EMJ MS
EUROPEAN MULTIDISCIPLINARY JOURNAL OF MODERN SCIENCE
https://emjms.academicjournal.io/index.php/ Volume: 4

ODR (Online Dispute Resolution) System as a Modern Conflict Resolution: Necessity and Significance

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Abstract: This article analyzes the jurisdiction of online dispute resolution in the case of conflict of laws rule to the server location or registration of the corresponding domain. If it is a company, then the place of registration is that of the company. It is ideal if the arbitration centre associated with the ODR platform uses its jurisdiction and the approval of the decision by the centre itself to ensure its execution. ODR can gain the most popularity and relevance within the framework of smart contracts. In this regard, it is necessary to adopt an international act (UNCITRAL Technical Notes on Online Dispute Resolution) or amend the New York Convention as well as recognize national laws and the UNCITRAL Model Law, a rule on the recognition and enforcement of ODR awards.

Keywords: ODR, artificial intelligence, conflict of laws, ‘law of location’, ‘law of structured place’, ‘law of damaged place’, Cyber Tribunal, ADR practices, UNCITRAL Model Law on Arbitration, International Arbitration centers, the WIPO Uniform Domain Name Dispute Resolution Policy (UDRP).

INTRODUCTION

Across the globe, the development of international trade relations and investment activities has led to the emergence of disputes that require resolution. Currently, the most relevant and quickly developing way of resolving such disputes is international commercial arbitration. International arbitration has become a favoured system for resolving disputes among many business partners in virtually every area of global trade, markets and investments. According to the Statistics and Arbitration Centers, in 2020, 946 cases in the International Court of Arbitration of the International Chamber of Commerce (ICC, Paris), 152 cases in the Arbitration Institute of the Stockholm Chamber of Commerce (SCC, Stockholm), 1080 cases in the Singapore International Arbitration Center (SIAC, Singapore) , The London International Court of Arbitration (LCIA, London) received 444 cases [1, P.12].These indicators demonstrate the importance of paying special attention to the effective regulation of international arbitration activities in the world.

Particular attention is paid to the benefits of international arbitration in the world; in particular, the wide introduction of information technology in this area, as international arbitration allows the parties to resolve disputes confidentiality, speed, arbitrary and impartial arbitration and enforcement of decisions worldwide. Particular attention is paid to the need to clearly define its jurisdiction in international arbitration, including the definition of the right to resolve the dispute, the abolition of the dispute in international arbitration or the recognition and enforcement of its decision.

When raising an issue with the courts of law, jurisdiction is of the utmost important for the assurance of whether the option to arbitrate may be postponed. Noncompliance may result in

the court continuing to consider the subject of the dispute and, for the most part, make a choice that will exert jurisdiction upon the parties. Despite the fact that the arbitral tribunal may not be limited by the court's choice, it is, on a basic level, necessary to contemplate upon a protest by one of the parties, regardless of whether the option to arbitrate has been postponed.

RESULTS AND DISCUSSION

The Arbitration Act 1996 states that a request for a stay must be conceded before the individual against whom the procedures were brought has made any move to respond substantively to the case and no sooner than after fitting technical advancements (assuming any) are made to recognise the lawful procedures.

The Private International Law Act (PILA) is, to some extent, excellent in this regard; it does not require a supplication by one of the parties. Rather, a Swiss court of law will decrease its jurisdiction ex officio unless the respondent continues the proceedings without challenging jurisdiction. This is an example of a common standard of Swiss law, as indicated by the ability of Swiss courts of law to apply government rules ex officio and, specifically, examine their jurisdiction ex officio [2, P.12].

Professor of law Geo believes that an arbitral court must comply with the decided agreements that are material to it: (i) the arbitral proceeding agreement; (ii) the pertinent arbitral instructions (in the event of official negotiation, these are provided by the establishment of the case in which the procedures are composed; in the event of specially appointed mediation, the parties may embrace the UNCITRAL Arbitration Rules that are composed to give a legitimate structure to impromptu mediation, agree on explicit guidelines in an understanding between them, or leave it to the arbitral council to decide the practical standards); (iii) the principles of the relevant arbitration regulations (generally, as observed previously, the rule of the point of intervention); and (iv) the New York Convention [3, P.34]. These grounds maintain a proper order of importance among one another: the intervention understanding between the parties is of the least degree of importance; the discrete selected rules are associated with the arbitration agreement and can, in this way, be considered as possessing the same level of importance; the appropriate arbitration laws have a higher degree of importance and, because they are compulsory, supercede the discrete selected rules and institutional intervention instructions; and the New York Convention maintains the utmost degree of significance, beating the various aforementioned grounds, as it contains obligatory arrangements. The underlying investigation would demonstrate that, regarding the decision of the regulations pertinent to the benefits of the dispute, the impacts of the parties' concurrence on the relevant law are significantly upgraded through affirmation by every single appropriate source, even those with an officially heightened position. There are, in any case, a few restrictions.

The rules of arbitration, as a complement to the arbitration arrangement, are provided by the selected organisation of the parties and apply in the case of the formal arbitral proceedings. The parties agree to arbitrate within the context of a certain organisation and adhere to the laws of this organisation, which are compulsory for both parties and the tribunal. The parties may simply opt to comply with the UNCITRAL Laws in the case of ad hoc arbitration or may decide to select the arbitration guidelines themselves. In these instances, such principles refer to the arbitration clause as an extension of the main agreement.

As the world and methods of conflict resolution evolve, ODR is becoming the most popular digital conflict resolution method. ODR procedures involve the filing of electronic documents in which the parties can use encryption or electronic signatures to protect the integrity of

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

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

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

The origins of ODR can be traced back to 1996, when the Virtual Magistrate Project was created to offer an online arbitration system for resolving electronic defamation issues. For instance, the University of Massachusetts Online Ombuds Office resolved a website dispute with the owner of a local newspaper associated with a copyright infringement through mediation [4, P.66]. Since 1999, many ODR service providers have actively addressed disputes in both the public and private spheres involving public and commercial entities [5, P.43].

To provide another example, in India, ODR originated from alternative dispute resolution (ADR) processes in which family disputes were resolved by srenis (businessmen doing the same business) and parishads (a group of men with legal knowledge). In other jurisdictions, ODR was also based on ADR practices, adding technologies to the ADR process to make it more efficient and convenient for the parties. In India, the use of ADR techniques is explicitly encouraged in the Nyaya Panchayat, Lok Adalat, Arbitration and Conciliation Act 1996, based on the UNCITRAL Model Law on Arbitration, providing statutory arbitration among other initiatives. The Indian legal framework supports ODR, including Section 89 of the 1908 Civil Procedure Code, which promotes the use of alternative dispute resolution between parties. Likewise, Rule 1A of Bylaw X empowers the court to direct the litigants to select any ADR method to resolve disputes. In addition, the Information Technology Act 2000 legally recognises the use of electronic signatures and electronic records. Recently, in the State of Maharashtra v Dr Praful B. Desai [6, P.19], the Indian Supreme Court ruled that video conferencing is an acceptable method of recording witness statements. In the case of Grid Corporation of Orissa Ltd v AES Corporation [7, P.23], the Supreme Court ruled: ‘When effective consultation can be achieved through electronic media and remote conferencing, there is no need for two people who need to act in consultation with each other to necessarily sit together in one place unless required by law or by the basic agreement between the parties’ [8, P.54].

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

Cost and time efficiency are typical characteristics of ODR, as opposed to litigation, which is a time-consuming and expensive method of resolving disputes. Brams, S.J. and Taylor, have clearly stated: ‘The difficulty of using traditional dispute resolution methods in low-value cross-border disputes has led to an interest in cheap cases, methods of resolving disputes between jurisdictions’ [9, P.22].

Jurisdictional issues have been studied in depth by western experts. In particular, Johnson examined the topic of borders on the Internet, countries in which the domain name is registered under the jurisdiction of the court [10, P.33].

ODR offers plenty of flexibility, it can be initiated at any point in a trial or even before a trial begins. The ODR may also be terminated if the parties mutually agree that it does not lead to a workable solution. The parties have the right to independently determine the methods and procedures for resolving disputes online in the event of disputes arising under a specific electronic contract. Even in the absence of a written contract declaring the ODR as a dispute resolution method, parties can use ODR methods to resolve their disputes when such disputes arise. In contrast to litigation, the parties are free to choose their governing contract law, dispute resolution procedure, ODR service provider and other related issues. The use of ODR also allows for the selection of a neutral third party from an experienced group of mediators and arbitrators, which increases impartiality and means that the parties can present their cases on their own without fear of their private disputes entering the public domain through legal precedents. Disputes and negotiations between the parties will always remain confidential. In B2C (Business to Consumer) transactions, ODR encourages customer loyalty, while in C2C (Consumer-to-consumer) transactions, it minimises dissatisfaction and the risk of fraudulent transactions between stakeholders.

Another definition of international jurisdiction is analysed by Fedotov. In his opinion, the country in which the Internet server is located depends on the criterion of jurisdiction. The author believes that every server that is materially located in a particular state and on the territory of that state is subject to its laws [11, P.21].

The state establishes its jurisdiction over a person if there is a specific connection between his territory and that person. A connection to a region is particularly evident when the information is located on a specific server that allows Internet users to access it. Obviously, a state can, at any time, establish its jurisdiction over persons who store information on its territory, and it is inappropriate for a person operating on the Internet to ignore the legislation of the state in which the information is posted. However, this precedent does not mean that other states should abandon their jurisdictions in favor of the jurisdiction of the state in which the server is located [12, P.89].

Referring to the jurisdiction of the country in which the server is located for a person who publishes a relevant item on the Internet is, without a doubt, convenient, as acknowledging the legislation of the 'host' country can resolve vexing issues. However, this also raises a serious concern; the opportunity for a person to create and use a document himself is especially convenient for keeping the level of protection of absolute rights low, and no special legislation on the Internet may decide the jurisdiction described. At the same time, it is important to remember that the domain name of the country in which the server is located may not be compatible with the country of registration, in which case a user that accesses the Internet from one domain name and switches to another computer thousands of miles away does not pose a problem for the domain name owner [13, P.80].

A variety of dispute resolution methods may be involved in ODR, including negotiation, conciliation, mediation, arbitration and hybrid mechanisms such as final offer arbitration, Medola, mini-trial, med-arb, and neutral evaluation. ODR can be adjudicated or out of court. An example of a litigation is arbitration in which the award by the arbitrator is binding on both parties. In contrast, in a non-adjudicated process, the main goal is to arrive at a settlement of a dispute between parties without ruling on its merits. Mediation by a neutral third party offers options for resolving disputes between the parties and active participation in the dispute resolution process.

In Canada, the Cyber Tribunal in Montreal has successfully resolved electronic disputes using ODR, while in the United States, the Online Ombuds Office has used electronic mediation. SquareTrade is a well-known ODR provider that resolves disputes between sellers and buyers who use online commercial services by adopting methods of negotiation and mediation. Financial and insurance disputes may be resolved in the USA through Cybersettle and Click 'N Settle. Other ODR service providers include www.mediate.com, www.novaforum.com, www.icourthouse.com and www.etribunal.com. Smartsettle uses negotiation software to resolve disputes between parties as well as give priority to various interests affected by disputes.

Deutscher Bundestag put forward his proposal to regulate the considered sphere of relations [14, P.56]. According to the author, non-contractual obligations on the Internet should be governed by the legislation of the country of permanent residence, the main place of business of the operator of the site or an individual or legal entity who has posted the results of intellectual activity on the Internet. However, the level of protection afforded under the relevant law cannot be lower than the level of protection afforded under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Otherwise, the laws of the country containing the server hosting the illegally used intellectual property shall apply. The author proposes the use of the proximity principle as a criterion for correction [15, P.90].

One of the most successful ODR initiatives is the WIPO Uniform Domain Name Dispute Resolution Policy (UDRP). The policy, adopted by ICANN on 26 August 1999, provides for an administrative procedure to resolve domain name disputes through accredited service providers that follow the UDRP along with their own additional rules. WIPO, the National Arbitration Forum and the Asian Domain Name Dispute Resolution Center are among the most highly accredited ODR service providers. In administrative proceedings, it is stipulated that disputes are subject to resolution. Within a certain time frame, procedures can be initiated before the trial continues. The decision of the administrative board can be appealed within 10 days. Disputes have been resolved through the UDRP on the transfer of domain names registered in bad faith by the respondent, which has no legitimate interest if the domain name is deceptively similar or identical to the complainant's trademark. At Tata Sons Ltd. v Advanced Information Technology Association [16, P.100], WIPO ordered the transfer of the Tata.org domain name to the plaintiff Tata Sons Ltd., as all three criteria of the UDRP policy were established in the case [17, P.20].

Conflicting rules regarding 'law of location', 'law of structured place' and 'law of damaged place', which are usually used to define rights in private international law, have different meanings when applied to legal disputes arising on the Internet in accordance with the criterion 'server location'[18, P.9]. Server location is the location of the physical communications system (hardware and software), and the physical location of the server hosting the information (website) cannot be considered as a criterion for this type of dispute. The location of the equipment qualifies as the location of the server if the tools and software installed on it belong to a specific person and are used to perform activities that are critical to legal disputes that arise on the Internet [19, P.44].

In online dispute resolution, many complex issues may arise – including commercial and legal ones – and their consequences follow. As a rule, when accessing the ODR process, mutual consent between the parties is required, whether through an explicit clause in the contract or by mutual agreement of the parties after a dispute that may arise. The service provider must be legally binding or enforceable. Most jurisdictions recognise and enforce the standard ODR clause on a B2B website; however, in the case of B2C contracts, especially in

the European Union, consumers cannot be deprived of the additional rights available to them by the law of their place of residence through an agreement restricting the jurisdiction of the court to the country of the ODR service provider if it provides lower standards of protection that the consumer is entitled to in his country of residence [20, P.21]. Maintaining the confidentiality and secrecy of negotiations as well as of any subsequent transactions between the parties when resolving disputes is one of the most important tasks of online international arbitration. The Internet is still considered an unsafe medium for arbitration, as cybercriminals have several methods with which to intercept data and messages between parties, and any information passing through Internet networks can be illegally stored or used by cybercriminals. In light of this, increasingly sophisticated methods of security on the Internet are emerging, such as the use of digital signatures. Furthermore, technology can be used to combat any Internet security loopholes and strengthen the ODR process. Stanieri A. and Zeleznikow J. [21, P.9] also believed that technology is a fourth party in the ODR process and noted that ODR can be used not only to effectively resolve online disputes but to build trust in virtual spaces as well. The use of cookies often violates Internet users' privacy and increases security concerns. E-litigation employs multiple layers of security, including a sophisticated server, complex passwords and software that backs up the complete data of its servers and stores information provided by parties in a secure environment. Such technical infrastructures are required to address any concerns about confidentiality breaches in the ODR process. Many paralegal rights, such as money back guarantees, buyer protection clauses and authentication stamps, are becoming popular on e-commerce websites. This only serves to generate more trust in ODR practices and promote consumer confidence in e-commerce.

Another significant concern for most parties is that their disputes should be independent and decisions should be impartial. To this end, they tend to prefer institutional ODR providers, which are more structured and transparent, reducing the chances of bias affecting panelists' decision-making process.

In cyberspace, there are no uniform laws for ODR, which creates challenges regarding the application of substantive and procedural law to the resolution of electronic disputes. To decide on the jurisdiction that applies to online disputes, the effects test [22, P.24] and the Zippo sliding scale approach [23, P.80] can be used. In private international law, the place of performance of a contract is an important parameter for determining the substantive law or jurisdiction that will be relevant to the circumstances of the case. Consumer protection law provides stronger consumer protections in Europe and the enforcement of binding legal regulations in lex situs, some of the challenges stemming from the lack of uniform cyber laws. Could there ever be an International Court of Justice that resolves disputes of any nature by enacting homogeneous cyber laws regulating the ODR process and procedures? Here, I draw an analogy between ODR and the application of lex mercatoria to international trade. It will be beneficial, though homogeneous, to formulate laws on ODR or the basic legal principles of ODR legislation and practice. Major international legislative texts, treaties, conventions and national initiatives can add certainty to ODR law and practices in cyberspace. In fact, this mission is thought to be halfway complete, as several initiatives have been implemented to bring more clarity to ODR. These initiatives include the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 and the Rome Convention on the Law Applicable to Contractual Obligations 1980. In 1999, the Organisation for Economic Co-operation and Development (OECD) published its guidelines for consumer protection in the context of electronic commerce [24, P.99]. The guidelines stipulate that the consumer should have access to fair

and cost-effective means of resolving disputes and explain the importance of information technology when using ADR systems.

In the European Union, letter E of Article 17 of the Trade Directive [25, P.99] provides that, in the event of an electronic dispute, Member States are required to ensure that parties are not prevented from using ADR procedures, 'including appropriate electronic means', to resolve a dispute. The National Alternative Dispute Resolution Advisory Board developed standards for ADR in 2001 and established ODR guidelines in 2002 [26, P.100].

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

Some critics, such as Drake and Moberg and Wilson, Aleman and Leatham [27, P.76], have expressed fears arising from a lack of personal interaction between the parties of the dispute. Physical presence, body language and tone of conversation are important when resolving a dispute. Along these lines, Goffman developed 'face theory', which explains that the process of resolving a dispute and its success directly depend on the communication between the parties and any negative or positive statements made during communication.

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

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

Companies such as Verisign and TRUSTe were then formed, and SquareTrade and BBB Online implemented the concept of trust marks as a self-regulatory initiative in ODR practice. At the government level, Electronic Consumer Dispute Resolutio (ECODIR) and other ODR projects were implemented as measures of e-governance, as ODR proved to be an effective means of dispute resolution. Schultz was of the opinion that the role of the state is more important than the self-regulatory approach. According to Schultz, 'symbolic capital' – that is, the social reputation of the ODR provider – lends credibility and authenticity to the ODR process that the government is able to provide. The government also provides financial assistance to ODR projects and assists in setting up the technical and administrative infrastructure needed to perform ODR. In addition, Schultz suggests that accreditation is imperative when providing ODR services, as well as acting as a certifier and clearinghouse,

helping parties select a service provider, facilitating electronic filing of forms and overseeing the ODR process. He also advocated for an online appeal system of verifying decisions by ODR providers that will provide greater transparency and accountability in the ODR system. Likewise, Rule states: 'To a large extent, the government is the ideal place to resolve disputes because the government has a strong incentive to resolve disputes so that society can function normally. The government is also a good place to resolve disputes, as it is usually not interested in the outcome of most of the issues that are entrusted to it'.

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

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

CONCLUSION

After reviewing above mentioned approaches, we have come to believe that ODR growth can be realised to its fullest potential through public-private partnerships. The role of government will be to instill trust and credibility, and the private sector will contribute to cutting-edge technology. In public-private partnerships, ODR best practices can be successfully established and implemented, and greater awareness and participation in the ODR process can be realised. In the US, Australia, New Zealand, Singapore, Canada and the UK, special funding provided by the government may help to initiate ODR projects.

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

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