

ONLINE DISPUTE RESOLUTION: AN AFRICAN PERSPECTIVE

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Abstract

Electronic commerce has flourished across the globe, and a growing market is to be found in Africa. According to recent statistics, the number of internet users in Africa has soared, with more and more people becoming participants in the global marketplace. With this unprecedented boom comes an inevitable increase in the number of disputes arising from internet transactions. This naturally requires an efficient and innovative way of addressing these disputes, especially in instances involving consumer transactions. In the USA and the EU much support has been found for the use of online dispute resolution (ODR) measures, based on the traditional alternative dispute resolution measures. The EU has published legislation specifically regulating ODR, and detailing the situations where it would find application. Using these examples as a point of departure, this paper will evaluate the suitability of ODR for the African context. The unique challenges presented by electronic commerce on the African continent will be discussed, and the advantages and disadvantages of ODR will be explored. The paper will briefly consider the foreign models and their relevance to the future development of ODR in Africa. Lastly, some recommendations will be made regarding the future growth and implementation of ODR measures in Africa.

Keywords: *e-commerce; online dispute resolution; Africa*

Introduction

Over the past twenty years, there has been a rapid expansion in the use of the internet in everyday interactions. Nowhere has there been more expansion than in the context of international trade, as the ease of communication removes the obstacles of distance and cost that had previously affected cross-border trade. Electronic commerce has thus flourished across the globe, and a growing market is to be found in Africa. The most recent statistics indicate that upwards of 40% of worldwide internet users have bought products online using some kind of desktop or mobile electronic device. Mobile data usage has been rising steadily

in the African region, and African users form a big part of the recent e-commerce boom. The number of users on the African continent is predicted to double by the end of 2015.¹

South Africa, in particular, has been marked as a “significant e-commerce force in the region”,² and is currently the only sub-saharan African country to show any growth in e-commerce. An established leader in the field, South African e-commerce sites have also become popular destinations for shoppers from other countries on the continent, most notably Nigeria and Egypt. It can be concluded that with this unprecedented boom, there will also be an inevitable increase in the number of disputes arising from internet transactions. This naturally requires an efficient and innovative way of addressing these disputes, especially in instances involving consumer transactions.

The reality of e-commerce transactions is that they typically involve small-value claims, and it is normally not economically viable for consumers in these transactions to take formal legal action against the suppliers if a dispute were to arise. The cost of court proceedings is a major deterrent, as well as the length of time that it would take to resolve these disputes. The volume of claims that could potentially arise in this manner could be overwhelming for the already strained court systems, and the small value of any possible gains would mean that the traditional court system would not be the best option for resolving disputes arising online. Added to this, we have the issue of jurisdiction, especially when dealing with cross border transactions, where the entirety of the transaction took place in an online place between parties from different countries.³

These challenges would suggest that a different method be considered when it comes to resolving disputes arising from e-commerce, specifically the smaller-value business-to-consumer (B2C) transactions. To meet the challenges that this new method of commerce creates,⁴ there has been a growing recognition that alternative dispute resolution measures would be well suited for resolving disputes that originate online.⁵ The traditional ADR procedures (arbitration, mediation and negotiation) arguably provide an ideal framework to use in solving offline disputes. However, there are certain elements of electronic contracts

¹ <http://ventureburn.com/2015/01/2015-year-online-shopping-south-africa/>, accessed 1 September 2015.

² <http://www.itnewsafrika.com/2015/03/study-reveals-that-e-commerce-is-on-the-rise-in-south-africa/>, accessed 1 September 2015.

³ A Roşu “Electronic Commerce – An International Phenomenon, Generating Commercial Litigations” *EIRP Proceedings* 7 (2012).

⁴ ZS Tang *Electronic Consumer Contracts in the Conflict of Laws* (2009) 150.

⁵ E van den Heuvel “Online Dispute Resolution as a solution to cross-border e-disputes: An introduction to ODR” available on: <http://www.oecd.org/dataoecd/63/57/1878940.pdf>, accessed 27 April 2015.

and disputes that are not addressed by the existing rules.⁶ A new system which is tailored to address the very specific issues arising from electronic commercial transactions is thus required. This system, based on the existing ADR rules, has come to be known as online dispute resolution (ODR).

The use of online dispute resolution

Definition

There are many different definitions of online dispute resolution, but in its simplest form the term refers to the use and adaptation of traditional alternative dispute resolution models (most commonly mediation, negotiation and arbitration) to resolve disputes which arise online. These types of disputes can arise from contracts concluded through electronic or digital means. This includes (but is not limited to) contracts concluded via e-mail, SMS (short message service) or other automated systems. Online disputes can also arise from situations where the entire transaction is conducted online, and the business and consumer have no other contact. The latter types of transactions include online marketplaces such as eBay, etsy.com and takealot.com, where the supplier is usually a company, and the consumer has a relative amount of anonymity as one of many faceless shoppers who use the site. Online dispute resolution can be especially useful in disputes arising from these situations, as the potential for error is large and the cost of traditional litigation is often a deterrent to disadvantaged consumers. There is also a large imbalance of power and resources between the consumer and the supplier,⁷ and the use of alternative dispute resolution methods can place the parties on a more equal footing.

Suitability for B2C disputes

As traditional alternative dispute resolution measures were developed to move dispute resolution out of the courts,⁸ and provide a more cost-effective and resource-saving alternative to litigation, it stands to reason that these methods would be perfectly suited to disputes arising from smaller value B2C transactions. In terms of Art. 10.7 of the UNIDROIT

⁶ J Hörnle "Online Dispute Resolution – The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration" <http://www.bileta.ac.uk/02papers/Hörnle.html>, accessed 3 May 2015.

⁷ B2C disputes "...typically involve small amounts of money and a significant power imbalance between the parties" MS Martin "Keep it online: the Hague Convention and the need for online alternative dispute resolution in international business-to-consumer e-commerce" 20 *B.U. Int'l L.J.* 125 (2002) 133-134.

⁸ E Katsh and J Rifkin *Online Dispute Resolution: resolving conflicts in Cyberspace* (2001) Jossey-Bass, San Francisco 25.

Principles 2010, alternative dispute resolution refers to “...proceedings whereby the parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute”.⁹

The most commonly used alternative dispute resolution proceedings are mediation, arbitration and negotiation.¹⁰ Each of these measures provide a cheaper method of resolving conflict,¹¹ which is especially important in conflicts where the disputed amount is small, as in many B2C transactions. These procedures are often more efficient than the court systems, as parties do not have to wait to have their matter heard before a judge.¹² Alternative dispute resolution also offers more flexibility, as (with the exception of arbitration) the decisions reached by parties are not binding. Alternative dispute resolution appears to be well-suited for use in online disputes,¹³ given that parties are not likely to want to invest much money or time in resolving these types of issues. It provides a cost-effective, time-effective and flexible means of addressing issues arising from cross-border e-commerce. It is also argued that the use of alternative dispute resolution affords more protection to the consumer as the weaker party, as the business would have more resources available for litigation, and could more easily afford to fight a matter in court, in terms of both money and time. In South Africa specifically, there has been a renewed interest in consumer protection, both domestically and in cross-border interactions. This interest is in line with the recent wave of consumer protection in the rest of the world, and should be developed to include the protection of consumers in e-commerce, including the creation of dispute resolution methods.

International recognition and development of ODR

This development has already begun on an international scale, with countries developing their own domestic law regarding online dispute resolution, and the creation of certain international instruments that provide guidelines for online dispute resolution and consumer protection. The United States is arguably the world leader in the law relating to online dispute

⁹ Art. 10.7 UNIDROIT Principles 2010.

¹⁰ G Kaufmann-Kohler “Online Dispute Resolution and its Significance for International Commercial Arbitration” in *Global Reflections on International Law, Commerce and Dispute Resolution Liber Amicorum* in honour of Robert Briner (2005) ICC Publishing 437-456, 438; P Lawson *Disputes in cyberspace: Online dispute resolution for consumers in cross-border disputes – an international survey* (2000) Consumers International 7

¹¹ J Hörnle *Cross-border Internet Dispute Resolution* (2009) Cambridge University Press 50.

¹² LA Bygrave “Online Dispute Resolution – what it means for consumers” Proceedings of ‘Domain Name Systems and Internet Governance’, Baker & McKenzie Cyberspace Law and Policy Centre in conjunction with the Continuing Legal Education programme of University of NSW, Grace Hotel, Sydney, 7 May 2002.

¹³ E Katsh and J Rifkin *Online Dispute Resolution: resolving conflicts in Cyberspace* (2001) Jossey-Bass, San Francisco 25; C Brannigan “Online Dispute Resolution” in A Stitt (ed) *Alternative Dispute Resolution Practice Manual* 6901-53. Looseleaf Service. North York, Ontario: CCH Canadian Limited, 1996.

resolution,¹⁴ with the most operational online dispute resolution providers (both government-run and private). This can perhaps be attributed to the growth of technology in California's Silicon Valley, which has resulted in a growing need for methods of resolving online disputes in areas of law as varied as domain name disputes, consumer interactions and online role player games. Regarding consumer contracts specifically, eBay (an American company) was one of the first e-commerce companies to develop its own system of online dispute resolution, the Resolution Center. As of 2013, this Resolution Center is fully automated, and is intended to provide buyers and sellers with an online interface to help them report and resolve conflicts, such as not receiving an item and not receiving payment for an item. The system is used as a last resort when eBay members cannot come to a resolution between themselves.¹⁵ The Center enables members to open a case which begins eBay mediation between the buyer and seller. The law relating to online dispute resolution differs in the different states, with the most developed systems being found in California and New York State.

In recent years, the European Union has also contributed to the development of the law relating to ODR.¹⁶ The issue of online dispute resolution was first addressed in the EU Directive on alternative dispute resolution for consumer disputes (2013), and was specifically legislated for in the Regulation on online dispute resolution for consumer disputes in the same year. These instruments have been adopted in all member states of the European Union, and provide guidelines for individual countries to regulate online dispute resolution, both domestically and with reference to cross-border disputes. This widespread implementation of the EU Directive and Regulation promotes uniformity of the law and will hopefully provide consumers and businesses in different countries with a basic standard of conduct when faced with disputes which arise online. Interestingly, the EU Directive and Regulation have also been adopted by Nigeria, and it remains to be seen how effective these rules will be in the Nigerian context, given the current disparity between the levels of technology in Europe and Africa.

The United Nations Commission on International Trade Law (UNCITRAL) has also established a working group dedicated to online dispute resolution. This working group was

¹⁴ LQ Hang "Online Dispute Resolution Systems: The Future of Cyberspace Law" 41 Santa Clara L. Rev. 837 (2001).

¹⁵ <http://smallbusiness.chron.com/contact-ebay-resolution-center-44676.html>, accessed 3 September 2015.

¹⁶ An example of this is seen in the internal policies of the Union, with a specific briefing note on ODR found in L Edwards and C Wilson "Redress and Alternative Dispute Resolution in Cross-Border E-commerce Transactions" DG Internal Policies of the Union IP/A/IMCO/NT/2006-31.

established in 2010, and their last meeting was in February 2015. There is also the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters as revised by the Hague Conference in Private International Law could also be of relevance when discussing the future of ODR, but it remains to be seen whether this draft convention will in fact come to fruition, and what kind of impact this instrument and the proposals of the UNCITRAL working group will have.

Current position of ODR in Africa

The African continent

With this renewed global interest in online dispute resolution as a background, we must now consider Africa's position regarding online dispute resolution and the potential for future growth. It would be ideal to follow suit and keep up with international developments, especially as a way to promote cross-border trade and strengthen e-commerce in Africa as a whole. However, the continent is still at the beginning stage of development, as there are a number of limitations and challenges that must be faced.

Authors have divided African states into three groups based on the level of their existing information and communications technology (ICT).¹⁷ The first group is referred to as the ICT-ready states, amongst them South Africa, Egypt, Morocco, Tunisia and Nigeria. The second group is the ICT-progressing states, which include Ghana, Algeria and Cameroon. The last group is the ICT- potentially progressing states, like Malawi, Botswana and much of Central Africa.

For the two latter groups, the challenges to the development of e-commerce and online dispute resolution are significant. The necessary infrastructure is lacking, and the technology available is often rudimentary. In addition, many developing countries struggle with basic problems, such as a shortage of basic supplies such as food, water and electricity. In these instances, the promotion of e-commerce would clearly not be a priority, and the more immediate challenges would need to be addressed first. In countries where the infrastructure does exist, and e-commerce continues to grow, there is often insufficient or non-existent e-commerce regulation, as the technology has developed faster than the legal rules. In the ICT-ready states, however, the challenges are minimal, and it seems like these states are beginning

¹⁷ MSA Wahab "Online Dispute Resolution for Africa" at www.mediate.com, accessed 2 September 2015.

to realise the potential of online dispute resolution as an effective means of resolving small-value B2C claims.

The South African position

In their 2003 “E-commerce and Development Report”, the United Nations Conference on Trade and Development (UNCTAD) state that “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”.

Although this “appropriate legal framework” is lacking in the majority of African countries, it is argued that the development of extensive laws regulating both e-commerce and consumer protection in South Africa makes South Africa an ideal candidate to spearhead the development of online dispute resolution. As previously mentioned, South African e-commerce sites have drawn a number of consumers from the rest of Africa, and will most likely continue to do so as its e-commerce continues to expand. Additionally, the only online dispute resolution initiatives currently operational in Africa are based in South Africa. Thus far, these initiatives have only focused on online dispute resolution in two spheres, namely domain name disputes and consumer law.

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. The respondent is then offered the opportunity to defend itself against the allegations. The provider appoints an adjudicator who decides whether or not the domain(s) should be transferred. The entire process is conducted using online procedures, and has been successful in resolving a number of these disputes in an efficient manner. Of special relevance of this discussion is the creation of the Onlineombud, which was created as an online means of implementing the Consumer Protection Act.¹⁸ The site is currently the only one operational in South Africa which provides for consumers to resolve their disputes online, and uses the online forum to put parties in touch with mediators. Although these programs provide a good initial step, it is still unclear which legal rules would govern online dispute resolution in domestic South African law, and it is questioned whether the continued growth of e-commerce and the volume of B2C disputes will not require clear guidelines to regulate online dispute resolution. This area of the law is still open for development, and it will be interesting to see the direction that the growth of ODR in South Africa will take.

¹⁸ 68 of 2008.

Conclusion

From this brief discussion, it is clear that the African continent is still in the initial stages of accepting online dispute resolution as a viable model for resolving disputes which arise online. It is becoming increasingly clear that the development of such a system is necessary in order for us to compete at a global level. It is also important for the facilitation of cross-border trade, which is essential for further economic growth in Africa.

The South African initiatives are but the first steps, and it is suggested that these initiatives, together with the existing e-commerce legislation in South Africa have the potential for further growth and development on the African continent. Online dispute resolution fits our need for efficient, cost-effective and adequate dispute resolution, and should thus be promoted and explored, both in South Africa and in the broader African context.

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