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The Future of Online Dispute Resolution (ODR): Definitions, Standards, Disability Accessibility, and Legislation

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Abstract

Jurisdictions around the world are increasingly turning to Online Dispute Resolution ('ODR') to resolve a variety of disputes. ODR adoption has accelerated primarily because of two reasons. First, the COVID-19 pandemic has forced judicial systems to suspend or severely limit inperson proceedings to control infection rates. Private mediators and arbitrators, likewise, have eliminated or dramatically reduced in-person sessions. Second, judicial systems do not have unlimited !nancial resources. They must always consider ways to provide access to justice as ef!ciently and effectively as possible. ODR may be able to provide signi!cant cost savings. But ODR processes are still new and evolving and much work still needs to be done. The !rst part of this paper explains why we need a clear de!nition of ODR. Along with the great potential ODR offers for improving access to justice, it can also compound existing dangers as well as create new ones. The second part explains how a clear de!nition can help us draft standards that will protect ODR users and suggests what should be included in those standards. Moreover, because an ODR system must be accessible to everyone, the third part explores how ODR accessibility can be guaranteed for persons with disabilities and other vulnerable populations. The Web Content Accessibility Guidelines are offered as a critical resource. The !nal part analyses user-protective

Keywords

ODR, Online Dispute Resolution, WCAG, Accessibility, Mediation, Persons with Disabilities

Disciplines

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The Future of Online Dispute Resolution (ODR): Definitions, Standards, Disability Accessibility, and Legislation

*David Allen Larson**

Jurisdictions around the world are increasingly turning to Online Dispute Resolution ('ODR') to resolve a variety of disputes. ODR adoption has accelerated primarily because of two reasons. First, the COVID-19 pandemic has forced judicial systems to suspend or severely limit in-person proceedings to control infection rates. Private mediators and arbitrators, likewise, have eliminated or dramatically reduced in-person sessions. Second, judicial systems do not have unlimited financial resources. They must always consider ways to provide access to justice as efficiently and effectively as possible. ODR may be able to provide significant cost savings. But ODR processes are still new and evolving and much work still needs to be done. The first part of this paper explains why we need a clear definition of ODR. Along with the great potential ODR offers for improving access to justice, it can also compound existing dangers as well as create new ones. The second part explains how a clear definition can help us draft standards that will protect ODR users and suggests what should be included in those standards. Moreover, because an ODR system must be accessible to everyone, the third part explores how ODR accessibility can be guaranteed for persons with disabilities and other vulnerable populations. The Web Content Accessibility Guidelines are offered as a critical resource. The final part analyses user-protective legislation that was enacted in Ontario, Canada and rejected by the United States Congress.

I. Introduction

It is always a pleasure to write about the future. No one can prove you wrong. With a wonderful sense of freedom,[1] this article will discuss four developments we can expect regarding online dispute resolution ('ODR'). First, there is currently no consensus regarding what ODR means. This article will explain why a more accurate definition is necessary and anticipate what eventually will be included in that definition. Second, although some individuals may argue that we should take a laissez-faire approach to ODR so that we do not restrict innovation, ODR standards will be adopted eventually. However, less compulsory guidance may be issued first. This article will suggest what likely will be included in those standards or guidance. Third, the author believes that it is critical to make ODR accessible for persons with disabilities. This article will explain

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[1] Tempered by the knowledge that the day will come when these words can be judged.

how that goal can be achieved. Fourth, the author predicts that requirements for ensuring accessibility for persons with disabilities will be included in future legislation. This article contrasts two early examples of legislation drafted to ensure accessibility and identifies what will be included in future legislation.

II. Defining Online Dispute Resolution ('ODR')

As individuals have rushed to take their professional lives online, it has become clear that there is confusion about what falls within the definition of ODR. Many mediators and arbitrators have been forced to move their dispute resolution practices online because of COVID-19. However, the only change for many of them is that they are now using video conferences rather than meeting in person. Although this does require that they recognise and pay attention to the very real differences between in-person and online communication, is this really ODR?

A. Examples of Existing Definitions

The first definition is provided by the Resolution Systems Institute. It is an independent entity that designs, operates, and evaluates alternative dispute resolution systems to promote access to justice.[2] It defines ODR as 'a broad set of technologies meant to either supplement or replace ways in which people have traditionally resolved their disputes. ODR shares and builds upon the foundational characteristics of alternative dispute resolution, or ADR, [emphasising] easier and more efficient methods of addressing conflict.'[3]

According to this definition, a judicial system, arbitrator, or mediator that has simply taken its traditional, offline dispute resolution process online, by using communication technology such as Zoom, is engaged in ODR.

The National Center for State Courts ('NCSC') has offered a different definition of ODR. The NCSC is an organisation with a mission to improve the administration of justice by providing leadership and services, not only to state courts in the United States, but also to courts around the world.[4] Its definition focuses on the integration of ODR into a court system, although it can also apply to private, non-judicial dispute resolvers.

[2] Resolution Systems Institute <https://www.aboutrsi.org/> accessed 28 February 2022.

[3] Resolution Systems Institute, 'Online Dispute Resolution' <https://www.aboutrsi.org/special-topics/online-dispute-resolution> accessed 28 February 2022.

[4] National Center for State Courts, 'Mission & History' <https://www.ncsc.org/about-us/mission-and-history> accessed 28 February 2022.

The NCSC explains that court-related ODR is a public-facing digital space where parties meet to resolve their dispute or case.[5] This description can be applied to non-judicial ODR providers if the 'public-facing' description is changed to 'private'. The NCSC then adds that ODR is a process that operates 'exclusively online'.[6] If the only change that a court system, mediator, or arbitrator has made is the adaption of video conferencing, then they are probably using other communication mediums, including telephones or traditional paper-based postage service. If that is true, then they are not engaged in ODR according to the NCSC definition.

The NCSC further states that ODR is 'explicitly designed to assist litigants in resolving disputes, rather than only judicial or court staff decision-making'.[7] Again, this definition can be applied to private mediators or arbitrators by simply replacing the words 'judicial or court staff'. Neither video conferencing nor e-mail is explicitly designed to assist litigants in resolving disputes. If those are the only technologies that a court system or dispute resolver is utilising, then, based on the NCSC definition, that is not ODR.

The NCSC concludes that ODR integrates and extends dispute resolution services offered by judicial systems (or mediators and arbitrators) into digital spaces efficiently, effectively, transparently, and fairly.[8] The NCSC definition can only be satisfied if disputes are being resolved by a single comprehensive online dispute resolution platform exclusively rather than by a combination of different communication mediums and technologies.

B. What Should be Included in the Definition

Before diving into the substance of ODR, we may consider why we should be concerned about the definition of ODR. ODR is still a relatively new concept, and the technologies available to support online dispute processes continue to expand and evolve. These technologies can potentially provide substantial benefits, but also introduce new dangers. Well-intentioned dispute resolvers operating online will appreciate guidance concerning ODR best practices. But before creating standards, it is necessary to clearly define the activity for which we are creating those standards.

As the discussion above explains, court systems and individuals that have pivoted online in response to COVID-19 are describing themselves as ODR providers, even though they may only be using communication technologies. The concern is that these users may believe they are utilising all the relevant technologies, and need not explore other options. However, other options do exist, and they can make a significant difference

[5] National Center for State Courts, 'What Is ODR?' <https://www.ncsc.org/odr/guidance-and-tools> accessed 28 February 2022.

[6] ibid.

[7] ibid.

[8] ibid.

in how the dispute resolution process plays out. Any definition of ODR must at least acknowledge the breadth of options.

For example, artificial intelligence can potentially improve dispute resolution practices in a variety of ways. Algorithmic systems can be designed to collect a wealth of information. Based on the participants' preferences, artificial intelligence can offer possible solutions based upon parties' professed interests beyond their imagination. Smartsettle is one example that uses optimisation algorithms to assist parties to reach solutions that are beyond 'win-win'.[9]

Blind bidding is an option that can be integrated into an ODR system.[10] The author is the System Designer for the New York State Unified Court System's small claims court pilot ODR project. Working with commercial ODR provider Matterhorn, blind bidding has already been integrated into the New York State ODR platform.[11] Blind bidding allows the claimant to submit a settlement demand to the platform that will not be revealed to the respondent. The respondent then submits their offer. If the demand and offer fall within a certain percentage range of each other, then the ODR platform alerts the parties that an agreement has been reached. If the demand and offer are too far apart the first time, the process can be repeated two more times. If the parties still fail to reach an agreement, they can then proceed to a person-to-person online negotiation, followed by mediation with a third-party mediator if necessary. In this regard, the blind bidding process allows parties to reach an agreement without the assistance of a third-party neutral, thus saving significant cost and time.

Machine learning is another option that automatically allows algorithms to improve dispute resolution processes through experience. Its goal is to empower computers to act without specific programming. Speech recognition and self-driving cars are examples of machine learning. In the field of ODR, machine learning can recognise fact patterns and predict potential settlement agreements for the parties.

If both judicial systems and non-judicial dispute resolvers do not appreciate that existing technologies can improve the dispute resolution process, opportunities to increase access to justice, as well as the consistency and fairness of results will be lost. Individuals may not be able to participate in the justice system for various reasons, including shame, fear, lack of vacation time, transportation issues, absence of childcare, physical intimidation by the other party, and disability. Because ODR does not require parties to appear at a scheduled time in a physical location, it can offer not only a virtual

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9 Smartsettle, 'Collaborative Negotiation Systems' <https://www.smartsettle.com/about-us> accessed 28 February 2022.

10 Smartsettle has developed a multivariate blind bidding system that uses algorithms to reward negotiators for moving quickly into zones of agreement, which is more sophisticated than a basic blind bidding process. Smartsettle, 'Smartsettle's Visual Blind Bidding' <https://info.smartsettle.com/products/smartsettle-one/smartsettles-visual-blind-bidding/> accessed 28 February 2022.

11 Civil Court of the City of New York, 'Small Claims Part, Online Dispute Resolution Platform' <https://cii2.courtinnovations.com/NYNYSC> accessed 28 February 2022. The New York State Unified Court System's small claims pilot ODR project was launched on 29 January 2021.

asynchronous option, but also technology-based processes that can eliminate these obstacles and increase access to justice.

Judicial systems, arbitrators, and mediators relying only on communication technologies may be inclined to return to familiar in-person processes after COVID-19 has subsided if they are not aware of the technological possibilities. The present is an exceptionally opportune moment in time. COVID-19 has forced dispute resolution processes to move online quickly. There is excitement and curiosity regarding how technology can improve judicial systems and alternative dispute resolution processes. A more universally accepted definition of ODR that focuses on how dispute resolution systems can recognise the potential offered by more sophisticated technologies and integrate technologies to resolve specific types of disputes will encourage users to explore the possibilities. That greater understanding, combined with clearer standards and best practices, can capture the current momentum and result in new system designs that begin to reimagine 'justice'.

III. Why Clear ODR Standards Are Important

The author is Co-Chair of the American Bar Association Section of Dispute Resolution ODR Standards Task Force ('ABA ODR Task Force'). The ABA ODR Task Force, along with the National Center for Technology and Dispute Resolution ('NCTDR'), and the International Council for Online Dispute Resolution ('ICODR'), are drafting standards and/or guidance for ODR providers. Understanding that many ODR providers may not be interested in wading through a lengthy, law-review-style exposition, the three drafting organisations intend to produce a succinct set of standards or guidance relevant to almost all ODR providers. To be both succinct and relevant, the standards or guidance must address the audience in question. If ODR means doing something more than just using video conferencing and e-mails to move traditional in-person processes online, the relevant standards or guidance for that audience will be different and more complex than those written for mere communication technologies users.

There is an ongoing debate regarding whether the ABA ODR Task Force or other entities attempting to influence or regulate ODR should be creating standards or guidance. Standards are more compulsory in nature and use obligatory language such as 'must'. One problem is that if standards are created, then there should be an entity that can enforce those standards. That entity might have to be created. It is possible that state legislatures or even national legislatures such as the United States Congress could officially adopt the proposed standards, but that process presents challenges.

Courts are much more comfortable with the idea of guidance rather than standards. The courts in the United States prefer creating their own rules rather than being fettered by external standards. One possibility is to produce standards for private sector ODR providers, and concurrently, guidance for the courts. The goal of the ABA ODR Task Force is to issue standards, guidance, or a combination of the two by summer 2022. As Co-Chair, I am as eager as anyone to see what we finally produce.

A. ICODR Standards

Even though it might be somewhat unwieldy, it is possible to draft standards that speak to both the sophisticated and the simple technology users. Helpful standards do already exist. ICODR has drafted a set of standards that provide valuable guidance for any ODR provider, and these standards should be circulated as widely as possible.[12] The ABA ODR Task Force, using these standards as a starting place, is working with ICODR and NCTDR to provide greater details regarding how those standards should be applied in practice:

- **Accessible**: ODR must be easy for parties to find and participate in and not limit their right to representation. ODR should be available through both mobile and desktop channels, minimize costs to participants, and be easily accessed by people with different physical ability levels.
- **Accountable**: ODR systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve.
- **Competent**: ODR providers must have the relevant expertise in dispute resolution, legal, technical execution, language, and culture required to deliver competent and effective services in their target areas. ODR services must be timely and use participants time efficiently.
- **Confidential**: ODR must maintain the confidentiality of party communications in line with policies that must be made public around a) who will see what data; and b) how that data can be used.
- **Equal**: ODR must treat all participants with respect and dignity. ODR should enable often silenced or marginalized voices to be heard and ensure that offline privileges and disadvantages are not replicated in the ODR process.
- **Fair/Impartial/Neutral**: ODR must treat all parties equally and in line with due process, without bias or benefits for or against individuals, groups, or entities. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance of commencement of ODR services.
- **Legal**: ODR must abide by and uphold the laws in all relevant jurisdictions.
- **Secure**: ODR providers must ensure that data collected and communications between those engaged in ODR is not shared with any unauthorized parties. Users must be informed of any breaches in a timely manner.

[12] International Council for Online Dispute Resolution, <https://icodr.org/sample-page/> accessed 28 February 2022. The author is a Fellow in the National Center for Technology and Dispute Resolution, which assisted in drafting the ICODR standards. The author participated in the drafting process and, acknowledging the possibility of creator’s bias, still believes that by any objective measurement the standards are a valuable contribution.

- **Transparent**: ODR providers must explicitly disclose in advance a) the form and enforceability of dispute resolution processes and outcomes; and b) the risks and benefits of participation. Data in ODR must be gathered, managed, and presented in ways to ensure it is not misrepresented or out of context.[13]

B. ODR Standards Protect Users

A strong case can be made for creating standards. A clear definition of ODR and carefully prepared standards can not only encourage and guide the development of trustworthy ODR, but also educate and warn users concerning ODR systems that may be problematic. This is because technology can be confusing, and when individuals are invited to use or choose an ODR platform, they may have no idea where to begin. Therefore, clear standards will be tremendously helpful for identifying which ODR practitioners are not adequately protecting users' interests.

Moreover, dispute resolvers, particularly those operating outside the court system, can significantly influence dispute resolution outcomes. This is especially true for mediators. In 1998, the author founded and edited a journal titled 'The Journal of Alternative Dispute Resolution in Employment' that existed for four years.[14] One of the author's colleagues, James R. Coben, authored an insightful article that still is relevant today.[15] Professor Coben asserted that mediation has a 'dirty little secret', and that mediators can easily manipulate and deceive parties. He explained that mediators can exercise pressure and persuasion by managing the negotiation agenda; managing communications through reframing and caucuses; controlling the physical setting in terms of seating arrangements, table shape or room size; making timing decisions such as when offers and responses are communicated or by imposing or removing settlement deadlines; packaging information to make it more or less likely to be heard; choosing who is allowed to sit at the table; exerting authority as an expert; encouraging doubt to moderate a party's position; or rewarding behavior by offering friendship or interest in a party's well-being.[16]

Professor Coben was not convinced that legislation is the answer. He believed that most manipulation is too nuanced to be regulated.[17] However, he did acknowledge that clear standards describing the limits of overt mediator misrepresentation would help deter the most extreme mediator deceptions.[18]

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[13] International Council for Online Dispute Resolution, 'ICODR Standards' <https://icodr.org/standards/> accessed 28 February 2022.

[14] Journal of Alternative Dispute Resolution in Employment, CCH (formerly Commerce Clearing House), Chicago.

[15] James Coben, 'Mediation's Dirty Little Secret: Straight Talk about Mediator Manipulation and Deception' (2000) 2(4) Journal of Alternative Dispute Resolution in Employment 4.

[16] National Center for State Courts (n 5).

[17] ibid.

[18] ibid.

These were Professor Coben's concerns twenty-two years ago. Now, imagine the deception that is possible when relying on technology-facilitated communication. Instead of a mediator influencing the parties by merely reframing one party's communication in the mediator's own words, a mediator now can use software such as AV Voice Changer to alter the parties' pitch and timbre to make statements sound more aggressive or conciliatory, for example. This can be a particular problem when communication on the ODR platform is asynchronous. Alternatively, if a mediator believes that an intentionally delayed response from one party may negatively impact negotiations, the mediator can simply blame the delay on a technological malfunction. The potential to manipulate the process, deceive the parties, and influence the outcome grows exponentially when we move from in-person dispute resolution processes to technology-facilitated processes.

Although it may not be possible to draft standards that identify and regulate every conceivable type of mediator manipulation, standards that articulate expectations regarding ODR can be crafted. Standards that emphasise transparency will help parties choosing an ODR platform to make better-informed choices. Those same standards must also advise and remind mediators what behaviours are appropriate, and that a fundamental principle of mediation is parties' self-determination.[19] Parties must understand what is happening during ODR may not be immediately apparent, and mediators should place party autonomy above the desire to achieve a high settlement rate.

C. Technology Can Cause Confusion Regarding the Role of the Mediator

Technology obviously impacts dispute resolution processes in a myriad of ways. One other effect must be mentioned. As Chair of the American Bar Association Section of Dispute Resolution, the author regularly interacts with mediators, arbitrators, judges, and judicial staff. There is currently a tremendous amount of communication between dispute resolvers as they attempt to identify best practices while moving quickly online. The consensus appears to be that a dispute resolver should begin any ODR process by introducing the parties to the technology. Dispute resolvers are encouraged to help the parties become familiar with the ODR platform before the actual dispute resolution process begins.

The problem is that the nature of the first interaction between a mediator and the parties is akin to teacher-student interaction. Although that may neither be the intention nor the goal, the mediators present themselves as the expert with all the answers. First impressions are powerful and lasting. It is not credible to pretend that after this first interaction, a mediator can immediately shift and assume the role of an impartial facilitator – one who will allow the parties themselves to control the direction of the resolution process. Mediators must be cognizant of the impact of their technology-training sessions

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[19] Coben (n 15).

and must reposition themselves as a genuine neutral. It may be advisable, for example, to have one person introduce and explain the technology that will be used and then have a different second person conduct the mediation.

The ICODR standards discussed earlier identify and respond to some of the concerns raised by ODR. For instance, an ODR system must ensure confidentiality and security. This means judicial systems, arbitrators, mediators, and any other type of dispute resolvers must ensure that communications cannot be intercepted. Those confidential communications and any other privileged data must be protected from outsiders consistent with the best available industry standards.

D. Accessibility Has Many Dimensions

An ODR system must be accessible. Accessibility has several dimensions. Individuals with limited financial resources, or those living in rural areas, may not have regular or secure access to broadband internet. Consequently, they may not interact effectively with an ODR platform that has not been thoughtfully designed to accommodate such individuals.

Designing an ODR platform that functions well on mobile phones may ameliorate the problem for many individuals with limited financial resources. Yet all mobile phones do not have the same capabilities. Consider this scenario from a global perspective: while 82.2% of the population in the United Arab Emirates have a smartphone, representing the highest smartphone penetration in the world, Bangladesh has the lowest user-to-population ratio – only 5.4%.[20] 75% of adults in India do not have a smartphone, although 40% own a mobile device.[21] 25% of people in Canada do not have a mobile phone of any kind.[22] Hence, ODR system design must consider both the fact that some users may access the system exclusively from a mobile phone and the types of mobile devices on which the platform will operate effectively.

Additionally, the fact remains that mobile phone coverage is not universal. Even if one has a mobile phone, that person may not have access to mobile phone service. Therefore, ODR system designers must offer accessibility options. However, because those options still may not completely resolve the accessibility issues, the ODR system must be able to identify those individuals at the initial stage of the process, and allow them to opt out.

One more reason why setting standards can be helpful is discussed in the next two sections concerning persons with disabilities. National and regional legislation may require governments and businesses to ensure that their services are accessible to persons with disabilities. If there are no standards or even guidance as to how that accessibility

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[20] Denis Metev, '39+ Smartphone Statistics You Should Know in 2020' (*Review 42*, 21 November 2020) <https://review42.com/smartphone-statistics/> accessed 28 February 2022.

[21] ibid.

[22] ibid.

can be provided, parties will have no choice but to litigate whether the accessibility mandate has been satisfied.

IV. Persons With Disabilities

ODR must be accessible for persons with disabilities. It is essential that persons with disabilities are able to use ODR as effectively as everyone else. It is more important than ever that services and activities online, including judicial systems and alternative dispute resolution processes, are accessible for persons with disabilities. COVID-19 is a deadly, easily transmitted disease, and in-person interactions are currently risky.[23] Consequently, people are shopping, working, socialising, and even visiting medical providers online. Many individuals are essentially living their entire lives online, outside of interactions with their immediate families. To ensure that persons with disabilities are not excluded from the fundamental activities of life itself, online activities must be designed to be accessible. Thus, digitally accessible judicial systems and alternative dispute resolution processes must be a priority.

Although there have been ODR providers for more than 20 years, most of the ODR activity has taken place in the private sector rather than within court systems, with only a few notable exceptions. Yet, because of COVID-19, judicial systems, mediators, and arbitrators have moved online out of necessity. The world has discovered that these services can be provided in a virtual environment. It is likely that a significant portion of court-integrated and private dispute resolution services will remain online because of cost savings (for example, no need to provide physical office space or commute to work), simple convenience, and perhaps increased productivity. Although vaccines are now available, it will take many months before they can be effectively administered around the world. Individuals will have to continue to interact online and will become increasingly comfortable in that environment. Many may never return to their former in-person manner of doing business.

A. Access to Justice Is a Fundamental Human Right

Access to justice is not merely a desirable goal. It is a fundamental human right. There were 82 signatories to the Convention on the Rights of Persons with Disabilities (‘CRPD’) and 44 signatories to its Option Protocol when the documents were first available for signature on 30 March 2007 - the highest number of signatures in history for any United

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[23] Johns Hopkins University of Medicine, ‘Coronavirus Resource Center’ <https://coronavirus.jhu.edu> accessed 28 February 2022.

Nations convention on its first day of signature.[24] It is the first comprehensive human rights treaty signed in the 21st century.[25] It shifts the focus from regarding persons with disabilities as 'objects' needing charity, medical treatment, and social protection, to people with rights who are capable of claiming those rights and making their own decisions based on free, informed consent.[26]

ODR systems are covered by Article 9. Article 9(1) addresses accessibility and the goal of enabling persons with disabilities to live independently and participate in all aspects of life.[27] Article 9(2)(g) further announces that 'parties shall promote access for persons with disabilities to new information and communications technologies and systems, including the internet'.[28] Additionally, Article 9(2)(h) declares that State Parties shall 'promote the design, development, production, and distribution of accessible information and communication technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.'[29]

ODR systems also fall within the language of Article 13. Article 13(1) explains that States Parties shall ensure effective, equal access to justice for persons with disabilities.[30] In this respect, procedural and age-appropriate accommodations shall be provided to allow persons with disabilities to participate effectively as direct and indirect participants in all legal proceedings.[31] For example, persons with disabilities must be able to participate as witnesses, and all legal proceedings should include investigative and other preliminary stages.[32]

Furthermore, the CRPD details clear articulations of human rights. State entities of signatories, such as judicial systems, are obliged to comply with the treaty. One can only hope that private actors such as mediators and arbitrators appreciate the importance of this human right and incorporate accessibility into their practices.

There may be national and regional legislation that requires ODR providers to make their services accessible. In the United States, for example, the Americans with Disabilities Act ('ADA') Title III prohibits discrimination by public accommodations

[24] United Nations Department of Economic and Social Affairs, 'Convention on the Rights of Persons with Disabilities' (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 ('CRPD'). The CRPD currently has 182 ratifications/accessions and 164 signatories for the Convention and 96 ratifications/accessions and 94 signatories for the Optional Protocol.

[25] ibid.

[26] ibid.

[27] ibid, Art 9(1).

[28] ibid, Art 9(2)(g).

[29] ibid, Art 9(2)(h).

[30] ibid, Art 13(1).

[31] ibid.

[32] ibid.

and commercial facilities based on disability.[33] The United States courts have determined that this legislation does apply to websites.[34] Although there is a split among the courts regarding whether a website must be linked to an actual physical location to be covered by the ADA, the trend - and the better rule - is that a physical location is unnecessary.[35]

B. Web Content Accessibility Guidelines (WCAG)

Because the types and degrees of disability can vary significantly, what constitutes reasonable and appropriate online accommodations for persons with disabilities may not be obvious. The World Wide Web Consortium ('W3C'), through the Web Accessibility Initiative ('WAI'), provides the most comprehensive information concerning website accessibility.[36] The Web Content Accessibility Guidelines ('WCAG') 2.0 and 2.1 provide detailed information on how to ensure that one's ODR platform is accessible for almost all types of disabilities.[37] WCAG 2.0 was published on 11 December 2008, WCAG 2.1 was published on 5 June 2018, and WCAG 2.2 was scheduled to be published in 2021.[38] Even though WCAG 2.2 has not been finalised, a new Working Draft of WCAG 3.0 was released on 7 December 2021.[39] All the requirements from 2.0 are included in 2.1, and the 'success criteria' are verbatim in 2.1.[40] The requirements for each iteration are cumulative. Accordingly, the contextual requirements on 2.0 and 2.1 will be identical to those in 2.2, and each successive version provides additional success criteria.[41] Thus, the different versions are backwards compatible, meaning that a website that satisfies the eventual WCAG 2.2 and 3.0 will satisfy 2.0 and 2.1.

The WCAG is organised under four principles: perceivable, operable, understandable, and robust. For each guideline, there are three levels of success criteria (A, AA, AAA).[42] Suffice to say, the WCAG is not an 'easy read'. In the Web Accessibility Initiatives' own

[33] Americans with Disabilities Act of 1990, 42 U.S.C, ss 12181-12189.

[34] *Andrews v Blick Art Materials*, LLC, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017) (stating that '[i]t is unambiguous that under Title III of the ADA, [the retailer's website] is a place of public accommodation.')

[35] David Larson, 'Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for Everyone' (2019) 34 Ohio St J on Disp Resol 431, 447-449.

[36] World Wide Web Consortium (W3C) and Web Accessibility Initiative (WAI), <https://www.w3.org/WAI/> accessed 28 February 2022.

[37] Web Content Accessibility Guidelines, <https://www.w3.org/WAI/standards-guidelines/> accessed 28 February 2022.

[38] Web Content Accessibility Guidelines Overview, <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/> accessed 28 February 2022.

[39] W3C Accessibility Guidelines (WCAG) 3.0, 'W3C Working Draft' <https://www.w3.org/TR/wcag-3.0/> accessed 28 February 2022.

[40] ibid.

[41] ibid.

[42] ibid.

words, 'WCAG is a technical standard, not an introduction to accessibility'.[43] WCAG is primarily intended for web content developers, web authoring tool developers, web accessibility evaluation tool developers, and anyone else who wants or needs a web- or mobile-accessibility standards.[44]

In 2010, the United States Department of Justice published an Advance Notice of Proposed Rulemaking to receive public comment regarding whether the WCAG should be adopted as the Title III website accessibility standard.[45] Unfortunately, the WCAG was not adopted. Although the United States has decided that ADA Title III applies to online activities, there are still no legal standards for determining compliance with Title III. The only guidance is a handful of court decisions that explain that public accommodations and commercial facilities have 'maximum flexibility' in meeting the ADA's requirements.[46] Such failure in providing specific guidance has left parties with no alternative but to litigate the meaning of 'flexibility'. As noted earlier, this is one of the reasons to provide standards for ODR systems.

V. Existing And Upcoming Legislation

A. Accessibility for Ontarians with Disabilities Act

Ontario, Canada was one of the first jurisdictions to take concrete actions to ensure that persons with disabilities can interact effectively with websites and web content. Ontario enacted the Ontarians with Disabilities Act 2001 to increase opportunities for persons with disabilities and allow them to be involved in the identification, removal, and prevention of barriers to their full participation in life.[47] This Act was expanded by the Accessibility for Ontarians with Disabilities Act, 2005, which creates accessibility standards that public, private, and non-profit entities must comply with.[48]

To its credit, Ontario anticipated that persons with disabilities might have difficulty navigating websites, and therefore passed regulations which further explained the requirements of the Accessibility for Ontarians with Disabilities Act, 2005. New Government and Legislative Assembly internet and intranet websites and web content on those sites were required to conform with WCAG 2.0 Level AA by 1 January 2012.

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[43] ibid.

[44] ibid.

[45] Department of Justice, 'Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations' (75 Fed. Reg. 142, 43465, 2010) <https://www.ada.gov/anprm2010/web%20anprm_2010.htm> accessed 28 February 2022.

[46] *Robles v Domino's Pizza LLC*, 913 F.3d 898, 908-909 (9th Cir. 2019).

[47] Ontarians with Disabilities Act, 2001, S.O. 2001, c. 32.

[48] Accessibility for Ontarians with Disabilities Act, 2005, O.S. 2005, c. 11 <https://www.ontario.ca/laws/statute/05a11> accessed 28 February 2022.

The only exceptions were success criteria 1.2.4 Captions (Live) and success criteria 1.2.5 Audio Descriptions (Pre-recorded).[49] By 1 January 2016, all Government and Legislative Assembly internet websites and web content were required to conform with WCAG 2.0 Level AA with the same two exceptions.[50] By 1 January 2020, all internet and intranet websites and web content were required to conform with WCAG 2.0 Level AA without exception.[51]

New internet websites and web content for designated public sector organisations and large organisations (50 or more employees)[52] were required to conform with WCAG 2.0 Level A by 1 January 2014. By 1 January 2021, they must conform to WCAG 2.0 Level AA with the two exceptions described in the preceding paragraph.[53]

The Government of Ontario, the Legislative Assembly, designated public sector organisations, and large organisations are excused from meeting requirements when it is considered not 'practicable'.[54] To determine whether it is practicable or not, considerations may include the availability of commercial software and/or tools, and any significant impact on an implementation timeline that was planned or initiated before 1 January 2012.[55]

Ontario should be applauded for acting as early as it did to protect persons with disabilities and for continuing to demonstrate leadership on this issue. However, the author questions what are the website accessibility requirements for small organisations, because there is nothing explicit in the regulations. If a judicial system has integrated ODR, then that ODR platform would appear to be subject to the relevant WCAG requirements. Nevertheless, for an ODR provider not associated with the government that has fewer than 50 employees, it is not clear whether the specific WCAG requirements and timelines specified in section 14 of the Integrated Accessibility Standards apply.

There may be liability exposure under more general disability protective legislation such as the Accessibility for Ontarians with Disabilities Act, 2005. This may leave persons with disabilities in a situation similar to those in the United States, who must rely upon litigation to define accommodation responsibilities more clearly. Given that Ontario has begun requiring WCAG compliance for some entities since 2012, one may question why the regulations never require compliance beyond WCAG 2.0 Level AA and do not gradually increase the requirement to WCAG 2.1.

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[49] Integrated Accessibility Standards, Ontario Regulation 191/11, s 14(3)1.

[50] ibid, s 14(3)2.

[51] ibid, s 14(3)3.

[52] ibid, s 2.

[53] ibid, s 14(4)1 and 2.

[54] ibid, s 14(5).

[55] ibid, s 14(6)(a) and (b).

B. United States: The Online Accessibility Act

Unlike Ontario, the United States does not have national legislation or regulations specifically in addressing digital accessibility for persons with disabilities. On 1 October 2020, the Online Accessibility Act was introduced into the United States House of Representatives.[56] The Bill would have amended the Americans with Disabilities Act and added a new Title VI: Consumer Facing Websites and Mobile Applications Owned or Operated by a Private Entity.[57] The Bill was disappointing, to say the least.

First, the accessibility requirements were set too low. The Bill only required websites and mobile applications to be in 'substantial' compliance with WCAG 2.0 Level A and AA, or any subsequent update, revision, or replacement to the WCAG 2.0 Level A and AA standard.[58] As the reader may recall, WCAG 2.0 was published in 2008, WCAG 2.1 was published in 2018, and WCAG 2.2 was scheduled to be published in 2021.[59] The Bill should have immediately required compliance with WCAG 2.1. In contrast, the regulations for the Accessibility for Ontarians with Disabilities Act, 2005, required WCAG 2.0 Level AA compliance for the websites and web content of the new Government of Ontario and the Legislative Assembly as far back as 1 January 2012.[60] Additionally, instead of merely requiring substantial compliance, the Ontarian regulations state the websites 'must' conform, with only two specific exceptions.[61]

WCAG 2.1 does not update, revise, or replace WCAG 2.0. Instead, it provides independent additional compliance requirements. Based on how the Bill was written, the WCAG 2.0 Level A and AA requirements would not be increased unless WCAG 2.0 itself is amended. This is not how compliance requirements are raised. Compliance requirements are increased by publishing successively higher numerical levels of WCAG, not by updating, revising, or replacing already published WCAG 2.0 and 2.1 compliance requirements.

Although one might assume it will be more difficult for small businesses to comply with accessibility requirements, these are not the early days of internet activity. Businesses have been offering goods and services on the internet for several decades. There is

[56] Online Accessibility Act, H.R. 8478 <https://www.congress.gov/Bill/116th-congress/house-Bill/8478/text> accessed 28 February 2022.

[57] ibid.

[58] ibid, s 601(b)(1).

[59] Web Content Accessibility Guidelines (n 37).

[60] Integrated Accessibility Standards (n 49).

[61] ibid.

substantial public support for making websites accessible for persons with disabilities.[62] The October 2020 Bill stated that any regulation relating to small businesses shall allow 'flexibility' to comply with WCAG 2.0 Level A and AA.[63] The undefined term 'flexibility' is a reason why the number of ADA Title III litigations concerning website accessibility has increased in the United States. If this term remains undefined, then the litigation situation will not be resolved.[64]

Further, the Bill required a plaintiff to provide notification of non-compliance to website or mobile application owners before they could file a complaint with the Attorney General.[65] The website owner/operator then has 90 days to bring the website or application into compliance before an individual could file lodging a complaint.[66] The author believes the law should require businesses to educate themselves regarding legal obligations. Persons with disabilities should not be required to provide notice and educate non-complying website or mobile application owners regarding legal obligations before filing a complaint.

If the website or application owner did not comply within 90 days, then the Attorney General could bring a civil action. The court may grant equitable relief and/or monetary damages to the person aggrieved, and assess a civil penalty in an amount not exceeding US$20,000 for the first violation and US$50,000 for any subsequent violation.[67] Punitive damages were not permitted.[68]

The Bill added that the court 'shall' consider any 'good faith effort' or attempt to comply with this Act when considering a civil penalty.[69] In usual cases, it is justified for courts to have discretion to consider a defendant's good faith efforts. Yet, as the defendants have already received the privilege of a 90-day notice period regarding violations of which they should have been aware, mandating that courts then consider defendants' good faith efforts to comply tilts the scales too heavily in favour of defendants. Although it is true that the regulations for the Accessibility for Ontarians with Disabilities Act, 2005,

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62 WAVE Web Accessibility Evaluation Tool <https://wave.webaim.org/> accessed 28 February 2022; Usablenet, <https://usablenet.com/about-us> accessed 28 February 2022; eSSENTIAL Accessibility <https://www.essentialaccessibility.com/> accessed 28 February 2022; Accessible Web, <https://accessibleweb.com/> accessed 28 February 2022; WebAIM, <https://webaim.org/> accessed 28 February 2022.

63 Online Accessibility Act (n 56) s 601(c)(3).

64 Minh Vu, Kristina Launey and Susan Ryan, 'Federal ADA Title III Lawsuit Numbers Drop 15% for the First Half of 2020 But a Strong Rebound Is Likely' (*Seyfarth Shaw*, 2 September 2020) <https://www.adatitleiii.com/2020/09/federal-ada-title-iii-lawsuit-numbers-drop-15-for-the-first-half-of-2020-but-a-strong-rebound-is-likely/> accessed 28 February 2022.

65 Online Accessibility Act (n 56) s 602(b).

66 ibid, s 602(b)(1).

67 ibid, s 602(d)(2).

68 ibid, s 602(d)(3).

69 ibid, s 602(d)(5).

excuse failure to meet compliance requirements when it is not 'practicable', the choice of that word indicates that the assessment should be objective. For example, whether commercial software or tools are available can be considered.[70] However, the United States Bill excuses non-compliance based on a more lenient 'good faith' standard.[71]

Upon exhausting administrative remedies, individuals were permitted to commence civil actions unless the Attorney General had instituted an enforcement action.[72] Plaintiffs were required to plead with particularity each element of each claim, including the specific barriers to access.[73] Rule 8 of the Federal Rules of Civil Procedure simply requires 'a short and plain statement of the claim showing that the pleader is entitled to relief.'[74] The United States Supreme Court has interpreted this requirement to mean that the allegations in the complaint must 'plausibly give rise to an entitlement to relief.'[75] Requiring persons with disabilities to plead with particularity to each element of their claim, including the specific barriers, imposes an excessively demanding pleading requirement. Although there are limited situations with stringent pleading requirements in the United States (such as those involving fraud or mistake),[76] website owners have the benefit of the explicitly detailed WCAG and the many consultants who are available to ensure accessibility for persons with disabilities. They do not need to be protected by heightened pleading requirements.

The author is pleased to report the Bill was not enacted into law.[77] Regrettably, legislators are determined to protect businesses, regardless of how damaging their actions are to the rights and livelihoods of persons with disabilities. They appear incapable of understanding that putting persons with disabilities in a disadvantageous position may reduce their number of customers. The Bill was reintroduced on 18 February 2021.[78] The author is again pleased to report that the predicted likelihood of passage is only 3%,[79] suggesting that this proposed legislation is more about pandering to a particular constituency rather than a realistic attempt to enact legislation.

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[70] Integrated Accessibility Standards (n 49), s 14(6)(a).

[71] Online Accessibility Act (n 56), s 602(d)(3).

[72] ibid, s 603(a).

[73] ibid.

[74] Federal Rules of Civil Procedure, Rule 8(a)(2).

[75] *Ashcroft v Iqbal* 556 U.S. 662, 679 (2009).

[76] Federal Rules of Civil Procedure, Rule 9(b).

[77] Online Accessibility Act (n 56).

[78] ibid.

[79] ibid. Note Skopos Labs, which describes itself as a team 'including *A.I. researchers, data engineers, and investment professionals* - created a machine learning & natural language processing platform that automatically decodes data, Bespoke AI. With years of scientific research, we developed a proprietary process to transform intangible developments into quantified impacts.' <https://www.skoposlabs.com/> accessed 28 February 2022.

VI. Conclusion

Although there is no consensus concerning a definition of ODR, that situation must change. It is imperative to have a clear definition for ODR that focuses on processes expressly designed to resolve disputes that integrate technologies beyond video conferencing. Notably, ODR standards have begun to appear and respected organisations such as the American Bar Association, ICODR, and NCTDR are currently devoting significant time and energy to drafting standards and guidance. Those standards and guidance will provide a framework for best practices and self-regulation of ODR.[80]

Moreover, ODR must be accessible for persons with disabilities because access to justice is a human right. The WCAG are the most detailed guidelines for achieving accessibility for everyone. Both governmental and non-governmental ODR providers will increasingly adopt the WCAG to guarantee accessibility. Accessibility for persons with disabilities is so crucial that jurisdictions will legislate protection for persons with disabilities. The Online Disability Act introduced into the United States House of Representatives is notable, recognising that access needs to be available for persons with disabilities. That legislation, however, appears to be tilted toward protecting businesses rather than ensuring digital accessibility. It is hoped that United States legislators will follow a model similar to the Accessibility for Ontarians with Disabilities Act, 2005, with the addition of a timeline for moving from WCAG 2.0 to 2.1 (eventually 2.2 and 3.0) and a greater emphasis on protecting accessibility rights for persons with disabilities rather than business interests.

[80] ICANN Online Dispute Resolution Standards of Practice <https://www.icann.org/resources/pages/odr-standards-of-practice-2012-02-25-en> accessed 28 February 2022.