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BRINGING DISPUTE RESOLUTION TO THE INTERNET: ONLINE DISPUTE RESOLUTION*

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1 Disputes are inevitable. Whether it is in our personal lives or our professional lives, no matter how careful one may be, it is unavoidable that a disagreement will crop up at some point. Disputes are an inescapable aspect of human interaction. As a result, every society throughout history has built systems for resolving disagreements fairly and peacefully. Court systems may be the most well-known means of addressing disagreements in the developed world, but many societies without courts have developed their own culturally appropriate systems for resolution (eg, citizen councils, restorative justice circles, or panels of elders).

2 One of the biggest forces shaping global society is the growth of information and communications technologies. The expansion of the Internet to almost every corner of the planet, combined with rapid advancements in mobile phone technology, is transforming our culture, our commerce, and our communities. But people are just as complicated on either side of a video chat as they are face-to-face, and as we move more of our lives into these online spaces, we're bringing our disputes with us.

3 In fact, these new technologies are facilitating the growth of new kinds of disputes. Now, anyone with a Wi-Fi connected tablet can buy an item from the other side of the world with just a few swipes of their finger. This is leading to a new kind of dispute, the online-only dispute, that is cross-border, high volume, and low value. It is simply not feasible to try to resolve these disputes through human-powered, in-person resolution systems. If we are to reliably provide fast and fair resolutions for online-only disputes, we need to find ways to use technology to build redress systems that work the way the Internet works.

4 This is the mission of the field of Online Dispute Resolution, or ODR. ODR is the application of information and communications technology to the task of resolving disputes. Many people assume that ODR always uses the Internet, and it is true that the Internet is a very powerful communications technology. But older technologies that are less glamorous and cutting edge, like telephones or word processors, also fall under the umbrella of ODR. Citizens and consumers are getting more comfortable with the use of technology in every area of their lives, and as a result, they increasingly expect that they will also be able to use it to address the disputes that crop up in their day to day interactions.

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5 This social resolution function has traditionally been provided by the courts. However, when it comes to technology, most courts are behind the times. Many courts around the world operate in largely the same way that they did a decade or two ago. Court processes are often quite slow, paper-based, and bound by geography. The designs for our judicial systems, crafted long before the advent of the Internet, seem increasingly out of sync with the newly networked reality many of us live in each day. Some basic challenges that crop up repeatedly in our online lives are very difficult to address through traditional judicial resolution approaches.

6 For instance, if a consumer in Singapore buys an item from a seller in France via an online marketplace based in Australia, and the item is shipped out of a warehouse in California, which law should govern the transaction? Which court should the case be filed in? What lawyer would take the case, especially if the value of the purchase is only \$200? And what if a case is decided against a defendant and the defendant just deletes the responsible online account and creates a new account to avoid responsibility? The old models we have for resolving disputes through the courts are too tied to geographic jurisdictions and in-person enforcement to address these kinds of issues. That is why we must envision new solutions.

I. Growth of ODR for e-commerce

7 I was the first Director of Online Dispute Resolution at eBay and PayPal. eBay was the first truly global online marketplace, with more than 250 million users transacting in more than 16 languages around the world. As eBay started to scale, the executives realised that the only way to continue to grow the marketplace was to build and maintain trust among users. An essential component of that trust was access to fast and fair resolutions when things went wrong. If a buyer purchased an item and subsequently had a problem (maybe they paid for the item but it never arrived, or it arrived but it was different from what the purchaser thought it was going to be) they needed to get a quick and effective solution to their problem. If the buyer found it hard to determine where they should go get a resolution, or if the resolution process was too long or complicated, the buyer's trust in eBay dropped. But if they easily discovered where they needed to go to report the issue, and they got a fair hearing and quick outcome, then it reinforced the user's trust, which spurred them to engage in further transactions.

8 To provide these quick solutions, we built something called the *Resolution Center*. The Resolution Center was accessible on the home page of both eBay.com and paypal.com, and it provided a centralised location where problems of all kinds could be reported and tracked. When we first launched the Resolution Center, we saw a big increase in the number of cases users were filing with eBay. The executives sponsoring the creation of the Resolution Center were incredulous; they asked me, "what are you doing to create all these disputes?" I responded, "I'm not creating any

disputes at all. These disputes were always out there. It's just that you never knew about them before, because you made it hard for the users to notify you."

9 Once we looked more closely, we discovered that these fast and fair resolutions were providing a big lift in customer loyalty and trust. Studies we conducted, within the eBay and PayPal data warehouses, revealed that buyers who filed a dispute and worked it out amicably with the seller, had almost a 15% higher loyalty in the six months after the dispute than buyers who never filed a dispute. And, even buyers who filed a dispute and lost the dispute (meaning they didn't get their money back) still had higher loyalty on average than users who never filed a dispute in the first place. These loyalty numbers were even better than the results from our marketing campaigns, leading some to facetiously suggest that we should intentionally give our buyers disputes so we could quickly resolve them and get the loyalty benefit. It can seem counter-intuitive at first glance, but once we spoke to our customers, we understood the reason why resolutions drove higher loyalty: the next time that buyer sat down at their computer to purchase something, they were much more likely to return to eBay because they had experienced a seamless resolution on a prior purchase.

10 These loyalty increases translated into hundreds of millions of dollars of revenue for eBay and PayPal. This encouraged eBay to raise the profile of the Resolution Center even further, and to add more features, which meant case volumes kept rising. The Resolution Center eventually processed more than 60 million disputes per year, 50% of which were resolved amicably between the buyer and the seller. Of these cases, 90% were resolved entirely via software, meaning no human employee of eBay or PayPal had to touch the case, because the users resolved the issue directly through the Resolution Center platform. Also, these resolutions were all extrajudicial, in that the outcomes were enforced only through eBay's policies and protocols, not through legal channels. Every case could be appealed in court if the parties so desired, but in 99.999% of cases, the outcome delivered by the Resolution Center was accepted by the parties as being the final and definitive resolution.

II. Lessons for the courts

11 Depending on how you count, the 60 million disputes we resolved per year at eBay and PayPal was a greater volume than all the disputes filed in the US civil court system in a year. And by 2010, eBay wasn't even the largest online marketplace, because Amazon and Alibaba were processing more transactions than eBay. If you add up all the e-commerce disputes around the world, you will find that there were more than 1 billion e-commerce disputes in just the last 12 months. Additionally, e-commerce is growing at about 20% per year, so that number will double again within a decade. The high volume of cases at eBay enabled us to learn quickly

what worked and what didn't, and to constantly tweak our resolution process to ensure they continuously improve.

12 Are the courts innovating at the same pace as e-commerce resolution processes like eBay's Resolution Center? What is the pace of continuous improvement for processes within the justice system? Citizens increasingly bring expectations honed on websites like Gmail and Facebook to their interactions with public agencies like the courts. Systems that require paper submission of documents, or in person filings and depositions, are perceived as being retro and inefficient. On eBay, we found that users would rather lose their dispute quickly than win their dispute but have it take a long period of time. For most eBay users, a "long period of time" meant about 12 days. eBay users were more frustrated if the resolution process took longer than 12 days than if the user had lost their case within the first 24 hours. How many court processes run their course within 12 days? More likely, court cases can take months or years. In India, a civil case can take ten to 13 years to get to trial. For users who are being trained to expect instant resolutions with a click of a button on a website, that kind of delay is unacceptable.

13 It is true that court processes have been designed to be deliberate and detailed. Deliberation and detail takes time, and can be quite expensive. As a result, many people are now extremely reluctant to file their cases in the courts. They believe the process will take a long time, be very expensive, and maybe not provide a satisfying outcome. Most disputes are probably never even filed in a court, largely because of these fears, so complainants forgo their right to a legal remedy. In the US, more than 97% of cases filed in the civil courts are closed before they get to trial. This does not mean that all those cases are resolved satisfactorily. Parties often give up before resolution because of long delays and spiralling legal costs. Sometimes, parties just throw in the towel after a certain time period because they find the process so frustrating.

14 ODR is laying out an alternate blueprint for the future of justice. In ODR processes, it's not necessary to sort out all the jurisdictional complexities behind each individual case. Parties can opt into the resolution mechanism when they make the initial purchase, and resolution processes can be built directly into the terms and conditions of the website, or even into the purchasing platform itself. If someone has a problem, they go right back to their "items I've purchased" page and click a button to request a solution. The information relevant to the case (*eg*, description of the item, price, shipping method) can be automatically inserted into the dispute filing. Software can also help to streamline the process, facilitate the collection of evidence, suggest acceptable resolution types, and maybe even provide instant resolutions in circumstances where the platform already has access to enough information to determine the appropriate outcome.

III. Momentum behind ODR

15 ODR may have started in e-commerce (and it is being tested and refined most aggressively by online merchants, marketplaces and payment providers) but the most exciting frontier for ODR these days is probably in its application to offline disputes. Many ODR providers have seen rapid uptake of ODR in public disputes (most notably, property tax assessment appeals), as well as repetitive financial matters like insurance reimbursements and debt collection cases. Consumer protection is being expanded with ODR tools and public agencies (like the Civil Aviation Authority in the UK) are increasingly using ODR platforms to provide easily accessible redress to consumers and complainants. Courts are now looking seriously at ODR as well for a wide variety of civil case types, including family disputes, landlord-tenant matters and neighbour disputes. And, these case types are just the tip of the iceberg. It's not hard to see ODR becoming commonplace in a wide spectrum of dispute areas, such as education, construction, product liability, traffic and more.

16 In fact, many international organisations who have looked at the changes coming to the justice system have concluded that ODR is really the only viable path forward. UNCITRAL,¹ the UN agency responsible for harmonising global laws, recently completed a five-year Working Group on ODR. More than 66 member delegations participated, and they recently issued their final report urging the expanded use of ODR to provide redress to global consumers.² The European Union passed a regulation in 2015 requiring all merchants in EU member states to inform their customers about the availability of ODR, and they even launched an EU-hosted reporting form that can collect cases and distribute them to the appropriate ODR provider.³

17 The courts are now following suit. In the UK, the Civil Justice Council recently completed a report concluding that ODR will be central to the evolution of the courts moving forward. In fact, as Sir Adrian Bruce Fulford, the Senior Presiding Judge for England and Wales, explained, "[i]n due course in my country, ODR will be an integral part of the ongoing digitalisation process. It is absolutely necessary for the survival of the justice system in the UK".⁴ The Province of British Columbia in

1 United Nations Commission on International Trade Law.

2 Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law (A/RES/71/138) <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/138> (accessed 1 June 2017).

3 Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes.

4 Quote extracted from "ODR & the Courts: The Promise of 100% Access to Justice?" (Hiil Trend Report IV) at p 87 <<http://www.onlineresolution.com/hiil.pdf>> (accessed 1 June 2017).

Canada has also recently launched a Civil Resolution Tribunal ("CRT") to handle low-dollar-value civil cases through ODR techniques. The Tribunal started by handling Strata (Condo) Association disputes, but is now expanding to other areas of small claims cases. The vision is that the CRT will eventually become mandatory, providing the sole forum for redress within the justice sector for low-dollar-value civil cases. Filers will not be required to have counsel to participate, and they will not be required to show up in court in person, participating instead in a wholly online process to achieve resolution.

18 These developments have created an enormous tailwind behind ODR. What was previously thought to be a curiosity and experimental prototype is emerging as the future of the justice system. ODR providers and platforms are launching all over the world to meet the demand. The website of the National Center for Technology and Dispute Resolution (odr.info) maintains a list of ODR providers that has grown to more than a hundred companies. Many of those platforms are well-constructed and appropriate to local cultural expectations.

19 As one example, my company, Modria, spun out of eBay in 2011 with a licence to some of the technology that powers Resolution Center. Modria (which stands for Modular Online Dispute Resolution Implementation Assistance) does not directly provide any dispute resolution services like mediation and arbitration. Modria is only a technology platform. Our focus is on building the most sophisticated toolbox for building ODR systems and then to partner with local dispute resolution service organisations (like the American Arbitration Association in the US, CEDR⁵ in the UK, and SMC⁶ in Singapore) to resolve individual cases. As mentioned above, there are many good ODR platforms in the world, but to illustrate how ODR works, I will talk about the Modria solution in some detail because I know it best.

IV. How ODR works

20 Modria is what is called a multi-tenant SaaS (software as a service) platform that lives in the cloud. We host Modria in the Amazon Web Services system, which means we can create new instances of Modria resolution centres all over the world with just a few clicks of a mouse. Modria's platform is also constructed to be highly secure, with a full-time chief information security officer and full ISO 27001 compliance. Our goal is to provide a very intuitive and streamlined user experience for resolving problems, backed by a robust and powerful administrative interface for managing high volumes of cases. The Modria platform even includes a policy centre to create rules that can automate the resolution or routing of cases based on criteria that can be dynamically adjusted at any time.

5 Centre for Effective Dispute Resolution.

6 Singapore Mediation Centre.

Modria also offers a full API ([application] programming interface) that enables it to easily integrate with other web-connected systems.

21 Modria has four main modules of functionality that can be clicked together like Legos. In dispute resolution, we often talk about the importance of “fitting the forum to the fuss”, meaning custom designing resolution flows around the needs of each individual dispute. This modular approach offers a great deal of flexibility in customising resolution processes appropriately for each case volume. The modules are diagnosis, negotiation, mediation and evaluation. Let’s go through each in detail.

22 **Diagnosis.** Traditionally, face-to-face dispute resolution has not put a lot of time and attention into the phase before a dispute starts. There is some scholarship around what is called “pre-negotiation”, but that is usually focused on the work that a mediator does with the parties prior to the first joint mediation session. ODR enables dispute resolvers to access cases much earlier than face-to-face processes. For example, in-person mediators usually only are invited into the dispute after the parties have been negotiating with each other for quite some time, and after the parties have reached an impasse. The mediator usually begins by asking the parties to go back to the beginning of the dispute and explain everything that has happened up to the point of the mediation. In ODR, by contrast, the complainant will often engage with ODR before they have even notified the respondent that they have a concern. ODR can play a much greater role in setting expectations for the parties and framing their initial communication.

23 As an example, at eBay, we would frequently get notifications of issues from buyers who were concerned that an item they had paid for had not yet arrived. We could then examine our records and determine, for instance, if the item had in fact been shipped, and if it was on its way. If we had a tracking number, we could reassure the buyer that the item was in transit and was likely to arrive in the next day or two. Then, after the item arrived, the buyer’s concern was resolved – and the seller was never aware of that concern. This diagnosis phase can be extremely effective in proactively addressing issues before they turn into disputes, or in framing party expectations to increase the likelihood of settlement. One of the truisms of dispute resolution is that the earlier a resolution can be achieved the better, and ODR gives us access to disputes at a much earlier stage than face-to-face processes. The best way to resolve a dispute is to prevent it from occurring in the first place.

24 **Negotiation.** Negotiation is the heart of all dispute resolution processes. We negotiate almost every time we interact with another person: with our co-workers, with our transaction partners, with our spouses and with our kids. ODR systems can assist negotiations by offering tools to propose and reject settlement offers, providing a structured intake to clarify the precise nature of the problem and acceptable resolution types, and even offering a library of resolutions achieved in similar matters

that the parties can utilise in jointly crafting their own resolution. A key concept of ODR is the idea of the *Fourth Party*, where technology has a place at the table along with party one and party two (the disputants) and party three (the human neutral). The fourth party can support the negotiation process and urge the parties toward agreement in ways a human third party can't (or shouldn't).

25 For example, consider the ODR technique called blind bidding. Say two insurance companies are arguing over the appropriate reimbursement amount for a motor vehicle accident. Neither company is willing to budge from their initial offers. But using an algorithmic negotiation approach, the two companies agree to enter three confidential proposals they would be willing to accept to settle the case. They also agree on a binding 10% resolution window. The algorithm then examines bid 1 from company A and bid 1 from company B. Say company A is willing to pay \$13,000 to settle the case, but company B wants \$17,000. Because the two numbers are not within the 10% resolution window, the algorithm moves on to examine bid 2 for each company. If the algorithm goes through all three rounds of bids and none of the offers are within the 10% resolution window, the parties are notified that no resolution was reached. But the bids are never disclosed, so the parties are back where they started (which means they have nothing to lose in trying the algorithm). But if company A indicates they are willing to pay \$15,000 in bid 3, and company B says they're willing to accept \$16,000, then the two bids are within the resolution window and the case settles for the median, or \$15,500. The platform then executes the binding agreement between the two sides for the final amount and the case is closed.

26 **Mediation.** Mediation is assisted negotiation. The parties continue to negotiate directly with each other, but they are joined by a third-party neutral who helps to facilitate the conversation, clarify issues, and reality test proposed solutions. Mediation ensures that the disputants retain the authority to determine the outcome, as they both must agree to any resolution. Mediators may exercise authority over the mediation process, but they have no decision-making authority. ODR can provide powerful new capabilities to mediators that can increase the likelihood of achieving a successful resolution, and help parties to be at their best during the mediation process.

27 Consider a family dispute between a husband and wife. Maybe they are separated and living in different states, but they need to reach an agreement on custody and visitation for their shared children. ODR can enable the two parties to have that discussion with the mediator via an online, text-based, asynchronous discussion forum. That forum works like e-mail, so parties are not required to respond immediately (like in a synchronous chat communication). That can enable each side to be a little more reflective in their posts, and maybe even do some research in between responses to ensure they are fully informed about their rights and the relevant law. If one party posts an angry message to the other party that is filled with threats and insults, which are likely to derail the

mediation, the mediator can intercept that post and talk it over with the poster before it is communicated to the counterparty. This capability is called "*pre-communication reframing*", and it is only possible in ODR. Also, the mediator can open additional discussion forums as caucus spaces. Each party then would have two discussions going at the same time: the joint discussion with the mediator and the other party, and a caucus discussion only with the mediator. The mediator would have three discussions: the joint discussion, a caucus with party A, and a caucus with party B. Normally, in a face-to-face mediation the mediator would have to pause the joint discussion to have a caucus, and the mediator would need to be careful to spend an equal amount of time with each party in the caucus period to preserve impartiality. Also, a mediator would almost never call a caucus when the joint discussion is going well, for fear that the progress would be derailed. But in an online mediation, the caucuses can be open at the same time as the joint discussion. And because both parties have equal access to the mediator, there is no need to balance time; if one party spends a lot of time in the caucus and the other party barely uses the caucus, it still does not compromise the mediator's impartiality because of the equal access. Also significant is the fact that the mediator can caucus with the parties without derailing the joint discussion, so if the mediation is moving quickly toward a resolution, the mediator can caucus with each side to ensure they're satisfied with where things are going.

28 **Evaluation.** Evaluative processes are when a neutral third party is brought into a dispute to render a decision. The most common evaluative ODR process is arbitration, which works essentially like a private trial. The arbitrator acts like a judge. After reviewing the submitted information and asking the parties questions, an arbitrator has the authority to decide the case. Arbitrations can be non-binding (meaning the decision rendered by the arbitrator can be accepted or ignored by the parties, as they like) or it can be binding (meaning the arbitrator's decision is final and the parties must abide by it even if they do not agree). Arbitration implies a certain level of legal enforceability, and a treaty called the New York Convention⁷ even makes arbitration awards that adhere to certain procedural steps legally enforceable in most countries around the world. But ODR enables other kinds of evaluative processes that would be impractical, if not impossible, in face-to-face dispute resolution.

29 A good example of an innovative evaluative process is the Community Court. At eBay, we built the Community Court to enable disputants to crowdsource the resolution of their disputes. Each party logged in and explained the matter from their perspective, and uploaded whatever supporting materials they felt were relevant. Once both sides had completed their case, eBay invited in a panel of users from the eBay community to examine the information the disputants had submitted. These eBay community members had to have previously applied to be

7 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

jurors in the Community Court, and they had to meet certain eligibility criteria (eg, long time on the site, high positive feedback percentage from trading partners, *etc*) We also made sure that all the jurors had never transacted with the disputants involved in the case. Each juror then examined the information provided by the disputants and then rendered a decision. We also asked the juror to explain the rationale for their decision. Once the jurors had all submitted their decisions, the party who received the most votes won the case, and eBay enforced the outcome appropriately. eBay monitored the decisions rendered by all the jurors and ensured that the jurors were doing a good job (eg, spending appropriate amounts of time reading the materials submitted by the parties, not always deciding for one side or the other, *etc*). When eBay announced the Community Court, we were overwhelmed by enthusiastic users who were eager to serve as jurors, and we quickly discovered that they expected no compensation in return for their service. And, because technology makes the operation of a crowdsourced ODR mechanism like this very efficient, there was no reason why we couldn't have 100 or even 500 jurors working on a case. This is an evaluative process, in that the parties do not have veto power over the outcome, but it is quite different from the evaluative processes run by the courts or arbitration organisations. In fact, the Community Court operates as sort of a fusion between a justice system and a democratic system. eBay has used this approach to resolve tens of thousands of matters, especially legally sensitive matters that eBay staff were reluctant to decide, and a similar technique is now being used at Alibaba in China to resolve millions of cases.

V. Conclusion

30 In 1976, an academic named Frank Sander introduced the concept of the Multi-Door Courthouse during a presentation at the Pound Conference. The idea behind the Multi-Door Courthouse is that it does not make sense for every case type to be handled in the same way, ushered into a courtroom and put in front of a judge. Professor Sander suggested that there should be a table at the front of the courthouse, and when the parties came in, someone sitting at the table could ask a few questions about the nature of the problem they were looking to resolve. If the matter was a family matter then the parties could be instructed to go through door #3, which was a custom resolution process designed for family cases. If the dispute was over intellectual property, the parties could be sent to door #7 for a process appropriate for that case type, and so on. This was a revolutionary concept at the time, and it was a big move in the direction of "fitting the forum to the fuss". Now, this approach is not uncommon in courthouses around the US.

31 But ODR can enable us to go farther. The modular ODR approach we describe here can create an online Multi-Door Courthouse with not only ten or 20 doors, but potentially 100 or 1,000 doors. In fact, an algorithm can gather information from the parties about the nature of their dispute during intake and then craft a custom resolution process on

the fly, offering an essentially infinite number of configurable doors to disputants. Research into ODR has shown that the effectiveness of ODR goes up the more the process is specifically tailored to a single dispute type, and this modular architecture offers endless possibilities for tailoring. It is easy to envision distinct ODR flows for landlord-tenant cases, or workplace cases, or family cases, or traffic cases, all communicating with parties in language appropriately tailored to the specific characteristics of their dispute.

32 The reality is that technology is transforming the practice of dispute resolution in significant ways, and as dispute resolution systems designers and service providers we need to embrace that transformation. Our job is work in the interest of our parties, and if our parties expect to be able to leverage technology in resolving their disputes, we should not instinctively resist their expectation. The field of dispute resolution has long been called “ADR” with the “A” standing for “alternative”. That word made clear that the courts are the default, and dispute resolution is the alternative. But for many of these new online-only disputes, the courts are essentially irrelevant. That’s why ODR practitioners observe that “there is no A in ODR”, because for many cases, ODR is no longer an alternative – it is now becoming the default.

33 It is true that for long-time practitioners, who are comfortable with face-to-face practice and may feel alienated by or fearful of technology, these changes are not necessarily easy to embrace. There will always be a place for face-to-face practice, and forcing a choice between offline and online dispute resolution is a false dichotomy. If you squint a little bit and look toward the future, it will be hard to tell ADR from ODR five or ten years from now – and who knows what exciting new technologies will be invented in the interim. We’ve only just begun to explore the full possibilities for ODR, but the progress we’ve made to date illustrates that it is our best option to expand access to justice and deliver on the promise of fast and fair redress for all.