

Do We Need to Regulate Online Dispute Resolution in Kenya?

By: Alvin Gachie¹

Abstract

This paper has discussed responses to the question of whether there is a need to regulate Online Dispute Resolution in Kenya. The first section introduces the concept of Online Dispute Resolution (ODR). The second section gives a background to the study on which this paper is based, giving the reader an understanding of the research on which this paper is grounded. The third section discusses the regulation-led approach in the United Kingdom, where the European Parliament has taken the lead in regulating dispute resolution mechanisms. It also explains the opposite approach, referred to in this paper as the market-led approach, characterised in the approach in the USA, where there is little state involvement in this private dispute resolution mechanism. This paper finds that law may be beneficial to regulating technology due to consumer protection concerns. For Kenya, the regulation-led approach is preferred to the market-led approach. This leads to a suggestion that Kenya should prioritise provision for Online Dispute Resolution in the legal framework.

1.0 Introduction

This paper discusses whether there is a need for a new legal framework for Online Dispute Resolution (ODR) in Kenya. There is little focus in existing literature on whether a developing country such as Kenya should prioritise provision for ODR in the legal framework, or whether ODR ought to develop first and legal provision to follow. Some authors argue that there is a need to put in place a dedicated legal framework for ODR, to take into

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<[http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20\(ODR\)%20InKenya.pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20(ODR)%20InKenya.pdf?sequence=1&isAllowed=y)> accessed on 4 January 2017.

account the peculiarities of the dispute resolution mechanism. This approach would be similar to the European Union (EU) experience, which factors in consumer protection issues to support the call for enactment of an ODR law. On the other side of the debate are authors who argue that there is no need for a dedicated legal framework for ODR. This side favours a scenario where the private dispute resolution field is market-driven, with little state involvement, as in the United States of America (USA).

This paper introduces the concept of ODR, briefly presents the two opposing arguments, and concludes that there is no need for a legal framework for ODR in Kenya. The paper finds that while parallels may be drawn from the experiences in the UK and USA, there is a need to allow ODR to develop before incorporating it into the legal framework. At a time when there is little market interest in ODR, the state may, however, explore other ways of promoting uptake of the dispute resolution mechanism, but not through enacting statute. ODR may rely on the legal framework for Alternative Dispute Resolution (ADR) in Kenya.

Imagine you have bought an electronic item on an online shop, and the supplier delivers it to your office. The item works well for two weeks, then it malfunctions. You had not checked on the supplier's website where the brick-and-mortar shop is located. What a better time to find out! You go onto the supplier's website and learn that the warehouse is in Arusha, Tanzania. You live in Kericho, Kenya. The total cost of returning the item to the supplier, including the mobile phone airtime you would use to communicate with the supplier, are far much more than the Kshs 4,000/- you spent to buy the item and have it delivered.

You have a Business to Consumer (B2C) dispute with the supplier. You might consider not pursuing the dispute because the cost and speed may outweigh the benefit, but it does not mean that ignoring the dispute will make it go away. Online Dispute Resolution may have a solution to your problem. It may be used to resolve the dispute between you as the consumer in Kenya, and the supplier in Tanzania. The possibility that you may never

meet the supplier, the distance between the parties, and the uncertainty of whether the process will be fair, are considerations that make it necessary to examine whether ODR should be regulated. This paper argues that the legal framework for ADR may support the emergence of ODR, and that there is no need for a dedicated legal framework for ODR in Kenya.

2.0 What is Online Dispute Resolution?

ODR is defined as 'a form of appropriate dispute resolution that utilizes telecommunication (usually internet-based, but to a lesser extent, telephones and cellular phones) to facilitate speedy and efficient resolution, mainly by compressing or reducing the time, costs and geographic space that is shared between disputing parties'. The following definition of ODR presents it as the nexus between dispute resolution and technology, where technology supports the existing dispute resolution mechanisms:

"ODR is ... technology supported dispute resolution. In that sense it can be any form of dispute resolution: technology supported mediation, technology supported arbitration, technology supported anything really."²

ODR may be used to resolve disputes that arise from both online and offline interactions. ODR involves the resolution of disputes that arise from online and mobile electronic commerce (e-commerce), but also extends to family law, e-consumer protection and disputes arising from off-line commerce. ODR is a suitable cost-effective dispute resolution mechanism for high-volume, low-value claims between parties in distant geographical locations, where straightforward repetitive issues may arise between different consumers on a regular basis.

² Alvin Gachie, 'An Evaluation of the Need for Regulation of Online Dispute Resolution (ODR) in Kenya' (LLM Thesis, University of Nairobi 2016) 64 <[http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20\(ODR\)%20InKenya.pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20(ODR)%20InKenya.pdf?sequence=1&isAllowed=y)> accessed 4 January 2017.

There are different forms of e-commerce transactions including B2C e-commerce transactions, Business to Business (B2B) e-commerce transactions, Government to Citizen (G2C) e-commerce transactions, and Consumer to Consumer (C2C) e-commerce transactions. The inherent nature of B2C online disputes makes them amenable to ODR. Therefore, disputes arising from online and mobile B2C e-commerce transactions are the best suited type of disputes for ODR. A person already using the internet and mobile phone to effect transactions would, according to this position, be more responsive to an attempt to resolve any dispute that may arise, using the same system.

2.1 Background

This paper is based on a study on whether there is a need for regulation of ODR in Kenya.³ The study evaluated the differing positions of regulation of ODR in the UK and the USA to determine whether either of the two approaches is favourable for Kenya. The study involved a desk-based review of literature, and interviews of ten respondents. This was not intended to be a representative sample. Rather, the study sought to draw opinions on whether there is a need to develop ODR law in Kenya. The study involved lawyers, academics, ODR experts and a judge.

In an effort to minimise the likelihood that the data provided by the respondents is traced back to them, the respondents have been anonymised. Many ethical guidelines for social science research suggest that it is important to anonymise research participants through assigning pseudonyms. While the author attempts to remove personal identifiers, it is acknowledged that it is impossible to completely hide the identity of respondents, as contextual identifiers in the responses may still be present. Further, their views have not been documented in any particular order: neither in the text nor in the footnotes.

³ Alvin Gachie (n 2).

2.2 Crossroads: Whether Kenya should Adopt a Regulation-led or Market-led Approach

A regulation-led approach in the United Kingdom versus a market-led approach in United States of America

Developed countries such as the UK and the USA have better infrastructure to sustain internet connectivity than developing countries such as Kenya, where weak infrastructure limits internet penetration.⁴ In the UK and USA respectively, the level of internet use was estimated at 92.6% and 88.5% in the year 2016, contrasted against Kenya's 45%.⁵ Kenya had approximately 21 million internet subscriptions, following a 3.7% increase in uptake from the year 2015.⁶ On a global comparative scale, developing countries such as Kenya have low access to broadband networks, and the use of both fixed and mobile telephone surpasses internet use.⁷

In Kenya, the increasing penetration of mobile phones, established mobile-communication infrastructure and low levels of internet connectivity all indicate that ODR may be facilitated by wireless mobile devices, and not computers.⁸ Low use of the internet in developing countries is associated with low disposable income.⁹ With such low disposable income, a household would prioritise shopping for subsistence in physical markets,

⁴ Chandra Gnanasambandam and others, 'Online and Upcoming: The Internet's Impact on India' (McKinsey & Company Inc 2012) 25 - 28; Angela Kaguara and Maureen Wanjiru, 'Digital Divide: The Glaring Reality' (University of Nairobi 2009) 7,8 <https://www.uonbi.ac.ke/wakaguara/files/digital_divide_conference_paper.pdf> accessed 24 November 2015.

⁵ Internet Live Stats, 'Internet Users by Country' (*Internet Live Stats*, 2016) <<http://www.internetlivestats.com/internet-users-by-country/>> accessed 14 September 2016.

⁶ Ibid.

⁷ Christine Zhen-Wei Qiang, 'Broadband Infrastructure Investment in Stimulus Packages: Relevance for Developing Countries' 7 <http://siteresources.worldbank.org/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/282822-1208273252769/Broadband_Investment_in_Stimulus_Packages.pdf> accessed 24 November 2015.

⁸ Doug Leigh and Frank Fowle, 'Online Dispute Resolution (ODR) within Developing Nations: A Qualitative Evaluation of Transfer and Impact' (2014) 3 *Laws* 106.

⁹ Luis Enriquez and others, 'Creating the Next Wave of Economic Growth with Inclusive Internet' (World Economic Forum 2015).

limiting engagement in e-commerce transactions such as online shopping.¹⁰ This suggests that e-commerce has not reached its full potential in Kenya. As e-commerce increases, the disputes that may arise from these business interactions may present a budding ground for ODR.¹¹

On the one hand, it is argued that developing legal standards to support ODR systems is important to ensure the development of the sector. According to this position, 'a solid legal framework is needed to allow for the proper growth of online dispute resolution with its norms, market and technology.'¹² Supporters of this view argue that developing legal standards for ODR may assist to stimulate growth in the area.¹³ The UK position draws from the view that regulation of ODR is essential for development of the area.¹⁴

The UK consists of three distinct legal systems: England and Wales; Scotland; and Northern Ireland.¹⁵ While there are differences with regard to

¹⁰ GSV Radha Krishna Rao and G Radhamani, *WiMAX: A Wireless Technology Revolution* (Auerbach Publications 2007) 323; Paul Guinness, *Geography for the IB Diploma Global Interactions* (Cambridge University Press 2011) 47.

¹¹ Rafal Morek, 'Regulation of Online Dispute Resolution: Between Law and Technology' <http://www.odr.info/cyberweek/Regulation%20of%20ODR_Rafal%20Morek.doc> accessed 17 November 2015.

¹² Ibid; Pablo Cortés, 'Online Dispute Resolution for Consumers' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2010) <<http://www.mediate.com/pdf/cortes.pdf>> accessed 17 November 2015.

¹³ Louis Del Duca, Colin Rule and Zbynek Loeb, 'Facilitating Expansion of Cross-Border E-Commerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems - Work of the United Nations Commission on International Trade Law)' (2012) 1 Penn State Journal of Law & International Affairs 81 - 82.

¹⁴ Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1 International Comparative Jurisprudence 76, 85.

¹⁵ European Union, 'United Kingdom' (*European Union*, 5 July 2016) <http://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en> accessed 14 September 2016; Sarah Carter, 'A Guide to the UK Legal System' (*Globalex - Hauser Global Law School Program, New York University School of Law*, 2015) <http://www.nyulawglobal.org/globalex/United_Kingdom1.html> accessed 19 May 2016; Tom Bolam, 'Common Mistakes in Choice of Law and Jurisdiction Clauses' (*Lexology*, 22 September 2015)

property rights and the court system, the three systems are similar.¹⁶ Many laws of the UK Parliament in London not only apply to England and Wales, but also to Scotland and Northern Ireland.¹⁷ In this paper, reference to the 'legal framework in the UK' connotes laws that apply throughout the UK, especially with regard to the UK involvement in the EU.

The UK is a member of the EU.¹⁸ By virtue of this relationship, EU laws affect the legal framework on ODR throughout the UK.¹⁹ A referendum on 23rd June, 2016 displayed support for 'Brexit', the process of withdrawal of the UK from the EU. The legal result of Brexit is that the EU laws cease to apply to the withdrawing state.²⁰ However, the effect of withdrawal on the legal framework is not immediate.²¹ The trigger process is the approval by the UK Parliament to invoke Article 50 of the Treaty of the European Union.²² This is likely to commence in 2017, leading to a conclusion of the official legal Brexit in 2019.²³ The UK remains a member of the EU until the

<<http://www.lexology.com/library/detail.aspx?g=8f9476e8-b712-4726-b675-21463a3355e9>> accessed 19 May 2016.

¹⁶ Tom Bolam (n 15).

¹⁷ Ibid.

¹⁸ UK Crown, 'Countries in the EU and EEA' (*UK Crown*, 2016) <<https://www.gov.uk/eu-eea>> accessed 14 September 2016; European Union (n 15); Vaughne Miller and others, 'Research Briefings - Brexit: What Happens Next?' (UK House of Commons 2016) Briefing Paper 07632 <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7632#fullreport>> accessed 14 September 2016.

¹⁹ Vaughne Miller and others (n 18) 10, 11.

²⁰ Consolidated Texts of the European Union Treaties as amended by the Treaty of Lisbon 2007, art 50(3); Eva-Maria Poptcheva, 'Article 50 TEU: Withdrawal of a Member State from the EU' (European Parliament 2016) Briefing <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf)> accessed 15 August 2016.

²¹ TEU (n 20), art 50(3); Eva-Maria Poptcheva (n 20).

²² TEU (n 20), art 50; David Davis, 'Exiting the European Union: Ministerial Statement' (UK House of Commons, 5 September 2016) <<https://www.gov.uk/government/speeches/exiting-the-european-union-ministerial-statement-5-september-2016>> accessed 14 September 2016.

²³ Ashley Cowburn, 'Brexit "could Be Delayed until Late 2019" with Whitehall Departments Not yet Ready to Trigger Article 50' *The Independent* (14 August 2016) <<http://www.independent.co.uk/news/uk/politics/brexit-date-article-50-eu-referendum-result-europe-theresa-may-a7189851.html>>.

official legal Brexit.²⁴ EU law influences the UK legal system until the UK Parliament either repeals certain pieces of EU legislation or enacts local legislation in particular areas.²⁵ For this reason, this paper discusses EU law on ODR as part of the legal framework of the UK.

The EU has designated laws dealing with ODR, including 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 (Regulation on Consumer ODR), as well as Regulation (EU) No. 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes. The UK adopted Regulation (EU) No. 2015/1051 through the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015, made by the Secretary of State designated for the purposes of section 2(2) of the European Communities Act 1972(a), in relation to matters relating to consumer protection. ODR is therefore well seated in the law in the UK. The aim of the provision for ODR in the law in the UK is to improve consumer confidence for both online and offline transactions.²⁶

In contrast to the position in the UK, the USA Federal Arbitration Act of 1970 mandates strict use of arbitration for B2C disputes.²⁷ However, the USA law

²⁴ Vaughne Miller and others (n 18) 8.

²⁵ Sarah Gordon, 'Untangling Britain from Europe Would Cause Constitutional "havoc"' *Financial Times* (20 June 2016) <<http://www.ft.com/cms/s/2/d7ae7b70-361a-11e6-9a05-82a9b15a8ee7.html#axzz4HQhVRMft>> accessed 16 August 2016.

²⁶ UK Department for Business, Innovation and Skills, 'Explanatory Memorandum to the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015' (2015).

²⁷ Amy Schmitz, 'Consumer Redress in the United States', *The Transformation of Consumer Dispute Resolution in the European Union: A Renewed Approach to Consumer Protection* (Oxford University Press 2016) 3.

does not proactively support ODR systems through regulation.²⁸ As a result, the ODR systems in the USA operate in the private realm.²⁹ The USA position is that regulation of ODR is not needed because the system developed without specific provision in the law and therefore should continue in the hands of private players.³⁰ This argument is supported by the example of the development of the mobile money services in Kenya, which developed in the hands of private players without a precedent in other countries for regulators to follow in providing regulation.³¹

Is there a need for introduction of a legal framework to govern the area of ODR in Kenya and to facilitate resolution of disputes arising from B2C e-commerce transactions?

B2C e-commerce disputes may be resolved through the court process, administrative process or ADR.³² In Kenya, litigation through the courts is provided for under the Civil Procedure Act (Cap 21) and the Civil Procedure Rules of 2010. The Kenya Information and Communications (Dispute Resolution) Regulations made pursuant to the Kenya Information and Communications Act of 1998 provide for a consumer in a B2C e-commerce

²⁸ Ibid.

²⁹ Ibid.

³⁰ Esther van den Heuvel, 'Online Dispute Resolution as a Solution to Cross-Border E-Disputes' 21, 22 <<http://www.oecd.org/internet/consumer/1878940.pdf>> accessed 4 October 2016.

³¹ Alvin Gachie (n 2) 64.

³² Feliksas Petrauskas and Eglė Kybartienė, 'Online Dispute Resolution in Consumer Disputes' (2011) 18 *Jurisprudence* 921; Pablo Cortés (n 12) 172, 173; Llewellyn Joseph Gibbon, 'Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration' (2002) 23 *Northwestern Journal of International Law & Business* 4, 5, 11 – 15 <<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1555&context=njilb>> accessed 14 September 2016; Colin Rule, Vikki Rogers and Louis Del Duca, 'Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments' (2010) 42 *Uniform Commercial Code Law Journal* 225 – 228 <<http://colinrule.com/writing/ucclj.pdf>> accessed 14 September 2016; Urša Jeretina, 'Administrative Aspects of Alternative Consumer Dispute Resolution in the European Union (EU), Slovenia and Croatia' (2016) 9 *NISPAcee Journal of Public Administration and Policy* 191 – 192 <<https://www.degruyter.com/downloadpdf/j/nispa.2016.9.issue-1/nispa-2016-0009/nispa-2016-0009.xml>> accessed 14 September 2016.

dispute with a telecommunications service provider to file a complaint with the Communications Authority of Kenya. A consumer may also resort to ADR as envisioned under Article 159 of the Constitution of Kenya of 2010, which provides that the courts and tribunals shall support the use of ADR.

Would a legal framework for ODR be of any use in Kenya? Should Kenya prioritise development of legal standards for ODR in the country drawing from the UK experience, or alternatively should ODR develop independent of the law drawing from the USA experience?

The dominant view of respondents to the paper on which this paper is based, on whether Kenya should adopt a regulation-led approach towards ODR, or whether the technology should develop first, leaned in favour of the regulation-led approach. While the frequency of references to a regulation-led approach stood at 55%, the frequency of references to a market-led approach was 30%. There was a third approach that emerged from the responses: a hybrid approach which carved a frequency of 15%. These respondents were of the view that the two dominant approaches may be merged, with the best of the UK regulation-led direction fused with the USA market-led direction.

Figure 1 shows the frequency of responses concerning the question on the need for regulation of ODR in Kenya. The figure shows a 30% frequency favouring the market-led approach, a 55% frequency tending towards the regulation-led approach, and a 15% frequency in support of a hybrid approach.

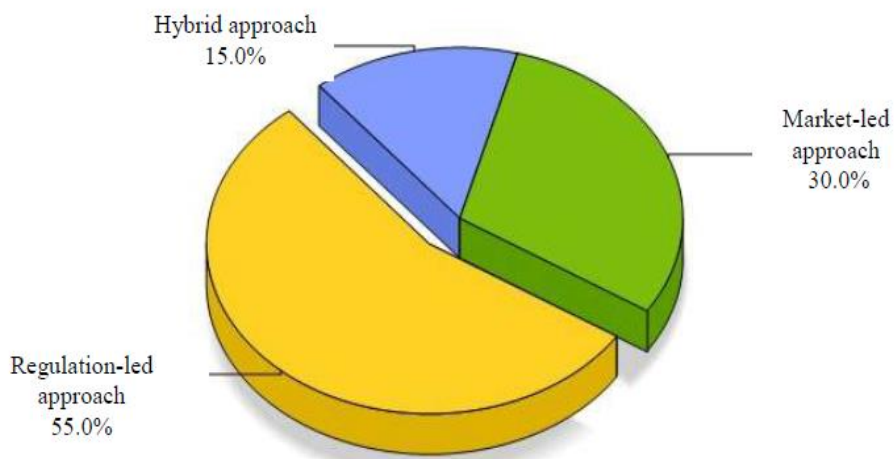


Figure 1: The need for regulation of ODR in Kenya, Source: Author

Respondent Q was emphatic about providing for ODR in the law. The provisions on ODR should however not be transplanted from another country without concern for the local realities in Kenya, but instead, should take into account the society the law seeks to regulate.³³ Highlighting the development of M-PESA before regulation was put in place for it, Respondent Q remarks:

“...it is time to codify (technology into law) getting the practices of ... corporates, getting the practices of our advanced nations and then customizing our own local instance of the law...It is high time we had the law because the technology has been ahead of it anyway as we speak today.”

According to Respondent H:

³³ Jacob K Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1 *International Journal of Humanities and Social Science* 240 <http://www.ijhssnet.com/journals/Vol.1_No._6;_June_2011/25.pdf> accessed 28 September 2016.

“I know there are those who say that the industry should regulate itself. That it shouldn't (have) the law. You have to have the law because there is the question of cyber security. You need the law to regulate the technology. The kind of law(s) you need (are) the so-called...technologically neutral laws... Or the laws with technologically neutral provisions because the technology is always changing. They're always changing. If you have...laws that are static and ... not dynamic, it means ... the law (will also need to) chang(e).”

Similarly, Respondent N noted that if the development of the law is proactive, responding to potential issues that may be presented by technology before they arise, then the result would be fewer disputes. On the contrary, if the development of the law is reactive, addressing the problems presented by technology when they arise, then the instances of disputes may be high:

“(T)echnology has become a very key facet of how business is conducted across the world, including in (Kenya). You need to have the law saying something about how those relationships are entered. How, for example, in terms of contracting what's the effect of the postal rule in an online situation? Effectively the law has to say something about technology so there has to be a more direct than in indirect relationship. If it's indirect which means as and when disputes come up then the law would address those then it takes a very reactive role as opposed to a proactive role, which then can take care of a lot of loopholes and solve a lot of disputes before they actually come up.”

The regulation-led approach draws from the UK experience. This approach has provision in the law for issues including consumer protection, as safeguarded in the EU ODR and ADR laws. According to Respondent B:

“... the EU is a model that could work in other places as well...if the EU system works well it will be a lot more comprehensive than ODR

in the US. ODR in the US is mainly used by some very large companies, consumer oriented companies: EBay, Facebook, Twitter and so forth. They generate huge numbers of disputes and they need systems for dealing with that. The EU regulation applies to everybody.”

While an ODR system is online, there is still a need to have the same consumer protection safeguards as offline dispute resolution systems. While courts carry out dispute resolution, due to the nature of ODR, public-private partnerships may be useful. According to Respondent Z:

“a lot of it will come down in the end if the courts are going to be adopting more and more technology and more and more technology based solutions within courts, that you have to depend first of all on, whether or not the courts want to do that in-house or whether they want to do that externally...businesses have much greater freedom and motivation to improve services, to make them faster, better, more efficient and better for the client, which is obviously much better than courts can do. As a result, you need to regulate the businesses that are providing these sorts of services to make sure that they are meeting the standards of current legal procedure. I think you have to legislate quite strongly. Just because something's online does not mean that it should be any less legally binding nor held to any lower standards. It should absolutely be of the same standards and you should legislate to that effect.”

The views of Respondent Z are backed up by those of Respondent J who, noting that using the law to positively impact the development of ODR would need support from the government, states:

“... Kenya...has two options... The government could develop their own platform and form a public body dealing with these matters. Or ... like in the UK, (the government could invite) ...a public tender ... where they say, “We need somebody to do this. Who is willing to do

it and for which price?" Then the government chooses the best of those who apply to do the job..."

Respondent D, while expressing a need for regulation, expressed a reservation whether it would be high in priority noting as follows:

"We still haven't gotten to the volumes that rationalize us spending money to get legislation on it, but it's something that we'll have to deal with I think sooner than later."

The existing laws on ADR may be amended to provide for ODR. This approach favours amending existing law instead of putting in place a dedicated legal instrument. This is the view taken by Respondent X displayed in the following excerpt:

"For B2B and B2C disputes, already an elaborate system has been established for ADR which can be evolved into the online space... The Arbitration Act has been put in place to give some legal force and recognition of this mechanisms... Kenya should not actively seek to regulate ODR but rather, to work with arbitrators and arbitration bodies to continually improve ADR and ODR, especially by clarifying that the existing mechanisms/regulations for ADR can be extended to ODR with the necessary modifications."

This view supports reference to ODR in the existing ADR law. In doing so, it still lends support for regulation of ODR. Respondent X supports the approach of building on the legal framework already in place relating to dispute resolution, noting that amendment may be required for ODR to operate efficiently:

"Since the law recognises freedom of contract, contracting parties are free to opt into the form of ADR they would like to govern any dispute in their contractual relationship. This would include ODR – the existing rules for ADR can possibly be applied – with the

necessary modification... - to ODR, without the need for new regulations for ODR; or possibly with a slight amendment of the ADR rules to clarify that they can also be applied online. The above applies to B2C and B2B disputes. When it comes to disputes that have to go to court, if we are saying that courts can adopt the use of technology in resolving cases for example conducting hearings through video conferencing, this might call for the passing of a few regulations/amendments on the laws governing court procedures."

The regulation-led approach recognises consumer protection as a key confidence-builder in e-commerce and ODR.³⁴ Consumers must be comfortable that the law guarantees their protection from unscrupulous traders.³⁵ They must be sure that if they share information over the ODR system, their information is protected through a robust data protection framework.³⁶ Consumers must have confidence in the viability of e-

³⁴ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (29 June 2016); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (15 June 2016); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (17 June 2016); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu), 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (23 June 2016).

³⁵ Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 34); Interview with Mark Lavi, Senior In-house Counsel, Safaricom, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (10 June 2016); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34); Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet), 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (29 June 2016).

³⁶ Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

commerce, the stability of the public infrastructure providing these services, and the integrity of the system from cybercrime.³⁷

Perspectives on regulation of technology have been considered to be those of developed countries. What is your comment on this view? What considerations may be taken by a developing country in evaluating the need for regulation of ODR?

A number of issues arise that must be taken into consideration if Kenya is to develop the regulation on ODR. The form of the regulation to be put in place must be decided. It may either be through independent legislation,³⁸ reference to ODR in existing ADR law,³⁹ or through issuance of guidelines that encourage certain legal standards to be upheld.⁴⁰ The starting point is the view that the legal framework for ADR as at 2016 is inadequate to meet the peculiar challenges presented by ODR. According to Respondent Z:

“...the most sensible thing is to set up first of all a framework. Then once you have a framework that you are happy with things operating within that you then use that to promote actively bringing

³⁷ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’, ‘Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis’ (9 July 2016).

³⁸ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 37); Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands, ‘Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis’ (15 July 2016).

³⁹ Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 35).

⁴⁰ Interview with Edward Muriithi Rinkanya, Principal Legal Officer for Dispute Resolution and Commercial Services, Communications Authority of Kenya, ‘Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis’ (7 August 2016).

ODR into a country. You know exactly where you can operate within, how it's going to work. Then you give companies a real opportunity to open up an entirely new market waiting for them. It's huge not only in terms of revenue itself but the promise of access to justice is huge.”

The UK has put in place the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 recognising the use of the EU ODR platform established under Article 5 of Regulation (EU) No. 524/2013.⁴¹ This serves as a reference to ODR in existing ADR law, through an amendment of the ADR statute or regulation. Another benchmark law in the UK is the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, which provides for approval of ADR entities that are competent to resolve disputes, including ODR-related disputes.⁴² Further, the EU ODR Regulation, effective January, 2016 is also instructive in considering developing a legal framework for ODR in Kenya.⁴³

All EU laws applicable in the UK before Brexit will still be in force until the exit is legally complete (possibly in 2019) or further into the future, if the UK enacts a separate Act or passes regulations to adopt the EU law.⁴⁴ There is no need to re-invent the wheel, but there is a need to adapt the legal

⁴¹ Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015, Art 2.

⁴² Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, Schedule 3.

⁴³ 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 2013.

⁴⁴ Ashley Cowburn (n 23); Swati Dhingra and others, ‘The UK Treasury Analysis of “The Long-Term Economic Impact of EU Membership and the Alternatives”: CEP Commentary’, *Brexit 2016 Policy analysis from the Centre for Economic Performance* (London School of Economics and Political Science 2016)

<http://cep.lse.ac.uk/pubs/download/brexit08_book.pdf> accessed 15 August 2016; Jiries Saadeh, ‘The European Union, Investment Treaties and Investment Arbitration Post-Brexit | Arbitration Blog’ <<http://arbitrationblog.practicallaw.com/the-european-union-investment-treaties-and-investment-arbitration-post-brexit/>> accessed 16 August 2016.

framework in other jurisdictions to conform to local realities.⁴⁵ Kenya may draw lessons from the UK experience, therefore, in considering preparing a legal framework for ODR. According to Respondent N:

“...there's no shame in not wanting to reinvent the wheel. There's absolutely no shame in copying... Why would I need to reinvent the wheel and come up with a triangular wheel instead of something circular? Or I come up with something which is a lot more native?”

A potential challenge for consideration that may limit development of ODR even if provision is made in the law, is the weak legal provision for e-commerce in Kenya.⁴⁶ Respondent N outlines the development of Information and Communication Technology (ICT) law in Kenya, highlighting the provision for e-commerce:

“... the national ICT policy ... promulgated in 2006 ... addressed issues of electronic commerce and sought to ... recognize electronic transactions... That led to the Kenya Communications (Amendment) Act 2009, which is now known as the Kenya Information and Communications Act ... (of) 2013. That was an attempt by government, both Parliament and the ... recognize e-transactions.

Respondent N deplores the inadequate provision for e-commerce in the law:

“I think that (the law on e-commerce) is insufficient as it currently is drafted and that's why we still need to have an Electronic Transactions... Act. Digital signatures...(have) been working ... for

⁴⁵ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 34); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34).

⁴⁶ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

over a decade in many Western countries. Since the law recognized that digital signatures can be used on documents in 2009, which was technologically speaking still fairly late, the (Communications Authority) has only started putting in place regulations on licensing of the entities that would supply these digital signatures ... From 2009 will be a decade in the next three years. Nothing has happened."

According to Respondent N, while the law recognises the digital signatures may be used, without regulations from the Communications Authority of Kenya on how they apply, the law is not implemented. Further, in relation to B2C transactions, there is a challenge with low levels of appreciation of how e-commerce works, including how digital signatures are used. This removes the utility of having laws in place, if they are not beneficial in practice:

"(T)he law says, "We recognize that you can use digital signatures for purposes of attesting to certain documents that you've entered into with the purpose of contracting." I have been in a situation where my bank cannot allow me to electronically sign a document. They need me to go to the bank and physically do that. The (Communications Authority) has not licensed ... entities that will offer (digital signatures). It does not mean they're not offered. There are people who offer (digital signatures) abroad...There's a high level of ignorance in the commercial sector as to the utility of (digital signatures). There are companies who in terms of e-bills internally allow people to append electronic signatures. Depending on who their client (or) suppliers are... It's good to have it in the law but we're not practical."

Another stumbling block would be to encourage wilful adoption of ODR by parties, as stated by Respondent B:

“I think the challenge for online dispute resolution, which is the same challenge for mediation, is to get both parties to agree to it. If only one party wants to have mediation or ODR and the other party doesn't, then you can't force anything.”

It is believed that stronger e-commerce laws than those present in Kenya would promote development in the area of ODR.⁴⁷ The issue of unreliable electricity connection came to light.⁴⁸ The development of e-commerce and ODR alike, would require better public infrastructure than what is currently available.⁴⁹ This would also require greater effort in increasing internet penetration in the country in light of the comparative lower levels than in the UK or the USA.⁵⁰ In 2016, only 16% of Kenyan adults had a smart phone, and only 18% accessed the internet at least once a month.⁵¹

Beyond this, Kenya does not have an effective addressing system.⁵² The UK and the USA have well laid out addresses not only in the urban areas but

⁴⁷ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

⁴⁸ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34).

⁴⁹ Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 37); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

⁵⁰ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 34).

⁵¹ Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya, 'The 2016 FinAccess Household Survey' (Financial Sector Deepening (FSD) Kenya 2016) 19 <<http://fsdkenya.org/publication/finaccess2016/>> accessed 16 September 2016.

⁵² Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 35).

also in the far-flung areas, facilitating efficient delivery of goods and services. Kenya lags behind with unmarked addresses making it difficult for e-commerce to progress, therefore creating an unfavourable environment for development of ODR.⁵³ It is therefore noted that aligning the laws with the emergent technology is not the solution to all problems. It is not a guarantee that once the laws are put in place, then ODR would thrive in Kenya. According to Respondent J:

“...it would be beneficial if there is some governmental support. I don't think legislation is a panacea. I think what you need more is resources and maybe legislation in terms of muscle to require traders or businesses to have the legal obligation to form or even to participate in ODR. For instance, if you have complaints against utilities or financial bodies it should be somehow monitored. It should also enable an ODR route for customers and consumers to complain when they have a reason to do so, and not just to force them to go to the court to elevate a complaint against a business. In that sense, I think the European approach would be better to enable the use of ODR.”

What is the way forward for regulation of ODR in Kenya?

Kenya should adopt a regulation-led approach to promote the development of ODR. The legal framework for ODR in Kenya may be developed either through enacting a law dedicated to the area, or through recognising ODR in the existing ADR law. Alternatively, ODR may be included in the legal system through preparation of ODR regulations under the ADR law, or through the Kenya Information (Dispute Resolution) Regulations of 2010. According to Respondent G:

“The best way under the law is (to) give the Minister the power to make regulations from time to time.”

⁵³ Ibid.

Once ODR is provided for in the law, Kenya may consider development of a pilot ODR system. The cost implications of establishing ODR systems must be taken into account. A pilot ODR system may be developed by the Communications Authority of Kenya to address the question of viability of ODR. Development of ODR systems may be taken up as a government-led initiative, where an internal department initiates a pilot project.⁵⁴ The Communications Authority of Kenya, for example, already has the Kenya Information and Communications (Dispute Resolution) Regulations, 2010 which may be used as a launch-pad for ODR regulation.⁵⁵ This should be accompanied by public awareness campaigns on the benefits of ADR in general, and ODR in specific, to further give life to the constitutional provision hailing the importance of out-of-court solutions to disputes.

Cybersecurity issues must also be addressed, for e-commerce to flourish and ODR to bud.⁵⁶ Further, levels of awareness among consumers, businesses, the judiciary and Advocates must be checked to create room for adoption of ODR.⁵⁷ Government bodies for example the Communications Authority of

⁵⁴ Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34); Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law (HiiL), The Hague, The Netherlands (n 38).

⁵⁵ Interview with Edward Muriithi Rinkanya, Principal Legal Officer for Dispute Resolution and Commercial Services, Communications Authority of Kenya (n 40); Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 35); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

⁵⁶ Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 37); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34); Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 35).

⁵⁷ Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 37); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 35); Interview

Kenya would be key information points to disperse knowledge not only on ODR but also on the existing ADR mechanisms, making the different stakeholders amenable to the dispute resolution mechanisms.⁵⁸ According to Respondent N:

“ODR ... draws heavily from the principles used in ADR. People need to be sensitized that you need not have necessarily contracted through online means. You might have contracted in the brick-and-mortar world but you can use that dispute to take it onto an ODR platform and use it to settle... People need to be (made aware by) ... the relevant regulatory institutes, ... (the Communications Authority) being one of them... (It is) a government mandate to publicize and let people know.”

2.3 Conclusion

This paper has discussed responses to the question whether there is a need for regulation of ODR in Kenya. The first section introduces the concept of ODR. The second section gives a background to the study on which this paper is based, giving the reader an understanding of the research on which this paper is grounded. The third section discusses the regulation-led approach in the UK, where the European Parliament has taken the lead in regulating the dispute resolution mechanisms. It also explains the opposite approach, referred to in this paper as the market-led approach, characterised in the approach in the USA where there is little state involvement in this private dispute resolution mechanism. The study on the legal framework for ODR in the UK and the USA revealed that law may be beneficial to regulating technology due to consumer protection concerns.

For Kenya, the regulation-led approach emerged as the preferred one. This leads to a suggestion that Kenya should prioritise provision for ODR in the

with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 34).

⁵⁸ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34).

legal framework. While the market-led approach in the USA has still seen development of ODR for B2C e-commerce disputes, there is concern that consumers may not adequately be protected under these private-led systems. The frequency of references to a regulation-led approach was 55%, the market-led approach drew a frequency of 30% in the responses. A hybrid approach was also suggested, adopting parts of the regulation-led approach to certain aspects of ODR, and parts of the market-led approach to other aspects of ODR. References to a hybrid approach had a frequency of 15%. A regulation-led approach is anticipated to support development of ODR in Kenya, ensuring consumers are well taken care of in the legal framework.