A Brand 'Online Dispute Resolution' (2019) *Summer School in Transnational Commercial Law & Technology* 1 at 12; Stegner op cit at 359; Calliess & Heetkamp op cit at 20.

<sup>117</sup> Calliess & Heetkamp op cit at 20; Duško Martić & Danijela Bjelja 'Chasm in UNCITRAL's work on framework for online dispute resolution' (2017) LXIX 1170 *The Review of International Affairs* 60 at 72.

process. There is an attempt to provide for the type of information to be disclosed in Note 12, which states that '(a)ll relevant information should be available on the ODR administrator's website in a user-friendly and accessible manner.'<sup>118</sup> Although this sounds promising, the effect is that of a token acknowledgment that some manner of information should be disclosed to potential disputants. The formulation is very vague, and no guidelines are provided about what would constitute 'relevant information'.

When discussing 'independence', the drafters have included provisions aimed at creating a fair and impartial ODR procedure. However, these provisions are just as vaguely formulated as those in the previous section, framing the ODR administrator's tasks as 'desirable'<sup>119</sup> or 'useful'<sup>120</sup> things to do, instead of establishing them as duties or responsibilities.

Further, when addressing the principle of 'expertise', the Notes suggest that the ODR administrator 'may wish to' introduce policies aimed at selecting or training the neutral facilitators.<sup>121</sup> The use of these policies is not framed as an imperative, nor is the provision relating to the implementation of quality assurance processes.<sup>122</sup> This seeming reluctance to create more stringent guidelines will have a negative effect on potential users' inclination to use the Notes as a tool when creating their own ODR processes. This is because so many of the provisions are either too general or do not provide a strong enough guideline for ODR administrators and the parties involved. This generality is a recurring theme throughout the Notes and will affect their usefulness and implementation.<sup>123</sup>

---

<sup>118</sup> Section II Note 12 UNCITRAL Technical Notes.

<sup>119</sup> 'It is desirable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.' Section II Note 13 UNCITRAL Technical Notes.

<sup>120</sup> 'It is useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interests.' Section II Note 13 UNCITRAL Technical Notes.

<sup>121</sup> Section II Note 15 UNCITRAL Technical Notes.

<sup>122</sup> Section II Note 16 UNCITRAL Technical Notes.

<sup>123</sup> Nadine Lederer 'The UNCITRAL Technical Notes on Online Dispute Resolution – Paper tiger or game changer' (2018) available at <http://arbitrationblog.kluwerarbitration.com/2018/01/11/new-found-emphasis-institutional-arbitration-india/>, accessed on 14 June 2023; Cortés *The Law of Consumer Redress* 204.

### 3.3.3.3. Section III – Stages of ODR proceedings

Note 18 provides that ‘the process of an ODR proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.’<sup>124</sup>

The drafting of this section echoes the ambivalent language used elsewhere in the Technical Notes, providing what an ODR process ‘may’ consist of. This is not necessarily a problem, as there is a range of ODR methods available to interested parties,<sup>125</sup> and it is an advantage that the formulation of this Note is open enough to allow for parties to select the most appropriate ODR processes for their particular disputes.

However, the very next Note establishes that the first stage of proceedings envisioned by the Notes is ‘a technology-enabled negotiation’.<sup>126</sup> This stands in direct contrast to what was stated in Note 18, where negotiation was made to seem like an option rather than an imperative. The phrasing of Note 19 suggests that the drafters preferred to use a typical negotiation structure in setting out a model ODR proceeding to the exclusion of other potential methods, which is unnecessarily limiting.<sup>127</sup> It could create the impression that negotiation is the ideal ODR method to use and influence parties to rely solely on this method, regardless of whether it is suitable for their respective disputes.

This first stage is one where the parties interact directly with each other via the ODR platform, and work on resolving the dispute themselves using the platform as a neutral forum. If this stage of ODR should fail, then provision is made for a facilitated settlement stage, where the ODR administrator appoints a neutral facilitator who will work with the parties to reach a settlement.<sup>128</sup> This second stage

---

<sup>124</sup> Section III Note 18 UNCITRAL Technical Notes; H Magd & A Palanissamy ‘E-commerce disputes and digital justice platforms – A developmental perspective’ (2021) 13(3) *Global Business and Management Research: An International Journal* at 98; Bin op cit at 72; Stegner op cit at 359; Schmidt-Kessen, Nogueira & Cantero Gamito op cit at 660; Pratham Arya & Lisa Sankrit ‘Keeping it online: Developing an ODR mechanism for India’s e-commerce disputes’ (2022) *RGNUL Financial & Mercantile Law Review* 1 at 6.

<sup>125</sup> Aura Esther Vilalta Nicuesa ‘Reputational feedback systems and consumer rights: Improving the European online redress system’ (2018) 5 *International Journal of Online Dispute Resolution* 122-145.

<sup>126</sup> Section III Note 19 UNCITRAL Technical Notes.

<sup>127</sup> Cortés *The Law of Consumer Redress* 191.

<sup>128</sup> Note 20 states that ‘If that negotiation process fails (i.e. does not result in a settlement of the claim), the process may move to a second, “facilitated settlement” stage (see paras. 40-44 below). In

marks a shift from ODR being a party-driven process to being a guided one, with a neutral third party taking the reins. If this facilitated settlement is unsuccessful in reaching a mutually agreeable solution, then there is the option of a third and final stage of ODR proceedings.<sup>129</sup> No detail is given about the structure of this process, and the vague formulation of this third stage is described as ‘the obvious result of lack of consensus on the nature of the final stage of ODR proceedings’,<sup>130</sup> an observation explored in the discussion of Note 45 below.<sup>131</sup>

#### *3.3.3.4. Section IV – Scope of ODR process*

The scope of the Technical Notes is limited, and they are only to be used to create ODR processes to resolve disputes arising from small-value cross-border sales or service contracts concluded through electronic means.<sup>132</sup> Section IV confirms this and explicitly makes provision for the UNCITRAL Technical Notes to be used in both B2B and B2C transactions.<sup>133</sup> However, the application of the Notes is limited to their use in the resolution of disputes arising from sales and service contracts.<sup>134</sup>

#### *3.3.3.5. Section V – ODR definitions, roles and responsibilities, and communications*

Structurally speaking, this section is placed oddly in the instrument. One would expect that the definition of ODR and the explanation of its nature would be placed first, as it would help to give the reader and potential ODR user context for the terminology used from the outset. As it is, the first definition of ODR found in the Notes is in Note 24, which states that:

‘Online dispute resolution, or “ODR”, is a “mechanism for resolving disputes through the use of electronic communications and other information and communication technology”. The process may be implemented differently by different administrators of the process and may evolve over time.’<sup>135</sup>

---

that stage of ODR proceedings, the ODR administrator appoints a neutral (see para. 25 below), who communicates with the parties in an attempt to reach a settlement.’

<sup>129</sup> Section III Note 21 UNCITRAL Technical Notes.

<sup>130</sup> Martić & Bjelja op cit at 73.

<sup>131</sup> 3.3.3.9 below.

<sup>132</sup> Section 1 Note 5 UNCITRAL Technical Notes.

<sup>133</sup> Section IV Note 22 UNCITRAL Technical Notes.

<sup>134</sup> Section IV Note 23 UNCITRAL Technical Notes.

<sup>135</sup> Section V Note 24 UNCITRAL Technical Notes.

This definition is quite broad and inclusive,<sup>136</sup> allowing for the fact there is no universally recognised definition of ODR. It confirms that the common thread in ODR processes is the use of electronic ICT to resolve the dispute,<sup>137</sup> leaving open the question of types of process that should be used.<sup>138</sup>

The importance of the technology-based intermediary in ODR is emphasised and it is required that there be ‘a system for generating, sending, receiving, storing, exchanging, or otherwise processing communications in a manner that ensures data security. Such a system is referred to herein as an “ODR platform”’.<sup>139</sup> However, the existence of this ODR platform is not sufficient to conduct an ODR proceeding. There must also be a party to administer and co-ordinate the platform, ensuring that the platform functions correctly, namely the ODR administrator.<sup>140</sup> The ODR administrator's powers and responsibilities are wide-ranging,<sup>141</sup> and the Notes position this administrator as the main driver of the ODR process.

The focus in the rest of this section is on the principle of efficiency, and frames the ODR administrator’s responsibility to facilitate communications as a means of enhancing such efficiency. This principle is foregrounded in this section, as Note 32 is also aimed at ensuring efficiency, stating that the provisions in it are designed to avoid loss of time in the ODR process.<sup>142</sup> It has been suggested that the time limits included throughout the Notes can act as an incentive for parties to settle their disputes quickly and that the inclusion of such limits serve to bolster the effectiveness of out-of-court dispute resolution mechanisms.<sup>143</sup>

---

<sup>136</sup> JN Kariuki ‘Embracing online dispute resolution in Kenya: Feasibility of an online dispute resolution portal for e-commerce disputes in Kenya’ (2019) 3(2) *Journal of Conflict Management and Sustainable Development* 63 at 65; Rachele Beretta ‘The use of technology in dispute resolution: A framework for the study of ODR’ (2023) *Vilnius University Open Series* 16 at 22.

<sup>137</sup> Syme op cit at 345; Mania op cit 77.

<sup>138</sup> Abbasli op cit at 27.

<sup>139</sup> Section V Note 26 UNCITRAL Technical Notes.

<sup>140</sup> Section V Note 27 UNCITRAL Technical Notes.

<sup>141</sup> ‘Its main functions include confirming, notifying and disclosing various information about the dispute settlement procedure; selecting, training and supervising the neutral person; coordinating the whole ODR procedure, such as extending deadlines.’ Zhang Juanjuan ‘On China online dispute resolution mechanism: Following UNCITRAL TNODR and Alibaba experience’ (2017) 4 *International Journal on Online Dispute Resolution* 14 at 29.

<sup>142</sup> Section V Note 32 UNCITRAL Technical Notes.

<sup>143</sup> Cortés *The Law of Consumer Redress* 185.

### 3.3.3.6. Section VI – Commencement of ODR proceedings

This section provides that the ODR process must be initiated by the claimant, and such initiation must be by way of a notice.<sup>144</sup> Such notice must include the name and electronic address of the claimant and respondent (or their authorised representatives), the grounds for the claim, any envisioned solutions, the claimant's preferred language and the claimant's chosen method of identification.<sup>145</sup> This is a straightforward requirement and is aimed at providing the ODR administrator and potential future facilitator with all information relevant to the ODR process. The ODR process only commences when the ODR administrator, after receiving notice from the claimant, notifies all relevant parties that the notice is available at the ODR platform.<sup>146</sup>

Following such notification, the respondent is then tasked with replying to the ODR administrator,<sup>147</sup> including their contact details and their response to the claim in their reply.<sup>148</sup> Both the initial notice sent by the claimant<sup>149</sup> and the response sent by the respondent must be accompanied by any necessary documents or other evidence.<sup>150</sup> The provision of such information and supporting evidence allows for transparency,<sup>151</sup> in that all parties will be able to consult the relevant documents and will be able to contact each other throughout the ODR process.

### 3.3.3.7. Section VII – Negotiation

Negotiation is the first step in the ODR process proposed by the Notes.<sup>152</sup> The negotiation stage can only begin once the respondent's response has been

---

<sup>144</sup> Section VI Note 31 UNCITRAL Technical Notes. Cortés states that '(i)t is expected that this stage of the ODR process will become highly automated.' Cortés *The Law of Consumer Redress* 184.

<sup>145</sup> Section VI Note 33(a)-(f) UNCITRAL Technical Notes.

<sup>146</sup> Section VI Note 34 UNCITRAL Technical Notes.

<sup>147</sup> Section VI Note 35 UNCITRAL Technical Notes.

<sup>148</sup> Section VI Note 35(a)-(f) UNCITRAL Technical Notes.

<sup>149</sup> Section VI Note 34 UNCITRAL Technical Notes.

<sup>150</sup> Section VI Note 36 UNCITRAL Technical Notes; Stegner *op cit* at 359.

<sup>151</sup> Transparency has been established as one of the foundational principles of a good ODR system, and so it is positive that Section VI provides for information to be shared amongst the parties. It is also suggested that the information required in Notes 34 and 35 forms part of the 'relevant information' referred to in Note 12 at 3.3.3.2 above. Also see Serkan Kaya & Muhammed Danyal Khan 'Online dispute resolution in Pakistan: Challenges and opportunities' (2022) 7(2) *Journal of Nusantara Studies* 103 at 109.

<sup>152</sup> Section VII Note 18 UNCITRAL Technical Notes; 3.3.3.3 above; Michael S Coffee 'Cross-border issues associated with the use of Online Dispute Resolution for international family law matters' (2021) 59(2) *Family Court Review* 211 at 213.

communicated to the ODR platform and the claimant has been notified of its availability, or the respondent has failed to respond to the notice of the claim within a reasonable time.<sup>153</sup> This measurement of a ‘reasonable time’ has been used earlier in the Notes,<sup>154</sup> but without any indication of what would be considered ‘reasonable’ under the circumstances.<sup>155</sup> Although this time period is indeterminate, it can be instructive to read this section in conjunction with Note 31, which prescribes that the ODR administrator must act promptly in the interests of efficiency.<sup>156</sup> If efficiency is the main aim of these proceedings, then a ‘reasonable time’ must be determined as one that promotes the speedy resolution of the dispute to ensure that this aim is achieved.<sup>157</sup> If negotiation does not deliver a final result, then parties will move to the next stage, which is a facilitated settlement.

#### *3.3.3.8. Section VIII – Facilitated settlement*

If the parties are unable to reach a settlement themselves through negotiation, they are automatically invited to the next stage: a facilitated settlement.<sup>158</sup> In such an instance, an impartial third party will be appointed to facilitate the dispute resolution. This facilitated settlement stage may begin once the negotiation stage fails for any reason or if the parties request to skip that stage and move directly to a facilitated settlement.<sup>159</sup> If either of these instances occurs, the ODR administrator must appoint a neutral facilitator, informing all parties of this appointment and providing parties with relevant details about the identity of the facilitator.<sup>160</sup>

#### *3.3.3.9. Section IX – Final stage*

This is the shortest section of the Notes, comprised solely of Note 45 which states that:

---

<sup>153</sup> Section VII Note 38 UNCITRAL Technical Notes.

<sup>154</sup> Section VII Note 35 UNCITRAL Technical Notes.

<sup>155</sup> This is similar to Notes 38 and 39, which both use this measurement of a ‘reasonable time’ without providing any clarity as to what would be considered reasonable in any given circumstance.

<sup>156</sup> Section VII Note 31 UNCITRAL Technical Notes.

<sup>157</sup> ‘Time limits bolster the principle of effectiveness in out-of-court proceedings.’ Cortés *The Law of Consumer Redress* 185.

<sup>158</sup> *Ibid* at 185.

<sup>159</sup> Section VIII Note 41 UNCITRAL Technical Notes.

<sup>160</sup> Section VIII Note 42 UNCITRAL Technical Notes.

'If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator or neutral informs the parties of the nature of the final stage, and of the form that it might take.'<sup>161</sup>

Very little detail is provided about what the final stage of proceedings should look like, and Abbasli suggests that this is due to disagreement within the Working Group regarding the regulation of the third stage, as parties were in dissensus about whether the outcomes of the ODR process should be binding.<sup>162</sup> As such, it is unclear what the third stage could involve, as it could then arguably be referred to a court for traditional litigation, or for arbitration, moving away from ODR as the dispute resolution tool.

From this section it is evident that the ODR administrator has a lot of freedom to decide the form that the third stage will take. As the process progresses, it becomes clear that the responsibility for resolving the dispute shifts from the parties themselves to a neutral facilitator and then finally to the ODR administrator. The ODR administrator seemingly has *carte blanche* to decide how best to resolve the dispute, and it remains to be seen how this power of the ODR administrator will be exercised.

#### *3.3.3.10. Section X – Appointment, powers, and functions of the neutral*

This section provides a detailed description of the role of the neutral facilitator referred to in Section VIII as well as the criteria that the ODR administrator must consider when appointing said neutral.<sup>163</sup>

The main criteria that potential candidates must have to be considered as a neutral facilitator are relevant professional experience and the dispute resolution skills required to deal with the dispute in front of them.<sup>164</sup> These requirements are simple and broad enough to allow for neutral facilitators to come from various professional fields other than law,<sup>165</sup> which can be advantageous to disputants, especially in matters which require expert knowledge of a different subject area. The express statement that the neutral does not have to be a legal professional seems to

---

<sup>161</sup> Section IX Note 45 UNCITRAL Technical Notes.

<sup>162</sup> Abbasli op cit at 27. Cortés *The Law of Consumer Redress* 191; Martić & Bjelja op cit at 71; Calliess & Heetkamp op cit at 19; Ronald A Brand 'The CISG: Applicable law and applicable forums' (2019) 38 *Journal of Law & Commerce* 137 at 146.

<sup>163</sup> Kaya & Khan op cit at 109.

<sup>164</sup> Section X Note 47 UNCITRAL Technical Notes.

<sup>165</sup> Cortés *The Law of Consumer Redress* 186.

be a way of reducing legal fees for the disputants, in keeping with the aim of providing a cost-efficient dispute resolution system.<sup>166</sup>

This broad description of neutral facilitators has been criticised, as ‘the training of neutrals should not be a matter of self-regulation...they are involved in determining legal entitlements; hence they should be able to make decisions that respect the law...’.<sup>167</sup> Perhaps in anticipation of this critique, there is a proviso that the neutral party will have to be a qualified lawyer if professional regulations require it, but the Note is structured in such a way that it potentially allows any person who complies with the stated requirements to be appointed as an ODR neutral.<sup>168</sup>

The neutral must also make a declaration that they are impartial and independent. The Note further imposes a positive duty to disclose any circumstances that would affect such impartiality and independence.<sup>169</sup> This duty remains throughout the dispute resolution proceedings. Yang and Yang opine that there should also have been some provision for the certification of information about neutrals’ areas of expertise, educational background and previous work experience by the administrator as a means of ensuring actual neutrality.<sup>170</sup> The exclusion of such a requirement means that the only reassurance of neutrality comes from the proposed neutral party themselves, and thus it would not be determined objectively. This is another shortcoming in the instrument, and could affect fairness of the selected ODR proceedings.

The disputants may object to the appointment of a neutral,<sup>171</sup> and if this option is exercised, the ODR administrator must decide whether to replace the neutral.<sup>172</sup> The parties may also object to the neutral receiving any information that was gathered or produced during the negotiation stage.<sup>173</sup> This is a very interesting inclusion, as it is the first suggestion that the information generated during the initial

---

<sup>166</sup> Section X Note 46 UNCITRAL Technical Notes; Juanjuan op cit at 29.

<sup>167</sup> Cortés *The Law of Consumer Redress* 186.

<sup>168</sup> Kaya & Khan op cit at 109.

<sup>169</sup> Section X Note 48(b) UNCITRAL Technical Notes.

<sup>170</sup> Yang & Yang op cit at 156.

<sup>171</sup> Section X Note 48(c) UNCITRAL Technical Notes.

<sup>172</sup> Section X Note 48(d) UNCITRAL Technical Notes.

<sup>173</sup> Section X Note 48(f) UNCITRAL Technical Notes.

negotiation could be private and worthy of being kept confidential. There is no other mention of protection of information in the Notes, and this is a very serious oversight.<sup>174</sup>

#### *3.3.3.11. Section XI – Language*

This section expressly provides for flexibility regarding the language used throughout ODR proceedings, citing the availability of various technological tools that can assist in this.<sup>175</sup> This flexibility finds expression in the next sentence, which allows parties to indicate whether they wish to proceed in a different language to that specified in an ODR agreement or other ODR rules.<sup>176</sup> The parties must do this by means of a notice or in their response to a notice, and the ODR administrator must then identify other suitable language options that the parties can choose from.

The construction of this provision is advantageous as it allows parties to choose to conduct proceedings in the language that they feel most comfortable with. This promotes trust in the ODR proceedings and helps to establish ODR as an accessible dispute resolution mechanism.

#### *3.3.3.12. Section XII – Governance*

Although this section is ostensibly about governance during the ODR process, it is one of the most vaguely formulated sections in the Notes, leaving the governance guidelines feeling strangely toothless.

The section begins with a general observation that there should be guidelines or minimum requirements for regulating the conduct of ODR platforms and administrators.<sup>177</sup> ODR proceedings should be subject to the same confidentiality and due process standards that apply in offline dispute resolution processes, and standards of independence, neutrality and impartiality should be upheld throughout the ODR proceedings.<sup>178</sup>

This is the extent of the guidance provided about governance of different aspects of ODR proceedings and it is much too general in its formulation, amounting

---

<sup>174</sup> See discussion at 3.3.3.1 above.

<sup>175</sup> Section XI Note 51 UNCITRAL Technical Notes.

<sup>176</sup> Section XI Note 51 UNCITRAL Technical Notes.

<sup>177</sup> Section XII Note 52 UNCITRAL Technical Notes.

<sup>178</sup> Section XII Note 53 UNCITRAL Technical Notes.

to a mere acknowledgement that there should be minimum standards that the ODR process must comply with. No further guidelines are given about how this is to be achieved, no provisional standards are provided and there is no suggestion of how these standards can be enforced during the ODR process. This type of observation should be self-evident and is insufficient as a guiding principle. The construction and content of this section reads like an afterthought, and it brings the Technical Notes to a rather unsatisfactory close.

### *3.3.3.13. Evaluation of the Technical Notes*

After conducting a thorough investigation of the Technical Notes, they appear to have various deficiencies in both their content and construction. Regarding the content, there are some aspects of the ODR process that have not been covered, and this omission might cause potential users to think twice about using ODR and the Technical Notes to resolve their disputes.

The other problem which could affect the interpretation and functioning of the Technical Notes is the language that is used in its construction. The language is extremely vague and repetitive, and at many points fails to convey the fact that these Technical Notes are intended as guidelines.<sup>179</sup> Phrases like ‘intended to’, ‘it is desirable’ and ‘it is useful’ are peppered throughout the Technical Notes,<sup>180</sup> and when used create the impression that whatever follows is optional. Sometimes this is effective and promotes flexibility, but in other instances, a greater level of certainty is required, and thus the ambiguous language is a hindrance rather than an asset.

The drafters were careful to state that the Notes ‘do not promote any practice of ODR as best practice’.<sup>181</sup> The inclusion of this statement could be read as hesitance to make a declarative statement that they have identified ODR as the best option for resolving cross-border small-value consumer disputes.<sup>182</sup>

The question then becomes whether the Technical Notes will have a positive impact on the continuing development of ODR in the global space, with some

---

<sup>179</sup> Lederer op cit. Cortés echoes this criticism, referring to the Technical Notes as ‘watered down’ in Cortés *The Law of Consumer Redress* 204.

<sup>180</sup> Notes 10,11,13, 15, 18, 28, 42 UNCITRAL Technical Notes.

<sup>181</sup> Section 1 Note 5 UNCITRAL Technical Notes; Gross op cit at 722.

<sup>182</sup> Martić & Bjelja op cit at 72.

commentators saying that the Notes failed to achieve what was anticipated and failed to produce any concrete results.<sup>183</sup> This could be because of the Technical Notes being in a very basic form, omitting key aspects of ODR. As such, there have been questions about the practical efficacy of the Notes,<sup>184</sup> although Bin is of the opinion that the Notes' benefit is primarily the contribution that it would make to the development of ODR systems by governments and private parties.<sup>185</sup>

As such, there is still much more scholarship and global engagement needed on the topic. Encouragingly, there are regional organisations that have been conducting research on ODR and its suitability for resolving consumer disputes and disputes arising from other interactions. The results of this research will be discussed in the next section.

#### 3.4. Other international ODR initiatives, reports and proposals

Although the UNCITRAL Technical Notes and the EU Regulation on consumer ODR are the most well recognised international instruments devoted to ODR, there are also other international initiatives and proposals that must be discussed here as they may give rise to future legislative or soft law instruments. An overview of the Organisation for Economic Co-operation and Development (OECD) Committee of Consumer Policy's work in relation to e-commerce transactions will be provided and the Organization of American States' (OAS) efforts to regulate ODR will be explored. Brief notes will also be provided on the potential for ODR in Asia, with a focus on the efforts of the Asia-Pacific Economic Cooperation (APEC) and the Association of Southeast Asian Nations (ASEAN).

An initiative that will undoubtedly also be of importance when discussing ODR in Africa is the African Continental Free Trade Area (AfCFTA) Agreement. The aim of

---

<sup>183</sup> Benyekhlef describes the process of the development of the Technical Notes as going 'from ambitious procedural rules to simple technical notes or, to paraphrase T.S. Eliot's "The Hollow Men" *...not with a bang but a whimper*' K Benyekhlef & N Vermeys 'UNCITRAL Adopts Technical Notes on ODR' (2016) available at <http://www.slaw.ca/2016/04/18/uncitral-adopts-technical-notes-on-odr/>, accessed 1 June 2023. Also see Stegner op cit at 360; Chaisse & Kirkwood op cit at 83.

<sup>184</sup> 'UNCITRAL's work on ODR has left much to be desired...producing technical notes on ODR, the meaning and nature of which are somewhat unclear.' Koulu *Law, Technology and Dispute Resolution* 126. Also see Sampani op cit at 2; Brand op cit; Cortés *The Law of Consumer Redress* 204; Calliess & Heetkamp op cit at 20.

<sup>185</sup> Bin op cit at 73. This is supported in Kaya op cit at 235.

the AfCFTA Agreement is to create a single market for goods and services across Africa, facilitate free movement of people and capital, create a foundation for a continental customs union and deepen economic integration across the continent.<sup>186</sup> In terms of this Agreement a digital trade protocol is being negotiated, which should include ODR and have an effect on how ODR will be used and applied in Africa. The AfCFTA Agreement and its potential impact on ODR in Africa will be discussed in more detail in Chapter 5 below.<sup>187</sup>

The focus of this section will thus be on the North American and Asian ODR initiatives, with a view to determining commonalities between their approaches to ODR and those seen in other international instruments.

#### 3.4.1. OECD Recommendation on Consumer Protection in E-commerce

Despite not being an instrument dedicated to the governance of ODR, like the EU Regulation on consumer ODR or the UNCITRAL Technical Notes discussed above,<sup>188</sup> the OECD Recommendation on Consumer Protection in E-Commerce (hereafter 'OECD Recommendation') plays an important role in addressing emerging challenges in e-commerce relating to consumer protection. The OECD Recommendation does not expressly provide for an ODR process, but includes a provision on dispute resolution. Part 1 of the OECD Recommendation provides for general principles relating to e-commerce, amongst them a provision governing dispute resolution and redress.<sup>189</sup> The dispute resolution section reads as follows:

'Consumers should be provided with meaningful access to fair, easy-to-use, transparent and effective mechanisms to resolve domestic and cross-border e-commerce disputes in a timely manner and obtain redress, as appropriate, without incurring unnecessary cost or burden. These should include out-of-court mechanisms, such as internal complaints handling and alternative dispute resolution (hereafter, "ADR"). Subject to applicable law, the use of such out-of-court mechanisms should not prevent consumers from pursuing other forms of dispute resolution and redress.'

---

<sup>186</sup> A Lemma, M Mendez-Parra & L Naliaka 'The AfCFTA: unlocking the potential of the digital economy in Africa' (2022) *ODI Report 1* at 9.

<sup>187</sup> See 5.5 below.

<sup>188</sup> See 3.2 and 3.3 above.

<sup>189</sup> Part 1, Section F, para 43 OECD Recommendation.

This provision highlights the need for a time and cost-effective dispute resolution process and includes out-of-court mechanisms in its recommendation, leaving room for ODR to find application in this instance. The emphasis on fairness, accessibility and transparency in the resolution of domestic and cross-border e-commerce disputes must also be noted, as these values are acknowledged as core values of a successful ODR process in other governing instruments.

Although no African countries are members of the OECD, South Africa is a Key Partner to the OECD,<sup>190</sup> and thus participates in policy debates and knowledge exchange. It is in this way that the provisions of the OECD Recommendation could find influence and application in Africa, albeit simply as a guideline.

#### 3.4.2. OAS Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes

The OAS' efforts to introduce an ODR mechanism in North and South America have their roots in a broader effort to increase the consumer protection methods that were then available in the OAS member states. Beginning at the Inter-American Specialized Conference on Private International Law in 2003,<sup>191</sup> OAS invited proposals from member states regarding the protection of consumers in cross-border e-commerce disputes.<sup>192</sup> The Brazilian, Argentinian, Paraguayan, and Canadian delegations to the OAS all submitted proposals in this regard.<sup>193</sup> Building on these proposals, the USA submitted their own revised proposal to the OAS in 2010, including specific provision for ODR.<sup>194</sup>

This proposal from the USA envisions the creation of an overarching practical framework for consumer protection through an OAS-ODR Initiative. In keeping with this aim, the proposal was accompanied by four annexes, each of which contained a Model Law draft. The first Annex contains the Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-commerce Consumer

---

<sup>190</sup> <https://www.oecd.org/about/members-and-partners/>.

<sup>191</sup> Calliess & Heetkamp op cit at 16-18.

<sup>192</sup> Colin Rule, Vikki Rogers & Louis Del Duca 'Designing a global consumer Online Dispute Resolution (ODR) system for cross-border small value-high volume claims – OAS' Developments' (2010) 42 *Uniform Commercial Code Law Journal* 221 at 231-232.

<sup>193</sup> Ibid at 231-232.

<sup>194</sup> Ibid at 231-233.

Disputes and is aimed at establishing an ODR initiative in the form of a multi-state electronic system that would use online mediation, negotiation, and arbitration to resolve small-value B2C disputes arising from e-commerce.<sup>195</sup> The Draft Model Law consists of a main document accompanied by four addenda. The main document and first addendum contain the general rules for the use of ODR to resolve cross-border e-commerce consumer disputes, while Addendum II consists of a draft Electronic Initiation Form to be used by consumers when instituting claims. Addendum III contains a draft Electronic Award form and Addendum IV is the sample Online Questionnaire to Consumers about ODR Providers.<sup>196</sup>

During 2010, the US invited other OAS member delegations to provide comments about their proposal, and it is unclear what the next step will be. Calliess and Heetkamp wrote in 2019 that 'At present, the delegations have not agreed on a date to hold the next CIDIP-conference given that the revision of the proposed documents is not finished'.<sup>197</sup> This still appears to be the position as no updated information has been published by OAS at the time of writing.

### 3.4.3. ODR initiatives in Asia

Although there are no existing ODR instruments in Asia, the interest in implementing ODR in the region is already present. Regional organisations are currently working towards developing a uniquely Asian ODR system, and it is interesting that the value of such a system has been seen from both an economic and a political perspective. This section will provide an overview of the APEC and ASEAN ODR proposals, as well as a statement of the timelines involved.

#### 3.4.3.1. APEC ODR framework

APEC's efforts to provide ODR within the Asia-Pacific region began in 2019, when the APEC Economic Committee supported the creation of an ODR framework for micro-, small- and medium-sized business enterprises. The framework was aimed at

---

<sup>195</sup> Section 1 Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes available at [http://www.oas.org/dil/esp/CIDIP-VII\\_doc\\_trabajo\\_gt\\_proteccion\\_consumidor\\_anexo\\_A\\_\\_Borrador\\_Ley\\_Marco\\_Cooperativo\\_Modelo\\_Solucion\\_Electro.pdf](http://www.oas.org/dil/esp/CIDIP-VII_doc_trabajo_gt_proteccion_consumidor_anexo_A__Borrador_Ley_Marco_Cooperativo_Modelo_Solucion_Electro.pdf), accessed on 24 June 2023.

<sup>196</sup> Ibid.

<sup>197</sup> Calliess & Heetkamp op cit at 17.

introducing and using ODR to resolve cross-border business-to-business (B2B) disputes that arose from these enterprises,<sup>198</sup> limiting the potential users of ODR. This limitation is arguably because of the economic focus of APEC, and it stands to reason that their primary motivation would be to facilitate trade within the Asia-Pacific region. Using ODR to resolve B2B disputes could help achieve this goal, as businesses would be more willing to trade with others in the region if there was a centralised dispute resolution system that they could access in the event of any conflict.

The Model Procedural Rules for the APEC Collaborative Framework for ODR of Cross-Border B2B Disputes (hereafter Model Procedural Rules)<sup>199</sup> consists of twenty-one articles, a model ODR clause for businesses to include in their contracts and a model statement of independence for the neutral ODR facilitator to use. Much like the UNCITRAL Technical Notes, the Model Procedural Rules contain provisions relating to the roles and responsibilities of the parties,<sup>200</sup> the commencement of ODR proceedings,<sup>201</sup> the various stages of the ODR process<sup>202</sup> and general provisions.<sup>203</sup>

However, the Model Procedural Rules differ from the UNCITRAL Technical Notes in terms of the structure of the ODR procedure. The Model Procedural Rules provide for a three-part ODR process that incorporates online negotiation, mediation, and arbitration. It is thus closer to traditional ADR methods and does not envision a new method of ODR. The disputing parties are thus to begin with online negotiation. If these negotiations fail, then the parties can use online mediation. If this is also unsuccessful then the final stage is online arbitration, leading to a more certain outcome and an enforceable order.<sup>204</sup>

---

<sup>198</sup> Article 1 APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business to Business Disputes (2019) available at [http://mddb.apec.org/Documents/2019/SOM/CSOM/19\\_csom\\_012anxb.pdf](http://mddb.apec.org/Documents/2019/SOM/CSOM/19_csom_012anxb.pdf), accessed on 4 June 2023.

<sup>199</sup> Model Procedural Rules for the APEC Collaborative Framework for ODR of Cross-Border B2B Disputes (2019) available at [http://mddb.apec.org/Documents/2019/SOM/CSOM/19\\_csom\\_012anxb.pdf](http://mddb.apec.org/Documents/2019/SOM/CSOM/19_csom_012anxb.pdf), accessed on 4 June 2023.

<sup>200</sup> Part II Model Procedural Rules.

<sup>201</sup> Part IV Model Procedural Rules.

<sup>202</sup> Part III Model Procedural Rules.

<sup>203</sup> Part V Model Procedural Rules.

<sup>204</sup> Calliess & Heetkamp op cit at 16-18.

The proposed APEC ODR system would thus provide more certainty and makes provision for the enforceability of outcomes, making it a more attractive option for businesses seeking an effective dispute resolution process. This is different to the UNCITRAL Technical Notes, which provides for a much more flexible process and no enforceable outcome such as that provided by arbitration or litigation. This difference could be attributed to the fact that the Model Procedural Rules are limited to business application or the fact that they are only intended to be applicable within a certain region, whereas the Technical Notes are designed to be more universal in application.

Despite this promising start, there are still various challenges that could hinder future development and adoption of the APEC Model Procedural Rules. Walter highlights capacity building and awareness of ODR as two factors that could play a role in the successful uptake of ODR in the region,<sup>205</sup> positing that it would be difficult to get different stakeholders to support ODR in developing regions given the general lack of familiarity with the online environment.

These challenges notwithstanding, the Model Procedural Rules are a positive step in bringing ODR to businesses in the Asia-Pacific region, and it is submitted that the introduction of this instrument will serve to promote ODR as a tool for further economic development and cross-border engagement between the APEC countries.

#### *3.4.3.2. ASEAN Strategic Action Plan for Consumer Protection 2016-2025*

An initiative that broadens the scope of ODR application in Asia is the Strategic Action Plan for Consumer Protection 2016-2025 that was developed by ASEAN in 2016. In recent years, ASEAN has recognised that ICT has developed to such an extent that it can be used as a driving force for economic growth in the Southeast Asian region.<sup>206</sup> However, it was also acknowledged that developing ICT could not be the only tool used to achieve this goal, as economic growth of a region also depends on the people

---

<sup>205</sup> Mark Walter, 'The CISG and cross-border access to commercial justice' (2019) 38 *Journal of Law & Commerce* 155 at 166.

<sup>206</sup> UNCTAD *Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations* (2013) iii.

who live there.<sup>207</sup> Thus, ASEAN aimed to update their existing consumer protection framework and include a comprehensive ODR proposal in this framework, developing regulations for both technological and human development.

With this as a background, the ASEAN Economic Community has published the ASEAN Strategic Action Plan for Consumer Protection 2016-2025 (ASAPCP)<sup>208</sup> which has the creation of an ODR mechanism as one of its stated goals. The ASAPCP contains plans for the creation of the ASEAN Regional Online Dispute Resolution Mechanism which consists of three main branches: national ODR systems, a regional ASEAN ODR network and a separate ASEAN mechanism for resolving cross-border disputes.<sup>209</sup> Although this proposed framework looks promising, it is still in the initial stages at the time of writing. Further discussion of the ASAPCP is thus beyond the scope of this work, but it promises to be an interesting addition to the ongoing efforts of governments and regional organisations to regulate ODR.

#### 3.4.4. ODR initiatives in Africa

Similar to the position in North America and Asia as stated above,<sup>210</sup> there is as yet no regional legislative instrument in Africa solely dedicated to ODR or ADR. However, there are regional instruments aimed at governing various aspects of electronic transactions which include references to ODR. These instruments will be discussed below as they will undoubtedly play a role in the future reception of ODR in Africa.

##### 3.4.4.1. COMESA Model Law on Electronic Transactions<sup>211</sup>

In 2010, the Common Market for Eastern and Southern Africa (COMESA) published a Model Law on Electronic Transactions and Guide to Enactment<sup>212</sup> (hereafter COMESA Model Law). This Model Law is wide-ranging, covering various aspects of electronic transactions, from their creation to formalities and consumer protection provisions.

---

<sup>207</sup> Phet Sengpunya 'Online Dispute Resolution scheme for e-commerce: The ASEAN perspectives' (2020) *Pécs Journal of International and European Law* 58 at 59.

<sup>208</sup> Abbreviated as ASAPCP, the Action Plan was adopted in 2016. The full text is available at <https://asean.org/storage/2012/05/ASAPCP-UPLOADING-11Nov16-Final.pdf>, accessed on 20 June 2023.

<sup>209</sup> Appendix, *ASEAN Strategic Action Plan for Consumer Protection 2016-2025* (2016).

<sup>210</sup> See 3.4.2 and 3.4.3 above.

<sup>211</sup> *COMESA Model Law on Electronic Transactions and Guide to Enactment* 2010

<sup>212</sup> *Op cit.*

Interestingly, the COMESA Model Law includes a chapter dedicated to ODR<sup>213</sup> consisting of one Article. Article 30 of the COMESA Model Law is entitled ‘Conciliation before the Court of Justice of the Common Market’ and recommends conciliation as the preferred dispute resolution process for parties to use in disputes arising from transactions governed by the COMESA Model Law.<sup>214</sup> This conciliation must take place by electronic means,<sup>215</sup> and thus constitutes the ODR referred to in the chapter heading. As such, although ODR is expressly recognised in the instrument, it is in a very limited way, consisting of a technologically facilitated conciliation process. This limitation can be viewed as beneficial in that it provides potential disputants with certainty, as this is the procedure that must be followed if the transaction between them is governed by the COMESA Model Law. However, no mention is made of how the outcome of the conciliation process will be enforced, and it remains to be seen how this provision will find practical application.

#### 3.4.4.2. AU Convention on Cyber Security and Personal Data Protection<sup>216</sup>

A necessary part of ODR is the sharing of personal data, as parties to the dispute will have to disclose relevant information about themselves in the course of dispute resolution. The protection of such data has been recognised as an important part of the legal framework needed for successful ODR,<sup>217</sup> and it is in this context that the AU Convention on Cyber Security and Personal Data Protection (hereafter ‘the Convention’) must be discussed.

Article 13 of the Convention sets out basic principles that govern the processing of personal data, amongst them fairness, accuracy, transparency and confidentiality. A key principle that must be observed is that of purpose and relevance

---

<sup>213</sup> Chapter V COMESA Model Law.

<sup>214</sup> Article 30 (2) of the COMESA Model Law states that ‘(a)ny party to a dispute arising from a transaction governed by this Law, may refer the dispute to the Court for conciliation’.

<sup>215</sup> Article 30 (4) COMESA Model Law.

<sup>216</sup> African Union *Convention on Cyber-security and Personal Data Protection* (2014) available at <http://opennetafrika.org/wp-content/uploads/researchandpubs/African%20Union%20Convention%20on%20CyberSecurity%20%20Personal%20Data%20Protection.pdf> accessed 12 December 2023.

<sup>217</sup> This has been expressly identified in Article 12 and 13 OJ L165/1, which contain rules relating to the processing of personal data that may be submitted in ODR proceedings, data confidentiality and security. Also see 3.2.3.2. above.

of the processed data.<sup>218</sup> Much like the EU Regulation on Consumer ODR,<sup>219</sup> the Convention limits the type of personal data that can be collected from data subjects to ‘specific, explicit and legitimate purposes’<sup>220</sup> and states that such data may only be retained as long as it is necessary for those purposes.<sup>221</sup> This principle will thus play a supportive role in ODR adoption by providing potential ODR users with some reassurance that their personal information will be safeguarded, creating a necessary environment of trust in the online space.

### 3.5. Concluding observations

This chapter contains an analysis of the regional legislation, international soft law instruments and ongoing regional projects which currently govern or purport to govern ODR, and there are some interesting themes that have emerged from this discussion.

The instruments and initiatives discussed in this section are similar in that they all involve an official body, be it a regional economic organisation like APEC, an international organisation like UNCITRAL or a regional government like the EC. This is one of the hallmarks of the institutional stage of ODR development,<sup>222</sup> and the creation and adoption of the instruments discussed in this chapter are evidence of the growing acceptance of ODR at the international level. Although these instruments differ in how they conceptualise the ideal ODR mechanism, a thread that runs through them is the importance of ODR as a method of consumer protection, a tool for economic growth and a way in which to strengthen regional blocs.

The main theme that has arisen in both this chapter and Chapter 2 is the ‘Western’ nature of ODR’s genesis and development. This is seen in the fact that ODR has its roots in the Global North and that many of the significant steps in its development have been taken in the USA and in the EU. This impression is perpetuated in the current developmental phase of ODR, as Asian regional

---

<sup>218</sup> Article 13 Principle 3 *Convention on Cyber Security and Personal Data Protection*; Graham Greenleaf & Marie Georges ‘The African Union’s data privacy Convention: A major step toward global consistency?’ (2014) 131 *Privacy Laws & Business International Report* 18 at 19.

<sup>219</sup> See 3.2.3.2 above.

<sup>220</sup> Article 13 Principle 3(a) *Convention on Cyber Security and Personal Data Protection*.

<sup>221</sup> Article 13 Principle 3© *Convention on Cyber Security and Personal Data Protection*.

<sup>222</sup> See 2.2.4.3 above.

organisations join the push to create regulatory frameworks for the use of ODR. ODR is thus still mostly 'located' in the more developed nations of the Global North, with Brazil being a notable exception.<sup>223</sup> More attention must thus be paid to the perception and potential application of ODR in the Global South and other developing nations.

The question is now whether ODR can be used effectively in developing nations and to promote economic growth and consumer protection in these regions. Assessing this will require an examination of the challenges that can be faced in ODR implementation, and a detailed exploration of the various conceptual and practical challenges faced by countries in the developing world that could pose obstacles to ODR recognition and implementation.

---

<sup>223</sup> The Brazilian government instituted a State-run ODR platform in 2014, Consumidor.gov.br. For more information about this platform and other private ODR systems in Brazil see Zanin & Bernardes *op cit* at 8; RVC Fernandes et al 'The expansion of online dispute resolution in Brazil' (2018) 9(2) *International Journal of Court Administration* 20-30.

## **CHAPTER 4: OBSTACLES TO THE SUCCESSFUL IMPLEMENTATION OF ONLINE DISPUTE RESOLUTION IN DEVELOPING COUNTRIES**

*'Is online dispute resolution a science fiction fantasy for developing countries?'*<sup>1</sup>

### 4.1. Introduction

Although the use of ODR is not so far removed from the current reality as to constitute science fiction, it has been questioned whether developing countries are truly ready to implement ODR on the same scale as more 'ODR-advanced' nations.<sup>2</sup> While the benefits of ODR have been laid out in the previous chapters, it would be remiss not to discuss the obstacles that developing nations would face in implementing ODR successfully. Taking stock of these challenges will allow for a balanced assessment of the feasibility of implementing ODR in developing nations.

This section thus aims to discuss the unique challenges faced by developing countries when determining whether ODR can be a successful method of dispute resolution in their respective legal systems, and thus the focus will be on those obstacles arising at the 'macro' level. In conducting this discussion, attention will also be paid to those challenges faced by ODR enthusiasts and practitioners on a smaller scale. By investigating these potential impediments to the successful implementation of ODR, it is hoped that this chapter would contribute to the overall assessment of the viability of ODR for the African continent.

In determining whether ODR use is feasible for developing countries in Africa, the following questions must be asked:

1. Is ODR suitable or convenient for African countries?
2. Is it possible for ODR mechanisms to develop in areas with limited internet connectivity?

---

<sup>1</sup> Albornoz & Martín op cit at 39.

<sup>2</sup> Mohamed S Abdel Wahab 'Online Dispute Resolution and digital inclusion: Challenging the global divide' (2004) *Third Annual Forum on Online Dispute Resolution, University of Melbourne, Australia* available at <https://www.mediate.com/Integrating/docs/ODR%20and%20Digital%20Inclusion%20-%20Mohamed%20Abdel%20Wahab.pdf>, accessed on 13 June 2023. Also see Parlade op cit at 5; Schmitz (2018) op cit at 4; Albornoz & Martín op cit at 39-41; Gabriela R Szlak 'Online Dispute Resolution in Latin America' in Mohamed S Abdel Wahab, Ethan Katsh, & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) 529-559.

3. Are there mechanisms appropriate to use in countries where only a limited proportion of the population has reliable Internet access?<sup>3</sup>

In answering these questions, the various challenges to the successful implementation of ODR must be considered, both internationally and those unique to Africa. From the available literature on the topic, it seems that these challenges can be broadly grouped into economic factors, technological factors, and social factors. Although there is some overlap between the three groups, they will be discussed separately here for ease of understanding.

#### 4.2. The economic divide

The first challenge that must be mentioned when discussing obstacles to successful ODR implementation in developing countries is the large economic divide between the developed world and the developing world.<sup>4</sup> Economic inequality is present at the international level and within individual countries between the richer and poorer citizens of those countries. Interestingly, there has been a decline in international wealth inequality between countries, while there has been an increase in economic inequality within countries' borders.<sup>5</sup> This has led to a perception that international wealth inequality is lessening, allowing for more equal interactions in the world market. However, despite the seeming decline in wealth inequality between countries, there is still a big gap that persists. A pertinent example here is that of the divide between Northern America and sub-Saharan Africa,<sup>6</sup> where the estimated average income of people living in Northern America is 16 times higher than that of people living in sub-Saharan Africa according to the UN World Social Report.<sup>7</sup>

This divide must be acknowledged when discussing the feasibility of introducing ODR, as a basic requirement of ODR is technology, which comes at a

---

<sup>3</sup> These questions are inspired by those formulated by Albornoz and Martín in their assessment of the feasibility of ODR in the Latin American context. The similarities in the regions allow for the adaptation of these questions for the African context. For more detail see Albornoz & Martín op cit at 41.

<sup>4</sup> Albornoz & Martín op cit at 40.

<sup>5</sup> United Nations Department of Economic and Social Affairs *World Social Report: Inequality in a Rapidly Changing World* (2020) at 3.

<sup>6</sup> North America has been identified here as it is the geographical location where ODR originated and the majority of ODR development has taken place. This development has been set out in detail in Chapter 2 above.

<sup>7</sup> United Nations *World Social Report* 3.

certain cost. Where cost of living is high and income is not commensurate with that cost, it stands to reason that the general population in developing nations would not be able to afford the same level of technology available to people in more developed countries.<sup>8</sup> Relating this to the UN's example of the disparity between Northern America and sub-Saharan Africa, it means that those in Northern America would have more access to better technology than the average sub-Saharan citizen would. Albornoz and Martín agree with this assessment, opining that 'developed countries are several steps ahead of emerging countries in the area of ICT, widely enjoying the benefits of connection technologies. It follows that, within rich nations, the use of an Internet environment in conflict-resolution is becoming quite widespread.'<sup>9</sup>

Moving from the international economic disparity between richer and poorer nations to the internal wealth disparity experienced in different countries, it has been acknowledged that a common feature of developing countries is the unequal distribution of wealth.<sup>10</sup> This unequal wealth distribution leads to various questions about what citizens are able to access: access to technology, access to reliable internet connections and consequently access to justice and, by extension, ODR,<sup>11</sup> as 'in spite of economic turbulence, ODR is automating at a rapid pace'.<sup>12</sup>

It has been proposed that ICT can play a key role in addressing income inequality and economic disparity, as greater internet usage is associated with a lower income inequality.<sup>13</sup> This economic divide thus cannot be considered in isolation and must be considered in conjunction with the technological obstacles to the successful implementation of ODR in countries on the lower end of the digital divide.

---

<sup>8</sup> Albornoz & Martín op cit at 40.

<sup>9</sup> Ibid at 40.

<sup>10</sup> Ibid at 41.

<sup>11</sup> Ibid; Hörnle (2003) op cit.

<sup>12</sup> Farned op cit at 335.

<sup>13</sup> Kami Richmond & Russell E Triplett 'ICT and income inequality: a cross-national perspective' (2018) 32:2 *International Review of Applied Economics* 195-214.

### 4.3. Technological challenges

#### 4.3.1. The 'digital divide'

One of the main challenges that has been identified since the early days of ODR is the so-called 'digital divide',<sup>14</sup> a divide that is inextricably linked to the abovementioned economic divide.

The digital divide has been defined in many ways. The Organisation for Economic Co-operation and Development (OECD) defines it as 'different levels of access and use of information and communication technologies (ICTs) and, more specifically, to the gaps in access and use of Internet-based digital services.'<sup>15</sup> This definition frames the concept of the digital divide in terms of availability of technology, focusing on the differing levels of access to technology experienced by individuals both nationally and globally. A digital divide can exist between the richer and poorer citizens of individual states<sup>16</sup> or between developed and developing countries.<sup>17</sup> Those in developed nations have greater access to the latest technology, while citizens of developing countries have historically been unable to keep up with these developments,<sup>18</sup> creating a gap between those with technological access and know-how and those without.

As technology continues to advance, it is creating a new borderless place that anyone with internet access can participate in, bringing together those from disparate backgrounds in an unprecedented way. Schmidt and Cohen refer to this space as the 'interconnected estate', pointing out that the ideal version of this space is one where 'any person with access to the Internet, regardless of living standard or

---

<sup>14</sup> Abdel Wahab op cit at 3; Braeutigam op cit at 275; Bartosz Ziemblicki 'Going online – is the world ready to replace litigation with online dispute resolution mechanisms?' 2015 *Wroclaw Review of Law, Administration and Economics* 40 at 40; Schmitz (2018) op cit at 4; James E Cabral, Abhijeet Chavan & Thomas M Clarke (et al) 'Using technology to enhance access to justice' (2012) 26 *Harvard Journal of Law & Technology* 241.

<sup>15</sup> OECD 'Bridging the rural digital divide' *OECD Digital Economy Papers* (2018) 11.

<sup>16</sup> Chris Berens 'Bridging the new digital divide' Violence Prevention Through Urban Upgrading Blog (2019) available at <http://vpuu.org.za/ict4d/digital-divide-south-africa/>, accessed on 21 June 2023.

<sup>17</sup> 'The diffusion and deployment of technology, the driving force of globalization, is asymmetric with few countries reaping the benefits of the information society' Abdel Wahab op cit at 7. Also see Amy J Schmitz & Colin Rule 'The new handshake: where we are now' (2016) 3:2 *International Journal of Online Dispute Resolution* at 84-94.

<sup>18</sup> Braeutigam op cit at 291; Evelyn Wamboye, Kiril Tochkov & Bruno S Sergi 'Technology adoption and growth in sub-Saharan African countries' (2015) 57:1 *Comparative Economic Studies* 136 at 137; Cashman & Ginnivan op cit at 54.

nationality, is given a voice and the power to effect change'.<sup>19</sup> However, the reality of this 'interconnected estate' is very far from the ideal. The space is necessarily exclusionary, as there are many who cannot access it due to a lack of access to ICT.<sup>20</sup> These individuals thus do not have a voice or the power to effect change in the interconnected estate, leading it to be dominated by citizens of wealthier nations who have advanced ICT.

The information gap between ICT-advanced countries and still-emerging nations continues to widen, leading to a greater knowledge, social and economic disparity between the so-called 'First World' and 'Third World'. This disparity should be a concern for developing nations given the potential contribution that the internet can make to countries' gross domestic product (GDP)<sup>21</sup> and the increasing necessity of being part of the internet economy to play a meaningful role in international trade.<sup>22</sup>

When looking at this digital divide in relation to ODR, it seems self-evident that 'the success of ODR depends very much on the easy use of the ODR process.'<sup>23</sup> Since its inception, the majority of ODR development has taken place in the global North.<sup>24</sup> This is due to the ready availability of technology and the rapid technological growth that took place in the USA during the past three decades. This digital divide between the developed and developing world is a particular problem for the uptake and development of ODR in Africa, as the majority of African states do not have the

---

<sup>19</sup> E Schmidt & J Cohen 'The digital disruption: Connectivity and the diffusion of power' (2010) 89 *Foreign Affairs* 75 at 75.

<sup>20</sup> Goodman op cit at 1; Orna Rabinovich-Einy & Ethan Katsh 'Access to digital justice: Fair and efficient processes for the modern age' (2017) 18 *Cardozo Journal of Conflict Resolution* 637 at 649.

<sup>21</sup> 'The Internet contributes an average 1.9 percent of GDP in aspiring countries—\$366 billion in 2010. By comparison, the Internet in developed countries contributes an average 3.4 percent of GDP.' Olivia Nottebohm et al 'Online and upcoming: The Internet's impact on aspiring countries' (2012) available at <http://www.mckinsey.com>, accessed on 22 June 2023.

<sup>22</sup> A Aleksandrova & D Khabib 'The role of information and communication technologies in a country's GDP: A comparative analysis between developed and developing economies' (2021) *Economic and Political Studies* 1 at 2; Doreen Bogdan-Martin 'Measuring digital development: Facts and figures 2019' (2019) *Technical report* International Telecommunications Union (ITU); Y Li 'Influence of the Internet on the economic growth of the Belt and Road region.' (2019) 11(3) *Global Journal of Emerging Market Economies* 248; Schmidt & Cohen op cit at 75.

<sup>23</sup> F Abedi 'Legal issues arising in online dispute resolution systems' (2019) *Journal of Organizational Behavior Research* 199 at 209.

<sup>24</sup> See Chapter 2 above for a more detailed explanation of the historical development of ODR and an introduction to the impact that the digital divide has on ODR implementation.

same ICT infrastructure and resources for online interactions as other 'ODR-ready' states do.<sup>25</sup> This necessarily precludes an adoption of ODR in Africa in the same way as it has been adopted in ICT-ready nations, where laptop and desktop computers are the most prevalent technological devices. However, it must be questioned whether there are other ways of introducing and implementing ODR in Africa, ones which acknowledge the specific contexts of both the continent as a whole and the individual nations which comprise it.

Parlade's definition includes the description of the disparity as explained above but takes it a step further, stating that

'The term "digital divide" is descriptive of the disparity in the access to technology among the rich and the poor. It is a divide engendered, not by technology itself, but by a pre-existing economic gap: like other benefits of human invention and labor, access to technological devices such as the telephone, computers and the internet come at a cost that is usually beyond the means of the underprivileged comprising a large segment of society.'<sup>26</sup>

Framing the digital divide in this way serves to highlight the far-reaching socio-economic effects that it has already had and continues to have, as those who have economic means have the latest technological tools at their disposal while underprivileged members of society are still struggling to have their basic needs met.<sup>27</sup> Braeutigam describes this dilemma in the following way, relating it to various other socio-economic factors:

'The disparities between the "info-haves" and the "info-have-nots" are typically correlated with socio-economic factors of income, race, ethnicity, education, profession, and gender. There is a pronounced disparity between nations, and especially between groups within nations. The divide has produced a class of "virtual elite" who are able to dominate online discussion forums because they have a higher degree of online literacy.'<sup>28</sup>

---

<sup>25</sup> Mohamed S Abdel Wahab (2012) op cit at 561; Osinachi Nwadem 'Online Dispute Resolution: Scope and matters arising' (2014) available at <https://ssrn.com/abstract=2592926>, accessed on 9 June 2023.

<sup>26</sup> Parlade op cit at 4.

<sup>27</sup> 'Many businesses and individuals in developing countries lack robust Internet access, as they understandably focus on paramount concerns such as clean water, electricity, and other basic necessities.' Schmitz (2018) op cit at 7; Parlade op cit at 4.

<sup>28</sup> Braeutigam op cit at 291 (footnotes omitted).

As such, there is a direct link between the economic divide<sup>29</sup> and the digital divide, as the inability to afford technology naturally leads to an unfamiliarity with ICT. As a result of this, the internet has become an exclusionary space for those who cannot afford to participate in it, with developing countries facing greater challenges in the integration of ICT into their citizens' lives.<sup>30</sup> As technology changes, the privileged internet users can afford to keep track of these new developments whilst the underprivileged are only able to access outdated technology, further widening the gap.<sup>31</sup>

As the Internet continues to transform society, this divide becomes more apparent. The negative effects of the digital divide cannot be underestimated. Although the rapid spread of ICT through developed countries has done much to advance commerce and society in those nations,<sup>32</sup> the converse is also true as the limited ICT available in developing countries is arguably limiting similar socio-economic development in those states. Poorer nations naturally lack the same access to technology as developed nations, effectively excluding those countries from meaningful social and economic interactions with developed countries.<sup>33</sup> It is thus imperative that countries have a high-functioning and current ICT system to boost both social and economic development,<sup>34</sup> with technology being identified as one of

---

<sup>29</sup> Discussed in detail at 4.2 above.

<sup>30</sup> In 2006, Hattotuwa phrased the problem as a wide-ranging one, saying that '(c)ountries in the Global South have skewed information technology frameworks, poorly-designed e-government initiatives, high cost of access to electronic communication, vast regions with no electricity, and little or no human resources to support ODR mechanisms.' Hattotuwa (2006) op cit at 372-373. Also see Susan Schiavetta, 'Online dispute resolution, e-government and overcoming the digital divide' (conference paper, 20th BILETA Annual Conference, Queen's University of Belfast, Belfast, 2005). The state of affairs has changed since Hattotuwa and Schiavetta wrote about the digital divide, and so although the divide still exists, there have been positive changes in the narrowing of that gap.

<sup>31</sup> Abedi op cit at 209; M Legg 'The future of dispute resolution: Online ADR and online courts' (2016) *Australasian Dispute Resolution Journal* 10; Changqing Shi, Tania Sourdin & Bin Li 'The smart court - A new pathway to justice in China?' (2021) *International Journal for Court Administration* 1 at 8 available at <https://ssrn.com/abstract=3778345>, accessed on 9 June 2023.

<sup>32</sup> Parlade op cit at 5; Schmidt & Cohen op cit at 81; Kariuki op cit at 73; Graham Ross 'Challenges and opportunities in implementing ODR' (2003) 1 at 4.

<sup>33</sup> David Allen Larson 'Brother, can you spare a dime - Technology can reduce dispute resolution costs when times are tough and improve outcomes' (2011) 11 *Nevada Law Journal* 523 at 526.

<sup>34</sup> Mihasonirina Andrianaivo & Kangni Kpodar 'ICT, financial inclusion, and growth: Evidence from African countries' (2011) International Monetary Fund (IMF) Working Paper No. 11/73 available at <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/ICT-Financial-Inclusionand-Growth-Evidence-from-African-Countries-24771>, accessed on 13 June 2023.

the key factors in the successful economic, social, political, and educational growth of individual countries.<sup>35</sup>

Having the latest ICT available to citizens is thus a basic requirement for socio-economic development in the modern world,<sup>36</sup> and so the narrowing of the digital divide has become a necessity if citizens of developing countries are to reap the same benefits from ICT as those in developed nations.<sup>37</sup> Efforts to close the digital divide will bring nations one step closer to being able to introduce and implement ODR as a viable method of dispute resolution.

#### *4.3.1.1. Is it possible to bridge this digital divide?*

Although it is clear that the digital divide must be bridged to ensure that there is equal participation by all in the 'interconnected estate', the question remains as to whether doing so is possible, given the vast disparity that currently exists between nations regarding ICT use and adoption.<sup>38</sup> As stated above, the adoption of ICT by developing nations will provide these countries with the opportunity to accelerate their economic development, slowly allowing developing nations to narrow the economic divide.<sup>39</sup> However, there is still the difficulty of how to achieve this.

A concept that is often mentioned when discussing practical means of bridging the digital divide is that of technology leapfrogging, described as 'an attractive notion to developing countries'.<sup>40</sup> 'Technology leapfrogging' refers to the situation where a population leaps straight to adopting a new technological innovation without having adopted the technology which precedes it,<sup>41</sup> thus

---

<sup>35</sup> J Schement 'Broadband, Internet and universal service: Challenges to the social contract of the 21st century' in A Schejter (ed) *And communications for all: A policy agenda for a new administration* (2009) 3-28; P M Napoli & J A Obar 'Mobile leapfrogging and digital divide policy: Assessing the limitations of mobile Internet access' (2013) *New America Foundation* 1.

<sup>36</sup> Napoli & Obar op cit at 3.

<sup>37</sup> Schiavetta op cit; N Adeleye & C Eboagu 'Evaluation of ICT development and economic growth in Africa' (2019) *Netnomics* 31 at 32; Sadushi op cit at 63.

<sup>38</sup> The World Trade Organisation (WTO) has recognised the existence of the digital divide and have affirmed the importance of providing support to developing country members to achieve sustainable development, with specific reference made to providing support through technological innovations. This recognition and undertaking is a positive step in the potential narrowing of the digital divide. For more detail, see the MC12 Outcome Document, WTO 12<sup>th</sup> Ministerial Conference 2022 (WT/L/1135).

<sup>39</sup> MWL Fong 'Technology leapfrogging for developing countries' (2009) *Encyclopedia of Information Science and Technology* 3505 at 3508.

<sup>40</sup> Ibid.

<sup>41</sup> Napoli & Obar op cit at 4; Fong op cit at 3508; Schmitz (2018) op cit at 10.

'skipping over' a few steps in the chain of technological development. Technology leapfrogging is a way of accelerating technological development,<sup>42</sup> which in turn rapidly increases both economic and social development, potentially narrowing the gap between developed and developing countries.<sup>43</sup> This leapfrogging is already happening in developing nations, where 'some...have skipped basic infrastructure improvements to leap into the Internet age.'<sup>44</sup>

There are undoubtedly benefits to the process of technology leapfrogging, as it can have the effect of allowing individuals in developing nations the opportunity to access the 'interconnected estate' by democratising access to the Internet and all it offers. However, there are also certain challenges presented by the sudden 'jump' in technology. It follows that the adoption of new technology would require the user to acquire new skills, and those who have not had exposure to the previous technology could struggle to learn the skills required for the new technology due to their lack of experience with the intermediate technology.<sup>45</sup> This could affect the effectiveness of the leapfrogging, as any potential benefits provided by the new technology could be outweighed by how difficult it is to learn how to use it. As such, it has been suggested that the chances of successful leapfrogging are increased when the operation of the new technology requires a markedly different skill set than that required by the previous technology.<sup>46</sup>

Perhaps for this reason, mobile technology has found popularity as a way of providing internet access to the masses, especially in developing countries. The seeming ubiquity of mobile phones in developing countries has allowed those countries with outdated or poor infrastructure to leapfrog technology like landlines

---

<sup>42</sup> R Davison, D Vogel & R Harris (et al) 'Technology leapfrogging in developing countries – An inevitable luxury' (2000) *The Electronic Journal of Information Systems in Developing Countries* 1 at 2; Adeleye & Eboagu op cit at 3.

<sup>43</sup> A Wijkman & M Afifi 'Technology leapfrogging and the digital divide' (2002) *Ainability A* 128; Napoli & Obar op cit at 13; Nottebohm (et al) op cit at 13.

<sup>44</sup> Schmitz (2018) op cit at 10.

<sup>45</sup> W E Steinmueller 'ICTs and the possibilities for leapfrogging by developing countries' (2001) 140(2) *International Labour Review* 193.

<sup>46</sup> Napoli & Obar op cit at 16.

and fixed internet connections,<sup>47</sup> rather using mobile data networks and wireless hotspots to provide internet access to more people. The use of a smartphone or other mobile device does not rely on knowledge of desktop or laptop computers, as it is a completely different way of accessing the internet.<sup>48</sup> Mobile internet technologies are spreading rapidly, and it must be investigated how these technologies can assist in reducing the digital divide.

#### 4.3.1.2. Mobile technology as a means of bridging the digital divide

Mobile technologies are often mentioned when discussing possible solutions to this digital divide, and it has been suggested that the rapid spread of mobile internet access across the world will be instrumental in shrinking the gap.<sup>49</sup> The expansion of mobile technology has been especially concentrated in the developing world,<sup>50</sup> bringing the internet to those who had been excluded from other more expensive ICT innovations.<sup>51</sup> Smartphones and other mobile devices have provided a new avenue for those of lower economic means to access the internet, having a democratising effect.<sup>52</sup> These mobile devices are cheaper and more readily available than traditional desktop or laptop computers, and thus provide an easier access point to

---

<sup>47</sup> V Rotondi, R Kashyap & LM Pesando (et al) 'Leveraging mobile phones to attain sustainable development' (2020) 117 *Proceedings of the National Academy of Sciences* 13413 at 13416; Avital Mentovich, JJ Prescott & Orna Rabinovich-Einy 'Are litigation outcome disparities inevitable? Courts, technology, and the future of impartiality' (2020) 71(4) *Alabama Law Review* 893 at 971; Amy J Schmitz 'Expanding access to remedies through e-court initiatives' (2019) 67 *Buffalo Law Review* 89 at 159; Also see Schmitz & Rule op cit at 94-95.

<sup>48</sup> Victor Terekhov 'Online mediation: A game changer or much ado about nothing' (2019) *Access to Justice in Eastern Europe* 33.

<sup>49</sup> Schmitz (2018) op cit at 11; Kariuki op cit at 63; Legg op cit at 10; J McGill, S Bouclin & A Salyzyn 'Mobile and web-based legal apps: Opportunities, risks and information gaps' (2015) *Canadian Journal of Law and Technology* 229 at 229; Sanjana Hattotuwa 'Mobiles and ODR: Why we should care' in Mohamed S Abdel Wahab, Ethan Katsh, & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) 95-107; JC Aker & IM Mbiti 'Mobile phones and economic development in Africa' (2010) 24(3) *Journal of Economic Perspectives* 207 at 210.

<sup>50</sup> 'The mobile phone is to many...their first PC. Mobiles today are more capable in fact than average PCs were a few years ago...In the case of smartphones, the mobile is even more akin to a PC, revolutionising in the vernacular as well as in English, the way content is consumed, disseminated and archived through text, video, audio and photography.' Hattotuwa (2012) op cit at 95.

<sup>51</sup> K Benyekhlef, E Amar & V Callipel 'ICT-driven strategies for reforming access to justice mechanisms in developing countries' (2015) 6 *World Bank Legal Review* 325; Wamboye, Tochkov & Sergi op cit at 139.

<sup>52</sup> Schmitz & Rule op cit at 94.

the internet than those technologies would.<sup>53</sup>

As a result of the ease of access and relative affordability of mobile devices and mobile data, there has been rapid and unprecedented growth in the mobile technologies market in developing countries, especially on the African continent. This surge in mobile use is especially seen in sub-Saharan Africa.<sup>54</sup> During 2020, mobile technologies and services generated more than 8% of the GDP in Sub-Saharan Africa. The mobile penetration rate for the region is at 28%, and it is anticipated that this number will reach 39% by 2025.<sup>55</sup> This growth is promising and has the potential to play a key role in narrowing the digital divide, as mobile devices have been proven to facilitate increased communication, connectivity, and access to the interconnected estate.<sup>56</sup>

This growth in the mobile technologies market in Africa also has important implications for the promotion of access to justice,<sup>57</sup> as increased internet access provides more potential avenues for ODR to find application. Access to justice through traditional litigation has been problematic across Africa, with reports of high costs of legal representation and administrative backlogs in the courts causing commentators to call for a reassessment of how disputes are resolved.<sup>58</sup> Even if parties manage to bring their matters to courts, there are problems with the

---

<sup>53</sup> Ibid at 95; Schmitz (2018) op cit at 13.

<sup>54</sup> R Bahri & AA Qaffas 'Impact of information and communication technology on economic growth: Evidence from developing countries' (2019) 7(1) *Economies* 21 at 23; SH Lee, John Levendis & Luis Gutierrez 'Telecommunications and economic growth: An empirical analysis of Sub-Saharan Africa' (2012) 44 *Applied Economics* 461 at 464.

<sup>55</sup> GSM Association 'The Mobile Economy Sub-Saharan Africa' (2021) available at [https://www.gsma.com/mobileeconomy/wpcontent/uploads/2021/09/GSMA\\_ME\\_SSA\\_2021\\_English\\_Web\\_Singles.pdf](https://www.gsma.com/mobileeconomy/wpcontent/uploads/2021/09/GSMA_ME_SSA_2021_English_Web_Singles.pdf), accessed on 11 June 2023.

<sup>56</sup> Rotondi, Kashyap & Pesando (et al) op cit at 13418.

<sup>57</sup> Benyekhlef, Amar & Callipel op cit at 326; DF Engstrom 'Digital civil procedure' (2021) 169:7 *University of Pennsylvania Law Review* 1 at 35; Magd & Palanissamy op cit at 101.

<sup>58</sup> 'Courts and other public entities will inevitably adopt more ODR. Frustration with adversarial proceedings continues to grow, heavy caseloads continue to present a problem, and costs associated with lawyers and litigation continue to be very high - too high for a significant number of individuals.' Rabinovich-Einy & Katsh op cit at 651. Also see Kariuki op cit 73; UJ Orji 'Technology mediated dispute resolution: Challenges and opportunities for dispute resolution in Nigeria' (2012) 5 *Computer and Telecommunications Law Review* 124 at 130; Ononogbu op cit at 80; Schmitz (2018) op cit at 32; JP Bongkiyi 'Online Dispute Resolution: Its prospects and potential for Cameroon' (2021) *Zien Journal of Social Sciences and Humanities* 86-95; A Sela 'Diversity by design: Improving access to justice in online courts with adaptive court interfaces' (2021) 15:1 *The Law & Ethics of Human Rights* 125 at 131.

management of court records, with delays in case registration, missing or damaged case files and inaccuracy in recording case registers.<sup>59</sup> Against this backdrop, it has been suggested that ODR could be implemented to promote the efficacy of justice systems,<sup>60</sup> as ODR would serve to reduce problems relating to cost, delay and inefficiency.<sup>61</sup> Katsh and Rule support this, saying that '(t)echnology also presents opportunities to develop new forms and formats that facilitate access to justice'.<sup>62</sup> ODR can be introduced to more citizens using new forms of technology,<sup>63</sup> extending them more affordable methods of access to justice.<sup>64</sup>

One such technology that creates new ways in which ODR can flourish is mobile technology. Mobile technology is well-suited for bringing ODR to individuals who previously were not able to access it,<sup>65</sup> as mobile devices like tablets and smartphones have various characteristics that promote the easy exchange of information. According to Chavan, modern mobile devices are multi-functional, allowing users to access the internet, communicate via email and instant messaging and run interactive mobile apps.<sup>66</sup> These devices typically use touchscreen interfaces, making them more immediate to access than desktop or laptop computers.

Smartphones and tablets are easily transported and wireless, allowing for connectivity through cellular data networks or wireless data networks. Mobile

---

<sup>59</sup> Mosweu & Mosweu op cit at 3; Orji op cit at 131.

<sup>60</sup> Motsaathebe & Mnjama op cit at 132; Schiavetta op cit; Samuel Dahan & David Liang 'The case for AI-powered legal aid' (2021) 46:2 *Queen's Law Journal* 415; Rabinovich-Einy (2021) op cit at 132; Cashman & Ginnivan op cit at 48.

<sup>61</sup> Cashman & Ginnivan op cit at 48; Orna Rabinovich-Einy & Ethan Katsh, 'The new new courts' (2017) 67(1) *American University Law Review* 165 at 188; Katsh & Rabinovich-Einy *Digital Justice* 51; Cabral, Chavan & Clarke (et al) op cit at 246; Parlade op cit at 11; Ziemblicki op cit at 42; Rabinovich-Einy (2021) op cit at 132.

<sup>62</sup> Katsh & Rule op cit at 329. This is echoed in Brian Simpson 'Algorithms or advocacy: does the legal profession have a future in a digital world?' (2016) 25:1 *Information & Communications Technology Law* 50-61; Mentovich, Prescott & Rabinovich-Einy op cit at 971; Rabinovich-Einy & Katsh op cit at 650-651.

<sup>63</sup> 'Instead, innovations in ODR are occurring with non-PC technologies, such as cell-phones, radios, Blackberries, and other wireless technologies.' Susan Summers Raines & Melissa Conley Tyler 'From e-bay to eternity: Advances in online dispute resolution' (2006) *University of Melbourne Legal Studies Research Paper* 200 at 203.

<sup>64</sup> Legg op cit; Orna Rabinovich-Einy & Ethan Katsh, 'Blockchain and the inevitability of disputes: The role for Online Dispute Resolution' (2019) 2 *Journal of Dispute Resolution* 47 at 58; Rabinovich-Einy (2021) op cit at 132.

<sup>65</sup> Schmitz (2019) op cit at 158.

<sup>66</sup> Cabral, Chavan & Clarke (et al) op cit at 268.

devices are also well suited for the storage of data, whether through recordings, pictures, videos or in the cloud.<sup>67</sup> This collection of attributes creates a good environment for hosting ODR platforms, allowing for quick communication between disputants, providing a relatively safe way to store information related to the disputes and allowing potential disputants to interact in a way that they are arguably more comfortable with, allowing individuals who only have mobile devices to access appropriate legal remedies in the event of a dispute.<sup>68</sup>

However, making ODR accessible to users who only have mobile devices means that practitioners will have to develop ODR programs in a way that acknowledges the differences in functionality, design and content that exist between mobile platforms and more traditional computer programs.<sup>69</sup> Governmental intervention, institutional support and the support of the legal and tech industries will thus be integral to the creation of mobile-friendly ODR processes,<sup>70</sup> and it is hoped that all stakeholders can work together to provide technological access and, consequently, access to ODR<sup>71</sup> as a method of increasing access to justice in African countries.

#### 4.3.2. Readiness of ICT infrastructure

Linked to economic and digital inequality is the lack of adequate ICT infrastructure in many developing countries, as poorer nations may be struggling to fulfil more basic needs of their citizens such as providing adequate housing and a consistent electricity supply, leaving little resources available to invest in ICT.<sup>72</sup>

One study posits that developed and developing nations use ICT in different ways,<sup>73</sup> perhaps as a result of the disparity between the resources available to each.

---

<sup>67</sup> Cabral, Chavan & Clarke (et al) op cit at 268; Schmitz & Wing op cit at 17.

<sup>68</sup> Schmitz op cit at 32; Zanferdini & De Oliveira op cit at 68.

<sup>69</sup> Cabral, Chavan & Clarke (et al) op cit at 275

<sup>70</sup> Leigh & Fowlie op cit at 114; Mentovich, Prescott & Rabinovich-Einy op cit at 974; Wamboye, Tochkov & Sergi op cit at 164.

<sup>71</sup> Ponte (2001) op cit at 91.

<sup>72</sup> Schmitz (2018) op cit at 32; JC Murombedzi 'Challenging inequalities, pathways to a just world' (2016) *World Social Science Report* 59.

<sup>73</sup> Aleksandrova & Khabib op cit at 14. These findings find support in Hyunwoo Yoon et al 'Older adults' internet use for health information: Digital divide by race / ethnicity and socioeconomic status' (2020) *Journal of Applied Gerontology* 105 at 107-108; Mentovich, Prescott & Rabinovich-Einy op cit at 972.

According to this study, developed nations already have firm positions in the international digital economy. Their use of ICT is aimed at expanding digital technologies and introducing these technologies into various socio-economic processes.<sup>74</sup> By contrast, it is argued that developing economies are still using ICT to build up their digital economies, by focusing on using ICT technologies to support the growth of the consumer market.<sup>75</sup> This is a useful distinction to bear in mind when also considering the difference that technology leapfrogging can make. By ‘jumping’ ahead in technological advancement, it is hoped that developing countries can accelerate their ICT development so that they can also focus on using ICT to improve socio-economic processes, as opposed to solely focusing on the digital economy. It is thus proposed that this leapfrogging be used with this aim in mind, and that it can assist in bringing cohesion to how ICT is used across the digital divide.

When considering the challenges that developing countries face regarding ICT infrastructure, it is reasonable to question whether the adoption of ODR is a possibility. It stands to reason that the success of any ODR system or program depends on technical capabilities and knowledge, and that any community’s exclusion from ICT and the internet would preclude them from implementing an ODR system effectively and reaping the benefits of such a dispute resolution system.<sup>76</sup> A fully functioning and up-to-date system of ICT infrastructure is thus a prerequisite for countries to have functional digital economies, and consequently to have proper access to ODR.<sup>77</sup>

A foundational requirement for ODR is ‘an efficient techno-legal framework that can support ODR modalities’.<sup>78</sup> Part of this techno-legal framework is a reliable ICT infrastructure, encompassing hardware components, software components and utilities.<sup>79</sup> These include availability and affordability of computers and mobile devices, a functional telecommunication network, internet availability and affordable

---

<sup>74</sup> Aleksandrova & Khabib op cit at 14.

<sup>75</sup> Aleksandrova & Khabib op cit at 14; Bahrini & Qaffas op cit at 22.

<sup>76</sup> Ross op cit at 4.

<sup>77</sup> Albornoz & Martín op cit at 55.

<sup>78</sup> Abdel Wahab (2012) op cit at 562.

<sup>79</sup> Albornoz & Martín op cit at 55.

digital services.<sup>80</sup> Countries that already have this infrastructure in place have effectively used ICT to integrate into the digital economy. The question is whether countries in Africa have the ICT-readiness to allow them entry into that global digital economy and the interconnected estate. In addition, it must be questioned whether these nations have sufficient ICT infrastructure to allow for the widespread use of technological developments in the judicial system to increase access to justice.<sup>81</sup>

It has been proposed that the outlook is generally positive for Africa, where 'the usage of ICT services has contributed to the positive transformation of lives and livelihoods evidenced by job-creation, increased income, cost minimisation, reduction in uncertainty and risk...'.<sup>82</sup> However, it must also be acknowledged that there are vast differences between the levels of ICT-readiness in different countries on the African continent, with some states being more prepared than others. There is thus still a lot of development that must take place for African countries to maximise the potential benefits of ICT services across sectors. In the global context, Aleksandrova and Khabib have divided countries into three categories based on their levels of ICT-readiness. These categories are as follows:

- Countries with almost no ICTs or telecommunication network infrastructure;
- Countries with relatively good telecommunication network density and ICT availability;
- Countries with a full-fledged ICT infrastructure that meets the needs of modern society.<sup>83</sup>

These categories echo those identified by Abdel Wahab when assessing ICT-readiness in Africa. Abdel Wahab divides the countries in Africa into three different groups, namely ICT ready states, ICT progressing states and ICT potentially progressing states.<sup>84</sup> This assessment is made based on an evaluation of each country's ICT capacity, conducted by considering three sets of ICT indicators:

---

<sup>80</sup> Aleksandrova & Khabib op cit at 14.

<sup>81</sup> Benyekhlef, Amar & Callipel op cit at 332.

<sup>82</sup> Adeleye & Eboagu op cit; Abdel Wahab (2012) op cit at 562.

<sup>83</sup> Aleksandrova & Khabib op cit at 2.

<sup>84</sup> Abdel Wahab (2012) op cit at 567.

infrastructure, capacity and finance.<sup>85</sup> Infrastructure indicators include all ICT equipment and levels of internet usage, encompassing computer ownership, use of mobile technology, number of active internet users, availability of broadband and fibre networks, and security of internet servers.<sup>86</sup> It has been argued that this category also includes basic infrastructure like reliable roads and electricity supply, as these facilitate the availability of the internet in a particular country.<sup>87</sup> Capacity indicators are focused more on the human side of internet use, and include information regarding technological literacy rates, public education levels, public awareness of and engagement with the internet and technology, etc.<sup>88</sup> Financial indicators include the investments that countries make in ICT development, the availability of domestic funds for technological innovation, the possibility of foreign investment, and the financial state of telecommunications companies.<sup>89</sup> The strength of these indicators determine whether states have sufficient ICT to support the introduction and development of ODR, and Abdel Wahab divides Africa's 54 nations into groups accordingly.

ICT ready states are those where all three indicators are at high levels, and Abdel Wahab includes South Africa, Egypt, Morocco and Tunisia in this group.<sup>90</sup> It must be cautioned that his assessment was made in 2012, and there have been significant developments since, with countries like Nigeria and Kenya strengthening their ICT infrastructure in the intervening years.<sup>91</sup> ICT progressing states are those where the indicators are somewhat present, but not to the levels required for the successful implementation of ICT in various aspects of life.<sup>92</sup> ICT potentially progressing states are those willing to implement ICT initiatives, but each indicator is

---

<sup>85</sup> Abdel Wahab (2012) op cit at 567; Benyekhlef, Amar & Callipel op cit at 332. The ICT indicators will be discussed at length in various sections of this study.

<sup>86</sup> Abdel Wahab (2012) op cit at 562.

<sup>87</sup> Nottebohm (et al) op cit at 14; Benyekhlef, Amar & Callipel op cit at 333.

<sup>88</sup> Abdel Wahab (2012) op cit at 562; Benyekhlef, Amar & Callipel op cit at 333.

<sup>89</sup> Abdel Wahab (2012) op cit at 562.

<sup>90</sup> Abdel Wahab (2012) op cit at 567; Benyekhlef, Amar & Callipel op cit at 332.

<sup>91</sup> See discussion of Nigeria and Kenya's ICT development at 5.3 and 5.4 below. Also see Soumitra Dutta & Bruno Lanvin (eds) *Network Readiness Index 2023: Trust in a network society: A crisis of the digital age?* (2023) available at <https://networkreadinessindex.org/africas-leading-lights-regional-network-readiness-for-digital-transformation/> accessed on 12 December 2023; Shimelis Assefa, Abebe Rorissa & Daniel Alemneh 'Digital readiness assessment of countries in Africa: A case study research' (2021) 58:1 *ASIS&T Annual Meeting* 400-404.

<sup>92</sup> Abdel Wahab (2012) op cit at 567; Benyekhlef, Amar & Callipel op cit at 332.

still in very low levels. This group is typically made up of states where there has been significant or ongoing political upheaval or resource scarcity.<sup>93</sup> In these nations, the economy is still emerging and other basic needs must first be met before ICT can be prioritised.<sup>94</sup>

A large part of ICT readiness in developing countries is the availability of ICT knowledge within the citizenry.<sup>95</sup> It is not enough to have the physical infrastructure in place; there must also be support in the form of people who have the requisite knowledge to maintain such infrastructure. Arguably, it would be best for countries to train their own ICT professionals, serving the dual purpose of promoting local expertise and creating jobs in the newly growing tech market. This would have the benefit of stimulating the economy and strengthening Africa's growing technical environment.<sup>96</sup> However, doing so would require extensive governmental intervention and the creation of a research and development policy specifically aimed at increasing technological capacity,<sup>97</sup> and it remains to be seen whether the various African governments have the capacity or the inclination to make this a priority.

In addition, it would not do to have the infrastructure and technical support in place, but then to have a populace unfamiliar with the current ICT and lacking the technological literacy to use the technology available to them to its fullest potential. The importance of this human element must be properly acknowledged, as individuals' unfamiliarity with technology and the internet could lead to a hesitance to participate in any online activity,<sup>98</sup> even if it would be to their benefit. Such hesitance would limit the successful uptake of ODR in developing nations,<sup>99</sup> and thus plans for ICT growth in developing nations would have to include programs aimed at educating individuals about the online space and familiarising them with it. If such education is not provided, then the benefits of technology will not be realised fully in

---

<sup>93</sup> Benyekhlef, Amar & Callipel op cit at 332.

<sup>94</sup> Murombedzi op cit at 599.

<sup>95</sup> Schmitz (2018) op cit at 44.

<sup>96</sup> For an overview of developments in Africa's tech hubs, see N Norbrook, M Soumaré & Q Velluet et al 'Tech hubs across Africa to incubate the next generation' (2020) available at <https://www.theafricareport.com/23434/tech-hubs-across-africa-to-incubate-the-next-generation/>, accessed 7 June 2023.

<sup>97</sup> Albornoz & Martín op cit at 55.

<sup>98</sup> Albornoz & Martín op cit at 54.

<sup>99</sup> Schmitz (2018) op cit at 12.

developing countries, maintaining the digital divide. This technological familiarity is thus essential in fostering an environment that will allow for the successful implementation of ODR, as '(f)eeing comfortable in mobile and electronic environments enhances a population's willingness to subject e-disputes to ODR proceedings.'<sup>100</sup>

A well-constructed and inclusive infrastructure is thus essential to implement in Africa if ODR is going to be introduced successfully.<sup>101</sup> From the discussion in this section, it is apparent that there is still some disparity in ICT readiness across the continent and it is thus suggested that the countries that are ICT ready will have to lead the way. The countries most commonly identified as African ICT leaders are South Africa, Nigeria, and Kenya.<sup>102</sup> Each of these will be investigated in the next chapter to assess their readiness for ODR.<sup>103</sup>

Although the ICT infrastructure is an important part of making ODR a feasible method of dispute resolution in the developing world, it is by no means the only factor that must be considered. There are other challenges, both societal and regulatory,<sup>104</sup> which must also be overcome.

#### 4.4. Cultural and social obstacles

As established above, individual countries' ability to reap the benefits of ODR depends on various factors. The economic and technological factors have been outlined above, but Schiavetta also highlights the important role played by cultural and social factors such as political support, cultural changes, and the creation of an adequate legal framework to support ODR.<sup>105</sup>

The term 'culture' has been defined broadly, with different definitions highlighting different factors. Goh proposes that culture can be understood 'in terms

---

<sup>100</sup> Albornoz & Martín op cit at 55.

<sup>101</sup> David Porteous 'The case for reframing ODR in emerging economies' (2018) 5(1-2) *International Journal of Online Dispute Resolution* 61 at 68.

<sup>102</sup> Ononogbu op cit at 86; Abdel Wahab (2012) op cit at 583.

<sup>103</sup> See 5.2, 5.3 and 5.4 below.

<sup>104</sup> Abdel Wahab, Mohamed S 'Online Dispute Resolution and digital inclusion: Challenging the global digital divide' 4-11 available at <http://www.mediate.com/Integrating/docs/ODR%20and%20Digital%20Inclusion%20%20Mohamed%20Abdel%20Wahab.pdf>, accessed on 20 June 2023; Ziemblicki op cit at 43.

<sup>105</sup> Schiavetta op cit.

of a set of tradition, laws, attitudes, beliefs and values.’<sup>106</sup> Sackin adds to this by identifying various factors that can influence these beliefs and values, including education and social values among them,<sup>107</sup> both of which play integral parts in the culture around ODR. These factors serve to affect the way that people approach issues of trust, privacy, and conflict, and it is thus important to understand them when talking about a new dispute resolution process.<sup>108</sup>

This section will focus on the various cultural and social challenges faced by developing countries wanting to implement ODR. The main challenges discussed here are the receptiveness of the national legal culture, cultural differences between African nations that could impede successful cross-border interaction, user trust in online procedures and concerns regarding enforcement of ODR outcomes.

#### 4.4.1. National legal culture

Individual countries’ national legal culture must be considered in assessing whether ODR would be a feasible dispute resolution method for them.<sup>109</sup> Abdel Wahab emphasises the importance of an appropriate legislative framework, saying that

‘enhancing ICT infrastructure and developing capacity to offer state-of-the-art ODR services hinge not only on ICT, capacity, and financial readiness, but also on the existence of adequate socio-legal infrastructure that provides compatible regulatory framework that boosts trust and confidence. This would ultimately create cultural readiness for ODR in Africa.’<sup>110</sup>

This statement alludes to a few of the challenges that will be discussed in this section, and highlights that they are all interlinked. A strong socio-legal framework is necessary to support the use of a suitable ICT infrastructure,<sup>111</sup> which will in turn promote trust and confidence, allowing for the widespread uptake and growth of

---

<sup>106</sup> BC Goh *Negotiating With The Chinese* (1996) 269.

<sup>107</sup> Jennifer Sackin ‘Online Dispute Resolution with China: Advantageous, but at what cost’ (2010) 12 *Cardozo Journal of Conflict Resolution* 245 at 264.

<sup>108</sup> *Ibid.*

<sup>109</sup> ‘The national legal culture is crucial for the success of ODR.’ J Glavanits ‘Obstacles of ODR in developing counties’ (2017) *UNCITRAL Congress 2017* 1 at 1.

<sup>110</sup> Abdel Wahab *op cit* at 568.

<sup>111</sup> Albornoz & Martín *op cit* at 56.

ODR in any given country. Thus, a firm legal basis is a prerequisite factor that must be in place to support the development of ODR programmes in Africa.<sup>112</sup>

One must then question whether such a legal basis exists in Africa, both at the national and regional levels. Previously, the lack of sufficient ICT and ODR oriented legislative instruments on the continent has been noted by commentators,<sup>113</sup> but there has been some progress in the decade since. Although there is not a proliferation of such instruments, there has been some movement towards realising the need for legislative regulation of internet use in Africa. As evidenced by the discussion in Chapter 3 above,<sup>114</sup> there is no regional African hard or soft law instrument specifically devoted to ODR. However, there has been some movement towards regulating internet transactions on the continent, with regional organisations working on projects aimed at creating a distinctly African approach to the development of ICT in the region.<sup>115</sup>

Despite the promise of these projects, there are no official regional instruments at present, although there are currently African Continental Free Trade Area (AfCFTA) negotiations under way regarding the regulation of digital trade in Africa.<sup>116</sup> However, individual African countries have been developing domestic legislation aimed at regulating online transactions. When Abdel Wahab wrote his assessment of ODR in Africa, he posited that Tunisia and South Africa had the most advanced ICT regulatory matrix.<sup>117</sup> It must, however, be noted that this was the

---

<sup>112</sup> 'The need for an appropriate legal framework that is supportive of and conducive to the practice of e-commerce has been identified as a prerequisite for the growth of e-commerce in general and ODR in particular.' UNCTAD *E-Commerce and Development Report* (2003).

<sup>113</sup> Abdel Wahab op cit at 568.

<sup>114</sup> See discussion at 3.4 above.

<sup>115</sup> New Partnership for Africa's Development (NEPAD) 'Africa Information and Communications Technology Sector Phase III Report' (2017); Draft African Declaration on Internet Rights and Freedoms (2015); African Union Declaration on Internet Governance and Development of Africa's Digital Economy (2018).

<sup>116</sup> Two documents that promise to change this paucity of regulation are the proposed AfCFTA Protocol on Digital Trade (forming part of Phase II protocols) and the Digital Transformation Strategy for Africa (2020-2030) adopted at the 2020 African Union Summit. For more detail see 5.4 below.

<sup>117</sup> Abdel Wahab op cit at 579.

position in 2012, and the current technological leaders in Africa are South Africa, Nigeria, and Kenya.<sup>118</sup>

South Africa, Nigeria and Kenya have all had significant development in both ICT and ICT regulation over the past decade and are all considered to be technological leaders in Africa.<sup>119</sup> These and other African countries now have legislation ranging from statutes relating to electronic communications to those which govern data protection and privacy. More detail about these legislative instruments will be provided in Chapter 5 below,<sup>120</sup> where the ICT-ready countries will be assessed in more detail to determine if it is feasible for those nations to use ODR as an alternative means of dispute resolution.

Another prerequisite for the successful implementation of ODR is more human in nature. Apart from having a strong legislative framework in place, the local legal practitioners must also be receptive to the idea of using ODR as an alternative dispute resolution measure. Although ODR can be adapted to different contexts and used in several types of disputes, these benefits will not be felt if those in legal practice do not adapt to accept it. However, there are various challenges that would lead the legal profession to be hesitant about incorporating ODR into their dispute resolution repertoire.<sup>121</sup> The first hurdle would undoubtedly be the perception of ODR as a legal disruption, as there has been a recognition that technology has the power to disrupt the legal profession in a drastic way.<sup>122</sup> According to Susskind, '(l)egal institutions and lawyers are at a crossroads ... and are poised to change more radically over the next two decades than they have over the last two centuries'.<sup>123</sup>

---

<sup>118</sup> Aimée Dushime 'These four countries are leading Africa's start-up scene – here's why' (2022) available at <https://www.weforum.org/agenda/2022/08/africa-start-up-nigeria-egypt-kenya-south-africa/>, accessed on 23 June 2023; Ify Ogo 'An agenda for the AfCFTA Protocol on E-commerce' (2020) available at <https://www.tralac.org/blog/article/14692-an-agenda-for-the-afcfta-protocol-on-e-commerce.html>, accessed on 24 June 2023.

<sup>119</sup> Ononogbu op cit at 78

<sup>120</sup> See 5.2.1, 5.3.1 and 5.4.1 below.

<sup>121</sup> Ojiako et al op cit at 305.

<sup>122</sup> AS Ng 'There may yet be hope for lawyers' (2022) 22(4) *Policy* 499-512; MG Owen 'Legal outsourcing to India: the demise of new lawyers and junior associates' 2008 *Global Business & Development Law Journal* 175; Richard Susskind *The end of lawyers?: Rethinking the nature of legal services* (2010); Farned op cit at 335; Barbara Rose 'No way back: Don't look now, but a technology revolution is changing the way lawyers work' (2009) 95 *ABA Journal* 64 at 64.

<sup>123</sup> Richard Susskind *Tomorrow's lawyers: An introduction to your future* (2013) xiii.

This change has already begun, with a growing acknowledgement that technology will affect the practice of law and the functioning of the judiciary.<sup>124</sup>

A possible reason for the hesitance surrounding the adoption of technology in the legal field is that ODR allows potential clients to drive their own dispute resolution process, removing or lessening the need for legal representation. This would reduce billable hours and would be less profitable than litigation,<sup>125</sup> so there is not much incentive for those lawyers to support ODR initiatives.<sup>126</sup> If there is the potential to lose business, then it will be more difficult to inspire lawyers to adopt and promote ODR.<sup>127</sup> However, Yoon argues that this pessimistic view of the impact of technology in the legal profession is not the only potential outcome. He proposes that the incorporation of technology into lawyers' daily practice will be advantageous overall, arguing that '(e)merging technologies could simultaneously increase the supply and demand for legal services. By improving their productivity, lawyers have the capacity to help more clients in the same amount of time.'<sup>128</sup> Thus, by using technology to augment the practice of law rather than supplant it, legal practitioners could find the adoption of technology to be to their advantage.<sup>129</sup>

This appears to be an issue across developing nations, with similar challenges being identified in Latin America.<sup>130</sup> The difference is that African cultures have historically been community minded and so different measures of dispute resolution are not completely outside of the norm.<sup>131</sup> It will thus arguably not be as difficult to make the cultural shift required for ODR to find widespread application, although

---

<sup>124</sup> Ng op cit at 501; Ononogbu op cit at 78; Sershiv Reddy 'Implementing a South African e-dispute resolution system for consumer disputes' 2020 *Obiter* 371 at 393-394.

<sup>125</sup> Ross op cit at 3; T Sourdin, B Li & T Burke 'Just, quick and cheap? Civil dispute resolution and technology' (2019) 19 *Macquarie Law Journal* 17 at 32.

<sup>126</sup> Ignacio Oltra Gras 'Online courts: Bridging the gap between access and justice' (2021) 10 *UCL Journal of Law and Jurisprudence* 24 at 34.

<sup>127</sup> Simpson op cit 50-61; Omoola & Oseni op cit at 262; Rose op cit at 64.

<sup>128</sup> Albert H Yoon 'The post-modern lawyer: Technology and the democratization of legal representation' (2016) 66 *University of Toronto Law Journal* 456 at 470; Omoola & Oseni op cit at 263; Susskind *The end of lawyers* at 269.

<sup>129</sup> Thomas R Moore 'The upgraded lawyer: Modern technology and its impact on the legal profession' (2019) 21 *UDC/DCSL Law Review* 27 at 33.

<sup>130</sup> Luz E Nagle 'E-commerce in Latin America: Legal and business challenges for developing enterprise' (2001) 50 *American University Law Review* 859 at 872; Fernandes (et al) op cit at 27; Albornoz & Martín op cit at 54.

<sup>131</sup> AO Akinola & UO Uzodike 'Ubuntu and the quest for conflict resolution in Africa' (2017) *Journal of Black Studies* 91 at 99-100.

there will likely still be resistance and scepticism. These fears can only be overcome if ODR mechanisms are proven to be efficient and effective, and the government, judiciary and private ODR entities will have to play an active role in changing the cultural norms.

There is also the problem of legal professionals and the judiciary being reluctant to adopt new techniques,<sup>132</sup> and this so-called 'reluctance to innovate' has been highlighted as a common attitude in the justice sector.<sup>133</sup> Authors have linked this attitude to various factors including a lack of readiness for innovation, inadequate budgets and the continued deprioritising of the justice system, especially in developing countries.<sup>134</sup> There is also the problem of judicial conservatism, and the slow rate at which the legal profession is adjusting to technological development.<sup>135</sup> This poses a real challenge as ODR will only be a viable method of dispute resolution if it is supported and taken up by the legal profession.<sup>136</sup>

An additional challenge that must be overcome if developing countries are to implement successful ODR systems is the awareness of ODR amongst legal practitioners and the public.<sup>137</sup> Abdel Wahab suggests that the best way to do this would be for the judiciary to get involved in promoting alternative dispute resolution methods, but it is not suggested how this would work practically or why the judiciary is better placed to do so than any other organisations would be.<sup>138</sup> A potential reason

---

<sup>132</sup> Ross op cit at 3; Jordan Bigda 'The legal profession: From humans to robots' (2018) 18 *Journal of High Tech Law* 396 at 412; M Corrales, M Fenwick & H Haapio 'Digital technologies, legal design and the future of the legal profession' in M Corrales, M Fenwick & H Haapio (eds) *Legal Tech, Smart Contracts and Blockchain. Perspectives in Law, Business and Innovation* (2019) 1–15. Hurter (2000) op cit at 205.

<sup>133</sup> Sourdin, Li & Burke op cit at 32.

<sup>134</sup> Farned op cit at 335; Gras op cit at 32; Richard Susskind *Online Courts and the Future of Justice* (2021) 108; Orji op cit at 128; B Udotai 'The growth and challenges of information technology in law practice in Nigeria' in K Nwosu (ed) *Legal Practice Skills & Ethics in Nigeria* (2003) 245; Schmitz (2019) op cit at 94.

<sup>135</sup> Martinek & Cupido op cit at 127; Simpson op cit 50-61; Hurter (2000) op cit at 205.

<sup>136</sup> Glavanits op cit.

<sup>137</sup> Ross op cit at 4; Yu Zhiqiang & Dong Peiwen 'On practical exploration and development path of Online Dispute Resolution system' (2019) 7 *China Legal Science* 54 at 57; Jie Zheng 'The role of ODR in resolving electronic commerce disputes in China' (2016) 3 *International Journal of Online Dispute Resolution* 41 at 47; Ponte (2001) op cit at 90; Mohammad Alharbi 'Key challenges facing Online Dispute Resolution in Saudi Arabia' (2019) 88 *Journal of Law, Policy and Globalization* 76 at 80; Wei Gao 'The success and failure of Online Dispute Resolution' (2017) 47(2) *Hong Kong Law Journal* 445 at 451.

<sup>138</sup> Abdel Wahab (2012) op cit at 579.

why the judiciary has been recommended to take the lead in this regard is the need for sufficiently trained neutral parties to facilitate the ODR processes. There needs to be an adequate supply of such individuals to act in instances where the ODR procedure requires a human neutral. These individuals could be drawn from those already in the judiciary, as they have already had some experience of dispute resolution. However, the issue of further training arises because ODR is a *sui generis* system of dispute resolution, and it is not given that neutrals trained in traditional ADR would automatically be able to adapt those skills to the ODR environment. As Ross states, 'If ODR is to be fully appreciated, those new techniques need to (be) identified and specialised training developed.'<sup>139</sup>

Although the involvement of the legal sector would be advantageous in creating an environment that is amenable to ODR, it would seem that there is still much hesitance about ODR amongst legal practitioners. Various authors have noted scepticism about the touted benefits of ODR, questioning whether it is indeed a viable method of dispute resolution. Despite this doubt, ODR has continued to grow and find application in diverse contexts, and it is predicted that the legal fraternity will become more receptive to the use of technology in dispute resolution, as it can provide many benefits to practitioners, disputants, and the judiciary alike. Prescott argues that

'courts should view ODR going forward not only as a potential opportunity for courtroom-like engagement in the traditional sense but as a substitute for many of the services historically provided by lawyers, which, in the end, are mostly about helping litigants understand how a court will perform and what it will produce in the specific instance of their case. Conceiving of ODR in this way – as the use of online communication technology and data science to make it easier for potential litigants to use, understand, and benefit from law in action – will get us much closer in the years ahead to “courts as a service.”'<sup>140</sup>

---

<sup>139</sup> Ross op cit at 5; Ponte (2001) op cit at 87.

<sup>140</sup> JJ Prescott 'Using ODR platforms to level the playing field: Improving pro se litigation through ODR design' in DF Engstrom (ed) *Legal Tech and the Future of Civil Justice* (2023) 286 at 304.

It is hoped that this will also be the case in Africa as more countries begin to adopt ODR,<sup>141</sup> and that each country's existing legal culture will adapt to accommodate technological developments.

#### 4.4.2. Cultural differences in cross-border interactions

Linked to the issue of the receptivity of the legal profession is the question of cultural readiness for ODR.<sup>142</sup> It has been posited that 'ODR is culture-blind but at the same, it has developed or is developing a culture of its own.'<sup>143</sup> Although there is some veracity in this claim, as ODR itself is not limited to a particular cultural group or background, it does not consider the impact that disputing parties' own cultural contexts would have on their attitudes towards this dispute resolution process.

The assessment of whether ODR can find success despite cultural differences must thus include considerations of and sensitivity to differing cultures across borders,<sup>144</sup> given that one of the main uses of ODR is to resolve cross-border disputes. Different languages, different approaches to seeking legal recourse and differences in values could all form barriers to the reception and spread of ODR in individual countries.<sup>145</sup> As Rabinovich-Einy recognises, ODR might be used to resolve disputes amongst individuals, organisations or corporations from different geographical locations and different nationalities.<sup>146</sup> As such, a requirement for ODR practitioners in the future will undoubtedly be some level of familiarity with the indigenous or most common languages spoken in a particular region as well as the customs commonly observed in such regions. This requirement will be especially useful in

---

<sup>141</sup> This recognition of ODR in Africa has already begun with the ODR Africa Network, an academic, non-profit social platform dedicated to ODR scholarship, training and community. For more information about the ODR Africa Network, see [odrafrica.com](http://odrafrica.com).

<sup>142</sup> Zanferdini & Oliveira op cit at 77; E Wilson-Evered & J Zeleznikow *Online family dispute resolution: Evidence for creating the ideal people and technology interface* (2021) 100-102.

<sup>143</sup> Amy J Schmitz, Lola Akin Ojelabi & John Zeleznikow 'Researching online dispute resolution to expand access to justice' (2022) *Giustizia Consensuale (Consensual Justice)* 269 at 278.

<sup>144</sup> D Rainey 'ODR and culture' in MSA Wahab, E Katsh & D Rainey (eds) *Online Dispute Resolution: Theory and Practice: A Treatise On Technology and Dispute Resolution* (2012) 197-213; Schmitz, Ojelabi & Zeleznikow op cit at 278.

<sup>145</sup> Nagle op cit at 872.

<sup>146</sup> O Rabinovich-Einy 'Balancing the scales: The Ford-Firestone case, the internet, and the future dispute resolution landscape' (2003) 6 *Yale Journal of Law & Technology* 1-53.

attempts to harmonise ODR initiatives in a particular region, for example across the African continent.<sup>147</sup>

There already appears to be some recognition of this potential challenge in the existing international instruments governing ODR, with both the UNCITRAL Technical Notes<sup>148</sup> and the EU Regulation on ODR<sup>149</sup> containing provisions relating to language proficiency of ODR facilitators and language availability on ODR platforms. This inclusion signifies that there is some recognition of the need to make ODR processes accessible across borders to individuals from varying cultural backgrounds, even though it only addresses one aspect of culture.

Despite this, there has also been criticism regarding the capability that ODR has to accommodate multicultural differences.<sup>150</sup> There have been reports that ODR has failed in its aims of accommodating the cultural and linguistic diversity of participants in cross-border disputes,<sup>151</sup> and it is unclear how this limitation can be overcome. Although it is a good starting point to attempt to build these considerations into the governing legislation, this in itself is not sufficient to address concerns about adequately acknowledging parties' diversity in the ODR process and creating a truly inclusive dispute resolution process. As such, the economic and digital divides are not the only challenges which must be overcome for ODR to thrive. It is imperative that the social and cultural contexts of potential ODR users be considered and catered for in the ODR services made available to them.<sup>152</sup>

---

<sup>147</sup> Nwadem op cit at 16.

<sup>148</sup> 'Technology tools available in ODR can offer a great deal of flexibility regarding the language used for the proceeding. Even where an ODR agreement or ODR rules specify a language to be used in proceedings, it is desirable that a party to the proceedings be able to indicate in the notice or response whether it wishes to proceed in a different language, so that the ODR administrator can identify other language options that the parties may select.' Section XI UNCITRAL Technical Notes.

<sup>149</sup> Articles 5(1)(2), 9(1)(3)-(4) Regulation (EU) No 524/2013 of 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

<sup>150</sup> 'ODR processes do not sufficiently accommodate for or facilitate diverse cultural issues between parties in the international environment.' Morek op cit at 174.

<sup>151</sup> Hörnle *Cross-Border Internet Dispute Resolution* 27; Sadushi op cit at 59; Schmitz, Ojelabi & Zeleznikow op cit at 275.

<sup>152</sup> Wilson-Evered & Zeleznikow *Online family dispute resolution* 100-2; Schmitz et al op cit at 280.

#### 4.4.3. Trust, privacy, and confidentiality concerns

In addition to the readiness of the legal fraternity and the various cultural and social impediments to the acceptance of ODR, there is also the potential challenge of a lack of consumer trust in ODR as an alternative method of dispute resolution.<sup>153</sup> It is argued that this consumer trust is integral to the success of any ODR venture,<sup>154</sup> as the process will only succeed if enough individuals choose to use it.<sup>155</sup> If there is no trust in ODR as a viable method of dispute resolution, then there will be no disputants choosing to use it and it will never find widespread acceptance.<sup>156</sup> Building up this consumer trust is thus essential for ODR to flourish in any country or region, as 'users will stay away unless the ODR services communicate safety, efficiency, and ease of use.'<sup>157</sup>

There are, however, a number of factors that could contribute to a lack of trust in ODR amongst consumers.<sup>158</sup> One of the concerns identified from the earliest stages of ODR is the lack of face-to-face interaction that takes place when solving a dispute online.<sup>159</sup> It has been argued that this lack of in-person interaction leads to the loss of various physical, facial and other non-verbal cues that would allow the parties to build a relationship and understanding with each other and the dispute resolution facilitator.<sup>160</sup> Although this argument had much merit in the early days of

---

<sup>153</sup> Martinek & Cupido op cit at 128; Ebner & Zeleznikow (2015) op cit at 155.

<sup>154</sup> Katsh & Rifkin *Online Dispute Resolution* 29; Ebner & Zeleznikow (2015) op cit at 155; Saptarshi Das *Consumer Redress through Online Dispute Resolution* (2019) 84-85; Hiroki Habuka & Colin Rule 'The promise and potential of Online Dispute Resolution in Japan' (2017) 4 *International Journal of Online Dispute Resolution* 74 at 75; Ethan Katsh 'Dispute resolution in Cyberspace' (1995) 28 *Connecticut Law Review* 971; Nwadem op cit at 11; Noam Ebner 'The human touch in ODR: Trust, empathy and social intuition in online negotiation and mediation' in D Rainey, E Katsh & M Abdel Wahab (eds) *Online Dispute Resolution: Theory and Practice* 2 ed (2021) 73-136.

<sup>155</sup> Turel & Yuan op cit at 425; Ebner & Zeleznikow (2015) op cit at 155.

<sup>156</sup> Terekhov op cit at 33; Nwadem op cit at 17; Schmitz, Ojelabi & Zeleznikow op cit at 282.

<sup>157</sup> Fernandes, Rule & Ono (et al) op cit at 27.

<sup>158</sup> CE Ong 'B2C e-commerce trust in redress mechanism: cross border issues' (2003) *Informing Science* 174.

<sup>159</sup> Kariuki op cit at 66; Ebner & Zeleznikow (2015) op cit at 155; Larson op cit at 533; Cole & Blankley op cit at 203; Nwadem op cit at 17; Orji op cit at 127; Sadushi op cit at 62; Sackin op cit at 262.

<sup>160</sup> Eisen op cit at 1308; Andrea M Braeutigam 'What I hear you writing is.. Issues in ODR: Building trust and rapport in the text-based environment' (2006) 38(1) *University of Toledo Law Review* 101 at 101; Colin Rule *Online Dispute Resolution in Business* 83; PD Galloway 'Is construction arbitration ready for Online Dispute Resolution?' (2013) 30(2) *The International Construction Law Review* 215 at 218; Kathleen Valley 'The electronic negotiator' (2000) *Harvard Business Review* 16 at 16-17; Condlin op cit at 739; Philippe Gilliéron 'From face-to-face to screen-to-screen: Real hope or true fallacy' (2008) 23(2) *Ohio State Journal of Dispute Resolution* 301 at 316, 326.

ODR, the cultural landscape has changed since then, especially in the younger generations who have grown up with technology.

In the past, online interaction was a relatively new concept, and so people were not used to conveying feeling and nuance through email or other textual communications. In the current context, much human interaction has moved online, with instantaneous online communication taking place on instant messaging apps, people sharing ideas and opinions on social media and videoconferencing apps finding application in various fields. The COVID-19 pandemic has done much to accelerate the development of online communication and ODR,<sup>161</sup> as it became a necessity to use these measures to supplement and, in some instances, replace in-person interaction.<sup>162</sup> As such, it could be argued that ordinary citizens have now become used to communicating online, and so the previous perception of online communication as cold and impersonal has changed.<sup>163</sup>

Another concern speaks to the possibility of verifying the identity of disputing parties,<sup>164</sup> as it is easier to falsify or obscure one's identity when interacting from a distance. Much like the lack of trust that arose from the reliance on textual communication, this fear was more prevalent in the earlier days of ODR development. To counter this, it has been suggested that the fear of parties fraudulently hiding aspects of their identity can be mitigated by relying on a variety

---

<sup>161</sup> Rabinovich-Einy (2021) op cit at 126; Gras op cit at 24-25; P Casanovas, L de Koker & M Hashmi 'Law, socio-legal governance, the internet of things, and industry 4.0: A middle-out/inside-out approach' (2022) *MDPI* 64 at 84; Justin Monahan 'Enemy at the gates: Online Dispute Resolution in the time of Covid-19' (2021) *Directed Research Project: Law in a Post-Pandemic World* 1 at 1; Y Razmetaeva & S Razmetaev 'Justice in the digital age: Technological solutions, hidden threats and enticing opportunities' (2021) 2(10) *Access to Justice in Eastern Europe* 104 at 106-107; Wasser op cit at 269.

<sup>162</sup> Schmitz, Ojelabi & Zeleznikow op cit at 271; T Sourdin & J Zeleznikow 'Courts, mediation and COVID-19' (2020) 48(2) *Australian Business Law Review* 138 at 144.

<sup>163</sup> Braeutigam op cit at 116; Lauren Newell 'Rebooting empathy for the digital generation lawyer' (2019) 34 *Ohio State Journal on Dispute Resolution* 1 at 4; Jean R Sternlight 'Pouring a little psychological cold water on Online Dispute Resolution' (2020) *Journal of Dispute Resolution* 1; Rabinovich-Einy & Katsh op cit at 649; Monahan op cit at 11; Nwandem op cit at 11; Schmitz (2019) op cit at 97.

<sup>164</sup> Noam Ebner 'ODR and interpersonal trust' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution Theory and Practice* (2012) 357-386; Ebner & Zeleznikow (2015) op cit at 156; Bordone op cit at 175; Orji op cit at 128.

of technologies during the ODR process, using audio-visual communications to verify parties' identity.<sup>165</sup>

There is already growing public concern around general internet security and privacy,<sup>166</sup> and this apprehension about sharing personal information online has extended to parties being concerned about privacy and confidentiality in ODR.<sup>167</sup> In the early days of ODR, Rule outlined the perceived privacy and confidentiality shortcomings of ODR, saying that these concerns created a barrier in attracting parties to accept and participate in online processes.<sup>168</sup> These concerns are still valid, as the advancement of ICT has created many more opportunities for internet users to disseminate personally sensitive information, resulting in increased threats to individuals' privacy.<sup>169</sup> In this context, ensuring confidentiality would amount to the protection of digital data by means of access control, prescribing who has access to such data and how such data may be used by them.<sup>170</sup>

Confidentiality and privilege are the bedrock of the typical lawyer-client relationship, and clients in those relationships have some assurance that their personal information will not be disseminated.<sup>171</sup> Informed consent is necessary

---

<sup>165</sup> Kariuki op cit at 69.

<sup>166</sup> 'The world of computing has always been interested in protecting systems and data from malfeasant access. As the internet developed, new forms of threats to systems and data have emerged, and this has resulted in a never-ending cycle of security measures and breaches.' Ebner & Zeleznikow (2015) op cit at 156-157. Also see Kariuki op cit at 70; Larson op cit at 528; Alharbi op cit at 82.

<sup>167</sup> 'The fact that there are still concerns about Internet security is the most prevalent and major issue with ODR today.' Yufei Zhang 'The future of Online Dispute Resolution and intelligent innovation' in F Balli et al (eds) *Proceedings of the 2022 International Conference on Economics, Smart Finance and Contemporary Trade* (2022) 929 at 933. See also S Kallel 'Online arbitration' (2008) 25(3) *Journal of International Arbitration* 345 at 346; Teitz op cit at 1015; Rabinovich-Einy (2021) op cit at 141; O Rabinovich-Einy 'Going public: Diminishing privacy in dispute resolution in the Internet age' (2002) 7(4) *Virginia Law and Technology Association* 2-55; Hörnle *Cross-Border Internet Dispute Resolution* 9; Lavi op cit at 905.

<sup>168</sup> 'If the parties are not 100% sure that communications will remain confidential they will refuse to participate in a process where they would be required to put sensitive information down in text form.' Rule op cit at 81-82; Zheng op cit at 50.

<sup>169</sup> IA Swelmiyeen & A Al-Nuemat 'Facebook e-court: Online justice for online disputes' (2017) 33 *Computer Law and Security Review* 223 at 225; U Ojiako (et al) op cit at 305; Carrie Shu Shang & Wenli Guo 'The rise of online dispute resolution-led justice in China: An initial look' (2020) *Australian National University Journal of Law and Technology* 25 at 39.

<sup>170</sup> Marc Henry 'An arbitrator's perspective: Confidentiality – Privacy – Security in the eye of the arbitrators or the story of an arbitrator who became a bee' in Dário Moura Vicente, Elsa Dias Oliveira & João Gomes de Almeida (eds) *Online Dispute Resolution: New Challenges* (2022) 181 at 185.

<sup>171</sup> S van Arsdale 'User protections in Online Dispute Resolution' (2015) *Harvard Negotiation Law Review* 107 at 129.

before such information can be shared. In ODR, disputing parties do not have the same expectation of a privileged relationship, but it is easy to see how these parties would still have privacy concerns.<sup>172</sup> The nature of the information shared during the ODR proceedings is personal, including contact details, opinions, financial and medical records and other sensitive information that the parties would not want to be accessible to the public.<sup>173</sup> The ODR providers tend to keep records of this information and the communications between the parties, and it is thus of paramount importance that this information be stored securely and protected.<sup>174</sup>

Van Arsdale argues that there are two aspects to the disputing parties' privacy concerns, namely protection against unauthorised access to data and protection against unauthorised use of such data once accessed.<sup>175</sup> Both aspects must be addressed before an ODR platform or process can be used effectively, to promote open and honest exchanges in the dispute resolution process.<sup>176</sup> Parties would not want to participate in ODR if there is a chance that their confidential information will be easily accessible and then used in unintended ways.<sup>177</sup> The question then arises as to how privacy and confidentiality concerns can be addressed, as to reassure these parties.

Ebner and Zeleznikow opine that, in answering this question, there are four different aspects of internet security that must be considered, namely information security, data security, personal security and system security.<sup>178</sup> Information security speaks to the protection of the parties' personal information shared throughout the ODR process.<sup>179</sup> To ensure this protection, the ODR provider could require that all

---

<sup>172</sup> Razmetaeva & Razmetaev op cit at 110.

<sup>173</sup> Van Arsdale op cit at 129; Terekhov op cit at 47; Farned op cit at 342; Goodman (2006) op cit at 15; Abedi op cit at 203.

<sup>174</sup> Goodman (2002) op cit at 2; Katsh (1996) op cit at 971.

<sup>175</sup> Van Arsdale op cit at 129; Ebner & Zeleznikow (2015) op cit at 159.

<sup>176</sup> Ebner & Zeleznikow (2015) op cit at 157-158; Rina Elsa Rizkiana 'The future of Online Dispute Resolution: Building a framework for e-commerce dispute resolution in Indonesia' (2021) 1:2 *The Lawpreneurship Journal* 114 at 133.

<sup>177</sup> Abedi op cit at 211-213.

<sup>178</sup> Ebner & Zeleznikow (2015) op cit at 157-159.

<sup>179</sup> Ebner & Zeleznikow (2015) op cit at 157; Samara Zimmerman 'Judge gone wild: Why breaking the mediation confidentiality privilege for acting in bad faith should be reevaluated in court-ordered mandatory mediation' (2009) 11 *Cardozo Journal of Conflict Resolution* 353; Orji op cit at 132.

parties to proceedings sign confidentiality agreements, either separately or as part of an automated ODR process. Data security protection encompasses any protective measures put in place to secure the hardware, software, servers, and any communication channels used during the ODR process.<sup>180</sup> Personal security refers to those measures aimed at protecting users from any physical or emotional harm,<sup>181</sup> although the risk of the former is somewhat reduced owing to the 'arm's length' nature of ODR processes. System security refers to the level of users' confidence in the ODR service's handling of their personal data and information.<sup>182</sup> All of these aspects must be considered in the future development of ODR processes to ensure comprehensive protection for potential users, as these are still areas of concern.

A key method of ensuring that internet users can be secure in knowing that their online information is safe is to ensure that there is adequate data privacy legislation in place.<sup>183</sup> It has been suggested that, at a bare minimum, ODR providers must comply with their local privacy statutes.<sup>184</sup> This is an excellent suggestion for countries and regions with a cohesive and extensive privacy regulation regime, but this is not the case in all countries. In the African context, there is still much disparity between the different legal frameworks on the continent, and thus the ICT-ready states and the approach taken by other regional African organisations would have to be looked to as the example when other countries are setting up their own data protection regulations.

#### 4.4.4. Jurisdictional concerns and enforcement of ODR outcomes

As ODR is aimed at allowing parties to resolve their own disputes, questions naturally arise about jurisdiction and enforcement of the outcomes.<sup>185</sup> It has been stated that uncertainty about enforcement of ODR outcomes is one of the main challenges facing the implementation and development of ODR as parties want the assurance of a set

---

<sup>180</sup> Ebner & Zeleznikow (2015) op cit at 158; Wilson-Evered et al op cit at 128.

<sup>181</sup> Ebner & Zeleznikow (2015) op cit at 159; Wilson-Evered et al op cit at 128; Sarah Rogers 'Online Dispute Resolution: An option for mediation in the midst of gendered violence' (2009) 24 *Ohio State Journal of Dispute Resolution* 349.

<sup>182</sup> Ebner & Zeleznikow (2015) op cit at 159.

<sup>183</sup> Nwadem op cit at 12.

<sup>184</sup> S van Arsdale op cit at 129; Terekhov op cit at 47.

<sup>185</sup> Katsh (et al) op cit at 726; Bordone op cit at 181; Cona op cit at 994; Lide op cit at 220; Ponte (2002) at 442; Haitham A Haloush 'Jurisdictional dilemma in online disputes: Rethinking traditional approaches' (2008) 42 *International Lawyer (ABA)* 1129 at 1130.

resolution to their disputes.<sup>186</sup> If there is no such assurance, parties' trust in the efficacy of the ODR process will be reduced, and they will not see it as a viable alternative to the traditional justice system.<sup>187</sup> The problem with creating uniform systems of enforcement is that it is difficult to determine which authority has jurisdiction over online disputes, given that the internet is by nature borderless.<sup>188</sup> However, the lack of technological borders does not equate to a lack of legal borders,<sup>189</sup> and it must be questioned how these legal borders are constructed. Once this is understood, the question of which body has jurisdiction over the dispute can be answered, allowing for the determination of appropriate enforcement mechanisms.

At present, there is no single enforcement mechanism that is specifically designed to enforce ODR outcomes,<sup>190</sup> and no concrete approach to determining the establishment of jurisdiction in online affairs. The issues of jurisdiction and enforcement are left unresolved, and thus warrant further investigation.

This section will briefly introduce the main approaches to determining jurisdiction over ODR proceedings and the subsequent enforcement of ODR outcomes. It must be noted that this aspect of ODR is still in its initial stages, and so this study will only contain an overview of the current schools of thought. Issues surrounding the determination of jurisdiction will be discussed first, followed by the current methods being used to enforce ODR outcomes.

#### *4.4.4.1. Jurisdiction and ODR*

The main difficulty when it comes to determining jurisdiction in ODR is that ODR has historically operated outside of the court system and traditional litigation and thus has not been subject to the usual rules of civil procedure. The inherent lack of geographical limits and the procedural variations in ODR's sphere of operation

---

<sup>186</sup> Hanriot op cit at 1; Szlak op cit at 534; Hang op cit at 838.

<sup>187</sup> Cortés *Online Dispute Resolution for Consumers* 60; Hanriot op cit at 3; Jie Zheng *Online Resolution of E-commerce Disputes* (2020) 285; Das *Consumer Redress* 83; Schmitz & Rule op cit at 94.

<sup>188</sup> Hanriot op cit at 3.

<sup>189</sup> Gregory J Wrenn 'Cyberspace is real, national borders are fiction: The protection of expressive rights online through recognition of national borders in cyberspace' (2002) 38 *Stanford Journal of International Law* 97 at 98.

<sup>190</sup> Zheng *Online Resolution of E-commerce Disputes* 152.

naturally raises questions about jurisdiction and national sovereignty,<sup>191</sup> especially when it comes to cross-border disputes. Each country has their own procedural rules regarding jurisdiction and choice of law,<sup>192</sup> which poses a difficulty when disputing parties live in different countries and seek to resolve their dispute in the online 'interconnected estate'.<sup>193</sup> This difference has been described as 'irreconcilable', but authors suggest that this is not necessarily the case as the rules of private international law could provide some resolution.<sup>194</sup> Generally speaking, private international law provides guidance as to how individual states can apply their own domestic law in a way that accords with both international norms and the legal systems of other countries.<sup>195</sup> To determine whether these private international law rules could be suitable for regulating issues of jurisdiction and enforcement in ODR, these rules must be assessed in more detail. It must be noted here that this section will not contain a thorough investigation of how the private international law of jurisdiction has been developed. Rather, the focus will remain on those parts of traditional private international law that have been disrupted by the addition of the online aspect of ODR with the aim of highlighting the areas of the law relating to jurisdiction that must be reconceptualised.

---

<sup>191</sup> 'In Cyberspace, jurisdiction is the overriding conceptual problem for domestic and foreign jurisdictions alike. Unless it is conceived of as an international space, cyberspace takes all the traditional principles of conflicts-of-law and reduces them to absurdity. Unlike traditional jurisdictional problems that might involve two, three or more conflicting jurisdictions, the set of laws which could apply to a simple homespun webpage is all of them.' Menthe op cit at 71; Calliess & Heetkamp op cit at 9; P Cortés 'Developing online dispute resolution for consumers in the EU: A proposal for the regulation of accredited providers' (2010) *International Journal of Law and Information Technology* 1 at 6.

<sup>192</sup> 'The advent of the internet, however, has caused jurisdictional confusion as several jurisdictions will have a legitimate claim and legitimate interest to apply their law. Indeed, the choice of any geographical contact or any particular national law will be arbitrary in cyberspace.' Haloush op cit at 1134.

<sup>193</sup> Swelmiyeen & Al-Nuemat op cit at 223; Cole & Blankley op cit at 205; Razmetaeva & Razmetaev op cit at 110; M Gilden 'Jurisdiction and the internet: the "Real World" meets cyberspace' (2000) 7 *ILSA Journal of International & Comparative Law* 160; Sadushi op cit at 67.

<sup>194</sup> Abedi op cit at 203; Benyekhlef & Gélinas op cit at 14; RI Turner 'Alternative Dispute Resolution in cyberspace: there is more on the line than just getting "online"' (2000) 7 *ILSA Journal of International & Comparative Law* 133 at 135-136.

<sup>195</sup> Ross op cit at 6.

The principle of territoriality is one of the ways in which states can establish jurisdiction over a particular matter,<sup>196</sup> allowing states to exercise jurisdiction over acts which occur within their borders or acts with effects that occur within a particular state's borders.<sup>197</sup> It is more difficult to determine where acts are deemed to have taken place when such acts are performed in an online environment that has traditionally been understood to be borderless and lacking a physical geographical counterpart.<sup>198</sup> However, there are some factors<sup>199</sup> which can be considered to determine whether an online transaction can be deemed to have taken place in a particular area and providing some indication as to where jurisdiction lies. In terms of traditional private international law principles, the typical grounds for establishing jurisdiction are whether the defendant is physically present in the area of the court's jurisdiction, whether they are domiciled or resident there or whether the defendant has submitted to the court's jurisdiction.<sup>200</sup> Additional factors have also been considered in the context of internet transactions, including the location of the servers,<sup>201</sup> the real-world location of the internet companies, the location of the parties to the dispute and the place where the domain name was registered.<sup>202</sup> Although it has been argued that consulting these factors would assist nations in establishing their national borders on the internet and allow them to establish jurisdiction over a particular dispute,<sup>203</sup> it also seems that this exercise would be

---

<sup>196</sup> 'The question of the place of jurisdiction is traditionally characterized by a territorial consideration. An issue is linked to a particular state, or – according to *Lodder's* representation - to an actor (person, government, computer).' Renate Dendorfer-Ditges & Philipp Wilhelm 'Dispute resolution in IT-conflicts' (2021) 7 *Yearbook on International Arbitration* 187 at 190. Also see William Jiménez & Arno R Lodder 'Analyzing approaches to internet jurisdiction based on model of harbors and the high seas' (2015) 29(2) *International Review of Law, Computers & Technology* 266; Thomas Schultz 'Carving up the internet' (2008) 19(4) *The European Journal of International Law* 799 at 811.

<sup>197</sup> Ponte (2002) op cit at 483; Uta Kohl 'Conflict of laws and the internet' in Roger Brownsword, Eloise Scotford & Karen Yeung (eds) *Oxford Handbook of Law, Regulation and Technology* (2017).

<sup>198</sup> For a critique of this conception of the internet and other suggestions as to how it should be approached, see Schultz (2008) op cit at 799.

<sup>199</sup> Wrenn suggests that courts 'should consider the location and relationship to the forum, if any, of the people, activities and technology at issue'. Wrenn op cit at 98.

<sup>200</sup> *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA) para [7]; CF Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 5<sup>th</sup> ed (2012) 205-217.

<sup>201</sup> Haloush op cit at 1136-1137.

<sup>202</sup> BE de La Chapelle & P Fehlinger 'Jurisdiction on the internet: How to move beyond the legal arms race' (2016) 3(7) *Digital Debates CyFy Journal* 8 at 14; Wrenn op cit at 99. It must be noted that the potential factors identified by these authors are not considered in all jurisdictions and thus the difference in approaches still persists.

<sup>203</sup> Wrenn op cit at 104.

fruitless if there is no indication of how these factors should be ranked. If all enjoy equal weighting or if they could all be consulted in the alternative, this leaves open the possibility that there would still be a literal conflict of laws between the multiplicity of jurisdictions in play.<sup>204</sup> The question is thus whether there is still room for such a strictly territorial approach when determining jurisdiction in the internet space or whether other options must be considered.<sup>205</sup>

In recent years, there has been a shift away from a strict adherence to territoriality in how jurisdiction is understood in the online space, and authors have begun to consider a theory of extraterritoriality. It has been posited that '(e)xttraterritorial extension of national jurisdiction is becoming the *realpolitik* of Internet regulation',<sup>206</sup> perhaps due to the prevalence of countries imposing their national regulations on individuals located outside their borders who happened to participate in online transactions that are somehow linked to those countries. The most obvious example of this is seen in the GDPR,<sup>207</sup> a comprehensive EU regulation aimed at safeguarding online user data and interactions in the EU itself but having a binding effect on private users outside of the EU. The widespread enforcement and acquiescence to such enforcement of instruments with extraterritorial effect has the effect of establishing states' rights to extend their jurisdiction beyond their geographical borders. This goes against the generally accepted private international law principles in terms of which each nation is only able to enforce laws on its own citizens. This potentially unlimited extension of States' jurisdiction beyond their

---

<sup>204</sup> Tobias Lutzi 'Internet cases in EU private international law developing a coherent approach' (2017) 66 *International & Comparative Law Quarterly* 687–721; Benjamin JC Wolf 'On-line but out of touch: Analyzing international dispute resolution through the lens of the internet' (2006) 14 *Cardozo Journal of International & Comparative Law* 281 at 291-292.

<sup>205</sup> '...jurisdictional rules premised on the concept of territoriality have been increasingly criticised as providing neither workable nor fair solutions' J Zekoll 'Online Dispute Resolution: Justice without the state?' (2014) *Max Planck Institute for European Legal History Research Paper Series* 1 at 1; 'Traditional legal doctrine treats the internet as a medium that facilitates communication and commerce between one legally significant geographical location and another. But trying to tie the laws of any particular territorial sovereign to interactions and transactions on the internet is a daunting challenge because the nature of the internet is inherently international.' Haloush op cit at 1134.

<sup>206</sup> De la Chapelle & Fehlinger op cit at 9.

<sup>207</sup> General Data Protection Regulation 2016/679.

borders has become a worrying trend and must be reconsidered as the internet continues to develop.

Both approaches discussed above still centre a traditional territorial model of establishing jurisdiction and are not advisable as they often create the problem of 'patchwork' jurisdictions,<sup>208</sup> not allowing for a cohesive approach to resolving disputes online. It must thus be asked whether there is another way to conceptualise jurisdiction in the online space, stepping away from the traditional understanding of jurisdiction as intrinsically linked to physical territories.

One such alternative would be the 'digital sovereignty' approach, which can loosely be described as a way in which states can replicate or construct national borders online.<sup>209</sup> Described as a reaction to the extraterritoriality approach,<sup>210</sup> digital sovereignty purports to regulate the relationships between individuals or individuals and companies online, but it is largely driven by public authorities. This approach retains the traditional rules of territoriality, but shifts it to the online space, allowing courts to establish jurisdiction over online activities that take place in their designated area, regardless of whether the parties involved are nationals or not. Popular methods of creating these artificial online borders are the creation of national gateways to the internet or providing that citizens of a country must store their online data within that state's national jurisdiction.<sup>211</sup> However, this approach is not without its potential pitfalls. First, as with both territoriality and extraterritoriality, strict adherence to these approaches will lead to an increase of

---

<sup>208</sup> Schultz op cit at 813.

<sup>209</sup> De la Chapelle & Fehlinger op cit at 10. A broader description of digital sovereignty is that it is 'the supremacy and independence of state power in the formation and implementation of information policy in the national segment and the global information space;—the right of the state to determine its information policy independently, to dispose of infrastructure, resources, and to ensure information security.' Elizaveta A Gromova, Natalia S Koneva & Elena V Titova 'Legal barriers to the implementation of digital industry (Industry 4.0) components and ways to overcome them' (2022) 25 *Journal of World Intellectual Property* 186 at 192.

<sup>210</sup> De la Chapelle & Fehlinger op cit at 10.

<sup>211</sup> 'In the most prominent category of digital sovereignty claims, the emphasis is on the idea that a nation or region should be able to take autonomous actions and decisions regarding its digital infrastructures and technology deployment. The majority of these claims relate to the geographical restriction of sovereignty to a specific territory and to states' efforts ensuring the security of digital infrastructures and their authority regarding digital communication matters pertaining to their territories and citizens.' Julia Pohle & Thorsten Thiel 'Digital sovereignty' (2020) 9(4) *Internet Policy Review* 1 at 8.

potential conflicts of jurisdictions, as each nation with some connection to the dispute will want to impose their own domestic laws. Another potential drawback is the widening of the digital divide. If servers and data storage are localised to individual countries, then those countries lacking in ICT may not have the resources or knowledge available to regulate the local internet use effectively.<sup>212</sup> Developing countries will be especially affected in this instance, and so digital sovereignty is not without its challenges.

There are supporters and detractors for each approach to determining jurisdiction listed above, but none of these approaches yet provide a practical and effective method of determining jurisdiction over online disputes. Perhaps because of the inadequacy of the existing approaches, it has been suggested that there should be a move away from conceiving jurisdiction in terms of territory towards considering the potential of the technology itself. According to Jew, 'the technology of the Internet provides system operators with technical controls over Internet users which territorial authorities could never assert through conventional legal principles.'<sup>213</sup> This suggestion was made as early as 1998, and bears further investigation and development, considering that using solely technological means to determine or establish jurisdiction in online disputes would effectively amount to self-regulation, itself rife with potential problems.<sup>214</sup> As such, it is argued that the best method to use would be one which recognises the unique requirements of the online space but still leaves room for international co-operation and regulation, providing parties with some legal protection and legitimacy in the ODR process.<sup>215</sup> One potential way to

---

<sup>212</sup> De la Chapelle & Fehlinger op cit at 10.

<sup>213</sup> Bernadette Jew 'Cyber jurisdiction—Emerging issues & conflicts of law when overseas courts challenge your web' (1998) *Computers & Law* 24 at 35.

<sup>214</sup> Jew op cit at 35. Bordone op cit at 181; Alejandro E Almaguer & Roland W Baggott III 'Shaping new legal frontiers: Dispute resolution for the internet' (1998) 13 *Ohio State Journal on Dispute Resolution* 711 at 711-712.

<sup>215</sup> Participants in a workshop on 'Extraterritorial enforcement' at Yale Law School proposed that determining jurisdiction in the online space be dealt with by the creation of '...a more robust framework that systematically applies the full corpus of conflict-of-laws to these cases. Such a framework will consider doctrinally each section of a conflict-of-laws analysis from choice of jurisdiction, to choice of law, to choice of remedy, to choice of enforcement. The goal could be to lay down the foundation for a potential Hague Convention, that could be developed by the Hague Conference on Private International Law (HCCH).' Workshop White Paper 'Extraterritorial Enforcement: Developing Norms for the Information Society', Yale Law School, December 2018; S

achieve this goal would be to involve private international law institutions,<sup>216</sup> approaching them to provide soft law guidelines aimed at developing a comprehensive conflict of laws approach for the information society, leaving scope for countries to adapt their internet regulation approach according to their local norms, customs and context.<sup>217</sup>

#### 4.4.4.2. Enforcement of ODR outcomes

Tied to the still complex issue of jurisdiction is the problem of enforcing ODR outcomes,<sup>218</sup> an issue which greatly impacts the attractiveness of ODR for potential users.<sup>219</sup> ODR outcomes must be made effective, and enforcement mechanisms are thus a vital part of a successful ODR system.<sup>220</sup> Parties are not likely to trust a dispute resolution system that does not have enforceable outcomes,<sup>221</sup> necessitating the development of private enforcement mechanisms<sup>222</sup> outside of the traditional approach of having the courts enforce the outcomes of dispute resolution.<sup>223</sup>

It must be noted that there are other methods of enforcement provided in relation to ADR measures such as conciliation and mediation, processes which have the potential to be conducted wholly or partially online. In the context of conciliation, enforceability mechanisms can be found in Rule 26 and Rule 29 of the ICSID Convention, Regulations and Rules.<sup>224</sup> In the context of mediation, the United Nations Convention on International Settlement Agreements Resulting from Mediation

---

Kumar 'Virtual venues: Improving Online Dispute Resolution as an alternative to cost intensive litigation' (2009) 27(1) *John Marshall Journal of Information Technology & Privacy Law* 81 at 94.

<sup>216</sup> Teitz op cit at 1015-1016.

<sup>217</sup> A Woods 'Litigating data sovereignty' (2018) 128 *Yale Law Journal* 328 at 334; Schultz op cit at 802.

<sup>218</sup> Hanriot op cit at 4; Hörnle *Cross-Border Internet Dispute Resolution* 22.

<sup>219</sup> Van Arsdale op cit at 129; Ziemblicki op cit at 43; Bongkiyi op cit at 92.

<sup>220</sup> Abedi op cit at 200.

<sup>221</sup> Ortolani op cit at 595; Cortes & Lodder op cit at 17; Cole & Blankley op cit at 205; Ponte (2002) op cit at 490; Fernandes (et al) op cit at 28.

<sup>222</sup> UNCITRAL defines these mechanisms as 'alternative to a court-enforced arbitration award or settlement agreement, and which can either (i) create incentives to perform or (ii) provide for the automatic execution of the outcome of proceedings.' UNCITRAL, Working Group III (Online Dispute Resolution), Online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms, Note by the Secretariat, UNCRITALOR, 281 Sess, UN Doc A/CN.9/WG.III/WP.124 (2013).

<sup>223</sup> Zheng op cit at 51; Kaufmann-Kohler & Schultz *Online Dispute Resolution* 210; Ortolani op cit at 595.

<sup>224</sup> International Centre for Settlement of Investment Disputes *ICSID Convention, Regulations and Rules* 2022.

(‘Singapore Convention’) provides for the enforcement of international settlement agreements reached through mediation.<sup>225</sup> If ODR proceedings fall within the scope of either of these instruments, then enforcement of the outcomes of such proceedings will be governed by them.

Alternative suggested means of enforcement of ODR outcomes include financial methods like chargeback agreements, technical control methods like automatic domain name management and reputation methods like trustmarks.<sup>226</sup> Each of these methods can be described as systems of self-enforcement of outcomes,<sup>227</sup> aimed at maximising cost-effectiveness and moving away from a strict reliance on courts and other enforcement authorities.<sup>228</sup> These methods will be considered briefly here to assess whether they provide the requisite certainty to reassure users of the utility and reliability of ODR.

#### Financial methods of enforcement

These methods are a way of imposing automatic enforcement of ODR outcomes and each of them involve a financial element, making them ideally suited for use in disputes arising from e-commerce. Escrow accounts, credit card chargeback and transaction insurance mechanisms are all examples of financial enforcement mechanisms.<sup>229</sup>

In terms of the escrow system, the escrow company functions as both a secure third party and an ODR provider.<sup>230</sup> An example of the successful use of such a system is the PayPal escrow system, where the buyer submits payment for a product to an escrow company who holds the money in a secure account. The

---

<sup>225</sup> United Nations Commission on International Trade Law (UNCITRAL) *United Nations Convention on International Settlement Agreements Resulting from Mediation* 2019.

<sup>226</sup> Ziemblicki op cit at 46; Kaufmann-Kohler & Schultz *Online Dispute Resolution* 210; Teitz op cit at 1013-1014; Gao op cit at 465.

<sup>227</sup> G Aksen ‘Global reflections on international law, commerce and dispute resolution’ (2005) *International Chamber of Commerce Publishing* 693; Bordone op cit at 182; Cortés *Online Dispute Resolution for Consumers* 10.

<sup>228</sup> Ortolani op cit at 596; Habuka & Rule op cit at 86.

<sup>229</sup> Abedi op cit at 211.

<sup>230</sup> Thomas Schultz ‘Online Dispute Resolution: An overview and selected issues’ (Paper delivered at the United Nations Economic Commission for Europe Forum on Online Dispute Resolution, Geneva 6-7 June 2002) at 10-11; Cortés *Online Dispute Resolution for Consumers* 10; Hanriot op cit at 18; Ortolani op cit at 619; Nicuesa op cit at 133-134.

company then authorises the seller to send the product to the buyer. The buyer must indicate whether the received product is in the proper order, and only then will the money be released to the seller by the escrow company. If a dispute arises between the contracting parties, the escrow company will keep the money paid to them, examine the parties' claims, and provide a neutral decision. The outcome will then either be reimbursing the buyer or completing the transaction and sending the money to the seller.<sup>231</sup>

An interesting development linked to the escrow system is the increased use of blockchain technology to provide parties to ODR with a self-enforcement mechanism.<sup>232</sup> According to Tihamiyu, '(b)lockchain ODR seeks to address some of the costs of centralization in the judicial system, particularly in the context of cross-jurisdictional disputes, low monetary value disputes, or disputes in need of fast resolution.'<sup>233</sup> Blockchain ODR has primarily been used in the context of smart contracts, which consist of computer code placed on a blockchain and are self-performing and self-enforcing,<sup>234</sup> since 'enforcement is automatic, and the code is immutable.'<sup>235</sup> ODR clauses can also be coded into the smart contract, for example where the parties have agreed on a specific course of action that would trigger the beginning of an ODR process.<sup>236</sup> In such an instance, parties unsatisfied with the contract's execution can then perform the required action, triggering the ODR process 'waiting' for them in the code. Rule affirms this use of blockchain in ODR, stating that blockchain 'removes the need to have a trusted third party, for example by acting as custodian or escrow agent for records or assets and thereby creating

---

<sup>231</sup> Hanriot op cit at 18; Habuka & Rule op cit at 87.

<sup>232</sup> P Ortolani 'Smart contracts, ODR and the new landscape of the dispute resolution market' in B Cappelletto & G Carullo (eds) *Blockchain, Law and Governance* (2021) 215 at 216; Greenberg & Ebner op cit at 25. Also see the discussion at 2.2.4.3 above which provides a more general introduction to the relationship between blockchain and ODR.

<sup>233</sup> Tihamiyu op cit at 95.

<sup>234</sup> Chaisse & Kirkwood op cit at 71; Bronwyn E Howell & Petrus H Potgieter 'Uncertainty and dispute resolution for blockchain and smart contract institutions' (2021) 17 *Journal of Institutional Economics* 545 at 557-558.

<sup>235</sup> Amy Schmitz & Colin Rule 'Online Dispute Resolution for smart contracts' 2019 *Journal of Dispute Resolution* 103 at 105.

<sup>236</sup> Ibid at 123.

transparency.’<sup>237</sup> Blockchain thus fills the place of the traditional custodian or escrow agent, effectively automating the enforcement of the ODR outcome.

Another popular self-enforcement mechanism is the chargeback system.<sup>238</sup> This system is controlled by payment service providers and allows buyers who have authorised transactions on their credit cards to request that such payment be reimbursed by the merchant in certain instances.<sup>239</sup> These instances are not always the same and are determined by individual countries’ legislation.<sup>240</sup> The most common occurrences that would trigger a chargeback are fraudulent use of the credit card, non-delivery of goods or the delivery of defective goods.<sup>241</sup> This mechanism differs to the escrow account in that the payment service providers do not act as the ODR provider, as they do not actively engage in dispute resolution. The chargeback system is an indirect enforcement mechanism as it is only there to provide a remedy for a consumer who has instituted a claim in good faith, it is not in itself a dispute resolution procedure. However, the use of this mechanism is a way of avoiding a dispute between the consumer and the trader, and so can be quite effective in ensuring that consumers have trust in the merchants that they choose to use.

Despite the relative ease of using this mechanism, it is limited to ensuring the prevention of e-commerce disputes and so would not be easily adaptable to other contexts.<sup>242</sup> Even in the context of e-commerce, it is a limited mechanism as it is only available to buyers who use a credit card,<sup>243</sup> excluding those who use other methods of payment to conclude their transactions. It is also weighted in favour of the consumer, not giving the trader a chance to have a fair dispute resolution process. This is especially concerning given that the financial service providers are the ones in charge of the system and so are not required to meet the standards that traditional

---

<sup>237</sup> Barnett & Treleaven op cit at 402-403.

<sup>238</sup> Ponte (2001) op cit at 87; Hörnle *Cross-Border Internet Dispute Resolution* 22; Schmitz & Rule op cit at 95; Calliess & Heetkamp op cit at 5.

<sup>239</sup> DE Sorkin 'Payment methods for consumer-to-consumer online transactions' (2001) 35 *Akron Law Review* 1 at 9; Ortolani op cit at 618.

<sup>240</sup> Hörnle *Cross-Border Internet Dispute Resolution* 38-39.

<sup>241</sup> Hörnle *Cross-Border Internet Dispute Resolution* 39; Del Duca, Rule & Loebel op cit at 70; Cortés *Online Dispute Resolution for Consumers* 18.

<sup>242</sup> Nicuesa op cit at 133.

<sup>243</sup> Cortés *Online Dispute Resolution for Consumers* 10; Hanriot op cit at 19; Hörnle *Cross-Border Internet Dispute Resolution* 42.

dispute resolution entities would have to meet, like transparency and fairness. The lack of a requirement of basic standards of fairness could discourage merchants from implementing a chargeback system, as there is then no assurance that their interests will be adequately protected. As such, the efficacy of this remedy has been questioned.<sup>244</sup>

### Technical control methods of enforcement

Like financial methods of enforcement, methods involving technical control are also considered to be automatic enforcement of the ODR outcomes. In these processes, technology is used to achieve the goal of self-enforcement. Perhaps the best (and most cited) example of this is the system employed by the Internet Corporation of Assigned Names and Numbers (ICANN),<sup>245</sup> an institution which has developed its own rules to resolve disputes relating to the ownership of domain names.<sup>246</sup> These rules are contained in the Uniform Domain Name Dispute Resolution Policy (UDRP)<sup>247</sup> and allow for the automatic enforcement of the outcome of a dispute about ownership of a domain name.<sup>248</sup> Once it has been established who the owner of a particular domain name is, ICANN automatically assigns that domain name to that party's IP address.<sup>249</sup>

In this instance, ICANN has control of the domain names and they are also the ODR provider, much like the role that the escrow company occupies in relation to escrow accounts. This allows them to carry out the terms of the outcome of the ODR

---

<sup>244</sup> 'As a result, the chargeback system is less a resolution process and more of a liability shift. The system is not designed to resolve disputes via mutual agreement... So while we can learn quite a bit from the chargeback system, it is not a realistically viable solution for consumer redress around the world.' Schmitz & Rule op cit at 95-96. Also see Schmitz (2018) op cit at 18.

<sup>245</sup> Internet Corporation for Assigned Names and Numbers (ICANN) available at <https://www.icann.org>, accessed on 26 May 2023; Gao op cit at 448; Del Duca, Rule & Loebl op cit at 67; Milton Mueller 'Rough justice: An analysis of ICANN's Uniform Dispute Resolution Policy' (2001) 17 *The Information Society* 3 at 6; Elizabeth G Thornburg 'Fast, cheap and out of control: Lessons from the ICANN dispute resolution process' (2002) 6 *Computer Law Review & Technology Journal* 89; Hans Klein 'ICANN and internet governance: Leveraging technical coordination to realize global public policy' (2002) 18(3) *Information Society* 193-207.

<sup>246</sup> Katsh & Rule op cit at 329; Sadushi op cit at 67.

<sup>247</sup> ICANN *Uniform Domain Name Dispute Resolution Policy* (1999) available at

<https://www.icann.org/resources/pages/policy-2012-02-25-en>, accessed on 26 June 2023.

<sup>248</sup> DJB Svantesson 'Borders on, or borders around—The future of the internet' (2006) 16 *Albany Law Journal of Science & Technology* 343 at 358; Ortolani op cit at 604; Hanriot op cit at 5; Abedi op cit at 209.

<sup>249</sup> ICANN UDRP para 3(1)(c).

process unilaterally, meaning that there is immediate enforcement of outcomes and parties have no choice besides compliance. Hanriot proposes that the amount of control that the ODR provider has over the resource plays a significant role in parties' compliance with ODR outcomes,<sup>250</sup> as a provider with more control can effect compliance themselves and ensure a short time between resolving the dispute and enforcing that resolution.

Rule describes the UDRP as one of the most successful examples of a global ODR system,<sup>251</sup> as it has processed more than 60 000 cases since its inception.<sup>252</sup> In addition, the system is precedent based, and so there are governing principles that can be drawn from the previous domain name cases. The success of this system means that it can be used as an example or a template for future ODR enforcement initiatives.<sup>253</sup>

#### Reputation methods of enforcement

These methods of enforcement are aimed at encouraging voluntary compliance with ODR outcomes by using systems which reinforce the trustworthiness of parties, most often seen in use by e-commerce merchants. This type of enforcement has also been described as 'indirect self-enforcement',<sup>254</sup> and is aimed at incentivising those involved in e-commerce to act fairly through means of mechanisms which indicate those parties' reliability.<sup>255</sup> User ratings on websites and trustmarks are two such

---

<sup>250</sup> Hanriot op cit at 14, 20; Thomas Schultz 'Online arbitration: Binding or non-binding?' (2002) *ADR Online Monthly* 1 at 8; Henry H Perritt Jr 'Towards a hybrid regulatory scheme for the internet' (2001) *University of Chicago Legal Forum* 215 at 237.

<sup>251</sup> C Rule 'Online Dispute Resolution and the future of justice' (2020) 16 *Annual Review of Law and Social Sciences* 277 at 283.

<sup>252</sup> ICANN *Rules for uniform domain name dispute resolution policy* (2012) available at <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>, accessed on 26 June 2023.

<sup>253</sup> Rule op cit at 283; Jaap van den Herik & Daniel Dimov 'Towards outsourced Online Dispute Resolution' (2012) 7(2) *Journal of International Commercial Law and Technology* 99 at 101; Frank Fowlie 'Online Dispute Resolution and ombudsmanship' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) 313 at 320.

<sup>254</sup> Ortolani op cit at 605.

<sup>255</sup> Pablo Cortés 'Online Dispute Resolution for consumers' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online dispute resolution: Theory and Practice* (2012) 139 at 149; Habuka & Rule op cit at 87.

mechanisms, each of which operates in a way that reflects on online sellers' reputations.<sup>256</sup>

Ratings are evaluations of the quality of goods or services that purchasers in online marketplaces are invited to submit after having concluded an e-commerce transaction.<sup>257</sup> These ratings could be used to enforce compliance with ODR outcomes in the following way: in the event of an e-commerce dispute between a buyer and an online merchant, the buyer could be required to provide a review of how the merchant conducted themselves during the dispute resolution process. If merchants consistently receive positive buyer feedback regarding their compliance with the ODR outcome, then other potential customers will see this and regard the merchants as trustworthy,<sup>258</sup> increasing the likelihood of repeat customers and drawing in new business. In this way, there is an incentive for online marketplaces to have working ODR procedures and to abide by them, as not doing so could lead to a loss of business. However, this system is not without its flaws. Consumers' ratings are subjective and so do not always give an accurate reflection of the trader's conduct.<sup>259</sup> There are also typically low response rates to requests for consumer reviews, meaning that it is not possible to determine the ratio of positive to negative outcomes accurately if only this measure is used.<sup>260</sup>

Trustmarks are also indications of quality but differ from ratings in that they are not conferred by users. Described as 'one of the most potentially significant mechanisms in promoting consumer confidence',<sup>261</sup> trustmarks are granted by a

---

<sup>256</sup> Hanriot op cit at 15; C Pecnard 'The issue of security in ODR' (2004) 7(1) *Berkeley Electronic Press* 1-5.

<sup>257</sup> Nicuesa op cit at 127.

<sup>258</sup> T Schultz 'Private legal systems: What cyberspace might teach legal theorists' (2007) 10 *Yale Journal of Law & Technology* 151 at 162; Colin Rule & Harpreet Singh 'ODR and online reputation systems' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online dispute resolution: Theory and Practice* (2012) 163 at 164.

<sup>259</sup> See the examples of this provided at Schmitz (2018) op cit at 14-16. Also see Nicuesa op cit at 128.

<sup>260</sup> UNCITRAL, Working Group III (Online dispute resolution), Online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms, Note by the Secretariat, UNCITRAL, 281 Sess, UN Doc A/CN.9/WG.III/WP.124 (2013).

<sup>261</sup> Hanriot op cit at 16. For further discussion of trustmarks, also see Cortés (2011) op cit at 22; Lavi op cit at 932.

neutral and independent authority and certify that merchants are trustworthy.<sup>262</sup> These labels are generally attributed to merchants who adhere to quality standards,<sup>263</sup> are compliant throughout the dispute resolution process and then voluntarily comply with the outcome.<sup>264</sup> Seeing that this label has been attributed to a business could encourage consumers to use that particular business,<sup>265</sup> as there is then an assurance that the outcome of any ODR proceedings would be enforced.<sup>266</sup> It could also motivate merchants to continue adhering to the standards guaranteed by the trustmark if a failure to do so would mean the removal of the trustmark.<sup>267</sup>

Another concern is how or whether international legal instruments related to the recognition and enforcement of awards made through traditional ADR methods would find application in the enforcement of ODR outcomes.<sup>268</sup>

These questions surrounding jurisdiction over online interactions and the enforcement of ODR outcomes are imperative to answer, as having predictable rules for jurisdiction and choice of law would do much to inspire confidence in ODR amongst potential users.<sup>269</sup> Regarding enforcement, whilst it is good that there are some self-enforcement mechanisms which have been proven to be effective, these methods are all linked to commercial disputes, and so it must still be seen whether such mechanisms can be adapted to use to enforce ODR outcomes stemming from other types of disputes. Hanriot posits that the future of enforcement of non-binding ODR outcomes lies in finding methods that prioritise incentivising the parties' compliance,<sup>270</sup> which is a definite conceptual shift from traditional approaches to enforcement of dispute resolution outcomes.

---

<sup>262</sup> Cortés *Online Dispute Resolution for Consumers* 62; Hörnle *Cross-Border Internet Dispute Resolution* 24; Katsh, Rifkin & Gaitenby op cit at 721.

<sup>263</sup> Nicuesa op cit at 126.

<sup>264</sup> Ortolani op cit at 605; Hörnle *Cross-Border Internet Dispute Resolution* 24.

<sup>265</sup> '(T)his program has a great deal of potential to build confidence in the online process for dispute resolution, thus resolving the problem of trust...' Lavi op cit at 932.

<sup>266</sup> Schmitz (2018) op cit at 42.

<sup>267</sup> Ponte (2001) op cit at 87; Abedi op cit at 211; T Reiniger 'Implementing NS-TIC: Virginia legal strategy for credential issuer liability, trustmarks, and ID proofing digital services' (2011) 123.

<sup>268</sup> Van Arsdale op cit at 129.

<sup>269</sup> Teitz op cit at 1009.

<sup>270</sup> Hanriot op cit at 22.

#### 4.5. Conclusion

It has been stated that ‘ODR has such potential, but its realization is not a given.’<sup>271</sup> There are several challenges which naturally hinder the introduction and implementation of ODR, and the impact of these economic, technological, social, and cultural factors must not be underestimated. This is especially true in Africa, where the range of countries on the continent differ in all these respects, with significant disparities between rich and poor African countries.

This chapter was thus aimed at providing an explanation of the breadth of challenges that hamper the successful implementation of ODR systems in various contexts, with a focus on the challenges faced in developing countries and the African continent. At the outset of the chapter, three questions were posed to assist in assessing the feasibility of ODR implementation in Africa: whether ODR is suitable for African countries, whether ODR would be able to develop in areas with limited internet connectivity and whether there are ODR mechanisms available that are appropriate for use in such countries.<sup>272</sup> In answering these questions, the merits of the most commonly listed challenges were assessed, and it seems that they are not insurmountable. Indeed, there has been much technological development in Africa over the past decade, and it is believed that the continent is slowly moving towards ODR-readiness, with countries like South Africa, Nigeria and Kenya leading the way.<sup>273</sup>

Although the economic and digital divides pose sizable challenges, it has been shown that there are continuing efforts to bridge these gaps. There are signs that the international wealth disparity is lessening,<sup>274</sup> and it is hoped that this trend will

---

<sup>271</sup> Rabinovich-Einy (2021) op cit at 148.

<sup>272</sup> See 4.1 above.

<sup>273</sup> ‘By and large, whilst African States are developing at different degrees given the intertwined matrix of techno-legal, socio-political, and economic infrastructures, ODR is no longer a distant dream, but rather a very much a proximate reality. South Africa has taken the lead with its two ODR initiatives in domain names and consumer disputes, and more States, such as Egypt, Morocco, Tunisia, Nigeria, Sierra-Leone, etc. are expected to follow suit in the near future.’ Abdel Wahab (2012) op cit at 581-583.

<sup>274</sup> United Nations *World Social Report 3*.

continue. However, there is still the persistent issue of wealth disparity within countries, and there is no sign of positive change in this regard.<sup>275</sup>

Technological readiness is also a key requirement for a functioning ODR system, and much has been said about the digital divide. This gap between technologically advanced countries and those where technology is not as readily available is a significant obstacle to ODR implementation and cannot be underestimated. However, the outlook for narrowing this gap is positive, with mobile technology allowing more people access to ICT, the internet and, by extension, ODR.<sup>276</sup> This phenomenon of technology leapfrogging significantly accelerates the rate at which individuals in developing countries can gain access to the Internet and begin to participate in online transactions, and so the proliferation of mobile technologies will be instrumental in reducing the digital divide.

Lastly, the cultural and social impediments to the acceptance of ODR were considered.<sup>277</sup> Consumer trust, concerns around internet security and the ongoing debate around questions of jurisdiction over internet disputes and enforcement of ODR outcomes were all mentioned in this chapter, but the consideration of these factors has yielded more questions than conclusions. ODR scholarship has seemingly only begun to consider how successful enforcement of ODR outcomes should work, and there is much left to discover in this regard. Additionally, more attention must be paid to the relationship between reliable enforcement methods and consumer trust, as having the former in place would go a long way in encouraging consumers to view ODR as a viable alternative dispute resolution method. This in turn would promote access to justice, as parties would then have another dispute resolution option available to them outside of traditional litigation.

From the above assessment of the potential challenges facing ODR and suggested means for overcoming these challenges, it can be agreed with Albornoz and Martín that 'ODR is not a science fiction fantasy for developing countries.'<sup>278</sup> Although some obstacles may seem insurmountable at present, the building blocks

---

<sup>275</sup> See 4.2 above.

<sup>276</sup> See 4.3.1.2 above for a detailed discussion of this phenomenon.

<sup>277</sup> See 4.4 above.

<sup>278</sup> Albornoz and Martín op cit at 59.

are already in place for resolving these issues in the future.<sup>279</sup> The flexibility of ODR<sup>280</sup> and its adaptability to individual regional contexts is what will allow for the successful uptake of ODR across the region, as ODR can be tailored to accommodate the specific demands of individual African countries.

---

<sup>279</sup> 'Thus one may ask the question whether ODR is merely a passing fad with no real impact on the arena of dispute resolution. The answer to this question is certainly negative: there is a clear need for ODR in the online environment. The Internet and ODR is still in a process of institution building, and even if it takes longer than originally assumed, everything is still in place to develop a global ODR system.' Sadushi op cit at 68.

<sup>280</sup> 'This is a very important feature because the task is not about blindly transposing dispute settlement methods from developed countries, but about tailoring them to local cultural characteristics, as well as local constraints, particularly those concerning ICT infrastructure.' Albornoz & Martín op cit at 59.

## CHAPTER 5: ASSESSMENT OF THE CURRENT ONLINE DISPUTE RESOLUTION LANDSCAPE ACROSS AFRICA

*'The narrative on dispute resolution in Africa is transformation, slowly but surely.'*<sup>1</sup>

### 5.1. Introduction

Having outlined the different challenges faced in ODR implementation in Africa, the focus in this chapter shifts to a study of African countries identified as technological leaders in the region, namely South Africa, Nigeria and Kenya.<sup>2</sup> Although social, economic and technological progress in many African countries has been hampered by corruption,<sup>3</sup> it has become a necessity for Africa that all nations improve their technological regulation and engagement so that they can play an active role in the international digital economy. As such, the above jurisdictions have been selected as potential ODR pioneers in Africa based on their ICT readiness, the existence of ADR and ODR provisions in their national legislation, and the existence of bodies to implement these provisions.

Each of the listed countries will be evaluated separately with reference to their legislative framework for ICT development in the broader sense, and the existing ODR initiatives in each jurisdiction. Following this evaluation is a note on the AfCFTA Agreement and the foreseen impact that it will have on the digital economy in Africa.

By investigating each of the African ICT leaders and their approaches to ODR in this way, a finding can be made regarding the current state of ODR on the continent and the ways in which it will develop in the future. The AfCFTA Agreement will affect the internal policy and legislation of each of these countries and must thus also be considered in the assessment of Africa's readiness for ODR.

---

<sup>1</sup> Ononogbu op cit at 86.

<sup>2</sup> Ononogbu op cit at 86; Abdel Wahab (2012) op cit 583.

<sup>3</sup> Halima Doma 'Enhancing justice administration in Nigeria through Information and Communications Technology' (2016) 32 *John Marshall Journal of Information Technology & Privacy Law* 89 at 93.

## 5.2. South Africa

According to Mosehlana,<sup>4</sup> South Africa was identified as an African leader in terms of the United Nations global e-government rankings of 2003 due to the government's undertaking to promote electronic processes in its functioning.<sup>5</sup> This perception was later echoed by Abdel Wahab in 2012, who posited that '...South Africa possess(es) the most advanced ICT regulatory matrix, which ultimately paved the way for the first ODR initiatives in Africa.'<sup>6</sup> South Africa still occupies this leadership position, according to the 2022 UN global e-government rankings,<sup>7</sup> despite the development of its ICT regulations and ODR initiatives taking place in a fragmented way.

South Africa has a number of statutes governing specific aspects of ICT use, from electronic communications to data protection.<sup>8</sup> These statutes have undoubtedly done much to create an environment that promotes ICT development and use.<sup>9</sup> However, it must be questioned whether the protection provided is sufficient to foster future development of ICT and, by extension, ODR. The existing ICT legislation that could have an impact on ODR will thus be discussed in this section, with specific reference to how it would create an environment in which ODR can thrive.

### 5.2.1. ICT Legislation and Policy

#### 5.2.1.1. *The Constitution 1996*

The Constitution of South Africa contains an express statement regarding dispute resolution and the right that citizens have to access justice. This right can be found in section 34, which states that 'Everyone has the right to have any dispute that can be

---

<sup>4</sup> MB Mohlesana 'ICT policy development in South Africa: Towards an improved e-government implementation' (2018) *The 3rd Annual International Conference on Public Administration and Development Alternatives, Stellenbosch University, Saldanha Bay, South Africa* at 695.

<sup>5</sup> UN: DESA *UN global e-government survey 2003* (2003).

<sup>6</sup> Wahab op cit at 577.

<sup>7</sup> UN: DESA *E-government survey 2022: The future of digital government* (2022) at 64

<sup>8</sup> Van der Merwe opines that 'it is quite apparent that telecommunications law in South Africa is almost exclusively a creature of statute. The problem is that many of these statutes are still relatively young and untested by the courts. In addition, an important part of the effect of these statutes will depend on regulations issued in terms (of) them, which regulations have not yet been drafted.' D van der Merwe (ed) *Information and Communications Technology Law* (3 ed) 2021 at 37.

<sup>9</sup> Wahab op cit at 577.

resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’<sup>10</sup> Although there is no specific provision made for ADR measures, the latter part of the section allows for citizens to use alternatives to the traditional court systems.<sup>11</sup> These alternatives include other appropriate independent and impartial fora, and thus creates scope for the use of ODR to resolve various types of disputes.<sup>12</sup>

Despite this apparent flexibility in section 34, it must be noted that online arbitration would not fall within the scope of the provision if such arbitration is private in nature. The current authority for this is the majority judgment in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews & Another*.<sup>13</sup> In this judgment, O’Regan ADCJ stated that section 34 of the Constitution would not have direct application to private arbitration, basing this on the understanding of an independent and impartial tribunal being one that must hold fair and public hearings when resolving disputes.<sup>14</sup> The element of publicity is necessarily missing from private arbitration proceedings and so the provisions of section 34 are not directly applicable to them. By extension, it would seem as though the same rule would apply to private online arbitrations, although this was not stated expressly.

However, it is argued that there is still room for other forms of ODR under section 34, insofar as the ODR method selected is independent, impartial and has a public element. Given the length of time since the creation of the Constitution and the rapid technological development that has taken place since, it would be more instructive to consider the South African legislation that has been developed in accordance with Constitutional principles to consider whether South Africa has the necessary legislative framework to support ODR. At present, the legislation is quite fragmented and seems to apply in specific sectors only. Each of these instruments

---

<sup>10</sup> s34 The Constitution, 1996.

<sup>11</sup> T Wilcocks & J Laubscher ‘Investigating alternative dispute resolution methods and the implementation thereof by architectural professionals in South Africa’ 2017 *Acta Structilia* 146 at 148; R Baloolal-Frank ‘Specialised tribunals in South Africa and access to justice’ (2015) 8 *International Journal of Business, Economics and Law* 123 at 125.

<sup>12</sup> Martinek & Cupido op cit at 142.

<sup>13</sup> *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews & Another* 2009 (6) BCLR 527 (CC).

<sup>14</sup> *Lufuno* ibid para 211.

will be discussed here to create a full picture of the legislative framework that currently supports ODR in South Africa.

#### 5.2.1.2. *Electronic Communications and Transactions Act 25 of 2002*

When discussing online transactions and disputes which could arise from them, the point of departure must be the Electronic Communications and Transactions Act<sup>15</sup> (ECTA). ECTA came into force on 30 August 2002 and has been referred to as South Africa's first comprehensive piece of e-commerce legislation.<sup>16</sup> The Act was created to enable and facilitate electronic communications and transactions in the public interest.<sup>17</sup> Amongst its stated aims are the recognition of the importance of the information economy for the economic and social development of South Africa,<sup>18</sup> the promotion of universal access to the information economy in underserved areas,<sup>19</sup> and the promotion of the understanding of electronic transactions in the country.<sup>20</sup> ECTA was created in response to the recognised 'need for legislation to support the national implementation of electronic commerce transactions within a framework of international standards.'<sup>21</sup>

Although the Act seeks to provide broad regulation of and promote access to the wider digital economy, it is argued that it would also be the point of departure when determining whether there is room for the development of ODR in existing South African legislation. The only section of the Act that specifically refers to dispute resolution in the online space is section 69 of ECTA, which provides for alternative dispute resolution in respect of disputes concerning the .za domain name.<sup>22</sup> This section mandates the Minister of Communications to create regulations governing

---

<sup>15</sup> Electronic Communications and Transactions Act 25 of 2002.

<sup>16</sup> O Sibanda 'The strict approach to party autonomy and choice of law in e-contracts in South Africa: Does the approach render South Africa an unacceptable jurisdiction' (2008) 41 *De Jure* 320 at 321; Hlengiwe Zondo-Kabini 'Application of the Electronic Communications and Transactions Act to online merchants from other jurisdictions' 2003 *North Western Journal of Technology & Intellectual Property* 78 at 78.

<sup>17</sup> s2(1) Act 25 of 2002.

<sup>18</sup> s2(1)(a) Act 25 of 2002.

<sup>19</sup> s2(1)(b) Act 25 of 2002.

<sup>20</sup> s2(1)(c) Act 25 of 2002.

<sup>21</sup> Department of Communications Republic of South Africa *A Green Paper on Electronic Commerce for South Africa* (2000) 25.

<sup>22</sup> Shumani L Gereda 'The Electronic Communications and Transactions Act' in Lisa Thornton et al (eds) *Telecommunications Law in South Africa* (2006) 262 at 280.

an alternative mechanism to resolve domain name disputes ‘with due regard to existing international precedent’.<sup>23</sup> These Regulations<sup>24</sup> were published in 2006 and outline the process to be followed in resolving domain name disputes, incorporating both offline and online processes and allowing for the disputes to be resolved via electronic communications.<sup>25</sup> Although this is a very limited space in which ODR could find operation, the recognition of the importance of regulating the online space is encouraging.

Apart from the provisions of s69 and the accompanying Regulations, ECTA does not specifically refer to ODR, similar to the Constitution. However, this is not surprising given that the Act was promulgated in 2002, when ODR was still in its early stages.<sup>26</sup> Thus, we must consider subsequent legislation to determine whether they create more scope for the future development and regulation of ODR in South Africa.

#### *5.2.1.3. Electronic Communications Act 36 of 2005*

Although the other statutes discussed in this section provide for various aspects of electronic communications and transactions, an assessment of South Africa’s readiness for ODR must also include a discussion of the legislation governing the telecommunications framework.<sup>27</sup> The Electronic Communications Act (ECA)<sup>28</sup> is the main statute regulating the electronic communications industry in South Africa, aimed at ‘promot(ing) convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors, and to provide the legal framework for convergence of these sectors.’<sup>29</sup> This Act effectively brought the regulation of broadcasting and telecommunications under one instrument and governs the ICT infrastructure in South Africa.<sup>30</sup> The Act comprises 15 sections, and provides

---

<sup>23</sup> s69(2) Act 25 of 2002; E Hurter ‘An evaluation of selected aspects of the alternative dispute resolution regulations for the resolution of domain name disputes in the .za domain name space’ (2007) 19 *South African Mercantile Law Journal* 165 at 165.

<sup>24</sup> GN R1166 GG 29405 of 22 Nov 2006.

<sup>25</sup> Regulations 15-36 GN R1166 GG 29405 of 22 Nov 2006.

<sup>26</sup> See 2.2.3 above for a discussion of the ‘entrepreneurial’ phase of development of ODR.

<sup>27</sup> See 4.3.2 above for an explanation of the importance of having a solid infrastructure as a basis for a well-functioning ICT system.

<sup>28</sup> Electronic Communications Act 36 of 2005.

<sup>29</sup> ZN Jobodwana ‘E-commerce and mobile commerce in South Africa: Regulatory challenges’ (2009) 4 *Journal of International Commercial Law & Technology* 287 at 291.

<sup>30</sup> Ss 2(c), (g), (n) Act 36 of 2005.

comprehensive regulation, covering aspects as diverse as licensing,<sup>31</sup> electronic communications networks and facilities,<sup>32</sup> radio frequencies,<sup>33</sup> technical equipment and standards,<sup>34</sup> broadcasting services<sup>35</sup> and more general regulations. It has been submitted that the Act is 'future-focused'<sup>36</sup> and so one would expect that the Act is set up in such a way that would accommodate future technological innovations.

#### 5.2.1.4. Consumer Protection Act 68 of 2008

The Consumer Protection Act (CPA)<sup>37</sup> governs all consumer contracts in South Africa, including commercial transactions that take place on the internet. As such, it includes provisions for the protection of online consumers and in some instances extends the protections available in ECTA.<sup>38</sup> As with the Constitution and ECTA as discussed above, there is no express provision for ODR in the CPA. However, upon reading sections 69 and 70 together it is clear that there is scope for ODR to be used in the resolution of consumer disputes as long as the proposed ODR provider falls under one of the types of providers listed in section 70.

Sections 69 and 70 of the CPA set out all dispute resolution avenues available to those with claims arising from consumer contracts, including provisions relating to ADR measures.<sup>39</sup> Section 70 is the alternative dispute resolution clause, and provides that consumers may seek to resolve any disputes that arise in respect of a transaction by referring them to the listed ADR providers.<sup>40</sup> These ADR providers include ombuds,<sup>41</sup> other entities or persons providing consumer conciliation, mediation or

---

<sup>31</sup> Chap 3 Act 36 of 2005.

<sup>32</sup> Chap 4 Act 36 of 2005.

<sup>33</sup> Chap 5 Act 36 of 2005.

<sup>34</sup> Chap 6 Act 36 of 2005.

<sup>35</sup> Chap 9 Act 36 of 2005.

<sup>36</sup> Lucien Pierce 'Electronic Communication Regulation' in S Papadopoulos & S Snail ka Mtuzze (eds) *Cyberlaw@SA: The Law of Internet in South Africa* 4 ed (2022) 17.

<sup>37</sup> Consumer Protection Act 64 of 2008.

<sup>38</sup> VA Lawack-Davids & FE Marx 'Consumer protection measures for erroneous or unauthorized internet payments: some lessons from the European Union?' (2010) 31(2) *Obiter* 446 at 455.

<sup>39</sup> 'Consensual dispute resolution (and, in particular, alternative dispute resolution) plays a central role in the enforcement of consumer rights in terms of the South African position, by way of the CPA.' J Barnard & E Mišćenić 'The role of the courts in the application of consumer protection law: A comparative perspective' (2019) 44(1) *Journal for Juridical Science* 111 at 114.

<sup>40</sup> s70(1) Act 64 of 2008.

<sup>41</sup> s70(1)(a) and (b) Act 64 of 2008.

arbitration<sup>42</sup> and the consumer court of the province.<sup>43</sup> Section 69 provides that consumers must first exhaust these options for dispute resolution before they can consult a court and use traditional litigation.<sup>44</sup> This seems to position ADR as the preferred dispute resolution avenue for consumer disputes.<sup>45</sup> Woker posits that ‘any person or entity who provides advice to consumers and who attempts to resolve consumer disputes could potentially be regarded as an ADR agent.’<sup>46</sup>

If this interpretation is correct, it would create the room for ODR to be implemented as one of the measures by which consumer disputes could be resolved,<sup>47</sup> considering that no further details are provided about who or what would qualify as an ADR agent. As such, small-value consumer disputes could serve as a relatively ‘low-risk’ entry point for the introduction of ODR in South Africa, allowing consumers to slowly build trust in the process and opening the door for its use in relation to other types of disputes.

#### 5.2.1.5. *Protection of Personal Information Act 4 of 2013*

The Protection of Personal Information Act (POPI) is South Africa’s first legislation devoted exclusively to data protection, described as ‘an omnibus data protection Act’.<sup>48</sup> The Act’s main aim is to ensure the privacy, safety, and confidentiality of data subjects’ personal information.<sup>49</sup> POPI gives effect to the right to privacy enshrined

---

<sup>42</sup> s70(1)(c) Act 64 of 2008.

<sup>43</sup> s70(1)(d) Act 64 of 2008.

<sup>44</sup> s69(1)(d) Act 64 of 2008. This interpretation of the provision is confirmed in *Joroy 4440 cc t/a Ubuntu Procurement v Potgieter N.O & Another* 2016 (3) SA 465 (FB) at para 10.

<sup>45</sup> ‘(T)he legislation is aimed at resolving consumer disputes at an early stage and long before matters reach the civil courts.’ T Woker ‘Consumer protection and alternative dispute resolution’ (2016) 1 *SA Mercantile Law Journal* 21 at 27-28. Also see Y Muphangavanhu ‘An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008’ (2012) 15(5) *Potchefstroom Electronic Law Journal* 320 at 336.

<sup>46</sup> Woker op cit at 29.

<sup>47</sup> Reddy op cit at 387; Ojiako (et al) op cit at 303.

<sup>48</sup> Anneliese Roos ‘Data protection law in South Africa’ in AB Makulilo (ed) *African Data Privacy Laws* (2016) 189-227 at 200.

<sup>49</sup> s2 Act 4 of 2013.

in the South African Constitution<sup>50</sup> and is a comprehensive data protection law in the same vein as the GDPR.<sup>51</sup>

Due to this focus of protecting personal information, it stands to reason that there is no express regulation of ODR in this statute. The only reference to dispute resolution found in the Act is in s40 in the context of the powers granted to the Information Regulator.<sup>52</sup> In terms of this section, the Information Regulator has the power to handle complaints by means of ADR processes such as mediation and conciliation.<sup>53</sup> ODR would arguably also constitute such an alternative dispute resolution measure and there is thus scope for its use within the provisions of POPI.

Having a statute like POPI in place is also important for the development of ODR as it provides some assurance to internet users that their personal information will be kept confidential and secure, and the Act thus has the potential to foster trust in online interactions,<sup>54</sup> whether commercial or otherwise. This protection of personal information also extends to protection of user data in cross-border interactions that take place online,<sup>55</sup> with section 72 of the Act specifically regulating the transborder flow of information.

Although Mohlameane and Ruxwana highlight the fact that the Act only fully came into effect in 2020, meaning that many providers and users are not yet familiar

---

<sup>50</sup> S14 Constitution of the Republic of South Africa, 1996.

<sup>51</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1 recital 1; L Swales 'The Protection of Personal Information Act and data de-identification' (2021) 117 *South African Journal of Science* 1 at 1; DE Skolmen & M Gerber 'Protection of personal information in the South African cloud computing environment: A framework for cloud computing adoption' (2015) *Information Security for South Africa* 1 at 5; Roos op cit at 204.

<sup>52</sup> The Information Regulator refers to a juristic person created in s39 Act 4 of 2013 to ensure compliance with the provisions of POPI, amongst other functions. A detailed description of the functions of the Information Regulator can be found in s40 Act 4 of 2013.

<sup>53</sup> s40(1)(d)(iii) Act 4 of 2013.

<sup>54</sup> See 4.4.3 above for a discussion about the importance of establishing consumer trust in the online space. It has been suggested that this trust is essential for the creation of a flourishing digital economy as it is a prerequisite for internet users to feel comfortable with online interactions and transactions.

<sup>55</sup> Chap 9 Act 4 of 2013.

with its provisions,<sup>56</sup> it is clear that POPI provides a supportive data protection framework.<sup>57</sup> It is hoped that operating ODR within this supportive framework will do much to foster trust in the system amongst potential disputants.

#### 5.2.1.6. *National Integrated ICT Policy White Paper*

In 2016, the South African Minister of Telecommunications and Postal Services published the National Integrated ICT Policy White Paper. This document ‘introduces a range of interventions to ensure that everyone in South Africa, regardless of who they are, where they live or their socio-economic status can improve the quality of their lives through accessing the benefits of participating in the digital society.’<sup>58</sup> Although the White Paper does not expressly acknowledge the use of ICT in the area of justice and dispute resolution, it does introduce interventions to facilitate the digital transformation of society in the broader sense, indicating an openness to the use of technology to facilitate various societal interactions. It is thus hoped that future iterations of this policy will expressly include the use of technology in dispute resolution and provide for ODR initiatives, even if not under that appellation.

#### 5.2.2. Existing ODR providers

Despite the fragmented legislation and policy, authors have recognised South Africa as one of the countries doing well in their incorporation of technology into the dispute resolution process.<sup>59</sup> The current ODR landscape in South Africa is composed of both public and private initiatives, and it is encouraging to see the success of these ventures. It seems that the development of ODR platforms has been sector-specific,

---

<sup>56</sup> M Mohlameane & N Ruxwana ‘Exploring the impact of cloud computing on existing South African regulatory frameworks’ (2020) 22(1) *South African Journal of Information Management* 2 at 6.

<sup>57</sup> ‘The Protection of Personal Information Act, 2013 (‘POPIA’) recognises everyone’s right to privacy and promotes the protection of personal information processed by public and private bodies, amongst other purposes. It does so fully cognisant that the removal of unnecessary impediments to the free flow of information might facilitate economic and social progress within the framework of the information society.’ *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others* [2022] ZAECMKHC 42 at para 8.

<sup>58</sup> The National Integrated ICT Policy White Paper (GN1212 GG 40345 of 3 October 2016).

<sup>59</sup> Izuoma Egeruoh Egeruoh-Adindu ‘Technology and the law: The impact of artificial intelligence (AI) on litigation and dispute resolution in Africa’ in C Eboe-Osuji et al (eds) *Nigerian Yearbook of International Law 2018/2019* (2019) 413 at 422.

with there being platforms for specific types of cases. This section will investigate some of the most well-known and most successful ODR platforms.

One of the oldest ODR programs in South Africa is the ZA Domain Name Dispute Resolution Regulations (ZADRR), adopted in 2006 to govern dot ZA domain name disputes.<sup>60</sup> This mechanism was created to resolve domain name disputes using online processes. In terms of these regulations, a disputant can file a dispute with a service provider, who then uses ICT to facilitate the dispute resolution procedure. The current service providers are the .za Domain Name Authority (ZADNA),<sup>61</sup> the Arbitration Foundation of Southern Africa (AFSA)<sup>62</sup> and the South African Institute of Intellectual Property Law (SAIIPL), which is the main service provider,<sup>63</sup> hearing the majority of domain disputes. The SAIIPL service is the longest running ODR program in South Africa and continues to be the main method of resolving domain name disputes.

Another long running ODR provider is the Consumer Goods and Services Ombud, which provides online mediation services to resolve consumer disputes.<sup>64</sup> This program allows potential disputants to lodge their consumer complaints online and be assigned an online mediator to help them resolve their dispute quickly and cheaply. This Ombud is one of the alternative dispute resolution mechanisms referred to in s70 of the CPA,<sup>65</sup> and provides a viable alternative to litigation for parties seeking to resolve small-value B2C disputes.

Interestingly, ODR has also found application outside of the more commercial areas identified above. ODR has been used in South Africa to resolve disputes arising from more sensitive areas of private law. Founded in 2017, *iedivorce.co.za* is a website aimed at facilitating divorce proceedings,<sup>66</sup> and allows parties to complete

---

<sup>60</sup> This dispute resolution program was created in accordance with section 69 of the ECTA, discussed at 5.2.1.2 above.

<sup>61</sup> ZADNA aims to provide domain dispute resolution through mediation. More information is available at <https://zadna.org.za>, accessed on 21 June 2023.

<sup>62</sup> [www.arbitration.co.za](http://www.arbitration.co.za).

<sup>63</sup> <https://saiipl.co.za/domain-names/>.

<sup>64</sup> Online Ombudsman is available at <http://www.cgso.org.za/>, accessed on 21 June 2023.

<sup>65</sup> See discussion at 5.2.1.4 above.

<sup>66</sup> [iedivorce.co.za](http://iedivorce.co.za).

most of their divorce paperwork and negotiations online with the assistance of an attorney. Parties will still need to go to court for their final divorce order to be granted, but the bulk of the proceedings will have taken place online.<sup>67</sup> Using technology to expedite the consultation and negotiation stages of divorce allows for a more accessible process for disputants and a speedier resolution to their disputes. Although this is arguably not a suitable way to resolve divorces that are more contentious, it is promising that this business has endured since 2017 and shows that ODR can be effective in the family law context.

Nuvalaw is a business that operates in the field of personal injury claims and has found success in both South Africa and the United Kingdom (UK). The company provides a platform for law firms to use in resolving personal injury claims, 'embedding innovative thinking in digital tools that help make the work of resolving claims more simple, more efficient, and more fun'.<sup>68</sup> Although the company is relatively young, Nuvalaw's platform uses negotiation or arbitration to achieve resolution of the claims submitted on its platform, creating room for parties to determine both liability and quantum.<sup>69</sup> Based on their statistics in the UK, using the Nuvalaw platform as an alternative to traditional litigation entails a cost saving of 53.8%.<sup>70</sup> This clear cost benefit is but one of the reasons that the platform is being adopted by South African firms. To date, 20948 claims have been resolved on the platform,<sup>71</sup> making it a viable dispute resolution mechanism in its particular field.

The Commission for Conciliation, Mediation and Arbitration (CCMA) is a dispute resolution body established in terms of Section 112 of the Labour Relations Act<sup>72</sup> and provides dispute resolution services for labour disputes. In 2020, the CCMA added a digital case referral and application platform,<sup>73</sup> bringing some of their services online. This makes dispute resolution accessible to more users who may not have been able

---

<sup>67</sup> <https://www.iedivorce.co.za/about/>.

<sup>68</sup> <https://www.nuvalaw.com/about-us>.

<sup>69</sup> <https://www.nuvalaw.com/>.

<sup>70</sup> Nuvalaw Cost Comparison supplied by Hendrik Kotze, Nuvalaw co-founder. A copy is on file with the author.

<sup>71</sup> <https://www.nuvalaw.com/>.

<sup>72</sup> 66 of 1995.

<sup>73</sup> <https://cmsonline.ccma.org.za/OnlineForms.aspx?AspxAutoDetectCookieSupport=1>.

to access the CCMA physically, and could serve as a useful online repository for the CCMA.

The success of these initiatives in their respective fields of law is a strong indicator that ODR can thrive in the South African context. Although the challenges outlined in Chapter 4 above are still present, they are by no means insurmountable, and so the outlook is good for the further development of ODR in the country and region.

### 5.3. Nigeria

As recently as 2014, it was argued that ‘in Nigeria, the question of the importance, relevance and purpose of regulation in the Information and Communications industry has not been properly considered.’<sup>74</sup> However, it has also been recognised that ICT is key to Nigeria’s continued development,<sup>75</sup> and so there must be a re-evaluation of the ICT regulatory framework in the country.<sup>76</sup> Promisingly, Nigerian lawyers and academics have expressed renewed interest in ODR as a viable dispute resolution measure.<sup>77</sup> Strengthening this renewed interest was the occurrence of the COVID-19 pandemic,<sup>78</sup> which forced a reconsideration of the traditional dispute resolution measures to accommodate for the limited contact caused by international lockdowns.<sup>79</sup>

---

<sup>74</sup> P C Obutte ‘ICT laws in Nigeria: Planning and regulating a societal journey into the future’ (2014) 17 *Potchefstroom Electronic Law Journal* 418 at 419.

<sup>75</sup> Doma op cit at 93; MA Jimoh ‘Advancing online dispute resolution in Nigeria: Current opportunities, legal challenges and the ways forward’ (2020) 11:2 *Law and Policy* 407 at 407-408; Orji op cit at 130.

<sup>76</sup> ‘Nigeria is the best place to begin, and possibly have an ODR system in place on the continent, because of its economic strength, population and infrastructural expansion in key areas of its growth.’ Ononogbu op cit at 82-83

<sup>77</sup> Ononogbu op cit at 80; Jimoh op cit at 407; CA Aniekwe ‘Legal framework for the use of information and communications technology (ICT) in the Nigerian justice system: A call for review’ (2019) 1(3) *International Journal of Comparative Law and Legal Philosophy* 125 at 128; CN Arinze-Umobi & IT Okonkwo ‘Alternative dispute resolution practice in Nigeria and the effect of the Covid-19 pandemic’ (2021) 2 *International Journal of Law and Clinical Legal Education* 82 at 84; Elejo Aishatu Adaji ‘Transforming Nigeria into a cash-less economy: Implications on consumers rights and dispute resolution mechanisms’ (2016) *Draft Paper Presented at 49th Annual Nigerian Association of Law Teachers (NALT) Conference* 1 at 14.

<sup>78</sup> Jimoh op cit at 408; Arinze-Umobi & Okonkwo op cit at 84; Zhang op cit at 930.

<sup>79</sup> I Sule, AM Mohamad & NAM Noor ‘The prospects of elawyering towards empowering strong justice institutions in Nigeria’ (2021) *Proceedings: Seminar on Law and Society 2021 (Solus V)* at 22;

Egeruoh-Adindu notes that, as yet, AI technologies are not well represented in the Nigerian ICT legal framework.<sup>80</sup> Like the South African law,<sup>81</sup> the Nigerian ICT legal framework is fragmented,<sup>82</sup> with the Ministry of Communications and Digital Economy acknowledging that ‘many of the existing regulatory instruments in the digital economy space have been developed in silos.’<sup>83</sup> At present, there is no specific legislation in place in Nigeria that governs ODR.<sup>84</sup> As such, the existing Nigerian ICT policies and relevant legislation will be discussed further below, with a view to understanding how they would support the implementation of ODR in Nigeria on a larger scale.

### 5.3.1. ICT Legislation and Policy

#### 5.3.1.1. *National Information Technology Development Agency Act 28 of 2007*

Following a recognition of the importance of establishing a stable digital economy for Nigeria,<sup>85</sup> the National Information Technology Development Agency Act was promulgated in 2007.<sup>86</sup> The Act’s aim was to establish the National Information Technology Development Agency (NITDA), a body entrusted with creating ‘a framework for the planning, research, development, standardization, application, coordination, monitoring, evaluation and regulation of Information Technology practices, activities and systems in Nigeria.’<sup>87</sup>

This mandate is a weighty one, and establishes NITDA as the primary supervisory, advisory, and regulatory body in matters concerning the development

---

Felix E Eboibi & Ebi Robert ‘Global legal response to coronavirus (COVID-19) and its impact: perspectives from Nigeria, the United States of America and the United Kingdom’ (2021) 47:4 *Commonwealth Law Bulletin* 593 at 621; CS Ibekwe & C Onwuatuegwu ‘ICT in the administration of justice: Challenges and prospects for labour and productivity’ (2021) 8(1) *Nnamdi Azikiwe University Journal of Commercial and Property Law* 1 at 6.

<sup>80</sup> Egeruoh-Adindu op cit at 429. Also see Aniekwe op cit at 131.

<sup>81</sup> See 5.2.1 above.

<sup>82</sup> Orji op cit at 131.

<sup>83</sup> Federal Ministry of Communications and Digital Economy National Digital Economy Policy and Strategy (2020-2030) at 22.

<sup>84</sup> Jimoh op cit at 428; Lukman Ayinla & Taiye Oliyide ‘Juridical perspective on the regulation of Online Dispute Resolution in Nigeria’ (2020) 7(2) *Islamic University Multidisciplinary Journal* 71 at 74.

<sup>85</sup> National Information and Communications Technology Policy (2012) at 17.

<sup>86</sup> Act 28 of 2007.

<sup>87</sup> S6(a) National Information Technology Development Agency Act 28 of 2007. Also see the agency’s description of their mandate, available at <https://nitda.gov.ng/background/>.

of ICT in Nigeria.<sup>88</sup> In the years since its institution, NITDA has been involved in creating programs to promote digital literacy and skills, developing and promoting digital services and providing regulation of ICT in relation to different fields. Their efforts have contributed greatly to the growth of ICT in the region, and NITDA continues to play a large role in ongoing ICT projects.

In keeping with their mandate of regulation of various aspects of Nigeria's ICT sector, NITD released a Draft Framework on alternative dispute resolution<sup>89</sup> aimed at creating an alternative to litigation that is easy to access, fast and suitable for a technological environment.<sup>90</sup> The Framework is broad in scope, and 'sets out a blueprint for the implementation of an alternative dispute resolution system for the ICT sector in a manner that enables the speedy resolution of ICT related disputes.'<sup>91</sup> The Framework includes a provision for the establishment of an ODR platform, a positive step in implementing ODR in the region. However, this Draft Framework did not progress much further than the initial stage and thus the development of a Nigerian ODR platform has yet to be realised.

#### *5.3.1.2. National Information and Communication Technology (ICT) Policy 2012*

Published by the Nigerian Ministry of Communications in 2012, the purpose of the National ICT Policy is to provide a framework for the harmonisation of the various policies for the different sectors in the ICT industry,<sup>92</sup> addressing the fragmentation mentioned at 5.3 above. For this reason, the Policy is extensive and covers a range of focus areas, each of which is discussed at length in Chapter 7 of the policy document.<sup>93</sup>

---

<sup>88</sup> See the various provisions outlining NITDA's legal mandate at s6(a)-(n) National Information Technology Development Agency Act 28 of 2007.

<sup>89</sup> Draft Framework on Alternative Dispute Resolution for the information communications technology (ICT) Sector 2020.

<sup>90</sup> M Oluwole & O Adebisi 'The Draft Framework on Alternative Dispute Resolution for the ICT sector: Highlights and issues arising' (2020) available at <https://tnp.com.ng/assets/images/uploads/TNP-Insights-The-Draft-Framework-on-Alternative-Dispute-Resolution-for-the-ICT-Sector-Highlights-and-Issues-Arising.pdf>, accessed on 12 December 2023.

<sup>91</sup> Ibid.

<sup>92</sup> National Information and Communications Technology Policy (2012) at 7.

<sup>93</sup> National Information and Communications Technology Policy (2012) at 26-56.

Another stated aim of the policy is the facilitation of Nigeria becoming a top 20 economy by 2020,<sup>94</sup> which unfortunately did not come to pass. The reasons for this failure to use technology effectively as a tool for economic growth have been speculated about,<sup>95</sup> and include corruption,<sup>96</sup> a lack of comprehensive governing legislation, and general computer illiteracy.<sup>97</sup> Despite these drawbacks, it is submitted that the National ICT Policy has done much to streamline the fragmented ICT policies and has provided a good framework for ICT development, creating an environment where ODR can thrive.

### 5.3.1.3. Nigerian Judiciary Information Technology Policy 2012

In conjunction with the National ICT Policy, there is the Nigerian Judiciary Information Technology Policy (JITPO), which follows on from the broader aims of the national ICT policy and specifically focuses on the use of technology in the judicial sector. A key aim of the policy is to ensure that ICT is used in a way that supports the judiciary in the effective provision of justice administration and dispensation.<sup>98</sup> This policy shows the judiciary's commitment to using technology to facilitate the administration of justice, making provision for the use of ICT in traditional litigation and court administration.<sup>99</sup>

The policy highlights 'information technology functional areas in the judiciary', namely litigation, the courtroom, barristers' chambers and central court administration.<sup>100</sup> These areas have been identified as those where technology can be effectively implemented to increase efficiency of the courts<sup>101</sup> and ensure that

---

<sup>94</sup> National Information and Communications Technology Policy (2012) at 7.

<sup>95</sup> Orji op cit 131; Ibekwe & Onwuatuegwu op cit at 9.

<sup>96</sup> KO Sabit 'Technology and its use in Nigerian courts' (2022) available at <https://ssrn.com/abstract=4099326>, accessed on 15 June 2023; Doma op cit at 93.

<sup>97</sup> Ibekwe & Onwuatuegwu op cit at 9; HD Kutigi & B Anigbogu 'ICT enhanced courtrooms in Nigeria: Are the conditions of effectiveness met?' (2017) 1 *UNIPORT Law Review* 151 at 152; Jimoh op cit at 427; Nwadem op cit at 14.

<sup>98</sup> Section 2.1 Judiciary Information Technology Policy (2012) 7; E G Ekhaton 'The application of video conferencing in judicial proceedings in Nigeria' available at <https://ssrn.com/abstract=3630821>, accessed on 17 June 2023.

<sup>99</sup> Section 2.4 Judiciary Information Technology Policy (2012) 8; Kutigi & Anigbogu op cit at 164.

<sup>100</sup> s2.4 Judiciary Information Technology Policy (2012) 8.

<sup>101</sup> s2.4 Judiciary Information Technology Policy (2012) 10.

there is security, confidentiality and privacy in every process of the court.<sup>102</sup> The policy goes on to address each of these areas in detail, and outlines how technology should be used in each. Of especial interest for this current work is the acceptance of virtual courtrooms and the openness to conducting litigation proceedings online, allowing for dispute resolution outside the physical courtroom space and creating a favourable environment for ODR to flourish.

However, much like the National ICT Policy, very little has been done since the inception of the JITPO to implement the 'laudable and practicable provisions'<sup>103</sup> found therein. As the JITPO is only a policy document, it needs to either be legislated on or incorporated in the Nigerian Court Rules to have any binding effect, and neither of these fortifications have occurred yet.<sup>104</sup>

#### 5.3.1.4. *Electronic Transactions Bill 2015*

An important legislative instrument that forms part of Nigeria's ICT-enabling legal framework is the Electronic Transaction Bill. Although this Bill has been passed by the Nigerian National Assembly, it has not yet been assented to by the President for it to become an Act. Despite this, the provisions of the Bill will do much to regulate the e-commerce sector in Nigeria once it takes effect and must thus be considered here.

The aim of the Bill is to provide a legal and regulatory framework for four main aspects of electronic transactions, namely the regulation of transactions using electronic or related media, the protection of consumers and other parties to such transactions, the protection of personal data and the facilitation of e-commerce in Nigeria.<sup>105</sup> The Bill is thus wide-ranging, aimed at the regulation of e-commerce as well as acknowledging the importance of consumer protection and data privacy concerns. It is interesting to note the comprehensive nature of this instrument,

---

<sup>102</sup> 'The judiciary will implement security policies and technologies at the network, server, and desktop levels that will ensure the confidentiality of chambers and court information without compromising reasonable expectations of stakeholders.' *Judiciary Information Technology Policy* (2012) 10.

<sup>103</sup> Aniekwe op cit at 126.

<sup>104</sup> Aniekwe op cit at 131; CA Aniekwe 'American realism and the Nigeria judicial system; a comparative analysis: Law review on contemporary legal issues in Nigeria' in PO Idomigie (ed.) *The Jurist* (2016) 119 at 121; Ayinla & Oliyide op cit at 75.

<sup>105</sup> Clause 1 Electronic Transaction Bill 2015.

bringing these disparate elements under the umbrella of electronic transactions. This is in contrast to the approaches taken in South Africa<sup>106</sup> and Kenya,<sup>107</sup> where these aspects are contained in separate Acts.

The Bill is divided into nine parts, including provisions regulating electronic records,<sup>108</sup> electronic signature,<sup>109</sup> data protection,<sup>110</sup> electronic contracts,<sup>111</sup> carriage of goods,<sup>112</sup> consumer protection,<sup>113</sup> and service providers.<sup>114</sup> Clause 43(1) of the Bill authorises NITDA to create procedures for the resolution of disputes arising from electronic transactions,<sup>115</sup> leaving room for NITDA to implement an ODR platform for e-commerce disputes. As discussed above,<sup>116</sup> NITDA has previously published a Draft Framework indicating their intention to do so, although this Framework does not seem to have developed further since its introduction. It is hoped that these efforts will be renewed in keeping with the push to develop ADR in Nigeria evidenced by the Arbitration and Mediation Bill.

#### *5.3.1.5. Arbitration and Mediation Bill 2022*

A big step in the recognition of ODR as a viable method of dispute resolution in Nigeria is the introduction of the Arbitration and Mediation Bill. As of May 2023, this Bill is still under review by a working group after having been brought before the Nigerian Senate and so its proposed provisions have not been finalised. However, some information about the Bill has been made public and will be included here due to the potential impact that it could have on ODR uptake in Nigeria.

---

<sup>106</sup> See 5.2 above.

<sup>107</sup> See 5.4 below.

<sup>108</sup> Part II Electronic Transaction Bill 2015.

<sup>109</sup> Part III Electronic Transaction Bill 2015.

<sup>110</sup> Part IV Electronic Transaction Bill 2015.

<sup>111</sup> Part V Electronic Transaction Bill 2015.

<sup>112</sup> Part VI Electronic Transaction Bill 2015.

<sup>113</sup> Part VII Electronic Transaction Bill 2015.

<sup>114</sup> Part VIII Electronic Transaction Bill 2015.

<sup>115</sup> Clause 43(1)(i) Electronic Transaction Bill 2015.

<sup>116</sup> See 5.3.1.1. above.

This Bill, when enacted, will repeal the current Arbitration and Conciliation Act of 1998 and create the Arbitration and Mediation Act.<sup>117</sup> One of the purposes of the Bill is to update Nigeria's alternative dispute resolution law to address current arbitration issues, one being the inclusion of ICT in the dispute resolution process.<sup>118</sup> The acknowledgement of the role that ICT can play in dispute resolution has been anticipated by academic authors,<sup>119</sup> and, if enacted, the Bill will do much to cement the commonplace use of online methods of dispute resolution in Nigeria.

### 5.3.2. Existing ODR initiatives

However, when it comes to ODR specifically, some strides have been taken, at least as far as legislating it is concerned. In 2014, Nigeria made the ADR Directive on Alternative Dispute Resolution and Regulation on Online Dispute Resolution available for all contractual disputes between consumers and businesses,<sup>120</sup> aiming to institute a set standard for ADR and ODR in B2C disputes. Although the recognition of ODR in Nigerian legislation has only taken place in this limited way, it is a step in the right direction and opens the gate for the adoption of ODR in other spheres.

In terms of ODR programs that are currently running, LawPavilion Business Solutions is an 'IT Research Tools provider',<sup>121</sup> offering Nigerian lawyers and courts software aimed at providing case management, court management and automation of court processes, which arguably includes dispute resolution processes.<sup>122</sup> One of the company's stated goals is the digital transformation of justice, and so there is a clear recognition that technology can be used effectively to expedite dispute resolution, and LawPavilion is thus an example of facilitative ODR. As of May 2023, the author is still awaiting a report on how LawPavilion's services have been received,

---

<sup>117</sup> Enehuwa Adagu 'Nigeria's new Arbitration and Mediation Bill' (2022) available at <https://www.ciarb.org/news/nigeria-s-new-arbitration-and-mediation-bill/>, accessed on 1 June 2023.

<sup>118</sup> Hiro Agarakı 'The new Nigerian Bill on arbitration & mediation: Lessons for the Singapore Convention' (2022) available at <http://indisputably.org/2022/08/the-new-nigerian-bill-on-arbitration-mediation-lessons-for-the-singapore-convention/>, accessed on 1 June 2023.

<sup>119</sup> Arinze-Umobi & Okonkwo op cit at 85.

<sup>120</sup> Ononogbu op cit at 81.

<sup>121</sup> <https://lawpavilion.com/about-us.html>.

<sup>122</sup> IA Olubiyi, AJ Olaniyan & N Odiaka 'The role of technology in the advancement of legal education and practice in Nigeria' (2015) at 12 available at [http://eprints.abuad.edu.ng/639/1/OlubiyietaI\\_Paper.pdf](http://eprints.abuad.edu.ng/639/1/OlubiyietaI_Paper.pdf), accessed on 3 June 2023.

but at present, it is a promising addition to the Nigerian legal sphere. The introduction of LawPavilion together with the policies enacted by both the government and the judiciary indicates acceptance of the role of technology in the law<sup>123</sup> and readiness for more widespread adoption of ODR in the country.<sup>124</sup>

#### 5.4. Kenya

Kenya is generally described as ‘a success story with regards to the influence of the Internet and its uses in empowering the public’,<sup>125</sup> being recognised as one of the main ICT hubs in Africa.<sup>126</sup> Referred to as the ‘Silicon Savannah’,<sup>127</sup> Kenya is a technological leader, being especially known for the successful use of mobile technology in various sectors.<sup>128</sup>

Despite this widespread acceptance and use of ICT in Kenya, the uptake of ODR in Kenya has been very slow. However, as in Nigeria, it seems that the legal fraternity in Kenya is now beginning to recognise the advantages that ODR presents, driven by the limitations presented by the COVID-19 pandemic.<sup>129</sup> A common thread in scholarly work is the need for a solid legal framework to support any ODR ventures if they are to be adopted in Kenya,<sup>130</sup> and thus the underlying legal framework must be

---

<sup>123</sup> Ekhaton op cit at 13.

<sup>124</sup> Further evidence of such readiness can be seen in the Draft Framework on Alternative Dispute Resolution as discussed at 5.3.1.1 above, where NITDA had previously proposed the creation of an ODR platform in Nigeria.

<sup>125</sup> Doma op cit at 93. Also see Maya Gainer ‘Transforming the courts: Judicial sector reforms in Kenya, 2011-2015’ (2015) *Innovations for Successful Societies* 1.

<sup>126</sup> K Okong’o & Michael Kyobe ‘Empirical examination of e-government in developing countries and its value in Kenya’s public service’ (2018) 21(1) *The Electronic Journal Information Systems Evaluation* 35 at 36.

<sup>127</sup> C Akamanzi et al ‘Silicon Savannah: the Kenya ICT services cluster’ (2016) *Harvard University – Microeconomics of Competitiveness* 1 at 9.

<sup>128</sup> Marthe Uwamariya & Claudia Loebbecke ‘Learning from the mobile payment role model: lessons from Kenya for neighboring Rwanda’ (2020) 26:1 *Information Technology for Development* 108-127 at 108; Ibekwe & Onwuatuegwu op cit at 3-4.

<sup>129</sup> Rooney op cit at 87.

<sup>130</sup> Ogonjo et al ‘Utilizing AI to improve efficiency of the environment and land court in the Kenyan judiciary’ (2021) *Proceedings of the Second International Workshop on AI and Intelligent Assistance for Legal Professionals in the Digital Workplace* (LegalAIIA 2021); Kariuki op cit at 73-74; Musau Evans Muthusi ‘Implementation of Article 159 bit by bit: a place for online dispute resolution in the Kenyan bar’ (2018) available at <https://su-plus.strathmore.edu/bitstream/handle/11071/9536/Implementation%20of%20Article%20159%20bit%20by%20bit%20-%20a%20place%20for%20online%20dispute%20resolution%20in%20the%20Kenyan%20bar.pdf?sequence=1&isAllowed=y>, accessed on 8 June 2023.

examined to see whether there would be sufficient legislative support for the widespread adoption of ODR.

Although it must be acknowledged here that the Arbitration Act of Kenya<sup>131</sup> does not provide for ODR, there is other legislation that leaves room for ODR to find application in Kenya.<sup>132</sup> These statutes and relevant policy considerations will be explored below.

#### 5.4.1. ICT Legislation and Policy

##### 5.4.1.1. *Constitution of Kenya 2010*

Described as ‘arguably the best promoter of ODR under its articles on the promotion of access to justice and the utilization of ADR methods’,<sup>133</sup> the Constitution of Kenya (‘the Constitution’) entrenches the citizens’ right of access to justice. Article 48 of the Constitution confirms that all citizens have the right to access justice, imposing an additional duty on the State to ensure that all citizens can access justice at a reasonable cost.<sup>134</sup>

Supporting this is the provision in Article 159 of the Constitution of Kenya which expressly names ADR as an alternative method of seeking justice in Kenya, stating that ‘in the exercise of judicial authority, courts and tribunals shall be guided by alternative forms of dispute resolution including mediation arbitration and traditional dispute resolution mechanisms.’<sup>135</sup> Both provisions indicate an openness to alternative methods of dispute resolution and create room for the acceptance and development of ODR in Kenya.<sup>136</sup> Kariuki proposes that ‘ODR as a form of dispute resolution will be in conformity with the primary legislation relating to ADR mechanisms in the country. It incorporates the use of technology to enhance access to justice in Kenya as well as serve as an alternative to litigation and adjudication

---

<sup>131</sup> Arbitration Act 4 of 1995.

<sup>132</sup> See 5.4.1 above.

<sup>133</sup> ME Wanyoike & J Wairimu ‘Online dispute resolution in Kenya: A case study of the European Union’ (2019) 7(1) *Alternative Dispute Resolution* 272 at 282.

<sup>134</sup> Art 48 Constitution of Kenya 2010.

<sup>135</sup> Art 159 Constitution of Kenya 2010.

<sup>136</sup> Wanyoike & Wairimu op cit at 282; Kariuki Muigua ‘Legitimising alternative dispute resolution in Kenya: Towards a policy and legal framework’ (2017) 5(1) *Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution* 74 at 92.

through the courts.<sup>137</sup> As such, it is clear that a proper understanding of the Constitution of Kenya would be inclusive of ODR measures,<sup>138</sup> and other legislation must be consulted to see how such measures would find practical implementation in Kenyan law.

#### *5.4.1.2. Civil Procedure Act 12 of 2012*

Interestingly, the Kenyan Civil Procedure Act<sup>139</sup> expressly provides for the use of ADR in resolving civil disputes. One of the objectives of the Act is to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes,<sup>140</sup> whether that be conducted by means of traditional litigation or through alternative means. This is confirmed in section 59C of the Act, which allows the court to refer civil disputes to other methods of dispute resolution either where the parties agree to do so or when the court assesses the matter and deems it suitable to be referred for ADR.<sup>141</sup>

The formulation of section 59C of the Act appears to be broad enough to include ODR as one of the alternative methods of dispute resolution provided for in the Act, and it is thus feasible for this section to serve as the statutory basis for the introduction and acceptance of ODR in Kenyan law.

#### *5.4.1.3. Consumer Protection Act 46 of 2012*

An overarching aim of the Consumer Protection Act<sup>142</sup> is to promote the social and economic welfare of Kenyan consumers.<sup>143</sup> This aim is to be achieved by providing a consistent, efficient, and accessible system of dispute resolution for consumer disputes.<sup>144</sup> ODR is arguably such a dispute resolution system, bringing with it the

---

<sup>137</sup> Kariuki op cit at 66.

<sup>138</sup> Muthusi op cit at 10.

<sup>139</sup> Civil Procedure Act 12 of 2012.

<sup>140</sup> s1A(1) Civil Procedure Act 12 of 2012.

<sup>141</sup> s59C Civil Procedure Act 12 of 2012.

<sup>142</sup> Consumer Protection Act 46 of 2012.

<sup>143</sup> s3(4) Consumer Protection Act 46 of 2012.

<sup>144</sup> s3(4)(g) Consumer Protection Act 46 of 2012.

benefits of cost-effectiveness and accessibility,<sup>145</sup> especially if mobile technologies are used to bring ODR to the masses.<sup>146</sup>

The Act also provides consumers with the freedom to agree to resolve their disputes using any procedure available in law,<sup>147</sup> creating the opportunity for parties to elect to use ODR despite the fact that it is not expressly recognised in Kenyan law. This lack of express recognition of ODR in legislation echoes the position in other African countries, as seen in the discussion above. However, the existing legislation is formulated broadly enough to encompass any future ODR measures that may be adopted in Kenya, and should be sufficient to support the current ODR ventures. As ODR continues to find support in Kenya, it will eventually need to be regulated in terms of a more specific instrument,<sup>148</sup> and it will be interesting to see how the law develops in this respect.

#### *5.4.1.4. Data Protection Act 24 of 2019*

Similarly to the South African POPI Act,<sup>149</sup> the Kenyan Data Protection Act aims to provide comprehensive regulation of the processing of personal data in Kenya<sup>150</sup> and, in some instances, beyond its borders.<sup>151</sup> Due to the potentially international impact of the Act, the drafters have ensured that its provisions are in line with those of the GDPR,<sup>152</sup> enabling the cross-border flow of information between all countries with a similar data protection regime.<sup>153</sup>

---

<sup>145</sup> See 2.2.4.2 above for a brief discussion of the benefits that ODR can provide.

<sup>146</sup> See 4.3.1.2 above for an explanation of how mobile technology can connect citizens to the internet in a cost-effective and convenient way. The ease of use and relatively cheap means of accessing the internet in this way makes mobile technology an ideal platform to use for bringing simple ODR apps to internet users.

<sup>147</sup> s88 Act 46 of 2012.

<sup>148</sup> Kariuki op cit at 74.

<sup>149</sup> See 5.1.2.5 above.

<sup>150</sup> s3 Act 24 of 2019.

<sup>151</sup> Part VI Act 24 of 2019.

<sup>152</sup> Jacktone Nengo 'The data protection vis a vis the developments around e-commerce In Kenya' (2020) available at <https://ssrn.com/abstract=3840397>, accessed on 9 June 2023.

<sup>153</sup> This will also promote the transfer of data between African countries, as countries like South Africa, Uganda and Egypt have all used the GDPR as a guiding instrument in the drafting of their data protection laws. See Brian Daigle 'Data protection laws in Africa: A pan-African survey and noted trends' 2021 *Journal of International Commerce and Economics* 1 at 2.

The provisions relevant to considering whether there is adequate legal protection for information shared during ODR proceedings are those governing the processing of personal data and the transfer of such data outside Kenya. Section 45 of the Act states the limited instances in which a data subject's sensitive personal data may be processed, expressly stating that this is allowed where such processing is necessary for the establishment, exercise, or defence of a legal claim.<sup>154</sup> Section 48 provides the conditions for the transfer of personal data outside Kenya, and emphasises that this is only to be permitted to jurisdictions with commensurate data protection laws in place.<sup>155</sup>

Upon reading these provisions it is clear that the use of personal data is permitted for purposes of dispute resolution, and thus there is scope for the use and transfer of this data during ODR proceedings. There is also the acknowledgement that parties would need to be sure that their personal information is being processed securely and confidentially, and thus the safeguards have been expressly built into the Act, requiring there to be certain security measures in place when such data is being handled, processed, or transferred.<sup>156</sup>

The introduction of this Act adds another layer to the legislative framework that is needed for the successful implementation of ODR, and can serve as another way of increasing consumer trust in the ODR process, creating some assurance that their personal information will be handled securely.

#### *5.4.1.5. The National Information Communications and Technology (ICT) Policy Guidelines (2020)*

This policy is commonly known as the Sector Policy, and is aimed at promoting ICT capacity, innovation and enterprise in Kenya.<sup>157</sup> The Sector Policy is aimed at providing a framework for the development of the Kenyan digital economy, creating an environment in which all citizens and stakeholders can participate in online

---

<sup>154</sup> s45(c)(i) Act 24 of 2019.

<sup>155</sup> s48(b) Act 24 of 2019.

<sup>156</sup> s41 Act 24 of 2019; Nengo op cit at 6.

<sup>157</sup> Gugu Resha *Assessing the potential for African digital governance to facilitate inclusive development: Rights, rules and revenues* (2021) 9.

activities.<sup>158</sup> The policy objectives are wide-ranging, including a focus on strengthening ICT infrastructure, promoting ICT knowledge and skills, and fostering innovation, efficiency and quality in the delivery of public services.<sup>159</sup> These are all requirements for a healthy digital economy, and so an express focus on these aspects of ICT development bodes well for the future of ICT in Kenya.

An interesting aspect of the Sector Policy is the key development areas that have been identified. The first of these development areas is referred to as ‘Mobile First’,<sup>160</sup> and reflects the government’s recognition of the importance of increasing internet connectivity amongst Kenyan citizens to allow for participation in online life. The policy is aimed at promoting ‘a mobile first approach, ensuring that every Kenyan has reasonable access by focusing on mobile and wireless infrastructure’.<sup>161</sup> This will continue to build on Kenya’s existing success in using mobile technology to provide internet access to more users,<sup>162</sup> and will allow the country to keep pace with global technological developments. It is suggested that ODR can find application and thrive in such an environment, where the majority of Kenyans have access to affordable and reliable internet connections via their mobile devices.

#### 5.4.2. Existing ODR initiatives

Despite the promise of the legislation and policy framework, there are not many ODR mechanisms currently operational in Kenya. The Kenyan Revenue Authority has taken the step of implementing an online dispute resolution mechanism to resolve tax disputes,<sup>163</sup> using ADR as an alternative means of dispute resolution outside of the traditional judicial process.<sup>164</sup> The ADR process was launched in 2015,<sup>165</sup> but was

---

<sup>158</sup> Part 4 National ICT Policy Guidelines.

<sup>159</sup> Part 4 National ICT Policy Guidelines.

<sup>160</sup> Part 4.1. National ICT Policy Guidelines.

<sup>161</sup> Part 4.1. National ICT Policy Guidelines.

<sup>162</sup> Mobile technology has been identified as one of the ways in which the digital divide can be narrowed. For a more detailed discussion of this, see 4.3.1.2 above.

<sup>163</sup> ‘KRA unveils Online Dispute Resolution mechanism’ available at <https://www.kenyanews.go.ke/kra-unveils-online-dispute-resolution-mechanism/>, accessed on 6 June 2023.

<sup>164</sup> Section 1.3 The Alternative Dispute Resolution (ADR) Framework available at <https://www.kra.go.ke/images/publications/ADR-FRAMEWORK.pdf>, accessed on 5 June 2023.

<sup>165</sup> The Alternative Dispute Resolution (ADR) Framework available at <https://www.kra.go.ke/images/publications/ADR-FRAMEWORK.pdf>, accessed on 5 June 2023.

updated to include an online service in 2020 in response to the limitations posed by the COVID-19 pandemic.<sup>166</sup> The pandemic has thus served as a catalyst for the increased uptake of ODR and a renewed interest in ODR as an alternative method for Kenyans to access justice.

Promisingly, since the COVID-19 pandemic, there has been increased use of ICT in traditional litigation proceedings, and the Kenyan courts have already adopted an e-filing system and conducted some hearings using videoconferencing.<sup>167</sup> As such, there is clearly an openness towards incorporating technology into the dispute resolution space, and so it is feasible that there is room in Kenyan law for the introduction of ODR as a method of dispute resolution in its own right.

This assessment is supported by the Kenyan courts' issuing of a collection of practice directions that expressly provide for litigation by telephone, ODR and online enforcement of judgments.<sup>168</sup> Direction 19 states that 'where practicable and taking into account the prevailing circumstances, the Court may make use of teleconferencing, videoconferencing and other appropriate technologies to dispose of any matter'.<sup>169</sup> This is a promising step in the acceptance of the use of ICT in dispute resolution processes, whether litigation or ODR, by the Kenyan government. It is submitted that this acceptance of the necessity of including ICT in dispute resolution by the government<sup>170</sup> and judiciary<sup>171</sup> has the potential to pave the way for the future adoption of ODR on a larger scale in the Kenya legal sphere.

#### 5.5. African Continental Free Trade Area (AfCFTA) Agreement

AfCFTA is the most recent step in building regional integration in Africa and strengthening the economic integration of nations. The agreement establishing the

---

<sup>166</sup> KRA unveils Online Dispute Resolution mechanism' available at <https://www.kenyanews.go.ke/kra-unveils-online-dispute-resolution-mechanism/>, accessed on 6 June 2023.

<sup>167</sup> Rooney op cit at 125.

<sup>168</sup> GG Vol CXXII No 67 GNN 3137 of 17 April 2020.

<sup>169</sup> Direction 19 GNN 3137 of 17 April 2020.

<sup>170</sup> Kariuki op cit at 71.

<sup>171</sup> See generally DO Odima 'E-Justice: define steps by the judiciary of Kenya' (2014) *Scientific Conference Proceedings for an explanation of the measures taken by the judiciary to include ICT in their functioning*; Judiciary of Kenya *Practice Directions on standardization of Practice & Procedures in the High Court* (2021).

AfCFTA was adopted in Kigali, Rwanda in 2018,<sup>172</sup> having been signed by 54 African Union (AU) member states as of June 2022<sup>173</sup> and ratified by 49 states as of June 2023.

The overarching goal of the agreement is to create an African single market for goods and services, facilitated by the free movement of persons and capital.<sup>174</sup> The AfCFTA agreement covers matters relating to trade in goods and services, investment, intellectual property rights and competition policy.<sup>175</sup> The AfCFTA is being negotiated in three phases. The first phase comprises trade in goods and services, a dispute settlement mechanism and customs and trade facilitation. The second phase will include intellectual property rights, investment, competition policy, digital trade and provisions for women and the youth in trade.<sup>176</sup> Being so comprehensive in scope, the AfCFTA will cement a tremendous step forward in the economic integration of the African continent.<sup>177</sup>

The only express provision for dispute resolution in the AfCFTA Agreement is found in Article 20, where a Dispute Settlement Mechanism to resolve disputes between State Parties is established.<sup>178</sup> The administration of this mechanism will be done in terms of the Protocol on rules and procedures on the settlement of disputes.<sup>179</sup> However, this Dispute Settlement Protocol focuses on disputes that may arise between member states and not between individual African citizens engaged in intra-continental trade. It is thus submitted that there is still a need for a continental dispute resolution mechanism that fills this gap.

A more important aspect of the AfCFTA Agreement that must be discussed when considering the future use of using ODR in Africa is the highly anticipated

---

<sup>172</sup> T Albert *The African Continental Free Trade Agreement: Opportunities and Challenges* (2019) 5.

<sup>173</sup> <https://auafcfta.org/#:~:text=The%20AfCFTA%20is%20one%20of,investment%20protection%2C%20amongst%20other%20areas.>

<sup>174</sup> Art 3 AfCFTA Agreement.

<sup>175</sup> Art 6 AfCFTA Agreement.

<sup>176</sup> <https://au-afcfta.org/trade-areas/> accessed on 23 June 2023.

<sup>177</sup> D Luke & J MacLeod 'Bringing about inclusive trade in Africa with the African Continental Free Trade Area' in D Luke & J MacLeod (eds) *Inclusive Trade in Africa: The Africa Continental Free Trade in Comparative Perspective* (2019) 1-4 at 4.

<sup>178</sup> Art 20 AfCFTA.

<sup>179</sup> Hereafter 'Dispute Settlement Protocol'.

Protocol on Digital Trade, the development of which was approved by the AU Assembly in 2020 and 2021.<sup>180</sup> This Protocol will be a necessary and welcome addition to the current text of the AfCFTA, especially considering the continental focus on the Fourth Industrial Revolution (4IR).<sup>181</sup> The Protocol on Digital Trade is still being developed,<sup>182</sup> but commentators have highlighted some policy insights that should be considered in the drafting of this protocol.<sup>183</sup>

One of these insights is the acknowledgment that more must be done to facilitate consumer trust in digital trade and provide adequate consumer protection in these interactions.<sup>184</sup> ODR is arguably a measure that can be used to encourage consumer participation in intra-African trade. Having an accessible and affordable method to use in cross-border trade disputes would provide reassurance that any disputes arising from such trade would be resolved and so consumers would have some security in online transactions. In response to the need to strengthen consumer trust in online transactions, it is thus suggested that the proposed Protocol on Digital Trade make express provision for a regional ODR mechanism to resolve disputes arising from cross-border trades, both B2C and B2B.

## 5.6. Comparison and concluding remarks

When considering the positions of the countries identified above, it is clear that the challenges identified in Chapter 4 above have had an effect on the spread of both ICT

---

<sup>180</sup> Assembly/AU/4(XXXIII) of 10 February 2020; Ext/Assembly/AU/Decl.1(XII) of 5 January 2021.

<sup>181</sup> M Chivunga & A Tempest 'Digital disruption in Africa: Mapping innovations for the AfCFTA in Post-COVID times' (2021) *SALIA Occasional Paper* 317 at 66.

<sup>182</sup> 'The Digital Trade protocol...is expected to be concluded in July 2023. AfCFTA Media Release (12 April 2023) available at <https://au-afcfta.org/2023/04/media-release/#:~:text=The%20Digital%20Trade%20protocol%2C%20which,opportunities%20in%20the%20digital%20economy>, accessed on 23 June 2023.

<sup>183</sup> See generally K Banga, J Macleod & M Mendez-Parra 'Digital trade provisions in the AfCFTA: what can we learn from South-South trade agreements' (2021) *Supporting Economic Transformation (SET) working paper series*; T Albert op cit; Chivunga & Tempest op cit; F Sucker 'COVID-19 pushes digital solutions and deepens digital divides: What role for African digital trade law?' (2020) available at <https://www.afronomiclaw.org/2020/05/09/covid-19-pushes-digital-solutions-and-deepens-digital-divides-what-role-for-african-digital-trade-law>, accessed on 21 June 2023.

<sup>184</sup> Banga, Macleod & Mendez-Parra op cit at 24; Kwami Ossadzifo Wonyra & Honoré Tenakoua 'Digitalisation as a driver of intra export promotion under African continental free trade area (AfCFTA)' (2022) 1 at 12 available at <https://ssrn.com/abstract=4014847>, accessed on 19 June 2023; Karishma Banga, Mohamed Gharib, Max Mendez-Parra & Jamie Macleod 'E-commerce in preferential trade agreements: Implications for African firms and the AfCFTA' (2022) *ODI Report* 48.

and ODR in each jurisdiction. The digital divide and the sometimes-fragmented ICT frameworks seem to be the most stubborn obstacles to overcome, and it has been evident that overcoming them will not be an easy process. Despite this, it would seem that South Africa, Nigeria and Kenya are well-placed to spearhead the introduction, study, and growth of ODR in Africa. Although each country's ICT has developed in different ways, they each have certain strengths that would make the adoption and implementation of ODR feasible.

Although each country has approached ICT implementation differently, there are also some similarities to be seen. The main similarity is that of the lack of cohesive ICT frameworks in the listed jurisdictions,<sup>185</sup> as the regulation of different ICT sectors is done through different legislative instruments. Due to this piecemeal method of regulation, there is still some uncertainty about the applicable law in some instances, notably when it comes to the resolution of disputes through online means, or those which have originated online. These lacunae in the law must be noted and an attempt must be made to provide rules to fill in that gap, a suggestion echoed throughout this work.

Despite these lacunae, the outlook seems promising. ODR providers are operational in South Africa, albeit in the private sector, and the success of each of these ventures is encouraging. It is hoped that similar ventures will begin to take root in Nigeria and Kenya, where there is already a policy framework in place to support such undertakings. Kenya has the added strength of their mobile telecommunications network, which has been used to great effect in ensuring that citizens can participate in the global economy. Harnessing this mobile technology to introduce citizens to simple dispute resolution apps is also a possibility for potential ODR providers and should be explored in years to come as technology develops.

Thus, from the detailed consideration of the selected ICT-ready African countries undertaken in this chapter, it is evident that 'whilst African States are

---

<sup>185</sup> '(I)n African countries...legislation relating to consumer protection in e-commerce straddles multiple policy domains and so is found in more than one law, for example, consumer protection law and electronic transaction legislation.' Best & Struwig op cit at 123.

developing at different degrees given the intertwined matrix of techno-legal, socio-political, and economic infrastructures, ODR is no longer a distant dream, but rather a very much proximate reality.<sup>186</sup>

---

<sup>186</sup> Abdel Wahab (2012) op cit at 583.

## CHAPTER 6: RECOMMENDATIONS FOR AN AFRICA-CENTRED APPROACH TO ONLINE DISPUTE RESOLUTION`

*'The issue now facing researchers, practitioners and policy-makers is not whether to use ODR, but rather how to best employ ODR.'*<sup>1</sup>

### 6.1. Introduction

Having considered the origins of ODR,<sup>2</sup> the challenges of implementing ODR in various contexts<sup>3</sup> and the current state of ODR in African countries identified as technological leaders,<sup>4</sup> the discussion must now turn to how an Africa-centered approach to ODR would look, bearing in mind the findings in Chapters 4 and 5 above and building on the previous discussion of existing regulatory instruments.<sup>5</sup>

One of the threads running throughout this work has been the acknowledgment that the regulation of ODR is very fragmented, with no overarching enforceable standards that can be used when setting up ODR mechanisms in different contexts and countries.<sup>6</sup> It is understandable, however, that no such standards exist, given that ODR crosses borders and jurisdictions, and it would be practically impossible to enforce the same standards uniformly across the world. Perhaps this is why Liyanage suggests that 'many scholars advocate diverse regulatory approaches which could be applicable to ODR because of the absence of a specific regulatory approach...'.<sup>7</sup> In keeping with this line of thinking, it is suggested here that instead of conceiving of ODR regulation as being rooted in legislation, it should be based on custom, drawing on international standards and norms to create

---

<sup>1</sup> Ayelet Sela 'Can computers be fair: How automated and human-powered Online Dispute Resolution affect procedural justice in mediation and arbitration' (2018) 33 *Ohio State Journal on Dispute Resolution* 91 at 138.

<sup>2</sup> Chapter 2 above.

<sup>3</sup> Chapter 4 above.

<sup>4</sup> Chapter 5 above.

<sup>5</sup> Chapter 3 above.

<sup>6</sup> Fahimeh Abedi, John Zeleznikow & Chris Brien 'Universal standards for the concept of fairness in Online Dispute Resolution in B2C e-disputes' (2019) 34 *Ohio State Journal on Dispute Resolution* 357 at 392; Albornoz & Martín op cit at 58; Susan Nauss Exon 'Ethics and Online Dispute Resolution: From evolution to revolution' (2017) 32 *Ohio State Journal on Dispute Resolution* 609 at 631.

<sup>7</sup> Liyanage op cit at 259. Wasser supports this, saying that 'to bolster only the best and the truest ODR justice, we must first answer a great number of nuanced questions of morality, engineering, and the role of government in an accelerating future. This must be primarily left up to academic journalism, as neither the public nor the private sector is properly equipped for this task.' Wasser op cit at 275.

a customary best practice in the same vein as the *lex mercatoria*, a '*lex electronica*'<sup>8</sup> as the case may be. Lodder and Bol appear to support this type of approach, saying that ODR requires a blend of existing legal principles like fairness and accountability and new principles specifically for application in the online environment.<sup>9</sup> The use of such guiding principles will help to ensure that ODR complies with baseline standards of both procedural and substantive quality, which is desirable in any dispute resolution process.<sup>10</sup>

This chapter will thus explore various the norms and principles that have come to govern ODR in different contexts; first considering those which are seemingly universal, then identifying how these principles could be tailored to the regulation and implementation of ODR in Africa. Lastly, some recommendations will be made about potential African Principles of ODR that could find application in the future.

## 6.2. ODR 'best practice': Principles for successful ODR

It is widely acknowledged that there is a difficulty in establishing international ODR regulation systems.<sup>11</sup> The reasons for this are many. Cross-border disputes already raise questions of choice of law, jurisdiction, enforcement, and general regulatory practices, given that different countries' rules would potentially be applicable. These questions become even more complicated when the online element is added,<sup>12</sup> and academics have attempted to theorise about how best to regulate ODR across

---

<sup>8</sup> Katsh (et al) op cit at 725; Michael G Bowers 'Implementing an Online Dispute Resolution scheme: Using domain name registration contracts to create a workable framework' (2011) 64 *Vanderbilt Law Review* 1265 at 1291; Schultz (2007) op cit at 153. Patrikios refers to this customary electronic law as the *lex informatica*, which he describes as 'the body of transnational substantive rules of e-business law and usages, as well as the method of their application for the resolution of e-disputes by arbitration'. Antonis Patrikios 'Resolution of cross-border e-business disputes by arbitration tribunals on the basis of transnational substantive rules of law and e-business usages: The emergence of the *Lex Informatica*' (2006) 38 *University of Toledo Law Review* 271 at 274.

<sup>9</sup> Arno R Lodder & Stephanie H Bol 'Towards an online negotiation environment: Legal principles, technical requirements and the need for close cooperation' (2003) *ADRJ Online Monthly* 7 at 9.

<sup>10</sup> 'In the context of dispute resolution, it is broadly acknowledged that the quality of the process leading to an outcome is just as important as the substantive quality – often designated as accuracy, or truth – of that outcome.' Fabien Gélinas 'Managing procedural expectations in small claims ODR' (2019) 6 (1) *International Journal of Online Dispute Resolution* 54 at 54.

<sup>11</sup> 'Much of the conflict surrounding ODR is based on the differing views espoused by various countries...' Ibid at 1289. Also see Bates op cit at 867-83; Wing op cit at 17-18.

<sup>12</sup> 'Calls for international treaties establishing ODR norms or standard practices are thus limited by the ability of the countries to agree on practical regulations.' Bowers op cit at 1292; Abernethy op cit.

borders.<sup>13</sup> The presence of these theories (however disparate) indicates a basic level of agreement that there is a need for laws to encourage, facilitate and enforce the use of ODR mechanisms,<sup>14</sup> and some steps in this direction have already been taken by regional organisations<sup>15</sup> and governments.<sup>16</sup>

It is submitted that it is not realistic or feasible to develop a global regulatory system for ODR, given the large technological and economic disparities between individual countries, between geographical regions and even between economic blocs.<sup>17</sup> Instead, the focus should be on finding commonalities across the existing instruments and market practices and using these to distil general guiding principles<sup>18</sup> that should be applied in ODR governance.<sup>19</sup>

This process has already begun, with selected regional bodies introducing their own guiding principles.<sup>20</sup> The various guiding principles have broadly been referred

---

<sup>13</sup> See 4.4.4 above for a discussion of the various approaches to the regulation of cross-border ODR. See also Graf-Peter Calliess 'Online Dispute Resolution: Consumer redress in a global market place' (2006) 7(8) *German Law Journal* 647 at 654 and Liyanage op cit at 261.

<sup>14</sup> Omoola & Oseni op cit at 274.

<sup>15</sup> See the discussion of the EU approach to ODR regulation at 3.2 above, the discussion of the OAS Draft [Model Law / Cooperative Framework] at 3.4.1 and the APEC Model Procedural Rules at 3.4.2.

<sup>16</sup> An example of this realisation can be seen in the Australian Guidelines for Electronic Commerce (2006), which specifically provides guidelines for ODR use in the context of e-commerce. For initiatives undertaken by individual governments, see the South African, Nigerian, and Kenyan policy documents and guidelines discussed at Chapter 5 above.

<sup>17</sup> See 4.3.1 above.

<sup>18</sup> 'Moreover, as the regulation of cyberspace is being carved up, there is also plenty of room for soft law rules resulting from self regulation by the different private stakeholders in the world of ODR. It is precisely in the online environment for dispute resolution that best practices and codes of conduct are generated.' Albornoz & Martín op cit at 58.

<sup>19</sup> 'Irrespective of whether ODR is implemented at the international or domestic level, there are universal principles that must be adhered to. These standards encapsulate the inherent principles of dispute resolution: justice, fairness and neutrality.' Teresa Ballesteros 'International perspectives on online dispute resolution in the e-commerce landscape' (2021) 8(2) *International Journal on Online Dispute Resolution* 85 at 87.

<sup>20</sup> 'Russian Online Arbitration Rules Come Into Force' available at <http://arbitrations.ru/en/presscentr/news/the-online-arbitration-regulation-comes-into-force/>, accessed on 12 June 2023; American Bar Association (ABA) Task Force on E-Commerce and ADR 'Recommended Best Practices for Online Dispute Resolution Service Providers' available at <https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/BestPracticesFinal102802.authcheckdam.pdf>, accessed on 12 June 2023; National Centre for Technology and Dispute Resolution 'Online dispute resolution standards of practice' (2009) available at <https://www.icann.org/en/system/files/files/odr-standards-of-practice-en.pdf>, accessed on 12 June 2023.

to as an ‘ODR user guide, roadmap or protocol’,<sup>21</sup> as ‘it is imperative...that ethical principles designed for ODR are included in the thinking behind the development of ODR systems design and practices, standards and legislation.’<sup>22</sup> Thus, in this section, the most common principles found across instruments will be highlighted and explored, with a view to compiling ODR best practice guidelines tailored to the unique challenges faced in African countries.

The main principles examined here will thus be fairness, transparency, due process, and accountability, prescribed as guiding principles underpinning ODR in Section II of the UNCITRAL Technical Notes.<sup>23</sup> These principles have also been identified in other instruments<sup>24</sup> and by authors prescribing an ethical ODR framework,<sup>25</sup> and so it can be accepted that they amount to commonly accepted foundational principles that should underpin any effective ODR process. Further investigation of each principle and how it could find practical application is thus warranted.

---

<sup>21</sup> Faye Fangfei Wang 'Online Dispute Resolution: Best practices in comparative perspective' (2017) 12 *Journal of Comparative Law* 472 at 481. Wing refers to it as a ‘GPS device’ in Leah Wing 'Ethical principles for Online Dispute Resolution: A GPS device for the field' (2016) 3 *International Journal of Online Dispute Resolution* 12 at 13, arguing that the use of ethical principles to govern the ODR process will ‘enhance the quality, effectiveness and scope of dispute resolution processes that employ technology.’

<sup>22</sup> Wing op cit at 20.

<sup>23</sup> See discussion at 3.3.1.2 above. Katsh and Rabinovich-Einy describe these principles as ‘the values and goals associated with public dispute resolution’ in Katsh & Rabinovich-Einy *Digital Justice* 154. See also Cashman & Ginnivan op cit at 48.

<sup>24</sup> International Council for Online Dispute Resolution (ICODR) *ICODR Standards*; Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/ EC (Regulation on consumer ODR), OJ L 165, Recitals (6), (27) and (29); Article 13. In the context of consumer protection, the United Nations has also identified these principles as being important, with section 37 of the Guidelines of Consumer Protection stating that ‘Member States should encourage the development of fair, effective, transparent and impartial mechanisms to address consumer complaints through administrative, judicial and alternative dispute resolution, including for cross-border cases.’

<sup>25</sup> Schmitz (2018) op cit at 43; Shope op cit at 74-76; P Motion 'Article 17 ECD: Encouragement of Alternative Dispute Resolution On-line Dispute Resolution: A view from Scotland' in L Edwards (ed) *The New Legal Framework for E-commerce in Europe* (2005) 137 at 148; Wing op cit at 13; Eddie Hurter 'An analysis of a new state of the art South African Online Dispute Resolution system' (2004) 16 *South African Mercantile Law Journal* 779 at 787; CCK Kumtepe 'A brief introduction to blockchain dispute resolution' (2021) XIV 2 *John Marshall Law Journal* 139 at 146.

### 6.2.1. Fairness

Fairness must be a foundational principle for any proposed system of dispute resolution, as '(a)ny dispute resolution system is ineffective if it is unfair.'<sup>26</sup> In the context of ODR, the focus has generally been on procedural fairness.<sup>27</sup> According to Hörnle, 'procedural fairness is not concerned with the outcome of the allocation but rather the procedure of getting there.'<sup>28</sup> Although it is accepted that procedural fairness is what must be aspired to when creating an ODR process, there is also some difficulty in determining what such fairness would entail. Fairness is an abstract and amorphous principle, as different meanings are imposed upon it depending on context and beholder.<sup>29</sup>

Despite the acknowledgement of the importance of fairness as a guiding principle in ODR, 'there is not a binding international legal instrument that regulates the procedural fairness of ODR rules. The Technical Notes on ODR issued by the UNCITRAL Working Group III on ODR (Technical Notes) set out rather general principles for ODR entities without any binding effect.'<sup>30</sup> Although these Technical Notes identify that fairness is necessary for a functioning ODR process,<sup>31</sup> no further content is given as to what such fairness would entail in a practical sense,<sup>32</sup> adding to the questions around the efficacy of the Technical Notes.<sup>33</sup>

A potential entry point to determining what fairness would mean in the ODR context is the consideration of the link between fairness and consumer trust,<sup>34</sup> as a

---

<sup>26</sup> Schmitz (2018) op cit at 41; Abedi, Zeleznikow & Brien op cit at 360.

<sup>27</sup> Zheng *Online Resolution of E-commerce Disputes* 212; Katsh & Rabinovich-Einy *Digital Justice* 51; Exon op cit at 631; Sourdin, Li & Burke op cit at 23.

<sup>28</sup> Hörnle *Cross-border Internet Dispute Resolution* 4; Reddy op cit at 387.

<sup>29</sup> 'Justice or fairness is a necessary principle for ODR systems. All actors involved in ODR regulation can easily agree on the abstract need for fairness, while their interpretations and concepts of fairness differ widely.' Abedi, Zeleznikow & Brien op cit at 360; Felicity Bell 'Family law, access to justice, and automation' (2019) 19 *Macquarie Law Journal* 103 at 129; Hörnle *Cross-border Internet Dispute Resolution* 4.

<sup>30</sup> Zheng *Online Resolution of E-Commerce Disputes* 213.

<sup>31</sup> Note 7 UNCITRAL Technical Notes.

<sup>32</sup> Zheng *Online Resolution of E-Commerce Disputes* 215.

<sup>33</sup> See 3.3.3.13 above.

<sup>34</sup> 'Services that can demonstrate higher fairness, would be better at building trust with users, and ultimately will be more likely to be used.' O Turel, YF Yuan & CE Connelly 'In justice we trust: Predicting user acceptance of e-customer services' (2008) 24(4) *Journal of Management Information Systems* 123 at 142; Habuka & Rule op cit at 86.

'component of building consumer trust in an ODR system is in ensuring the reliability and the perceived fairness of the proceedings.'<sup>35</sup> It is thus both the actual procedural fairness and the perception of such fairness<sup>36</sup> that must be considered by those seeking to create and implement successful ODR systems.<sup>37</sup> Prospective ODR users seek fair and consistent outcomes from the process,<sup>38</sup> and thus the fairness of any given ODR procedure must be apparent to an outside viewer.

How, then, would one determine whether a process is truly fair and whether it is also seen to be fair? An attempt at identifying markers of fairness in the ODR process has been made by Abedi, Zeleznikow and Brien.<sup>39</sup> They have identified six elements that can be used to measure the procedural fairness of ODR systems. These elements are equal treatment, respect, neutrality, trustworthiness, consistency, and ethicality.<sup>40</sup> This identification is relatively recent, and it will be interesting to see how ODR stakeholders engage with these markers of fairness in both the regulation of ODR and in ODR systems design. An aspect of ODR that can provide assistance in the assessment of fairness of ODR is the ease of collecting data, as it is generally processed through an ODR provider and thus there should be an electronic record of the entire process.<sup>41</sup> Looking for the abovementioned markers in those electronic records would be an effective method of assessing the fairness of any given ODR process, and it would be a practical way of ensuring that this principle is complied with.<sup>42</sup>

---

<sup>35</sup> Bowers op cit at 1301; Braeutigam op cit at 102-103.

<sup>36</sup> Bashar H Malkawi 'Online alternative dispute resolution and transparency' (2009) 2 *Contemporary Asia Arbitration Journal* 101 at 103; Orna Rabinovich-Einy & Ethan Katsh 'Digital justice: Reshaping boundaries in an Online Dispute Resolution environment' (2014) 1 *International Journal of Online Dispute Resolution* 5 at 16.

<sup>37</sup> 'Alongside efficiency, dispute resolution mechanisms will have to ensure fairness if they are to sustain their legitimacy.' Ibid at 36.

<sup>38</sup> Orna Rabinovich-Einy 'Reflecting on ODR: The Israeli Example' (2008) available at [https://www.researchgate.net/publication/221172969\\_Reflectingon\\_ODR\\_The\\_Israeli\\_Example](https://www.researchgate.net/publication/221172969_Reflectingon_ODR_The_Israeli_Example), accessed on 2 June 2022; Ebner & Zeleznikow (2015) op cit at 149; Ebner & Greenberg op cit at 95; Abedi, Zeleznikow & Brien op cit at 367.

<sup>39</sup> Ibid at 368.

<sup>40</sup> Ibid at 392.

<sup>41</sup> Amy J Schmitz 'A blueprint for Online Dispute Resolution system design' (2018) 21 *Journal of Internet Law* 1 at 4.

<sup>42</sup> 'Various features of ODR that were initially viewed as short-comings, such as documentation, are now seen as potentially advantageous by facilitating better monitoring, quality control, consistency,

Despite this identification of potential markers to use when assessing fairness of ODR processes, Condlin has noted that ‘the case for ODR is still weak on justice and fairness’<sup>43</sup> and so there is still room for further engagement with and development of fairness standards. Rabinovich-Einy and Katsh are in agreement with this, stating that ‘the potential for enhancing both efficiency and fairness through ODR and mitigating the tension between public and private justice remains unrealized.’<sup>44</sup>

### 6.2.2. Transparency

Transparency is another essential part of any justice system, and ensures accessibility and accountability.<sup>45</sup> Although the principle is very closely linked to fairness,<sup>46</sup> it must be considered as an essential component<sup>47</sup> of a successful ODR process in its own right, and has thus been included as such in some of the regional guidelines on ODR.<sup>48</sup> Some authors have posited that transparency is a prerequisite for an ODR process to be considered fair,<sup>49</sup> as a fair dispute resolution process is one where parties can see and understand the decision-making process, and thus have access to sufficient information to challenge any perceived unfairness.<sup>50</sup>

According to Martinez, ‘transparency pertains both to clarity on how the system works and the resulting case outcomes, subject to preservation of

---

and a higher degree of transparency in informal dispute resolution.’ E Latifah, A H Bajrektarevic & M N Imanullah ‘The shifting of alternative dispute resolution: From traditional form to the online dispute resolution’ (2019) 6(1) *Brawijaya Law Journal* 27 at 35.

<sup>43</sup> Condlin op cit at 756. Stylianou supports this, saying that ‘(p)erhaps the most consistent and convincing criticism of online dispute resolution stems from concerns of procedural and substantive fairness.’ Stylianou op cit at 124.

<sup>44</sup> Orna Rabinovich-Einy & Ethan Katsh ‘A new relationship between public and private dispute resolution: Lessons from Online Dispute Resolution’ (2017) 32 *Ohio State Journal on Dispute Resolution* 695 at 720.

<sup>45</sup> Cashman & Ginnivan op cit at 55.

<sup>46</sup> Ebner & Zeleznikow (2015) op cit at 153; Abedi, Zeleznikow & Brien op cit at 361.

<sup>47</sup> ‘Another critical aspect of ODR is the notion of transparency, which helps to increase trust in ODR services.’ Kaya & Khan op cit at 109.

<sup>48</sup> UNCITRAL Technical Notes op cit; OAS Draft Model Law / Cooperative Framework for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes op cit; Wing op cit at 24-27.

<sup>49</sup> Ebner & Zeleznikow op cit at 159; Hurter (2004) op cit at 788; Anjanette H Raymond & Scott J Shackelford ‘Technology, ethics, and access to justice: Should an algorithm be deciding your case’ (2014) 35 *Michigan Journal of International Law* 485 at 522; Schmitz (2018) op cit at 5.

<sup>50</sup> John Zeleznikow & Emilia Bellucci ‘Legal fairness in Alternative Dispute Resolution processes - Implications for research and teaching’ (2012) 23 *Australasian Dispute Resolution Journal* 265.

confidentiality.<sup>51</sup> It is thus imperative that ODR service providers provide potential users with information about themselves, their services, the dispute resolution process itself and any third party neutrals that must be involved.<sup>52</sup> Schmitz takes this a step further, proposing that transparency also includes the responsibility to conduct regular audits, placing a duty on ODR administrators to provide reports to auditors who can assess whether the use of technology is truly promoting fairness in the dispute resolution process.<sup>53</sup> This proposal is made in the context of courts using ODR, but can also find application in other ODR processes as a way of maximising transparency and encouraging consumer trust.

However, mere disclosure is not sufficient to create an informed potential ODR user. Van Arsdale suggests that the information provided must also be understandable and easily accessible, presented in a way that emphasises the key information.<sup>54</sup> Such a detailed presentation of information would serve to assist potential users in making an informed choice about whether any given ODR system would be suitable for them,<sup>55</sup> and would arguably do much to promote trust in the ODR process<sup>56</sup> by educating outside parties about what such a process would entail.<sup>57</sup>

Regarding the case outcomes, these must also be made available so that there is transparency about the quality and impartiality of the resolution itself,<sup>58</sup> regardless

---

<sup>51</sup> Janet K Martinez 'Designing Online Dispute Resolution' (2020) *Journal of Dispute Resolution* 135 at 144.

<sup>52</sup> Zheng *Online Resolution of E-commerce Disputes* 265; Hurter (2004) op cit at 788; Exon op cit at 631; Wing op cit at 27.

<sup>53</sup> Amy J Schmitz 'Dangers of digitizing due process' (2020) available at <https://ssrn.com/abstract=3525757>, accessed on 24 June 2023. Also see Devin Cooper 'Utah, ODR, and the new "Millennial"um' (2021) 35 *BYU Journal of Public Law* 261 at 292-293.

<sup>54</sup> Van Arsdale op cit at 126.

<sup>55</sup> Malkawi op cit at 103; Cabral, Chavan, Clarke (et al) op cit at 302; Cooper op cit at 292.

<sup>56</sup> 'Transparency is one of the key elements encouraging trust in reliance on ODR, because availability of full information is useful for ODR users to determine whether or not the ODR provider is trustworthy, whether effective redress mechanisms are available, whether the cost and duration is reasonable and whether it is suitable for their nature of disputes.' Wang op cit at 484.

<sup>57</sup> Zheng *Online Resolution of E-commerce Disputes* 265.

<sup>58</sup> Malkawi op cit at 110; Ramasastry op cit at 173; Ruha Devanesan & Jeffrey Aresty 'ODR and justice - An evaluation of Online Dispute Resolution's interplay with traditional theories of justice' in E Katsh, D Rainey & M Abdel Wahab (eds) *Online Dispute Resolution: Theory and Practice* (2012) 251 at 265.

of the form that that resolution takes. Malkawi opines that publishing ODR outcomes allows parties to anticipate the consequences of their actions and begins to create a sense of predictability,<sup>59</sup> presumably through highlighting patterns in the outcomes of specific types of disputes. Welsh supports this, stating that 'ODR creates a unique opportunity to collect, analyze, and make public substantial amounts of data in order to assess the innovation's effects and detect problematic patterns.'<sup>60</sup> The increased documentation of the dispute resolution process offered by ODR is thus an advantage,<sup>61</sup> promoting transparency and subsequently promoting fairness and accountability.

An important counterpoint to transparency that must be considered in the implementation of ODR across sectors is the need for confidentiality, as the two principles would initially appear to be opposites. Whilst transparency requires openness and accessibility throughout the dispute resolution process, considerations of confidentiality must also be taken into account, as parties to a dispute would want some reassurance that any personal information divulged by them during the dispute resolution process would be protected. Although ODR offers many advantages, it cannot be denied that there is still potential for error, especially given the unique threats to privacy that exist online.<sup>62</sup> Confidentiality and privacy must thus also be features of a successful ODR process<sup>63</sup> and ODR providers must strike a balance between keeping parties' information confidential and making the process a transparent and fair one.<sup>64</sup>

---

<sup>59</sup> Malkawi op cit at 110.

<sup>60</sup> Nancy A Welsh 'Bringing transparency and accountability (with a dash of competition) to court-connected dispute resolution' (2020) 88 *Fordham Law Review* 2449 at 2497.

<sup>61</sup> Katsh & Rabinovich-Einy *Digital Justice* 179.

<sup>62</sup> Welsh op cit at 2498.

<sup>63</sup> See the definition and discussion of confidentiality at 4.4.3. above. Also see Heather Scheiwe Kulp & Amy J Schmitz 'Real feedback from real people: Emphasizing user-centric designs for Court ODR' (2020) 26(2) *Dispute Resolution Magazine* 6 at 10.

<sup>64</sup> Wang op cit at 488.

### 6.2.3. Due process

A much-debated value amongst ODR proponents and critics has been that of due process, a necessary part of any dispute resolution process.<sup>65</sup> At its essence, 'due process guarantees meaningful notice and an opportunity to be heard.'<sup>66</sup>

The UNCITRAL Technical Notes acknowledge that the principle of due process is a foundational one, and gives content to it in the following way:

'It is desirable that ODR proceedings be subject to the same confidentiality and due process standards that apply to dispute resolution proceedings in an offline context, in particular independence, neutrality and impartiality.'<sup>67</sup>

The Technical Notes expressly include the values of independence, neutrality, and impartiality under the broader heading of due process, an approach taken by other authors as well.<sup>68</sup> Hörnle describes due process as being composed of two fundamental principles: the impartiality of judges and the principle of a fair hearing.<sup>69</sup> Construing due process in this way positions it as the 'active' part of fairness, giving practical effect to the more abstract concept. There can thus be no doubt that due process and fairness are interlinked,<sup>70</sup> and thus it could be useful to look at how due process can be achieved in ODR, given that it takes place outside the traditional court structures of judges and hearings.

As more focus is beginning to be placed on the regulation of the online space and ODR, it has been suggested that 'legal scholars and systems experts must work together to shape the contours of due process in this automated age.'<sup>71</sup> This is a necessity, as adherence to due process standards is key for creating trust in the ODR process and outcomes,<sup>72</sup> especially when ODR is used to perform a public function.<sup>73</sup>

---

<sup>65</sup> Shang & Guo op cit at 35; Gélinas op cit at 56.

<sup>66</sup> Danielle Keats Citron 'Technological due process' (2008) 85 *Washington University Law Review* 1249 at 1305.

<sup>67</sup> Note 53 UNCITRAL Technical Notes.

<sup>68</sup> Gross op cit at 723.

<sup>69</sup> Hörnle *Cross-border Internet Dispute Resolution* 13.

<sup>70</sup> Hörnle *Cross-border Internet Dispute Resolution* 18; Wing op cit at 25; Jeretina op cit at 60.

<sup>71</sup> Citron op cit at 1301.

<sup>72</sup> Schmidt-Kessen (et al) op cit at 681.

<sup>73</sup> Van Gelder op cit at 226; Jeretina op cit at 61.

Wing posits that due process is already part of the design and implementation of ODR processes, saying that they are a reflection of the communities and stakeholders that they arise from and serve.<sup>74</sup> This may be too optimistic a view, considering that bias could still play a role in these processes where the ODR facilitator is human, or where an algorithm has been created that fails to take variations in situations into account.<sup>75</sup>

It is thus suggested that it is difficult to create a set of general due process standards for ODR, considering that the term serves as an umbrella for a variety of dispute resolution methods.<sup>76</sup> Cortés suggests a flexible approach, proposing that ‘the adequate level of due process should vary according to the value and complexity of the dispute...While procedural standards need to be broad enough to encompass various processes, they also need to be sufficiently narrow to guarantee an acceptable level of due process.’<sup>77</sup> How such a balance is to be achieved practically is as yet unclear, but what is certain is that considerations of due process must inform an ODR process for it to be viable.

#### 6.2.4. Accountability

Linked to each of the above principles is the principle of accountability. Broadly speaking, the aim of accountability is to ‘ensure that decision-makers exert power in a fair and effective manner.’<sup>78</sup> In the context of ODR, this means that those developing and implementing any ODR process must be accountable to the communities that they operate in.<sup>79</sup> Such accountability necessarily includes aspects of transparency,<sup>80</sup> as an ODR process must be accessible to outsiders so that it can be observed and measured against accepted standards of fairness and due process. Having accountability measures in place would promote compliance with minimum ethical and procedural standards on the part of ODR providers,<sup>81</sup> as there would then

---

<sup>74</sup> Wing op cit at 25.

<sup>75</sup> ‘In ODR, inefficiency, errors, or bias can be hidden under nicely crafted computer interfaces based on the way the program was constructed.’ Morek op cit at 188-189. Also see Shang & Gao op cit at 37-38.

<sup>76</sup> Pablo Cortés *The Law of Consumer Redress* 191.

<sup>77</sup> Pablo Cortés *The Law of Consumer Redress* 191.

<sup>78</sup> Rabinovich-Einy (2006) op cit at 260.

<sup>79</sup> Wing op cit at 25.

<sup>80</sup> Schmitz & Wing op cit at 22.

<sup>81</sup> Wing (et al) op cit at 14.

be consequences for any failure to do so. This brings an element of certainty to any ODR proceedings and would arguably ensure a certain quality level as well.

Rabinovich-Einy states that accountability can be created either formally or informally. Formal accountability measures are those which are imposed by a legal source, such as legislation or policy guidelines. Informal accountability measures are based in people's behaviour and include things like accepted standards of professionalism and concerns about reputation.<sup>82</sup> It is suggested that both methods of creating accountability can find application in ODR and would depend on the type of ODR process. For example, a more complicated dispute resolution process would warrant a more formal system of accountability and more regulation. Thus, accountability should be approached in a similar way to due process, as a flexible principle that takes a different form according to context.

These foundational principles of fairness, transparency, due process, and accountability are thus all strongly linked and the relationship between them has been construed differently by different authors and instruments, as evidenced by the above discussion. Despite the difficulty sometimes experienced in differentiating between these principles and in determining how they should find application, they must all be present in any given ODR system for that system to be viable. Ensuring that these principles are given effect to would also go some way to overcoming the challenges that typically impede the successful uptake of ODR,<sup>83</sup> and thus the relationship between these principles and the identified ODR challenges must be further examined.

### 6.3. Using foundational principles to address the regional challenges

In Chapter 4 above, it was asserted that there are three broad groupings of challenges that would impact the successful implementation of ODR in Africa: economic

---

<sup>82</sup> Rabinovich-Einy (2006) op cit at 261.

<sup>83</sup> Wing agrees with this, stating that 'there are a number of challenges that both ADR and ODR have faced for more than a generation, including unequal access to resources, power imbalances, privileging of repeat players and other access to justice issues. Employing ethical principles may assist in finding strategies for tackling some of these concerns, especially with the help of technology.' Wing op cit at 28.

challenges,<sup>84</sup> technological challenges<sup>85</sup> and socio-cultural challenges.<sup>86</sup> Although addressing the economic challenges is not within the scope of ODR guidelines as they require larger-scale political intervention, attention must be paid to how having minimum standards for ODR implementation can alleviate some of the technological and socio-cultural challenges.

Regarding the technological challenges, promising developments have already taken place that have served to change the face of ODR. As mentioned above, the role of the fourth party has grown,<sup>87</sup> with technology being used to a greater extent in ODR.<sup>88</sup> Smart contracts, blockchain and AI have become a regular feature of doing business, and their relationship with ODR must be examined more closely. ODR processes are already being adapted by this technology, using algorithms and AI to process information<sup>89</sup> and using blockchain and smart contracts to create self-enforcement mechanisms for ODR.<sup>90</sup> Smart contracts are especially interesting as they consist of computer code and exist on the blockchain,<sup>91</sup> meaning that they are entirely different to traditional contracts and thus disputes arising from them require an online resolution.<sup>92</sup> Schmitz and Rule propose ODR as a solution for smart contract dispute resolution, suggesting that it be built into smart contracts, with the ODR process being embedded in the code and automatically operating when a dispute arises.<sup>93</sup>

Using ODR in conjunction with such high technology could have an impact on the values underpinning ODR,<sup>94</sup> as new ways of contemplating and applying ODR

---

<sup>84</sup> See 4.2 above.

<sup>85</sup> See 4.3 above.

<sup>86</sup> See 4.4 above.

<sup>87</sup> See 2.2.4.3 above.

<sup>88</sup> Rule (2020) op cit at 287-288; Katsh & Rabinovich-Einy *Digital Justice* 47; Chaisse & Kirkwood op cit at 68.

<sup>89</sup> Katsh & Rabinovich-Einy *Digital Justice* 47; Rabinovich-Einy (2021) op cit at 126.

<sup>90</sup> Ortolani op cit at 598-602; Janet Hui Xue & Ralph Holz 'Applying smart contracts in online dispute resolutions on a large scale and its regulatory implications' in M Ragnedda & G Destefanis (eds) *Blockchain and Web 3.0: Social, Economic, and Technological Challenges* (2019); Koulu (2016) op cit at 40.

<sup>91</sup> Schmitz & Rule (2019) op cit at 103.

<sup>92</sup> Wulf A Kaal & Craig Calcaterra 'Crypto transaction dispute resolution' (2018) 73 *Business Law* 1 at 37-38.

<sup>93</sup> Ibid at 105; Jakub J Szczerbowski 'Place of smart contracts in civil law. A few comments on form and interpretation' (2017) *Law & Society: Private Law – Contracts eJournal* 1.

<sup>94</sup> See 2.2.4.3 above.

would give rise to different ethical and policy considerations. As such, any proposed guiding principles for ODR would also have to include some consideration of the rate at which technology is growing and the impact that more advanced development would have on the integrity of ODR processes.<sup>95</sup> A main concern about ODR in blockchain and smart contracts is the anonymity that these platforms present, as everything happens automatically and parties cannot challenge the neutrals.<sup>96</sup> This anonymity would have an adverse effect on the transparency of the process, which would also affect fairness and due process. As such, any proposed ODR guidelines must be flexible, allowing for the possibility of dispute resolution without any human neutrals and leaving room for a new conception of fairness in the context of fully automated dispute resolution.

Regarding socio-cultural challenges, the main concerns are the questions surrounding trust, privacy and confidentiality and the ongoing uncertainty about the best way to give effect to ODR outcomes. To a lesser extent, issues of language and multicultural inclusion can also be addressed by having baseline principles that ODR processes must comply with.

User trust in ODR is an overwhelming and ongoing concern, as ODR will only be a feasible method of dispute resolution if enough users buy into the idea of using it. Requiring ODR providers to disclose certain information is one way to promote trust in the ODR process, as is requiring providers to keep records of the disputes processed. This ensures transparency and accountability, allowing potential users insight into how their claims will be processed. Having such transparency and accountability measures in place and allowing outsiders to see how a process takes place arguably also incentivises ODR providers to conduct the process impartially and fairly, knowing that any perceived unfairness could be challenged. It is submitted that this is especially important in the African context, given that ODR has yet to find

---

<sup>95</sup> The potential risks are pointed out by Schmitz, who states that '(w)hile the use of AI and algorithms can be useful to assist in making reasoned judgments, there is a risk that technology will replace human judgment and creativity that computers cannot replicate. In other words, algorithms and machine learning may perpetuate bias or eschew the "human touch" often necessary in some dispute resolution processes.' Schmitz (2020) op cit.

<sup>96</sup> Kadioglu op cit at 147.

widespread use in many African countries. Ensuring that ODR providers adhere to a foundational ethical standard is key to the fostering of consumer trust<sup>97</sup> in ODR and thus promoting a more common use of ODR in Africa.

It is further submitted that any underlying guiding principles for ODR adopted in Africa must expressly address the issues of privacy and confidentiality, to ensure that transparency of the ODR process does not result in vulnerability of the ODR users, especially considering the sensitive nature of the information that is shared during the dispute resolution process. Although this will require a careful balancing of values, such an exercise is a necessity if the ODR process is to find acceptance amongst potential users.<sup>98</sup> It would be instructive to consider the provisions of the SADC Model Law on Data Protection<sup>99</sup> in this regard, as it provides a regional framework for Data Protection, one of the typical areas of concern that users identify when deciding whether to use ODR. Although the Model Law is specifically aimed at Southern African Development Community (SADC) countries, its provisions could also find application in other African nations, serving to provide a unified standard of data protection across the continent and helping to promote privacy and confidentiality in the ODR process.

Accessibility of ODR processes is another value that must be reflected in any guiding principles that would find application in Africa. This value has many facets, from technological to linguistic. It must be accepted that technological accessibility is somewhat difficult to regulate in a guiding principle, as much depends on affordability and availability of devices with which to access the internet, as well as the technological know-how needed to use such devices effectively.<sup>100</sup> It must also

---

<sup>97</sup> 'With or...without government regulation, complete legal transparency is an ethical obligation of private platforms. Beyond providing relevant information restated in lay terms, this must entail checking users' understanding as a lawyer or human mediator certainly would. Such a policy would not only preserve users' rights, but also improve overall ambient trust of ODR systems, bolstering this budding industry.' Wasser op cit at 273.

<sup>98</sup> Kulp & Schmitz op cit at 11.

<sup>99</sup> Southern African Development Community (SADC) *Data Protection Model Law* (2013).

<sup>100</sup> 'To access the benefits of ODR, individuals must still be able to use, and understand how to, the technology associated with an ODR platform. The unshakeable fear is that by incorporating technology in the system design, demographics with limited access to the Internet or knowledge on how to use the Internet would be deprived of the benefits ODR presents.' Tianmiyu op cit at 130.

be recognised that ODR processes must be simple enough to work on a mobile device,<sup>101</sup> given the widespread use of mobile technology in Africa. Regarding linguistic accessibility, some consideration must be given to instituting minimum language requirements for ODR systems to ensure that ODR users can access the process and understand it.<sup>102</sup> This serves to promote transparency, as it would ensure that parties are properly informed of the ODR options available to them.

There is thus much that can be achieved through the implementation of minimum guiding principles, and it is believed that creating such a standard would allow African countries to work around the obstacles currently facing the successful uptake of ODR across the continent.

#### 6.4. Recommended guiding principles for Intra-African ODR

After considering the foundational ODR principles listed above, together with the acknowledgement of the various challenges faced in implementing ODR in Africa, it is suggested that it is time for a regional framework of ODR guidelines. Some basic guiding principles will be proposed here, with the aim of encouraging ICT-ready African states to implement them as minimum standards when creating their own ODR systems and legislative framework. It is suggested that these recommended principles be used as a foundation for further scholarship and development of ODR by private practitioners, governmental bodies, and scholars across Africa. The consideration and development of these principles could be further undertaken by ODRAfrica, to assist in understanding how ODR could successfully be implemented in various African countries.

In suggesting these guiding principles, the elements of fairness, accountability, transparency, and due process as discussed above<sup>103</sup> have been considered. The

---

<sup>101</sup> 'As part of user-centered design, ODR should be designed to be accessible primarily, or concurrently, on mobile devices as well as on desktop or laptop computers.' Kulp & Schmitz op cit at 11.

<sup>102</sup> Loebel supports the consideration of linguistic accessibility when developing ODR standards and systems, saying 'ODR standards should contribute to enabling everybody to file a complaint online in his or her language about anything anywhere in the world with the probability that the complaint would be resolved fairly and quickly, and the process would be user-friendly.' Zbynek Loebel 'Identifying and establishing standard ODR processes' (2016) 3 *International Journal of Online Dispute Resolution* 125 at 125.

<sup>103</sup> See 6.2.1-6.2.4 above.

importance of privacy and user trust has also been noted, and so it is hoped that what is recommended here will address the main concerns that users have about using ODR processes, proceeding from the premise that 'ODR standards or best practices should never stray too far from what the users of ODR might expect from a platform they are required to use to conduct justice-related business'.<sup>104</sup>

The suggested basic principles are thus not aimed at promoting a particular form of ODR but are merely highlighting minimum standards that an ODR system should comply with in order to be most effective. This is in keeping with the approach by Del Duca et al, who state that '(w)here possible, ODR rules should articulate higher-level process requirements and values (e.g. due process, transparency, impartiality) as opposed to detailed procedural requirements (e.g. three neutrals per case, seven days to respond).'<sup>105</sup>

It is suggested that the main principles to consider should be accessibility, transparency, and fairness, as the effective practical implementation of each of these principles will ensure that due process is followed.

#### 6.4.1 Guiding Principles for ODR in Africa

##### *6.4.1.1. Accessibility*

The principle of accessibility is multi-faceted, incorporating physical accessibility, linguistic accessibility, and the requisite knowledge that users must have to access online services.

To be truly accessible, an ODR system must have the following attributes:

- A proposed ODR system must be capable of being used on mobile devices, taking into account the level of mobile penetration in Africa. As such, the software used should be capable of being used across devices, accessible from both fixed and mobile technology.

---

<sup>104</sup> Kulp & Schmitz op cit at 7.

<sup>105</sup> Louis F Del Duca, Colin Rule & Brian Cressman 'Lessons and best practices for designers of fast track, low value, high volume global e-commerce ODR systems' (2015) 4 *Penn State Journal of Law & International Affairs* 242 at 270.

- State parties must ensure that the selected ODR process is accessible in more than one language, giving due consideration to the prevalent languages in the region. It is envisioned that making this language selection could be contentious, as language is an integral part of the colonial history of Africa. However, ODR systems must be accessible across intra-African borders and make provision for the high likelihood that parties will have different home languages, so there should be the option of finding a common language.
- An ODR system must be accompanied by clear instructions to potential users and an explanatory overview of the type of dispute resolution that will be used to address their claims. This will enable users to make an informed choice and choose to use an ODR program that they feel comfortable with.

#### *6.4.1.2. Transparency*

As highlighted above,<sup>106</sup> transparency promotes both accountability and fairness. As such, it includes the disclosure of information and ensuring that parties' consent is obtained throughout the dispute resolution proceedings.

To be sufficiently transparent, an ODR process must include the following:

- An express duty of disclosure on the ODR provider. The ODR provider must be bound to disclose their contact details and provide detailed information about the type of dispute resolution that they conduct, information about any third-party neutrals, and information about the outcomes of the ODR process (removing any sensitive information about the disputing parties).
- A provision requiring the ODR provider, any neutral facilitators, and disputing parties to disclose any conflicts of interest.
- A specific provision about how the users' private information will be safeguarded. This will preferably be with reference to a national<sup>107</sup> or regional legal standard<sup>108</sup> of data protection. Including this as a guiding principle acknowledges the need for confidentiality of sensitive information, providing

---

<sup>106</sup> See 6.2.2 above.

<sup>107</sup> For example, the South African POPI Act (discussed at 5.2.1.5 above) or the Kenyan Data Protection Act (discussed at 5.4.1.4 above).

<sup>108</sup> For example, the Southern African Development Community (SADC) *Data Protection Model Law* (2013).

some reassurance to users that their personal data will not be publicised or used in a manner that they did not agree to.

#### *6.4.1.3. Fairness*

Although the broader concept of fairness encompasses some of what is discussed at 6.4.1.1 and 6.4.1.2, the focus in this proposal is on procedural fairness, in keeping with the approach taken by other authors.<sup>109</sup> Included in this consideration will be measures that must be taken to ensure accountability, as it is submitted that accountability is a prerequisite for a fair process.

To be procedurally fair, an ODR process must promote the following practices:

- The ODR process must be facilitated by an impartial, independent neutral party. If the process is entirely automated, then it must be certified by a human neutral to ensure that there is no bias coded into the program.
- Any proposed ODR facilitator must provide the disputing parties with equal opportunities to have their side heard. If automated, scope must be created for both parties to make representations.
- To promote accountability, parties to the dispute must be able to access a record of their ODR proceedings. Such parties must then also be able to appeal an outcome if they are dissatisfied with it.

Complying with these minimum requirements will ensure that these values are built into African ODR processes, which is a practical first step in addressing some of the obstacles faced in implementing ODR.

#### 6.5. Concluding remarks

After the exploration of the current state of ODR in Africa, this chapter contains an attempt at identifying current accepted standards of ODR best practice. It thus includes a brief survey of the principles most commonly identified as being necessary for any successful ODR process and some discussion of these principles. The aim was to highlight the commonality in these foundational principles and unpack each

---

<sup>109</sup> See 6.2.1 above.

principle for an understanding of why they have been considered to be fundamental.

The guiding principles and ethical considerations that were most often cited were those of fairness, transparency, due process, and accountability, albeit in different permutations. It was acknowledged that it is not always easy to delineate these concepts, as they are often intertwined. An attempt was thus made to disentangle them and to assess how they could find application in the African context. To assist in this assessment, it was necessary to consider how the principles of fairness, transparency, due process, and accountability would relate to the various obstacles to successful ODR implementation in Africa, and whether the practical application of such principles would be sufficient to overcome these difficulties.

Although it is acknowledged that uniform legislative regulation of ODR would not be a realistic goal given the diversity of technological readiness and legislative frameworks across the continent, it is submitted that it would still be valuable to identify certain basic standards that can be used to inform individual countries' development of their own ODR regulations.

Based on the most common guiding principles found in the available literature (fairness, transparency, due process, and accountability), some suggestions have been made about basic guiding principles that can be used to develop African ODR processes. It is proposed that the main principle be that of accessibility, in light of the various challenges faced around internet access and online literacy across Africa. Positioning accessibility as a key principle places value and due emphasis on the need to meet potential ODR users where they are, allowing for mobile access to ODR and prioritising access across borders.

The other principles identified are those of transparency and fairness, which would work together to ensure an independent and impartial dispute resolution process, one which gives effect to due process requirements and creates an ODR process that users can trust in. The principles of transparency and fairness as outlined above<sup>110</sup> emphasise the need to create a safe online environment for potential ODR users in the foreground, in recognition of the ongoing concerns about fairness and

---

<sup>110</sup> See 6.4.1.2 and 6.4.1.3 above.

security that affect user trust in the ODR process. It is believed that using the principles formulated in 6.4.1 above as a preliminary basis for ODR development and implementation in Africa will do much to foster user trust and participation, thus stimulating the growth of ODR across the continent.

## CHAPTER 7: CONCLUSION

*'Although there are challenges in Africa on the use of ODR in the resolution of disputes, it is evident that with time, and the creation of awareness through access to information, ODR will be received and utilized to its maximum in all aspects of online activity.'*<sup>1</sup>

### 7.1. Findings of the study

From the outset of this thesis, the aim was to investigate the potential role that ODR could play in the African dispute resolution landscape and whether it would be suited for widespread use on the continent. To answer the question whether it would be feasible to use ODR systems to resolve various types of disputes on the African continent, various research questions were considered and the technological leaders in Africa were assessed with regard to their ICT readiness and existing ODR programs.

The following aspects were focused on throughout the various chapters: identifying the hallmarks of successfully implemented ODR,<sup>2</sup> understanding the obstacles that have traditionally impeded the development of ODR<sup>3</sup> and assessing how ODR could find application in the unique circumstances found across African countries. Using South Africa, Nigeria and Kenya as examples, the current state of ODR in Africa was examined.<sup>4</sup>

As discussed at length above,<sup>5</sup> ODR originated in the Global North and developed in response to the growth of the internet. Although it was first used to refer to the use of technology to replicate traditional ADR measures when resolving online disputes,<sup>6</sup> it has grown from these beginnings and now encompasses a range of dispute resolution techniques, all incorporating some or other technological aspect. These techniques range from technology-facilitated ADR such as online mediation and online negotiation to entirely automated dispute resolution systems

---

<sup>1</sup> Ononogbu op cit at 86-87.

<sup>2</sup> See Chapter 3 above.

<sup>3</sup> See especially Chapter 4 above.

<sup>4</sup> See the comparative study in Chapter 5 above.

<sup>5</sup> See the overview of the historical development of ODR in Chapter 2 above.

<sup>6</sup> Katsh (1996) op cit at 22-23; Chan op cit at 531; Hörnle (2003) op cit at 29.

run by AI.<sup>7</sup> ODR has thus grown far beyond its initial shape, and has come to be an umbrella term<sup>8</sup> for dispute resolution that is partly or mostly technology driven, with causes of action arising both on- and offline. It is also evident that ODR will continue to grow and evolve, especially as it responds to more demands of the modern world. One example of a factor that has pushed this growth and evolution is the COVID-19 pandemic,<sup>9</sup> which has forced governments, practitioners and scholars to consider alternative digital options to traditional dispute resolution.<sup>10</sup> Specifically, the pandemic has forced a reconsideration of the benefits that ODR could bring to the widespread administration of justice.<sup>11</sup> These benefits include the cost-effectiveness and flexibility that ODR provides,<sup>12</sup> as well as the fact that ODR allows parties to conduct their dispute resolution proceedings at an arm's length,<sup>13</sup> allowing access to justice despite a pandemic that demanded social distancing. The creative ways in which technology can be used to increase access to justice will be an ongoing discussion in the law,<sup>14</sup> and it is hoped that this thesis can contribute to the growing scholarship in this area.

---

<sup>7</sup> Alessa op cit at 323-325; Hörnle *Cross-Border Internet Dispute Resolution* 74; Cortés *Online Dispute Resolution for Consumers* 53; Albornoz & Martín op cit at 44; Condlin op cit at 723-724; Ebner & Greenberg op cit at 70.

<sup>8</sup> 'ODR includes a broad ensemble of tools and technological methods of communication...The various ODR tools enable the resolution of disputes for cases in which the traditional alternatives are less viable and even, at times, impossible.' Linneman op cit at 282. Also see Lavi op cit at 879; Katsh (2012) op cit at 27-28.

<sup>9</sup> 'Early in 2020 the emergence of the COVID-19 pandemic served as a 'big bang' for online dispute resolution (ODR) development and use. We are...well along the road towards full integration of technology into the courts and every other dispute resolution system, worldwide.' Daniel Rainey & Larry Bridgesmith 'Bits and bytes and apps – oh my! Scary things in the ODR forest' (2021) 8(1) *International Journal on Online Dispute Resolution* 3 at 4.

<sup>10</sup> 'The (forced) changes in behaviour relating to physical distancing measures are likely to have lasting effects, with organisations, companies and individuals only partly reverting to previously used methods. The acceleration of technological innovation will presumably improve the user-friendliness of various digital solutions, resulting in users becoming accustomed to relying on them.' Sucker op cit at 5. Also see Rabinovich-Einy (2021) op cit at 126; Gras op cit at 24-25; Casanovas, De Koker & Hashmi op cit at 84; Monahan op cit at 1; Razmetaeva & Razmetaev op cit at 107; Schmitz, Ojelabi & Zeleznikow op cit at 271; Sourdin & Zeleznikow op cit at 144.

<sup>11</sup> Kaya & Khan op cit at 105; Lisa K Dicker & C Danae Paterson 'COVID-19 and conflicts: The health of peace processes during a pandemic' (2020) 25 *Harvard Negotiation Law Review* 213 at 244.

<sup>12</sup> See 2.2.4.2 above.

<sup>13</sup> Katsh (2006) op cit.

<sup>14</sup> Tiamiyu states that 'the pandemic's influence has blurred the lines between this orthodox conception of ODR and other dispute resolution systems...As a result, a new conception of ODR will be needed in the future - one that focuses on a dispute resolution mechanism with the ability to resolve online exclusive disputes, while also incorporating ICT tools into the system design.' Tiamiyu op cit at 107.

From an overview of the development of ODR since its inception, the discussion then shifted to an analysis of the various legal instruments that are presently used to govern ODR in different countries and regions. These instruments include regional legislation,<sup>15</sup> soft law instruments<sup>16</sup> and policy undertakings,<sup>17</sup> and some interesting commonalities between them were highlighted.

These governing instruments were all created and implemented by an official body, whether a regional government, an international organisation, or broader economic organisations.<sup>18</sup> This similarity is indicative of the official recognition of ODR as a valuable and viable alternative to traditional litigation, and further indicates a willingness on the part of governing organisations to adopt and develop ODR on a larger scale than could have been done in the private sector. Although the selected instruments differ in how they have constructed their preferred ODR systems, all of them serve to highlight the important role that ODR can play in consumer protection, furthering a nation's economic growth and promoting cross-border trade in distinct economic blocs and beyond.

Despite the encouraging findings in Chapters 2 and 3 above, it is also evident from the exploration of the law relating to ODR that the majority of its growth and development has taken place in the Global North, leading to a distinctly 'Western' framing of disputes, dispute resolution and how technology should be used in this context.<sup>19</sup> Whilst this is not in and of itself a negative quality, it is one that must be acknowledged and questioned, as the framework that any given ODR system was created in will necessarily influence its functionality, desired effects and actual effects

---

<sup>15</sup> [2013] OJ L165/63; [2013] OJ L165/1.

<sup>16</sup> United Nations Commission on International Trade Law (UNCITRAL) *UNCITRAL Technical Notes on Online Dispute Resolution* (2017).

<sup>17</sup> Model Procedural Rules for the APEC Collaborative Framework for ODR of Cross-Border B2B Disputes (2019) available at [http://mddb.apec.org/Documents/2019/SOM/CSOM/19\\_csom\\_012anxb.pdf](http://mddb.apec.org/Documents/2019/SOM/CSOM/19_csom_012anxb.pdf), accessed on 2 March 2023.

<sup>18</sup> See 2.2.4.3 above.

<sup>19</sup> 'ODR has been developed in and championed by countries, organizations, and individuals in the Global North—countries that have benefited from sophisticated and pervasive Internet services and infrastructure, low cost access, and the ubiquity of personal computers (PCs) and that also have legal frameworks that have evolved over time to incorporate ODR applications in dispute resolution.' Hattotuwa (2006) *op cit* at 372.

on both law and society. An attempt has thus been made to identify, discuss, and evaluate ODR instruments and scholarship from other parts of the world in the earlier chapters of this work, with special attention being paid to how ODR has been conceptualised and applied in developing countries.

This examination of the suitability of ODR for the developing world comes into stronger focus from Chapter 4, where the discussion shifts to a more practical enquiry into the challenges that are typically faced by developing countries when implementing ODR. The challenges are first identified generally and then each is explored to determine which of these conceptual and practical challenges could pose obstacles to further ODR adoption in the developing world. The challenges have been broadly grouped into economic, technological, social and cultural factors, each of which could hinder the successful uptake of ODR in developing nations.<sup>20</sup> It is acknowledged that Africa is a large and diverse continent, and each country naturally has its own unique grouping of challenges that must be overcome before ODR can be introduced and applied.<sup>21</sup> However, there are certain commonalities that can be highlighted, which would hopefully allow for the adoption of ODR in countries across the continent.

The overriding concerns that appear from the existing literature on ODR in developing nations are the economic and digital divides. As previously stated, there are large disparities between rich and poor countries in Africa, and between rich and poor citizens of those countries. Economic inequality is rife across the continent, creating very different standards of living amongst African citizens. This necessarily impacts access to technology, creating a digital divide to parallel the economic divide.<sup>22</sup> This disparity in access to the digital world, the internet and the digital economy is an ongoing concern in many developing countries<sup>23</sup> and will arguably pose the biggest hurdle to ODR adoption and development. Despite the continuing

---

<sup>20</sup> Albornoz & Martín op cit at 40.

<sup>21</sup> Abdel Wahab (2012) op cit at 582.

<sup>22</sup> This parallel is discussed at length in Richmond & Triplett op cit at 195-214.

<sup>23</sup> Wamboye, Tochkov & Sergi op cit at 137; Schmidt & Cohen op cit at 75; Larson op cit at 526; Andrianaivo & Kpodar op cit.

efforts to bridge these gaps, the wealth and technology disparity continues<sup>24</sup> in developing countries and there is no simple solution for reducing it.

However, there is a way in which the digital divide can be narrowed significantly, and that is through the increased use of mobile technology, which has already found widespread use across Africa. It is trite that technological readiness is a key requirement for a functioning ODR system,<sup>25</sup> and reality of the digital divide cannot and must not be underestimated. However, mobile technology is increasingly being used to allow more people access to ICT and the internet, and mobile devices are creating more of a technological familiarity amongst people who were previously excluded from online life.<sup>26</sup> This increased digital familiarity and online access makes it more likely that people will be able to access and use ODR to resolve disputes that would otherwise go unresolved. The use of mobile technology has allowed for technology leapfrogging<sup>27</sup> and has significantly increased the rate at which individuals in developed countries can gain access to the internet and, by extension, the digital economy.<sup>28</sup> It is thus suggested that promoting the use of mobile technologies will be instrumental in lessening the digital divide, and that creating mobile-friendly ODR platforms would provide a simpler way to make ODR accessible to individuals who do not have ready access to PC's, laptops and wired internet connections.<sup>29</sup>

In addition to these economic and technological challenges, there are also concerns about cultural and social perceptions of ODR,<sup>30</sup> both of which could pose significant impediments to the acceptance of ODR.<sup>31</sup> The chief factors considered

---

<sup>24</sup> Braeutigam op cit at 291.

<sup>25</sup> Schement op cit at 6-8; Napoli & Obar op cit at 4.

<sup>26</sup> Fong op cit at 3508; Hattotuwa (2006) op cit at 372.

<sup>27</sup> See 4.3.1.2 above for a detailed discussion of this phenomenon.

<sup>28</sup> Wijkman & Afifi op cit at 128; Nottebohm (et al) op cit at 13.

<sup>29</sup> Schmitz (2018) op cit at 11; Kariuki op cit at 63; Legg op cit at 10; McGill, Bouclin & Salyzyn op cit at 229; Aker & Mbiti op cit at 210; Bahrini & Qaffas op cit at 23; Lee, Levendis & Gutierrez op cit at 464.

<sup>30</sup> Zanferdini & Oliveira op cit at 77; Wilson-Evered & Zeleznikow op cit at 100-102.

<sup>31</sup> See 4.4 above; Wilson-Evered & Zeleznikow op cit at 100-2; Schmitz et al op cit at 280.

were those of consumer trust,<sup>32</sup> the growing concerns around privacy and security of online interactions<sup>33</sup> and questions of online jurisdiction and enforcement of ODR outcomes.<sup>34</sup> In contemplating these factors, it became clear that there are still many unanswered questions about how to address them in potential ODR users, and this is an area where ODR scholarship needs to grow. Although the use of accountability measures such as regular audits and generally reporting on ODR outcomes could go some way to reassure potential users of the efficacy and trustworthiness of ODR mechanisms, this is not sufficient on its own, and much more thought must be given to the fostering of consumer trust.

To assist in the assessment of feasibility for ODR in Africa despite the various challenges outlined in this chapter, three questions were posed. First, it was questioned whether ODR would indeed be suitable for African countries. Second, there was a consideration of whether ODR could be effectively introduced and developed in areas with limited internet connectivity. Third, it was questioned whether there are already ODR mechanisms available that would be appropriate for use in countries with limited basic and technological infrastructure.<sup>35</sup> In answering these questions, each of the most commonly identified challenges were assessed, and it became evident that they have each had an effect on the spread of ICT and ODR. Despite the severity of the digital divide and the sometimes-inconsistent ICT frameworks, it would seem that most of the challenges are capable of being overcome,<sup>36</sup> although doing so will warrant increased governmental intervention. This view is supported by the fact that there has been significant technological

---

<sup>32</sup> Martinek & Cupido op cit at 128; Ebner & Zeleznikow (2015) op cit at 155; Katsh & Rifkin op cit at 29; *Das Consumer Redress* 84-85; Habuka & Rule op cit at 75-76; Katsh (1995) op cit at 971; Nwandem op cit at 11; Turel & Yuan op cit at 425.

<sup>33</sup> Ebner & Zeleznikow (2015) op cit at 156-157; Kariuki op cit at 70; Larson op cit at 528; Alharbi op cit at 82; Zhang op cit at 933; Kallel op cit at 346; Teitz op cit at 1015; Rabinovich-Einy (2021) op cit at 141; Rabinovich-Einy (2002) op cit at 45; Hörnle *Cross-Border Internet Dispute Resolution* 9; Lavi op cit at 905; Van Arsdale op cit at 129.

<sup>34</sup> Katsh (et al) op cit at 726; Bordone op cit at 181; Cona op cit at 994; Lide op cit at 220; Ponte (2002) at 442; Haloush op cit at 1130; Hanriot op cit at 3; *Das Consumer Redress* 83; Schmitz & Rule op cit at 94; Van Arsdale op cit at 129.

<sup>35</sup> See 4.1 above.

<sup>36</sup> Sadushi op cit at 68; Albornoz & Martín op cit at 59.

development in Africa, with South Africa, Nigeria and Kenya consistently being listed as technological leaders on the continent.<sup>37</sup>

Although each of the countries identified have developed and regulated their ICT sectors in different ways, they have each tried to foster an environment that supports technological development, making them ideal candidates to lead ODR in Africa.<sup>38</sup> South Africa, Nigeria and Kenya have all tried to regulate their ICT sectors mainly through legislative intervention, although this has been achieved in different ways. South Africa seems to have the most legislation-dense approach, with various statutes dedicated to different aspects of ICT, including electronic communications and transactions and data protection.<sup>39</sup> In Nigeria, the approach is part legislative and part policy-driven, with an increased focus on how general judicial policy must adapt to include technology-driven justice solutions.<sup>40</sup> Kenya has also implemented a combination of legislation and policy documents, and room has been created for further ICT development.<sup>41</sup> The use of various instruments has, however, created lacunae in the law and there is thus scope for further governmental intervention or academic engagement on these as yet unregulated areas.

However, these lacunae are not hampering the operation of ODR providers in South Africa, Nigeria, and Kenya. South African ODR providers are operational in the public and private sectors,<sup>42</sup> and the success of some of the earlier endeavours seems to be inspiring the creation of ODR systems in ever more varied fields of law. In Nigeria, the focus seems to be on pushing ODR solutions in the existing court system, using technology to facilitate litigation and moving some disputes online and out of

---

<sup>37</sup> Ononogbu op cit at 86; Abdel Wahab (2012) op cit 583; Doma op cit at 93.

<sup>38</sup> See Chapter 5 above.

<sup>39</sup> This was acknowledged by Van der Merwe op cit at 37. Examples of these statutes include the Electronic Communications and Transactions Act 25 of 2002, Electronic Communications Act 36 of 2005 and the Protection of Personal Information Act 4 of 2013, each of which is discussed in detail at 5.2.1 above.

<sup>40</sup> Obutte op cit at 419; Doma op cit at 93; Jimoh op cit at 407-408; Orji op cit at 130; Ikenga KE Oraegbunam 'Admitting computer-based evidence in Nigeria: Resonances from South Africa, India and United Kingdom' (2017) 20 *Nigerian Law Journal* 224 at 239.

<sup>41</sup> Ogonjo (et al) op cit; Kariuki op cit at 73-74; Muthusi op cit; Muigua op cit at 92.

<sup>42</sup> These service providers include the .za Domain Name Authority (ZADNA), the Arbitration Foundation of Southern Africa (AFSA), Nuvalaw and the Commission for Conciliation, Mediation and Arbitration (CCMA). These providers and others are discussed in more detail at 5.2.2 above.

the courtrooms.<sup>43</sup> This is a promising development, as state adoption of ODR would serve to publicise it as a distinct method of dispute resolution and raise awareness of ODR amongst citizens. Kenya's strength in ODR development will be their well-established and much lauded mobile telecommunications network.<sup>44</sup> Having this network in place has been used to great effect in promoting other forms of participation in the digital economy, with many Kenyans using their mobiles for affordable and accessible banking and e-commerce.<sup>45</sup> Potential ODR providers in the region could harness these existing frameworks and use them to introduce people to simple dispute resolution apps, simultaneously promoting familiarity with the online environment and with ODR. Based on the assessment of South Africa, Nigeria and Kenya, the outlook for ODR in Africa and other developing countries is a positive one.<sup>46</sup>

To support the ongoing growth and development in the ICT-ready African countries and beyond, it was also necessary to identify some accepted standards of ODR 'best practice'.<sup>47</sup> Doing so would promote a general standard for ODR programs to comply with and help to achieve consistency between various countries in the absence of an overarching international regulation for ODR.<sup>48</sup> Developing a set of 'best practice' standards would be the best way to achieve something akin to uniformity between countries while still acknowledging the unique circumstances in each country. The foundational principles most commonly acknowledged by ODR scholars and policy-makers are fairness, transparency, due process, and accountability.<sup>49</sup>

---

<sup>43</sup> Kutigi & Anigbogu op cit at 164; Aniekwe op cit at 128; Arinze-Umobi & Okonkwo op cit at 84; Sule, Mohamad & Noor op cit at 22; Ayinla & Oliyide op cit at 74.

<sup>44</sup> Uwamariya & Loebbecke op cit at 108; Ibekwe & Onwuatuwegwu op cit at 3-4; Schmitz (2018) op cit at 11; Kariuki op cit at 63.

<sup>45</sup> Ononogbu op cit at 80; Schmitz op cit at 32; Leigh & Fowlie op cit at 114.

<sup>46</sup> Abdel Wahab (2012) op cit at 583.

<sup>47</sup> Wasser op cit at 275; Albornoz & Martín op cit at 58.

<sup>48</sup> Katsh (et al) op cit at 725; Bowers op cit at 1291; Schultz (2007) op cit at 153; Patrikios op cit at 274; Lodder & Bol op cit; Del Duca, Rule & Cressman op cit at 270.

<sup>49</sup> Wing op cit at 12-29; Schmitz (2018) op cit at 4-5; Conklin op cit at 756; Stylianou op cit at 124; Raymond & Shackelford op cit at 522; Kaya & Khan op cit at 109; Rabinovich-Einy & Katsh (2017) op cit at 720; Latifah, Bajrektarevic & Imanullah op cit at 35; Ebner & Zeleznikow op cit at 159; Hurter (2004) op cit at 788; Martinez op cit at 144; Wang op cit at 481.

In the available literature, these principles are not always easy to distinguish from each other as there are some factors that they have in common.<sup>50</sup> However, an attempt was made to define fairness, transparency, due process and accountability as separate concepts to better understand how they could be used in the African context.<sup>51</sup> It was then questioned whether the use of these principles would assist in overcoming the various challenges to successful ODR implementation in Africa, with special attention paid to how they would find practical application. Based on this discussion, some initial suggestions have been made for developing a 'best practice' guideline specifically tailored to African ODR projects.<sup>52</sup> These suggestions are made in response to the identified challenges to ODR implementation in Africa, and have been formulated in a way that aims to address or mitigate some of these challenges. The main proposal is that accessibility be used as the foundational guiding principle for developing ODR in Africa, with the aim of creating ODR processes that are easy to access for users with varying levels of internet access and online literacy. Considering the fact that the majority of internet users in Africa are mobile users and meeting them at this point will do much to promote the spread of ODR and will stimulate interest in pursuing this alternative avenue to dispute resolution.<sup>53</sup>

The other principles identified are transparency and fairness, which often overlap,<sup>54</sup> but typically work together to ensure accessibility and accountability.<sup>55</sup> Together with accessibility, the principles of transparency and fairness must be present to ensure an independent and impartial dispute resolution process, one which gives effect to due process requirements and creates an ODR process that users can trust in. The principles of transparency and fairness as outlined above<sup>56</sup> would require the creation of a safe online environment for potential ODR users, in

---

<sup>50</sup> Abedi, Zeleznikow & Brien op cit at 360; Bell op cit at 129; Hörnle *Cross-border Internet Dispute Resolution* 4.

<sup>51</sup> See 6.2 above.

<sup>52</sup> See 6.4 above.

<sup>53</sup> Hattotuwa supports this user-driven approach to ODR implementation, positing that '(t)o be successful, technologies and frameworks must be resonant to demands from the grassroots, be sustainable, and empower communities by taking ODR to the people instead of making the people come to technology hubs.' Hattotuwa (2006) op cit at 374.

<sup>54</sup> Ebner & Zeleznikow (2015) op cit at 153; Abedi, Zeleznikow & Brien op cit at 361.

<sup>55</sup> Cashman & Ginnivan op cit at 55.

<sup>56</sup> See 6.4.1.2 and 6.4.1.3 above.

recognition of the ongoing concerns about fairness and security that affect user trust in the ODR process. It is believed that using the principles formulated in 6.4.1 above as a point of departure for more widespread ODR development in Africa will do much to foster user trust and participation in ODR, thus stimulating the growth of ODR across the continent.

## 7.2. Future questions to be considered

Despite the interesting and positive outcomes that have come from this investigation, there are some aspects of ODR that have given rise to further questions. The answers to these questions will require continued study, as they require input from various stakeholders. These issues will be briefly mentioned here to highlight their importance and the need for further ODR scholarship aimed at resolving them.

The question of establishing jurisdiction over online disputes is still an open-ended one.<sup>57</sup> Although there have been suggestions ranging from the use of traditional private international law<sup>58</sup> to the application of a principle of extraterritoriality,<sup>59</sup> there is still no definitive approach to follow.<sup>60</sup> Determining jurisdiction is a foundational principle in dispute resolution, and so more thought must be given to how this would be achieved in cross-border ODR.

Linked to this issue is the recognition and enforcement of ODR outcomes, with one of the main critiques of ODR being that it often lacks enforceable outcomes.<sup>61</sup> As discussed above,<sup>62</sup> the successful enforcement of ODR outcomes is an ongoing problem to be solved. There is much left for ODR scholars to discover in this regard, and careful consideration must be given to the form of enforcement that would be most effective for parties to ODR, be it through financial methods, technical control methods or reputation methods.<sup>63</sup> Each of these methods has been promoted by

---

<sup>57</sup> Stylianou op cit at 141; Katsh (et al) op cit at 726; Bordone op cit at 181; Cona op cit at 994; Lide op cit at 220; Ponte (2002) at 442; Haloush op cit at 1130; Hanriot op cit at 1; Szlak op cit at 534; Hang op cit at 838.

<sup>58</sup> Abedi op cit at 203; Benyekhlef & Gélinas op cit at 14; Turner op cit at 135-136; Ross op cit at 6.

<sup>59</sup> De la Chapelle & Fehlinger op cit at 9.

<sup>60</sup> See 4.4.4.1 above.

<sup>61</sup> Hanriot op cit at 4; Hörnle *Cross-Border Internet Dispute Resolution* 22.

<sup>62</sup> See 4.4.4.2 above.

<sup>63</sup> Ibid.

scholars as potential solutions for the problem of enforcing ODR outcomes,<sup>64</sup> and it is suggested that the selection of a suitable enforcement method would depend greatly on the nature of the dispute itself and the existing relationship between the parties. The development of reliable enforcement mechanisms would do much to provide assurance to potential ODR users, increasing their trust in the efficacy of ODR and strengthening the viability of ODR as a separate method of dispute resolution apart from traditional litigation and ADR.

Another challenge to the successful implementation of ODR that is especially pertinent in Africa is the question of how best to overcome or at least narrow the digital and economic divide that persists in individual African countries and the continent as a whole.<sup>65</sup> This is a question that is much larger than the scope of this study, and providing an effective solution will take the input of a variety of stakeholders, given that the digital and economic divide involves governmental, legal, technological and economic aspects. Although there are promising signs that the widespread use of mobile technology across Africa is being used to narrow this divide,<sup>66</sup> it is still a problem that requires further intervention at a higher level, and it is hoped that there will be ongoing governmental and private efforts to overcome this obstacle.

### 7.3. Concluding observations

The study has succeeded in showing that the adoption, development, and implementation of ODR is indeed feasible in Africa, although it may take a different form than the ODR popularised in the Global North.<sup>67</sup> Despite the obstacles that persist, this study shows that the foundations are already in place for overcoming them in the future. This study further posits that the ability that ODR has to be flexible and adapt to different regional contexts will be the reason that it succeeds in various

---

<sup>64</sup> Ziemblicki op cit at 46; Kaufmann-Kohler & Schultz *Online Dispute Resolution* 210; Teitz op cit at 1013-1014; Gao op cit at 465.

<sup>65</sup> These concerns are discussed at length at 4.2 and 4.3 above.

<sup>66</sup> See the discussion at 4.3.1.2. above.

<sup>67</sup> Hattotuwa supports this understanding, saying that 'the development of ODR in the Global South is following different trends and informed by different dynamics. While not irrelevant in the North, the digital divide...underpins the context of ODR in developing countries.' Hattotuwa (2006) op cit at 372.

African countries, as ODR can provide an easier avenue by which to access dispute resolution proceedings outside of traditional litigation and ADR and is flexible enough to be adapted to the needs and contexts of individual countries.

Supporting this is the assessment and comparison of the ODR readiness of South Africa, Nigeria, and Kenya, recognised technological leaders in Africa. These countries have been shown to have the legislative and technological infrastructure in place to provide an adequate framework in which ODR can operate, and the successful ODR projects in these countries are evidence of this. Furthermore, the identification of a basic set of underlying principles that can be used by individual countries when developing their own ODR programs would provide a 'best practice' of sorts, allowing for the creation and growth of a uniquely African system of ODR, one that can be adapted to meet the needs of the individual countries across the continent.

## BIBLIOGRAPHY

### Primary sources

#### ***Constitutions***

Constitution of the Republic of South Africa, 1996.

Constitution of Kenya, 2010.

#### ***Statutes***

##### *South Africa:*

Electronic Communications Act 36 of 2005.

Electronic Communications and Transactions Act 25 of 2002.

Protection of Personal Information Act 4 of 2013.

##### *Nigeria:*

Electronic Transaction Bill 2015

National Information Technology Development Agency Act 28 of 2007.

##### *Kenya:*

Arbitration Act 4 of 1995.

Civil Procedure Act 12 of 2012.

Consumer Protection Act 46 of 2012.

Data Protection Act 24 of 2019.

##### *European Union:*

Council Directive (EC) 2013/11 on alternative dispute resolution for consumer disputes [2013] OJ L165/63.

Council Regulation (EC) 524/2013 on online dispute resolution for consumer disputes [2013] OJ L165/1.

General Data Protection Regulation (GDPR) Regulation (EU) 2016/679 OJ L119/1.

### ***International instruments***

African Union *African Continental Free Trade Area Agreement* 2018.

African Union *African Union Declaration on Internet Governance and Development of Africa's Digital Economy* 2018.

African Union *Convention on Cyber Security and Personal Data Protection* 2014.

African Union *Draft African Declaration on Internet Rights and Freedoms* 2015.

International Centre for Settlement of Investment Disputes (ICSID) *ICSID Convention, Regulations and Rules* (2022).

Southern African Development Community (SADC) *Data Protection Model Law* 2013.

United Nations Commission on International Trade Law (UNCITRAL) *UNCITRAL Technical Notes on Online Dispute Resolution* 2018.

United Nations Commission on International Trade Law (UNCITRAL) *United Nations Convention on International Settlement Agreements Resulting from Mediation* 2019.

United Nations Conference on Trade and Development (UNCTAD) *United Nations Guidelines for Consumer Protection* 2016.

### ***Cases***

*South Africa:*

*Joroy 4440 cc t/a Ubuntu Procurement v Potgieter N.O & Another* 2016 (3) SA 465 (FB).

*Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews & Another* 2009 (6) BCLR 527 (CC).

*Richman v Ben-Tovim* 2007 (2) SA 283 (SCA).

*Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others* [2022] ZAECMKHC 42.

*Foreign:*

*Tierney v Email America* VM Docket No 96–0001 (1996) (United States of America).

### **Secondary Sources**

#### **Books**

Albert, T *The African Continental Free Trade Agreement: Opportunities and Challenges* (2019) Cuts International, Geneva.

Cortés, Pablo *Online Dispute Resolution for Consumers in the European Union* (2010) Routledge, New York.

Cortés, Pablo *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (2017) Cambridge University Press, Cambridge.

Das, Saptarshi *Consumer Redress through Online Dispute Resolution* (2019) LAP Lambert Academic Publishing, Mauritius.

Forsyth, CF *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 5<sup>th</sup> ed (2012) Juta and Company, Cape Town.

Goh, BC *Negotiating With The Chinese* (1996) Dartmouth Publishing, Brookfield.

Hill, J *Cross-Border Consumer Contracts* (2008) Oxford University Press, Oxford.

Hörnle, Julia *Cross-Border Internet Dispute Resolution* (2009) Cambridge University Press, New York.

Katsh, Ethan & Orna Rabinovich-Einy *Digital Justice: Technology and the Internet of Disputes* (2017) Oxford University Press, New York.

Katsh, Ethan & Janet Rifkin *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (2001) Jossey-Bass, San Francisco.

Kaufmann-Kohler, G & T Schultz *Online Dispute Resolution: Challenges to Contemporary Justice* (2004) Kluwer Law International, The Hague.

Koulu, Riikka *Law, Technology and Dispute Resolution: Privatisation of Coercion* (2019) Routledge, Oxfordshire.

Rheingold, Howard *The Virtual Community: Homesteading on the Electronic Frontier* (1994) The MIT Press, Massachusetts.

Rule, Colin *Online Dispute Resolution for Business: B2B, ECommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (2002) Jossey-Bass, San Francisco.

Susskind, Richard *The End of Lawyers? Rethinking the Nature of Legal Services* (2010) Oxford University Press, New York.

Susskind, Richard *Tomorrow's Lawyers: An Introduction to Your Future* (2013) Oxford University Press, Oxford.

Susskind, Richard *Online Courts and the Future of Justice* (2021) Oxford University Press, Oxford.

Tang, Zheng Sophia *Electronic Consumer Contracts in the Conflict of Laws* 2 ed (2015) Hart Publishing, Oxford.

Van der Merwe, D (ed) *Information and Communications Technology Law* (3 ed) 2021 LexisNexis, South Africa.

Wilson-Evered, Elisabeth & John Zeleznikow *Online Family Dispute Resolution: Evidence for Creating the Ideal People and Technology Interface* (2021) Springer Nature, Switzerland.

Zheng, Jie *Online Resolution of E-commerce Disputes* (2021) Springer Nature, Switzerland

### ***Chapters in books***

Abdel Wahab, Mohamed S 'Online Dispute Resolution in Africa' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution Theory and Practice* (2012) Eleven International Publishing, The Hague.

Abernethy, Steve 'Building large-scale Online Dispute Resolution and trustmark systems' in Ethan Katsh & Daewon Choi (eds) *Online Dispute Resolution (ODR): Technology as the Fourth Party Papers and Proceedings of the 2003 United Nations Forum on ODR* (2003).

Aniekwe, CA 'American realism and the Nigeria judicial system; a comparative analysis: Law review on contemporary legal issues in Nigeria' in P O Idomigie (ed.) *The Jurist* (2016) University of Abuja, Nigeria.

Conley Tyler, Melissa & Di Bretherton 'Seventy-six and counting: an analysis of ODR Sites' in Ethan Katsh & Daewon Choi (eds) *Online Dispute Resolution (ODR): Technology as the Fourth Party Papers and Proceedings of the 2003 United Nations Forum on ODR* (2003).

Corrales M, M Fenwick, & H Haapio 'Digital technologies, legal design and the future of the legal profession' in M Corrales, M Fenwick, & H Haapio (eds) *Legal Tech, Smart Contracts and Blockchain. Perspectives in Law, Business and Innovation* (2019) Springer Nature, Singapore.

Cortés, Pablo 'Online Dispute Resolution for consumers' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution Theory and Practice* (2012) Eleven International Publishing, The Hague.

D'Angelo, Larissa 'A comparison between American and Italian Online Dispute Resolution systems' in VK Bhatia, CN Candlin & M Gotti (eds) *Discourse and Practice in International Commercial Arbitration: Issues, Challenges and Prospects* (2012) Routledge, Oxfordshire.

Devanesan, Ruha & Jeffrey Aresty 'ODR and justice - An evaluation of Online Dispute Resolution's interplay with traditional theories of justice' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution Theory and Practice* (2012) Eleven International Publishing, The Hague.

Ebner, Noam 'ODR and interpersonal trust' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution Theory and Practice* (2012) Eleven International Publishing, The Hague.

Ebner, Noam 'The human touch in ODR: Trust, empathy and social intuition in online negotiation and mediation' in D Rainey, E Katsh & M Abdel Wahab (eds) *Online Dispute Resolution: Theory and Practice 2 ed* (2021) Eleven International Publishing, The Hague.

Egeruoh-Adindu, Izuoma Egeruoh 'Technology and the law: The impact of artificial intelligence (AI) on litigation and dispute resolution in Africa' in C Eboe-Osuji et al (eds) *Nigerian Yearbook of International Law 2018/2019* (2019) Springer Nature, Switzerland.

Fowlie, Frank 'Online Dispute Resolution and ombudsmanship' in Mohamed S Abdel Wahab, Ethan Katsh, & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) Eleven International Publishing, The Hague.

Gereda, Shumani L 'The Electronic Communications and Transactions Act' in Lisa Thornton et al (eds) *Telecommunications Law in South Africa* (2006) Real African Publishers, Johannesburg.

Henry, Marc 'An arbitrator's perspective: Confidentiality – Privacy – Security in the eye of the arbitrators or the story of an arbitrator who became a bee' in Dário Moura Vicente, Elsa Dias Oliveira & João Gomes de Almeida (eds) *Online Dispute Resolution: New Challenges* (2022) Nomos, Baden-Baden.

Hörnle, Julia 'Online Dispute Resolution - More than the emperor's new clothes' in Ethan Katsh & Daewon Choi (eds) *Online Dispute Resolution (ODR): Technology as the Fourth Party Papers and Proceedings of the 2003 United Nations Forum on ODR* (2003).

Hattotuwa, Sanjana 'Mobiles and ODR: Why we should care' in Mohamed S Abdel Wahab, Ethan Katsh, & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) Eleven International Publishing, The Hague.

Katsh, Ethan 'ODR: A look at history' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) Eleven International Publishing, The Hague.

Kohl, Uta 'Conflict of laws and the internet' in Roger Brownsword, Eloise Scotford & Karen Yeung (eds) *Oxford Handbook of Law, Regulation and Technology* (2017) Oxford University Press, New York.

Kramer, Xandra E 'Access to justice and technology: Transforming the face of cross-border civil litigation and adjudication in the EU' in K Benyekhlef et al (eds) *eAccess to justice* (2016) University of Ottawa Press, Ottawa.

Loutocký, Pavel 'Practical impacts of the EU Regulation on Online Dispute Resolution for consumer disputes' in Klára Drličková & Tereza Kyselovská (eds) *COFOLA INTERNATIONAL 2016: Resolution of international disputes* (2016) Muni Press, Masaryk.

Luke, D & J MacLeod 'Bringing about inclusive trade in Africa with the African Continental Free Trade Area' in D Luke & J MacLeod (eds) *Inclusive Trade in Africa: The Africa Continental Free Trade in Comparative Perspective* (2019) Routledge, New York.

Martinek, MM & R Cupido 'Online dispute resolution for B2C controversies: the first European regulations and experiences' in D van der Merwe (ed) *Magister: Essays vir/for Jannie Otto* (2020) LexisNexis, Durban.

Mišćenić, Emilia 'The effectiveness of judicial enforcement of the EU consumer protection law' in Z Meškić et al (eds) *Balkan Yearbook of European and International Law* (2020) Springer Nature, Switzerland.

Motion, P 'Article 17 ECD: Encouragement of Alternative Dispute Resolution On-line Dispute Resolution: A view from Scotland' in L Edwards (ed) *The New Legal Framework for E-commerce in Europe* (2005) Hart Publishing, Oxford.

Ortolani, P 'Smart contracts, ODR and the new landscape of the dispute resolution market' in B Cappiello & G Carullo (eds) *Blockchain, Law and Governance* (2021) Springer Nature, Switzerland.

Pierce, Lucien 'Electronic Communication Regulation' in S Papadopoulos & S Snail ka Mtuze (eds) *Cyberlaw@SA: The Law of Internet in South Africa* 4 ed (2022) Van Schaik Publishers, Hatfield.

Poblet, Marta & Graham Ross 'ODR in Europe' in D Rainey, E Katsh & M Abdel Wahab (eds) *Online Dispute Resolution: Theory and Practice* 2 ed (2021) Eleven International Publishing, The Hague.

Prescott, JJ 'Using ODR platforms to level the playing field: Improving pro se litigation through ODR design' in DF Engstrom (ed) *Legal Tech and the Future of Civil Justice* (2023) Cambridge University Press, Cambridge.

Rabinovich-Einy, Orna & Ethan Katsh 'Lessons from online dispute resolution for dispute systems design' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) Eleven International Publishing, The Hague.

Rainey, Daniel 'ODR and Culture' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) Eleven International Publishing, The Hague.

Roos, Anneliese 'Data protection law in South Africa' in AB Makulilo (ed) *African Data Privacy Laws* (2016) Springer Nature, Switzerland.

Rule, Colin & Harpreet Singh 'ODR and online reputation systems' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) Eleven International Publishing, The Hague.

Sankey, Michael 'From rags to riches: Democratisation of the photographic art' in V Garnons-Williams (ed) *Photography and Fictions: Locating Dynamics of Practice* (2014) Queensland Centre for Photography, Queensland.

Schement, J 'Broadband, internet and universal service: Challenges to the social contract of the 21st century' in A Schejter (ed) *And communications for all: A policy agenda for a new administration* (2009) Lexington Books, United States of America.

Szlak, Gabriela R 'Online Dispute Resolution in Latin America' in Mohamed S Abdel Wahab, Ethan Katsh & Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (2012) Eleven International Publishing, The Hague.

Udotai, B 'The growth and challenges of information technology in law practice in Nigeria' in K Nwosu (ed) *Legal Practice Skills & Ethics in Nigeria* (2003) Dcon Consulting, Nigeria.

Van Eck, MM 'The disruptive force of smart contracts' in W Doorsamy et al (eds) *The Disruptive Fourth Industrial Revolution* (2020) Springer Nature, Switzerland.

Van Veenen, Jelle 'Online integrative negotiation tools for the Dutch Council for Legal Aid' in Marta Poblet (ed) *Expanding the horizons of ODR: Proceedings of the 5<sup>th</sup> International Workshop on Online Dispute Resolution* (2008) Huygens Editorial, Barcelona.

Wilson-Evered, Elizabeth et al 'Towards an on-line family dispute resolution service in Australia' in Marta Poblet (ed) *Mobile Technologies for Conflict Management* (2011) Springer Nature, Switzerland.

Xue, Janet Hui & Ralph Holz 'Applying smart contracts in online dispute resolutions on a large scale and its regulatory implications' in M Ragnedda & G Destefanis (eds) *Blockchain and Web 3.0: Social, Economic, and Technological Challenges* (2019) Routledge, New York.

### **Articles**

Abbasli, Taleh 'Can Online Dispute Resolution prevail over the traditional methods of resolution?' (2022) 8 *Baku State University Law Review* 21.

Abdel Wahab, Mohamed S 'The global information society and Online Dispute Resolution: A new dawn for dispute resolution' (2004) 21 *Journal of International Arbitration* 168.

Abedi, Fahimeh 'Legal issues arising in online dispute resolution systems' 2019 *Journal of Organizational Behavior Research* 199.

Abedi, Fahimeh & John Zeleznikow 'Developing regulatory standards for the concept of security in online dispute resolution systems' (2019) 35 *Computer Law & Security Review* 2.

Abedi, Fahimeh, John Zeleznikow & Emilia Bellucci 'Universal standards for the concept of trust in online dispute resolution systems in e-commerce disputes' (2019) 27(3) *International Journal of Law and Information Technology* 209.

Abedi, Fahimeh, John Zeleznikow & Chris Brien 'Universal standards for the concept of fairness in Online Dispute Resolution in B2C e-disputes' (2019) 34 *Ohio State Journal on Dispute Resolution* 357.

Adaji, Elejo Aishatu 'Transforming Nigeria into a cash-less economy: Implications on consumers rights and dispute resolution mechanisms' (2016) *Draft Paper Presented at 49th Annual Nigerian Association of Law Teachers (NALT) Conference* 1.

Adeleye, N & C Eboagu 'Evaluation of ICT development and economic growth in Africa' (2019) *Netnomics* 31.

Ahmad, Masood & SM Ali 'Online Dispute Resolution - An emerging Alternative Dispute Resolution tool' (2019) 9(3) *IUP Law Review* 36.

Akamanzi, C (et al) 'Silicon Savannah: the Kenya ICT services cluster' (2016) *Harvard University – Microeconomics of Competitiveness* 1.

Aker, JC & IM Mbiti 'Mobile phones and economic development in Africa' (2010) 24(3) *Journal of Economic Perspectives* 207.

Akinola AO & UO Uzodike '*Ubuntu* and the quest for conflict resolution in Africa' (2017) 49(2) *Journal of Black Studies* 91.

Aksen, G 'Global reflections on international law, commerce and dispute resolution' (2005) *International Chamber of Commerce Publishing* 693.

Albornoz, María Mercedes & Nuria González Martín 'Feasibility analysis of online dispute resolution in developing countries' (2012) 44 *University of Miami Inter-American Law Review* 39.

Aleksandrova, A & D Khabib 'The role of information and communication technologies in a country's GDP: A comparative analysis between developed and developing economies' (2021) *Economic and Political Studies* 1.

Alessa, Hibah 'The role of Artificial Intelligence in Online Dispute Resolution: A brief and critical overview' (2022) 31:3 *Information & Communications Technology Law* 319.

Alharbi, Mohammed 'Key challenges facing Online Dispute Resolution in Saudi Arabia' (2019) 88 *Journal of Law, Policy and Globalization* 76.

Almaguer, Alejandro E & Roland W Baggott 'Shaping new legal frontiers: Dispute resolution for the internet' (1998) 13 *Ohio State Journal on Dispute Resolution* 711.

Aniekwe, CA 'Legal framework for the use of information and communications technology (ICT) in the Nigerian justice system: A call for review' (2019) 1(3) *International Journal of Comparative Law and Legal Philosophy* 125.

Aresty, Jeffrey M 'The internet and ADR: Educating lawyers about Online Dispute Resolution' (2006) 23 *GPSolo* 30.

Arinze-Umobi, CN & IT Okonkwo 'Alternative dispute resolution practice in Nigeria and the effect of the Covid-19 pandemic' (2021) 2 *International Journal of Law and Clinical Legal Education* 82.

Arya, Pratham & Lisa Sankrit 'Keeping it online: Developing an ODR mechanism for India's e-commerce disputes' (2022) *RGNUL Financial & Mercantile Law Review* 1.

Assefa, Shimelis, Abebe Rorissa & Daniel Alemneh 'Digital readiness assessment of countries in Africa: A case study research' (2021) 58:1 *ASIS&T Annual Meeting* 400-404.

Ayinla, L & Taiye Oliyide 'Juridical perspective on the regulation of Online Dispute Resolution in Nigeria' (2020) 7(2) *Islamic University Multidisciplinary Journal* 71.

Bahrini, R & AA Qaffas 'Impact of information and communication technology on economic growth: Evidence from developing countries' (2019) 7.1 *Economies* 21.

Bakhramova, M 'Theoretical and legal regulation of ODR in the European Union countries' (2022) 2(1) *European Journal of Innovation in Nonformal Education* 299.

Balcha, A 'Online Dispute Resolution for electronic commerce under Ethiopian legal framework: The need for reform (2022) 11(1) *Oromia Law Journal* 103 at 119.

Ballesteros, Teresa 'International perspectives on online dispute resolution in the e-commerce landscape' (2021) 8(2) *International Journal on Online Dispute Resolution* 85.

Baloolal-Frank, R 'Specialised tribunals in South Africa and access to justice' (2015) 8 *International Journal of Business, Economics and Law* 123.

Banga, K, J Macleod & M Mendez-Parra 'Digital trade provisions in the AfCFTA: what can we learn from South-South trade agreements' (2021) *Supporting Economic Transformation (SET) working paper series*.

Barnard, J & E Mišćenić 'The role of the courts in the application of consumer protection law: A comparative perspective' (2019) 44(1) *Journal for Juridical Science* 111.

Barnett, Jeremy & Philip Treleaven 'Algorithmic dispute resolution—The automation of professional dispute resolution using AI and blockchain technologies' (2018) 61(3) *The Computer Journal* 399.

Bates, Donna M 'A consumer's dream or Pandora's box: Is arbitration a viable option for cross-border consumer disputes?' (2004) 27 *Fordham International Law Journal* 823.

Bell, Felicity 'Family law, access to justice, and automation' (2019) 19 *Macquarie Law Journal* 103.

Benyekhlef, Karim & Fabien Gélinas 'Online Dispute Resolution' (2005) 10 *Lex Electronica* 1.

Beretta, Rachele 'The use of technology in dispute resolution: A framework for the study of ODR' (2023) *Vilnius University Open Series* 16 at 22.

Berman, Greg & John Feinblatt 'Problem-solving courts: A brief primer' (2001) 23 *Law & Policy* 125.

Best, Laura & Miemie Struwig 'Online business practices to enable consumer protection in the African context' (2020) 4(10) *International Journal of Economics, Business and Management Research* 118.

Betancourt, Julio César & Elina Zlatanska 'Online dispute resolution (ODR): What is it, and is it the way forward?' (2013) 79 *Arbitration* 256.

Bigda, Jordan 'The legal profession: From humans to robots' (2018) 18 *Journal of High Tech Law* 396.

Bin, Z 'Legal system of ODR for CBEC among the B&R countries' (2021) 4(6) *Contemporary Social Sciences* 67.

Bogdan, Michael 'The new EU Regulation on online resolution for consumer disputes' (2015) 9 *Masaryk University Journal of Law & Technology* 155.

Bongkiyi, JP 'Online Dispute Resolution: Its prospects and potential for Cameroon' (2021) *Zien Journal of Social Sciences and Humanities* 86.

Bordone, Robert C 'Electronic online dispute resolution: A systems approach – Potential, problems, and proposal' (1998) 3 *Harvard Negotiation Law Review* 175.

Bowers, Michael G 'Implementing an Online Dispute Resolution scheme: Using domain name registration contracts to create a workable framework' (2011) 64 *Vanderbilt Law Review* 1265.

Brand, Ronald A 'Online Dispute Resolution' (2019) *Summer School in Transnational Commercial Law & Technology* 1.

Brand, Ronald A 'The CISG: Applicable law and applicable forums' (2019) 38 *Journal of Law & Commerce* 137.

Braeutigam, Andrea M 'Fusses that fit online: Online mediation in non-commercial contexts' (2006) 5 *Appalachian Journal of Law* 275.

Braeutigam, Andrea M 'What I hear you writing is.. Issues in ODR: Building trust and rapport in the text-based environment' (2006) 38(1) *University of Toledo Law Review* 101.

Brennan, Rebecca 'Mismatch.com: Online Dispute Resolution and divorce' (2011) 13 *Cardozo Journal of Conflict Resolution* 197.

Cabral, James E, Abhijeet Chavan & Thomas M Clarke (et al) 'Using technology to enhance access to justice' (2012) 26 *Harvard Journal of Law & Technology* 241.

Calliess, Graf-Peter 'Online Dispute Resolution: Consumer redress in a global market place' (2006) 7(8) *German Law Journal* 647.

Calliess, Graf-Peter & Simon Johannes Heetkamp 'Online Dispute Resolution: Conceptual and regulatory framework' (2019) *Transnational Law Institute Think!* 1.

Carneiro, D et al 'Online dispute resolution: an artificial intelligence perspective' (2014) 41 *Artificial Intelligence Review* 211.

Carrell, Alyson & Noam Ebner 'Mind the gap: Bringing technology to the mediation table' (2019) *Journal of Dispute Resolution* 1.

Casanovas, P, L De Koker & M Hashmi 'Law, socio-legal governance, the internet of things, and industry 4.0: A middle-out/inside-out approach' (2022) *MDPI* 64.

Cashman, Peter & Eliza Ginnivan 'Digital justice: Online resolution of minor civil disputes and the use of digital technology in complex litigation and class actions' (2019) 19 *Macquarie Law Journal* 39.

Chaisse, Julien & Jamieson Kirkwood 'Smart courts, smart contracts, and the future of Online Dispute Resolution' (2022) 5 *Stanford Journal of Blockchain Law & Policy* 62.

Chan, Gerald L 'Getting to yes online: A look at the history, concepts, issues and prospects of Online Dispute Resolution systems (ODRS)' (2009) 83 *Philadelphia Law Journal* 528.

Chivunga, M & A Tempest 'Digital disruption in Africa: Mapping innovations for the AfCFTA in Post-COVID times' (2021) *SAIIA Occasional Paper* 317 66.

Chiu, Chao-Min, Hua-Yang Lin & Szu-Yuan Sun & Meng-Hsiang Hsu 'Understanding customers' loyalty intentions towards online shopping: an integration of technology acceptance model and fairness theory' (2009) 28:4 *Behaviour & Information Technology* 347.

Citron, Danielle Keats 'Technological due process' (2008) 85 *Washington University Law Review* 1249.

Clark, Eugene, Cho, George & Hoyle, Arthur 'Online Dispute Resolution: Present realities, pressing problems and future prospects' (2003) 17 *International Review of Law, Computers & Technology* 7.

Clifford, Damian & Yung Shin van der Syde 'Online dispute resolution: Settling data protection disputes in a digital world of customers' (2016) 32 *Computer Law & Security Review* 272.

Coffee, Michael S 'Cross-border issues associated with the use of Online Dispute Resolution for international family law matters' (2021) 59(2) *Family Court Review* 211.

Cole, Sarah Rudolph & Kristen M Blankley 'Online mediation: Where we have been, where we are now, and where we should be' (2006) 38 *University of Toledo Law Review* 193.

Cona, Frank A 'Application of online systems in alternative dispute resolution' (1997) 45 *Buffalo Law Review* 975.

Condlin, Robert J 'Online dispute resolution: Stinky, repugnant or drab' (2017) 18 *Cardozo Journal of Conflict Resolution* 717.

Cooper, Devin 'Utah, ODR, and the new "Millennial"um' (2021) 35 *BYU Journal of Public Law* 261.

Cortés, Pablo 'Developing Online Dispute Resolution for consumers in the EU: A proposal for the regulation of accredited providers' 2011 *International Journal of Law and Information Technology* 20.

Cortés, Pablo 'A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward' (2015) 35(1) *Legal Studies* 114.

Cortés, Pablo & Arno R Lodder 'Consumer dispute resolution goes online: Reflections on the evolution of European law for out-of-court redress' (2014) 21(1) *MJ* 14.

Dahan, Samuel & David Liang 'The case for AI-Powered legal aid' (2021) 46:2 *Queen's Law Journal* 415.

Daigle, Brian 'Data protection laws in Africa: A pan-African survey and noted trends' 2021 *Journal of International Commerce and Economics* 1.

Davis, FD 'User acceptance of information technology system characteristics, user perceptions and behavioral impacts' (1993) 38(3) *International Journal of Man-Machine Studies* 475.

Davison, R, D Vogel & R Harris et al 'Technology leapfrogging in developing countries – An inevitable luxury' (2000) *The Electronic Journal of Information Systems in Developing Countries* 1.

De Almeida, K Rosa & M Vetis Zaganelli 'Adequate treatment of conflicts online: Realising the right to health in the context of the covid-19 pandemic' (2021) 17(96) *Direito Público* 152.

De La Chapelle, BE & P Fehlinger 'Jurisdiction on the internet: How to move beyond the legal arms race' (2016) 3(7) *Digital Debates CyFy Journal* 8.

De La Rosa, Fernando Esteban 'Scrutinising access to justice in consumer ODR in cross-border disputes: The Achilles' heel of the EU ODR platform' (2017) 4(2) *International Journal on Online Dispute Resolution* 26 at 27.

De La Rosa, Fernando Esteban & Cátia Marques Cebola 'The Spanish and Portuguese systems: Two examples calling for a further reform – Uncovering the architecture underlying the new consumer ADR/ODR European framework' (2019) 6 *European Review of Private Law* 1251.

Deffains, Bruno & Yannick Gabuthy 'Efficiency of Online Dispute Resolution: A case study' (2005) 60 *Communications & Strategies* 20.

Del Duca, Louis F, Colin Rule & Brian Cressman 'Lessons and best practices for designers of fast track, low value, high volume global e-commerce ODR systems' (2015) 4 *Penn State Journal of Law & International Affairs* 242.

Del Duca, Louis, Colin Rule & Zybnek Loebel 'Facilitating expansion of cross-border e-commerce – developing a global online dispute resolution system (Lessons derived from existing ODR systems – Work of the United Nations Commission on International Trade Law)' (2012) 1 *Penn State Journal of Law and International Affairs* 1.

Dendorfer-Ditges, Renate & Philipp Wilhelm 'Dispute resolution in IT-conflicts' (2021) 7 *Yearbook on International Arbitration* 187.

Dicker, Lisa K & C Danae Paterson 'COVID-19 and conflicts: The health of peace processes during a pandemic' (2020) 25 *Harvard Negotiation Law Review* 213.

Doma, Halima 'Enhancing justice administration in Nigeria through Information and Communications Technology' (2016) 32 *John Marshall Journal of Information Technology & Privacy Law* 89.

Dung, Tran Viet, Lea Leveau & Khuu Hong Linh 'Developing an online consumer dispute resolution platform in the field of e-commerce in Vietnam: Lessons from the European Union' (2021) 5(2) *Vietnamese Journal of Legal Sciences* 31.

Ebner, Noam & Elayne E Greenberg 'Strengthening Online Dispute Resolution justice' (2020) 63 *Washington University Journal of Law & Policy* 65.

Ebner, Noam & John Zeleznikow 'Fairness, trust and security in Online Dispute Resolution' (2015) 36 *Hamline University's School of Law's Journal of Public Law and Policy* 144.

Ebner, Noam & John Zeleznikow 'No sheriff in town: Governance for online dispute resolution' (2016) *Negotiation Journal* 297.

Eboibi, Felix E & Ebi Robert 'Global legal response to coronavirus (COVID-19) and its impact: perspectives from Nigeria, the United States of America and the United Kingdom' (2021) 47:4 *Commonwealth Law Bulletin* 593.

Edelman, Lauren B, Howard S Erlanger & John Lande 'Internal dispute resolution: The transformation of civil rights in the workplace' (1993) 27 *Law & Society Review* 497.

Edwards, Lilian & Caroline Wilson 'Redress and alternative dispute resolution in EU cross-border e-commerce transactions' (2007) 21:3 *International Review of Law Computers and Technology* 315.

Eisen, Joel B 'Are we ready for mediation in cyberspace' (1998) *Brigham Young University Law Review* 1305.

Engstrom, DF 'Digital civil procedure' (2021) 169:7 *University of Pennsylvania Law Review* 1.

Evans, Tonya M 'Role of international rules in blockchain-based cross-border commercial disputes (2019) 65:1 *Wayne Law Review* 1.

Exon, Susan Nauss 'Ethics and Online Dispute Resolution: From evolution to revolution' (2017) 32 *Ohio State Journal on Dispute Resolution* 609.

Farned, Dusty Bates 'A new automated class of online dispute resolution' (2011) *Faulkner Law Review* 338.

Faturoti, B 'Institutionalised ADR and access to justice: The changing faces of the Nigerian judicial system' (2014) 1(1) *Journal of Comparative Law in Africa* 1.

Fong, MWL 'Technology leapfrogging for developing countries' (2009) *Encyclopedia of Information Science and Technology* 3505.

Friedman, George H 'Alternative dispute resolution and emerging online technologies: Challenges and opportunities' (1997) *Hastings Communications and Entertainment Law Journal* 695.

Friedman, George H & Robert Gellman 'An information superhighway 'on ramp' for alternative dispute resolution' (1996) *New York State Bar Journal* 38.

Gainer, Maya 'Transforming the courts: Judicial sector reforms in Kenya, 2011-2015' (2015) *Innovations for Successful Societies* 1.

Galloway, PD 'Is construction arbitration ready for Online Dispute Resolution?' (2013) 30(2) *The International Construction Law Review* 215.

Gao, Wei 'The success and failure of Online Dispute Resolution' (2017) 47(2) *Hong Kong Law Journal* 445.

Gatteschi, Valentina et al 'Blockchain and smart contracts for insurance: Is the technology mature enough?' 2018 *Future Internet* 1.

Gélinas, Fabien 'Managing procedural expectations in small claims ODR' (2019) 6 (1) *International Journal of Online Dispute Resolution* 54.

Gibbons, Llewellyn Joseph 'Creating a market for justice? A market incentive solution to regulating the playing field: Judicial deference, judicial review, due process and fair play in online consumer arbitration' (2002) 23 *Northwestern Journal of International Law and Business* 1.

Gilden, M 'Jurisdiction and the internet: the "real world" meets cyberspace' (2000) 7 *ILSA Journal of International & Comparative Law* 160.

Gilliéron, Philippe 'From face-to-face to screen-to-screen: Real hope or true fallacy' (2008) 23(2) *Ohio State Journal of Dispute Resolution* 301.

Gingras, Darren & Joshua Morrison 'Artificial intelligence and family ODR' (2021) 59(2) *Family Court Review* 227.

Glavanits, Judith 'Obstacles of ODR in developing countries' (2017) *UNCITRAL Congress 2017* 1.

Goodman, Joseph W 'The pros and cons of online dispute resolution: An assessment of cyber-mediation websites' (2003) 2 *Duke Law & Technology Review* 1.

Goodman, Joseph W 'The advantages and disadvantages of Online Dispute Resolution: An assessment of cyber-mediation web sites' (2006) 9:11 *Journal of Internet Law* 10.

Gras, Ignacio Oltra 'Online courts: Bridging the gap between access and justice' (2021) 10 *UCL Journal of Law and Jurisprudence* 24.

Greenberg, Elayne E & Noam Ebner 'What dinosaurs can teach lawyers about how to avoid extinction in the ODR evolution' 2019 *St John's University School of Law Faculty Publications* 1.

Greenleaf, Graham & Marie Georges 'The African Union's data privacy Convention: A major step toward global consistency?' (2014) 131 *Privacy Laws & Business International Report* 18.

Gromova, Elizaveta A, Natalia S Koneva & Elena V Titova 'Legal barriers to the implementation of digital industry (Industry 4.0) components and ways to overcome them' (2022) 25 *Journal of World Intellectual Property* 186.

Gross, Claudia M 'News from the United Nations Commission on International Trade Law (UNCITRAL): UNCITRAL towards the end of 2016' (2016) 21 *Uniform Law Review* 720.

Habuka, Hiroki & Colin Rule 'The promise and potential of Online Dispute Resolution in Japan' (2017) 4 *International Journal of Online Dispute Resolution* 74.

Haloush, Haitham A 'Jurisdictional dilemma in online disputes: Rethinking traditional approaches' (2008) 42 *International Lawyer (ABA)* 1129.

Haloush, Haitham A & Bashar H Malkawi 'Internet characteristics and Online Alternative Dispute Resolution' (2008) 13 *Harvard Negotiation Law Review* 327.

Hang, Lan Q 'Online dispute resolution systems: The future of cyberspace law' (2001) *Santa Clara Law Review* 845.

Hanriot, Maxime 'Online Dispute Resolution (ODR) as a solution to cross border consumer disputes: The enforcement of outcomes' (2016) 2 *McGill Journal of Dispute Resolution* 1.

Hattotuwa, Sanjana 'Transforming landscapes: Forging new ODR systems with a human face' (2006) 23(3) *Conflict Resolution Quarterly* 371.

Hörnle, Julia 'Online Dispute Resolution: The emperor's new clothes' (2003) 17 *International Review of Law Computers and Technology* 27.

Hörnle, Julia 'Encouraging Online Dispute Resolution in the EU and beyond - Keeping costs low or standards high?' (2013) 38 *European Law Review* 200.

Hourani, Sara 'Mind the gap? A critical analysis of the recognition and enforcement of cross-border consumer ODR outcomes in the EU' (2022) 1 *Revista Ítalo-Española de Derecho Procesal* 73.

Howell, Bronwyn E & Petrus H Potgieter 'Uncertainty and dispute resolution for blockchain and smart contract institutions' (2021) 17 *Journal of Institutional Economics* 545 at 557-558.

Hurter, E 'Disputes resolution in cyberspace: A futuristic look at the possibility of online intellectual property and e-commerce arbitration' (2000) 12 *South African Mercantile Law Journal* 199.

Hurter, E 'An evaluation of selected aspects of the alternative dispute resolution regulations for the resolution of domain name disputes in the .za domain name space' (2007) 19 *South African Mercantile Law Journal* 165.

Ibekwe, CS & C Onwuatuegwu 'ICT in the administration of justice: Challenges and prospects for labour and productivity' (2021) 8(1) *Nnamdi Azikiwe University Journal of Commercial and Property Law* 1.

Jeretina, Ursa 'Consumer Online Dispute Resolution (ODR) - A mechanism for innovative e-Governance in EU' (2018) 16 *Central European Public Administration Review* 45.

Jew, Bernadette 'Cyber jurisdiction—Emerging issues & conflicts of law when overseas courts challenge your web' (1998) *Computers & Law* 24.

Jiménez, William & Arno R Lodder 'Analyzing approaches to internet jurisdiction based on model of harbors and the high seas' (2015) 29(2) *International Review of Law, Computers & Technology* 266.

Jimoh, MA 'Advancing online dispute resolution in Nigeria: Current opportunities, legal challenges and the ways forward' (2020) 11:2 *Law and Policy* 407.

Jobodwana, ZN 'E-commerce and mobile commerce in South Africa: Regulatory challenges' (2009) 4 *Journal of International Commercial Law & Technology* 287.

Juanjuan, Zhang 'On China online dispute resolution mechanism: Following UNCITRAL TNODR and Alibaba experience' (2017) 4 *International Journal on Online Dispute Resolution* 14.

Kaal, Wulf A & Craig Calcaterra 'Crypto transaction dispute resolution' (2018) 73 *Business Law* 1.

Kadioglu, Cemre 'Bricks and clicks: Online Dispute Resolution mechanisms and implementation of online arbitration in Turkey for cross-border business to consumer e-commerce disputes' (2019) 1(1) *ASBU Digital Law Review* 113.

Kallel, S 'Online arbitration' (2008) 25(3) *Journal of International Arbitration* 345.

Kariuki, JN 'Embracing online dispute resolution in Kenya: Feasibility of an online dispute resolution portal for e-commerce disputes in Kenya' (2019) 3(2) *Journal of Conflict Management and Sustainable Development* 63.

Katsh, Ethan 'Dispute resolution in cyberspace' (1995) 28 *Connecticut Law Review* 953.

Katsh, Ethan 'Online Dispute Resolution: Some implications for the emergence of law in cyberspace' (2007) 21 *International Review of Law Computers & Technology* 97.

Katsh, Ethan, Janet Rifkin & Alan Gaitenby 'E-commerce, e-disputes, and e-dispute resolution: In the shadow of e-bay law' (2000) 15 *Ohio State Journal on Dispute Resolution* 705.

Katsh, Ethan & Colin Rule 'What we know and need to know about Online Dispute Resolution' (2016) 67 *South Carolina Law Review* 329.

Katsh, Ethan & Leah Wing 'Ten years of online dispute resolution (ODR): Looking at the past and constructing the future' (2006) 38 *University of Toledo Law Review* 19.

Kaya, Serkan 'Access to justice for consumers in Turkey: The need for enhancing consumer dispute resolution through online dispute resolution' (2022) 26(1) *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* 225.

Kaya, Serkan & Muhammed Danyal Khan 'Online dispute resolution in Pakistan: Challenges and opportunities' (2022) 7(2) *Journal of Nusantara Studies* 103.

Kesan, Jay P & Rajiv C Shah 'Fool us once shame on you - fool us twice shame on us: What we can learn from the privatizations of the internet backbone network and the domain name system' (2001) 79 *Washington University Law Quarterly* 111.

Klein, Hans 'ICANN and internet governance: Leveraging technical coordination to realize global public policy' (2002) 18(3) *Information Society* 193.

Kontak, Matija 'Modern tools to lower the costs of disputes: Digitalisation and the new venues of online dispute resolution' (2021) *Harmonius: Journal of Legal and Social Studies in South East Europe* 113.

Koulu, R 'Blockchains and online dispute resolution: Smart contracts as an alternative to enforcement' (2016) 13:1 *SCRIPTed* 40.

Kowal, Jolanta & Narcyz Roztocki 'Information and communication technology management for global competitiveness and economic growth in emerging economies' (2013) 57(1) *The Electronic Journal of Information Systems in Developing Countries* 1 at 2.

Krause, Jason 'Settling it on the web: New technology, lower costs enable growth of online dispute resolution' (2007) 93 *ABA Journal* 42.

Kravec, Nicole Gabrielle 'Dogmas of Online Dispute Resolution' (2006) 38 *University of Toledo Law Review* 125.

Kulp, Heather Scheiwe & Amy J Schmitz 'Real feedback from real people: Emphasizing user-centric designs for Court ODR' (2020) 26(2) *Dispute Resolution Magazine* 6.

Kumar, S 'Virtual venues: Improving Online Dispute Resolution as an alternative to cost intensive litigation' (2009) 27(1) *John Marshall Journal of Information Technology & Privacy Law* 81.

Kumtepe, CCK 'A brief introduction to blockchain dispute resolution' (2021) XIV 2 *John Marshall Law Journal* 139.

Kutigi, HD & B Anigbogu 'ICT enhanced courtrooms in Nigeria: Are the conditions of effectiveness met?' (2017) 1 *UNIPORT Law Review* 151.

Larson, David Allen 'Brother, can you spare a dime - Technology can reduce dispute resolution costs when times are tough and improve outcomes' (2011) 11 *Nevada Law Journal* 523.

Latifah, E, AH Bajrektarevic & MN Imanullah 'The shifting of alternative dispute resolution: From traditional form to the online dispute resolution' (2019) 6(1) *Brawijaya Law Journal* 27.

Lavi, Dafna 'Three is not a crowd: Online mediation-arbitration in business to consumer internet disputes' (2016) 37 *University of Pennsylvania Journal of International Law* 871.

Lawack-Davids, VA & FE Marx 'Consumer protection measures for erroneous or unauthorized internet payments: some lessons from the European Union?' (2010) 31(2) *Obiter* 446.

Lee, SH, John Levendis & Luis Gutierrez 'Telecommunications and economic growth: An empirical analysis of Sub-Saharan Africa' (2012) 44 *Applied Economics* 461.

Lee, Younghwa, Kenneth A Kozar & Kai RT Larsen 'The Technology Acceptance Model: Past, present, and future' (2003) 12(50) *Communications of the Association for Information Systems* 752.

Legg, Michael 'The future of dispute resolution: Online ADR and online courts' (2016) *Australasian Dispute Resolution Journal* 10.

Leigh, Doug & Frank Fowlie 'Online Dispute Resolution (ODR) within developing nations: A qualitative evaluation of transfer and impact' (2014) 3 *Laws* 106.

Li, Y 'Influence of the internet on the economic growth of the Belt and Road region.' (2019) 11(3) *Global Journal of Emerging Market Economies* 248.

Lide, E Casey 'ADR and cyberspace: The role of Alternative Dispute Resolution in online commerce, intellectual property and defamation' (1996) 12 *Ohio State Journal on Dispute Resolution* 193.

Linneman, Danielle 'Online Dispute Resolution for divorce cases in Missouri: A remedy for the justice gap' (2018) *Journal of Dispute Resolution* 281.

Lipsky, David B & Ariel C Avgar 'Online Dispute Resolution through the lens of bargaining and negotiation theory: Toward an integrated model' (2006) 38 *University of Toledo Law Review* 47.

Liyanage, Kananke Chinthaka 'The regulation of Online Dispute Resolution: Effectiveness of online consumer protection guidelines' (2012) 17(2) *Deakin Law Review* 251.

Lodder, Arno R & Stephanie H Bol 'Towards an online negotiation environment: Legal principles, technical requirements and the need for close cooperation' (2003) *ADRJ Online Monthly* 7.

Lodder, Arno R & John Zeleznikow 'Developing an Online Dispute Resolution environment: Dialogue tools and negotiation support systems in a three-step model' (2005) 10 *Harvard Negotiation Law Review* 287.

Loebl, Zbynek 'Identifying and establishing standard ODR processes' (2016) 3 *International Journal of Online Dispute Resolution* 125.

Loos, MBM 'Enforcing consumer rights through ADR at the detriment of consumer law' (2016) 1 *European Review of Private Law* 61 at 67.

Loutocký, Pavel 'Online dispute resolution to resolve consumer disputes from the perspective of European Union law: Is the potential of ODR fully used?' (2016) *Masaryk University Journal of Law and Technology* 113.

Lutzi, Tobias 'Internet cases in EU private international law: Developing a coherent approach' (2017) 66 *International & Comparative Law Quarterly* 687.

Magd, Hesham & Ayyappan Palanissamy 'E-commerce disputes and digital justice platforms – A developmental perspective' (2021) 13:3 *Global Business and Management Research: An International Journal* 92.

Malkawi, Bashar H 'Online alternative dispute resolution and transparency' (2009) 2 *Contemporary Asia Arbitration Journal* 101.

Mania, Karolina 'Online Dispute Resolution: The future of justice' (2015) 1 *International Comparative Jurisprudence* 76.

Martić, Duško & Danijela Bjelja 'Chasm in UNCITRAL's work on framework for online dispute resolution' (2017) LXIX 1170 *The Review of International Affairs* 60.

Martinez, Janet K 'Designing Online Dispute Resolution' (2020) *Journal of Dispute Resolution* 135.

McGill, J, S Bouclin & A Salyzyn 'Mobile and web-based legal apps: Opportunities, risks and information gaps' 2015 *Canadian Journal of Law and Technology* 229.

McIntyre, J, A Olijnyk & K Pender 'Civil courts and COVID-19: Challenges and opportunities in Australia' (2020) 45(3) *Alternative Law Journal* 195.

Menthe, D 'Jurisdiction in cyberspace: a theory of international spaces' (1998) 4 *Michigan Telecommunications and Technology Law Review* 69.

Mentovich, Avital, JJ Prescott & Orna Rabinovich-Einy 'Are litigation outcome disparities inevitable? Courts, technology, and the future of impartiality' (2020) 71(4) *Alabama Law Review* 893.

Moeves, Amy S & Scott C Moeves 'Two roads diverged: A tale of technology and alternative dispute resolution' (2004) 12 *William & Mary Bill of Rights Journal* 843.

Mohlameane, M & N Ruxwana 'Exploring the impact of cloud computing on existing South African regulatory frameworks' (2020) 22(1) *South African Journal of Information Management* 2.

Monahan, Justin 'Enemy at the gates: Online dispute resolution in the time of Covid-19' 2021 *Directed Research Project: Law in a Post-Pandemic World* 1.

Moore, Thomas R 'The upgraded lawyer: Modern technology and its impact on the legal profession' (2019) 21 *UDC/DCSL Law Review* 27.

Morek, Rafal 'The regulatory framework for Online Dispute Resolution: A critical view' (2006) 38 *University of Toledo Law Review* 163.

Mosweu, Tshepo Lydia & Olefhile Mosweu 'Electronic court records management systems: A review of literature in selected African countries' (2018) 36(4) *Mousaion: SA Journal of Information Studies* 3.

Motsaathebe, Lorato & Nathan Mnjama 'Managing court records: a survey of record-keeping practices in selected countries' (2009) 27(2) *Mousaion: SA Journal of Information Studies* 132.

Mueller, Milton 'Rough justice: An analysis of ICANN's Uniform Dispute Resolution Policy' (2001) 17 *The Information Society* 3.

Muigua, Kariuki 'Legitimising alternative dispute resolution in Kenya: Towards a policy and legal framework' (2017) 5(1) *Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution* 74.

Muphangavanhu, Y 'An analysis of the dispute settlement mechanism under the Consumer Protection Act 68 of 2008' (2012) 15(5) *Potchefstroom Electronic Law Journal* 320.

Murombedzi, JC 'Challenging inequalities, pathways to a just world' (2016) *World Social Science Report* 59.

Nagle, Luz E 'E-commerce in Latin America: Legal and business challenges for developing enterprise' (2001) 50 *American University Law Review* 859.

Napoli, PM & JA Obar 'Mobile leapfrogging and digital divide policy: Assessing the limitations of mobile Internet access' (2013) *New America Foundation* 1.

Ng, AS 'There may yet be hope for lawyers' (2022) 22:4 *Policy* 499.

Newell, Lauren 'Rebooting empathy for the digital generation lawyer' (2019) 34 *Ohio State Journal on Dispute Resolution* 1.

Nicuesa, Aura Esther Vilalta 'Reputational feedback systems and consumer rights: Improving the European online redress system' (2018) 5 *International Journal of Online Dispute Resolution* 122.

Obutte, PC 'ICT laws in Nigeria: Planning and regulating a societal journey into the future' (2014) 17 *Potchefstroom Electronic Law Journal* 418.

Ojiako, U (et al) 'An examination of the "rule of law" and "justice" implications in Online Dispute Resolution in construction projects' (2018) 36 *International Journal of Project Management* 301.

Okong'o, K & Michael Kyobe 'Empirical examination of e-government in developing countries and its value in Kenya's public service' (2018) 21(1) *The Electronic Journal Information Systems Evaluation* 35.

Ong, CE 'B2C e-commerce trust in redress mechanism: cross border issues' (2003) *Informing Science* 174.

Ononogbu, Ijeoma 'Transformation of dispute resolution in Africa' (2015) *International Journal of Online Dispute Resolution* 79.

Omoola, SO & UA Oseni 'Towards an effective legal framework for online dispute resolution in e-commerce transactions: trends, traditions and transitions' (2016) 24(1) *IJUM Law Journal* 257.

Oraegbunam, Ikenga KE 'Admitting computer-based evidence in Nigeria: Resonances from South Africa, India and United Kingdom' (2017) 20 *Nigerian Law Journal* 224.

Orji, UJ 'Technology mediated dispute resolution: Challenges and opportunities for dispute resolution in Nigeria' (2012) 5 *Computer and Telecommunications Law Review* 124.

Ortolani, Pietro 'Self-enforcing Online Dispute Resolution: Lessons from Bitcoin' (2016) 36(3) *Oxford Journal of Legal Studies* 595.

Owen, MG 'Legal outsourcing to India: the demise of new lawyers and junior associates' 2008 *Global Business & Development Law Journal* 175.

Page, Joanna & Laurel Bonnyman 'ADR and ODR – achieving better dispute resolution for consumers in the EU' (2016) 17 *ERA Forum* 145.

Patrikios, Antonis 'Resolution of cross-border e-business disputes by arbitration tribunals on the basis of transnational substantive rules of law and e-business usages: The emergence of the *Lex Informatica*' (2006) 38 *University of Toledo Law Review* 271.

Paulson, Kristi J 'Mediation in the covid-19 era: Is online mediation here to stay?' (2021) 51 *Southwestern Law Review* 142.

Pecnard, C 'The issue of security in ODR' (2004) 7(1) *Berkeley Electronic Press* 1.

Perritt Jr, Henry H 'Dispute resolution in electronic network communities' (1993) 38 *Villanova Law Review* 349.

Perritt Jr, Henry H 'Dispute resolution in cyberspace: Demand for new forms of ADR' 2000 *Ohio State Journal on Dispute Resolution* 675.

Perritt Jr, Henry H 'Towards a hybrid regulatory scheme for the internet' (2001) *University of Chicago Legal Forum* 215.

Peters, Shamaise 'The evolution of alternative dispute resolution and online dispute resolution in the European Union' (2021) 12(1) *CES Derecho* 3 at 8.

Philippe, Miréze 'ODR redress system for consumer disputes: Clarifications, UNCITRAL Works and EU Regulation on ODR' 2014 *International Journal of Online Dispute Resolution* 67.

Pohle, Julia & Thorsten Thiel 'Digital sovereignty' (2020) 9(4) *Internet Policy Review* 1.

Ponte, Lucille M 'Throwing bad money after bad: can online dispute resolution (ODR) really deliver the goods for the unhappy internet shopper' (2001) 3 *Tulane Journal of Technology and Intellectual Property* 55.

Ponte, Lucille M 'Boosting consumer confidence in E-business: Recommendations for establishing fair and effective dispute resolution programs for B2C online transactions' (2002) 12(2) *Albany Law Journal of Science & Technology* 441.

Ponte, Lucille M 'Michigan Cyber Court: A bold experiment in the development of the first public virtual courthouse' (2002) 4 *North Carolina Journal of Law & Technology* 51.

Porteous, David 'The case for reframing ODR in emerging economies' (2018) 5(1-2) *International Journal of Online Dispute Resolution* 61.

Price, Catherine 'Alternative dispute resolution in Africa: Is ADR the bridge between traditional and modern dispute resolution' (2018) 18 *Pepperdine Dispute Resolution Law Journal* 393.

Rabinovich-Einy, Orna 'Going public: Diminishing privacy in dispute resolution in the Internet age' (2002) 7(4) *Virginia Law and Technology Association* 2.

Rabinovich-Einy, Orna 'Balancing the scales: The Ford-Firestone case, the internet, and the future dispute resolution landscape' (2003) 6 *Yale Journal of Law & Technology* 1.

Rabinovich-Einy, Orna 'Technology's impact: The quest for a new paradigm for accountability in mediation' (2006) 11 *Harvard Negotiation Law Review* 253.

Rabinovich-Einy, Orna 'The past, present and future of Online Dispute Resolution' (2021) 74 *Current Legal Problems* 125.

Rabinovich-Einy, Orna & Ethan Katsh 'Digital justice: Reshaping boundaries in an Online Dispute Resolution environment' (2014) 1 *International Journal of Online Dispute Resolution* 5.

Rabinovich-Einy, Orna & Ethan Katsh 'Access to digital justice: Fair and efficient processes for the modern age' (2017) 18 *Cardozo Journal of Conflict Resolution* 637.

Rabinovich-Einy, Orna & Ethan Katsh 'A new relationship between public and private dispute resolution: Lessons from Online Dispute Resolution' (2017) 32 *Ohio State Journal on Dispute Resolution* 695.

Rabinovich-Einy, Orna & Ethan Katsh 'The new new courts' (2017) 67(1) *American University Law Review* 165.

Rabinovich-Einy, Orna & Ethan Katsh 'Blockchain and the inevitability of disputes: The role for Online Dispute Resolution' (2019) 2 *Journal of Dispute Resolution* 47.

Raines, Susan Summers & Melissa Conley Tyler 'From e-bay to eternity: Advances in online dispute resolution' 2006 *University of Melbourne Legal Studies Research Paper* 200.

Rainey, Daniel & Larry Bridgesmith 'Bits and bytes and apps – oh my! Scary things in the ODR forest' (2021) 8(1) *International Journal on Online Dispute Resolution* 3.

Ramasastri, Anita 'Government-to-citizen Online Dispute Resolution: A preliminary inquiry' (2004) 79 *Washington Law Review* 159.

Rastogi, K, R Bahuguna, S Kathuria et al 'Technical intercession of Artificial Intelligence in solving Online Dispute Resolution' 2023 *IEEE Devices for Integrated Circuit (DevIC)* 194 at 198.

Raymond, Anjanette H & Scott J Shackelford 'Technology, ethics, and access to justice: Should an algorithm be deciding your case' (2014) 35 *Michigan Journal of International Law* 485.

Razmetaeva, Y & S Razmetaev 'Justice in the digital age: Technological solutions, hidden threats and enticing opportunities' (2021) 2(10) *Access to Justice in Eastern Europe* 104.

Reddy, Sershiv 'Implementing a South African e-dispute resolution system for consumer disputes' 2020 *Obiter* 371.

Reiniger, T 'Implementing NS-TIC: Virginia legal strategy for credential issuer liability, trustmarks, and ID proofing digital services' (2011) 123.

Richmond, Kami & Russell E Triplett 'ICT and income inequality: a cross-national perspective' (2018) 32:2 *International Review of Applied Economics* 195.

Rizkiana, Rina Elsa 'The future of online dispute resolution: Building a framework for e-commerce dispute resolution in Indonesia' (2021) 1:2 *The Lawpreneurship Journal* 114.

Rogers, Sarah 'Online Dispute Resolution: An option for mediation in the midst of gendered violence' (2009) 24 *Ohio State Journal of Dispute Resolution* 349.

Rooney, Kim M 'The global impact of the Covid-19 pandemic on commercial dispute resolution in the first seven months' (2020) 14 *Dispute Resolution International* 83.

Rose, Barbara 'No way back: Don't look now, but a technology revolution is changing the way lawyers work' (2009) 95 *ABA Journal* 64.

Rotondi, VR Kashyap & LM Pesando (et al) 'Leveraging mobile phones to attain sustainable development' (2020) 117 *Proceedings of the National Academy of Sciences* 1.

Rühl, Giesela 'Alternative and Online Dispute Resolution for cross-border consumer contracts: A critical evaluation of the European legislature's recent efforts to boost competitiveness and growth in the internal market' (2015) 38 *Journal of Consumer Policy* 431.

Rule, Colin 'Technology and the future of dispute resolution' 2015 *Dispute Resolution Magazine* 4.

Rule, Colin 'Online dispute resolution and the future of justice' 2020 *Annual Review of Law and Social Science* 277.

Rule, Colin, Vikki Rogers & Louis Del Duca 'Designing a global consumer Online Dispute Resolution (ODR) system for cross-border small value-high volume claims – OAS' Developments' (2010) 42 *Uniform Commercial Code Law Journal* 221.

Ruslijanto, Patricia Audrey 'Transforming landscapes: How ODR reshaping the prospect of dispute settlement in a connected world' (2018) 16 *Indonesian Journal of International Law* 84.

Sackin, Jennifer 'Online Dispute Resolution with China: Advantageous, but at what cost' (2010) 12 *Cardozo Journal of Conflict Resolution* 245.

Sadushi, Mimoza 'The theory and practice of dispute resolution in the digital age' (2017) 5 *Global Journal of Politics and Law Research* 57.

Sampani, Constantina 'Online dispute resolution in e-commerce: is consensus in regulation UNCITRAL's utopian idea or a realistic ambition?' 2021 *Information & Communications Technology Law* 1.

Schiavetta, Susan 'The relationship between e-ADR and Article 6 of the European Convention of Human Rights pursuant to the case law of the European Court of Human Rights' (2004) 1 *Journal of Information, Law and Technology* 1.

Schmidt, Eric & Jared Cohen 'The digital disruption: Connectivity and the diffusion of power' (2010) 89 *Foreign Affairs* 75.

Schmidt-Kessen, MJ, R Nogueira & M Cantero Gamito 'Success or failure? – Effectiveness of consumer ODR platforms in Brazil and in the EU' (2020) 43 *Journal of Consumer Policy* 659.

Schmitz, Amy J 'A blueprint for Online Dispute Resolution system design' (2018) 21 *Journal of Internet Law* 1.

Schmitz, Amy J 'There's an app for that: Developing Online Dispute Resolution to empower economic development' (2018) 32 *Notre Dame Journal of Law, Ethics & Public Policy* 1.

Schmitz, Amy J 'Expanding access to remedies through E-court initiatives' (2019) 67 *Buffalo Law Review* 89.

Schmitz, Amy J 'Addressing the class claim conundrum with Online Dispute Resolution' (2020) *Journal of Dispute Resolution* 361.

Schmitz, Amy J, Lola Akin Ojelabi & John Zeleznikow 'Researching Online Dispute Resolution to expand access to justice' 2022 *Giustizia Consensuale (Consensual Justice)* 269.

Schmitz, Amy J & Colin Rule 'The new handshake: where we are now' (2016) 3:2 *International Journal of Online Dispute Resolution* 84.

Schmitz, Amy J & Leah Wing 'Beneficial and ethical ODR for family issues' (2020) *Family Court Review* 1.

Schultz, Thomas 'Online arbitration: Binding or non-binding?' (2002) *ADR Online Monthly* 1.

Schultz, Thomas 'Does Online Dispute Resolution need governmental intervention? The case for architectures of control and trust' (2004) 6 *North Carolina Journal of Law and Technology* 71.

Schultz, Thomas 'Private legal systems: What cyberspace might teach legal theorists' (2007) 10 *Yale Journal of Law & Technology* 151.

Schultz, Thomas 'Carving up the internet' (2008) 19(4) *The European Journal of International Law* 799

Sela, Ayelet 'The effect of online technologies on dispute resolution system design: Antecedents, current trends and future directions' (2017) 21 *Lewis & Clark Law Review* 633.

Sela, Ayelet 'Can computers be fair: How automated and human-powered Online Dispute Resolution affect procedural justice in mediation and arbitration' (2018) 33 *Ohio State Journal on Dispute Resolution* 91.

Sela, Ayelet 'E-nudging justice: The role of digital choice architecture in online courts' (2019) *Journal of Dispute Resolution* 127.

Sela, Ayelet 'Diversity by design: Improving access to justice in online courts with adaptive court interfaces' (2021) 15:1 *The Law & Ethics of Human Rights* 125.

Sengpunya, Phet 'Online Dispute Resolution scheme for e-commerce: The ASEAN perspectives' (2020) *Pécs Journal of International and European Law* 58.

Shang, Carrie Shu & Wenli Guo 'The rise of online dispute resolution-led justice in China: An initial look' (2020) *Australian National University Journal of Law and Technology* 25.

Shope, Mark L 'The international arbitral institution response to COVID-19 and opportunities for Online Dispute Resolution' (2020) 13 *Contemporary Asia Arbitration Journal* 67.

Sibanda, O 'The strict approach to party autonomy and choice of law in e-contracts in South Africa: Does the approach render South Africa an unacceptable jurisdiction?' (2008) 41 *De Jure* 320.

Simpson, Brian 'Algorithms or advocacy: does the legal profession have a future in a digital world?' (2016) 25:1 *Information & Communications Technology Law* 50.

Skolmen, DE & M Gerber 'Protection of personal information in the South African cloud computing environment: A framework for cloud computing adoption' (2015) *Information Security for South Africa* 1.

Sorkin, DE 'Payment methods for consumer-to-consumer online transactions' (2001) 35 *Akron Law Review* 1.

Sourdin, Tania 'Justice in the age of technology: "The rise of machines is upon us"' (2017) 139 *PrecedentAULA* 4.

Sourdin, T, B Li & T Burke 'Just, quick and cheap? Civil dispute resolution and technology' (2019) 19 *Macquarie Law Journal* 17.

Sourdin, T & J Zeleznikow 'Courts, mediation and COVID-19' (2020) 48(2) *Australian Business Law Review* 138.

Stegner, Marianne 'Online dispute resolution: The future of consumer dispute resolution' (2017) 5 *Yearbook on International Arbitration* 347.

Steinmueller, WE 'ICTs and the possibilities for leapfrogging by developing countries' (2001) 140(2) *International Labour Review* 193.

Sternlight, Jean R 'Pouring a little psychological cold water on Online Dispute Resolution' (2020) *Journal of Dispute Resolution* 1.

Stewart, Karen & Joseph Matthews 'Online arbitration of cross-border, business to consumer disputes' (2002) 56 *University of Miami Law Review* 1111.

Stylianou, Paul 'Online Dispute Resolution: The case for a treaty between the United States and the European Union in resolving cross-border e-commerce disputes' (2008) 36 *Syracuse Journal of International Law & Commerce* 117.

Sule, I, AM Mohamad & NAM Noor 'The prospects of elawyering towards empowering strong justice institutions in Nigeria' (2021) *Proceedings: Seminar on Law and Society 2021 (Solas V)* 22.

Supriyadi, AP, SKW Amnesti & S Zulaicha 'The online-based economical dispute resolution for 4.0 industry in the new normal era' (2022) 12(2) *Jurisdictie: Jurnal Hukum dan Syariah* 145 at 157.

Svantesson, DJB 'Borders on, or borders around—The future of the internet' (2006) 16 *Albany Law Journal of Science & Technology* 343.

Swales, L 'The Protection of Personal Information Act and data de-identification' (2021) 117 *South African Journal of Science* 1.

Swelmiyeen, IA & A Al-Nuemat 'Facebook e-court: Online justice for online disputes' (2017) 33 *Computer Law and Security Review* 223.

Syme, David 'Keeping pace: On-line technology and ADR services' (2006) 23 *Conflict Resolution Quarterly* 343.

Szczerbowski, Jakub J 'Place of smart contracts in civil law. A few comments on form and interpretation' (2017) *Law & Society: Private Law – Contracts eJournal* 1.

Teitz, Louise Ellen 'Providing legal services for the middle class in cyberspace: The promise and challenge of on-line dispute resolution' (2001) 70 *Fordham Law Review* 985.

Terekhov, Victor 'Online mediation: A game changer or much ado about nothing' 2019 *Access to Justice in Eastern Europe* 33.

Thomas, Luke, Sarah Kaur & Simon Goodrich 'Making ODR human: Using human-centred design for ODR product development' (2018) 5 *International Journal of Online Dispute Resolution* 146.

Thornburg, Elizabeth G 'Fast, cheap and out of control: Lessons from the ICANN dispute resolution process' (2002) 6 *Computer Law Review & Technology Journal* 89.

Tiamiyu, Oladeji M 'The impending battle for the soul of ODR: Evolving technologies and ethical factors influencing the field' (2022) 23 *Cardozo Journal of Conflict Resolution* 75 at 84.

Turel, O & Y Yuan 'Online Dispute Resolution services: Justice, concepts and challenges' (2010) *Handbook of group decision and negotiation* 425.

Turel, O, YF Yuan & CE Connelly 'In justice we trust: Predicting user acceptance of e-customer services' (2008) 24(4) *Journal of Management Information Systems* 123.

Turner, RI 'Alternative Dispute Resolution in cyberspace: There is more on the line than just getting "online"' (2000) 7 *ILSA Journal of International & Comparative Law* 133.

Urhiewhu, Lucky Oghenetega & Daniel Emojorho 'Conceptual and adoption of Technology Acceptance Model in digital information resources usage by undergraduates: Implication to higher institutions education in Delta and Edo of Nigeria' (2015) 6(21) *Journal of Education and Practice* 82.

Uwamariya, Marthe & Claudia Loebbecke 'Learning from the mobile payment role model: lessons from Kenya for neighboring Rwanda' (2020) 26:1 *Information Technology for Development* 108.

Valley, Kathleen 'The electronic negotiator' (2000) *Harvard Business Review* 11.

Van Arsdale, Suzanne 'User protections in Online Dispute Resolution' (2015) *Harvard Negotiation Law Review* 107.

Van den Herik, Jaap & Daniel Dimov 'Towards outsourced Online Dispute Resolution' (2012) 7(2) *Journal of International Commercial Law and Technology* 99.

Van Gelder, Emma 'The EU approach to consumer ODR' (2019) 6(2) *International Journal of Online Dispute Resolution* 219.

Vierira de Carvalho Fernandes, Ricardo, Colin Rule, Taynara Tiemi Ono & Gabriel Estevam Botelho Cardoso 'The expansion of online dispute resolution in Brazil' (2018) 9 *IJCA* 20.

Walter, Mark 'The CISG and cross-border access to commercial justice' (2019) 38 *Journal of Law & Commerce* 155.

Wamboye, Evelyn, Kiril Tochkov & Bruno S Sergi 'Technology adoption and growth in Sub-Saharan African countries' (2015) 57:1 *Comparative Economic Studies* 136.

Wang, Faye Fangfei 'Online Dispute Resolution: Best practices in comparative perspective' (2017) 12 *Journal of Comparative Law* 472.

Wangui, Grace 'Factors influencing performance of the judicial system in Kenya, the case of delayed court rulings' (2017) 1(1) *International Journal of Law and Policy* 64.

Wanyoike, ME & J Wairimu 'Online dispute resolution in Kenya: A case study of the European Union' (2019) 7(1) *Alternative Dispute Resolution* 272.

Weiss, Russell 'Some economic musings on Cybersettle' (2006) 38 *University of Toledo Law Review* 89.

Welsh, Nancy A 'Bringing transparency and accountability (with a dash of competition) to court-connected dispute resolution' (2020) 88 *Fordham Law Review* 2449.

Wijkman, A & M Afifi 'Technology leapfrogging and the digital divide' (2002) *Ainability A* 128.

Wilcocks, T & J Laubscher 'Investigating alternative dispute resolution methods and the implementation thereof by architectural professionals in South Africa' 2017 *Acta Structilia* 146.

Wing, Leah 'Ethical principles for Online Dispute Resolution: A GPS device for the field' (2016) 3 *International Journal of Online Dispute Resolution* 12.

Wing, Leah 'Artificial intelligence and Online Dispute Resolution system design: Lack of / access to justice magnified' (2017) 4(2) *International Journal on Online Dispute Resolution* 16.

Wing, Leah et al 'Designing ethical Online Dispute Resolution systems: The rise of the fourth party' (2021) 37(1) *Negotiation Journal* 1.

Winick, Bruce J 'Therapeutic jurisprudence and problem-solving courts' (2003) 30 *Fordham Urban Law Journal* 1055.

Woker, T 'Consumer protection and alternative dispute resolution' (2016) 1 *SA Mercantile Law Journal* 21.

Wolf, Benjamin JC 'On-line but out of touch: Analyzing international dispute resolution through the lens of the internet'(2006) 14 *Cardozo Journal of International & Comparative Law* 281.

Woods, A 'Litigating data sovereignty' (2018) 128 *Yale Law Journal* 328.

Wrenn, Gregory J 'Cyberspace is real, national borders are fiction: The protection of expressive rights online through recognition of national borders in cyberspace' (2002) 38 *Stanford Journal of International Law* 97.

Yoon, Albert H 'The post-modern lawyer: Technology and the democratization of legal representation' (2016) 66 *University of Toronto Law Journal* 456.

Yoon, Hyunwoo et al 'Older adults' internet use for health information: Digital divide by race / ethnicity and socioeconomic status' (2020) *Journal of Applied Gerontology* 105.

Zanferdini, Flavia de Almeida Montingelli & Rafael Tomaz de Oliveira 'Online Dispute Resolution in Brazil: Are we ready for this cultural turn?' (2015) 24 *Revista Paradigma* 68.

Zanin, Henrique da Silveira & Pedro Henrique Dias Alves Bernardes 'Technology and access to justice during the pandemic: online dispute resolution development in Brazil and Japan' (2022) 18(50) *Revista Tecnologia e Sociedade* 1.

Zelevnikow, John & Emilia Bellucci 'Legal fairness in Alternative Dispute Resolution processes - Implications for research and teaching' (2012) 23 *Australasian Dispute Resolution Journal* 265.

Zekoll, J 'Online Dispute Resolution: Justice without the state?' (2014) *Max Planck Institute for European Legal History Research Paper Series* 1.

Zheng, Jie 'The role of ODR in resolving electronic commerce disputes in China' (2016) 3 *International Journal of Online Dispute Resolution* 41.

Zhiqiang, Yu & Dong Peiwen 'On practical exploration and development path of Online Dispute Resolution system' (2019) 7 *China Legal Science* 54.

Ziemblicki, Bartosz 'Going online – is the world ready to replace litigation with online dispute resolution mechanisms?' (2015) *Wroclaw Review of Law, Administration and Economics* 40.

Zimmerman, Samara 'Judge gone wild: Why breaking the mediation confidentiality privilege for acting in bad faith should be reevaluated in court-ordered mandatory mediation' (2009) 11 *Cardozo Journal of Conflict Resolution* 353.

Zondo-Kabini, Hlengiwe 'Application of the Electronic Communications and Transactions Act to online merchants from other jurisdictions' 2003 *North Western Journal of Technology & Intellectual Property* 78.

### **Conference papers**

Abdel Wahab, Mohamed S 'Online Dispute Resolution and digital inclusion: Challenging the global divide' (2004) *Third Annual Forum on Online Dispute Resolution* University of Melbourne, Australia.

Adaji, Elejo Aishatu 'Transforming Nigeria into a cash-less economy: Implications on consumers rights and dispute resolution mechanisms' (2016) *49th Annual Nigerian Association of Law Teachers (NALT) Conference*.

Conley Tyler, Melissa 'Evaluating recent developments in Online Dispute Resolution' (2006) *Fourth International Forum on ODR* Cairo.

Hutchinson, Brian 'ODR and the future of ADR: Lessons learnt from ECODIR' (2006) *Conference on Consumer ADR in Spain and the EU* Madrid.

Kano, Tsuyoshi & Toyama Kentaro 'Bottlenecks of ICT innovation in Rwanda' (2020) *Proceedings of the 2020 International Conference on Information and Communication Technologies and Development*.

Odima DO 'E-Justice: define steps by the judiciary of Kenya' (2014) *Scientific Conference Proceedings for an explanation of the measures taken by the judiciary to include ICT in their functioning*.

Ogonjo et al 'Utilizing AI to improve efficiency of the environment and land court in the Kenyan judiciary' (2021) *Proceedings of the Second International Workshop on AI and Intelligent Assistance for Legal Professionals in the Digital Workplace*.

Roşu, Angelica 'Electronic commerce – An international phenomenon, generating commercial litigations' (2012) *7 EIRP Proceedings*.

Schiavetta, Susan 'Online dispute resolution, e-government and overcoming the digital divide' (2005) *20th BILETA Annual Conference* Queen's University of Belfast, Belfast.

## Reports

Andrianaivo, Mihasonirina & Kangni Kpodar *ICT, Financial Inclusion, and Growth: Evidence from African Countries* (2011) Working Paper No. 11/73, International Monetary Fund, IMF Working Paper.

Banga, Karishma, Mohamed Gharib, Max Mendez-Parra & Jamie Macleod 'E-commerce in preferential trade agreements: Implications for African firms and the AfCFTA' (2022) *ODI Report 48*.

Bogdan-Martin, Doreen 'Measuring digital development: Facts and figures 2019' (2019) *Technical report International Telecommunications Union*.

Dutta, Soumitra & Bruno Lanvin (eds) *Network Readiness Index 2023: Trust in a network society: A crisis of the digital age?* (2023)

Judiciary of Kenya *Practice Directions on standardization of Practice & Procedures in the High Court* (2021).

Lemma, A, M Mendez-Parra & L Naliaka 'The AfCFTA: unlocking the potential of the digital economy in Africa' (2022) *ODI Report 9*.

New Partnership for Africa's Development (NEPAD) 'Africa Information and Communications Technology Sector Phase III Report' (2017).

OECD 'Bridging the rural digital divide' *OECD Digital Economy Papers* (2018).

Resha, Gugu *Assessing the potential for African digital governance to facilitate inclusive development: Rights, rules and revenues* (2021).

UNCTAD *E-Commerce and Development Report* (2003).

United Nations Department of Economic and Social Affairs *World Social Report: Inequality in a Rapidly Changing World* (2020).

WTO MC12 Outcome Document, WTO 12<sup>th</sup> Ministerial Conference 2022 (WT/L/1135).

## Internet resources

## Websites

<https://au-afcfta.org/trade-areas/>

<https://ehome.dha.gov.za/>

<https://lawpavilion.com/about-us.html>.

<http://odrlatinoamerica.com/>

<https://odrafrica.com/>

<https://online.natis.gov.za/>

<https://uitelkaar.nl/>

<https://www.businessofapps.com/data/dating-app-market/>

<https://www.gov.uk/make-money-claim>

<https://www.sarsefiling.co.za>

[www.civilresolutionbc.ca/](http://www.civilresolutionbc.ca/)

## Articles and reports

Abbott, Ryan and Hiro Aragaki ‘Three tips for international online dispute resolution in the age of COVID-19’ available at <https://businesslawtoday.org/2020/10/three-tips-international-online-dispute-resolution-age-covid-19/>, accessed 24 June 2023.

Abdel Wahab, Mohamed S ‘Online Dispute Resolution and digital inclusion: Challenging the global digital divide’ 4-11 available at <http://www.mediate.com/Integrating/docs/ODR%20and%20Digital%20Inclusion%20%20Mohamed%20Abdel%20Wahab.pdf>, accessed on 20 June 2023.

Adagu, Enehuwa ‘Nigeria’s new Arbitration and Mediation Bill’ available at <https://www.ciarb.org/news/nigeria-s-new-arbitration-and-mediation-bill/>, accessed on 1 June 2023.

Agaraki, Hiro ‘The new Nigerian Bill on arbitration & mediation: Lessons for the Singapore Convention’ available at <http://indisputably.org/2022/08/the-new->

*nigerian-bill-on-arbitration-mediation-lessons-for-the-singapore-convention/*, accessed on 1 June 2023.

American Bar Association Task Force on E-commerce & Alternative Dispute Resolution available at <http://www.law.washington.edu/ADA-eADR>, accessed on 21 November 2020.

American Bar Association (ABA) Task Force on E-Commerce and ADR 'Recommended Best Practices for Online Dispute Resolution Service Providers' available at <https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/BestPracticesFinal102802.authcheckdam.pdf>, accessed on 12 June 2023.

Asia-Pacific Economic Cooperation 'APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business to Business Disputes' (2019) available at [http://mddb.apec.org/Documents/2019/SOM/CSOM/19\\_csom\\_012anxb.pdf](http://mddb.apec.org/Documents/2019/SOM/CSOM/19_csom_012anxb.pdf), accessed on 4 June 2023.

Asia-Pacific Economic Cooperation 'Model Procedural Rules for the APEC Collaborative Framework for ODR of Cross-Border B2B Disputes' (2019) available at [http://mddb.apec.org/Documents/2019/SOM/CSOM/19\\_csom\\_012anxb.pdf](http://mddb.apec.org/Documents/2019/SOM/CSOM/19_csom_012anxb.pdf), accessed on 4 June 2023.

*ASEAN Strategic Action Plan for Consumer Protection 2016-2025* (2016) <https://asean.org/storage/2012/05/ASAPCP-UPLOADING-11Nov16-Final.pdf>, accessed on 20 June 2023.

Benyekhlef, K & N Vermeys 'UNCITRAL Adopts Technical Notes on ODR' (2016) available at <http://www.slaw.ca/2016/04/18/uncitral-adopts-technical-notes-on-odr/>, accessed 1 June 2023.

Berens, Chris 'Bridging the new digital divide' (2019) available at <http://vpuu.org.za/ict4d/digital-divide-south-africa/>, accessed on 21 June 2023.

Clinton, William J 'A framework for global electronic commerce' (1997) available at <http://www.econmerce.gov/framework.htm>., accessed on 21 June 2023.

De Groot, Juliana 'What is the General Data Protection Regulation? Understanding & complying with GDPR requirements in 2019' (2019) *Digital Guardian* available at <https://digitalguardian.com/blog/what-gdpr-general-data-protection-regulation-understanding-and-complying-gdpr-data-protection>, accessed on 4 June 2023.

Dushime, Aimée 'These four countries are leading Africa's start-up scene – here's why' (2022) available at <https://www.weforum.org/agenda/2022/08/africa-start-up-nigeria-egypt-kenya-south-africa/>, accessed on 23 June 2023.

Edwards, L & C Wilson 'On-line dispute resolution in cross-border consumer e-commerce transactions: lessons from eBay and ICANN' (2007) available at <https://era.ed.ac.uk/bitstream/handle/1842/2382/ADRinODRecommerce.pdf?sequence=>, accessed on 13 June 2023.

Ekhatior, EG 'The application of video conferencing in judicial proceedings in Nigeria' available at <https://ssrn.com/abstract=3630821>, accessed on 17 June 2023.

European Commission *Functioning of the European ODR Platform Statistical Report December 2021* available at <https://commission.europa.eu/system/files/2021-12/2021-report-final.pdf>, accessed on 4 June 2023.

European Commission, Directorate-General for Justice and Consumers *Online Dispute Resolution: Web-scraping of EU traders' websites: Final report* (2018) available at [doi/10.2838/128916](https://doi.org/10.2838/128916), accessed on 4 June 2023.

Friedland, David K 'Resolving disputes online during the covid-19 pandemic' (2020) available at <https://www.inta.org/resolving-disputes-online-during-the-covid-19-pandemic/>, accessed on 24 June 2023.

Gellman, Robert 'A brief history of the virtual magistrate project: The early years' (1996) available at <http://www.umass.edu/dispute/ncair/gellman.htm>, accessed on 12 June 2023.

GSM Association 'The Mobile Economy Sub-Saharan Africa' (2021) available at [https://www.gsma.com/mobileeconomy/wpcontent/uploads/2021/09/GSMA\\_ME\\_SSA\\_2021\\_English\\_Web\\_Singles.pdf](https://www.gsma.com/mobileeconomy/wpcontent/uploads/2021/09/GSMA_ME_SSA_2021_English_Web_Singles.pdf), accessed 11 June 2023.

ICANN *Uniform Domain Name Dispute Resolution Policy* (1999) available at <https://www.icann.org/resources/pages/policy-2012-02-25-en>, accessed on 26 June 2023.

ICANN *Rules for uniform domain name dispute resolution policy* (2012) available at <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>, accessed on 26 June 2023.

Katsh, Ethan 'Dispute resolution without borders: Some implications for the emergence of law in cyberspace' (2006) 11 *First Monday* available at <https://doi.org/10.5210/fm.v11i2.1313>, accessed 24 June 2023.

'KRA unveils Online Dispute Resolution mechanism' available at <https://www.kenyanews.go.ke/kra-unveils-online-dispute-resolution-mechanism/>, accessed on 6 June 2023.

Lederer, Nadine 'The UNCITRAL Technical Notes on Online Dispute Resolution – Paper Tiger or Game Changer' available at <http://arbitrationblog.kluwerarbitration.com/2018/01/11/new-found-emphasis-institutional-arbitration-india/>, accessed on 14 June 2023.

Lexisnexis 'When you can't meet in court: Pros and cons of online dispute resolution' available at <https://www.lexisnexis.com.au/en/COVID19/blogs-and-articles/when-you-cant-meet-in-court-online-alternative-dispute-resolution-during-coronavirus-covid19>, accessed on 27 January 2021.

Muthusi, Musau Evans 'Implementation of Article 159 bit by bit: a place for online dispute resolution in the Kenyan bar' (2018) available at <https://su-plus.strathmore.edu/bitstream/handle/11071/9536/Implementation%20of%20Article%20159%20bit%20by%20bit%20%20%20a%20place%20for%20online%20dispute%20resolution%20in%20the%20Kenyan%20bar.pdf?sequence=1&isAllowed=y>, accessed on 8 June 2023.

National Centre for Technology and Dispute Resolution 'Online dispute resolution standards of practice' (2009) available at

<https://www.icann.org/en/system/files/files/odr-standards-of-practice-en.pdf>, accessed on 12 June 2023.

Nengo, Jacktone 'The data protection vis a vis the developments around e-commerce In Kenya' (2020) available at <https://ssrn.com/abstract=3840397>, accessed on 9 June 2023.

Norbrook, N, M Soumaré, Q Velluet & M Galtier 'Tech hubs across Africa to incubate the next generation' (2020) available at <https://www.theafricareport.com/23434/tech-hubs-across-africa-to-incubate-the-next-generation/>, accessed on 7 June 2023.

Nottebohm, Olivia et al 'Online and upcoming: The Internet's impact on aspiring countries' (2012) available at <http://www.mckinsey.com>, accessed on 22 June 2023.

Nwandem, Osinachi 'Online Dispute Resolution: Scope and matters arising' (2014) available at SSRN: <https://ssrn.com/abstract=2592926>, accessed on 9 June 2023.

Obi-Farinde, Morenike 'ODR in Africa: The emergent face of dispute resolution post COVID-19' available at <https://mediate.com/odr-in-africa-the-emergent-face-of-dispute-resolution-post-covid-19/>, accessed on 21 June 2023.

Ogo, Ify 'An agenda for the AfCFTA Protocol on E-commerce' (2020) available at <https://www.tralac.org/blog/article/14692-an-agenda-for-the-afcfta-protocol-on-e-commerce.html>, accessed on 24 June 2023.

Olubiyi, IA, AJ Olaniyan & N Odiaka 'The role of technology in the advancement of legal education and practice in Nigeria' (2015) at 12 available at [http://eprints.abuad.edu.ng/639/1/Olubiyietal\\_Paper.pdf](http://eprints.abuad.edu.ng/639/1/Olubiyietal_Paper.pdf), accessed on 3 June 2023.

Organisation of American States 'Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes' (2010) available at [http://www.oas.org/dil/esp/CIDIP-VII\\_doc\\_trabajo\\_gt\\_proteccion\\_consumidor\\_anexo\\_A\\_\\_Borrador\\_Ley\\_Marco\\_Cooperativo\\_Modelo\\_Solucion\\_Electro.pdf](http://www.oas.org/dil/esp/CIDIP-VII_doc_trabajo_gt_proteccion_consumidor_anexo_A__Borrador_Ley_Marco_Cooperativo_Modelo_Solucion_Electro.pdf), accessed on 24 June 2023.

Parlade, CV 'Challenges to ODR implementation in a developing country' (2003) *Proceedings of the UNECE Forum on ODR* available at <http://www.odr.info/unece2003>, accessed on 5 June 2023.

Rabinovich-Einy, Orna 'Reflecting on ODR: The Israeli Example' (2008) available at [https://www.researchgate.net/publication/221172969\\_Reflectingon\\_ODR\\_The\\_Israeli\\_Example](https://www.researchgate.net/publication/221172969_Reflectingon_ODR_The_Israeli_Example), accessed on 2 June 2022

Roger, Christine 'People are using Red Dead Redemption 2 to have work meetings for those who work from home' available at <https://www.techtimes.com/articles/249792/20200521/people-are-using-red-dead-redemption-2-to-have-work-meetings-for-those-who-work-from-home.htm>, accessed 2 June 2023.

'Russian Online Arbitration Rules Come Into Force' available at <http://arbitrations.ru/en/presscentr/news/the-online-arbitration-regulation-comes-into-force/>, accessed on 12 June 2023.

Sabit, KO 'Technology and its use in Nigerian courts' (2022) available at <https://ssrn.com/abstract=4099326>, accessed on 15 June 2023.

Schmitz, Amy J 'Dangers of digitizing due process' (2020) available at <https://ssrn.com/abstract=3525757>, accessed on 24 June 2023.

Shi, Changqing, Tania Sourdin & Bin Li 'The smart court - A new pathway to justice in China?' (2021) *International Journal for Court Administration* 1 at 8 available at <https://ssrn.com/abstract=3778345>, accessed on 9 June 2023.

Sucker, Franziska 'COVID-19 pushes digital solutions and deepens digital divides: What role for African digital trade law?' (2020) available at <https://www.afronomicslaw.org/2020/05/09/covid-19-pushes-digital-solutions-and-deepens-digital-divides-what-role-for-african-digital-trade-law>, accessed on 21 June 2023.

The Alternative Dispute Resolution (ADR) Framework available at <https://www.kra.go.ke/images/publications/ADR-FRAMEWORK.pdf>, accessed on 5 June 2023.

Van Gelder, E & A Biard 'The Online Dispute Resolution platform after one year of operation: A work in progress with promising potential' available at <http://dx.doi.org/10.2139/ssrn.3169254> accessed on 15 June 2023.

Wonyra, Kwami Ossadzifo & Honoré Tenakoua 'Digitalisation as a driver of intra export promotion under African continental free trade area (AfCFTA)' (2022) 1 at 12 available at <https://ssrn.com/abstract=4014847>, accessed on 19 June 2023.

Yang, Lifan Yang & Jianzheng Yang 'The drafting idea of UNCITRAL ODR rules and ODR enforcement practice in China' available at <http://klri.re.kr:9090/bitstream/2017.oak/6480/1/The%20Drafting%20Idea%20of%20UNCITRAL%20ODR%20Rules%20and%20ODR%20Enforcement%20Practice%20in%20China.pdf>, accessed on 27 June 2023.