

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

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Degree, Strathmore University Law School**

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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 time 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.

