

## ONLINE DISPUTE RESOLUTION IN BRAZIL: ARE WE READY FOR THIS CULTURAL TURN?

### RESOLUÇÃO ONLINE DE CONFLITOS NO BRASIL: ESTAMOS PRONTOS PARA ESSA MUDANÇA CULTURAL?

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#### ABSTRACT

Litigiousness is a social phenomenon. The complaints that Brazilian's court are now running are very inflated. Judges are burdened. With this in mind, it is important to say that there is a promising future for digital economy. Online dispute resolution (ODR) is a new method for addressing disputes that arose online. The growth of online dispute resolution is tied to the growth of e-commerce. Given the background, we think that it is a mistake to believe that Online Dispute resolution and Alternative Dispute Resolution (ADR) will ever replace any sizable proportion of our litigation in Court, but it is important to increase and improve more pacific and less costly means of dispute resolution in Brazil. ODR is a new form of dispute resolution in comparison to conventional courtrooms and even to ADR mechanisms. These methods are able to deliver justice in a digital society.

**Key words:** Online dispute resolution. Alternative dispute resolution. digital society. e-commerce. cultural turn.

#### RESUMO

Litigiosidade é um fenômeno social. As causas que os Tribunais Brasileiros enfrentam apresentam-se em número inflacionado. Juízes estão sobrecarregados. Com isso em mente, é importante dizer que há um futuro promissor para a economia digital. A resolução online de

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conflitos(ODR) é um novo método para lidar com disputas que surgem do comércio eletrônico. O crescimento da resolução online de conflitos está ligado ao incremento desse comércio eletrônico. Delineado esse contexto, pensamos ser um erro acreditar que a resolução online de conflitos e os métodos alternativos de resolução de conflitos (ADR) irão tomar o lugar e ter a mesma proporção da litigância nos Tribunais, mas é importante aumentar e melhorar os meios mais pacíficos de resolução de conflitos no Brasil. A resolução online de conflitos é uma nova forma de resolver litígios sem comparação com o método tradicional de resolução pelo Poder Judiciário e até mesmo pelos meios alternativos de solução de lides. Esses métodos (ODR) são aptos para entregar justiça uma sociedade digital.

**Palavras-chave:** Resolução de conflitos Online. Métodos Alternativos de resolução de conflitos. sociedade digital. comércio eletrônico. mudança cultural.

## 1 PROMOTING ONLINE DISPUTE RESOLUTION IN OUR COUNTRY

More and more people in Brazil use every day mobile services and personal computers in their work, also at home.

The mobile phones are sometime the first personal computer for lots of people that cannot afford to have a real computer device. Mobile phones have proved to be a boon in the third world, so now Brazil has a high internet usage rate in the world. We are number five on the list of internet users by countries, with a number of 107.822.831 internet users and a growth in one year of 7%<sup>3</sup>.

Therefore “with the proliferation of internet communication, it became apparent that the online environment was fast becoming an arena that was rich with disputes but deficient in avenues for effectively addressing them”.<sup>4</sup>

We still are not used to deal with ODR (Online Dispute Resolution) and few people know what it means, and how to use this important method to help them to resolve disputes in reasonable time, inexpensively or with lower costs.

Now we are becoming familiar with mediation in Brazil, but most people just do not know that the face-to-face mediation online works as well as the face-to-face method offline and sometimes it is cheaper and better.

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<sup>3</sup> Internet Live Stats. Elaboration of data by International Telecommunication Union (ITU), United Nations Population Division, Internet & Mobile Association of India (IAMAI), World Bank. July 1 2014 Estimate. Available in: <<http://www.internetlivestats.com/internet-users-by-country/>>. Access in: jan 09 2016.

<sup>4</sup> RABINOVICH-EINY, Orna. KATSH, Ethan. **Lessons from Online Dispute Resolution for Dispute Systems Design**. p. 51. Available in: <[http://www.mediate.com/pdf/rabinovitch\\_katsh.pdf](http://www.mediate.com/pdf/rabinovitch_katsh.pdf)>. Access in: feb 02 2016.

There is currently in this country a lack of mechanisms which allow consumers and traders to resolve e-commerce disputes through electronic means.

As internet usage continues to expand, it has become increasingly necessary to design efficient mechanisms for resolving Internet disputes because traditional mechanisms, such as litigation, can be time-consuming, expensive and raise jurisdictional problems. Offline disputes, on the other hand, can be addressed with traditional dispute resolution mechanism supplemented with Online technologies.<sup>5</sup>

In this context, should we ask, like to Mexican authors did, referring to an unsuccessful online trade that they did: “Is on line dispute resolution a science fiction fantasy for developing countries?”<sup>6</sup>

## 2 ELETRONIC COMMERCE (E-COMMERCE)

E-Commerce is a reality nowadays.

It benefits consumers providing more buying options but may leave them without good remedies when these purchases go wrong.

The online dispute resolution (ODR) systems may be a very good method to provide consumers with real and less expensively remedies for online purchases and also for offline purchases.

The main scope of the ODR is commercial matters and consumers disputes.

In e-commerce and e-contracts, consumers find occasionally very difficult to return an item, to make a guarantee effective, to get a refund, to make and exchange and sometimes even to make an item to arrive.

In this circumstance, better than to address a dispute in the traditional way, is to use ODR, which also allows building trust with consumers and increasing sales.

Marketplaces understand their community capacity building and thus recognize the importance of keeping fair and strong reputation systems, This also makes them aware of the need to count on efficient mechanisms to manage disputes regarding

<sup>5</sup>GOODMAN, Joseph W. The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites. **Duke Law Scholarship Repository**. Available in: <<http://scholarship.law.duke.edu/dltr/vol2/iss1/2>>. Access in: feb 02 2016.

<sup>6</sup>ALBORNOZ, María Mercedes. GONZÁLEZ MARTÍN, Nuria, Feasibility Analysis of Online Dispute Resolution in Developing Countries (October 31, 2012). University of Miami Inter-American Law Review. **Social Science Research Network**. Vol. 44, No. 2, 2013. Available in: <<http://ssrn.com/abstract=2184447>>. Access in: jan 20 2016.

negative feedback in their communities in a fair way, and limit legal responsibility for users' behavior online (...) still, ODR is not seen by companies as legal or dispute resolution matter, nor as an autonomous issue, but rather as one of the elements of what will be called the 'trust cocktail', which also refers to auto-regulatory measures, such as codes of conducts, best practices, trust marks or seals of trust, and feedback or reputation management systems among others.<sup>7</sup>

With economic globalization there is a huge growth of e-commerce and also of international disputes.

For dealing with small scale cross-border conflicts, the face-to-face ADR and the legal courtroom model are expensive and sometimes inaccessible due to the requirement for long distances travel and the need for legal representation.

These international disputes are appropriate for submission to ADR and ODR procedures.

This paper, however, will not evaluate the use of ODR for cross-border disputes, although this issue is very popular nowadays, particular in Europe, where there is an effort encouraging online dispute resolution to remove the national limitation of domestic procedures.<sup>8</sup>

In this context ODR

are intended to improve the functioning of the retail internet market and enhance redress for consumers. In principle, ODR mechanisms are expected, among other things, to 'facilitate access to justice', and should therefore be able to tackle some of the problems concerning the use of offline dispute resolution mechanisms.<sup>9</sup>

The scope of ODR, we cannot forget, exceeds the field of e-commerce. It can include, also, the offline dispute resolution.

<sup>7</sup>SZLAK. Gabriela R. **Online Dispute Resolution in Latin America: Challenges and Opportunities**. p. 551. Available in: <<http://www.mediate.com/pdf/szlak.pdf>>. Access in: jan 05 2016.

<sup>8</sup>A cross-border case is on when at least one of the parties in dispute is domiciled or habitually resident in a member State other than the Member State of the court of tribunal seised, in CORTES, Pablo, Does the Proposed European Procedure Enhance the Resolution of Small Claims?. Civil Justice Quarterly. **Social Science Research Network**. Vol. 27, No. 1, pp. 83-97, 2008. Available

in: <<http://ssrn.com/abstract=983527>> ou <<http://dx.doi.org/10.2139/ssrn.983527>>. Access in: feb 11 2016.

<sup>9</sup>BETANCOURT, Julio César. ZLATANSKA, Elina, Online Dispute Resolution (ODR): What is it, and is it the Way Forward? (September 13, 2013). 79 International Journal of Arbitration, Mediation and Dispute Management. **Social Science Research Network**. Issue 3, 2013. p. 258. Available in: <<http://ssrn.com/abstract=2325422>>. Access in: jan 25 2016.

### 3 ONLINE DISPUTE RESOLUTION (ODR) DEFINITION:

The expression Online Dispute Resolution refers to the use of alternative dispute resolution methods (ADR) over internet.

ODR is dispute resolution outside the courts, based on information and communications technology and in particular, based on the power of computers to efficiently process enormous amounts of data, store and organize such data and communicate it across the internet on a global basis and with speed. As a concept ODR arose from, and is based on Alternative Dispute resolution (ADR) which refers to extra-judicial dispute resolution processes such as arbitration or mediation. However, in addition to processes such as online mediation and online arbitration, ODR has developed innovative online process, such as mock trials (Where a jury of online volunteers give a verdict based on a set of facts as a form of crowd sourcing) or blind-bidding negotiation techniques (where each party makes successive monetary settlement offers, which are not disclosed to the other party and lead to a settlement if and when the bid come within close reach of each other).<sup>10</sup>

It means that ADR mechanisms are used online, as opposed to offline. ODR uses the ICT (information and communication technologies) to the ODR fields.

That is the reason for using the expression ODR.<sup>11</sup>

The development of these forms of dispute settlement is an alternative

“more consensus-based form of social Peace- keeping” and “allow the parties to resume dialogue and come to a real solution for their disputes through negotiation instead of getting locked into a logic of conflict confrontation with a winner and a loser at the end”<sup>12</sup>

ODR and ADR work because not every form of human activity is necessarily adversary. Most of our activities are benign and altruistic, so there is no need for redress injuries.

<sup>10</sup> HÖRNLE, Julia, Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Lower or Standards High? (September 29, 2012). Queen Mary School of Law Legal Studies Research Paper. **Social Science Research Network**. No. 122/2012. Available in: <<http://ssrn.com/abstract=2154214>> ou <<http://dx.doi.org/10.2139/ssrn.2154214>>. Access in: feb 04 2016.

<sup>11</sup> “Online dispute resolution can involve the parties in mediation, arbitration, and negotiation. The parties may use the internet and web-based technology in a variety of ways. Online Dispute Resolution can be done entirely on the internet, or online through email, videoconferencing, or both. The parties can also meet in person, or off-line. Sometimes, combinations of online and off-line methods are used in Online Dispute Resolution”. Dispute Resolution Reference Guide. Online Dispute Resolution. Dispute Resolution Series. Produced by Dispute Prevention and Resolution Division Department of Justice, Canada. Available in: <<http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.html>>. Access in: feb 11 2016.

<sup>12</sup> **Alternative dispute resolution - Communitylaw**: The European Union is very interested in alternative dispute resolution. Available in: <[http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm)>. Access in: feb 09 2016.

At this point we can say that ODR is not intended to replace court procedures and it cannot deprive parties (consumers or traders) of their fundamental rights of access to the judicial system.

### 3.1 ODR AND THE GOVERNMENT SECTOR

It is important to emphasize the need of governmental support and recognition of ODR methods.

“Those within the litigation system have noted that technology changes have the potential to dramatically transform the way in which dispute resolution is carried out”.<sup>13</sup>

The lack of legal framework for the enforcement of the e-resolutions can be a problem, and also if there is a fee for this service, because this burden of cost may scare consumers so they probably will prefer to seek redress in the traditional way, going to the Courts.

ODR, like ADR, should be introduced in the mainstream justice system.

A legal framework is very important to develop ODR in Brazil. These legislative instruments would be able to facilitate the trust in e-commerce activities, but we have to preserve the traditional judicial redress.

Even though the dispute arises from e-commerce, the framework for ODR should not override the consumer's right to seek judicial redress.

ODR platforms may improve access to justice for those litigants who would otherwise be unable to settle small causes.

In the online world there are no geographic and political boundaries. People are now connected globally through the internet. Now people around the world are together every day.

ODR improves access to dispute resolution by making it cheaper, easier and quicker.

ODR is a new form of dispute resolution in comparison to conventional courtrooms and even to ADR mechanisms. These methods are able to deliver justice in a digital society.

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<sup>13</sup> SOURDIN, Tania. LIYANAGE, KanankeChinthaka, The Promise and Reality of Online Dispute Resolution in Australia (January 24, 2012). **Social Science Research Network**, p. 489. Available in: <<http://ssrn.com/abstract=2721537>>. Access in: jan 18 2016.

## 4 LITIGIOUSNESS

Litigiousness is a fact of modern life so we have to think what can be done to resolve the disputes in a different and efficiently way.

Sometimes, for certain kinds of problems, an adversary system is not the best option.

ODR methods are useful and important as an alternative to litigation but they do not presage the end of litigiousness.

In fact, it is possible that they will increase the number of disputes to be processed. Many disputes that now are not settled for lack of efficient means of conflict resolution.<sup>14</sup>

It is essential to know how this new method works before online mediation becomes a reality in our country.

Nevertheless, we still have many challenges. It is important to consider what are we supposed to do if something goes wrong. What if the item we buy does not arrive or what arrives is not the one that the buyer expected or if there is a need to exchange?

The traditional solutions that are available in the judicial system are not adequate to deal with the new reality of the information society.

Brazil cannot afford to stay out of the ODR debate due to the fact that we have faced a huge growth of ICT and Digital Economy.

Traditional legal systems are based on the stability provided by time and space as the regular framework for the legal structure. Using online tools to address disputes that arise online means a radical change. As online interaction is increasing perceived as more flexible, informal and efficient, ODR has become a promising option for out-of-court disputes resolution.<sup>15</sup>

Many disputes can be resolved out of courts. There are several alternatives to courtroom litigation.

“Certainly, the most innovative and interesting revolution in the field of ADR is Online Dispute Resolution (ODR)”.<sup>16</sup>

<sup>14</sup>In Brazil we call it ‘litigiosidadecontida’, a rich expression created by Kazuo Watabane. WATANABE, Kazuo et al. Juizado Especial de Pequenas Causas, São Paulo: **Revista dos Tribunais**, 1985, passim.

<sup>15</sup> SZLAK. Gabriela R. op. cit., 545.

<sup>16</sup> SZLAK. Gabriela R. op. cit., 536.

## 5 COOPERATIVE AND PEACEFUL METHODS:

We must change from a competitive model to a cooperative and peaceful one.

In the court litigation process there are losers and winners.

With this in mind, we cannot forget that the challenge we face nowadays concerns to the development of digital economy, so there is a need to reform in order to forge a more efficient and effective justice system to deal with this new reality.

In this transformation we should add ADR and ODR methods which aim to diversify the way for the resolution of conflicts. What about the readiness of our country for Global ODR system?

The future seems to be full of promising opportunities to the ODR field in Brazil, but the lack of digital platforms for solving e-commerce and lack of research is a problem. It seems that our judicial system is still not ready for the disputes that will arise.

We now live in a moment of time where we can create and multiply a diversity of disputes resolution methods to respond to the complex society that confront us.

### 5.1 ALTERNATIVE DISPUTE RESOLUTION (ADR)

The use of alternative dispute resolution (ADR) improves access to justice and it is able to resolve disputes quickly and more efficiently.<sup>17</sup>

“Although civil procedures traditionally focuses on court procedures and rules, serious problems of court congestion have resulted in increased attention by judges and commentators to alternative means by which parties may resolve private disputes”<sup>18</sup>

ADR methods constitute interesting and suitable option for reducing costs and time, improving outcomes’ efficiency, and avoiding the unnecessary escalation of the disputes into the courts of justice. In the last twenty years or more the use of ADR has been slowly but firmly growing in the region. This can be explained by different

<sup>17</sup>“Nowadays, access to Justice is considered synonymous with access to the Courts. This is because of the trend of prosecution, in other words, it is expected that all disputes will be resolved in Court. We need to rethink this model, accepting alternatives means of conflict resolution as efficient and appropriate, able to contribute to the preservation of social peace” in ZANFERDINI, Flávia de AlmeidaMontingelli. DESJUDICIALIZAR CONFLITOS: UMA NECESSÁRIA RELEITURA DO ACESSO À JUSTIÇA. *Novos Estudos Jurídicos*, [S.l.], v. 17, n. 2, p. 237-253, ago. 2012. ISSN 2175-0491. Available in: <<http://siaiap32.univali.br/seer/index.php/nej/article/view/3970>> ou doi: <<http://dx.doi.org/10.14210/nej.v17n2.p237-253>>. Access in: jan 22 2016.

<sup>18</sup> FRIEDENTHAL. Kane and Miller. *Civil Procedure*, Third Edition. West Group: St. Paul, Minn, 1999, p. 1.



causes, most significantly the judicial systems' crisis and the practical impossibility of attending efficiently the increasing number of the cases submitted. Ortega Hernández has considered that, by promoting universal access to justice, states have ended up with a backlog of cases that is impossible to attend efficiently. As a consequence, this has given great impulse to ADR in the region, which is performed outside the courts but within some kind of framework support.<sup>19</sup>

## **6 ICT: INFORMATION AND COMMUNICATION TECHNOLOGIES IN THE INFORMATION SOCIETY**

We have seen in the last few years the incorporation of online services.

The reality, as we know, is that the courts are too overloaded with work.

So, there is a need for reform. We have to improve tools for managing and solving disputes online.

The development for ICT brings efficacy for the administration of justice.

We have been implementing reforms for the gradual elimination of the physical case files, but the challenges are still huge.

The use of ICT brings a positive impact on improving levels of transparency for the judicial system.

ICT and ADR are crucial for the expansion of ODR. There is also a need for harmonization between cyber legislation and the digital economy expansion.

To promote, implement and develop ODR will bring us a cultural change.

ODR methods vary because there are different ODR providers. They utilize a combination of computers programs and human assisted processes to deliver a resolution for the parties' disputes.

Due process of law should not be compromised and disputants must have all information before they agree to use those methods. They should know who will decide and how is going to be decided their case, so it is important to provide more transparency regarding the decision making process in order to improve public approval.

Participants in an online dispute resolution mechanism should trust that the outcome is fair and that ODR is impartial and independent off all participating parties.

Cross-border and also long distance disputes arise now ever more frequently in the online setting between people of different states within a country or people from different

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<sup>19</sup> SZLAK. Gabriela R. op. cit., 534-535.

countries so the access to conventional courts is sometimes very difficult and at least one litigant must travel to the jurisdiction of the other to adjudicate the claim. There is always a desire for quick and inexpensive settlement of disputes.

## 7 CULTURAL CHANGE

We need a cultural turn in the dispute resolution field.

Culture, as we know, “is the way we do things around here”.<sup>20</sup>

The basic model of dispute resolution in Brazil, at this time, is the adversarial one.

We still live the adversary-culture and, just like in the United States of America, “litigation has become the nation’s secular religion.”<sup>21</sup>

In our culture, we are used to the idea that is good and most of the time necessary that our conflicts would be settled by a decision maker and we do seek redress enforceable.

Now it is the time to the cultural turn.

We have to reject excessive litigation but

*Vivire en conflictos normal y permanente; hay que tratar de aprender a vivir con él y las alternativas pueden ser la lucha-litigio, que ocasiona pérdida para una parte y ganancia para la otra, el galeoteo o la búsqueda de una salida o de una solución creativa en que no haya un perdedor sino que ambas partes resulten ganadoras.*<sup>22</sup>

There are good and efficient alternatives to the traditional litigation.

For resolving disputes there are more pacific and less costly means. In Brazil we are very innovative people and we are used to unceasing changes.

## CONCLUSIONS

<sup>20</sup> RAINEY, Daniel. **ODR and Culture**, p. 205. Available in: <<http://www.mediate.com/pdf/rainey.pdf>>. Access in: feb 09 2016.

<sup>21</sup> LIEBERMAN, Jethro K. **The Litigious Society**, Foreword. Basic Books, INC. New York: 1983.

<sup>22</sup> KATZ, Flora M. **Negociar y mediar el conflicto**, 1.ed, Buenos Aires. Legis: Argentina, 2010, p.26.

Traduction: Living in conflict is normal and permanent; We must try to learn to live with it and the alternatives may be fighting-disputes, which causes loss of one party and gain for another, haggling or finding a creative way or solution where there is no loser but both sides are winners.

The use of ODR may encourage litigants to settle their disputes in a faster, cheaper and more efficient way.

This procedure offers consumers a new option for access to justice.

An effective implementation in our country of the ODR may increase consumers' confidence in buying Online.

The out of courts resolution may come from private sectors or from the judicial system. The goal is to have ODR providers along with state recognition.

ODR helps to build trust in the digital economy.

ODR platforms may improve access to justice for those litigants who would otherwise be unable to settle small causes.

In the online word there are no geographic and political boundaries. People are now connected globally through the internet. Now people around the world are together every day.

We hope ODR methods become a reality in the near future, but there is still a lot to do.

It is very difficult to predict how ODR will develop in Brazil, but there is a trend in the near future for more efficient ways of handling disputes that came from the digital economy, so we think that we are ready for this cultural change.

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