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Fairness, Trust and Security in Online Dispute Resolution

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FAIRNESS, TRUST AND SECURITY IN ONLINE DISPUTE RESOLUTION

Noam Ebner & John Zeleznikow [1]

I. INTRODUCTION

The past fifteen years have witnessed immense growth in the application of technology in the field of conflict resolution. One area of particular interest is the growth of the practice and study of Online Dispute Resolution (ODR), which has its roots in the worlds of technology and of Alternative Dispute Resolution. As the field of ODR develops, its terminology and conceptual frameworks require exploration and clarification, with special care taken to convey shared meaning between participants coming from the two contributing worlds noted above.

In this article, we introduce three conceptual areas – key concepts in ODR – that would benefit from such clarification, showing the need for suitable terminology and demonstrating the value of refined conceptual frameworks. Part II of this article will provide a brief background of the history and development of ODR, will discuss many of the benefits of using ODR in the modern dispute resolution process, and will address the confusion regarding ODR terminology. Part III will focus upon three core elements of ODR: trust, fairness, and security. This section will pay particular attention to the unique benefits and risks of the ODR process through the lens of each element. Finally, Part IV concludes the article and presents the opportunity for further research.

II. BACKGROUND

A. What Is Online Dispute Resolution?

While there is no generally-accepted definition of Online Dispute Resolution (ODR), practitioners can think of ODR as using

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the Internet to perform Alternative Dispute Resolution (ADR).[2] While this is a helpful working definition, it is important to note that one difficulty in providing a more precise and widely accepted definition is that ODR is many things, to many people.

Generally speaking, ODR describes a field of activity that has developed since the mid-1990s. The e-commerce boom brought with it a wave of disputes resulting from online activity; resolving these disputes online seemed to be a logical act of "fitting the forum to the fuss,"[3] a long-held principle in the ADR field. Since this time, however, ODR has crossed many boundaries assumed by its early innovators, and is practiced across a wide range of contexts, regardless of whether the disputes it services originated online or in traditional settings.[4]

One perspective on ODR is, as we shall see, that ODR is not merely a tool helpful to e-commerce, but, instead, a natural evolution of the trend towards using alternative approaches to litigation across a wide range of civil, commercial, and family disputes.

One reason for this phenomenon is that average trials are getting longer and more complex, and the cost of pursuing traditional legal recourse is rising. Focusing on traditional disputes, researchers explain that the potential transaction costs of litigation provide an incentive for nearly *all* legal suits to settle.[5]

ODR provides solutions for cases that do not justify long, complex trials – such as in the case of low-value transactional disputes, in cross-border and cross-jurisdictional contexts. The unsatisfied purchaser of an item on eBay is more likely to prefer an

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[2] ARNO R. LODDER & JOHN ZELEZNIKOW, ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY (1st ed. 2010).

[3] Frank E. Sanders & Stephan B. Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting ADR Procedure*, 10 NEGOTIATION J. 49 (1994).

[4] Noam Ebner, *E-Mediation*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 203-206 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

[5] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

online process for achieving redress rather than pursuing litigation with the seller, who may be based in another country.[6]

A second reason for the trend towards ADR lies in its growing acceptance by mainstream conflict systems, including court systems.[7] This acceptance has trickled down to affect the attitudes of litigants themselves.[8] Focusing on this reason is, in many ways, the natural next step in the evolution of ADR's rise (which has spanned the past four decades.) While the focus of ADR has largely been on face-to-face processes, incorporating technology into ADR processes has quietly been commonplace for a long time. Primarily, this has taken the form of using the telephone[9] as a simple measure for convening people who cannot or should not be together in the same room, whether owing to geographical situations, to extremely vitriolic situations, or to situations where violence has occurred.[10]

As Internet technology has become widespread, much attention has been directed at using these tools for dispute

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[6] Steve Abernethy, *The SquareTrade Experience in Online and Offline Disputes*, PROCEEDINGS OF THE 2003 UNITED NATIONS FORUM ON ODR 2003, *available at* http://www.mediate.com/Integrating/docs/Abernethy.pdf (last visited May 25, 2015).

[7] Modern alternatives to litigation have been heavily influenced by the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, which took place in Minneapolis, Minnesota from April 7 to 9 1976. At this conference, US Chief Justice Warren Burger encouraged the exploration and use of informal dispute resolution processes. *See* LODDER, *supra* note 1.

[8] *See, e.g.,* Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L REV. 637 (2014).

[9] *See* Jessica Carter, *What's New in Telephone Mediation? A Public Sector Mediation Service Steps Up to a New Level of Telephone Access for Parties in Mediation*, 11 *ADR BULLETIN* 1, art. 4 (2009); *see also* Mark Thomson, *Alternative Modes of Delivery for Family Dispute Resolution: The Telephone Dispute Resolution Service and the Online FDR Project*, 17 J. OF FAM. STUD. 253 (2011); Claudine SchWeber, *Your Telephone May be a Party Line: Mediation by Telephone*, 7 MEDIATION Q., 191 (1989).

[10] LODDER, *supra* note 1; *see also* Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. ADVOC. 34 (1994).

resolution.[11] In some ways, ODR is a natural evolution of convening over the telephone. Technology now offers parties different levels of immediacy, interactivity and media richness to choose from.[12] Through some platforms, parties can choose to communicate through text;[13] through others, they can convene in real-time video, allowing them to see each other and, possibly, a mediator.[14]

It is important to note, however, that ODR is far more than a range of new communication platforms. In fact, when discussing ODR one might be discussing any of the following:

The online communication platform used for exchanging messages and offers in an ODR process;[15]

A wide range of individual processes from the ADR spectrum that can be conducted online (e.g., online negotiation, online mediation);[16]

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[11] For early work on the subject, see Ethan Katsch & Janet Rifkin, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICT IN CYBERSPACE (2001) and COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: FOR E-COMMERCE B2B, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS (2002). For a recent compendium of work, see MOHAMED S. ABDEL WAHAB, ETHAN KATSH & DANIEL RAINEY, ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION (2012).

[12] *See* A. Bhappu & Z. Barsness, *Risks of Email*, *in* THE NEGOTIATOR'S FIELDBOOK 395-400 (Andrea Kupfer Schneider & Christopher Honeyman eds. 2006).

[13] *See, e.g.,* Anne-Marie G. Hammond, *How Do You Write Yes? A Study on the Effectiveness of Online Dispute Resolution*, 20 CONFLICT RES. Q. 261 (2003).

[14] For discussion of video mediation see, Noam Ebner & Jeff Thompson, @*Face Value? Nonverbal Communication and Trust Development in Online Video-Based Mediation*, 1 INT'L J. ONLINE DIS. (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395857.

[15] This communication platform might be intended for the general public and widely accessible, whether for free (e.g., Skype) or at cost (e.g., telephone). On the other hand, it might be a specifically designed internet-based platform tailor-made to conduct dispute resolution process through, such as the platforms offered by companies such as eBay and PayPal or by ODR service providers such as Modria and Juripax. These platforms are tailored to support the types of communication and case-management encountered in dispute resolution.

[16] The spectrum of ODR, in terms of the processes offered online, is far too wide to detail here. For discussion of a variety of contexts in which ODR is offered, and

An ODR system - an environment in which parties to specific types of disputes are led through a particular process or set of processes on their way to a resolution, or;[17]

ODR technology / software, aiming far beyond the 'communications platforms' discussed above.[18]

B. Terminology and the Development of ODR

The ambiguity of terminology regarding the very meaning of the term "ODR" is not reserved solely for top-level terms. We certainly do not say this disparagingly, but rather encouragingly. ODR is a very young field and is advancing in leaps and bounds; it is little wonder that conceptual work, particularly of an academic nature, will lag somewhat behind. In our view, much of the work in the domain of ODR has focused upon practice rather than theory. A recent book edited by Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey is probably the first to delve conceptually into some of ODR's major themes[19]; in addition to chapters surveying ODR practice on six continents,[20] the book includes chapters zooming in on specific topics: artificial intelligence, mobile devices, e-commerce, consumer conflicts, government, courts and

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the range of processes designed to address them, see WAHAB ET AL., *supra* note 11.

[17] As opposed to an individual process, the system is a component of a larger environment. The best example of such a system is eBay's dispute resolution system. According to Colin Rule, former director of Dispute Resolution at E-Bay, thirty-five million disputes were filed with E-Bay in 2006. Colin Rule, Address at the Fourth International Conference on Online Dispute Resolution (June 8 2007); *see About Us,* MODRIA, http://www.modria.com/our-story/ (last visited May 15, 2015). The number of cases jumped to about sixty million disputes by 2012. *See* Arthur Pearlstein, Bryan Hanson & Noam Ebner *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 203-206 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

[18] ODR developers are seeking to create intelligent agents, and robust negotiation support systems (NSS). These systems aim to assist humans in achieving better outcomes then they would themselves, even when performing to the peak of their abilities.

[19] WAHAB ET AL., *supra* note 11.

[20] North America, Europe, Australia, Asia, Latin America and Africa. *Id.*

ombudsmanship.[21] This book is a worthy springboard for continued engaging with other theoretical principles of ODR.

In that spirit, this article aims to uncover other conceptual ambiguities and point out how the field can develop better through making distinctions between similar, yet different, concepts. In particular, this article will spotlight concepts and terms whose blurring are a logical part of ODR's evolution, given that the marriage between the world of technology and that of dispute resolution has led to reciprocal adoption of some of the most commonly used terms originating from either side. As precision gives way to convenience, and specific intent to general understanding, it is certainly understandable if some blurring of terminological usage and intent occurs.

As a young and rapidly growing interdisciplinary area of practice and inquiry, ODR has been served well by having areas of constructive vagueness, in which theorists and developers from different backgrounds could engage with each other using generally-understood terminology (even if not scientifically precise.) Our suggestion that ODR has reached a stage at which this terminological expansion can be revisited, with newly created or spotlighted frameworks, is in essence a suggestion that ODR has reached a milestone of maturity.

This clarification process is in no way a linguistic or theoretical endeavor; it we hope it to have immediate and significant practical impact. By providing new frameworks for exploring ODR platforms, processes, technology and systems, we hope to assist ODR developers and practitioners with new, sophisticated, tools for their work.

III.   CORE ELEMENTS OF ONLINE DISPUTE RESOLUTION

In this paper, we will briefly introduce three specific elements that are core to ODR and would benefit from having a clarifying, discerning spotlight aimed their way: fairness, trust and security. In

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[21] *Id.*

a general sense, all three of these issues are important to any discussion of ADR, including in face-to-face settings.[22] In the realm of online processes and systems, they arguably have even greater importance. However, in the transition from discussing the familiar face-to-face setting, to discussing the online, the meanings associated with these terms have multiplied.[23] Since engendering senses of trust, security and fairness may be crucial to ODR's development and acceptance, we suggest that accurate understanding of these terms is essential.

As we discuss below[24], it seems clear that these concepts are important to all the connotations associated with the term ODR, and are key whether one is focusing on a communication platform, a dispute system, an individual process or a particular form of technology.[25] For example, one might posit that without access to secure, trusted and fair online dispute resolution systems, consumers would be reluctant to purchase products over the World Wide Web, whether from eBay, Amazon, low cost airlines or a multitude of other companies. Lacking trust in their counterpart, or in the neutral assisting them, individuals might not participate in a mediation process. Wary of insecure communications platforms, they may refrain from disclosures that could lead to quick resolution of conflicts. Further, concerned that a technological platform is programmed in way that is unfair to them, they may refrain from accepting its advice. Hence, to advance the field of ODR, we need to consider and develop issues of fairness, trust and security.

A. Fairness in Online Dispute Resolution

One of the major concerns raised by people using negotiation processes is about the fairness or justice of the process.[26] Individuals undertake negotiation to derive better outcomes than would

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[22] *See infra* Part III(A)-(C).

[23] *See infra* Part III(A)-(C).

[24] *See infra* Part III(A)-(C).

[25] *See supra* Part II(A).

[26] John Zeleznikow & Andrew Vincent, *Providing Decision Support for Negotiation: The Need for Adding Notions of Fairness to Those of Interests*, 38 UNIV. TOLEDO. L. REV. 101 (2007).

otherwise occur (either through abandoning the engagement with the other, or through engaging in other modes of conflict).[27] Negotiation processes can be classified as distributive or integrative.[28] In distributive approaches, the problems are seen as *zero sum* and resources are imagined as fixed: *divide the pie*.[29] In integrative approaches, problems are seen as having more potential solutions than are immediately obvious, and the goal is to *expand the pie* before dividing it.[30] Parties attempt to accommodate as many interests of each of the parties as possible, leading to the so-called "win-win," or "all gain," approach.[31] Traditional negotiation decision support has focused upon providing users with decision support on how they might best obtain their goals.[32]

Both of these approaches to negotiation might be understood to include commonly expressed notions of "fairness." For example, in integrative negotiation, one might consider that meeting the interests of all parties involves meeting these *equally*. One might also encounter parties who, while negotiating integratively, [33] express an interest in "being treated fairly", or relying on an objective criteria of "fairness" to assess any potential agreement.[34] In distributive negotiation, one party might frame her offer to split things down the middle as being "fair"; however, one notion of "fairness" which is not focused on in either of these approaches is the notion of an objective legal measure of "fairness" – that is, legal justness.

In some negotiation contexts, however, legal fairness is important.[35] For example, in Australian Family Law, the interests of

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[27] Id.

[28] RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Zeleznikow & Vincent, *supra* note 26.

[33] Such terms often appear in the seminal work of Roger Fisher and William Ury on interest-based negotiation (an approach related to integrative negotiation. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

[34] *Id.*

[35] Zeleznikow & Vincent, *supra* note 26.

the child are considered paramount, so the interests of the parents are negligible in negotiations between them.[36] Similarly, in employment law, individual bargaining between employers and employees might lead to basic needs and rights, such as recreation leave and sick leave, to be whittled away.[37] In both of these cases, parties have restricting standards of "fairness" imposed on them by law and the courts, limiting their negotiation range.

Expanding on the notion of an integrative or interest-based negotiation, scholars developed the notion of principled negotiation.[38] Principled negotiation promotes deciding issues on their merits rather than through a haggling process focused on what each side says it will and will not do.[39] In the domain of legal negotiation, Mnookin and Kornhauser introduced the notion of bargaining in the shadow of the trial (or law).[40] By examining the case of divorce law, they contended that the legal rights of each party could be understood as bargaining chips that can affect settlement outcomes.[41] The question of "What would a judge do in this case?" is therefore looming over parties' shoulders at an out-of-court negotiation session.[42] Thus, legal norms find their way into negotiation. The threat of a judicial decision is one way in which their effect is posed;[43] another is as a set of rules which parties might naturally adhere to, given that they are objective criteria,— standards legitimized by the law or society and not only by one party's say-so.[44]

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[36] *See* John Zeleznikow & Emilia Bellucci, *Legal Fairness in Alternative Dispute Resolution Processes – Implications for Research and Teaching*, 23 AUSTRALASIAN DISP. RESOL., J. 265 (2012).

[37] *Id.*

[38] FISHER & URY, *supra* note 33.

[39] *Id.*

[40] Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 850 (1979).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* FISHER & URY, *supra* note 33.

The role of fairness and justice in negotiation and other ADR processes is complex. Fairness includes several different aspects, with the foremost divide being that between distributive (or outcome) fairness, and procedural fairness.[45] In the environment created by the Internet, these complexities are compounded.

One challenge with adding "*legally just*" elements into ODR systems lies in the notion that ODR systems, by their nature, lend themselves to trans-jurisdictional situations and interactions.[46] Of course, Negotiation Support Systems[47] created for particular situations/jurisdictions (such as for Australian Family Law) can be more easily calibrated in this regard;[48] particular parameters can be pre-set according to law, and topics requiring resolution under law can be designated as mandatory fields in the system.[49] On the other hand, contexts or marketplaces in which there is no generally-applicable set of legal norms might greatly benefit from the development of measures, or at the very least principles, for the construction of negotiation support systems.[50] Alternatively, these marketplaces could benefit from the creation of dispute systems designs which are, in some way resembling legal, "just" and "fair."[51]

Through an examination of the relevant literature in a variety of domains – including international conflicts, family law, and sentencing and plea bargaining – and an in-depth discussion of negotiation support tools in Australian family law, Zeleznikow and Bellucci (2012) have developed a set of important factors that should

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[45] For elaboration on this topic see, Nancy A. Welsh, *Perceptions of Fairness, in* THE NEGOTIATOR'S FIELDBOOK, 165-74 (Andrea K. Schneider et al. eds., 2006).

[46] *See* Abernathy, *supra* note 8.

[47] *See* note 18 and accompanying text.

[48] John Zeleznikow, *Methods for Incorporating Fairness into Development of an Online Family Dispute Resolution Environment*, 22 AUSTRALASIAN DISPUTE RESOLUTION J. 16 (2011).

[49] *Id.*

[50] *Id.*

[51] ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 357-386 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

be incorporated into "fair" negotiation support processes and tools.[52] These factors include:

Transparency[53] - For a negotiation to be fair, it is essential to be able to understand - and, if necessary, replicate - the process in which decisions are made.[54] In this way unfair negotiated decisions can be examined, and if necessary, be altered;[55]

Highlighting and clarifying the shadow of the law[56] –In legal contexts, awareness to the probable outcomes of litigation provides parties with beacons or norms for the commencement of any negotiations – as they inform them of their alternatives to negotiation.[57] Bargaining in the shadow of the law thus provides standards for adhering to *legally just* and *fair* norms.[58] Providing disputants with advice about likely court outcomes by incorporating such advice in negotiation support systems can help support fairness in such systems.[59] In non-legal contexts, and in contexts in which multiple legal norms compete and clash, which norms cast this shadow? Without answering this question, we suggest that considering it, and, if possible, providing parties with a set of rules that will determine outcomes, might promote a sense of fairness.

Limited discovery[60] - Even when the negotiation process is transparent, it can still be flawed if there is a failure to disclose vital information.[61] Discovery processes increase settlements and decrease trials by organizing the voluntary exchange of information.[62] This benefit is often lost in a negotiation, especially if important information is not disclosed, or even worse, hidden.[63]

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[52] Zeleznikow & Bellucci, *supra* note 36.

[53] *Id.*

[54] *Id.*

[55] *Id*.

[56] *Id.*

[57] *Id.*

[58] Zeleznikow & Bellucci, *supra* note 36.

[59] *Id*.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

Requiring specified aspects of disclosure in a negotiation might help enhance the fairness of the negotiation process.[64] Incorporating these factors does, however, have some drawbacks for the development of negotiation support systems:

(1) Disputants might be reluctant to be frank;

(2) Disputants may see mediators as biased;

(3) There is difficulty and danger in incorporating discovery, both in terms of time and money; and

(4) There is a difficulty in realising, ahead of time, the potential repercussions of disclosing confidential information to one's negotiation counterpart.

However, in thinking about incorporating fairness into a platform or a system, it may be that considering ways to organize, support and encourage information-sharing, rather than coercing the same, may be very helpful for promoting a sense of fairness.[65]

B. Trust in Online Dispute Resolution

We now discuss two central concepts that seem to have acquired multiple meanings, contexts and applications when discussed in the literature on ODR. "Trust" has deep roots in the context of dispute resolution, and stretching the concept to include technological aspects has strained its meaning to some extent. "Security" has deep roots in the field of computing and online communications, but its application to issues in dispute resolution requires refining.

Beginning with trust, this inconsistency in the discussion of trust in the ODR literature has been noted by Ebner, who suggests differentiating categorically between usages of the term "trust" as it relates to ODR.[66] Elaborating on this model, we suggest that four such categories exist.

i. ODR as a trust provider/facilitator.

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[64] Zeleznikow & Bellucci, *supra* note 36.

[65] *Id.*

[66] Noam Ebner, *ODR and Interpersonal Trust*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 357-386 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

Incorporating ODR into systems such as e-commerce is one measure expected to raise consumers' level of trust in the system.[67] Continuing development of the Internet, from a financial perspective, has always depended on the success of e-commerce, which is, in turn, absolutely dependent on trust.[68] This fragile condition has been summarized by Colin Rule's statement: "Transactions require trust, and the Internet is woefully lacking in trust."[69]

ii. User's trust in ODR

ODR must be marketed, and its technology must be constructed, in such a way that the public will trust it as an efficient and effective way of managing their disputes. This is no simple challenge. All forms of ADR have, historically, encountered public distrust at one point or another. In our experience, the notion of conducting these processes online often kindles strong distrust even from practitioners of ADR. Viewing dispute resolution as a process requiring warmth and human interaction, professionals may find it hard to imagine that Internet communication – seen as cold and distance-creating – could support the process. There is no reason to expect higher levels of trust amongst the general public. As a field, ODR must convince users that they can trust that the technology used will be benevolently designed or at least neutral. Practitioners must convince user that the technology a). will not fail or freeze up; b). will be able to support their dispute; c). will be competent in performing as promised; d). will not involve time or costs beyond what the consumer envisions, and; e). will be, in general, user-friendly.

iii. Interpersonal trust

Parties utilizing the ODR experience not only levels of distrust inherent in most conflict situations; they are also hindered by challenges to trust between parties, and trust between parties and

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[67] Rule, *supra* note 11.

[68] *Id.*

[69] *Id.* at 98.

their neutral, which are triggered by the nature of online communication and of the online environment.[70]

iv. *Trust in content offered by the system*

If an ODR system is going to provide parties with advice about dispute resolution norms (such as the outcomes of similar cases resolved in the past, information regarding the legal or marketplace norms affecting the dispute, or likely court outcomes) how can we enhance parties' trust in the advice? Untrusted advice will not have the effect the system was designed to encourage. If the system is going to give advice about trade-offs or optimizing agreements,[71] how can we ensure a sufficient degree of trust in the processes (the algorithms underlying and generating this advice) for doing so?If the system is going to provide an outcome (such as, the result of an automated blind bidding, or an automated decision on whether the type of claim raised is legitimate or actionable in the first place,)[72] how do we enhance users' trust in these outcomes? Obviously, a powerful connection between users' trust in the content, and the degree to which the system is perceived as "fair" exists, demonstrating the need for close examination of these concepts and the ways they interact in ODR systems.[73]

C. SECURITY IN ONLINE DISPUTE RESOLUTION

Similar to the term "trust," the term "security" has applications in the world of computer science as well as in the context of ADR. The world of computing has always been interested in protecting systems and data from malfeasant access. As the Internet

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[70] For further elaboration on interpersonal trust in the online environment, see Ebner, *supra* note 66.

[71] *See, e.g,* John Nash, *Two Person Cooperative Games*, 21 ECONOMETRICA 128 (1953); Steven J. Brams & Alan D. Taylor, FAIR DIVISION, FROM CAKE CUTTING TO DISPUTE RESOLUTION (1996); Zeleznikow & Bellucci, *supra* note 36; Ernest M. Thiessen,& Joseph P. McMahon, *Beyond Win-Win in Cyberspace,* 15 OHIO ST. J. ON DISP. RESOL. 643 (2000).

[72] LODDER, *supra* note 1. See, in particular, Chapter Two of this text for a discussion of norms for the use of technology in dispute resolution.

[73] *Id.*

developed, new forms of threats to systems and data have emerged, and this has resulted in a never-ending cycle of security measures and breaches.

In traditional mediation, the term 'security' might be related to information security, discussed in terms of confidentiality (which the mediator promises parties, or which they promise each other)[74] or to privilege (which the law often grants to protect mediation conversations, documents, and testimony from making its way into the courtroom).[75] In addition, the term security might denote parties' sense of wellbeing and comfort. This might span "emotional security," where parties feel in a safe place, in competent hands, dealing with a neutral they can trust, and protected from their counterparty's abuse, or it might be be related to physical security – in the sense that the setting and the ground-rules are designed to prevent things from getting out of hand, or in the sense that screening or other measures might be necessary to avoid threats to physical wellbeing (e.g., in situations where violence is/has been an issue)[76]

As these worlds converge in the practice of ODR, it is important to separate between different connotations of the term; as a result of this importance, we have developed a framework for differentiation between four types of security.

i. Information Security

This context connotes the security of the ODR process in terms of protecting parties' information from being shared by outsiders to the process as a result of to human activity. Included are familiar dispute resolution issues such as a mediator's duty to keep what she learns to herself, parties' contracting with each other to keep a process confidential, and the legal notion of privilege, protecting

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[74] Samara Zimmerman, *Judge Gone Wild: Why Breaking the Mediation Confidentiality Privilege for Acting in Bad Faith Should Be Reevaluated in Court-Ordered Mandatory Mediation,* 11 CARDOZO J. CONFLICT RESOL. 353 (2009).

[75] *Id.*

[76] Elisabeth Wilson-Evered et al., *Towards an On-Line Family Dispute Resolution Service in Australia*, *in* MOBILE TECHNOLOGIES FOR CONFLICT MANAGEMENT 125-40 (Marta Poblet ed., 2011).

information from being uncovered by parties or judges in the course of a legal process.

ii. Data security

This context focuses on the protections set in place around the communication channels, the software, the servers and any hardware used for ODR. Such protection aims to prevent external people from hacking the system and obtaining non-public information, whether this is directly related to a dispute (e.g., pictures uploaded as evidence in an online arbitration case) or not (e.g., addresses and phone numbers). Additionally, focusing on this aspect of security would suggest that internal limitations be set in place to ensure that parties to disputes or their neutrals cannot access areas or information they are not allowed to view (e.g., protecting a conversation held in a private caucus chat room between one party and a mediator from being viewable by the other party).

iii.   Personal security

In this context, security connotes the provision of safe and clearly defined processes to protect users from actual harm, whether physical or emotional.[77] In ODR, the risk of physical harm is reduced, owing to the parties' physical separation; indeed, ODR can serve an important function in providing ADR services in cases where there is the potential for domestic violence (or in other cases where there is a need for shuttle mediation.)[78] Interestingly enough, in this domain we have noted that some disputants want to use ODR, yet prefer not to utilize available video conferencing for the purposes of convening; the reduced social presence of their counterparty, it seems, lends to an enhanced sense of personal security on an emotional level.

iv. System security

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[77] *Id.*

[78] *Id.; see also* Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence,* 24 OHIO ST. J. DISP. RES. 349 (2009).

Used in this context, security connotes the degree to which users feel confident that the ODR service they are using – the technological platform or its human operators – is not utilizing their information, participation, behavior or data in any way. As a user, my sense of security might be enhanced so long as I feel the service is not using my data, selling my data, using me as an unknowing participant in an experiment, or anything else. Specific uses that I, as a user, might be concerned about, or might certainly like to be consulted about, might include the service, *inter alia* : 1) using my data, without my permission; 2). using data in ways I might not like; 3).data mining, for any purposes; 4). learning about conflict behavior (beyond what is needed to service my own dispute); 5). learning about bargaining behavior (beyond what is needed to service my own dispute); 6.) learning about typing speed, time spent on particular pages, or advertisement-clicking – preferences, and; 7). any other use of data else.

IV.   CONCLUSION

To become a more mature domain, Online Dispute Resolution (like its older sibling Alternative Dispute Resolution) needs to develop theoretical models as well as implement practical solutions. Prevalent amongst these theoretical issues – with critical practical ramifications - are the concepts of fairness, trust and security in ODR.

In this brief article we have introduced and discussed critical issues in each of these domains, and demonstrated why they need further development. We have noted that for ODR systems to be considered *fair*, we must ensure that such systems are transparent, give advice about the shadow of the law and alternatives to negotiation as well as provide some degree of transparency.

When examining trust in ODR, we need to examine ODR's role in providing trust in online activities, consider the effect of users' trust in ODR on the field's development, recognize the unique dynamics of interpersonal trust development in the online environment, and enhance users' trust in advice or other content

offered by an ODR system. We have also suggested that there are four distinct connotations of the term "security" in ODR: Information Security, Data Security, Personal Security and System Security. Finally, we note that that these three concepts of fairness, trust and security all merit closer examining; the interactions between them are worthy of further research as well.