

**Embracing Online Dispute Resolution as an Avenue to Justice in
Kenya**

**Submitted in partial fulfilment of the requirements of the Bachelor of Laws
Degree, Strathmore University Law School**

**By
James Ngotho Kariuki
077973**

**Prepared under the supervision of
Mr. Francis Kariuki**

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Declaration

I, JAMES NGOTHO KARIUKI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

MR. FRANCIS KARIUKI

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Dedication

To all Kenyans, current and future, seeking access to justice- may technology enhance their efforts.

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List of Abbreviations

ADR	Alternative Dispute Resolution
AI	Artificial Intelligence
CBK	Central Bank of Kenya
CIArb	Chartered Institute of Arbitrators
CPA	Civil Procedure Act
CPGRAMS	Centralized Public Grievance Redress and Monitoring System
CPR	Civil Procedure Rules
DRC	Dispute Resolution Centre
EU	European Union
HMOC	Her Majesty's Online Court
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICT	Internet and Communication Technology
IRA	Insurance Regulatory Authority
KBA	Kenya Bankers Association
KRA	Kenya Revenue Authority
MTI	Mediation Training Institute
NCAIR	National Centre for Automated Information Research
NCIA	Nairobi Centre for International Arbitration
NIXI	National Internet Exchange of India
NLC	National Land Commission
ODR	Online Dispute Resolution
PCK	Postal Corporation of Kenya
SDRC	Strathmore Dispute Resolution Centre
TLCEODRI	Techno Legal Centre of Excellence for Online Dispute Resolution in India
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
WIPO	World Intellectual Property Organisation

List of Cases

Bensusan Restaurant Corp. v. King, 126 F.3d, 1997.

Safaricom Limited v. Ocean View Beach Hotel Limited & 2 others [2010] eKLR.

Shakti Bhog Foods Ltd. v. Kola Shipping Ltd. AIR (2009) SC 12.

Trimex International FZE Ltd. v. Vedanta Aluminum Ltd. (2010) 3 SCC 1.

List of Conventions/Treaties/Declarations

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959,
330 UNTS 38.

List of Statutes & Policy Documents

Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 No. 1392 (UK).

Arbitration Act, No. 4 of 1995. as amended by the Arbitration (Amendment) Act (2010).

Arbitration Act,1899 (Repealed), Laws of India.

Arbitration Act,1940 (Repealed), Laws of India.

Arbitration and Conciliation Act (No.26 of 1996), Laws of India.

Bengal Regulating Act of 1773 (Repealed), Laws of India.

Chartered Institute of Arbitrators, The CI Arb (K) Adjudication Rules.

Civil Procedure Act (Act No 12 of 2012).

Civil Procedure Act of 2010 (Revised Edition 2012).

Civil Procedure Rules, Legal Notice No. 151 of 2010.

Consumer Protection Act (No. 46 of 2012).

Fair Administrative Action Act, (2015).

Information and Communications (Amendment) Act, (No. 41 of 2013).

Information Technology Act (No 21 of 2000), Laws of India.

Land Act No. 6 of 2012, (Revised Edition 2012).

Ministry of Information Communications and Technology, *Draft National ICT Policy* (2016).

Nairobi Centre for International Arbitration Act, (No. 26 of 2013).

National Land Commission Act (No. 5 of 2012).

Regulation on Consumer ODR, Regulation (EC) No 2006/2004 and Directive 2009/22/EC. (EU).

Small Claims Court Act, (No 2 of 2016).

The Code of Civil Procedure (Act No. 8 of 1908), Laws of India.

The Constitution of Kenya (2010).

The Kenya Judiciary, *Judiciary Transformation Framework 2012-2016*, (2012).

Abstract

Online Dispute Resolution (hereinafter ‘ODR’) is a branch of dispute resolution that incorporates aspects of information and communication technology (hereinafter ‘ICT’). However, this does not limit the scope of ODR to the internet since it also incorporates off-line dispute resolution. Essentially, ODR is a derivative from the conventional Alternative Dispute Resolution (hereinafter ‘ADR’) mechanisms. Withal, with the significantly rapid developing ICT sector, there is an urgent need for a direct and more efficient dispute resolution mechanism for online disputes. In Kenya for example, the rapid developments in the ICT sector have led to an increased access to internet facilities by the citizenry. It has therefore become difficult to ignore the changes brought about by ICT developments to the world of dispute resolution. Consequently, this study seeks to address the viability of ODR mechanisms in the Kenyan context. It will seek to clarify the barriers inhibiting this application and how they can be overcome. It will also address the validity of ODR as an independent dispute resolution mechanism contrasting it with the already established forms of ADR.

Chapter One

Introduction

1.1 Background of Online Dispute Resolution

1.1.1 Conventional Methods of Alternative Dispute Resolution

One of these methods is negotiation. It can be described as the meeting of parties to discuss issues at hand and arrive at a mutually acceptable solution without the help of a third party. The process is fully controlled by the parties.¹ Out of a negotiation a mediation may form. This is a voluntary informal, consensual, confidential and non-binding dispute resolution process in which a third party helps the parties come to a negotiated solution. It is sometimes classified as an intervention of the negotiation process by a third neutral party.² An arbitration is a process subject to statutory controls whereby formal disputes are determined by a private tribunal of the parties choosing. The third party is appointed with the authority to determine the dispute and give a final and binding award.³

Another dispute resolution mechanism is conciliation. This is a process where a third party called a conciliator restores damaged relationships between disputing parties by bringing them together, clarifying perceptions and pointing out misconceptions.⁴ In the case of a construction related matter, adjudication can be resorted to, where an impartial third party neutral known as an adjudicator makes a fair rapid and inexpensive decision on a given dispute arising out of a construction contract.⁵

1.1.2 History of Online Dispute Resolution

ODR dates back to the 1990s and to a prediction made at the time. The prediction was that as the internet continued to evolve as and its usage increases, it would become eventually become discordant. Unfortunately, that prediction is evident today.⁶

Some of the early scepticism about the need for and use of ODR stemmed from the fact that the invention of the internet occurred in 1969 and for the beginning twenty to twenty-five years of its existence there were relatively few disputes. This is because there were relatively

¹ Kariuki M, *Resolving Disputes through Mediation in Kenya*, Glenwood Publishers Ltd., 2012, 11.

² Kariuki M, *Resolving Disputes through Mediation in Kenya*, 3.

³ Kariuki M, *Settling Disputes through Arbitration in Kenya*, Glenwood Publishers Ltd., 2012, 1.

⁴ Fenn P, 'Introduction to Civil and Commercial Mediation', in Chartered Institute of Arbitrators, Workbook on Mediation, CI Arb London, 2002,14.

⁵ Chartered Institute of Arbitrators, *The CI Arb (K) Adjudication Rules*, Rule 2.1.

⁶ Katsh E & Rifkin J, *Online Dispute Resolution. Resolving Conflicts in Cyberspace*, San Francisco: Jossey-Bass, 2001, 21.

fewer users of the internet e.g. mostly just academia and military activities. Disputes that arose at the time were settled informally.⁷

Up until 1992, the National Science Foundation (managing the Internet at the time) banned the commercial use of the internet. Hence, if one managed to connect to the Internet or had the computer skills to navigate the internet, they would not have found anything to buy. There were no consumer/commercial disputes not because the design of the internet environment prevented disputes but because the online population was small with very limited ways to generate a dispute; which is the exact opposite today.⁸

With the development of the World Wide Web in 1989 it wasn't long before the first graphical browsers appeared. Netscape was the most popular at the time.⁹ It was not until 1994 that the need for tools, resources and expertise in responding to disputes would occur.¹⁰

The first ODR articles appeared in a law review in 1966. The National Centre for Automated Information Research (NCAIR) was the sponsor of the first ODR-focused conference and it also launched the first ODR projects such as the Virtual Magistrate¹¹, the Online Ombudsman Office at the University of Massachusetts as well as a family dispute ODR project at the University of Maryland.¹²

In the mid-1990s, courts began to battle with questions concerning jurisdiction such as instances where parties would be in different places and were interacting online.¹³

The rapid information and communication processing capabilities of the network opened up opportunities for creative ways to resolve cases that did not go to court.¹⁴ The forces contributing to disputes could now be applied to resolve them.¹⁵

In one of the most popular disputes of the time, a participant in a text based virtual world called LambdaMoo, would assault several women participants' virtual characters¹⁶. Julian Dibbell, a journalist, wrote an article on the events in LambdaMoo titled "A Rape in

⁷ Ethan Katsh & Janet Rifkin, *Online Dispute Resolution. Resolving Conflicts in Cyberspace*, 22.

⁸ Kesan J P and Shah R C, 'Fool Us Once Shame on You – Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Domain Name System', 79 *Wash. U. L.Q.* 2001, 89.

⁹ Netscape available at < <http://www.toptenreviews.com/software/articles/the-first-great-internet-browser-war/> >accessed on 18 January 2017.

¹⁰ Lide E C, 'ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation', 12 *Ohio State Journal on Dispute Resolution* 1996, 193.

¹¹ Virtual Magistrate History available at < <http://www.umass.edu/dispute/ncair/gellman.htm> >accessed on 18 January 2017.

¹² Katsh E, 'Dispute Resolution in Cyberspace', 28 *Connecticut Law Review* 1996, 953.

¹³ *Bensusan Restaurant Corp. v King*, 126 F.3d, 1997, 25.

¹⁴ Gershenfeld N, *When Things Start to Think*, Coronet Books, Philadelphia, 1999, 10.

¹⁵ Gershenfeld N, *When Things Start to Think*, 10.

¹⁶ The Case of Mr. Bungle and the "Cyber-Rape", available at, <www.albany.edu/faculty/rpy95/webtext/bungle.htm> accessed on 14th February 2016.

Cyberspace”, which remains one of the most controversial essays about disputes in cyberspace.¹⁷

Early university student disputes online touched on a number of behaviours. One of the first Internet-related copyright cases was in 1994. It involved David LaMacchia, an M.I.T. student. David used his account to provide access to others to upload and download software illegally.¹⁸

In summary, the development of ODR can be divided into four phases. The first ran from 1990 to 1996. It was the stage in which electronic solutions were being tested.¹⁹ Between 1997 -1998, development in ODR was dynamic which led to the establishment of the first commercial web portals offering services in this area. The period between 1999 to 2000 was a favourable period for economic development especially in IT services.²⁰ Many companies embarked on forms of electronic dispute resolution. Unfortunately, few are still in operation.²¹ The year 2001 was the beginning of the institutional phase, in which ODR was introduced into institutions like administration authorities and courts.²²

1.1.3 ODR in Kenya

In Kenya, the Constitution provides for the right to access to justice for all.²³ This right is easily impeded by various factors like the lack of appropriate instruments to achieve justice coupled by the inefficiency in pursuing other mechanisms such as litigation e.g. the high costs of litigation.²⁴ One of the ways of enhancing access to justice is through ADR. This is provided for in the Constitution.²⁵ The Civil Procedure Act provides that the overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.²⁶ The Civil Procedure Act also states that a suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for referral.²⁷

¹⁷ Dibbel J, ‘A Rape in Cyberspace’ available at: <http://www.villagevoice.com/news/a-rape-in-cyberspace-6401665> -accessed on 23 February 2016.

¹⁸ Online Center for Engineering and Science at Case Western Reserve University, *The David LaMacchia case*, available at < www.onlineethics.org/Resources/19049/lamindex.aspx >accessed on 12th February 2016.

¹⁹ Tyler M C, Bretherton D, ‘Seventy-six and counting: An analysis of ODR sites’ in *Workshop on Online Dispute Resolution at the International Conference on Artificial Intelligence and Law*, Edinburgh UK, 2003, 4.

²⁰ Tyler M C, Bretherton D, ‘Seventy-six and counting: An analysis of ODR sites’, 4.

²¹ Tyler M C, Bretherton D, ‘Seventy-six and counting: An analysis of ODR sites’, 4.

²² Tyler M C, Bretherton D, ‘Seventy-six and counting: An analysis of ODR sites’, 4.

²³ Article 48, *Constitution of Kenya* (2010).

²⁴ Justice Kajimanga C., *Enhancing access to justice through ADR: The Zambian Experience*, Chartered Institute of Arbitrators Kenya, 2013, 36.

²⁵ Article 159, *Constitution of Kenya* (2010).

²⁶ Section 1A (1), *Civil Procedure Act* (Act No 12 of 2012).

²⁷ Section 59 C, *Civil Procedure Act* (Act No 12 of 2012).

Therefore, ODR as a form of ADR can be embraced as a means to enhance access to justice in Kenya.

This is however impeded by the fact that there lacks an independent legal framework governing ODR in Kenya. This is coupled by the fact that ODR has not gathered sufficient recognition as a stand-alone form of dispute resolution as it borrows heavily from existing forms of ADR and is just perceived as just extrapolations which is not the case due to its unique aspects both a technological and a process perspective.²⁸ Even before considering ODR, the conventional methods of ADR still face challenges today. These challenges relate to lack of capacity in terms of insufficient trained personnel who can handle disputes using ADR mechanisms and lack of understanding on the working of some mechanisms such as mediation.²⁹

It is clear that there is no elaborate legal footing for ODR as a dispute resolution mechanism in Kenya.³⁰ In light of this fact, this study aims to approach ODR in the broadest sense in that it will encapsulate the various individual applications of ODR instead of narrowing the view of application to a single aspect. This way, it will be easier to delineate the potential of the application of an all-encompassing ODR framework which the individual ODR applications can build upon.

1.2 Statement of The Problem

There is lack of a cogent legal and institutional framework for the use of ODR in Kenya. In addition, ODR is being perceived as an extrapolation of the existing forms of ADR ridding it of individual recognition. This inhibits the amount of legal attention it deserves consequently limiting access to justice.

1.3 Research Objectives

1. To critically examine whether the Kenyan legal framework provides a sufficient ground for the practice of ODR in Kenya.
2. To critically examine whether the Kenyan institutional framework provides a sufficient ground for the practice of ODR in Kenya
3. To explore the viability of ODR as a stand-alone alternative as compared to the conventional alternative dispute resolution methods in Kenya.

²⁸ Brannigan C, *Online Dispute Resolution*, CCH Canadian Ltd, 2007, 2.

²⁹ Muigua K, and Kariuki F. 'ADR, Access to Justice and Development in Kenya', *Strathmore Annual Law Conference at Strathmore University Law School*, 2014.

³⁰ 'Kenya Facts', available at, <<http://country-facts.findthedata.com/1/173/Kenya>> accessed on 18 November 2015.

1.4 Hypothesis

There is need for the recognition of ODR as an independent form of Alternative Dispute Resolution in the legal framework in Kenya.

1.5 Literature Review

Literature on ODR in Kenya is extremely scarce. However, the topic has been discussed in other jurisdictions since it has been a growing issue of concern in the developing world. These discussions can be broken into a few predominant themes. The themes that will be discussed here are; the view of ODR as an independent alternative in comparison to it being just an extrapolation of ADR; application of ODR mechanisms and lastly the regulation of ODR mechanisms.

1.5.1 ODR as an Independent Alternative to Conventional ADR Mechanisms

It is a fact that ODR has its roots in the alternative dispute resolution movement. According to Kallel, ODR directly emerged as an online extension of ADR.³¹ Mercedes and Gonzalez are of the view that forms of ADR combined with ICT, result in ODR.³² They have taken notice of courts gradually incorporating advanced technology into their procedures, e.g. using electronic means of communication or admitting audiences held via video conferencing.³³ In this sense, they are known as “cyber-courts” or “cyber-tribunals”, but they are not and could not be considered “alternative.” They are traditional state courts that conduct everyday judicial proceedings using new ICT to carry out certain procedural steps.³⁴

Rudolph and Blankley believe that ODR is indeed an actual alternative to traditional litigation in domestic courts since it embraces several private or out-of-court mechanisms.³⁵ They go ahead and point out that ODR can be defined as “any method by which parties attempt to resolve disputes online.”³⁶

Like Kallel, Zheng takes the position that different approaches to ODR exist in the current literature.³⁷ She goes on to say that ODR can be conceived as the transposition of the

³¹ Kallel S, ‘Online Arbitration’, 25 *Journal of International Arbitration* (2008), 345.

³² Mercedes M A and Gonzalez N M, ‘Feasibility Analysis of Online Dispute Resolution in Developing Countries’, 44:1 *Inter-American Law Review* 2012, 44.

³³ Mercedes M A and Gonzalez N M, ‘Feasibility Analysis of Online Dispute Resolution in Developing Countries’, 44.

³⁴ Mercedes M A and Gonzalez N M, ‘Feasibility Analysis of Online Dispute Resolution in Developing Countries’, 44.

³⁵ Rudolph S C & Blankley K M, ‘Online Mediation: Where We Have Been, Where We Are Now and Where We Should Be’, 38 *University of Toledo Law Review* 2006, 193.

³⁶ Rudolph S C & Blankley K M, ‘Online Mediation: Where We Have Been, Where We Are Now and Where We Should Be’, 193.

³⁷ Zheng S T, *Electronic Consumer Contracts in the Conflict of Laws*, Hart: Oxford and Portland, Oregon, 2009, 152.

traditional ADR mechanisms online without substantive differences from their traditional counterparts except being more convenient and effective.³⁸

Some of the ODR mechanisms may not rely on conventional ADR methods since they are fully technology-based.³⁹ Colin Rule goes by this by highlighting that, some special mechanisms designed for meeting the needs of Internet users are not completely new from a legal perspective.⁴⁰

1.5.2 Regulation of ODR Mechanisms

The development of ODR procedures is made possible by ODR platforms⁴¹ and ODR providers.⁴² On one hand, ODR platforms host ODR services managed by third party providers; on the other hand, ODR providers are professionals or institutions that become involved at the request of the parties in conflict.⁴³

According to Teitz, ODR, like all of e-commerce, needs to have mechanisms to build consumer trust in the goods or services (legal services in the form of dispute resolution) and to ensure consumer protection.⁴⁴ She asserts that regulation of legal services, including dispute resolution, need not be delegated wholly to the professional organizations that incorporate a degree of preference to their own interests.⁴⁵ The users of ODR, be they consumer or business, have none of the normal channels to guarantee integrity and minimum standards of performance in the virtual world of ODR.⁴⁶ If one hires a lawyer to resolve a dispute, one deals with a real person or a real office or a license. There is something connected to a physical existence.⁴⁷

Schultz highlighted that at times in the field of ODR, such discourse advocating control, government intervention and regulation is often rejected because it is thought to create

³⁸ Zheng S T, *Electronic Consumer Contracts in the Conflict of Laws*, 152.

³⁹ Gill C, Williams J, Brennan C & Hirst C, *Models of Alternative Dispute Resolution (ADR)*, Queen Margaret University, Consumer Insight Centre, 2014, 27.

⁴⁰ Rule C, *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, Jossey-Bass Publishers, San Francisco, 2002, 61.

⁴¹ These are internet based locations where interested parties can submit their claims to be resolved online.

⁴² These are the organisations that give rise to locations on the internet where disputes can be resolved online

⁴³ Nicuesa V, 'Resolución electrónica de conflictos' in Peguera M (ed), *Principios De Derecho De La Sociedad*, Aranzadi, 2010, 409.

⁴⁴ Teitz E, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution', *70 Fordham Law Review* 2001, 985, 1010.

⁴⁵ Teitz E, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution', 985, 1010.

⁴⁶ Teitz E, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution', 985, 1010.

⁴⁷ Teitz E, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution', 985, 1010.

obstacles to the development of ODR. They argue that the best regulation is no regulation, or at best pure self-regulation.⁴⁸

1.5.3 Dangers Imposed by the Online Nature of ODR

Hacking has been one of the prominent dangers of the use of the internet.⁴⁹ ODR methods are therefore also vulnerable due to their presence or use of the internet. Internet connection speeds in different areas may vary and the worst frail connections may disappear in the middle of resolving a dispute.⁵⁰ As a result, online methods may be affected by this disparity thus affecting the overall process. Eisen acknowledges the impersonal nature of the internet and that it makes it harder to obtain details of the dispute by a regulatory body since the source of the information is unclear.⁵¹ Details of the parties may also be limited since it may at times omit necessary follow-up details such as the addresses of the parties which may not be a central requirement of ODR process.⁵²

Probably the most prominent danger according to Amauger and Baggott is the inadequate confidentiality, security and authenticity of ODR systems.⁵³ They point out that despite the development of cutting-edge security technologies and encryption methods, the Internet “can still be porous when it comes to the security of data transmitted electronically.”⁵⁴ Inadequate Internet security has been a major deterrent in the growth of e-commerce and may also have a direct bearing on the use and regulation of ODR.⁵⁵

1.5.4 Regulation of ODR in the Kenyan Context

ODR does not have a firm legislative foothold in Kenya. However, many online activities take place that equally demand consumer protection as a result of the challenges facing the regulation of internet activities in Kenya.⁵⁶

⁴⁸ Schultz T, ‘Does Online Dispute Resolution Need Governmental Intervention? A Case for Architectures of Control and Trust’, *Journal of Law and Technology*, 6:1 2004, 106.

⁴⁹ Saghar E, and Desmedt Y, *Exploiting the Client Vulnerabilities in Internet E-voting Systems: Hacking Helios 2.0 as an Example*, EVT/WOTE 10, 2010, 1-9.

⁵⁰ How bad is Africa’s Internet? available at ><http://spectrum.ieee.org/telecom/internet/how-bad-is-africas-internet>< accessed on 16th March 2016.

⁵¹ Eisen J B, ‘Are We Ready for Mediation in Cyberspace?’, *Brigham Young University Law Review* 1998, 1305, 1322.

⁵² Eisen J B, ‘Are We Ready for Mediation in Cyberspace?’, 1305, 1322.

⁵³ Almaguer A E & Baggott W R, ‘Shaping New Legal Frontiers: Dispute Resolution for the Internet’, *13 Ohio State Journal on Dispute Resolution*, 1998, 735.

⁵⁴ Almaguer A E & Baggott W R, ‘Shaping New Legal Frontiers: Dispute Resolution for the Internet’, 735.

⁵⁵ Almaguer A E & Baggott W R, ‘Shaping New Legal Frontiers: Dispute Resolution for the Internet’, 735.

⁵⁶ Souter D & Makau M K, *Internet Governance in Kenya: An Assessment for The Internet Society*, ICT Development Associates Ltd., 2012, 25.

In issues relating to online disputes, the Consumer Protection Act states that a supplier in an internet agreement must disclose all prescribed information to the consumer.⁵⁷ It also provides an opportunity for the consumer to accept or decline the agreement or correct any errors in it.⁵⁸ In addition, the supplier has to deliver a copy of the agreement in writing within the prescribed period after the consumer enters the agreement.⁵⁹ A consumer can commence a proceeding on behalf of other persons in a dispute arising out of a consumer agreement.⁶⁰ Any acknowledgement in a consumer agreement that requires a dispute to be submitted to an arbitration is invalid since it prevents the party from filing an action in the High Court. However, parties may still agree to resolve the dispute using any procedure available in law.⁶¹

The consumer is also given the authority to cancel an agreement at any time from the date the agreement is entered to until seven days after the consumer receives a copy of the agreement.⁶² The consumer may cancel an internet agreement within thirty days after an agreement where the supplier has represented himself falsely.⁶³

Notwithstanding these provisions, the scope of online disputes is increasing and ODR may be the appropriate step in catering for their growth.

1.5.5 Various Forms of ODR

ODR manifests itself in different ways. Automated Negotiation is one of the forms of disputes online that involves the participation of two or more parties in the bargaining of resources with the intention of benefitting mutually using the tools of electronic commerce.⁶⁴ Despite the fact that the negotiation is between the two human parties, it also involves intelligent software agents that would seem to facilitate the negotiation process in an intelligent manner.⁶⁵ An example of this is where one party calls another to make secret bids on the matter to be negotiated.⁶⁶ “Secret” in this sense means that the parties themselves are unaware of their opposing party’s bids.⁶⁷ It is at this point that a computer software automatically evaluated the

⁵⁷ Section 31 (1), *Consumer Protection Act* (No. 46 of 2012).

⁵⁸ Section 31 (2), *Consumer Protection Act* (No. 46 of 2012).

⁵⁹ Section 32, *Consumer Protection Act* (No. 46 of 2012).

⁶⁰ Section 4, *Consumer Protection Act* (No. 46 of 2012).

⁶¹ Section 88, *Consumer Protection Act* (No. 46 of 2012).

⁶² Section 33, *Consumer Protection Act* (No. 46 of 2012).

⁶³ Section 33 (2), *Consumer Protection Act* (No. 46 of 2012).

⁶⁴ Beam C & Segev A, ‘Automated Negotiations: A Survey of the State of the Art’, *Fisher Centre for Information Technology & Management: University of California*, 1996, 3.

⁶⁵ Maes P, ‘Modeling Adaptive Autonomous Agents’, *Artificial Life Journal Vol 1, No. 1 & 2*, 1994, 135-162.

⁶⁶ Krause J ‘Settling it on the Web. New Technology, Lower Costs Enable Growth of Online Dispute Resolution’ *American Bar Association Journal*, 2007, 14.

⁶⁷ Krause J ‘Settling it on the Web. New Technology, Lower Costs Enable Growth of Online Dispute Resolution’, 14.

bids and comes to a common middle-ground (Blind-bidding).⁶⁸ Like conventional negotiation parties are not bound by the final verdict of the program.⁶⁹

Online Mediation (Assisted Negotiation) is another form of online dispute resolution. It can involve a scenario where the parties of a conventional mediation can perform the mediation entirely online with the help of ICT variations such as videoconferencing and emails or a combination of those.⁷⁰ It can also involve a situation where the mediator has been replaced by technology that plays a similar role in the process.⁷¹

Online Arbitration is quite similar to the aspects of online mediation. The main difference that arises is the binding nature of the final award of the online arbitration as compared to online mediation where the process is non-binding until the final agreement is signed.⁷² Submission of documents, evidence and witness hearings can all be performed through online means such as email, teleconferencing, videoconferencing (e.g. Skype) among others.⁷³

Despite the fact that the advent of ODR has paved a path for the future of dispute resolution, it has been put on the spotlight for its lack of legitimacy, which is affected by concerns regarding reliability and authenticity.⁷⁴ According to Cole, critics of ODR cite quality issues and focus on the lack of community standards.⁷⁵ He observes that one reason for a lack of standards is the online community's attempt to be free of tradition rules and regulations.⁷⁶

1.6 Theoretical Framework

This study applies two theories namely: Procedural Justice Theory and Restorative Justice Theory.

⁶⁸ Krause J 'Settling it on the Web. New Technology, Lower Costs Enable Growth of Online Dispute Resolution', 14.

⁶⁹ Kariuki M, *Resolving Disputes through Mediation in Kenya*, 11.

⁷⁰ ABA Taskforce on Electronic Commerce and Alternative Dispute Resolution Taskforce, *What is Online Dispute Resolution? A Guide to Consumers*, 2002, 3.

⁷¹ Jacobs P 'Mediation Now and Then', *Newsletter, Mediation, International Bar Association Legal Practice Division*, 2007, 14.

⁷² How it works – 'Anywhere Arbitration', available at <<http://www.anywherearbitration.com/how-it-works.html>> accessed on 18th March 2016.

⁷³ Ponte L and Cavenagh T, *Cyberjustice, 'Online Dispute Resolution for E-Commerce'* Parson Prentice Hall, 2005, 84.

⁷⁴ Victorio M R, 'Internet Dispute Resolution (IDR): Bringing ADR into the 21st Century', 296.

⁷⁵ Cole, Rudolph S C & Blankley K M, 'Online Mediation: Where We Have Been, Where We Are Now and Where We Should Be', *University of Toledo Law Review*, (2006) 193, 196.

⁷⁶ Cole, Rudolph S C & Blankley K M, 'Online Mediation: Where We Have Been, Where We Are Now and Where We Should Be', 193, 196.

1.6.1 Procedural Justice Theory

According to Rawls, justice is the first value of social intentions, as truth of systems of thought.⁷⁷ While explaining Aristotle's concept of retributive justice,⁷⁸ Rawls perceives justice as fairness premised on equal opportunities and liberties.⁷⁹

Procedural justice theory explains the procedural fairness in dispute resolution which ensures that the outcome is acceptable by both parties in a dispute.⁸⁰ Thus, even when people lose they feel better about it when they experience fairness.⁸¹ Procedural justice promotes legitimacy by giving individuals a neutral and trustworthy decision-maker allowing them a voice and treating them with respect.⁸² According to Galligan, fair procedures made known to and accepted by parties lead to fair and acceptable results even if the result does not favour one of the parties.⁸³

In relation to this study, the procedural justice theory provides a standard of examining the extent to which ODR in Kenya can meet the principles of the Constitution which provides for fair administrative action,⁸⁴ state the responsibility to promote access to justice,⁸⁵ fair hearing⁸⁶ and exercise of alternative forms of dispute resolution as part of judicial authority.⁸⁷

1.6.2 Social Construction of Technology (SCOT) Theory

The origins of SCOT can be traced back to Trevor Pinch and Wiebe Bijker through their 1987 article titled; "The Social Construction of Facts and Artefacts: Or How the Sociology of Science and the Sociology of Technology Might Benefit Each Other".⁸⁸

The theory mainly argues that social concepts within a society define the shaping of technology within that society.⁸⁹ Society's underpinnings i.e. human beings, determine the shape of technology through their actions. These actions consist of an interactive process within

⁷⁷ John Rawls, *A Theory of Justice*, Revised ed., Harvard University Press, 1971, 3.

⁷⁸ Aristotle, *The Nicomachean Ethics*, translated by J A Thompson, London, Penguin Books Ltd, 1976, 741.

⁷⁹ Rawls, *A Theory of Justice*, 52.

⁸⁰ Tyler T R Degoey P & Heather S, 'Understanding why the justice of group procedures matters: A test of the psychological dynamics of the group-value model', *Journal of Personality and Social Psychology* 70, 1996 913–930.

⁸¹ Blumoff H R and Tyler R T, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', *Journal of Dispute Resolution* 2 2011, 3.

⁸² Blumoff H R and Tyler R T, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', 5.

⁸³ Galligan J D, *Due Process and Fair Procedures*, Oxford University Press, 1996, 12.

⁸⁴ Article 47, *Constitution of Kenya*, (2010).

⁸⁵ Article 48, *Constitution of Kenya*, (2010).

⁸⁶ Article 50 (1), *Constitution of Kenya*, (2010).

⁸⁷ Article 50 (1), *Constitution of Kenya*, (2010).

⁸⁸ Pinch T & Bijker W, 'The Social Construction of Facts and Artifacts: Or How the Sociology of Science and the Sociology of Technology Might Benefit Each Other' *Social Studies of Science* 14, 1984, 399-441.

⁸⁹ Klein H Kleinman D, 'The Social Construction of Technology: Structural Considerations', *Science, Technology, & Human Values*, Vol. 27 No. 1, 2002, 29.

the concerned social groups that yield the background upon which technology can base itself on.⁹⁰

The social groups described above are interpreted as all the members of a certain social group that share the same set of meanings that are attached to a specific technology.⁹¹ The actions of the social group manifest the potential operation and utilization of the technology⁹²

In the application of this theory to this study, ODR can be seen as the technology that the respective social group ought to shape through their actions. Societal practices can manifest themselves through the enactment of laws and their respective enforcement mechanisms that are meant to govern the operation of ODR. This law and the corresponding enforcement mechanisms will be centred around providing an effective avenue for dispute resolution. Therefore, the underlying technology behind ODR is structured around the social need for more amicable dispute resolution processes.

ODR can therefore be seen as a manifestation of the SCOT theory. The affected social group, as highlighted above, may see ODR as a way of improving the dispute resolution process. It is also important to note that technology can also shape up the law around it. ODR may trigger the manifestation of a sociological framework to manage itself. Lawmakers may seek to better the use of ODR by creating a solid regulatory framework around it.

By coupling the interests of the relevant social group with the constantly developing technological space, technology can be modelled on the basis of those interests thus improving their effectiveness. ODR seeks to do the same in the interest of society's need for dispute resolution avenues.

1.7 Justification of the Study

Rapid development in the ICT sector in Kenya is very evident in the last few years. With all the good that that brings, conflicts are inevitable. Conflicts of this nature pose a challenge to our rigid, slow to adapt, legal framework that may have no direct remedies to the ever-upcoming problems that this sector poses. Even where there are remedies in the law, there is no efficiency in its access therefore making its pursuit more cumbersome. This should not be the case.

⁹⁰ Bijker W Hughes T Pinch T, (eds), 'The Social Constructions of Technological Systems', *MIT Press Cambridge, Massachusetts*, 1987, 17.

⁹¹ Bijker W Hughes T Pinch T, (eds), 'The Social Constructions of Technological Systems', *MIT Press Cambridge, Massachusetts*, 1987, 30.

⁹² Klein H Kleinman D, 'The Social Construction of Technology: Structural Considerations', *Science, Technology, & Human Values*, Vol. 27 No. 1, 2002, 29.

There is the need to provide a better, more suitable avenue to justice and what better way to do that, than the enforcement and application of a dispute resolution mechanism within the ICT sector itself?

1.8 Research Methodology

The methodological approach applied to this study is critically reviewing the literature on Alternative Dispute Resolution with a focus on Online Dispute Resolution.

1.8.1 Data Collection

Data collection will involve the utilization of both primary and secondary sources of data. Primary sources include statutes relevant to ODR, the Constitution of Kenya, and other international instruments. They will be useful in establishing the legal framework governing the different forms of ODR in Kenya vis-a-vis the legal framework in other jurisdictions.

Mostly primary data, such as the Constitution and the relevant statutes will be accessed through their officially publicized sources such as Kenya Law. Thereafter qualitative data collected will be critically analysed. As for the other publications such as law textbooks and journal articles, they shall be accessed by visiting libraries such as the Strathmore Library. Majority of the material will be accessed online through online libraries such as the Lexis Nexis, JSTOR, Kenya Law, as well as individual publications on the open net.

The secondary used include textbooks, journal articles, media reports, conference papers and the internet/online libraries, interviews with people conversant with ADR and ODR and visits to the Chartered Institute of Arbitrators (Kenya Branch). These will give a fine/detailed look into the different aspects of ODR as a form of ADR, and will bring to light the practical aspects of the mechanism as well as a detailed appraisal and critique of the mechanism and its different manifestations.

The study shall also adapt a comparative analysis so as to compare and contrast systems of ODR in Kenya and in other jurisdictions. It will specifically look at England in the United Kingdom and India. This is because they have embraced ODR for a significantly long period. I will therefore be able to take note of some of its successes as well as challenges. It will finally address the solutions to the challenges that can and have been remedied in the period of its practice.

1.8.2 Data Analysis

The data obtained is qualitative data. The secondary and primary data collected were analysed in light of the research objectives, study of the problem, hypothesis, the theories behind the topic and the overall justification of the study.

1.9 Chapter Breakdown

Chapter one: Introduction to the study: This chapter will give a brief background of the study. It also identifies the problem as well as the objectives of the study in relation to the problem. A review of literature of the topic will also be addressed in this chapter followed by identification of the research methods to be used.

Chapter Two: ODR in the Kenyan Context: This chapter will look at the current state of ODR in Kenya. It will highlight the current state of recognition practice and regulation of ODR.

Chapter Three: Comparative Analysis of ODR in the England and India: This chapter will pay attention to the current state and ongoing development of ODR in other jurisdictions where it has developed sufficiently enough to highlight its major achievements as well as its drawbacks. It will derive ideals on the mechanism and determine the viability of their replication or adaptation in Kenya.

Chapter Four: Operability of an Independent ODR System in Kenya: This chapter will deal with the issue on the recognition of ODR as an independent dispute resolution mechanism and its potential operation in today's context.

Chapter Five: Findings, Recommendations and Conclusions: This chapter will consider all that has been covered in the study and lay out the findings and recommendations on how to improve the current state of practice of ODR in Kenya.

Chapter Two

ODR in the Kenyan Context

2.1 Introduction

This chapter will attempt to identify the position of ODR in Kenya. It will highlight the relevant laws that apply with respect to ODR and other legal aspects that would pave the way for the development of ODR in Kenya. It will also identify various institutions in the country that have aided in the development of ADR and how they can or already have, contributed to the development of ODR in Kenya.

The focus on ADR and not ODR is premised on the fact that Kenya has already embraced ADR in the resolution of disputes. In addition, ODR shares similar underlying principles envisaged in ADR i.e. access to justice, expeditiousness, and an alternative/complimentary to the court mechanisms etc. To best understand the applicability of ODR in Kenya, it would be key to identify legal and institutional underpinnings of ADR and thereafter scrutinize how ODR can be conceptualised within the same provisions.

The Kenyan government through their policy on ICT development strives to develop cogent rules on the terms and conditions used in the concluding of online contracts. This also includes providing for structures that will be utilised to develop complaint handling procedures that will allow consumers to seek redress from service providers.¹ The policy also proposes the development of the legal/regulatory frameworks and technical solutions that will improve the detection and prevention of cyber threats. This proposed framework should also take into consideration the extraterritorial nature of these cyber threats.² The policy highlights as one of its challenges, the need to modify the present legal and institutional framework in place since it is currently not very conducive to the development of ICT and its application.³ Although the policy highlights that the Communications and Multimedia Appeals Tribunal⁴ will hear and settle ICT related disputes, this does not perpetuate the main idea of ODR which is the resolution of disputes through online facilities with minimal brick and mortar procedures.

¹ Ministry of Information Communications and Technology, *Draft National ICT Policy* 2016, 33.

² Ministry of Information Communications and Technology, *Draft National ICT Policy* 2016, 34.

³ Ministry of Information Communications and Technology, *Draft National ICT Policy* 2016, 35.

⁴ The Kenya Information and Communications (Amendment) Act, (No. 41 of 2013).

The former Chief Justice, Dr Willy Mutunga in his address during the African Arbitrators Conference at Windsor, noted that our constitution⁵ advocates for the use and application of all forms of alternative dispute resolution in the exercise of judicial authority.⁶

The Judiciary Transformation Framework pushes for the promotion of ADR mechanisms in the administration of justice.⁷ At the core of the framework, the judiciary intends to put in place an elaborate ICT strategic plan that will enable the judiciary to harness technology in the pursuit of justice.⁸ Apart from the management applications of ICT that the judiciary intend to apply, the framework falls in line with the promotion of ODR. It proposes a tele-justice system which simply refers to the incorporation of teleconferencing into the justice system.⁹

The framework also proposes the digitalisation of court records. The effect of this could be less reliance on physical copies of documents thus facilitating the shift to an independent online platform for administering justice. It also proposes an SMS inquiry system that is going to be part of an overall complaints management system. The framework proposes the extension of the application of ICT to incorporate training programmes that will disseminate the know-how on dispute resolution to the public. The framework also proposes the implementation of a Local Area Network within the court areas so as to facilitate a communication portal that will serve as a platform for the incorporation of virtual court systems.¹⁰

2.2 Legal Framework for ADR in Kenya

There are various legal instruments that deal with the practice and enforcement of ADR in Kenya. There is no legal material that deals specifically with the practice of ODR in the country. However, various provisions of law and of conventional ADR may act as footstones for the development of ODR in Kenya.

There are a number of legal instruments that give authority to the various forms of ADR in Kenya. Some of them include: The Constitution,¹¹ The Civil Procedure Act¹² and the Civil

⁵ Article 159, *Constitution of Kenya* (2010).

⁶ Dr Willy Mutunga, "Alternative Dispute Resolution and Rule of Law", East African Arbitrators Conference, Nairobi, 25 September 2014, Available at: - <http://www.judiciary.go.ke/portal/page/speeches> accessed on 3 November 2016.

⁷ The Kenya Judiciary, *Judiciary Transformation Framework 2012-2016*, 2012, 14.

⁸ The Kenya Judiciary, *Judiciary Transformation Framework 2012-2016*, 21.

⁹ The Kenya Judiciary, *Judiciary Transformation Framework 2012-2016*, 46.

¹⁰ The Kenya Judiciary, *Judiciary Transformation Framework 2012-2016*, 47.

¹¹ *The Constitution of Kenya* (2010).

¹² Revised Edition 2012 [2010].

Procedure Rules,¹³ Arbitration Act,¹⁴ Consumer Protection Act¹⁵ and the Land Act¹⁶, The Fair Administrative Action Act¹⁷ and The Small Claims Court Act.¹⁸

2.2.1 The Constitution 2010

The Constitution of Kenya recognises ADR as an avenue to access justice in Kenya. It states that in the exercise of judicial authority, courts and tribunals shall be guided by alternative forms of dispute resolution including mediation arbitration and traditional dispute resolution mechanisms.¹⁹ It further bestows responsibility of the state to ensure access to justice for all persons at a reasonable fee that shall not impede them.²⁰

In addition to the above express provisions on access to justice the constitution also obliges the court not to impede justice on the account of procedural technicalities. It urges the court to minimise on formalities related to proceedings so as to give room for proceedings on the basis of informal documentation. It also stated that no fees should be charged for the commencement of proceedings.²¹

The constitution also recognises every citizen's right of access to information held by the state. This right facilitates access to justice by providing the citizen with adequate knowledge of their respective rights. This makes it possible for them to seek redress from the court.²²

Access to justice in the constitution is also advocated through upholding one's right to administrative action that is efficient, expeditious, lawful, reasonable and procedurally fair.²³ Another right critical to the enhancement of one's access to justice that is upheld by the constitution is the right to a fair and public hearing.²⁴ Only by exercising fairness during the hearing process can the proper procedural execution of the available mechanisms result in justice to the one who seeks it.

It is clear from the above provisions that the Constitution promotes access to justice through ADR. From the language applied in Article 159, the Constitution does not limit

¹³ Legal Notice No. 151 of 2010.

¹⁴ No. 4 of 1995.

¹⁵ No. 46 of 2012. Revised edition 2014 [2012].

¹⁶ No. 6 of 2012. Revised Edition 2012.

¹⁷ *The Fair Administrative Action Act*, (2015).

¹⁸ *The Small Claims Court Act*, (No 2 of 2016).

¹⁹ Article 159, *Constitution of Kenya* (2010).

²⁰ Article 48, *Constitution of Kenya* (2010).

²¹ Article 22, *Constitution of Kenya* (2010).

²² Article 35, *Constitution of Kenya* (2010).

²³ Article 47, *Constitution of Kenya* (2010).

²⁴ Article 50, *Constitution of Kenya* (2010).

alternative means to those expressly provided.²⁵ This means that the Constitution is able to accommodate online methods of dispute resolution despite the fact that it has not been expressly provided for as long as it falls in line with the promotion of access to justice.

It can therefore be deduced that ODR as a form of dispute resolution is in conformity with the primary legislation relating to ADR mechanisms in the country. It incorporates the use of technology to enhance access of justice in Kenya as well as serve as an alternative to litigation and adjudication through the courts.

2.2.2 Civil Procedure Act (CPA) and the Civil Procedure Rules(CPR)

Both the CPA and the CPR are mainly applied in court and court related proceedings²⁶ thus are *prima facie* antecedent to the concept of ADR. However, the CPA provides for the overriding objective which promotes the just, expeditious, proportionate and affordable resolution of the civil disputes.²⁷ For the overriding objective to be applied, the CPA states that for its furtherance specified in section 1A, the Court shall ensure; the just determination of the proceedings, the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and the use of suitable technology.²⁸ The courts are obliged to ensure that parties can explore alternative means to resolve their disputes.²⁹

This is seen in the case of *Safaricom Limited v Ocean View Beach Hotel Limited*³⁰ where the High Court referred the case back to the arbitrator after the complainant brought it before the court. The Court of Appeal held that the overriding objective enables the court to seize the opportunity to make orders and issue declarations to meet the ends of justice. In that respect, they gave the requested interim order and thereafter referred the case back to arbitration.

The CPR provides for pre-trial rules which stipulate that courts should consider ADR before setting a matter for hearing.³¹ It also provides that at the request of the parties or at the

²⁵ Chief Bayo Ojo, 'Achieving Access to Justice Through Alternative Dispute Resolution' *Chartered Institute of Arbitrators (Kenya) Journal*, 1 2013 1.

²⁶ Section 1 of the Civil Procedure Act states that, the Act applies to proceedings in the High Court and, subject to the Magistrate's Courts Act (Cap. 10), to proceedings in subordinate courts.

²⁷ Section 1A, *Civil Procedure Act* (2010).

²⁸ Section 1B *Civil Procedure Act* (2010).

²⁹Musuli P, 'The Challenges of Implementing ADR as an Alternative Mode of Access to Justice in Kenya', *Chartered Institute of Arbitrators (Kenya) Journal 1* 2013 15.

³⁰ *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR.

³¹ Order 11 Rule 3 (2)(h), *Civil Procedure Rules* (2010).

court's discretion where it deems appropriate, it can adopt any other appropriate means of dispute resolution.³²

The CPA and the CPR both encourage the practice of ADR with the view of access to justice. These laws therefore have the potential to lay the groundwork for the practice of ODR in Kenya.

2.2.3 Arbitration Act

Arbitration is one of the forms of ADR. The main governing legislation of the practice in Kenya is the Arbitration Act of 1995 ("hereinafter The Arbitration Act"). The Arbitration Act paves way for arbitral proceedings and the enforcement of arbitral awards by Kenyan courts.³³ It also outlines the instances where the courts can intervene in arbitration matters.

An arbitration agreement should be in writing. The term 'writing' includes an exchange of electronic mail or other means of telecommunication which provide a record of the agreement.³⁴ This makes it open to the incorporation of online agreements which exist within the cyberspace as valid agreements. For the greater aim, (which is ODR) this will serve as a starting point in the process of achieving that aim.

The act recognises the use of emails and facsimile as a means of communication between parties pursuant to an arbitration agreement.³⁵ This provision is an example of how online methods can be incorporated in the dispute resolution process. This paves the way for greater recognition of online mechanisms and the establishment of a framework that will regulate this progression into the online sphere.

The act states that the parties to an arbitration will do all things necessary for the proper and expeditious conduct of the arbitral proceedings.³⁶ An interpretation of this section *vis-à-vis* ODR will mean that the use of online methods will assist to expedite the arbitral process. For example, if one of the parties is not close to the venue of the proceedings and is yet to submit their evidence, it would be easier to email the information as compared to physically travelling all the way which would not be in conformity with the aim of this section.

The act also gives the parties the freedom to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.³⁷ The arbitral tribunal in the absence of the above can conduct the proceeding as they deem fit.³⁸ This freedom can prove to be

³² Order 46 Rule 20 (1), *Civil Procedure Rules* (2010).

³³ Section 36, *Arbitration Act* (1995).

³⁴ Section 4, *Arbitration Act* (1995).

³⁵ Section 9, *Arbitration Act* (1995).

³⁶ Section 19A, *Arbitration Act* (1995).

³⁷ Section 20, *Arbitration Act* (1995).

³⁸ Section 20, *Arbitration Act* (1995).

beneficial to the incorporation of ODR in the arbitral proceedings. Either the parties of the arbitral tribunal at their discretion may choose to implement ODR in their proceedings.

With the incorporation of Information Technology in various aspects of Arbitration e.g. e-mails, coupled with a stable legal framework surrounding the practice of Arbitration, a way can be paved for the incorporation of ODR in Kenya.

2.2.4 Consumer Protection Act

In online and related disputes, the Consumer Protection Act states that a supplier in an internet agreement must disclose all prescribed information to the consumer.³⁹ It also provides an opportunity for the consumer to accept or decline the agreement or correct any errors in it.⁴⁰ In addition, the supplier must deliver a copy of the agreement in writing within the prescribed period after the consumer enters the agreement.⁴¹

Parties may agree to resolve the dispute using any procedure available in law.⁴² The effect of this provision is the fact that parties to a consumer agreement can choose to adopt ADR mechanisms to resolve their disputes. ODR is not independently recognised under the law however, this provision is open to the fact that it can be incorporated once it is formally recognised.

Online adaptations of conventional ADR methods already recognised by law are applicable through this provision. For example, Amazon in their Terms and conditions state that; “Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court”.⁴³ From this provision, the need for ODR is apparent. This is because a dispute arising out of an online transaction will have to be resolved through conventional means. This may prove to be difficult since factors such as the choice of the applicable law and the location of the proceedings may not be favourable to the consumer. Consequently, the consumer becomes more reluctant to make a claim under the framework laid out because of its complexity. ODR mechanisms propose that the standard online clauses take

³⁹ Section 31 (1), *Consumer Protection Act* (No. 46 of 2012).

⁴⁰ Section 31 (2), *Consumer Protection Act* (No. 46 of 2012).

⁴¹ Section 32, *Consumer Protection Act* (No. 46 of 2012).

⁴² Section 88, *Consumer Protection Act* (No. 46 of 2012).

⁴³ Amazon Terms and Conditions available at <

https://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088 > accessed on 9 November 2016.

into account not only the law of the seat of the arbitration but the *lex domicilii* of the consumer should also apply.⁴⁴

The consumer may cancel an internet agreement within thirty days after an agreement where the supplier has represented himself falsely.⁴⁵ This provision shows that the act takes into consideration online transactions and aims to protect consumers. ODR can come into play by providing a standard that has to be met by online businesses worldwide. Various jurisdictions will have to abide by these standards. That way, clear enforcement mechanisms can be put in place to prevent misrepresentation by buyers and sellers.

ODR has the potential of playing a key role in the resolution of disputes in the online market.

2.2.5 Land Act

The Act points out that among the guiding principles and values that should apply to land matters, participants in land affairs should apply alternative dispute resolution mechanisms in land dispute handling and management.⁴⁶

The application of these mechanisms is subject to the authority and discretion of the National Land Commission (NLC).⁴⁷ The NLC is mandated to encourage the application of alternative dispute resolution mechanisms in land management and disputes.⁴⁸

In light of the NLC's mandate and the provisions of the Land Act, the promotion of alternative methods of dispute resolution opens up the opportunity to further access to justice through ODR. Given the digitalisation of land related documents and records, ODR has the potential of playing a role in the resolution of disputes, expediting the process and potentially reducing any transaction costs e.g. transport costs. In Kenya, the Ministry of Lands and Physical Planning has taken up this objective through the National Land Information Management System. This project is aimed at the digitalization of land paper records in the Ministry. This includes the setting up of the Electronic Records Management System that will be the main tool in the management of the digitalized land records.⁴⁹ Digitization will allow these records to be applied in ODR which as aforementioned, is highly dependent on electrical records and communications.

⁴⁴G Kaufmann-Kohler, T Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*, Kluwer Law International, 2004, 180.

⁴⁵ Section 33 (2), *Consumer Protection Act* (No. 46 of 2012).

⁴⁶ Section 4 (2) (m), *Land Act* (No. 6 of 2012).

⁴⁷ Established by the Constitution of Kenya under Article 67.

⁴⁸ Section 5 (2) (f), *National Land Commission Act* (No. 5 of 2012).

⁴⁹ National Land Information System available at < http://www.ardhi.go.ke/?page_id=216 > accessed on 12 November 2016.

2.2.6 Fair Administrative Action Act

The main objective of this act is the promotion of the exercise of administrative authority in a fair, expeditious, efficient, lawful, reasonable and procedurally fair manner.⁵⁰

This act is pursuant to Article 47 of the Constitution of Kenya on fair administrative action. Its application extends beyond judicial bodies and also applies to quasi-judicial bodies under the Constitution or any other written law.⁵¹

As portrayed in the Constitution and this Act, fair administrative action falls within the potential intentions of ODR. This particularly includes expediting the dispute resolution process as well as eliminating the barriers in the brick and mortar world such as physical distance and ancillary expenses required in the physical process.

2.2.7 Small Claims Court Act

The Small claims court is considered a subordinate court according to the Constitution.⁵² The main objective of this legislation⁵² is to provide an avenue where small claims that would otherwise be determined in the usual courts can be handled separately. The result of this would be to ease the pressure on the other courts and at the same time provide an alternative which facilitates the quick settlement of small disputes.⁵³

The Small Claims Court is mandated under the act to adopt any other appropriate means of dispute resolution for the attainment of the above objective. The court can adopt ADR mechanisms and any agreement reached shall be recorded as a binding order from the court.

ODR is bound to have a very important position in the resolution of small claims. The use of an online platform to solve disputes means less human intervention. The more complex a dispute is, the more necessary it becomes to require more human involvement. With small claims, the parties, with the aid of technology alone, take part in the resolution of small claims.

The court may permit the proceedings before the court to be conducted by telephone, videophone or any other electronic means.⁵⁴ Furthermore, the act gives the parties the authority to lodge their claims through electronic means.⁵⁵ This provisions allow the applicability of ODR and just goes to show that the act can accommodate online mechanisms to facilitate justice.

⁵⁰ Section 4, *The Fair Administrative Action Act*, (2015).

⁵¹ Section 3, *The Fair Administrative Action Act*, (2015).

⁵² Article 169 (1) (d), *Constitution of Kenya* (2010).

⁵³ Section 3, *The Small Claims Court Act*, (No 2 of 2016).

⁵⁴ Section 29, *The Small Claims Court Act*, (No 2 of 2016).

⁵⁵ Section 23 (7), *The Small Claims Court Act*, (No 2 of 2016).

2.3 Institutional framework for ADR in Kenya

There are various institutions involved in the practice of ADR. They include; The Chartered Institute of Arbitrators (CIArb), The Nairobi Centre for International Arbitration (NCIA), Strathmore Dispute Resolution Centre (SDRC), the Mediation Training Institute (MTI) and the Judiciary.

2.3.1 Chartered Institute of Arbitrators

This is one of the major institutions, not only in Kenya but worldwide, that promotes and propagates the practice of ADR.⁵⁶ Although its focus is primarily on arbitration, it also offers training and other facilities in other fields of ADR such as mediation.⁵⁷ The institute is also involved in the publication of articles and related documents that aim at addressing the emerging issues in the practice of ADR as well as furthering awareness of the practice.⁵⁸

In addition, the institute provides professional training on the various forms of ADR to the public. One can enrol in one of the various courses offered and emerge as a qualified practitioner in that field of ADR without necessarily having to go through any other educational system.⁵⁹ This encourages any interested person regardless of their profession or prior training to become an ADR practitioner.

The institute has also taken upon itself to establish rules that will apply to the respective dispute resolution clauses in contracts that have accepted to apply them. These rules supplement the already established legislation governing the form of ADR. For example, the institute has provided Arbitration Rules⁶⁰ that will apply to contracts that have accepted to apply them.⁶¹ These rules are read hand in hand with the provisions of the Arbitration Act 1995 which as previously mentioned, govern the practice of Arbitration in Kenya.

The Arbitration Rules are inclined to accommodate online mechanisms. The rules allow notice to be delivered through electronic means such as facsimile or e-mail.⁶² The rules also, when the circumstances arise, prescribe that the arbitration proceedings can be conducted through a hearing by electronic communication.⁶³

⁵⁶ Ngotho P, 'The Role of the Chartered Institute of Arbitrators in the Integration of Arbitration in Africa – The Missing Links', *Chartered Institute of Arbitrators Journal* 4, 2016 63.

⁵⁷ CIArb. Kenya available at < <http://www.ciarbkenya.org/about.html> > Accessed on 23rd August 2016.

⁵⁸ CIArb. Kenya available at < <http://www.ciarbkenya.org/about.html> > Accessed on 23rd August 2016.

⁵⁹ CIArb. Courses Available at < <http://www.ciarbkenya.org/courses.html> > Accessed on 23rd August 2016.

⁶⁰ CIArb. Arbitration Rules Available at < <https://www.ciarb.org/.../ciarb-arbitration-rules.pdf> > Accessed on 23rd August 2016.

⁶¹ A standard clause may state that '*...The arbitration shall be governed by both the Arbitration Act 1995 and Rules as agreed between the parties...*' This means that the applicability of the rules is subject to the parties' determination.

⁶² Article 2 (2), *CIArb Arbitration Rules* (2015).

⁶³ Article 5 (2), *CIArb Arbitration Rules* (2015).

It is evident that the Chartered Institute of Arbitrators plays a key role in the promotion of ADR in Kenya. More importantly, through its publications,⁶⁴ it paves the way for new and refreshing literature on emerging issues such as ODR. It is therefore an important platform to promote the recognition and the practice of ODR in Kenya.

2.3.2 Nairobi Centre for International Arbitration

This is a recent ADR establishment in Kenya. It was established in 2013 through the Nairobi Centre for International Arbitration Act.⁶⁵ Its main aim is to promote the practice of international commercial arbitration as well as other forms of ADR in Kenya.⁶⁶

Due to the novelty of the institute, it has not done much in the sphere of ADR publications. It however intends to do so as it matures.⁶⁷

It also has established a set of arbitration⁶⁸ and mediation⁶⁹ rules, which aid the practice of the respective ADR mechanisms. Under the arbitration rules, a hearing can be conducted through a video conference, telephone or other electronic means subject to the agreement of the parties at the discretion of the arbitrator.⁷⁰ The arbitration rules further allow the use of electronic forms of documentation.⁷¹ On the other hand, the rules on mediation allow the mediator to communicate with the parties through a videoconference or any other electronic means that they see fit.⁷² It is clear from these provisions that the rules are open to the use of electronic and online mechanisms to facilitate their processes. It would be ideal in light of this openness to further the application of online mechanisms such as videoconferencing and the use of emails especially with regard to international matters.

Unlike the Chartered Institute of Arbitrators, the NCIA is a local initiative. This goes to show that Kenya is taking steps in the promotion of ADR practice both locally and at a global level. It will therefore act as a stepping stone in the recognition and promotion of ODR practice. This can be done through publications as well as the active participation of experienced ADR practitioners in promoting ODR.

⁶⁴ CI Arb. Publications available at: <http://www.ciarbkenya.org/publications.html> -Accessed on 23rd August 2016.

⁶⁵ *Nairobi Centre for International Arbitration Act*, (No. 26 of 2013).

⁶⁶ NCIA Website available at http://ncia.or.ke/index.php?option=com_content&view=article&id=109&Itemid=1241 >Accessed on 23rd August 2016.

⁶⁷ NCIA Information available at <http://www.ncia.or.ke/about-ncia/> >accessed on 19 November 2016.

⁶⁸ NCIA Arbitration Rules available at http://ncia.or.ke/phocadownload/arbitration_rules_2016.pdf >Accessed on 23rd August 2016.

⁶⁹ NCIA Mediation Rules available at http://ncia.or.ke/images/downloads/mediation_rules_2016.pdf >Accessed on 23rd August 2016.

⁷⁰ Rule 22, NCIA Arbitration Rules (2015).

⁷¹ Rule 25 (3) (d), NCIA Arbitration Rules (2015).

⁷² Rule 11 (3) (c), NCIA Mediation Rules (2016).

2.3.3 Strathmore Dispute Resolution Centre (SDRC) [formerly Dispute Resolution Centre (DRC)]

The DRC in Kenya was founded in 1997. It is aimed at promoting ADR mechanisms amid the increasing need for the resolution of disputes in East Africa. The centre is involved in the offering of training services in ADR as well as the provision of professional services relating to ADR which include consultancies among others.⁷³

Recently in 2012 DRC merged with Strathmore Law School to come up with the Strathmore Dispute Resolution Centre (SDRC). SDRC's main objective is the promotion of mediation and ADR mechanisms in Kenya and the wider East Africa.⁷⁴ Additionally, it is also involved in the propagation of hybrid ADR mechanisms such as Med-Arb and Arb-Med.⁷⁵ This is in a bid to create a more effective avenue to the resolution of disputes.

SDRC⁷⁶ is involved in producing publications which address various issues surrounding ADR and its development in East Africa and Africa on a wider scale. Dispute resolution clauses that refer to SDRC⁷⁷ are complimented with guidelines and rules that aid in the respective ADR process.

SDRC is, thus, a regional ADR hub promoting ADR not only in the country but in the wider East African region. With regard to ODR, SDRC can play a key role given its strategic position, resources and reputation in the region.

2.3.4 Mediation Training Institute (MTI)

MTI is a global organisation which is mainly tasked with the training and certification in mediation and the strategic management of workplace conflict.⁷⁸ It was established in 1985 and later launched in Kenya on the 18th of May 2010.⁷⁹

Unlike other institutes, it is primarily a virtual platform operating mainly from its website.⁸⁰ Although it is originally based in the United States, it has managed to establish a

⁷³ DRC Kenya available at < <http://www.disputeresolutionkenya.org/index.htm> -Accessed on 24th August 2016.

⁷⁴ SDRC available at: <http://www.strathmore.edu/sdrc/> >Accessed on the 24th of August 2016.

⁷⁵ Available at < <http://www.strathmore.edu/sdrc/what-we-do/dispute-resolution-services> >Accessed on 24th August 2016.

⁷⁶ SDRC Publications available at < <http://www.strathmore.edu/sdrc/resources/articles> >Accessed on 24th August 2016.

⁷⁷ SDRC Model Documents available at < <http://www.strathmore.edu/sdrc/resources/model-documents> >Accessed on 24th August 2016.

⁷⁸ MTI Website available at < www.mediationworks.com/pdf/MTI_Company_Profile.pdf >Accessed on 24th August 2016.

⁷⁹ MTI Website available at < <http://www.mediationworks.com/intl/kenya.htm> >Accessed on the 24th August 2016.

⁸⁰ This is because most of their courses are online and do not necessarily require a physical appearance.

global presence through international partnerships with local institutions and individuals.⁸¹ MTI in Kenya works through MTI Africa, which also operates in Uganda, Tanzania, Rwanda and South Sudan.⁸²

Other than training, MTI is also involved in seminars and webinars (a seminar conducted over the internet) which usually involve addressing the various issues surrounding mediation and workplace conflict resolution. They may either be available to the public or some may be private depending on the circumstances surrounding the issue being discussed.⁸³

MTI has embraced online methods to promote ADR. Other than its virtual primacy, it has gone further to provide an online conflict management toolbox which assists in assessing the costs and forms of conflicts in an organisation.⁸⁴

In view of the promotion of ODR, MTI is in a very good position comparatively. It has embraced the benefits of an online platform and thus can serve as a starting point in the promotion of ODR in Kenya.

2.3.5 The Judiciary

The Kenyan judiciary has taken steps in the incorporation of electronic mechanisms including online systems. This can be seen through the efforts of the Judiciary Transformation Framework which is attempting to incorporate ICT into various parts of the system.⁸⁵

As mentioned above, it is taking strides in the development of a teleconferencing platform into the justice system.⁸⁶ The digitalization of land documents will consequently be supplemented by ICT-supplemented judiciary. The Small Claims Court will be an essential part of the incorporation and promotion of ODR since it is easier to settle small claims through ODR.⁸⁷

2.4 International examples of the application of ODR

International bodies such as the International Chamber of Commerce (ICC) have as one of their goals, the development of the digital economy. It prioritizes the development of

⁸¹ The company profile describes it as a virtual organization located at www.mediationworks.com with a headquarters staff of six people in Kansas City USA. MTI's services are delivered by a global network of certified trainers.

⁸² MTI Website available at < <http://www.mediationworks.com/intl/kenya.htm> > Accessed on 24th August 2016.

⁸³ MTI Webinars available at < <http://www.mediationworks.com/webinars/index.html> > Accessed on 24th August 2016.

⁸⁴ MTI Toolbox available at < <http://www.mediationworks.com/dmi/toolbox.htm> > Accessed on 24th August 2016.

⁸⁵ The Kenya Judiciary, *Judiciary Transformation Framework 2012-2016*, 1.

⁸⁶ The Kenya Judiciary, *Judiciary Transformation Framework 2012-2016*, 46.

⁸⁷ CJC Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims*, Civil Justice Council London, 2015, 12.

legislation and policy related to digital trade in relation to the regulatory modernization in the digital economy.⁸⁸

The American Arbitration Association under their mediation rules allow the mediation to be conducted through electrical or technical means. In addition, their arbitration rules also provide for the same in a bid to increase the efficiency and the economy of the proceedings.⁸⁹

Companies like eBay have an online resolution process incorporated in their online platforms which allows the consumer to address their issues directly to the company before resorting to any other dispute resolution process. They refer to this platform as the resolution centre which can easily be accessed through their online retail stores.

Amazon on the other hand tries to resolve disputes that arise online. When a buyer submits a complaint, Amazon will contact the seller and help facilitate a resolution. Amazon contacts the buyer for additional information and the buyer must respond within five days or the complaint may be cancelled. Amazon strives to resolve disputes within 45 days from the date of submission.⁹⁰

2.5 Conclusion

The current laws and institutions governing ADR in Kenya have the potential to act as the platform necessary to facilitate the introduction of ODR. Kenya's constantly developing ICT sector has a key role to play in this development. With the necessary support and infrastructure, Kenya can comfortably make the next step by incorporating ODR-specific aspects in the pre-existing legal and institutional framework in place.

⁸⁸ International Chamber of Commerce available at < <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/digital-economy/> > accessed on 18th November 2016.

⁸⁹ ICDR, International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) (2014).

⁹⁰ Amazon Dispute Resolution Process available at: <https://payments.amazon.com/help/201751580> -accessed on 19 November 2016.

Chapter Three

Comparative Analysis of ODR in India and England

3.1 Introduction

This chapter aims at identifying and analysing the underlying legal framework and the application of ODR systems in India and the England. The choice of India as a comparative template owes to the fact that the country, like Kenya, is in the development phase in terms of its implementation of ADR. At the same time, it is in the process of enacting legislation and enforcement mechanisms that aim at accommodating ODR within the country.

This chapter will analyse the legal and institutional framework in place in India such as the Arbitration and Conciliation Act¹ and the Information Technology Act.² It will also look at various platforms supporting ODR such as the Electronic courts in India³ and the Centralized Public Grievance Redress and Monitoring System (hereinafter “CPGRAMS”).⁴ It will also highlight the proposed developments in ODR yet to be implemented by the state. India faces similar challenges as Kenya regarding its judicial system such as a large backlog of cases coupled by the lack of the necessary infrastructure for the proper implementation of ODR.⁵

England in association with the European Union (hereinafter “EU”) has made significant strides in the legal and implementation aspects of ODR. This can be seen through the ADR for Consumer Disputes (Amendment) Regulations,⁶ which mandates online dispute resolution mechanisms for online retailers in England. This is supplemented by the Online Dispute Resolution for Consumer Disputes and Amending Regulations (Regulation on consumer ODR) that apply to the members of the EU.⁷

It would be important to note at this point that there have been no changes to the rights and the status of EU and England nationals as a result of the (Brexit) referendum.⁸ This chapter will make a purely legal and institutional approach to the development of ODR in England *vis à vis* the EU and thus will not be affected by the shifting political landscape.

¹ *Arbitration and Conciliation Act* (No.26 of 1996) available at, < <http://lawmin.nic.in/ld/P-ACT/1996/index1996.htm> >accessed on 12 January 2016.

² *Information Technology Act* (No 21 of 2000). available at < <http://lawmin.nic.in/ld/P-ACT/2000/index2000.htm> >accessed on 12 January 2016.

³ E-Courts in India, available at < <http://www.electroniccourts.in/> >accessed on 13 December 2016.

⁴ Centralized Public Grievance Redress and Monitoring System < available at: <http://pgportal.gov.in/> >accessed on 13 December 2016.

⁵ Dimensions of Online Arbitration in India, available at < <https://advocatechenoyceil.com/tag/online-dispute-resolution-india/> >accessed on 13 December 2016.

⁶ *Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations* 2015 No. 1392.

⁷ *Regulation on Consumer ODR, Regulation*, (EC) No 2006/2004 and Directive 2009/22/EC.

⁸ “Brexit” Referendum available at > <https://www.gov.uk/eu-eea> >accessed on 9 December 2016.

The EU is an ideal example of the path Kenya ought to take in terms of the place of ODR. This is because, it has managed to establish an online dispute resolution platform for online disputes.⁹ Furthermore, the Online Dispute Resolution Advisory Group of the Civil Justice Council made a recommendation for the establishment of an online court¹⁰ which will be discussed later in the chapter.

Cumulatively, this chapter will look into the developments in these two countries in the area of ODR so as to identify a path suitable for Kenya in its journey towards ODR as an avenue for resolving disputes in Kenya.

3.2 ODR in India

As mentioned earlier, India faces similar hurdles as Kenya in relation to the backlog of pending cases to be resolved and the developing legal landscape surrounding ADR.¹¹ This necessitates the country to seek alternative methods of dispute resolution.

Consequently, India's current ADR legal framework incorporates various aspects of ODR that may be emulated by Kenya. These can be found in their Code of Civil Procedure,¹² the Arbitration and Conciliation Act¹³ and their Information Technology Act.¹⁴

3.2.1 The Code of Civil Procedure¹⁵

This piece of legislation facilitated the implementation of ADR in India. The Code prescribes the use of alternative dispute resolution mechanisms such as arbitration, mediation conciliation and mediation¹⁶ through an amendment in the Code of Civil Procedure (Amendment Act).¹⁷ The provision gives the court the authority to provide for alternative means where it deems fit.¹⁸

In relation to ODR, this provision acts as a stepping stone similar to the Kenyan Civil Procedure Code.¹⁹ It paves the way for alternative means which includes ODR.

⁹ EU ODR Platform available at <<https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN>> accessed on 9 December 2016.

¹⁰ CJC Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims*, February 2015.

¹¹ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial (wo)manpower*, July 2014.

¹² *The Code of Civil Procedure* (Act No. 8 of 1908).

¹³ *Arbitration and Conciliation Act* (No.26 of 1996).

¹⁴ *Information Technology Act* (No 21 of 2000).

¹⁵ *The Code of Civil Procedure* (Act No. 8 of 1908).

¹⁶ Section 89, *The Code of Civil Procedure* (Act No. 8 of 1908).

¹⁷ *The Code of Civil Procedure* (Amendment Act 46 of 1999).

¹⁸ Section 7, *The Code of Civil Procedure* (Amendment Act 46 of 1999).

¹⁹ *Civil Procedure Act* (Revised Edition 2012 [2010]).

3.2.2 Arbitration and Conciliation Act²⁰

Arbitration first found its place in Indian legislation through the Bengal Regulation Act²¹ which was the first to prescribe the role of arbitrators. It was later followed by the Arbitration Act of 1940²² which repealed the Arbitration Act of 1899.²³ This finally led up to the Arbitration and Conciliation Act.²⁴

This Act gives parties the authority to determine the procedure to be followed by the arbitral tribunal.²⁵ They are not bound by the Code of Civil Procedure.²⁶

This means that Parties may even choose to conduct the whole of the proceedings online if they have the appropriate means. This can be seen in the case of *Shakti Bhog Foods Ltd v. Kola Shipping Ltd*²⁷ where the Supreme Court of India upheld the validity of an arbitration agreement entered by the parties through exchange of emails only and no formal writing signed by the parties. This is also the case in *Trimex International Fze Limited v. Vedanta Aluminium Limited*²⁸ where Trimex and Vedanta exchanged several emails regarding the supply of bauxite when there was only a draft contract which was yet to be formalised. The Supreme court of India upheld the email correspondence as a valid communication of an offer and an acceptance.

3.2.3 Information Technology Act 2000

This Act plays a facilitative role in the promotion of ODR in India. The purpose of the Act was to encourage electronic data interchange and other means of electronic communication through the recognition of electrical records and digital signatures.²⁹

Electronic records can be authenticated by affixing a digital signature.³⁰ Electronic records are legally recognised where the law provides that information may be in writing or in the typewritten or printed form.³¹ Similarly, digital signatures are also recognised where any law provides for authentication through the affixture of a signature.³²

²⁰ *Arbitration and Conciliation Act* (No.26 of 1996).

²¹ *Bengal Regulating Act* of 1773 (Repealed).

²² *Arbitration Act*,1940 (Repealed).

²³ *Arbitration Act*,1899 (Repealed).

²⁴ *Arbitration and Conciliation Act* (No.26 of 1996).

²⁵ Section 19(2), *Arbitration and Conciliation Act* (No.26 of 1996).

²⁶ Section 19(1), *Arbitration and Conciliation Act* (No.26 of 1996).

²⁷ *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.* AIR (2009) SC 12.

²⁸ *Trimex International FZE Ltd. v. Vedanta Aluminum Ltd.* (2010) 3 SCC 1.

²⁹ Preliminary, *Information Technology Act* (No 21 of 2000).

³⁰ Section 3, *Information Technology Act* (No 21 of 2000).

³¹ Section 4, *Information Technology Act* (No 21 of 2000).

³² Section 5, *Information Technology Act* (No 21 of 2000).

What this means for ODR is that parties are not only able to conduct proceedings online, but are also able to authenticate any requisite documents through electronic means.³³ This means that physical documents need not be sent to a party for authentication via a signature. The ODR proceedings can be conducted in its entirety online. As mentioned before, this Act is facilitative in relation to ODR simply because it legally legitimises the use of ICT facilities to enhance contractual relations.³⁴

3.2.4 Initiatives supporting ODR in India

India has established systems aimed at relieving the judicial pressure caused by the large backlog of pending cases. These systems utilise ICT mechanisms to provide access to dispute resolution platforms. One of these systems include, the Centralised Public Grievance Redress Monitoring System³⁵ (hereinafter “CPGRAMS”). This is an online platform set up by the Indian Government aimed at providing a channel for the general public to communicate their grievances to the government.

CPGRAMS is linked to two government agencies namely, the Department of Administrative Reforms and Public Grievances; Ministry of Personnel, Public Grievances & Pensions³⁶ and the Directorate of Public Grievances; Cabinet Secretariat.³⁷ These two departments work together to address the grievances lodged through the portal and follow them up to their completion.³⁸

Another initiative that is being utilized is the Techno Legal Centre of Excellence for Online Dispute Resolution in India (hereinafter “TLCEODRI”). This is a forum that discusses the development and implementation of ODR in India. In addition, the forum has opened a dispute resolution platform that utilises unique ‘tickets’ that open an online channel for dispute resolution.³⁹ This platform is in its testing phase. Nonetheless, it serves as a prime template for the future of ODR mechanisms to be established in India.⁴⁰ TLCEODRI also hosts a blog where articles, opinions, views, suggestions and methods pertaining to use of ODR in India are discussed.⁴¹

³³ Digital Signature India, available at < <https://www.digitalsignatureindia.com/> > accessed on 12 January 2016.

³⁴ Digital Signature India, available at < <https://www.digitalsignatureindia.com/> > accessed on 12 January 2016

³⁵ CPGRAMS, available at < <http://pgportal.gov.in/> > accessed on 21 December 2016.

³⁶ Department of Administrative Reforms and Public Grievances, available at < <http://persmin.nic.in/> > accessed on 21 December 2016.

³⁷ Directorate of Public Grievances, available at < <http://dpg.gov.in/> > accessed on 21 December 2016.

³⁸ CPGRAMS available at < <http://pgportal.gov.in/grm.aspx> > accessed on 21 December 2016.

³⁹ TLCEODRI Dispute Resolution Portal, available at < <http://odrindia.in/training/odr/> > accessed on 21 December 2016.

⁴⁰ TLCEODRI Dispute Resolution Portal available at < <http://odrindia.in/tlceodri/> > accessed on 21 December 2016.

⁴¹ TLCEODRI Blog Platform, available at < <http://odrindia.in/tlceodri/> > accessed on 21 December 2016.

In addition to the above, India is piloting an e-court system which intends to bring speedier trials to the judicial process.⁴² This system however, is in its infancy stage.⁴³ Phase-I of the project is already being implemented through the establishment of a Case Information System software⁴⁴ which will be accessible through an e-courts portal.⁴⁵ However, the Case Information System software already exist here in Kenya through the establishment of Kenya Law.⁴⁶

The novel section in India's e-court project is in phase-II. This phase was approved in July, 2015 by the Cabinet.⁴⁷ It intends to enhance the availability of e-services through e-filing of cases which will allow the public to electronically file cases without the need for physical documentation.⁴⁸ This development will be essential to ODR because the lack of physical documentation compliments online dispute resolution processes in general.

The National Internet Exchange of India (NIXI) is tasked with the maintenance of domestic internet traffic between different internet service providers.⁴⁹ It also manages the '.IN' domain.⁵⁰ It utilises online arbitration in the resolution of domain name disputes.⁵¹ It also has a public grievance tab providing a link to the CPGRAMS online platform.⁵²

3.3 ODR in England

England as has benefitted from significant strides in the EU regarding the development of ODR. The EU established an online dispute resolution platform for online disputes.⁵³ This applies to member states through the Online Dispute Resolution for Consumer Disputes and Amending Regulations (Regulation on consumer ODR).⁵⁴

⁴² E-courts Project Summary, available at< <http://www.nic.in/projects/e-courts-project> >accessed on 22 December 2016.

⁴³ E-courts information available at< <http://electroniccourts.in/> >accessed on 22 December 2016.

⁴⁴ Phase-I, E-courts Project, available at< <http://pib.nic.in/newsite/PrintRelease.aspx?relid=132954> >accessed on 22 December 2016.

⁴⁵ E-courts Portal, available at< http://www.ecourts.gov.in/ecourts_home/ >accessed on 22 December 2016.

⁴⁶ Kenya Law, available at< <http://kenyalaw.org/kl/> >accessed on 22 December 2016.

⁴⁷ Phase-II approval available at< <http://gadgets.ndtv.com/internet/news/cabinet-approves-phase-ii-of-ecourts-mission-mode-project-716272> >accessed on 22 December 2016.

⁴⁸ E-committee Supreme Court of India, *Policy and Action Plan Document Phase-II of the E-courts Project*, 2014, 65.

⁴⁹ National Internet Exchange of India (NIXI), available at< <http://www.nixi.in/en/about-us> >accessed on 12 January 2017.

⁵⁰ NIXI .IN Registry, available at< <http://www.nixi.in/en/about-us/76-in-registry> >accessed on 12 January 2017.

⁵¹ Jhusiwala R, 'Online Dispute Resolution, A Step in the Right Direction', Issue 5, *PSA Legal Counsellors Bulletin*, 2010, 1.

⁵² NIXI Public Grievance Page, available at< <http://www.nixi.in/en/public-grievance-redressal-officer> >accessed on 12 January 2017.

⁵³ EU ODR Platform, available at< <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN> >accessed on 22 December 2016.

⁵⁴ *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

These regulations apply to all out-of-court dispute resolution processes concerning contractual obligations stemming from online sales or service contracts between consumers and traders.⁵⁵ It dictates that the platform ought to provide an electronic complaint form which can be filled in by the complainant.⁵⁶ More importantly, the platform offers an electronic case management tool free of charge, which enables the parties to conduct the dispute resolution procedure online through the ODR platform.⁵⁷

For this system to work, member states are obliged to establish ‘ODR contact points’. These will provide a local platform to lodge claims in respective state. They act as conduits to the main EU ODR platform.⁵⁸

The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations bring the regulation into force in England. It mandates online traders within England to provide a link to the EU online platform on their website which is easily accessible to the consumers.⁵⁹

In England, online platforms such as the ‘ODR Contact Point’ have been set up to educate the public on what they need to know before they engage in online dispute resolution and to link them to the EU site.⁶⁰

The Civil Justice Council is an advisory public body in the UK which is established under the Civil Procedure Act 1997.⁶¹ It is tasked with the responsibility of overseeing and coordinating the modernisation of the civil justice system.⁶² A report, by an advisory group within the Civil Justice Council, called for a new system for ODR to be piloted "as soon as is practicable" and said that a new online court could be operational in England and Wales by 2017.⁶³ The report recommends that the new internet based court shall be referred to as Her Majesty’s Online Court (HMOC).⁶⁴

Lord Dyson, former head of Civil Justice and former Justice of the Supreme Court of the UK, said that the system, like in France, should encourage more than simply greater

⁵⁵ Article 1, *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

⁵⁶ Article 5a, *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

⁵⁷ Article 5(d), *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

⁵⁸ Article 7, *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

⁵⁹ Regulation 19A, *Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations* 2015.

⁶⁰ ODR Information website, available at < <https://www.odrcontactpoint.uk/> > accessed on 22 December 2016.

⁶¹ Section 6, *Civil Procedure Act* 1997.

⁶² CJC Website, available at < <https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/> > accessed on 22 December 2016.

⁶³ UK Online Court Information available at < <http://www.out-law.com/en/articles/2015/april/UK-businesses-must-prepare-for-online-dispute-resolution-says-expert/> > accessed on 22 December 2016.

⁶⁴ CJC Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims*, February 2015.

efficiency and that it should allow innovation such as the creation of a website that provides an e-filing service for litigants-in-person.⁶⁵

Individuals would be able to resolve their disputes through an ODR mechanism. If that failed, the website would enable the creation of files electronically and the necessary court documents to commence a claim. He also mentioned that this kind of system would primarily aim at small claims.⁶⁶

3.3.1 Complaint Filing Procedure on the ODR Platform⁶⁷

When a dispute arises, the consumer will need to fill in an online complaint form and submit it to the ODR Platform.⁶⁸ The complaint will be sent from the ODR Platform to the respective trader, who will propose an ADR entity to the consumer. The trader has 10 days to mention whether they are either obliged or not to use a specific approved ADR provider if they are willing to use one of the approved ADR providers mentioned in the message from the ODR Platform.⁶⁹

Where the trader doesn't intend to use an approved ADR provider, then the ODR Platform will not be able to proceed with the complaint any further.⁷⁰

When the trader has responded to this message, the ODR platform will then send a similar message to the consumer. If they both agree on an ADR entity to handle their dispute, the ODR Platform will automatically transfer the complaint to that entity. Once the transfer has occurred, the ADR entity handles the case entirely online and reaches an outcome in 90 days.⁷¹

3.4 Other Global ODR Initiatives

There are other ODR initiatives that have been established that apply generally to anyone with access to the internet. They provide ODR services to anyone who is interested

⁶⁵ Lord Dyson, *Delay Too Often Defeats Justice*, April 2015 at The Law Society, Magna Carta Event.

⁶⁶ Lord Dyson, *Delay Too Often Defeats Justice*, April 2015 at The Law Society, Magna Carta Event.

⁶⁷ European Union Online Dispute Resolution Procedure, available at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.complaints.timeLine&uuid=#step-one> -accessed on 22 December 2016.

⁶⁸ European Union Online Dispute Resolution Procedure, available at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.complaints.timeLine&uuid=#step-one> -accessed on 22 December 2016.

⁶⁹ European Union Online Dispute Resolution Procedure, available at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.complaints.timeLine&uuid=#step-one> -accessed on 22 December 2016.

⁷⁰ European Union Online Dispute Resolution Procedure, available at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.complaints.timeLine&uuid=#step-one> -accessed on 22 December 2016.

⁷¹ European Union Online Dispute Resolution Procedure, available at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.complaints.timeLine&uuid=#step-one> >accessed on 22 December 2016.

around the world. Some include; Modria,⁷² Anywhere Arbitration,⁷³ and Ujuij.⁷⁴ The United Nations Commission on International Trade Law (hereinafter ‘UNCITRAL’) is also coming up with rules that will govern cross-border ODR.⁷⁵

Modria is a cloud based platform that provides tools for resolution of disputes online.⁷⁶ It primarily deals with business to consumer disputes.⁷⁷ It does this by providing an avenue for the submission of a claim by a customer. It thereafter analyses the relevant information such as the item or service being contended, shipping details etc. Modria automatically decides on a resolution based on the information regarding the dispute and if the customer is not satisfied with the resolution, Modria connects the customer directly to the seller to work out the problem themselves.⁷⁸ For one to obtain services from Modria, they must subscribe to the platform at a fee.⁷⁹

Anywhere Arbitration maintains the same idea as Modria of providing an online platform for dispute resolution. However, it only deals with online arbitration.⁸⁰ Parties are meant to agree beforehand to utilise the platform. Just like conventional arbitration, parties are to submit their claim and the defence which will be arbitrated by an actual arbitrator/panel of arbitrators.⁸¹ These submissions will be made by e-mail.⁸² In addition, like in conventional arbitration, parties can also submit evidence, seek clarifications on a submission or even ask questions regarding any submission like an examination-in-chief, cross-examination or a re-examination in court.⁸³ Finally, the arbitrator(s) will produce an award one week after the exchange of all statements and documents. This award is enforceable in countries that are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁸⁴

⁷² Modria, available at < <http://modria.com/product/> >accessed on 12 January 2017.

⁷³ Anywhere Arbitration, available at < <http://www.anywherearbitration.com/> >accessed on 12 January 2017.

⁷⁴ Ujuij, available at < <http://www.ujuij.org/whatisujuij.html> -accessed on 12 January 2017.

⁷⁵ Working Group III, available at < http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html >accessed on 13 January 2017.

⁷⁶ Modria Product, available at < <http://modria.com/product/> >accessed on 12 January 2017.

⁷⁷ How Modria Works, available at < <http://modria.com/how-it-works/> >accessed on 12 January 2017.

⁷⁸ How Modria Works, available at < <http://modria.com/how-it-works/> >accessed on 12 January 2017.

⁷⁹ Modria Pricing, available at < <http://modria.com/pricing/> >accessed on 12 January 2017.

⁸⁰ About Anywhere Arbitration, available at < <http://www.anywherearbitration.com/about-us.html> >accessed on 13 January 2017.

⁸¹ How Anywhere Arbitration Works, available at < <http://www.anywherearbitration.com/how-it-works.html> >accessed on 12 January 2017.

⁸² Anywhere Arbitration Claim Submission, available at < <http://www.anywherearbitration.com/submit-a-claim.html> >accessed on 12 January 2017.

⁸³ How Anywhere Arbitration Works, available at < <http://www.anywherearbitration.com/how-it-works.html> >accessed on 12 January 2017.

⁸⁴ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 June 1959, 330 UNTS 38.

Ujuj (pronounced as ‘You Judge’) is an online alternative to a small claims court. Parties submit their arguments in video form by uploading them to the website for the Internet Public to vote on the outcome.⁸⁵

The claimant is to record a video of his claim which is limited to three minutes. They can also provide a fifty-character description of the claim and enter the amount claimed in the case of a monetary dispute. The claimant must know the email address of the respondent since once the claim has been submitted, Ujuj will notify the respondent of a pending claim. Ujuj will provide the respondent with a link which will direct them to the video of the claimant. Similarly, the defendant is to present his defence in a three-minute video just like the claimant.⁸⁶

After both parties, have made their submissions, the case will be publicised and made available for voting for seven days. To vote, one must have an Ujuj account. If an account holder has not been specified as an interested party to a case, then they can only vote on cases that are open to any account holder.⁸⁷

If the final average vote is less than thirty three percent, then the Claimant will lose the case and will be required to give the respondent ten percent of what he was claiming. In the same instance, the respondent would have won the case and will not owe the claimant what he claimed, he will instead expect ten percent of the amount claimed. The opposite applies where the average vote is above thirty three percent.⁸⁸

UNCITRAL established a working group on Cross-Border ODR in 2010.⁸⁹ The group assigned was ‘Working Group III.’⁹⁰ It is tasked with the development of rules that will govern cross-border ODR for disputes arising out of e-commerce transactions.⁹¹ It holds a series of sessions in which they discuss the formulation of these rules, each time improving them.⁹² Their last session was held on 29 February 2016 to 4 March 2016 in New York where they discussed aspects such as the principles of the process, the stages of the ODR process, the scope

⁸⁵ Ujuj, available at: <http://www.ujuj.org/whatisujuj.html> >accessed on 13 January 2017.

⁸⁶ Ujuj, available at: <http://www.ujuj.org/whatisujuj.html> >accessed on 13 January 2017.

⁸⁷ Ujuj, available at: <http://www.ujuj.org/whatisujuj.html> >accessed on 13 January 2017.

⁸⁸ Ujuj, available at: <http://www.ujuj.org/whatisujuj.html> >accessed on 13 January 2017.

⁸⁹ National Centre for Technology and Dispute Resolution (NCTDR), available at: <http://odr.info/uncitral-cross-border-odr/> >accessed on 13 January 2017.

⁹⁰ Working Group III, available at: http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html >accessed on 13 January 2017.

⁹¹ NCTDR, available at: <http://odr.info/uncitral-cross-border-odr/> >accessed on 13 January 2017.

⁹² Working Group III, available at: http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html >accessed on 13 January 2017.

of the ODR process among other issues.⁹³ It is expected that the Working Group will eventually produce a substantial framework governing cross-border ODR.

3.5 Conclusion

It is clear from the discussed ODR structures and entities that it is essential to establish a concrete legal framework from which initiatives can be grounded on. For example, the legalisation of digital signatures in India paves the way for more online transactions thus giving more legitimacy to ODR initiatives.⁹⁴ Following this establishment, both countries have utilised the services of ODR institutions to set up an ODR base in their countries. In India, the establishment of CPGRAMS as a centralised platform for submitting online grievances and in England, the EU ODR platform in association with ODR Contact Point are some of the institutions that have furthered the ODR initiative in their respective countries.

Kenya can replicate most of these initiatives. As seen from the previous chapter, we have the necessary institutions in place that can come up with policy that can be translated into viable laws. Consequently, these institutions can act upon those new laws and come up with cogent ODR initiatives like those highlighted above.

⁹³ UNCITRAL, *Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session*, 27 June 2016, New York.

⁹⁴ Digital Signature Development available at <<http://www.networkmagazineindia.com/200610/coverstory03.shtml>> accessed on 23 December 2017.

Chapter Four

Operability of an Independent ODR System in Kenya

4.1 Introduction

This chapter will attempt to reconcile the various aspects of ODR that have the potential to improve the state of access to justice in Kenya. It will address the need for its independent recognition in the Kenyan legal system and evaluate its viability as a legitimate alternative that can be applied in lieu of the existing conventional forms of ADR.

The word “independent” regarding ODR is used to portray a stand-alone system of ODR that is not annexed (in law or in practice) the conventional methods of ADR.

It goes without saying that indeed the prospect of ODR will be beneficial to the current state of access to justice in Kenya. However, what is to be determined is whether ODR itself need be given individual recognition in our current legal and institutional framework.

As already elaborated in the previous chapters, there are various forms of ODR that exist. Some of these forms utilise autonomous programmes while others act as conduits to facilitate conventional methods of ADR. It has also been mentioned in Chapter Two that our legal system has the legal framework necessary to improve the position of ODR.

It is critical to this study to establish whether these forms of ODR can be facilitated by the current legal framework or whether Kenyan policy makers need to go back to the drawing board to set up a legal and institutional framework that gives further recognition of ODR.

Kenya, as pointed out in the previous chapters, is in the process of improving its ICT infrastructure in general¹ and within the legal landscape.² This corresponds with the constant global development in various areas of technology such as online commerce and telecommunication.³ Consequently, ODR has a place in the current global space. However, what is left for consideration is whether Kenya is able to recognise ODR as an independent avenue to justice in Kenya.

Considering the above, this chapter will attempt to determine the practicality of ODR in Kenya. It will also look at how ODR can fit in as an independent alternative form of dispute resolution. It will also assess the state of technology in the country and determine the practicality of ODR with the current technological infrastructure. A regulatory authority will be essential in the establishment of ODR. Therefore, this chapter will also attempt to determine

¹ Ministry of Information Communications and Technology, *Draft National ICT Policy* (2016), 33.

² The Kenya Judiciary, *Judiciary Transformation Framework 2012-2016*, 2012, 14.

³ Urrutia B, ‘Internet and its effects on competition’, *Universidad Internacional Menendez Pelayo (UIMP) Workshop* 2000, 2.

a potential regulator given the stark differences with conventional methods. This chapter will also elaborate on the effect of ODR on the conventional ADR methods of ADR. Lastly, it will look at some of the benefits to be expected from embracing an independent ODR framework.

4.2 Practicality of ODR within the Current Institutional Framework

As discussed in Chapter Two, there are a number of institutions that deal with ADR in Kenya. It particularly looked at the Chartered Institute of Arbitrators, the Nairobi Centre for International Arbitration, the Strathmore Dispute resolution centre and the Mediation Training Institute, among others.

These institutions have important roles in the practice and regulation of ADR. The question arises as to how ODR can be practiced and regulated by the same institutions. The Chartered Institute of Arbitrators, is an international organisation with semi-autonomous branches in a number of countries.⁴ However, the value of the institution lays with the individual members and practitioners within it.⁵ This is a similar situation within other intuitions such as SDRC.⁶ The NCIA being a novel institution may currently not share in this quality but they anticipate subscribers as they grow.⁷

The effect of this structure is a strong dependence on the human aspect of dispute resolution. ODR as discussed earlier, can either facilitate or diminish the role of the human aspect of the dispute resolution process.⁸ Therefore, by institutions having a strong reliance on the human aspect, it is more difficult to embrace ODR due to the lack of knowledge on the topic coupled by the reluctance to embrace new methods.⁹

More so, institutions may have to invest in embracing this form of dispute resolution. Like in the UK, there may be the need to establish an ODR platform that deals specifically with ODR. As it stands, Kenya does not have an ODR platform specifically dealing with online disputes. This may come as a challenge that may deter the current institutional framework from making that leap into the online platform. The Communications Authority of Kenya is mandated to regulate communication services in the country.¹⁰ The commission, by its own

⁴ CI Arb Main Website, available at < <http://www.ciarb.org/about> > accessed on 10 January 2016.

⁵ CI Arb Singapore Website, available at < <http://www.ciarb.org.sg/membership/> > accessed on 10 January 2016.

⁶ SDRC Panel of Mediators, available at < <http://www.strathmore.edu/sdrc/our-people/panel-of-mediators> > accessed on 10 January 2016.

⁷ NCIA Arbitrators Panel Registration, available at < <http://www.ncia.or.ke/arbitrators-panel-status-application/> > accessed on 10 January 2016.

⁸ Jacobs P 'Mediation Now and Then', 14.

⁹ The Internet and ADR Educating Lawyers about Online Dispute Resolution, available at, < http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/internetadr.html < accessed on 16th March 2016.

¹⁰ Section 5, *Information and Communications Act*, (2011).

initiative or in association with other organisations may engage in the establishment of an online platform. As pointed out in Chapter Three, NIXI in India provide for online arbitration and at the same time link their site to the CPGRAMS platform. Similarly, the Communications Authority can replicate NIXI through the establishment of an online platform.

A communication company like Safaricom, being the biggest communication company in East and Central Africa,¹¹ can be utilised to further the goal of an independent ODR system. The Communications Authority can utilise Safaricom's Network to provide an access point to ODR services through their mobile devices.

The type of ODR that involves semi-autonomous programs that greatly diminish human involvement may seem inopportune from the institutions' standpoint. This can be linked to their dependence on the human aspect of dispute resolution. It is sometimes easy to overlook the fact that these institutions are in fact also business enterprises which aim to benefit monetarily from dispute resolution. This can play in the reluctance of institutions to embrace ODR as a dispute resolution method.

The Kenyan institutional framework also involves the Judiciary. Unlike private institutions as mentioned above, it is part of the government and it is bound by law to act in the interest of its citizenry.¹² Therefore, it is less likely for the judiciary to capitalise on private interests over the needs of the people. This institution is in a unique position regarding ODR. Being an arm of the government, it is in the best position to establish a centralised ODR platform as in the case of India in form of their Centralised Public Grievance Redress Monitoring System.¹³ A page can also be taken from the EU ODR platform¹⁴ and the proposed, Her Majesty's Online Court (HMOC) in the England and Wales.¹⁵

Similarly, institutions that provide services to the general public are bound to have disputes and therefore can benefit from an ODR system. Institutions such as the Insurance Regulatory Authority(IRA),¹⁶ the Kenya Revenue Authority(KRA),¹⁷ Postal Corporation of

¹¹ Safaricom Website, available at < <https://www.safaricom.co.ke/about-us/about-safaricom> >accessed on January 16 2017.

¹² Article 10, *Constitution of Kenya* (2010).

¹³ CPGRAMS, available at < <http://pgportal.gov.in/> >accessed on 21 December 2016.

¹⁴ EU ODR Platform, available at < <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN> >accessed on 22 December 2016.

¹⁵ CJC Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims*, February 2015.

¹⁶ IRA Website, available at < <http://www.ira.go.ke/> >accessed on 16 January 2017.

¹⁷ KRA Website, available at < <http://www.kra.go.ke/> >accessed on 16 January 2017.

Kenya (PCK),¹⁸ Kenya Bankers Association (KBA),¹⁹ and the Central Bank of Kenya (CBK)²⁰ can play a key role in the advancement of ODR.

The IRA website contains a page for the online submission of complaints.²¹ The complaints procedure is determined by the authority.²² However, complaints submitted by telephone or e-mail must be confirmed in writing.²³ This may limit the enforceability of ODR thus the need for an independent ODR framework that is capable supporting online submissions without the need for paperback submissions.

Similarly, KRA have a complaint submission page but the specific resolution process has not been specified.²⁴ With initiatives such as I-Tax which enable online filing of tax returns and related transactions,²⁵ there is the need for an ODR system capable of addressing the challenges that arise from the use of online services such as hacks and distortion of online information through malicious software.

PCK do not provide for an online platform for dispute resolution.²⁶ Despite this, they host an online service aimed at tracking one's emails knowing when they are delivered and opened.²⁷ They additionally provide e-mail encryption services.²⁸ It also provides for electronic signatures which result in legally binding signoffs on online documents and agreements.²⁹ These services can prove to be essential to the development of ODR.

KBA's main objective is to cater for the interests of member banks in the negotiation of terms and conditions for its employees and the standardization of management practices.³⁰ It engages with the government sector regulator which is the CBK. This relationship is prone to disputes arising due to the varied interests of the two institutions. Disputes between the two

¹⁸ Postal Corporation Website, available at < <https://www.posta.co.ke/> > accessed on 16 January 2017.

¹⁹ KBA Website, available at < <http://www.kba.co.ke/index.php> > accessed on 16 January 2017.

²⁰ CBK Website, available at < <https://www.centralbank.go.ke/bank-supervision/> > accessed on 16 January 2017.

²¹ IRA Complaints Form, available at < <http://www.ira.go.ke/index.php/component/proforms/complaints-form> > accessed on 16 January 2017.

²² IRA Complaints Procedure, available at < <http://www.ira.go.ke/index.php/component/fsf/?view=faq&catid=6> > accessed on 16 January 2016.

²³ IRA Complaints Procedure, available at < <http://www.ira.go.ke/index.php/component/fsf/?view=faq&catid=6> > accessed on 16 January 2016.

²⁴ KRA Complaints and Information Centre, available at < <http://www.kra.go.ke/index.php/complaints-and-information-centre> > accessed on 16 January 2017.

²⁵ KRA I-Tax, available at < <http://www.kra.go.ke/index.php/kra-portal> > accessed on 16 January 2017.

²⁶ Postal Corporation Website, available at < <https://www.posta.co.ke/> > accessed on 16 January 2017.

²⁷ R-Mail, available at < <http://www.rmail.com/pck/> > accessed on 16 January 2017.

²⁸ R-Mail Encryption, available at < <http://www.rmail.com/pck/features/email-encryption-2/> > accessed on 16 January 2017.

²⁹ R-Mail, E-Signature, available at < <http://www.rmail.com/pck/features/e-sign-2/> > accessed on 16 January 2017.

³⁰ KBA Background Information available at < http://www.kba.co.ke/about_us.php > accessed on 16 January 2016.

institutions are frequently referred to the courts and usually involve class action suits.³¹ This system can be transitioned to the operation of ODR in that class action suits will be able to be filed online where the dispute can be expeditiously resolved

The above institutions can operate in tandem with the proposed online platform. The platform can act as a link to specific online platforms hosted by the institutions. Here, specific expertise can be applied to specific cases. These platforms will be regulated by the independent ODR framework.

The use of facilitative rather than role diminishing modifications can encourage its implementation.³² Conventional methods of ADR can be altered to cope with the ever-changing technological standards in the country.³³ This will also require changes in the legal framework since Kenya has established laws on some types of ADR such as the Arbitration Act.³⁴

4.3 Practicality of ODR within the Current Legal Framework

Chapter Two dealt with the various laws on Kenya that can be applied to ODR. The Constitution implicitly invites the idea of ODR through its provisions on the promotion of access to justice.³⁵ It, however, does not contain any express provision on ODR. This may not be an inhibitor, as such, since it is the nature of the Constitution to have a blanket application of the law. In line with this ideology, it would be important to establish whether the current statutory regime would be adequate to support ODR as a method of resolving disputes in the country.

In the case of the Arbitration Act,³⁶ it provides for party autonomy which would consequently give the parties the authority to conduct proceedings expeditiously.³⁷ Furthermore, the freedom to determine procedure³⁸ allows for the space to implement ODR procedures such as correspondence through e-mails. However, this is not enough to maximise the possibilities ODR can provide.

For instance, the lack of regulations on online-arbitration where submission of documents, evidence and witness hearings can all be performed through online means such as

³¹ KBA/CBA Disputes Information available at < <http://www.businessdailyafrica.com/Corporate-News/Bankers-seek-key-court-ruling-on-loan-charges-in-class-/539550-3157820-oadgus/index.html> > accessed on 16 January 2017.

³² Rafal Morek, 'Regulation of Online Dispute Resolution: Between Law and Technology', 2005 13, available at < http://www.odr.info/cyberweek/Regulation%20of%20ODR_Rafal%20Morek.doc > accessed on 14 Jan 2016.

³³ Ministry of Information Communications and Technology, *Draft National ICT Policy* 2016, 33.

³⁴ *Arbitration Act*, No. 4 of 1995.

³⁵ Article 48, *Constitution of Kenya* (2010).

³⁶ *Arbitration Act* No. 4 of 1995.

³⁷ Section 19A, *Arbitration Act* (1995).

³⁸ Section 20, *Arbitration Act* (1995).

email, tele-conferencing, video-conferencing³⁹ may fall short of provisions relating to the standards to be maintained such as confidentiality, network interference, and the potential of intentionally frustrating the process due to the lack of physical presence of the parties.

The Consumer Act opens “business to consumer” disputes to any resolution procedure available in the law.⁴⁰ ODR is not recognised by the law independently thus there is still the need to resort to conventional methods. The Act gives slight recognition and protection of online transactions⁴¹ but does not provide online methods of resolution. This may come as a challenge since, as mentioned earlier, it may prove more cumbersome to resolve thus deterring the complainant from resolving the issue.

The Kenya Information and Communications Act of 2009,⁴² provides for e-commerce, e-contracting and digital signatures.⁴³ The Act supports e-contracts by giving recognition to signed either physically or electronically by way of an e-signature.⁴⁴ However, although the law indeed recognises digital signatures, without regulations from the Communications Authority on their application, the law cannot be implemented further thus removing their utility since they are not beneficial in practice.⁴⁵

The other Acts mentioned in Chapter Two face the same challenge, that is the lack of a sufficient legal background capable of supporting ODR to its full potential.

The contrary applies in the case of the Online Dispute Resolution for Consumer Disputes and Amending Regulations (Regulation on consumer ODR)⁴⁶ in force in the UK through the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations.⁴⁷ These pieces of legislation apply directly to the regulation of ODR in the UK and thus provide for a more cogent framework for its application.

³⁹ How it works – ‘Anywhere Arbitration’, available at <<http://www.anywherearbitration.com/how-it-works.html>> accessed on 18th March 2016.

⁴⁰ Section 88, *Consumer Protection Act* (No. 46 of 2012).

⁴¹ Section 33 (2), *Consumer Protection Act* (No. 46 of 2012).

⁴² *Kenya Information and Communications Act* (2009).

⁴³ Section 83P, *Information and Communications Act* (2009).

⁴⁴ Section 2, *Information and Communications Act* (2009).

⁴⁵ J. Gachie, ‘An Evaluation of The Need for Regulation of Online Dispute Resolution (ODR) In Kenya, LLM Thesis, University of Nairobi, November 2016.

⁴⁶ *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

⁴⁷ *Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations* (2015).

4.4 Technology in Relation to the Applicability of ODR in Kenya

Susan Sibley stated that when technology assists to promote dispute resolution, the law should act as a snap-shot of society, to 'capture the changed society'.⁴⁸ This raises the question as to whether the law has considered the changes in technology in relation to ODR.

The relationship between law and technology has been criticised for not being linear but is rather seen as a multifaceted system.⁴⁹ The law can be seen as a system that runs autonomously alongside systems such as technology politics and commerce.⁵⁰ However, these systems can also depend on one another⁵¹ as is the case in ODR.

Technology may take the place of the judge or decision-maker in ODR, the system must have safeguards that the persons involved would have the dispute resolved in a fair manner.⁵² Therefore, ODR law should account for procedural fairness if it is to be accepted as an independent dispute resolution process.

The incorporation of technological aspects into a dispute resolution process prompts the review of the current legal framework. The current legal framework supports ADR and not ODR. Therefore, to properly encapsulate all aspects of the developing state of technology into a dispute resolution process, particular attention must be given to it in the form of an independent legal background, that is to say that the current state of technology has not been sufficiently reflected in the existing ADR legal framework.⁵³

ODR may require additional expertise in terms of human input. This means that professionals in the ICT sector will be required to supplement the efforts of legal professionals. This puts pressure on the legal professionals to acquaint themselves with the technological aspects of ODR so as to avert the need of an ICT expert.⁵⁴

⁴⁸ Silbey S, 'Law and the Ordering of Our Life Together: A Sociological Interpretation of the Relationship between Law and Society' in R J Neuhaus, T L Shaffer and S S Silbey (eds) *Law and the Ordering of Our Life Together*, William B Eerdmans, 1989, 2.

⁴⁹ Mattheis C, 'The System Theory of Niklas Luhmann and the Constitutionalization of the World Society' 4 *Goettingen Journal of International Law*, 2012, 625, 631.

⁵⁰ Seidl D, 'Luhmann's Theory of Autopoietic Social Systems' available at < http://www.zfog.bwl.uni-muenchen.de/files/mitarbeiter/paper2004_2.pdf > accessed on 21 October 2016.

⁵¹ Laszlo A and Krippner S, 'Systems Theories: Their Origins, Foundations, and Development' in J Scott Jordan (ed), *Systems Theories and A Priori Aspects of Perception* 1 edition, Elsevier, 1998, 8.

⁵² J. Gachie, 'An Evaluation of The Need for Regulation of Online Dispute Resolution (ODR) In Kenya, LLM Thesis, University of Nairobi, November 2016, 54.

⁵³ J. Gachie, 'An Evaluation of The Need for Regulation of Online Dispute Resolution (ODR) In Kenya, LLM Thesis, University of Nairobi, November 2016, 58.

⁵⁴ The Internet and ADR Educating Lawyers about Online Dispute Resolution, available at, >http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/internetadr.html< accessed on 16th March 2016.

Laws should be crafted in a progressive and not a retrogressive manner.⁵⁵ Technology is bound to get to a point where it supersedes the current legal framework thus prompting new laws. Technological advancements such as Artificial Intelligence, (hereinafter “AI”) may be such an advancement.⁵⁶ Many authorities have argued that the AI techniques will be beneficial to the legal practice.⁵⁷

The closest to AI that the world has come to in the legal profession as pointed out in Chapter One is the blind-bidding process where one party calls another to make secret bids on the matter to be negotiated. Secret in this sense means that the parties themselves are unaware of their opposing party’s bids. It is at this point that a computer software automatically evaluates the bids and comes to a common middle-ground.⁵⁸

It is evident that ODR methods cannot be fully utilized where technology has not equally developed. This is simply because ODR is dependent on technology in order to be practiced. It is also evident that the current legal framework must be altered so as to accommodate technological developments which in turn will consequently provide a better space for the practice of ODR.

4.5 Regulation of ODR in Kenya

This part will seek to identify what would be the most practical approach to be taken in the regulation of ODR in Kenya. This will involve the level of involvement of the state, private institutions and individuals in the development of the process.

As mentioned earlier, the Communications Authority of Kenya is mandated to regulate communication services in the country.⁵⁹ Among its functions, it is also mandated to facilitate the development of e-commerce in Kenya.⁶⁰ This places it right at the centre of the development of ODR. It can work with the institutions mentioned above in the development of an online platform. It can provide the licence for the operation of the online platform as well as its general compliance with internet regulations.⁶¹

⁵⁵Law and Technology: Looking into the future - selected essays, available at <<http://cadmus.eui.eu/handle/1814/13482> >accessed on 1 January 2017.

⁵⁶ Mehl L, ‘Automation in the Legal World: From the Machine Processing of Legal Information to the “ Law Machine’ in *Mechanisation of Thought Processes*, 1958, 757-787.

⁵⁷ Dan Hunter, “Commercialising Legal Neural Networks” (1996) 2 JILT, available at <<http://elj.warwick.ac.uk/elj/jilt/artifint/2hunter/> >accessed on 9 January 2017.

⁵⁸ What is Cybersettle? available at: <http://www.cybersettle.com> -accessed on 10 January 2017.

⁵⁹ Section 5, *Information and Communications Act*, (2011).

⁶⁰ CAK Website, available at: <http://ca.go.ke/index.php/what-we-do> -accessed on 10 January 2017.

⁶¹ Section 10, *Kenya Information and Communications Act* (2009).

The development of ODR procedures is made possible by ODR platforms⁶² and ODR providers.⁶³ On one hand, ODR platforms host ODR services managed by third party providers; on the other hand, ODR providers are professionals or institutions that become involved at the request of the parties in conflict.⁶⁴ Institutions poised to provide ADR services such as the Chartered Institute of Arbitrators, NCIA and SDRC can act as ODR providers once they have made the necessary changes to embrace ODR. Alternatively, the government can set up its own ODR platforms and actively act as an ODR provider. This can be done through the establishment of ODR services in institutions that provide public services such as the IRA, KRA and the CBK among others discussed above.

It has been argued by some that ODR does not need government interference and that many ODR services should take root on their own.⁶⁵ Facilities such as Anywhere Arbitration,⁶⁶ Ujuj,⁶⁷ and Modria⁶⁸ operate online free from government interference. The use of email correspondence e.g. G-Mail and Yahoo Mail may also be free from government regulation. However, self-regulation resulted to several disagreements between consumer groups the most prominent of which the e-companies were suggesting that a mandatory ODR process should be integrated before going to court.⁶⁹

This prompted consumers to demand the retention of direct access to court. Thus, the consumer advocacy groups began to entertain the idea of government regulation. This was further encouraged by the shortcomings of ODR providers through their lack of transparency, neutrality, appropriate complaint mechanisms and poor recognition of cultural and linguistic differences.⁷⁰

As Kenya begins to embrace ODR, we should take the above situations into account. Government involvement in the process is indeed critical in that it will be able to create favorable standards that ODR providers should abide by. This is the case in the UK through their ODR regulations. The state will have to take initiative to come up with new standards that

⁶² These are internet based locations where interested parties can submit their claims to be resolved online.

⁶³ These are the organisations that give rise to locations on the internet where disputes can be resolved online

⁶⁴ Nicuesa V, 'Resoluci' on electr'onica de conflictos' in Peguera M (ed), *Principios De Derecho De La Sociedad*, Aranzadi, 2010, 409.

⁶⁵ Chornenki G, *The Corporate Counsel Guide to Dispute Resolution*, Canada Law Book Inc., Aurora, 1999, 7-10.

⁶⁶ Anywhere Arbitration <available at: <http://www.anywherearbitration.com/> >accessed on 12 January 2017.

⁶⁷ Ujuj, available at: <http://www.ujuj.org/whatisujuj.html> >accessed on 12 January 2017.

⁶⁸ Modria, available at < <http://modria.com/product/> >accessed on 12 January 2017.

⁶⁹ United Nations Conference on Trade and Development, 'E-Commerce and Development Report 2003 (Internet edition prepared by the UNCTAD secretariat): Chapter 7: Online dispute resolution: E-commerce and beyond', available at <http://www.unctad.org> >accessed on 8 January 2017.

⁷⁰ Rabinovich-Einy O, 'Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape', 6 *Yale J. L. & Tech*, 2003-2004, 12.

will regulate ODR as an independent form of dispute resolution due to the complexities that arise in dealing with technology and cyberspace.

From the above, it would be adequate to propose a hybrid system of operation where the state, through the Communications Authority of Kenya could provide for general regulations that would govern online platforms. This would be supplemented by proposed ODR regulations that will provide the structure of the process. At the same time, private ODR providers could operate within this framework providing the necessary avenues for the practice of ODR. This way, there will be a combination of both the state's resources and those of the private bodies to further the ODR objective in Kenya.

4.6 Effect of ODR on Conventional Forms of ADR in Kenya.

ODR is seen as an important new tool, a new system, a new way of doing business that is more efficient, more cost-effective and much more flexible than traditional approaches. It combines the efficiency of alternative dispute resolution with the power of the internet to save businesses money, time, and frustration.⁷¹

While the defining characteristic of ODR is that it is done online, Katsh and Rifkin acknowledge that the ADR aspect is also significant and should always be present, even in those ODR methods that do not *strictu sensu*, have an equivalent ADR mechanism in the offline environment.⁷²

As mentioned earlier, the progress of ODR is also discouraged by ADR practitioners who do not want their services run down by new trends that omit human input. This is because ADR practitioners who do not have training in the ICT aspects of ODR may find it difficult to embrace the method entirely.⁷³

An independent ODR framework will increase access to justice but it would be wrong to assume that ODR and ADR are mutually exclusive. Conventional models can be utilised as conduits to ODR. This can be done through ICT enhancements on pre-existing ADR methods. This means that conventional methods cannot be completely done away with. The case is that ADR will act as the rubric upon which ODR will obtain its basic principles from.

Kenyan ADR institutions which provide these conventional methods will have to adapt so as to embrace ODR. As aforementioned, these institutions may be reluctant to do so for the

⁷¹ Rule C, *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, Jossey-Bass Publishers, San Francisco, 2002, 61.

⁷² Katsh E & Rifkin J, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, 19.

⁷³ The Internet and ADR Educating Lawyers about Online Dispute Resolution, available at, >http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/intern etadr.html< accessed on 16th October 2016.

reasons pointed out. However, they can only do so for a limited period of time since developments are imminent and institutions and individuals in the legal profession will have no choice but to move with the times.

There is the risk that conventional methods will be preferred to ODR. This is because there is a general lack of trust in the concept of the internet (e-confidence).⁷⁴ Particularly with e-commerce transactions, confidence in the internet is essential if there is to be confidence in ODR. Lack of legal certainty and public confidence hampers its growth.⁷⁵

Another factor that should be taken into consideration in determining the practicality of ODR, is Kenya's current state regarding the social awareness of the citizens to developments and even the use of technology. Currently, forty five percent of the current population has access to the internet.⁷⁶ This would mean that the remaining fifty-five percent would have to sought out conventional methods. Consequently, this may deter policy makers from placing their confidence in an ODR framework and perhaps shift their focus to improving conventional methods of ADR.

From the above, it is evident that ODR can both encourage the practice of conventional methods and at the same time, it has the potential of diminishing the role of conventional ADR.

4.7 Potential Benefits of an Independent ODR System

With more and more e-commerce transactions being conducted in Kenya,⁷⁷ there will be an increasing number of online disputes. E-Commerce disputes arising out of business-to-consumer contracts or business-to-business contracts, initiated on the internet, could be resolved online.⁷⁸ Friedman is of the opinion that in these contractual disputes, the parties are both presumably familiar with operating the internet, have e-mail facilities, and have an online financial relationship, thereby making online dispute resolution easier.⁷⁹ From Grebb's point of view, ODR can be used to resolve issues concerning delivery of products, enforcement of warranties, guarantees on products, over-billing issues, and issues arising out of click-through agreements i.e. "By clicking you are accepting personal liability", among many others. In fact,

⁷⁴ Ponte L and Cavenagh T, Cyberjustice, 'Online Dispute Resolution for E-Commerce' *Parson Prentice Hall*, 2005, 137.

⁷⁵ Teitz E, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution', *70 Fordham Law Review* 2001, 993-994.

⁷⁶ Internet Live Stats, available at < <http://www.internetlivestats.com/internet-users/kenya/> > accessed on 2 January 2016.

⁷⁷ Kabuba P, 'E-Commerce and Performance of Online Businesses In Kenya', LLM Thesis, University of Nairobi, November 2014, 6.

⁷⁸ Nadler J 'Electronically-Mediated Dispute Resolution and E-Commerce.' *Negotiation Journal* 17.4 (2001), 333-347.

⁷⁹ Friedman G H, 'Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities', 708.

several ODR providers are involved in assisting parties to reach a settlement in online contractual disputes. An example is when Square Trade mediated a dispute between a purchaser and eBay.⁸⁰

Stand-alone regulation of ODR will result in a comprehensive legal and regulatory framework free from loopholes that may arise from extrapolating conventional methods. More so, it will improve the success rate of ODR methods thus inspiring confidence in the processes.

Since the internet is a global entity, various jurisdictions have various laws that apply to their online activities regarding dispute resolution. In the absence of a cogent ODR system, these jurisdictions will impose their standards to fill the gaps in ours. As a result, Kenyans may be subject to unscrupulous regulations that favour the foreign entity to our disadvantage.⁸¹ We would be open to impediments to justice by e-commerce multinationals with a dominant online presence.

Domain name disputes can also be resolved through ODR. The Internet Corporation for Assigned Names and Numbers (ICANN) allows a domain name registrant of a general top-level domain (such as a “.com” or “.net” domain name) to submit any dispute arising out of a domain name registration to a resolution service provider.⁸² As an example of its effectiveness, very large number of domain name disputes were filed with the WIPO Arbitration and Mediation Center, and 95% have been decided online.⁸³

Intellectual property disputes are resolvable through ODR. Jonathan Ko has observed that, with the use of new technologies, particularly the internet, it has become much easier for intellectual property pirates to infringe upon intellectual property rights.⁸⁴ For instance, copyrights in songs and movies are constantly infringed. Similarly, unauthorized hyperlinking, framing, and meta-tagging on the internet could also violate copyright and trademark rights.⁸⁵ Lide noted that the choice to use online arbitration to settle intellectual property disputes has

⁸⁰ Grebb M, *Settle This: Which Technology Resolves Disputes Best?* National Arbitration and Mediation, available at ><http://www.clicknsettle.com/pr032001.cfm> < accessed on 22nd December 2016.

⁸¹ Amazon Conditions available at <https://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088 >accessed on 9 November 2016.

⁸² ICANN, *Uniform Domain Name Dispute Resolution Policy 1999*, <<http://www.icann.org/udrp/udrp-policy-24oct99.htm>> Accessed on 22nd February 2016.

⁸³ WIPO Arbitration and Mediation Center, *UDRP Case Filing and Decisions*, available at <<http://arbiter.wipo.int/domains/statistics/cumulative/results.html> > accessed on 22nd February 2016.

⁸⁴ Ko J B, ‘Para-sites: The Case for Hyperlinking as Copyright Infringement’, *18 Los Angeles Entertainment Law Journal*, 1998, 361.

⁸⁵ Ko J B, ‘Para-sites: The Case for Hyperlinking as Copyright Infringement’, 361.

been firmly supported. Therefore, ODR, which is flexible and amenable to dynamic areas of law, may be useful in resolving online intellectual property disputes.⁸⁶

Monetary disputes could be solved online and involve credit card claims, claims between an insurance company and an online merchant involving e-commerce and Internet insurance, and subscription fees for online services among many others. Victorio suggested that when an online dispute concerns a disagreement about money, using ODR to settle such disputes may facilitate the bargaining process in reaching a swift resolution.⁸⁷

4.8 Conclusion

This Chapter has been an incorporation of the accounts of Chapter Two and Chapter Three in trying to determine the operability of an independent ODR system in Kenya. It analyses the role of the law, institutions and the current technological capacity in making that determination. It addresses the potential benefits and challenges that can arise out of the operation of ODR independently in Kenya. Considering the above, the next chapter will seek to finally address the question as to whether ODR is viable as a legitimate alternative as compared to conventional dispute resolution methods in Kenya.

⁸⁶ Lide E C, 'ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation' 1996, 193, 222.

⁸⁷ Victorio M R, 'Internet Dispute Resolution (IDR): Bringing ADR into the 21st Century', *1 Pepperdine Dispute Resolution Law Journal*, 2001, 279, 283-84.

Chapter Five

Findings, Recommendations and Conclusion

5.1 Introduction

This chapter contains a summary of the findings, conclusions drawn from the findings and proposed recommendations.

This study was undertaken to address the lack of a cogent legal and institutional framework for the use of ODR in Kenya. It also sought to discuss ODR being perceived as an extrapolation of existing forms of ADR ridding if of individual recognition in Kenya.

In order to address the problem, this paper set out to determine whether the Kenyan legal and institutional framework provides sufficient ground for the practice of ODR in Kenya. It was also meant to explore the viability of ODR as a stand-alone alternative as compared to the conventional alternative dispute resolution methods in Kenya. Lastly, this study was meant to propose recommendations on how to apply ODR as proposed above in Kenya.

5.2 Summary of Findings

The findings of this research revealed that the current legal framework in Kenya does not expressly restrict the application of ODR neither does it expressly acknowledge its existence in Kenya.

From the research, it was found that the Kenyan Institutional Framework has not engaged in the promotion of ODR methods. It was also found that institutions have the necessary resources to engage in the promotion of ODR. However, these resources are being utilised to improve the conventional methods of ADR.

The findings of this objective revealed that the current legal and institutional framework annexes aspects of ODR to the conventional forms of ADR.

The findings also reveal that this annexation inhibits the growth of ODR in Kenya. This was traced back to the lack of prioritisation of ODR by ADR law and institutions which consequently, act as a glass ceiling for the growth of ODR.

5.3 Recommendations

Following the above findings and corresponding conclusions, the following recommendations are proposed;

a) Need to formulate ODR legislation

That the current institutions and individual experts dealing with the promotion of alternative methods of dispute resolution should engage in the development of policy that will be aimed at formulating legislation that will specifically regulate ODR and its practice in

Kenya. This proposed document should contain all variations of ODR and include detailed guidelines on how each will be practiced.

b) Establishment of Online Platforms

The State with assistance from experts in the field of ADR should mobilise to create an online platform for the resolution of disputes online. Guidelines on how the platform will be utilised and governed should be contained in the proposed ODR legislation. Government's involvement in the initiative is essential for the maintenance of standards that are favourable to the general citizenry.

Specialised Institutions such as KRA and the others mentioned in Chapter Four should engage in establishing online platforms under the proposed ODR legislation purposed to address the specific grievances associated with the services they provide to the public.

c) Defining a clear and practicable ODR procedure

This would entail clearly outlining the steps that a party seeking ODR will use in order to seek recourse. For example, it may involve a series of steps such as briefly describing the dispute in question. This can be done through email or directly from the proposed ODR platform. The platform may also link its domain to a mobile application which will greatly improve access to the platform.

The second step would involve the classification of the dispute by the ODR practitioners and allocating the dispute to the most appropriate method. The platform should also give an opportunity for the parties in dispute to select their desired method. e.g. online arbitration, automated negotiation etc.

The third step would outline the details behind the exchange of information regarding the case such as the complaint, the corresponding defences evidence and even witness statements if any. This could be communicated through emails. This would also be adequate in a 'documents only' form of ODR such as an automated negotiation.

Where the process necessitates a hearing, all the participants may be brought together virtually through audio-visual means such as a video conference. Alternatively, participants can also be brought together through a teleconference setting. These instances create real-time interaction without physical confrontation. This would be essential on ODR in general and processes such as online arbitration.

Depending on the process, the determination can either be made by a fully autonomous programme specialised for the task or an actual human being with the requisite qualifications. For example, in an online arbitration, the arbitrator may be an actual person interacting with

the parties through the prescribed channels. Alternatively, in an online mediation, the determination may be made by a fully autonomous programme. In some instances, the programme may be semi-autonomous relying, to a certain degree, on a human aspect.

The final decision can be communicated to the parties through a electronically-written communication such as an email. Alternatively, the decision can be communicated to the parties in another hearing setting, either audio-visual or just audio which can be later put down in writing.

This example doesn't cover all the aspects of the process but it demonstrates its feasibility with regard to its applicability in Kenya.

d) ODR Education

The current institutions in place should place more focus in the dissemination of information regarding ODR through their publications. Education institutions should also engage in including ODR as a method of dispute resolution. The consequence of these actions would be the increased awareness of the existence of ODR as a mechanism to resolve disputes.

e) Recognition of ODR as a stand-alone process

For the recognition of ODR as a stand-alone dispute resolution process to be achieved, the proposed ODR legislation should be structured in such a way that ODR will have the capacity to be developed without relying on the conventional methods. ODR will in some cases inevitably derive its principles from ADR but this does not mean that the practice of ODR should be entirely dependent on conventional methods. To create this room for expansion and acceptance of ODR, the law, institutions, and other potential ODR participants should be aligned to the idea of ODR as a stand-alone dispute resolution process.

f) Updating the existing legal framework

The law ought to adapt to changes in technology where novel aspects emerge and regulation is needed for its smooth application. However, the rate at which technology changes is significantly faster than the rate at which the law can keep up. This creates a discrepancy between the two and this discrepancy drags the adaptation process limiting the optimisation potential of new technologies. Thus, Kenyan lawmakers should be keen to act upon these changes as soon as they arise. With respect to ODR in Kenya, its optimisation greatly relies on the adequate adaptation of our legal framework to one that embraces the technology required to support ODR.

5.4 Conclusions

In light of the statement of the problem, objectives, hypothesis and the theoretical framework, the study has reached its objectives and addressed the statement of the problem.

The objectives were to:

1. To critically examine whether the Kenyan legal framework provides a sufficient ground for the practice of ODR in Kenya.
2. To critically examine whether the Kenyan institutional framework provides a sufficient ground for the practice of ODR in Kenya.
3. To explore the viability of ODR as a stand-alone alternative as compared to the conventional alternative dispute resolution methods in Kenya.

Objective 1:

According to the findings of this research, the Kenyan legal framework does not recognise ODR as one of the methods of dispute resolution. However, it is open to the prospect of a developing ICT sector and the incorporation of various aspects of ODR such as the anticipated increase in reliance on electronic communication devices and the proliferation of the internet in the country. Unfortunately, this is not enough legal space for apt development of ODR in Kenya.

Objective 2:

Institutions in Kenya have not embarked on the development of ODR as a stand-alone form of dispute resolution. They have instead dedicated their time and resources to the improvement of conventional methods. This means that they have not proved to be essential in supporting ODR in Kenya. However, it is also possible for these institutions to support ODR through the creation of policy through action of the individual members that constitute them since they possess the legal expertise. More so, institutions such as PCK which provides for R-Mail can apply the technology being used i.e. e-signatures and e-mail encryption in the ODR process.

Objective 3:

ODR is indeed a viable stand-alone alternative as compared to the conventional methods. This is because, as the findings suggest, the current approach represented by the law and the current institutions in place does not give the prospect of ODR enough breathing room to mature to its full potential. The development of a cogent ODR environment will require a great amount of attention and detail in crafting legislation to govern the practice and regulation of the system as a whole.

The hypothesis of the study was that there is indeed the need for the recognition of ODR, as an independent form of Alternative Dispute Resolution in the legal framework in Kenya. The study has proved this hypothesis by analysing Kenya's legal and institutional framework in Chapter Two and identifying the limitations preventing the growth of ODR thus prompting the need for an independent ODR framework. Additionally, the study has shown the success of an independent ODR framework in Chapter Three affirming the need for the recognition of ODR as an independent alternative of dispute resolution in Kenya.

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