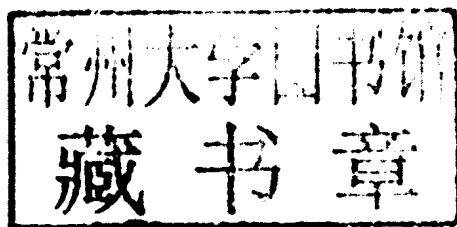


ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE

*A TREATISE ON TECHNOLOGY AND DISPUTE
RESOLUTION*

MOHAMED S. ABDEL WAHAB, ETHAN KATSH AND DANIEL RAINEY
(Eds.)



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FOREWORD

Is court a service or a place? When people or organizations are in dispute, must they congregate in physical courtrooms to resolve their differences?

It does seem to be deeply imbued in conventional Western thinking that when serious conflicts arise in society, then the warring people become parties and it is to some court that they head: at law school, students are often taught that the court is the definitive forum and mechanism for settling differences; in our literature, the courtroom is the theatre in which many disagreements are played out; and the lay perception of the administration of justice is frequently articulated in terms of wood paneled hearing rooms, arcane procedures and judges in robes.

Critics of the court system, however, have for long challenged whether courts are indeed the best placed institution and method for resolving many kinds of dispute. Opponents have argued, for example, that pursuing an action in the courts is too confrontational, too time-consuming and too costly. Many have gone further and called for the widespread adoption of ADR, alternative dispute resolution.

This collection of essays – written by undoubted authorities in the field – is concerned with one emerging category of alternative dispute resolution, known as online dispute resolution, or ODR. When a conflict is handled using ODR, a traditional courtroom is not employed. Instead, the process of resolving a dispute is entirely or largely conducted through the Internet. Of course, as this volume shows, this snapshot of ODR is an oversimplification. In the pages that follow, it is made clear that many techniques fall under the umbrella of ODR, such as e-mediation, e-negotiation, and e-arbitration, and that these techniques can be deployed in sorting out a wide range of disagreements – from consumer disputes to problems arising from e-commerce, from quarrels amongst citizens to conflicts between individuals and the state. The book also shows that ODR is already being embraced, albeit in varying degrees, in North America, Europe, Asia, Australia, Africa, and Latin America.

In a world in which the Internet is so firmly embedded, it should come as no revelation that online methods might be devised for sorting out at least some tensions and clashes that arise amongst human beings. And yet, most lawyers and many litigators have not yet heard of ODR. More disconcertingly, when seasoned legal advisers are introduced to the notion of ODR, they often regard it with distrust and as a curiosity that will remain forever on the edge of their world. The skeptics quickly question the fairness, openness, rigor and reliability of ODR. These misgivings are not to be dismissed lightly. Instead, in this book, measured, compelling and reassuring accounts of ODR are offered, addressing a wide range of related issues, including trust, justice, cultural context, and the interaction of ODR

with traditional judicial systems. Even in the chapters that explore the potential of artificial intelligence and mobile technology for ODR, the tone is not evangelical.

Nonetheless, it is hard to digest the theory and case studies presented here and not feel a strong sense of optimism that we are on the threshold of a new era for dispute resolution; that we are being offered a glimpse of methods for settling disagreements that will incur costs that are, at last, proportionate to the amounts at issue. The credibility of legal systems around the world is currently being challenged by disgruntled users – from impoverished individuals through to multinational businesses – who claim that the courts are no longer an affordable or sensible forum for disposing of many of their conflicts.

In these difficult economic times, ODR offers the promise of robust and yet radically less expensive dispute resolution. And while it may seem alien or outlandish for lawyers, policymakers and opinion formers of today, few of these belong to the Internet generation. Future generations, for whom working and socialising online is second nature, may regard ODR as an entirely natural facility, much more so than conventional courts.

For long, I have described ODR as an example, in law, of a disruptive technology – one whose introduction can fundamentally challenge and change working practices of the past. For whom, though, is ODR disruptive? The harsh truth is that ODR is most disruptive for those who currently make a living from traditional litigation. For lawyers and public servants whose careers are in the courts, ODR may well be regarded as threatening. This should not deter us from evolving techniques that better meet the needs of Internet-based societies. It is not the purpose of the courts to provide lawyers with a livelihood. Crucially, what may be disruptive for law firms may be empowering for those who have problems to resolve.

As with all disruptive technologies, ODR is not therefore an uncontroversial field of theory and practice. That is why this book is so important. Until now, much discussion of ODR has been anecdotal and speculative. In gathering together the essays that follow, Mohamed Wahab, Ethan Katsh and Daniel Rainey have taken the debate and theory about ODR to a new level – a standard of discourse that is better informed, more systematic, and rooted more reliably in experience of live systems.

I wish the work every success.

Professor Richard Susskind OBE
IT Adviser to the Lord Chief Justice of England and Wales
President of the Society for Computers and Law

ABBREVIATIONS

AAA's	American Arbitration Association
ABA	American Bar Association
ACUS	Administrative Conference of the United States
ADR	Alternative Dispute Resolution
AECE	La Asociación Española de la Economía Digital
AI	Artificial Intelligence
ANRT	National Telecommunications Regulatory Agency
ASEAN	Association of South East Asian Nations
B2B	Business to Business
BATNA	best alternative to a negotiated agreement
BBB	Better Business Bureau
BC	British Columbia
BFSO	Banking and Financial Services Ombudsman
BILETA	British & Irish Law, Education and Technology Association
BIS	Business Information Systems
BSA	Business Software Alliance
C2B	Consumer to Business
C2C	Consumer to Consumer
CA	Certificate Authority
CAV	Consumer Affairs Victoria
CCC	Consumers Coordination Council
CCP	Commonwealth Court Portal
CDA	Communications Decency Act
CDRI	Court Dispute Resolution International
CE	European Committee of Standardization
CEJA	Council on Ethical and Judicial Affairs
CEO	Chief Executive Officer
CIDIP	Conferencias Interamericanas Especializadas de Derecho Internacional Privado
CMS	Case Management System
CNN	Cable News Network
CNSS	National Social Security Fund
CORE	Consumer Online Resource & Empowerment Centre

ABBREVIATIONS

CRDP	Centre de recherche en droit public
CSP	Certificate Service Providers
CWA	CEN Workshop Agreement
DOS	Disk Operating System
DSCV	Dispute Settlement Centre of Victoria
DSD	Dispute Systems Design
DSR	Detailer Seller Rating
EC	European Commission
ECC	European Consumer Centres
ECLAC	Economic Commission for Latin America and the Caribbean
ECODIR	Electronic Consumer Dispute Resolution
ECT	Electronic Communications and Transactions Act
EDR	Electronic Dispute Resolution
EEC	European Economic Community
ERIA	Economic Research Institute for ASEAN and East Asia
ESP	E-Signature Service Provider
EU	European Union
F2F	Face to Face
FDI	Foreign Direct Investment
FDR	Family Dispute Resolution
FEDMA	The Federation of European Direct and Interactive Marketing
FHA	Fair Housing Act
FICS	Financial Industry Complaints Service
FMCS	Federal Mediation and Conciliation Service
FOIA	Freedom of Information Act
FOS	Financial Ombudsman Service
G2C	Governmental to Citizen
GBD	Global Business Dialogue
GDP	Gross Domestic Product
HLSO	High Level Summit Organizing Committee
IAAA	International Arbitration Amendment Act 2010
IACM	International Association for Conflict Management
ICANN	Internet Corporation for Assigned Names and Numbers
ICASA	Independent Communications Authority of South Africa

ICC	International Chamber of Commerce
ICCP	Information, Computer and Communications Policy
ICDR	International Centre for Dispute Resolution
ICT	Information and Communication Technology
IDB	Inter-American Development Bank
IDP	Internally Displaced Persons
IFJ	International Federation of Journalists
IICL	Institute for International and Comparative Law
ILCE	Latin American E-commerce Institute
IOS	Insurance Ombudsman Service
IP	Internet Protocol
IRA	Irish Republican Army
IT	Information Technology
ITAC	Information Technology Academia Collaboration
ITIDA	Information Technology Industry Development Agency
LGDCU	Ley General Defensa consumidores y usuarios (General Law on Consumer and User Protection)
LIT	Legal Information Technology
M2B	Mobile to Business
MCOL	Money Claim Online
MDG	Millennium Development Goals
MFF	Mutual Feedback Withdrawal
NADRAC	National Alternative Dispute Resolution Advisory Council
NARA	National Archives and Records Administration
NCA	National Credit Act No. 34 of 2005
NCAIR	National Centre for Automated Information Research
NGO	Non-Governmental Organization
NMB	National Mediation Board
NRI	Network Readiness Index
NSF	National Science Foundation
NTRA	National Telecommunications Regulatory Authority
OAS	Organization of American States
OCA	Online Consumer Arbitration
OCAA	Online Consumer Arbitration Awards

ABBREVIATIONS

OCDE	Organization for Economic Cooperation and Development
ODR	Online Dispute Resolution
OECD	Organization for Economic Cooperation and Development
OGIS	Office of Government Information Services
PC	Personal Computer
PCOL	Possession Claim Online
PKI	Public Key Infrastructure
PM	Prime Minister
R&D	Research and Development
SAIIP	South African Institute of Intellectual Property Law
SANCO	South African National Civic Organization
SCT	Small Claims Tribunal
SDRCC	Sports Dispute Resolution Center of Canada
SMS	Short Message Service
T2	Technology-reliant to technology-reliant
TABD	Transatlantic Business Dialogue
TACD	Transatlantic Consumer Dialogue
TAGS	Technology Assisted Group Solutions
TIO	Telecommunication Industry Ombudsman
TISCO	Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTY	Teletypewriter
UAB	University of Alabama at Birmingham
UCLA	University of California, Los Angeles
UDRP	Uniform Dispute Resolution Policy
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commissions on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commissions for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research

UNV	United Nations Volunteers
US	United States
USD	United States Dollars
USDA	United States Department of Agriculture
VoIP	Voice over Internet Protocol
WATNA	Worst Alternatives to a Negotiated Agreement
WIPO	World Intellectual Property Organization
WSI	World Summit on the Information Society
ZADRR	ZA Dispute Resolution Regulations

LIST OF EXISTING ODR PROVIDERS

1. ODRWorld <www.odrworld.com>
2. ODRChina <www.odrchina.com/index.php>
3. ODRMalaysia <www.odrmalaysia.com>
4. ODRAustralia <www.odraustralia.com>
5. ODRIndia <www.odrindia.com>
6. SmartSettle <www.smartsettle.com>
7. Cybersettle <www.cybersettle.com>
8. RisolviOnline <www.risolvionline.com>
9. TheMediationRoom <www.themediationroom1.com>
10. CORE <www.corenic.org/dispute-policy.htm>
11. Net-Case at the International Chamber of Commerce (ICC)
12. Web-File at the AAA's online arbitration <<https://apps.adr.org/webfile/>>
13. Austrian Internet Ombudsman <www.ombudsmann.at/>
14. Electronic Consumer Dispute Resolution (ECODIR) <www.ecodir.org>
15. Uniform Domain Names Dispute Resolution Policy (UDRP) at Internet Corporation for Assigned Names and Numbers (ICANN) <www.icann.org/en/udrp/udrp.htm>
16. NetNeutrals <<http://netneutrals.com/>>
17. Consumer Affairs Victoria (CAV) <www.consumer.vic.gov.au>
18. Family_Winner
19. Telecommunication Industry Ombudsman (TIO) <www.tio.com.au>
20. Financial Ombudsman Service (FOS) <www.financial-ombudsman.org.uk>
21. South African Institute of Intellectual Property Law (SAIIPL) <www.saiipl.org.za>
22. Onlineombud <www.onlineombud.com/index.html>
23. Cibertribunal Peruano <www.cibertribunalperuano.org>
24. Concilianet <www.concilianet.profeco.gob.mx>
25. Benoam <www.benoam.ne>
26. American Arbitration Association <www.adr.org>
27. Better Business Bureau Online <www.bbbonline.org/>
28. Family Mediation Canada <www.fmc.ca>
29. Federal Mediation and Conciliation Service <www.fmcs.gov>
30. iCourthouse <www.i-courthouse.com>
31. National Arbitration Forum <www.adrforum.com>
32. PayPal <www.paypal.com>
33. Resolution Canada <www.resolutioncanada.ca/>
34. SettleOnline <www.settleonline.com>

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35. SettleTheCase <www.settlethecase.com>
36. SmartSettle <www.smartsettle.com/>
37. TRUSTe <www.truste.com>
38. WebAssured <www.webassured.com>
39. Settle Today <www.settletoday.com>
40. Electronic Courthouse <www.electroniccourthouse.com>
41. National Mediation Board <www.nmb.gov>
42. Onlinearbitration.net <www.onlinearbitration.net>
43. Fair Outcomes <www.fairoutcomes.com/>
44. Virtual Courthouse <www.virtualcourthouse.com>
45. net-ARBitration Works <www.net-arb.com>
46. Juripax <www.juripax.com>
47. Chamber Settle
48. Netneutrals <<http://netneutrals.com/>>
49. Ebay Resolution Center <<http://resolutioncenter.ebay.com/>>
50. Sports dispute resolution center of Canada <www.crdsc-sdrcc.ca/eng/home.jsp>
51. Fiserv <www.fiserv.com>
52. Centre de Médiation et Arbitrage de Paris <www.cmap.fr>
53. Agència Catalana de Consum <www.consum.cat/>
54. Camera di Commercio di Firenze <www.conciliaonline.net/concilia/>
55. AECE, AUTOCONTROL i Red.es <www.confianzaonline.es>
56. Camera di Commercio di Ancona <www.an.camcom.gov.it>
57. Der Internet Ombudsmann <www.ombudsmann.at>
58. Mediar Online <www.mediaronline.com>
59. Allegro
60. Modria <www.modria.com>
61. Mediate.com <www.mediate.com>

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He regularly appears as arbitrator, expert, and counsel in major ad-hoc and institutional arbitral proceedings subject to Egyptian and foreign laws such as English, French, Emirati, Saudi and Swiss Laws, where he has prosecuted arbitral proceedings across diverse investment and commercial spectrums. Dr. Abdel Wahab is also a CEDR accredited mediator, member of the LCIA Arab Users Council, and Mediation Consultant to the World Bank. He is a leading ODR scholar, who holds over forty five prizes for academic achievement, and has is widely published in learned international journals and is a regular speaker in national and international conferences on International Commercial Arbitration, Online Dispute Resolution, Private International Law, Project Finance and PPPs, and IT Law.

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Jeffrey Aresty is licensed to practice law in Massachusetts and the District of Columbia. In addition to his law degree (Boston University Law, 1976), he also earned masters of laws degrees in taxation (1979) and international banking (1993) from Boston University Law School. He has an extensive background in negotiating and structuring international joint venture relationships, establishing direct and indirect sales, marketing and manufacturing operations in Europe, South America and the Far East, negotiating and structuring licensing, sales, service, and other agreements necessary to transfer technology, staff foreign operations, market products and services. Mr. Aresty is the editor of *The ABA Guide to International Business Negotiations*, the premier legal text on the subject.

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Karim Benyekhlef has been a professor in the Faculty of Law of the Université de Montréal since 1989, and since 1990 he has been seconded to the Centre de recherche en droit public, of which he has been the Director since 2006. A member of the Quebec Bar since 1985, he practiced in the federal Department of Justice from 1986 to 1989. His areas of teaching and research are information technology law, constitutional law (human rights and freedoms), international law, and legal theory and history. In 1995, Prof. Benyekhlef, founded the electronic law journal *Lex Electronica* (<www.lex-electronica.org>), and is also the originator of one of the first on-line dispute resolution projects (the CyberTribunal project, 1996-1999, eResolution, 1999-2001, and ECODIR project, 2000-: <www.ecodir.org>).

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Professor Katsh has chaired the International Forums on Online Dispute Resolution, held in Geneva in 2002 and 2003, Melbourne in 2004, Cairo in 2006, Liverpool in 2007, Hong Kong in 2007, Victoria (Canada) in 2008, Haifa, Israel in June 2009, Buenos Aires in 2010 and Chennai (India) in February 2011. He has been Visiting Professor of Law and Cyberspace at Brandeis University, is on the Board of Advisors of the Democracy Design Workshop, the legal advisory board of the InSites E-governance and Civic Engagement Project, the Board of Editors of Conflict Resolution Quarterly, and is a Fellow of the American Bar Foundation. Professor Katsh received the Chancellor's Medal and gave the campus Distinguished Faculty Lecture in October 2006.

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Arthur Pearlstein, Professor of Law and Director of the Werner Institute for Negotiation and Dispute Resolution at Creighton University, received his B.A from Haverford College, his J.D. from Harvard Law School cum laude, and his Master's in Dispute Resolution from the Straus Institute for Dispute Resolution at Pepperdine University. Immediately prior to joining the Creighton faculty, Professor Pearlstein served as the general counsel and director of Alternative Dispute Resolution and International Programs at the Federal Mediation and Conciliation Service (FMCS). In addition to his work as a lawyer, mediator, and facilitator, Professor Pearlstein has substantial teaching experience both overseas and in the US. He has taught language, cross-cultural communications and negotiations skills as a visiting lecturer to foreign university students and professionals in law, business, and international relations, including at such institutions as the International Islamic University in Kuala Lumpur, Malaysia, and Bilkent University in Ankara, Turkey. His research and praxis interests include dispute systems design, emergence and private ordering in conflict resolution, and intergovernmental and cross-cultural collaboration.

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Marta Poblet is the director of the UAB Institute of Law and Technology, where coordinates a number of research projects dealing with law and technology, judicial systems, legal professions, and alternative dispute resolution systems. She holds a J.D. from the Stanford University (Stanford Law School, 2002) and a M.A. in International Legal Studies (Stanford Law School, 2000). She is also a past Fellow of the Stanford Center on International Conflict and Negotiation (2001). Her research interests cover technology-oriented developments in legal organizations, judicial systems, mediation systems, online dispute resolution (ODR)