

PADDLING TO SURFING: THE RISE OF ONLINE DISPUTE RESOLUTION

05 August 2019 | Global
Legal Briefings - By **Kathryn Sanger and Anita Phillips**

ODR has become a common term in the disputes world. Given business is almost always conducted online, why shouldn't disputes be resolved in the same way? Whether it is Brexit or the Belt and Road, ODR has been touted as part of the solution.

THE ODR 'SPECTRUM'

ODR can be many different things.

At its simplest, it is a way of filing disputes documents securely online, using virtual meetings and hearings, with resolution by human decision makers and facilitators. China's internet courts, platforms like ebram.hk (electronic business related arbitration and mediation), and various national court modernisation projects fall into this bracket.

In the consumers space, it has for some time been underpinned by AI too; with sites like eBay and Alibaba using algorithms instead of humans to generate quick and cheap online decisions to resolve e-commerce disputes. This is best suited to simple disputes where monetary payment is sought and liability is generally uncontested. In fact, there may be no need for ODR at all: smart contracts using Blockchain technology are leapfrogging ODR and coding resolution based on prescribed outcomes (eg late delivery of product A results in \$B payment from seller to buyer). But AI-driven ODR may also help in complex scenarios. ODR platform, Smartsettle, has famously used algorithms to 'negotiate' Brexit - looking at both sides' BATNAs and WATNAs and improving the negotiated deal.

A half-way house, between algorithms and traditional decision makers, can be found in the field of cryptocurrencies: Kleros is the ODR platform for Ethereum, where subject-matter specialist 'jurors' are selected to resolve disputes quickly online (a form of crowd justice).

DO FRAMEWORKS GOVERN ODR?

Yes. Several pan-regional ODR frameworks have evolved. The EU's ODR Regulation introduced in a platform that became operative in February 2016. It covers EU based e-commerce consumers and traders (classic B2C, or business to consumer disputes). All businesses selling goods or services online within the EU are required to carry a link on their website to the ODR platform. The platform uses dispute resolution bodies (mediation institutions) approved by national governments to resolve the dispute. Use of the ODR platform is not compulsory and impact has been patchy. According to an EU report in December 2017, 40% of the 24,000 complaints lodged in the first year were resolved outside the platform, albeit via contact between consumers and traders initiated by it. A lack of response from traders to complaints resulted in a significant proportion of complaints being automatically closed and less than 1% of cases actually reached resolution via mediation.

The Asia Pacific Economic Co-operation (**APEC**) is formalising a business to business (B2B) ODR system, likely to be based in part on the EU ODR platform, using national institutions to help resolve disputes. Echoing most Belt and Road models, APEC's platform suggests mediation first, then arbitration.

UNICTRAL has recently developed the Declaration of Rome under the Belt and Road Service Connection, with ODR at its heart. Mixed-mode dispute resolution, combining mediation and arbitration, and using online features where possible, seems to be the direction of travel for Belt and Road disputes.

Meanwhile, the International Council for Online Dispute Resolution, comprising world experts in the field of ODR, is developing global standards.

THE FUTURE?

ODR is a natural consequence of user demand. Efficiency, technology and greater collaboration were identified in the [Global Pound Conference](#) series as key themes from the 4,500+ stakeholders surveyed worldwide on the future of commercial disputes resolution.

And whilst the legal profession is a slow adopter of change, market demand for legal process to reflect the realities of life and business is driving ODR's rise. Once anchored to a physical place (a court, tribunal or meeting room), dispute resolution is becoming less centralised.

Expect to see much more of ODR in the future, particularly as smart contracts gain pace and use similar algorithms to code contract outcomes.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



KATHRYN SANGER

PARTNER, HONG

KONG

+852 21014029

kathryn.sanger@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2022