

The Growth of E-Commerce and Online Dispute Resolution in Developing Nations: An Analysis

Robin V. Cupido

Abstract—Online dispute resolution has been identified in many countries as a viable alternative for resolving conflicts which have arisen in the so-called digital age. This system of dispute resolution is developing alongside the Internet, and as new types of transactions are made possible by our increased connectivity, new ways of resolving disputes must be explored. Developed nations, such as the United States of America and the European Union, have been involved in creating these online dispute resolution mechanisms from the outset, and currently have sophisticated systems in place to deal with conflicts arising in a number of different fields, such as e-commerce, domain name disputes, labour disputes and conflicts arising from family law. Specifically, in the field of e-commerce, the Internet's borderless nature has served as a way to promote cross-border trade, and has created a global marketplace. Participation in this marketplace boosts a country's economy, as new markets are now available, and consumers can transact from anywhere in the world. It would be especially advantageous for developing nations to be a part of this global marketplace, as it could stimulate much-needed investment in these nations, and encourage international co-operation and trade. However, for these types of transactions to proliferate, an effective system for resolving the inevitable disputes arising from such an increase in e-commerce is needed. Online dispute resolution scholarship and practice is flourishing in developed nations, and it is clear that the gap is widening between developed and developing nations in this regard. The potential for implementing online dispute resolution in developing countries has been discussed, but there are a number of obstacles that have thus far prevented its continued development. This paper aims to evaluate the various political, infrastructural and socio-economic challenges faced in developing nations, and to question how these have impacted the acceptance and development of online dispute resolution, scholarship and training of online dispute resolution practitioners and, ultimately, developing nations' readiness to participate in cross-border e-commerce.

Keywords—Developing countries, feasibility, online dispute resolution, progress.

I. INTRODUCTION

GLOBALISATION is occurring at an unforeseen rate, no doubt as a result of the increased connectivity provided by the Internet. The Internet has become a space where people from different countries and cultures can meet and interact, and facilitates everything from our social interactions to the way we consume information. It has also become a major catalyst for cross-border trade, as it removes geographical barriers, and has opened up new marketplaces. With this increase in Internet activity and interactions comes an increase in the amount of disputes between people, both in their

domestic settings and across national borders. Many of these disputes arise completely in the online sphere, and range in content from domain name issues to business-to-consumer (B2C) disputes. It stands to reason that a reliable and accessible system of dispute resolution is needed to address these issues, and it has been widely accepted that the system of online dispute resolution (ODR) is best suited to do so.

Developed nations like the United States of America and the European Union have been the leaders in creating ODR mechanisms, and currently have sophisticated systems in place to address online disputes arising from various fields. These systems encourage consumers to participate in online cross-border trade, as they are assured that there are adequate systems in place to resolve any potential disputes that may arise. It is clear that participation in this global online marketplace will boost a country's economy, as it will bring in money from foreign consumers through trade. It could also stimulate foreign investment in developing nations and promote the growth of an international marketplace. However, there is a gap between developed and developing countries when it comes to Internet usage, e-commerce and the implementation of ODR.

This discussion will begin by investigating the so-called digital divide between developed and developing nations and explore the practical effect thereof. The focus will then shift to the current state of ODR in developing countries, with specific reference to South African law. A brief overview of the Latin American position will also be provided, as well as similarities and differences between the systems. Lastly, attention will be paid to whether or not developing countries are indeed ready to implement ODR, and whether the digital divide can feasibly be bridged.

II. THE DIGITAL DIVIDE

The "digital divide" is a term that has been used by a number of writers in law and technology to describe the disparity that exists between the rich and the poor regarding access to and use of technology [1]. This digital divide can occur internally between a country's rich and poor citizens, and can also occur on a larger scale between developed and developing nations, as "the diffusion and deployment of technology, the driving force of globalization, is asymmetric with few countries reaping the benefits of the information society" [2]. This gap in technological development continues to grow, and is a potential hindrance to the adoption and growth of ODR in developing countries.

Developed countries are currently far ahead of developing countries when it comes to the widespread use of information

R. V. Cupido is with the Department of Private Law, University of Johannesburg, Johannesburg, South Africa (phone: +27 11 559 3360; e-mail: rcupido@uj.ac.za).

and communications technology (ICT). The United States and the European Union are the leaders in this field, and have the necessary physical and legal infrastructure for their citizens to participate in online cross-border activities, including e-commerce, domain name issues and e-consumer protection. These are also the nations where ODR is extensively regulated and applied in various fields, including family law disputes, B2C disputes and domain name disputes.

There are many factors that have contributed to the existence of this divide, and it is suggested that it is largely due to a pre-existing economic gap between developed and developing nations, although it has been suggested that “at an international level, the digital divide might be closing and...developing countries might be going through an unprecedented catching up process in terms of access.” [3]. However, the reality is that many people in developing countries do not have the resources to access technological devices, and are facing other more basic challenges such as poverty, political upheaval and lack of access to basic utilities, such as water and electricity. Perhaps for this reason, it has been questioned whether ODR is really a feasible system to implement in developing countries. These serious challenges notwithstanding, it is still worth investigating whether there are developing countries that have the potential to prioritise the development of ICT, and in so doing manage to lessen the digital divide.

It has been argued that introducing ICT would have a positive impact in developing nations, as it would assist in streamlining the operation of the justice system and would improve citizens’ access to justice [4]. Specifically, the introduction of ODR would address many of the problems faced in the justice systems of developing countries, including the overburdening of courts and the expense of litigation. This would arguably be due to ICT being cheaper to use than the court system, which would make it more accessible to poorer members of society. It could also potentially assist with reducing court backlogs, as there would then be fewer people making use of traditional litigation [5]. However, there are a number of factors influencing a country’s ability to successfully implement ICT (and by extension ODR). These include having the requisite political support, an adequate legal framework to govern the use of technology in the justice system, sufficient funding and a culture where the use of technology is welcomed. As many developing countries share these challenges as a result of having unequally distributed wealth, it will be instructive to consider the position in more than one country in order to see whether developing nations are ready for the implementation of ICT, participation in e-commerce and the use of ODR in the justice system, which would directly affect these nations’ ability to bridge the digital divide.

III. THE CURRENT STATE OF ODR IN DEVELOPING NATIONS

There is a scarcity of literature on the current state of ODR in developing countries, and scholarship in this area is still emerging. For this reason, this discussion will focus primarily on the position in South Africa (being the author’s native state

and a leader in e-commerce on the African continent) and will compare it briefly with the Latin American position, as these systems share certain challenges when it comes to ICT and ODR implementation.

A. The South African position

At the beginning of the millennium, when developed countries’ interest in ODR was experiencing a resurgence, it was opined that little had changed regarding South African interest in ODR [6]. Since then, there has been some development, but there is no legislation or government initiative that directly addresses the introduction and implementation of ODR. Despite this, South Africa has been marked as a significant e-commerce force in Africa [7] and is currently the only Sub-Saharan African country to show any growth in e-commerce. South Africa also has the requisite legal framework in place to regulate e-commerce and consumer protection, and is one of the few ICT-ready states on the African continent, which makes it an ideal system to spearhead the growth and spread of ODR in Africa.

South Africa currently has two ODR programs, namely in the fields of domain name disputes and consumer law disputes. [8]. The ZADRR (ZA Domain Name Dispute Resolution Regulations) was created to resolve domain name disputes by allowing the complainants to file a dispute with a dispute resolution service provider, who then appoints an adjudicator to deliberate over the matter. The whole process takes place online, and has thus far been successful in the efficient resolution of these disputes. In the field of consumer protection, there has been the creation of the Onlineombud, which was created as an online means of implementing the South African Consumer Protection Act [9]. The site is currently the only one available where consumers can resolve their disputes online, and uses the online forum to put parties in touch with mediators. Although these programs provide a good initial step, there is still a gap when it comes to legislative regulation of ODR. There appears to be a growing recognition that ODR could also be used in other areas of South African law, and this recognition is in line with the way in which ODR is currently being applied in some Latin American states.

One of the areas in which ODR could be used is in family dispute resolution, specifically as it relates to the care of and contact with children. This application has been discussed by the South African Law Reform Commission [10] and it has been acknowledged that ODR measures could be used as an alternative to the traditional litigation model currently applied by the courts. The Law Reform Commission argues that technological advances can improve the courts themselves and can allow for the public to access courts more easily. This can potentially be done by establishing “virtual courtrooms”, which is an online judicial forum that provides the same judicial services as a physical courtroom but is accessed online using communications technology [11]. One potential benefit of this type of system would be the increased availability of the courts, as litigants would no longer be bound to the operating hours of the physical court room. Case processing

tasks, such as filing documents could be done online, allowing it to be cheaper and more efficient. Litigants would also have the option of participating in trials using videoconferencing, which would eliminate travel costs. This type of dispute resolution would be an effective way to improve the South African public's access to courts and access to justice. This right is contained in Section 34 of the South African Constitution, and states that "everyone has the right to have any dispute that can be 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." [12]. There are many problems which prevent the realisation of this right. It is often too expensive for the average South African citizen to afford legal representation to adequately represent them in traditional court proceedings. There is also the issue of physically accessing the courts, as many people are unable to attend court during the week as a result of work obligations, not to mention the long distances that must be travelled to get there. The courts are overburdened with the number of cases brought to them, and there is currently a backlog of cases, meaning that many litigants' matters are heard long after they arise, and circumstances could lead to them not being properly resolved.

The use of virtual courts and other methods of ODR would thus be a cost-effective way to streamline the judicial process [13]. Of course, there are also potential drawbacks of using technology to supplement (and in some cases replace) traditional court proceedings. There is the concern that we may not have the necessary infrastructure to maintain a virtual court, as it would rely on a stable data provider and steady electricity supply, which has not always been a certainty in recent years [14]. The high cost of Internet in South Africa could also be a deterrent, although there has been an increase in initiatives which aim to provide Wi-Fi access to all citizens [15]. Despite these challenges, many South African citizens are active participants in the online sphere. It is interesting to note that most users access the Internet using mobile devices instead of computers. This high level of mobile Internet usage is seen across a number of developing countries (including China, Colombia, the Philippines and South Africa) and has been described as a method of "leapfrogging connectivity", bringing the Internet to those who otherwise would not be able to access it. The number of mobile Internet users (whether via smartphone or tablet) continues to grow, and it is estimated that over 60 % of the population have access to the Internet via smartphones [16]. This increase in connectivity bodes well for the spread of ICT in Africa, and it is entirely feasible that we may soon be ready for the introduction of ODR measures in different fields of law.

B. The Latin American Position

In their article on the feasibility of ODR in developing countries, Albornoz and Martin acknowledge that "developing countries share the common characteristic of unequally distributed wealth; therefore many of the observations and conclusions regarding Latin America may also be valid for other developing countries." [17]. It appears that many of the

same issues are faced in the South African and Latin American contexts when it comes to the prevalence of ICT and the potential use of ODR measures. However, the majority of writers seem positive about overcoming the challenges of ODR implementation in Latin America and other developing countries, and there are already promising examples of ODR use. ODR is still in its early stages in Latin American countries, and has been used mostly in the field of e-commerce, which has been growing rapidly [18]. This increase in electronic transactions will also lead to an increase in the number of disputes, and ODR has been identified as a way of settling these disputes cheaply and efficiently.

Similar to the African position, the existing ICT infrastructure does not extend to all Latin American states, and Internet access is often too expensive for citizens to make use of traditional broadband Internet connections. There has, however, been an increase in the number of mobile Internet users, and e-commerce has flourished in this context, as it has in South Africa.

Another similarity is seen in the operation of court systems, with Latin American courts experiencing many of the same issues as those in South Africa. Expense and accessibility are cited as two of the main problems for potential litigants, which could also be contributing to a general sense of frustration with the limitations of the justice system. ODR would arguably function as an efficient alternative, especially since the cost of traditional litigation is often a deterrent to disadvantaged parties. In the event that a dispute arises from a cross-border e-transaction, especially in instances where one party is from a developed country and the other from a developing country, there is typically a large imbalance of power and resources between the parties [19] and the use of ODR can serve to place the parties on a more equal footing.

An interesting perspective on the importance of introducing ODR to developing countries is the idea that it has the capacity to contribute to the development of emerging economies. This contribution would be an indirect one, as the existence of an adequate ODR system would encourage consumer trust in e-commerce and would motivate increased participation in global e-commerce and, by extension, the global economy. Despite this positive view, there is still a lack of awareness in Latin America (and South Africa) about the existence of e-commerce and ODR. It is thus of utmost importance that governments in developing countries start thinking of ways to educate their citizens about ICT, and work towards creating the necessary infrastructure to support citizens' participation in the global online economy. A large part of this infrastructure is the necessary legal framework to govern e-commerce and ODR, and guidance in this regard can be taken from more developed countries. Scholarship in this area would also contribute to the creation of rules and empower practitioners to begin introducing ODR mechanisms into the current systems of dispute resolution.

IV. POTENTIAL IMPLEMENTATION OF ODR: FACTORS TO BE CONSIDERED

Four groups of factors have been identified that play a role

in ICT development, namely connectivity, access and capacity, policy and regulation and the socio-cultural environment. A brief assessment of these factors can help to indicate whether or not a country has the necessary capacity to introduce ICT and, by extension, ODR.

Once it has been established that a nation has the basic readiness to begin implementing ODR, there are still certain objectives that such a system must meet in order for it to be successful. It has been submitted that ODR must be practical, effective, fair and cheap. This can be achieved by using systems that minimise the need for extended legal proceedings and legal advice, which can be costly. Processes such as online mediation and online negotiation should thus be considered and assessed to see whether they would assist in achieving these aims.

Online mediation is a voluntary proceeding, and has much in common with traditional mediation. Both types of proceedings involve the parties and an objective third party mediator. The parties themselves decide on the best outcome for the case, and the mediator facilitates the communication between them. The mediator has no decision-making power. This removes the need for legal representatives, and is thus less adversarial than litigation proceedings. However, in online mediation there is no face-to-face interaction, and the mediator is typically in contact with the parties using videoconferencing. The reliability of the technological tools is a necessity, as contact and communication are the cornerstones of mediation.

Online negotiation differs in that it is a computer-assisted eethem reach an agreement. Instead of a physical third party, there is technology that asks questions, suggests solutions and sends reminders to the disputing parties. These mechanisms have proven to be popular in developed countries and are efficient and cost-effective for parties. It moves dispute resolution out of the courts and minimises legal costs, allowing parties to manage their own dispute instead of spending time and money on legal advice, especially in instances where the amount in dispute is small. Another important consideration is that the ODR system chosen by developing countries be one that promotes public policy values and satisfies the broader needs of society. This is especially true in South Africa's constitutional dispensation.

V. CONCLUSION

What then is the way forward for developing nations regarding ICT and ODR? It is clear that the digital divide must be bridged in order for developing countries to join the global marketplace and be active participants in the so-called information society. Participation in e-commerce will also play a key role in stimulating the economies in developing countries by bringing in more foreign money and encouraging trust in emerging economies.

It is acknowledged that "there is a direct relationship between bridging the digital divide, achieving a high degree of ICT penetration and the progressive development of e-commerce and ODR" in developing countries. This discussion has shown that, despite the slow process of introducing ICT

and ODR in developing countries, it has been recognised as a necessity for closing the digital divide. The importance of developing nations joining the international information society is acknowledged, and the initial steps taken by Latin America and South Africa are promising [20]. There is potential for huge growth of ICT and ODR in developing nations, and in spheres other than e-commerce and trade. It will be especially interesting to see how ICT and ODR are used to promote access to justice and the courts, and the wider effects that this will have on promoting public policy values.

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