

ADR, ODR, claims, reputation: the quest for an effective justice model for online transactions*

Valentina Morgante

Abstract

The goal of the paper is to briefly explore the challenges and potentialities of different justice models within the Digital Market.

For this purpose, the analysis is focused on ODR (Online Dispute Resolution) and ODA (Online Dispute Avoidance) methods, trying to investigate if – and to what extent - at the present stage of their development, they proved themselves suitable to be awarded a medal of effectiveness in the arena of online legal disputes.

Summary

1. The Digital Market: a world (wide web) of law without justice or of justice without law? – 2. ODR, stranger things? – 3. ODA (Online Dispute Avoidance) tools: when the justice without law risks, sometimes, to turn into law without justice – 4. Finding Nemo: which law for ODR? – 5. Some few (provisional) conclusions.

Keywords

Digital Justice; Web Reputation; Online Dispute Resolution; Online Dispute Avoidance

1. The Digital Market: a world (wide web) of law without justice or of justice without law?

As effectively stated by Jeffrey Robertson «justice is the great game precisely because its rules provide the opportunity of winning against the most powerful [...]. This does not mean that David will necessarily slay Goliath, but that laws of battle will prevent Goliath from sidling up and hitting him on the head. They arm David with a slingshot, a possibility of victory»¹.

Those words of hope (particularly rare and inspiring, since meant to talk to a traditionally skeptical professional category, such as the one of the modern lawyers) were written by Mr. Robertson referring to the highly value-oriented and problematic re-

* Il presente contributo corrisponde, con alcune integrazioni, al testo dell'intervento svolto in occasione del convegno *JusTech e Industry 4.0, i cambiamenti indotti dalle nuove tecnologie nel diritto delle imprese*, Università degli Studi di Padova, 14 febbraio 2019. Su determinazione della direzione, il contributo è stato sottoposto a referaggio anonimo in conformità all'art. 15 del regolamento della Rivista.

¹ G. Robertson QC, *The justice game*, London, 1999.

lationship between justice and human rights. Nonetheless, the same principle might be well applied – *mutatis mutandis* – to the (relatively) new quest for an effective justice model for online B2C transactions².

Indeed, since the dawn of the digital market, Authors have been asking themselves if the Internet – land of many Davids and few (but big and powerful) Goliaths – would become a world of law without justice or, on the opposite, of justice without law³.

Both, and none of the two, most probably.

2. ODR, stranger things?

The rise of a widespread awareness in relation to the centrality of ODR (Online Dispute Resolution) for the full development of the worldwide digital market is fairly recent⁴.

Nonetheless, already in the mid-late 90s many Scholars started to deal with the above field of investigation⁵, predicting that the dappled world of ADR was doomed to become even more jeopardized after meeting its online dimension⁶, and, like this, evolving into ODR.

ODR is in fact an acronym whose scope is, potentially, even wider than the one of ADR, thanks to the peculiarity of combining the “alternativeness” of ADR to – some – online dimension⁷.

² The acronym B2C commonly refers to commercial transactions between a professional operator (identified, in the acronym, by the letter B - “Business”) and a consumer (identified in the acronym by the letter C – “Consumer”). B2C transactions are commonly opposed, respectively, to C2C transactions (acronym referring to peer-to-peer commercial transactions between non-professional players) and B2B transactions (acronym referring to peer-to-peer commercial transactions between professional players). For the above purpose of distinguishing between different categories of transactions based on the subjective characteristics of the parties involved, reference can be made to the legal definition of consumer provided by EU Legislation. Pursuant to art. 2 of the Directive 2011/83/EU of October 25, 2011 on consumer rights, indeed, «“consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession». In turn, according to the same provision, «“trader” means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession».

³ For an early adopter prospective, see J. Auerbach, *Justice without law? Resolving Disputes without Lawyers*, Oxford, 1983.

⁴ As shown by the contemporary blooming of scientific publications, as well as ODR Legaltech start-ups.

⁵ See, among others, M. Burnstein, *A Global Network in a Compartmentalised Legal Environment*, in K. Boele-Woelki, C. Kassedjan (ed.), *Internet: Which Court Decides? Which Law Applies?*, The Hague, 1998, 23-24; H. Perrit, *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, in *Ohio State Journal on Dispute Resolution*, 2000, 675 ss.

⁶ As effectively stated by Hornle, indeed, «the application of conventional jurisdictional rules to Internet disputes is enormously complex, unpredictable and uncertain, often because jurisdictional rules are based on territorial connecting factors – such as the place of performance of a contract, or the place where a tort occurs – that are highly ambiguous in the Internet-related cases». See J. Hornle, *The jurisdictional Challenge of the Internet*, in L. Edwards – C. Waelde (ed.), *Law and the Internet*, Portland, 2009, 121 – 122.

⁷ See J. Hörnle, *Online Dispute Resolution – The Emperor’s New Clothes? Benefits and Pitfalls of Online Dispute*

Again, not a trivial combination (nor under its characteristics or its outcomes).

The acronym “alternative dispute resolution” (ADR) traditionally refers to any dispute resolution methods alternative to the “ordinary” one, meaning the one achieved through the intervention of a State Court.

The “alternativeness” can therefore: (a) be merely subjective, having to do with the way the trusted third party is appointed (as it happens with arbitration, where the case is adjudicated by an arbitrator appointed by the parties, instead of a State Judge); or (b) involve the objective potential outcome of the settlement (as it happens with mediation, naturally purposed to transformative outcomes, in contrast with the adjudicative characterization of any judicial judgement)⁸.

ODR adds to this picture (itself controversial) an “online dimension”, which might attach: (i) to the (virtual) place where the trusted third party “sits”; (ii) to the nature (human, virtual or mixed) of the trusted third party; and / or (iii) to the kind of transaction from which the disputes to be settled arise⁹.

In this context, the least innovative (and problematic) category of ODR is the one aimed to settle any disputes – regardless if related or not to deals closed in the digital market – through the intervention of a human trusted third party who does not physically meet the litigants, using exclusively technology to receive the pleads, to run any eventual hearing and to deliver his or her judgement or his or her proposal of mediation.

Here, indeed, technology plays a role of mere facilitator of the most classical dispute resolution activity, making it faster and (relatively) cheaper.

The level of complexity increases when it comes to settle disputes related to deals closed in the digital market and in particular B2C (or C2C) transactions.

The peculiar nature of this kind of transaction, in fact, radically changes the quest for justice, imposing an overall rethinking of it.

Reference is made to the most typical, and common, digital commercial transactions, the B2C ones: as for every consumeristic transaction, their main characteristics are obviously the (averagely) low economic value, which may often vary between some hundreds to some few euros, itself preventing – as it also happens in “traditional” transactions – full access to justice. With reference to online transactions, though, the effect of prevention of full access to justice is amplified by the long-distance (typically

Resolution and its Application to Commercial Arbitration, in *International Review of Law, Computers & Technology*, 2003, 2: «In one sense, ODR is simply about the use of new tools – information management tools and communication tools – for dispute resolution. But it is equally true that these tools change the methods by which disputes are being solved. ODR introduces a new paradigm of dispute resolution».

⁸ For an general overview of the modern alternatives to litigation, both outside and inside the IT society, see A.R. Roddler, J. Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology*, Cambridge, 2010, spec. 1-38, 72-85.

⁹ As assessed by Goodman in fact, «Online dispute resolution (“ODR”) can take place either entirely or partly online and concerns two types of disputes: those that arise in cyberspace and those that arise offline. 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 mechanisms supplemented with online technologies». See J.W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, in *Duke Law & Technology Review*, 2, 2003, 1 ss.

transnational) nature of the deal, which in case of a litigation carries with it well-known (and expensive to solve) international private law issues such as the ones of applicable law, jurisdiction and cross-border enforcement¹⁰.

They are, in other words, disputes unsuitable to be solved by «black-robed judges, well-dressed lawyers and fine paneled courtrooms»¹¹. On the opposite, they require simplified, accessible and quick models of settlement.

Here comes, again, technology, largely used to facilitate the adjudicative procedure¹². It might be alleged, in fact, that the most authentic “alternativeness” of ODR lays in the use of technology (eventually in combination with human intervention) as a trusted third party, suitable to solve any commercial dispute arising from online transactions in a quick, effective and neutral (*rectius*, standardized) way¹³.

This opens the door to a crowded and diverse world, which starts from the so-called «cyber-Mediation Websites»¹⁴ and lands to «decision support ODR services», using technology as a generator of automated suggestions for optional solution, elaborated by software agents whose functioning is based on data related to conflict resolution behaviors and communication theories¹⁵.

As it is quite intuitive, the more one swift towards the latter, the more the original quest for efficiency in digital justice seems to be addressed (provided – but by no means guaranteed - that the technological trusted third party is truly trustworthy)¹⁶.

3. ODA (Online Dispute Avoidance) tools: when the justice without law risks, sometimes, to turn into law without justice

While technology is becoming more and more powerful as an underlying mean of empowerment of ODR methods, some technologically (almost) free tools might still retain the podium of effectiveness in the resolution of online disputes (quite sometimes achieving it through ODA)¹⁷.

¹⁰ For a comprehensive analysis of the challenges posed by e-commerce transactions, see P. Cortés, *Online Dispute Resolution for Consumers in the European Union*, London, 2011, 1-12.

¹¹ W.E. Burger, *On Vicious Legal Spiral*, in *Judges Journal*, 16, 1977, 49.

¹² R. Koulu, *Lam, technology and dispute resolution*, London, 2018, 6.

¹³ Being the two hardly synonymic: for further references, see below note No. 16.

¹⁴ Serving «as a neutral arena to exchange settlement offers», until the parties agree on the same blind bid. On the topic, see J. W. Goodman, *op. cit.*; E. Katsh, J. Rifkin, A. Gaitenby, *E-Commerce, E-Disputes and E-Dispute resolution: In the Shadow of the “eBay Law”*, in *Ohio State Journal on Dispute Resolution*, 2000, 720-721.

¹⁵ One of the harshest criticisms to the use of automated technological third parties (lately quite effectively boosted by technological development, especially in the field of AI and blockchain) as online dispute resolution solvers is the risk of discrimination depending, among others, on the bias initial settings of the algorithm. On the topic see M. Kilgour, C. Eden, *Handbook of Group Decision and Negotiation*, Berlin, 2010, 431.

¹⁶ See B. A. Williams, C.F. Brooks, Y. Shmargad, *How Algorithms Discriminate Based on Data They Lack: Challenges, Solutions, and Policy Implications*, in *Journal of Information Policy*, 2018, 78 ss.

¹⁷ According Cortés the phenomenon of ODA is so relevant that the same macro-category of ODR

Among them, the king and the queen of the world (wide web) of justice without law are feedbacks and (virtual) standardized settlement agreements, both based on the powerful non-legal sanction mechanism of reputation.

As for feedbacks, it is indisputable that peer to peer reviews became, throughout the years, crucially important in the average online buyer-user experience¹⁸, given that more and more often the buyer's pre-purchase opinion is (mainly) formed on the feedbacks written by the previous users.

Indeed, in a high-volume transactions' environment such as the digital market, the feedback mechanism can naturally work as an «informal third-party control»¹⁹, aimed to increase consumers' confidence²⁰ by offering to the buyer access to a pool of information related (by similarity) to the transaction he or she is about to close and coming from experienced (in the sense that they already went through a similar experience), neutral (in thesis)²¹ third parties.

With the indirect benefit of decreasing – *de facto* – the likelihood of future disputes related to the feedbacked transaction.

In turn, settlement agreements, reached in B2C transactions through the offer (and the respective acceptance) of forms of compensation alternative to the pecuniary one, create a non-strictly legal ODA mechanism mainly based on reputation, filtered through customer satisfaction.

A typical example can be found in the case of the discount coupon offered in discharge of a late delivery. By accepting, the purchaser – while waiving any right to claim a further compensation for any damage it could have occurred to him or her as a consequence of the delay – gets immediate compensation²².

Besides, it is not rare for this kind of settlement agreement to be spontaneously proposed by the seller, without even any need of the filing of a claim.

It is, therefore, a fairly efficient mechanism, allowing the customer to an immediate compensation (avoiding any uncertain investment of time and resources required by a legal claim) in any case he or she appreciate as satisfactory, in an overall perspective, the alternative compensation offered to him.

«can be divided into dispute avoidance and dispute resolution». P. Cortés, *Online Dispute Resolution for Consumers in the European Union*, London, 2011, 59.

¹⁸ To such an extent that some computer scientists, already almost two decades ago, theorized that without feedbacks many marketplaces would not even have come into existence: M. Singh, *The Practical Handbook of Internet Computing*, New York, 2004, 20-23.

¹⁹ S. Panther, *Non-legal sanction*, in B. Bouckaert, G. De Greet (eds.), *Encyclopedia of Law and Economics*, New York, 2000.

²⁰ See S. Yuthayotin, *Access to Justice in Transnational B2C E-Commerce*, Berlin, 2004, 229.

²¹ In this paper, the complex legal problems arising from the hypothesis of bias, or purportedly adverse or even false, feedbacks, will not be discussed. For an introduction to an ODR mechanism intended for disputes on fraudulent user reviews, see e.g. K.G. Newcomer, *Online Dispute Resolution Decision Making – A NetNeutrals Practitioner's View*, in C. Adamson (ed.), *Online Dispute Resolution: An International Business Approach to Solving Consumer Complaints*, Bloomington, 2015.

²² The examples are the same anyone could find in the traditional textbooks of private law for the hypothesis of a good or service purchased under the condition for it to be provided before or on a certain date (e.g. the special white scarf bought by the bride in order to wear it on her wedding day but delivered, nonetheless the express obligation foreseen in the contract, only a week later).

But does it all go for the benefit – and the enhanced protection – of the consumer, finally realizing justice without need of law? Not always, and not necessarily.

As for the feedbacks, it seems actually fairly reasonable that a widespread and systematized feedback system may also have, as a side effect, a raise of the consumer's threshold regarding the expected diligence to comply with his or her legal obligations. For instance, a non-conformity claim could be objected ungrounded (or, at least, could be objected that the related guarantee would be strongly mitigated in its scope and effectiveness), in any case the purchaser, by simply reading the feedbacks made available on the purchasing website or platform, could become fully aware of the real characteristics of the service or the product provided.

This could result in turning the non-legal ODA instrument of feedback in a tool for dispute avoidance (re)balancing, this time based on the law, the positions of the seller and the purchaser.

Moving on to deformed (where not hidden) settlement agreements, it might be disputed that, while granting a generalized compensation to all the purchasers who find themselves in the same situation towards the seller – regardless of the filing of a claim (and therefore increasing the substantial level of justice in the system) – the unsolicited offers for compensation may jeopardize the effectiveness of the individual access to justice and full legal compensation.

Especially if we assume, as it seems rather reasonable to do, that a party who already filed a claim is normally well aware of his or her Zone of Possible Agreement (ZOPA)²³, while the same proposition is not necessarily true with reference to the addressee of unsolicited offers of settlement.

Let's say, for example, that the mobile internet connection offered in a certain region from a given operator does not work for some hours, during a working day. The morning after, the telephone company sends to all its customers, through its app, a notification, saying that if he or she would accept it, to make it up for the disservice of the day before, they would offer a full day of unlimited, free, connection. Accepting it, obviously, means waiving – implicitly – any further claim for compensation, even the ones the customer did not still even realize to exist (it could be for example that due to the lack of connection a payment order was not executed by the payment app, exposing the customer to a fine, without him or her having even noticed it at the time of the acceptance of the “settlement”).

This is not, though, necessarily clear for the customer who simply accepts, with a tap (or eventually just uses, without rising any objection), the offer for unlimited connection the day after.

And still a lawyer could argue that it was a valid and effective settlement agreement, suitable to exclude the right to claim any other additional form of compensation.

Again, the equilibrium between justice without law and law without justice lies in a thin line.

²³ The concept of Zone of Possible Agreement (ZOPA) is commonly used in the theory of negotiation to refer to the bargaining range where two or more parties can find a common, mutually satisfactory, ground. For this purpose, according to Mnookin, Peppet and Tulumello, the ZOPA «defines a “surplus” that must be divided between the parties». See R.M. Mnookin, S.R. Peppet, A.S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, Boston, 2004, 19.

4. Finding Nemo: which law for ODR?

Being heavily based and dependent on technology, ODR physiologically goes through continuous, fast, evolution (as it does, with the same and even bigger rate of acceleration, the digital market they are purported to serve) and the Regulator struggles to keep the pace up.

It is actually objectively difficult (both on a national and an international level) to effectively take action at a normative level, avoiding the concrete risk of a premature obsolescence of any regulation on the subject²⁴.

Not by chance, the first intervention of the EU on the topic dates back to 2001²⁵ and still, almost 20 years (of heavy and continuous development – both substantial and legislative – of the digital single market) later, an updated and efficient institutional model of ORD for the EEA could not still be perfected²⁶.

(Only) in 2016, indeed, the European Commission inaugurated a public ODR platform, common to all Member States and aimed to allow consumers and traders in the EU or Norway, Iceland, and Liechtenstein to resolve disputes relating to online purchases of goods and services without going to court²⁷.

The platform, though, at least at the present stage, did not yet achieve a satisfactory level of efficiency.

In 2017²⁸, upfront of 5 Million visitors to the platform website (which confirms the huge interest and centrality of the thematic) only 36,000 claims were filed.

Among those 36,000, only 2% was settled in ODR, while 81% of the procedures was closed within the first 30 days²⁹. Which means, according to the procedural rules of the platform³⁰, that in 8 cases out of 10 the seller did not agree on the choice of a settlement body, so that the claim cannot be processed any further through the platform. In such a context, it seems fair to say that provisions such as the one of art. 14 of the EU Regulation 524/2013 – obliging traders established within the Union engaging in

²⁴ Moreover, premature obsolescence is one of the main contemporary discussion topics of the entire technological world. On this point, see R. Kurz, *Quality, obsolescence and unsustainable innovation*, in *Ekonomski Vjesnik*, 27(2), 2015, 511 ss.

²⁵ Reference is made to the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the so called “Directive on electronic commerce”) and to the Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.

²⁶ Nonetheless since then the subject was further regulated in multiple occasions, and in particular – lately – through the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (the so called “Directive on consumer ADR”) and the Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (the so called “Regulation on consumer ODR”).

²⁷ As explained in the [home page of the EC ODR platform website](#).

²⁸ More specifically, between February 2017 and February 2018: the second year of functioning of the platform.

²⁹ The data are taken by the [report published in December 2018 by the European Commission](#).

³⁰ [Available at ec.europa.eu](#).

online sales or service contracts, and online marketplaces established within the Union, to provide on their websites an electronic link, easily accessible for consumers, to the ODR platform – did not prove themselves as an over effective tool of consumer protection.

The intentions were good, so where is the catch?

With reference to the specific case of the EC ODR platform, it might be argued that the rationale behind those – not heartwarming, to say the truth – numbers is that the platform involves an almost total lack of automation and technological advancement³¹, basically ending up being a mere collector of claims which, through the mediation of the platform (materializing in an email sent – under the effigy of the EC – to the seller) are notified to the Business party of the B2C transaction.

Nonetheless, the failure of ODR to achieve a widespread market implementation, proved worldwide to be quite a general one, resulting from multiple, concurrent critical factors³², ranging from the lack of enforceable mechanisms, to the inequality in bargaining power between parties and linguistic barriers³³.

All the above-mentioned difficulties, thus, could be most probably largely reduced by the right combination of appropriate technological developments and legal changes, quite undetachable ingredients for a tasty ODR cocktail (requiring not too much of a detailed legislation and not too few of an inch of pioneerism in the use of technology).

5. Some few (provisional) conclusions

ODR (and, more generally, online justice) will play a fundamental role in the further full development of the digital single market³⁴.

In turn, the right dose of legal boundaries is crucial to make ODR a popular tool of online justice, as recognized by the European Commission in its Communication of 13 April 2011³⁵, which identifies legislation on ADR including an electronic commerce dimension as one of the twelve levers to boost growth and strengthen confidence in the Single Market.

The need for some kind of legal framework has long been accepted even by US Authors, traditionally much more reluctant to invoke the intervention of the regulator³⁶.

³¹ Neglecting, at least at the present stage, any use of upcoming technologies, such as blockchain and (blockchain based) smart contracts.

³² For an early, comprehensive analysis of the reasons which contributed to the failure of many ODR programs, see T. Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, in *North Carolina Journal of Law & Technology*, 6, 2004, 75.

³³ J. Hornle, *Online Dispute Resolution in Business to Consumer E-commerce Transactions*, in *Journal of Information Law & Technology*, 2002.

³⁴ As emphatically underlined by Rule «only after users of online marketplaces can obtain redress will the real potential of e-commerce be achieved». C. Rule, *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer*, San Francisco, 2002, 89 ss. See also L. Mommers, *Virtualization of Dispute Resolution. Establishing Trust by Recycling Reputation*, in *Information and Communications Technology Law*, 15, 2006, 182 ss.

³⁵ Entitled “Single Market Act — Twelve levers to boost growth and strengthen confidence — Working together to create new growth”.

³⁶ On the topic, see R. Morek, *The Regulatory Framework for Online Dispute Resolution: A Critical View*,

Indeed, though the Internet proved itself a sensibly chameleonic and flexible actor, it would be overoptimistic to imagine that it could, alone, perfectly adjust into a world of justice without law (especially if, keeping in mind art. 6 of the ECHR Convention, we would like to imagine this world as suitable to guarantee an adequate level of generalized – effective and substantial – access to justice).

A (world-wide), technologically aware and updated, legislation for the digital market is therefore needed, especially for the purpose to patrol the effectiveness of the general and individual access to justice in case of breach of the consumers' rights.

Arguably, though – to be effective and more resilient to technological obsolescence – the invoked regulation should not be a detailed and preceptive one, but rather a common framework of principle, setting boundaries and legal standards³⁷.

From here, yet a further, fundamental, question: being the digital market by definition unbound from the traditional State-based logic governing the administration of legislative and judicial power, who will be the regulator in charge to setting up (or, at least, to systematize) the new (cyber) *lex mercatoria*³⁸ and its enforcement mechanisms?

in *University of Toledo Law Review*, 38, 2006, 303 ss.; S. Edwards, *Doing International Business Online for the Small and Medium Enterprise*, in T. Kubota (ed.), *Cyberlaw for Global E-Business: Finance, Payment, and Dispute Resolution*, Hershey, 2007.

³⁷ In this direction, significantly, go the Ethics guidelines for trustworthy AI published on April 8, 2019 by the High-Level Expert Group on AI of the European Commission.

³⁸ See S. Cooper, C. Rule, L.F. Del Luca, *From Lex Mercatoria to Online Dispute Resolution: Lessons from History in Building Cross-Border Redress Systems*, in *Uniform Commercial Code Law Journal*, 43, 2011.