



Global Trends of Online Dispute Resolution (ODR) with reference to Online Trade in Pakistan

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ARTICLE DETAILS	ABSTRACT
<p>History <i>Revised format: November 2018</i> <i>Available Online: December 2018</i></p>	<p>Online Trading in Pakistan has been rising with every passing day. State level regulation for online trade is inevitable reality. Online trade has systematically entered in Online Dispute Resolution (ODR) System that is the format of Alternate Dispute Resolution System (ADR). Many multinational vendors such as Amazon and Alibaba are using Online Dispute Resolution mechanism to make the trade efficient and less dependent on conventional remedial systems of Civil Laws and cumbersome procedures of classical courts. Online Trade in Pakistan is a novel idea and is flourishing by every passing day. On the same time, online trade faces issues of dispute resolution. This paper will aim at introducing Online Dispute Resolution (ODR) as a model through case studies of various developed nations and international framework. Moreover, this paper will identify the prospect and limitations of Online Dispute Resolution in Pakistan.</p>
<p>Keywords <i>Online Dispute Resolution (ODR), Alternative Dispute Resolution (ADR), Negotiation, Arbitration, European Union (EU), UNCITRAL Technical Notes</i></p>	
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1. Introduction and Background of Study

Since the early 2000s, the amount of internet usage around the world has grown by 970 % as a consequence of quick evolution of information and communication technologies (ICT) ("World Internet Users Statistics and 2017 World Population Stats", 2017). In the world, slightly fewer than 3.9 billion people are using the internet ("World Internet Users Statistics and 2017 World Population Stats", 2017). While the number of internet users is almost 2 billion in Asian, the number is almost 600 million in the EU ("World Internet Users Statistics and 2017 World Population Stats", 2017). While in 2002, the internet users in Pakistan were only 133 thousand, this number has increased to 44 million in 2017 ("Internetworldstats.com, 'Internet Usage in Asia", 2017).

Table 1

INTERNET USERS AND 2017 POPULATION STATISTICS FOR ASIA						
ASIA REGION	Population (2017 Est.)	Pop. % World	Internet Users 30-June-2017	Penetration (% Population)	Internet % Users	Facebook 30-Jun-2017
Asia Only	4,148,177,672	55.2 %	1,938,075,631	46.7 %	49.9 %	736,003,000
Rest of World	3,370,851,298	44.8 %	1,947,491,988	57.8 %	50.1 %	1,243,700,530

WORLD INTERNET USAGE AND POPULATION STATISTICS JUNE 30, 2017 - Update						
World Regions	Population (2017 Est.)	Population % of World	Internet Users 30 June 2017	Penetration Rate (% Pop.)	Growth 2000- 2017	Internet Users %
Africa	1,246,504,865	16.6 %	388,376,491	31.2 %	8,503.1%	10.0 %
Asia	4,148,177,672	55.2 %	1,938,075,631	46.7 %	1,595.5%	49.7 %
Europe	822,710,362	10.9 %	659,634,487	80.2 %	527.6%	17.0 %
Latin America / Caribbean	647,604,645	8.6 %	404,269,163	62.4 %	2,137.4%	10.4 %
Middle East	250,327,574	3.3 %	146,972,123	58.7 %	4,374.3%	3.8 %
North America	363,224,006	4.8 %	320,059,368	88.1 %	196.1%	8.2 %
Oceania / Australia	40,479,846	0.5 %	28,180,356	69.6 %	269.8%	0.7 %

Even though the use of ADR and ODR to disputes has recently become more popular, most of legal academic literature emanates from West countries. By this time, there has been the relatively limited publication on this issue in developing countries. It is shown that ODR is still in its initial phase in Pakistan. The most of existing literature comes from developed countries such as the EU and the US, which has advanced jurisdictions, leave a significant legal literature gap in developing countries. It is obvious that Pakistan has a different legal culture from the EU and the US. In Pakistan, not only legal differences but also the cultural, the ICT infrastructure and the regulatory challenge are some significant reasons that not allow to ADR and ODR to reach their full efficacy. This research assesses feasibility analysis of ODR by considering the growth of ODR in Pakistan juridical circumstances. It analyses what and how can be practised from the ODR legal academic literature in advanced jurisdictions such as the EU and the US and to implement this learning in Pakistan context.

The history of internet in Asia is not very long. First mail from China was made on 20th of September, 1987 and now it seems a miracle that almost everything is turning towards use of information technology including trade and commerce based on internet websites. For resolving online disputes, China has introduced various government and private level dispute resolution centres. The same trends are demonstrated by a world 2nd largest population, India, where internet and Information Technology revolution is taking it to one of the largest internet using nation. India has seven hundred million mobile phone users consuming internet to facilitate from e-commerce. E-bay, an internet based vendor, has made its operations in India to the level of Online Dispute Resolution through e-court. The same trends are observed in markets of Pakistan. E-trading is a good tool to reduce the cost, increases efficiency of transaction and is time effective. The same has been benefited by various online vendors in Pakistan. It has been observed that regulation of e-commerce in Pakistan is not efficient as the transactions are prone to fraud, misrepresentation and other contractual misunderstandings. Various studies have indicated the potentials of e-commerce in Pakistan mentioning that 67% of companies in Pakistan use internet websites to advertise their brands.

Absence of regulation on e-commerce at state level has made the trade un-certain for both consumers and vendors. This has given rise to various un-remedied disputes.

Pakistan has recently passed Alternate Dispute Resolution Bill 2016 recently but it does not cover the domain of e-commerce and Online Dispute Resolution (ODR). Online trade and commerce in Pakistan is conducted by various websites. A consumer enters an online web portal and takes various offers with the prescriptions and prices. The consumer, a private or company, then puts acceptance by putting an online order agreeing on the terms and conditions along with the description of product or services. Later, the vendor delivers the goods. It is settled principle of contract law that 'agreements are enforceable by law and the fundamental liability of all parties is to perform it with good faith'. Now, this 'good faith' is not only delivery of goods or services but also the intended benefit of parties to the contract. Online trade and commerce in Pakistan lacks this 'good faith'. Parties in an online transaction cannot access each other easily and the communication on internet goes unproductive various times in case of Online Dispute Resolution (ODR) due to various reasons such as internet literacy, shortage of energy and power and high bandwidth requirements of internet. Moreover, the lack of state regulation makes online commerce less certain. This issue leads towards leaving grievances un-remedied as well as impact on national economy.

This paper will introduce readers with basic concept of Online Dispute Resolution (ODR) and global trends by quoting international infrastructure on Online Dispute Resolution (ODR). Moreover, developments related to same issue will be presented to find the way out for Online Dispute Resolution (ODR) in Pakistan. This study will play a pivotal role in turning Alternate Dispute Resolution in commerce and trade to the level of Online Dispute Resolution (ODR) in e-commerce. This paper will be among pioneer scholarship on the issue introducing international standards of Online Dispute Resolution (ODR) at national level. Study will also equip reader with various remedial methods in Online Dispute Resolution (ODR). Primary question of study is finding the gaps of efficient e-commerce and trade by defining Online Dispute Resolution (ODR) and its trends globally. The study will also focus on efficiency of global experiences of Online Dispute Resolution (ODR) and how Pakistan can benefit from that experience through this comparative study.

2. Research Methodology

The study follows black letter approach involving doctrinal methodology. It will not be descriptive in a sense as it will aim at analysing the basic concept of Online Dispute Resolution (ODR) and its trends and perspective in Pakistan and globally. The study will also take advantage of comparative methods of research by taking illustrations of operation of Online Dispute Resolution (ODR) in China and India. The study will then put forward some recommendations for Pakistan based on experience of China and India based upon neighbourhood and identical trends of commerce and industry. 89 percent of population of Pakistan are mobile users and almost all companies provide access to internet to its consumers. This makes e-commerce a potential in Pakistan where internet users may access online vendors through websites and other mobile applications. Online trade in Pakistan is growing with rapid pace and it is speculated that it will touch the figure of 1 billion USD in 2020. Online trade is compatible with environment in Pakistan where half of population is female and due to socio-religious constraints they are not on equal terms with men to mobilise. Moreover, the congested traffic conditions also play a vital role in boost of online trade. E-commerce in Pakistan has been expanding with every passing day. Recently, Alibaba Group has made their way by meeting Prime Minister of Pakistan. Various surveys indicate that e-commerce in Pakistan bears a great potential and can play a vital role in boosting economy. Many national groups like pakwheels, zameen property, draz group and Kamyu are expanding their volume of trade with every passing day. But it has been observed that customer satisfaction and performance of e-contract faces many uncertainties and the consumer faces a great deal of trouble because of absence of effective regulation on state level. Online transaction in Pakistan and all over the world involves an online offer and acceptance through following procedures:

- Where a customer is visiting online portal of any company and in capacity of private individual, one is accepting an offer by the vendor by a click. This is also called B2C (Business to Consumer Contract).
- Some of the online contract involves both companies where the contract involves contract between two organisations. This is also named as Business to Business contract (B2B).
- Where an online portal involves two consumers and acts as mediator between the two parties. This type of transaction is commonly known as Consumer to Consumer contract (C2C).

E-Commerce in Pakistan is evolving and that is why many challenges come in its way. These challenges include lack of demand, mistrust from traditional society, very low awareness about technological use, infrastructural

issues, absence of effective regulation, ineffective advertising, and most significantly absence of vibrant ODR. Table mentioned below summarizes issues of E-Commerce in Pakistan.

Table 2

Category	Issues
<u>General Issues</u>	<ul style="list-style-type: none"> • Lack of Demand • Mistrust • Lack of Awareness of Technology • Focusing entire Pakistan
<u>Online Retail Model</u>	<ul style="list-style-type: none"> • Expatriates and Click and Mortar are the most popular sub-models • Infrastructure • Lack of Regulation • Traditionalist nature of Pakistanis
<u>Brokerage Model</u>	<ul style="list-style-type: none"> • Higher form of E-Commerce
<u>Virtual Community Model</u>	<ul style="list-style-type: none"> • Lack of Willingness to Pay • Advertising • Cost • Educational and Maturity Level
<u>Others</u>	<ul style="list-style-type: none"> • Secondary to the models mentioned above • Piracy Issue

Note: Shumaila & Zeeshan, 2018

These transactions are based on online contact and agreements. Sellers make an offer online and the buyer after going through the offer and the description of product and services makes an acceptance online. This transaction does not involve face to face contact of physical access between parties. In this case any kind of dispute related to transaction is a little hard to be resolved. The matter of Dispute Resolution (ODR) is broad in perspective. Online Dispute Resolution is mainly conducted through websites and emails. In some matters it is also conducted offline and face to face. It may also be understood that Dispute Resolution (ODR) may not be confused to Alternate Dispute Resolution. This dispute may also go to the courts and civil disputes. To make e-commerce more vibrant, the trends of Dispute Resolution (ODR) are gaining strength in Asia and globally.

3. Basic Structure of Online Dispute Resolution

Every year billion transactions occur in the world. In the digital age, with the help of ICT, there is no limitations on time and geographic and jurisdiction boundaries for completing transactions through the internet. International transactions or usage have increased the number of cross-border disputes. Traditional disputes resolution system does not meet legal requirement of such disputes because:

- Various countries got different rules for trade and multiple prohibitive costs to invoke legal action in almost all jurisdictional aspects
- Since the localization factors on the Internet are far less obvious, it is difficult to locate business locations and performance in cyberspace because of the infinite Internet that can be accessed from anywhere in the world.
- Cyber related disputes may require legal experts who can adapt to various evolving technical, social and commercial practices of cyberspace (Wang, 2017).

In order for creating cost effective and more efficient solution for resolving disputes, ODR has been awakened legal scholars' interest since 1990s. Recently, a number of non-profit making public organizations such as World Intellectual Property Organization (WIPO), the American Arbitration Association (AAA), the American Bar Association (ABA) the Better Business Bureau (BBB), the National Arbitration Forum (NAF) and China International economic and Trade arbitration Commission (CIETAC) go further to develop the scheme of ODR (Wang, 2017).

There are various approaches towards to definition and description of ODR mechanisms. For example, Kaufman-Kohler and Schultz define three perspectives; nominate cyberspace, non-adjudicative ADR and arbitration (Kaufmann-Kohler & Schultz, 2004). These authors additionally recognize that the essential feature of a practicable description of ODR is that it focuses on the issues raised by its overarching feature, being operated online (Kaufmann-Kohler & Schultz, 2004). ODR has been recently described by UNCITRAL Technical Notes on Online Dispute Resolution (hereafter Technical Notes):

ODR is a mechanism for resolving disputes through the use of electronic communications and other information and communication technology.

After these definitions and descriptions, it can be said that ODR refers to help to resolve dispute with the assistance of ICT, particularly the Internet. This technology has been called as the 'fourth party' by Katsh and Rifkin (Katsh & Rifkin, 2001, Rainey, 2014). ODR is not science fiction. Each year millions of disputes are resolved online and hundreds of online dispute resolution providers offer their service around the world. Every year only on eBay, around 60 million disagreements among traders are settled through ODR (Rule 2012). This is a 'well-established' way of resolving disputes, appropriate for the internet age. Whereas ADR and ODR mechanisms have some common features, such as lower cost, greater speed, more flexibility in outcomes and so on, ODR has unique traits, which include bridging distance, saving travel and venue cost and enabling parties to access expertise outside their local area (Rule, 2002). Nevertheless, ODR obviously has some drawbacks. Text-based techniques can diminish communication cues that can in turn lead to misunderstandings, negative interpersonal behaviour, and frustration because of delays in response (Tyler & McPherson, 2006).

4. Online Negotiation; Preliminary Framework of ODR

Online negotiation can also be called 'e-negotiation' or 'cyber negotiation'. Negotiation is most common and basic forms of the dispute resolution. It is believed that the most of people do not think about in fact they are negotiating in day-to-day life. Efficiency of negotiation may be considered in formal situation such as a business meeting or buying a car. The essence of negotiation can be defined that there is no third party in any type of communication between two or more people when they try to resolve their dispute (Lodder & Zeleznikow, 2010). In a pure negotiation disputants try to reach agreement without neutral body helping (Rule, 2002).

There are two key methods of negotiation available to resolve dispute over the internet: automated and assisted negotiation (Kaufmann-Kohler, 2005). 'Automated negotiation' and 'assisted negotiation' were described by Dr Wang as:

Automated negotiation: The parties successively submit to a computer a monetary figure as a settlement proposal. The computer then compares the offer and the demand and reaches a settlement for their arithmetic mean

Assisted negotiation: The parties communicate with one another over the internet, using for instance e-mails, web-based communication tools or video conferences (Wang, 2008)

E-mail has become the foremost way of the communication in the workplace (Epstein, 2001). Invariably, e-mail negotiation has become most common in order to resolve disputes because of some advantages such as time and distance, cost effective, in writing, more planned and so on (Epstein, 2001). However, according to a research, e-mail negotiation 'increased contentiousness', 'diminished information sharing, process cooperation and trust' and 'increased effects of negative attribution' (Ebner et al, 2009). It shows that face-to-face contact is better than electronically in order to reach consensus (Ebner et al, 2009).

5. Online Mediation; an Effective ODR

Mediation is another type of method to resolve disputes. The main aim of mediation is to offer the parties to settle their disputes in a sustainable and self-determined way. Today mediation is used in majority fields. In the past years, mediation was mainly focusing solving labour and family disputes. Nevertheless, because of several benefits of the use of mediation compared to with other methods of dispute resolutions such as procedural flexibility, cost-efficient, time-efficient, it has been used in small claim disputes, consumer conflicts, commercial disputes, tax disputes, bankruptcy and so on.

The European Parliament approved the EC directive of the European Parliament and the Council on certain aspects of civil and commercial arbitration (hereafter 'EC Directive on Mediation') defined 'Mediation' as:

'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State (EC Directive on Mediation 2008 Article 3).'

According to those descriptions, mediation refers a process that a mediator tries to assist two or more disputants to solve their dispute. Parties are at freedom to abandon from the process at any time. The third party or mediator does not have the authorization to force a binding decision on them. Mediation is grounded on the intentional involvement of parties.

Besides this, online mediation may be understood as 'system-based' contrasting to a 'face-to-face-based' device (Betancourt & Zlatanska, 2013). The only difference between offline mediation and online mediation is that parties and third party always communicate via the internet (Wang, 2008). The e-mediation method reflects a track or a set of phases usually subjected to targets, report of proceedings, flow processes and, occasionally, complex schemes with algorithms that may enhance suggestions (Vilalta, 2012). Electronic schemes offer parties producing informal pitches or suggestions, and parties are helped by third person, mediators, that cooperate online (Vilalta, 2012). Communication can be synchronized like asynchronous, such as cyber conference, chat, or e-mail. Platforms may also organize unrelated Caucasus and common areas and personal conversations. In a common field, each party (Vilalta, 2012). These services frequently offer complementally phone support.

6. Online Arbitration; Award and Enforcement of ODR

Arbitration is a way, impartial for third party, called 'arbitrator', awards final decision for parties. This method has increasingly been chosen by parties in order to resolve disputes, especially in international disputes due to various reasons that the one of main reasons is that the award given by an arbitrator is normally enforceable as a court judgement. Businesses are willing to go to arbitration because arbitral award can be efficiently executed in 157 countries signatories to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, also known as the "New York Arbitration Convention" or the "New York Convention". It is permitted to remain as one of the most successful practices to provide confidence in the approval and enforcement of cross-border arbitral awards.

Online arbitration may be referred as an online version of offline arbitration. It includes everything from the 'online arbitration agreement' to the 'online arbitral award'. In online arbitration, the claimants, the arbitral tribunal, experts are supposed to make use of electronic devices, including sophisticated software and hardware devices, to participate in the proceedings (Farned, 2011). The effective of the electronic devices can be seen particularly in complex and large scale arbitration procedure. The other significant advantage of online arbitration is that arbitrations witnesses and parties do not need to travel and accommodate (Hörnle, 2009). Especially, international arbitrators desire to consider without travelling to abroad and would willingly issue an arbitral award in an electronic form. This type of mechanism may be feasible generally in consumer disputes such as small claims but not involve complex issues and high amount of money are at stake.

7. Potentials and Limitations of ODR

The main disadvantage of ODR is that it avoids the using face-to-face interaction which gives a chance to the mediators and arbitrators to evaluate the credibility of parties and witnesses. When a dispute is handled on the internet, the disputants may involve in causing lacking the mediator's or arbitrators' awareness. Moreover, a party may not know another party that may cause tremendous misunderstanding between them. Another commonly discussed issue regarding ODR is that during resolving disputes, parties wish to keep all aspects of proceedings private. This could potential a party to print out and distribute recorded communication without permission of the other party. Moreover, in the digital age, it is risky that unauthorised people could intercept communications transmitted over the ICT.

The third demerit of ODR is that while ODR is one of the best suited methods for resolving some kind of disputes, it may not be suitable for any types of disputes. For example, some significant disputes which is not parties' disposal need assistance from court that is why ODR cannot handle those disputes. Last but not least, some other

factors may also be considered challenging or at least obstacles when used ODR. Language barriers in cross-border disputes, skills of or difficulty of using of computer or communicating may be a disadvantage for parties who are less familiar with these skills.

While ODR has some significant considered issues as discussed above, it also provides number of benefits. As opposed to traditional litigation, the one of main benefits of ODR is that it is saving time. In a dispute, if a party wants to physically involve in the process, least one of disputant would have to travel which significantly reduces the speedy of process. ODR also gives parties more flexibility in procedure, quicker solutions and more creative solutions (Lide, 1996; Hörnle, 2003).

8. The EU ADR Directive and the ODR Regulation

The EU adopted two innovative legislations namely the Directive on consumer Alternative Dispute Resolution (hereafter the `ADR Directive`) and the Regulation on consumer Online Dispute Resolution (hereafter the `ODR Regulation`). The main aim of the new legislation is to resolve consumer disputes out of the court, faster, cheaper and simpler than the court may offer (ADR Directive, Recital 5). More specifically, in the Article 5 of the Directive states that it is a requirement for Member states to ensure the provision of ADR entities (ADR Directive Article 5) in order to resolve domestic and cross-border any type of contractual disputes which are parties' disposal, between consumers and traders, except disputes related to health service and higher education (ADR Directive, Article 5).

The ADR Directive requires a duty on the Member States to assure the provision of nationally certified CADR entities, which are available online, for consumer complaints arising from the purchase of goods and the provision of services (ADR Directive, Article 2(2)). The Directive applies to all both domestic and cross-border contractual disputes where a trader is established in the EU and a consumer is a resident of the EU (ADR Directive, Article 2(1)).

The ODR Regulation sets an `ODR Platform` that purposes to facilitate the resolution of consumer disputes arising from e-commerce (ODR Regulation, Article 1). While the Regulation does not define the ODR, the description of the ODR Platform is given in Article 5 (2) as:

'a single point of entry for consumers and traders seeking the out-of-court resolution of disputes covered by this Regulation. It shall be an interactive website which can be accessed electronically and free of charge in all the official languages of the institutions of the Union (ODR Regulation, Article 5).'

According to this description, a single point of entry at Union level, in order to settle domestic and cross-border complainant, are offered by ODR Platform to consumers (Article 5). Moreover, electronic case management tool that is a free of charge in all the official languages are offered (Article 5). In the Article 7 of the Regulation, it is states that one ODR contact point shall be designated by each Member State (Article 7). This ODR contact point shall provide assisting to the resolution of disputes related to submitted complaints. Procedure of the `registration of complaint` (Article 8), `dispensation and conduction of a complaint` (Article 9) and `dispute resolution mechanism` (Article 10) are deeply dealt with by the Regulation. Moreover, in terms of protective reasons, the Regulation examines in detail; `database` (Article 11), `processing of personal data` (Article 12), `data confidentiality and security` (Article 13) and `consumer information` (Article 14).

9. UNCITRAL Technical Notes on ODR

It questions the scope and adequacy of international ODR laws. There is no special binding legislation concerning ODR for consumer and commercial disputes, but there are some essential legislative movements in the UNCITRAL. In 2010, The UNCITRAL established a working group called *Working Group III* to develop rules to handle low-value, high-volume B2B and B2C e-commerce claims (Del Duca, Rule & Rogers, 2010). After its forty-ninth session in 2016 UNCITRAL Technical Notes adopted (*Working Group III*, 2016). It is worthy nothing that Technical Notes is descriptive and non-binding and reflects the core principles of an ODR process. Technical Notes rules not only focus on consumers, but also traders can be claimants. The Technical Notes are expected to have a significant influence on the advancement of systems to facilitate the resolution of disputes arising from cross-border low-value good or service contracts completed by using electronic communications,

10. Conclusion

Online Dispute Resolution (ODR) is going to play a pivotal role in establishing a robust e-commerce regime in Pakistan sooner or later. Online Trade has already expanded its sphere from baby lotions to robotics. This paper focused on national preparedness for the vibrant regime with special focus of Online Dispute Resolution (ODR). E-commerce regulation got both state and private boundaries. Online Dispute Resolution (ODR) is the advanced format of Alternate Dispute Resolution (ADR) that is effectively playing its role for dispute resolution on private level. Global trade giants such as Amazon or Alibaba are using computer based soft as well as face-to-face methods for trade related dispute resolutions. This paper has presented an overview of international framework on Online Dispute Resolution (ODR) that will help policy makers to regulate e-commerce in Pakistan.

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