

**AN EVALUATION OF THE NEED FOR REGULATION
OF ONLINE DISPUTE RESOLUTION (ODR) IN
KENYA**

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REG. NO: G62/82350/2015

**A Thesis Submitted in Partial Fulfilment of the Requirements for Award of the Degree
of Master of Laws (LL.M) from The University of Nairobi**

November, 2016

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ACKNOWLEDGMENTS

I remember the first day of nursery school. I was dressed, fed and taken on a ride in my parents' red Toyota Corolla. Dad was driving. We stopped at an unfamiliar place, where there were other cars and other children wearing similar clothes as I was. This looked like fun. Dad got out and said hello to a certain lady, who smiled and welcomed me. I was unsure of who this lady was, but she looked friendly. Dad jumped into the car (this may sound more dramatic than it was in reality). He said he was 'coming back'. He was leaving me. I cried. He drove off. I cried some more. The lady comforted me, held my hand, and walked me into *Msingi Bora* Kindergarten, the start of this journey in the search for knowledge.

More than two decades later, I am proud to have reached this milestone in my academic pursuit. Through this Master of Laws (LL.M) course especially in writing this thesis, I am grateful for the gentleman who held my hand at this stage in this journey in the search for knowledge. Mr. Leonard Aloo, my supervisor, has challenged me to ask questions; to dig deeper; to break the bounds of preconception that limit our thinking. His follow-up SMS' startled me into action, when I was trapped in inertia. Encouraging me to pursue innovating approaches to conducting research, nudging me to pursue the unfamiliar territory by exploring an area with little local input, and questioning my thinking prompting me to be more critical and deliberate: Mr. Aloo has made this feat possible.

We were placed on this earth among people. I am fortunate to still have the kind humans that have watched me grow, see me to this point. Dr. Stephen Njoroge Gachie, Ph.D. (Dr. Dad) and Dr. Wachuka Njoroge, Ph.D. (Dr. Mum) have been the ever-guiding light in this endeavor. To have parents that understood when I would miss family events doing school-related activities is a blessing. Dr. Damian Muindi Maingi, Ph.D. and Mrs. Melissa Muindi, academicians striving to sow the seeds of intellect in the present generation, have been instrumental. Master Mariga Wang'ombe, for checking up on me to know how I was faring: your frequent questions have challenged me to make progress with this thesis, even though you may not have known the effect they have had. To Amelia Muindi, my niece, watching you grow brings home the idea of working hard to create a better future for your generation. Thank you for forcing your mum to call "Uncle Gash" at 7AM in the morning, just to say hi. I also sincerely thank Dr. Mum, Wambaire Cikũ and Mrs. Melissa Muindi for proofreading my thesis, critiquing my

analyses and offering your comments on how to improve. I am grateful for their support, and I must acknowledge that any errors contained in this work are mine.

To my larger family, friends and colleagues, your support has not gone unnoticed. I am grateful. I hope that my little contribution to the quest for knowledge serves as proof that this little boy who cried on his first day of school, is steady on the path for greater things to come.

I thank you all.

ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
ADRP	Alternative Dispute Resolution Policy
B2B	Business to Business
B2C	Business to Consumer
C2C	Consumer to Consumer
CAK	Competition Authority of Kenya
ccTLD	country code Top-Level Domain
e-commerce	electronic commerce
EFTA	Electronic Fund Transactions Act
ESIGN	Electronic Signatures in Global and National Commerce
EU	European Union
FTC	Federal Trade Commission
G2C	Government to Citizen
ICANN	Internet Corporation for Assigned Names and Numbers
ICT	Information and Communications Technology
KeNIC	Kenya Network Information Centre
KNBS	Kenya National Bureau of Statistics
NACOSTI	National Commission for Science Technology and Innovation
NCIA	Nairobi Centre for International Arbitration
NCPD	National Council for Population and Development
ODR	Online Dispute Resolution
OECD	Organisation for Economic Co-operation and Development
PDF	Portable Document Format
SME	Small and Medium-sized Enterprise
TAM	Technology Acceptance Model
UEFA	Union des Associations Européennes de Football
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WIPO	World Intellectual Property Organisation
ZADRR	ZA Domain Name Dispute Resolution Regulations

LIST OF REGIONAL AND NATIONAL LAWS

Kenya/East African Community

Alternative Domain Name Dispute Resolution Policy 2003

Arbitration Act 1995

Civil Procedure Act (Cap 21)

Civil Procedure Rules 2010

Constitution of Kenya 2010

Consumer Protection Act 2012

East African Community Electronic Transactions Bill 2014

Evidence Act (Cap 80)

Kenya Information and Communications Act 2009

Kenya Information and Communications (Amendment) Act 2013

Science, Technology and Innovation Act 2013

The Nairobi Centre for International Arbitration Act 2013

The Treaty for the Establishment of the East African Community 1999

United Kingdom/European Union

Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015

Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015

Charter of Fundamental Rights of the European Union 2000

Consolidated Texts of the EU Treaties as amended by the Treaty of Lisbon 2007

Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC 2013

European Communities Act 1972

Human Rights Act 1998

Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC 2013

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

Treaty on the Functioning of the European Union 2007

United States of America

Electronic Fund Transactions Act 1978

Electronic Signatures in Global and National Commerce Act 2000

Federal Trade Commission Act 1914

Federal Arbitration Act 1970

LIST OF CASES

Anne Mumbi Hinga v Victoria Njoki Gathara [2009] Court of Appeal of Kenya at Nairobi Civil Appeal 8 of 2009, eKLR

Asociación Profesional Élite Taxi v Uber Systems Spain, SL - Request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain) lodged on 7 August 2015 European Court of Justice C-434/15

Evangelical Mission for Africa & another v Kimani Gachuhi & another [2015] High Court of Kenya at Nairobi Miscellaneous Civil Application 479 of 2014, eKLR

Franz Grad v Finanzamt Traunstein [1970] European Court of Justice 9-70, European Court Reports 00825

Fratelli Variola SPA v Amministrazione italiana delle Finanze [1973] European Court of Justice 34-73, European Court reports 00981

Hanif Sheikh v Alliance Nominees Limited & 17 others [2014] High Court of Kenya at Nairobi Civil Suit 241 of 2012, eKLR

Inter-Environnement Wallonie ASBL v Région Wallonne [1997] European Court of Justice C-129/96, European Court reports I

Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex parte Barclays Bank of Kenya Limited [2015] High Court of Kenya at Nairobi Miscellaneous Civil Application 46 of 2013, eKLR

Republic v Mark Lloyd Steveson [2016] High Court of Kenya at Kiambu Criminal Revision 1 of 2016, eKLR

Salvatore Grimaldi v Fonds des Maladies Professionnelles [1989] European Court of Justice C-322/88

Telkom Kenya Limited v Rapid Communications Limited [2015] High Court of Kenya at Nairobi Civil Case 344 of 2014, eKLR

Transport for London v Uber London Limited & 2 others [2015] High Court of Justice, Queen's Bench Division, Administrative Court CO/1449/2015

Union des Associations Europeennes de Football (UEFA) v Funzi Furniture [2000] WIPO Arbitration and Mediation Center WIPO Domain Name Decision: D2000-0710

Vimalkumar Bhimji Depar Shah & another v Stephen Jennings & 5 others [2016] High Court of Kenya at Nairobi Civil Case 300 of 2015, eKLR

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ABSTRACT

This study evaluates the need for a legal framework for Online Dispute Resolution in Kenya. Online Dispute Resolution is the meeting point of dispute resolution and technology. While on one end it is argued that a favourable legal system on Online Dispute Resolution may boost the sector as is seen in the United Kingdom experience, on the other extreme there are calls for non-interference by the state in a market-driven approach such as in the United States of America where a deregulated Online Dispute Resolution system is preferred. This study presents the dispute resolution scenario in Kenya, drawing parallels from the United Kingdom and United States of America experiences. The thesis explores the question whether Kenya should prioritise development of legal standards for Online Dispute Resolution drawing from the United Kingdom experience, or whether Online Dispute Resolution should develop independent of the law drawing from the United States of America experience. The problem addressed is that the lack of a legal framework for Online Dispute Resolution in Kenya has the potential to stifle development of the area. The null hypothesis is that there is no need for a legal framework for Online Dispute Resolution in Kenya. The study finds that Kenya should consider adopting legal standards for Online Dispute Resolution, especially for consumer protection concerns.

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CHAPTER ONE: BACKGROUND TO THE STUDY

1.0 Introduction

This study evaluates the need for recognition of Online Dispute Resolution (ODR) in the legal framework in Kenya. It focuses on ODR for resolution of disputes arising from small value Business to Consumer (B2C) electronic commerce (e-commerce) transactions. The study assesses the nature of ODR. It analyses the regulatory framework in the United Kingdom (UK) and the United States of America (USA) to evaluate whether it is necessary to introduce a legal framework to govern ODR in Kenya. This chapter presents a background to the study, the statement of the problem, theoretical bases underlying this study, objectives of the study, research questions and hypotheses for this study.

1.1 Background to the Problem

Imagine you purchase a household item on an online shop, and the supplier delivers it to your office. The item works fine for the first few days, but after a week it malfunctions. You would like to return it to the supplier, but your office is in Nairobi and you learn from the supplier's website that they are based in Eldoret. Considering that the item is only worth Kshs 200/- and the cost of sending it back to the supplier coupled with the telephone costs far outweigh the value of the item, you are at a loss as to what to do. ODR offers a solution to your problem. It may be used to resolve the dispute between you as the consumer in Nairobi, and the supplier in Eldoret. The possibility that you may never meet the supplier, the distance between the parties, and the uncertainty of whether the process will be fair, are considerations that make it necessary to examine whether ODR should be regulated. This study seeks to establish whether there is a need to regulate ODR in Kenya.

ODR is defined as 'a form of appropriate dispute resolution that utilizes telecommunication (usually internet-based, but to a lesser extent, telephones and cellular phones) to facilitate speedy and efficient resolution mainly by compressing or reducing the time, costs and geographic space that is shared between disputing parties'.¹ The disputes that may be subject

¹ Sara Parker, 'Online Dispute Resolution (ODR) and New Immigrants: A Scoping Review' (British Columbia Ministry of Labour, Citizens' Services and Open Government 2010) 7.

to ODR arise from either online or offline interactions.² ODR involves the resolution of disputes that arise from online and mobile e-commerce, but also extends to family law, e-consumer protection and disputes arising from off-line commerce.³ ODR is a suitable cost-effective dispute resolution mechanism for high-volume, low-value claims between parties in distant geographical locations, where straightforward repetitive issues may arise between different consumers on a regular basis.⁴

ODR may also be used to resolve domain name disputes, intellectual property disputes and monetary disputes.⁵ For example, the ODR case of *Union des Associations Europeennes de Football (UEFA) v Funzi Furniture*⁶ was decided by an administrative panel of the World Intellectual Property Organisation (WIPO) Arbitration and Mediation Center. The complainant filed the claim against the respondent, a website developer based in Mombasa, Kenya which had registered “www.championsleague.com”. The sole panellist found that the respondent had no rights or legitimate interests in respect of the domain name. The panel ordered that the domain name be transferred to the complainant. This was both a domain name and intellectual property dispute.⁷

There are different forms of e-commerce transactions including B2C e-commerce transactions, Business to Business (B2B) e-commerce transactions, Government to Citizen (G2C) e-commerce transactions, and Consumer to Consumer (C2C) e-commerce transactions.⁸ The

² David B Lipsky and Ariel C Avgar, ‘Online Dispute Resolution Through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model’ (2007) 38 University of Toledo Law Review 101, 48.

³ María Mercedes Albornoz and Nuria González Martín, ‘Feasibility Analysis of Online Dispute Resolution in Developing Countries’ (2012) 44 Miami Inter-American Law Review 39, 40.

⁴ Louis Del Duca, Colin Rule and Zbynek Loebel, ‘Facilitating Expansion of Cross-Border E-Commerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems - Work of the United Nations Commission on International Trade Law’ (2012) 1 Penn State Journal of Law & International Affairs 81 – 82; Julia Salasky, ‘Jurisdiction, Sovereignty, and the Creation of a Global System for Online Dispute Resolution’ (2015) 1 The Journal of Technology and International Arbitration 3 – 34; Jack Graves, ‘Leveraging Technology for More Cost-Effective Arbitration of Cross-Border Commercial Disputes: An Introduction to the Range of Possibilities with a Focus on SMEs’ (2015) 1 The Journal of Technology and International Arbitration 35 – 46; Lee A Bygrave, ‘Online Dispute Resolution – What It Means for Consumers’, *Domain Name Systems and Internet Governance* (Baker & McKenzie Cyberspace Law and Policy Centre and the Continuing Legal Education programme of University of NSW 2002) 1; Brian A. Pappas, ‘Online Court: Online Dispute Resolution and the Future of Small Claims’ (2008) 12 UCLA Journal of Law and Technology.

⁵ Aashit Shah, ‘Using ADR to Resolve Online Disputes’ (2004) 10 Richmond Journal of Law and Technology <<http://jolt.richmond.edu/v10i3/article25.pdf>> accessed 17 November 2015.

⁶ *Union des Associations Europeennes de Football (UEFA) v Funzi Furniture* [2000] WIPO Arbitration and Mediation Center WIPO Domain Name Decision: D2000-0710.

⁷ *ibid.*

⁸ Rania Nemat, ‘Taking a Look at Different Types of E-Commerce’ (2011) 1 World Applied Programming 100, 100 – 103; Parag Shiralkar, ‘Digital Signature: Application Development Trends In E-Business’ (2003) 4 Journal of Electronic Commerce Research 94; Shirish C Srivastava and Thomson SH Teo, ‘A Framework for

inherent nature of B2C online disputes makes them amenable to ODR.⁹ Therefore, disputes arising from online and mobile B2C e-commerce transactions are the best suited type of disputes for ODR.¹⁰ A person already using the internet and mobile phone to effect transactions would, according to this position, be more responsive to an attempt to resolve any dispute that may arise, using the same system.

Developed countries such as the UK and the USA have better infrastructure to sustain internet connectivity than developing countries such as Kenya where weak infrastructure limits internet penetration.¹¹ In the UK and USA respectively, the level of internet use was estimated at 92.6% and 88.5% in the year 2016 contrasted against Kenya's 45%.¹² Kenya had approximately 21 million internet subscriptions, following a 3.7% increase in uptake from the year 2015.¹³ On a global comparative scale, developing countries such as Kenya have low access to broadband networks, and the use of both fixed and mobile telephone surpasses internet use.¹⁴

In Kenya, the increasing penetration of mobile phones, established mobile-communication infrastructure and low levels of internet connectivity all indicate that ODR may be facilitated by wireless mobile devices, and not computers.¹⁵ Low use of the internet in developing countries is associated with low disposable income.¹⁶ With such low disposable income, a household would prioritise shopping for subsistence in physical markets, limiting engagement

Electronic Government: Evolution, Enablers and Resource Drainers', *The Eighth Pacific Asia Conference on Information Systems PACIS* (2004) 2080

<http://www.researchgate.net/profile/Thompson_Teo/publication/239919762_A_Framework_for_Electronic_Government_Evolution_Enablers_and_Resource_Drainers/links/0c96052954df4bdcce000000.pdf> accessed 24 November 2015.

⁹ Aashit Shah (n 5) 4; Feliksas Petrauskas and Eglė Kybartienė, 'Online Dispute Resolution in Consumer Disputes' (2011) 18 *Jurisprudence* 921, 922; Lee A Bygrave (n 4) 2.

¹⁰ Aashit Shah (n 5).

¹¹ Chandra Gnanasambandam and others, 'Online and Upcoming: The Internet's Impact on India' (McKinsey & Company Inc 2012) 25 – 28; Angela Kagwara and Maureen Wanjiru, 'Digital Divide: The Glaring Reality' (University of Nairobi 2009) 7,8

<https://www.uonbi.ac.ke/wakaguara/files/digital_divide_conference_paper.pdf> accessed 24 November 2015.

¹² Internet Live Stats, 'Internet Users by Country' (*Internet Live Stats*, 2016)

<<http://www.internetlivestats.com/internet-users-by-country/>> accessed 14 September 2016.

¹³ *ibid.*

¹⁴ Christine Zhen-Wei Qiang, 'Broadband Infrastructure Investment in Stimulus Packages: Relevance for Developing Countries' 7

<http://siteresources.worldbank.org/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/282822-1208273252769/Broadband_Investment_in_Stimulus_Packages.pdf> accessed 24 November 2015.

¹⁵ Doug Leigh and Frank Fowlie, 'Online Dispute Resolution (ODR) within Developing Nations: A Qualitative Evaluation of Transfer and Impact' (2014) 3 *Laws* 106.

¹⁶ Luis Enriquez and others, 'Creating the Next Wave of Economic Growth with Inclusive Internet' (World Economic Forum 2015).

in e-commerce transactions such as online shopping.¹⁷ This suggests that e-commerce has not reached its full potential in Kenya. As e-commerce increases, the disputes that may arise from these business interactions may present a budding ground for ODR.¹⁸

On the one hand, it is argued that developing legal standards to support ODR systems is important to ensure the development of the sector. According to this position, ‘a solid legal framework is needed to allow for the proper growth of online dispute resolution with its norms, market and technology.’¹⁹ Supporters of this view argue that developing legal standards for ODR may assist to stimulate growth in the area.²⁰ The UK position draws from the view that regulation of ODR is essential for development of the area.²¹

The UK consists of three distinct legal systems: England and Wales; Scotland; and Northern Ireland.²² While there are differences with regard to property rights and the court system, the three systems are similar.²³ Many laws of the UK Parliament in London not only apply to England and Wales, but also to Scotland and Northern Ireland.²⁴ In this study, reference to the ‘legal framework in the UK’ connotes laws that apply throughout the UK, especially with regard to the UK involvement in the EU.

¹⁷ GSV Radha Krishna Rao and G Radhamani, *WiMAX: A Wireless Technology Revolution* (Auerbach Publications 2007) 323; Paul Guinness, *Geography for the IB Diploma Global Interactions* (Cambridge University Press 2011) 47.

¹⁸ Rafal Morek, ‘Regulation of Online Dispute Resolution: Between Law and Technology’ <http://www.odr.info/cyberweek/Regulation%20of%20ODR_Rafal%20Morek.doc> accessed 17 November 2015.

¹⁹ *ibid*; Pablo Cortés, ‘Online Dispute Resolution for Consumers’ in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2010) <<http://www.mediate.com/pdf/cortes.pdf>> accessed 17 November 2015.

²⁰ Louis Del Duca, Colin Rule and Zbynek Loebl (n 4) 81 – 82.

²¹ Karolina Mania, ‘Online Dispute Resolution: The Future of Justice’ (2015) 1 *International Comparative Jurisprudence* 76, 85.

²² European Union, ‘United Kingdom’ (*European Union*, 5 July 2016) <http://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en> accessed 14 September 2016; Sarah Carter, ‘A Guide to the UK Legal System’ (*Globalex - Hauser Global Law School Program, New York University School of Law*, 2015) <http://www.nyulawglobal.org/globalex/United_Kingdom1.html> accessed 19 May 2016; Tom Bolam, ‘Common Mistakes in Choice of Law and Jurisdiction Clauses’ (*Lexology*, 22 September 2015) <<http://www.lexology.com/library/detail.aspx?g=8f9476e8-b712-4726-b675-21463a3355e9>> accessed 19 May 2016.

²³ Tom Bolam (n 22).

²⁴ *ibid*.

The UK is a member of the EU.²⁵ By virtue of this relationship, EU laws affect the legal framework on ODR throughout the UK.²⁶ A referendum on 23rd June, 2016 displayed support for ‘Brexit’, the process of withdrawal of the UK from the EU. The legal result of Brexit is that the EU laws cease to apply to the withdrawing state.²⁷ However, the effect of withdrawal on the legal framework is not immediate.²⁸ The trigger process is the approval by the UK Parliament to invoke Article 50 of the Treaty of the European Union.²⁹ This is likely to commence in 2017, leading to a conclusion of the official legal Brexit in 2019.³⁰ The UK remains a member of the EU until the official legal Brexit.³¹ EU law influences the UK legal system until the UK Parliament either repeals certain pieces of EU legislation or enacts local legislation in particular areas.³² For this reason, this study discusses EU law on ODR as part of the legal framework of the UK.

The EU has designated laws dealing with ODR, including Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR), as well as Regulation (EU) No. 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes. The UK adopted Regulation

²⁵ UK Crown, ‘Countries in the EU and EEA’ (*UK Crown*, 2016) <<https://www.gov.uk/eu-eea>> accessed 14 September 2016; European Union (n 22); Vaughne Miller and others, ‘Research Briefings - Brexit: What Happens Next?’ (UK House of Commons 2016) Briefing Paper 07632 <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7632#fullreport>> accessed 14 September 2016.

²⁶ Vaughne Miller and others (n 25) 10, 11.

²⁷ Consolidated Texts of the European Union Treaties as amended by the Treaty of Lisbon 2007, art 50(3); Eva-Maria Poptcheva, ‘Article 50 TEU: Withdrawal of a Member State from the EU’ (European Parliament 2016) Briefing <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf)> accessed 15 August 2016.

²⁸ TEU (n 27), art 50(3); Eva-Maria Poptcheva (n 27).

²⁹ TEU (n 27), art 50; David Davis, ‘Exiting the European Union: Ministerial Statement’ (UK House of Commons, 5 September 2016) <<https://www.gov.uk/government/speeches/exiting-the-european-union-ministerial-statement-5-september-2016>> accessed 14 September 2016.

³⁰ Ashley Cowburn, ‘Brexit “could Be Delayed until Late 2019” with Whitehall Departments Not yet Ready to Trigger Article 50’ *The Independent* (14 August 2016) <<http://www.independent.co.uk/news/uk/politics/brexit-date-article-50-eu-referendum-result-europe-theresa-may-a7189851.html>>.

³¹ Vaughne Miller and others (n 25) 8.

³² Sarah Gordon, ‘Untangling Britain from Europe Would Cause Constitutional “havoc”’ *Financial Times* (20 June 2016) <<http://www.ft.com/cms/s/2/d7ae7b70-361a-11e6-9a05-82a9b15a8ee7.html#axzz4HQhVRMft>> accessed 16 August 2016.

(EU) No. 2015/1051 through the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 made by the Secretary of State designated for the purposes of section 2(2) of the European Communities Act 1972(a), in relation to matters relating to consumer protection. ODR is therefore well seated in the law in the UK. The aim of the provision for ODR in the law in the UK is to improve consumer confidence for both online and offline transactions.³³

In contrast to the position in the UK, the USA Federal Arbitration Act of 1970 mandates strict use of arbitration for B2C disputes.³⁴ However, the USA law does not proactively support ODR systems through regulation.³⁵ As a result, the ODR systems in the USA operate in the private realm.³⁶ The USA position is that regulation of ODR is not needed because the system developed without specific provision in the law and therefore should continue in the hands of private players.³⁷ This argument is supported by the example of the development of the mobile money services in Kenya, which developed in the hands of private players without a precedent in other countries for regulators to follow in providing regulation.³⁸

This study evaluates whether there is a need for introduction of a legal framework to govern the area of ODR in Kenya, to facilitate resolution of disputes arising from B2C e-commerce transactions. B2C e-commerce disputes may be resolved through the court process, administrative process or Alternative Dispute Resolution (ADR).³⁹ In Kenya, litigation through

³³ UK Department for Business, Innovation and Skills, 'Explanatory Memorandum to the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015' (2015).

³⁴ Amy Schmitz, 'Consumer Redress in the United States', *The Transformation of Consumer Dispute Resolution in the European Union: A Renewed Approach to Consumer Protection* (Oxford University Press 2016) 3.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ Esther van den Heuvel, 'Online Dispute Resolution as a Solution to Cross-Border E-Disputes' 21, 22 <<http://www.oecd.org/internet/consumer/1878940.pdf>> accessed 4 October 2016.

³⁸ Leonard Obura Aloo, 'M-Banking in Kenya: Consumer Protection Issues and Proportional Risk Regulation' (International Development Law Organization (IDLO) 2010) Microfinance Research Paper 12.

³⁹ Feliksas Petrauskas and Eglė Kybartienė (n 9); Pablo Cortés (n 19) 172, 173; Llewellyn Joseph Gibbon, 'Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration' (2002) 23 *Northwestern Journal of International Law & Business* 4, 5, 11 – 15

<<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1555&context=njilb>> accessed 14 September 2016; Colin Rule, Vikki Rogers and Louis Del Duca, 'Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments' (2010) 42 *Uniform Commercial Code Law Journal* 225 – 228 <<http://colinrule.com/writing/ucclj.pdf>> accessed 14 September 2016; Urša Jeretina, 'Administrative Aspects of Alternative Consumer Dispute Resolution in the European Union (EU), Slovenia and Croatia' (2016) 9 *NISPAce Journal of Public Administration and Policy* 191 – 192 <<https://www.degruyter.com/downloadpdf/j/nispa.2016.9.issue-1/nispa-2016-0009/nispa-2016-0009.xml>> accessed 14 September 2016.

the courts is provided for under the Civil Procedure Act (Cap 21) and the Civil Procedure Rules of 2010. The Kenya Information and Communications (Dispute Resolution) Regulations made pursuant to the Kenya Information and Communications Act of 1998 provide for a consumer in a B2C e-commerce dispute with a telecommunications service provider to file a complaint with the Communications Authority of Kenya. A consumer may also resort to ADR as envisioned under Article 159 of the Constitution of Kenya of 2010 which provides that the courts and tribunals shall support the use of ADR. However, section 88 of the Consumer Protection Act of 2012 states:

“88. (1) Any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.”

It is argued that section 88 of the Consumer Protection Act may limit the use of ADR in B2C e-commerce disputes because it allows the consumer to override the arbitral clause in the agreement and commence an action in court.⁴⁰ This study adopts the approach that ODR is a merger of ADR and technology. Therefore this study assumes that if section 88 of the Consumer Protection Act applies to arbitration in the physical world, it would also apply to e-arbitration, a form of ODR that occurs in the cyberspace. This study therefore considers that section 88 of the Consumer Protection Act may affect ODR. Since ODR is a developing area in the law, the effect of this provision on the development of ODR in Kenya is uncertain.

⁴⁰ Kariuki Muigua, ‘Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises’ 29 <<http://www.kmco.co.ke/attachments/article/122/Emerging%20Jurisprudence%20in%20the%20Law%20of%20Arbitration%20in%20Kenya.pdf>> accessed 30 September 2016; John Kamau, ‘How the Consumer Protection Act Works for Consumers (Consumer Protection Act No. 46 of 2012)’ <<http://johnmkamau.blogspot.com/2016/02/how-consumer-protection-act-works-for.html>> accessed 30 September 2016.

1.2 Statement of the Problem

ODR requires a stable legal framework in which to operate.⁴¹ However, on a national, regional and international level, there is limited hard law dealing directly with ODR.⁴² The area is predominantly governed by soft law, through recommendations and guidelines.⁴³ It is argued that uncertainty arising from inadequate provision for ODR, and underdeveloped ODR mechanisms, reduce consumer confidence in B2C e-commerce.⁴⁴ There is therefore need to determine whether specific regulation of ODR would be useful or not.⁴⁵

From the UK experience, it may be concluded that introduction of either a soft law or hard law regulatory framework for ODR in Kenya would contribute to increasing consumer confidence in e-commerce.⁴⁶ This line of thinking appears to propose that without either a soft law or hard law regulatory framework for ODR in Kenya, the development of ODR for B2C e-commerce may be prejudiced. On the converse, a preliminary assessment of the USA experience supports the outlook that no regulation is required for ODR to develop.⁴⁷ Based on the USA experience, it may appear that there is no need to provide for ODR in the legal framework in Kenya.⁴⁸

The Constitution of Kenya of 2010 supports the use of ADR in all disputes including B2C e-commerce disputes.⁴⁹ However, it is argued that section 88 of the Consumer Protection Act

⁴¹ Sodiq O Omoola and Umar A. Oseni, 'Towards an Effective Legal Framework for Online Dispute Resolution in E-Commerce Transactions: Trends, Traditions, and Transitions' (2016) 24 International Islamic University of Malaysia Law Journal 274

<https://www.researchgate.net/publication/303896528_Towards_an_Effective_Legal_Framework_for_Online_Dispute_Resolution_in_E-Commerce_Transactions_Trends_Traditions_and_Transitions> accessed 29 September 2016; Kananke Chinthaka Liyanage, 'The Regulation of Online Dispute Resolution: Effectiveness of Online Consumer Protection Guidelines' (2012) 17 Deakin Law Review 251; Felix Steffek and others, 'Guide for Regulating Dispute Resolution (GRDR): Principles and Comments' in Felix Steffek and others (eds), *Regulating Dispute Resolution – ADR and Access to Justice at the Crossroads* (Hart Publishing 2013) 18 <http://www.mpipriv.de/files/pdf4/Guide_for_Regulating_Dispute_Resolution_GRDR_Principles_and_Comments.pdf> accessed 27 September 2016.

⁴² Lee A Bygrave (n 4).

⁴³ *ibid.*

⁴⁴ Fahimeh Abedi and John Zeleznikow, 'The Provision of Trustworthy Online Dispute Resolution for Business to Consumer Electronic Disputes', *Proceedings of 7th Asia-Pacific Business Research Conference* (2014) <http://www.wbiworldconpro.com/uploads/singapore-conference-2014/marketing/1408616117_512-Fahimeh_abedi.pdf> accessed 17 November 2015.

⁴⁵ Felix Steffek and others (n 41) 32.

⁴⁶ Sodiq O Omoola and Umar A. Oseni (n 41); Fahimeh Abedi and John Zeleznikow (n 44); Karolina Mania (n 21) 85.

⁴⁷ Esther van den Heuvel (n 37) 21 – 22.

⁴⁸ *ibid.*

⁴⁹ Constitution of Kenya 2010, art 159.

may inhibit ADR and may therefore have a negative influence on ODR.⁵⁰ Section 88 of the Consumer Protection Act implies that even though B2C e-commerce disputes are resolved using ODR, the consumer may still bypass the assumed finality of the ODR system to file the matter at the High Court.⁵¹ This in addition problematizes the utility of provision for ODR in the legal framework.

1.3 Theoretical Framework

The theoretical framework that guides the study is outlined in this section. A theoretical framework explains the main phenomena in a study, and to show the assumed relationship between otherwise unnecessarily complex and abstract ideas.⁵² This theoretical framework is therefore important because it displays the theoretical assumptions made in building the argument for whether or not introduction of a legal framework for ODR in Kenya is necessary. Once the theory is set out, the analysis of the data collected as a result of the research tests the theoretical assumptions and contributes to refining the discussion on whether a legal framework for ODR is needed in Kenya.⁵³

There is no central theory explaining the phenomenon of ODR.⁵⁴ Literature acknowledges the need for a unifying theory, noting however that it would be challenging to establish one at this point because ODR is an ever-changing nascent phenomenon.⁵⁵ The form of dispute resolution would therefore need to persist and more research would be required in order to arrive at the ideal theory.⁵⁶

This study takes the sociological approach to law. The sociological approach to jurisprudence studies law in its setting in society.⁵⁷ Scholars such as Eugen Ehrlich and Georges Gurvitch

⁵⁰ Daisy Owuor Ajima, 'Making Kenya a Hub for Arbitration of International Financial Service Disputes' (LLM Thesis, University of Nairobi 2014) 74

<http://erepository.uonbi.ac.ke/bitstream/handle/11295/75602/Ajima_Making%20Kenya%20a%20hub%20for%20arbitration%20of%20international%20financial%20services%20disputes.pdf?sequence=3> accessed 30 September 2016; Constitution of Kenya (n 49), art 157; Consumer Protection Act 2012 s 88.

⁵¹ Consumer Protection Act (n 50); John Kamau (n 40).

⁵² Terrell Lamont Strayhorn, *Theoretical Frameworks in College Student Research* (University Press of America 2013) 1.

⁵³ Nicholas Walliman, *Research Methods: The Basics* (Routledge 2011) 131.

⁵⁴ Riikka Koulu, 'Three Quests for Justification in the ODR Era: Sovereignty, Contract and Quality Standards' (2014) 19 *Lex-Electronica* 43.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ LB Curzon, *Jurisprudence* (Cavendish Publishing Limited 1995) ch 15.

consider the existence of the “living law” and argue in support of legal pluralism.⁵⁸ Modern interpretations of classical socio-legal theorists’ work suggests that apart from the law as a normative scheme, there are other rival normative schemes such as the internet that produce similar outcomes in society, such as dispute-resolution mechanisms.⁵⁹ The cyberspace offers normative schemes that resolve disputes arising from the transnational community brought together by the internet.⁶⁰ Such dispute-resolution mechanisms may be based on the general principles of law incorporated into social practice, and administered by institutions and private autonomous acts of internet users.⁶¹ The theories which guide this study acknowledge the effect of technology on procedural dispute resolution law.⁶² They also recognise the effect of procedural dispute resolution law on technology.

Technology is ‘an approach’ involving ‘application of scientific principles to solve practical problems’.⁶³ An ‘innovation’ is ‘the implementation of a new or significantly improved product (good or service), or process, a new marketing method, or a new organizational method in business practices, workplace organization or external relations.’⁶⁴ The diffusion of new knowledge and technology is central to innovation.⁶⁵ According to sociologists, ‘technology,

⁵⁸ David Nelken, ‘Eugen Ehrlich, Living Law, and Plural Legalities’ (2008) 9 *Theoretical Inquiries in Law* 443; Gunther Teubner and Peter Korth, ‘Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society’ in Margaret Young (ed), *Regime Interaction in International Law: Theoretical and Practical Challenges* (2009) <https://www.jura.uni-frankfurt.de/42853939/ZweiArtendesRechtsppluralismusENG_PK_okt08.pdf> accessed 19 May 2016; Douglas W Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163, 182.

⁵⁹ David Nelken (n 58) 452, 460.

⁶⁰ Gunther Teubner and Peter Korth (n 58).

⁶¹ *ibid.*

⁶² Riikka Koulu (n 54).

⁶³ Morten Levin, ‘Technology Transfer in Organizational Development: An Investigation into the Relationship between Technology Transfer and Organizational Change’ (1997) 2 *International Journal of Technology Management* 297; Sazali Abdul Wahab, Raduan Che Rose and Suzana Idayu Wati Osman, ‘Defining the Concepts of Technology and Technology Transfer: A Literature Analysis’ (2012) 5 *International Business Research* 71 <<http://www.ccsenet.org/journal/index.php/ibr/article/viewFile/13847/9501>> accessed 20 September 2016.

⁶⁴ Organisation for Economic Co-operation and Development (OECD) and Development Statistical Office of the European Communities (EUROSTAT), *Oslo Manual: Guidelines for Collecting and Interpreting Innovation Data* (3rd edition, OECD 2005) 46 <<http://www.oecd-ilibrary.org/docserver/download/9205111e.pdf?expires=1474389259&id=id&accname=guest&checksum=3C857B41886BE47F7176F321586E1A6F>> accessed 20 September 2016; United Nations Industrial Development Organization, ‘The Role of Technology and Innovation in Inclusive and Sustainable Industrial Development’ (United Nations Industrial Development Organization 2015) *Industrial Development Report* xix <https://www.unido.org/fileadmin/user_media_upgrade/Resources/Publications/EBOOK_IDR2016_FULLREPORT.pdf> accessed 20 September 2016.

⁶⁵ Organisation for Economic Co-operation and Development (OECD) and Development Statistical Office of the European Communities (EUROSTAT) (n 64) 31.

including social technology (is) a design for instrumental action that reduces the uncertainty of cause-effect relationships involved in achieving a desired outcome'.⁶⁶

The theory of science posits that science brings change to society, and as a result, phenomena such as technology have created new sciences.⁶⁷ This study adopts the position that jurisprudence (the study of law) is a science involving 'the collection and systematisation of facts' and 'the deduction of general principles from data concerning legal systems', therefore crediting it with the status of a social science.⁶⁸ Figure 1 illustrates the relationship between technology, society and the law. Technology has an impact on society. Society influences the law. As a result, technology has an indirect impact on the law, with society as the medium.

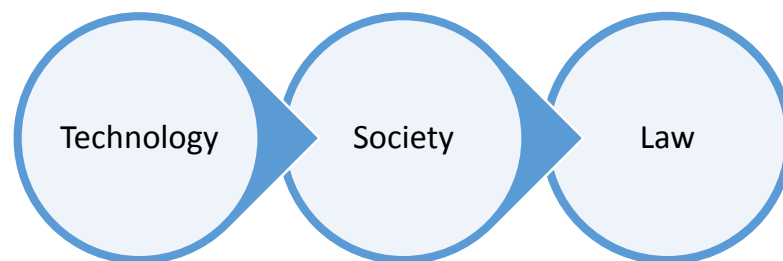


Figure 1: A sociological approach to the effect of technology on the law⁶⁹

The sociological approach to law considers that the interests of society must be embodied in the law.⁷⁰ These social interests include general morals and general progress.⁷¹ General progress here means 'the self-assertion of the social group toward higher and more complete

⁶⁶ Liming Zhao and Arnold Reisman, 'Toward Meta Research on Technology Transfer' (1992) 39 IEEE Transactions on Engineering Management 13; Sazali Abdul Wahab, Raduan Che Rose and Suzana Idayu Wati Osman (n 63) 71.

⁶⁷ Riikka Koulu (n 54).

⁶⁸ LB Curzon (n 57) 4,5.

⁶⁹ David Nelken (n 58).

⁷⁰ LB Curzon (n 57) 163; James A Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part II)' (1962) 7 Villanova Law Review 165.

⁷¹ LB Curzon (n 57) 164; Linus J McManaman, 'Social Engineering: The Legal Philosophy of Roscoe Pound' (1958) 33 St. John's Law Review 19, 20

<<http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=4478&context=lawreview>> accessed 4 October 2016.

development of human powers'.⁷² This includes economic progress (freedom of property, trade, industry), and cultural progress (freedom of science, improvement of education and aesthetic surroundings).⁷³

Technology impacts society.⁷⁴ Dispute resolution is a societal mechanism of managing relationships between different parties.⁷⁵ Dispute resolution arises where there is a strained relationship that society seeks to rectify or terminate through addressing the root cause of an issue arising from conflicting positions.⁷⁶ Dispute resolution therefore either mends or terminates relationships.⁷⁷ The result of the impact of technology on dispute resolution, a social concept, gives rise to ODR.

The law adopts and mirrors the aspirations of the society to improve trade and promote the freedom of science.⁷⁸ When technology assists to promote dispute resolution, the law should act as a snap-shot of society, to capture the 'changed society'.⁷⁹ The present study therefore questions whether the law has aptly accommodated the changes in society brought about by

⁷² LB Curzon (n 57); Linus J McManaman (n 71) 20; Eli E Nobleman, 'Review of Roscoe Pound, Treatise on Jurisprudence' (1961) 10 *The American University Law Review* 179, 196 – 197.

⁷³ LB Curzon (n 57); Linus J McManaman (n 71) 20; Eli E Nobleman (n 72) 196 – 197.

⁷⁴ Peter Sasvari, 'The Effects of Technology and Innovation on Society' (2012) 5 *Bahria University Journal of Information & Communication Technology*

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.428.9560&rep=rep1&type=pdf>> accessed 20 September 2016; Attila Kincsei, 'Technology and Society in the Information Age' (2007)

<http://www.icsd.aegean.gr/website_files/metaptyxiako/154935850.pdf> accessed 20 September 2016.

⁷⁵ Kariuki Muigua and Kariuki Francis, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' [2015] *Strathmore Law Journal* <<http://www.press.strathmore.edu/uploads/journals/strathmore-law-journal/SLJ1/1-SLJ-1-KMuigua-FKariuki-Alternative-Dispute-Resolution.pdf>> accessed 20 September 2016; Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution' (2012) 30

<<http://www.ciarkkenya.org/assets/a-paper-on-adr-and-article-159-of-constitution.pdf>> accessed 20 September 2016; Kariuki Muigua, 'Natural Resources and Conflict Management in East Africa', *1st NCMG East African ADR Summit* (2014)

<https://profiles.uonbi.ac.ke/kariuki_muigua/files/natural_resources_and_conflict_management_in_east_africa-1st_east_african_adr_summit_final.pdf> accessed 20 September 2016.

⁷⁶ Oliver Ramsbotham, Tom Woodhouse and Hugh Miall, 'Introduction to Conflict Resolution: Concepts and Definitions', *Contemporary Conflict Resolution* (3rd Edition, Wiley 2011)

<<http://www.oxfordresearchgroup.org.uk/sites/default/files/Chapter%201%20-%20Introduction%20to%20Conflict%20Resolution.pdf>> accessed 20 September 2016; Kariuki Muigua and

Kariuki Francis (n 75); Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution' (n 75) 30.

⁷⁷ Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution' (n 75) 30.

⁷⁸ LB Curzon (n 57); Susan Silbey, 'Law and the Ordering of Our Life Together: A Sociological Interpretation of the Relationship between Law and Society' in R J Neuhaus, T L Shaffer and S S Silbey (eds), *Law and the Ordering of Our Life Together* (William B Eerdmans 1989) 2

<http://web.mit.edu/ssilbey/www/pdf/law_society.pdf> accessed 21 September 2016.

⁷⁹ Susan Silbey (n 78) 2.

technology. The change here, is ODR. This study suggests that where the law does not cater for ODR, it does not live up to preservation of the social interest.

Figure 2 illustrates the relationship between technology, dispute resolution, ODR and ODR law. Technology has a positive impact on dispute resolution, giving rise to the concept of ODR, a techno-social hybrid concept.⁸⁰ Following the theoretical arguments raised in this section, on the sociological conceptions of the law, Figure 2 shows a situation where ODR, a techno-social phenomenon is recognised in the law, giving rise to ODR law.

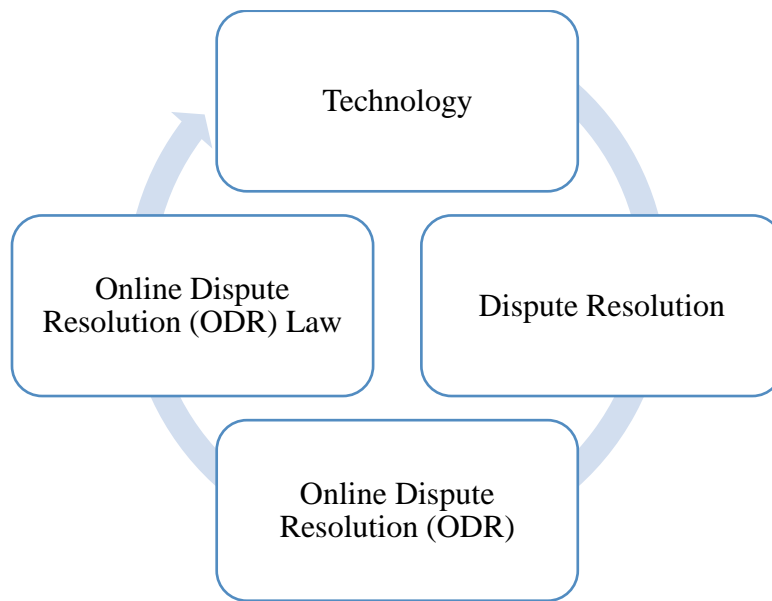


Figure 2: A sociological approach to ODR Law⁸¹

The relationship between technology and the law has however been criticised as not being directly positive and linear, but rather part of a multifaceted system.⁸² The systems theory approach shows that there may be a conflict between technology and law.⁸³ According to systems theory, the law is an autonomous system which runs alongside other systems such as

⁸⁰ Arpit Merchant, Tushant Jha and Navjyoti Singh, ‘The Use of Trust in Social Machines’ (International World Wide Web Conference Committee (IW3C2) 2016) 787 <<http://www2016.net/proceedings/companion/p787.pdf>> accessed 21 September 2016; Alessandro Vespignani, ‘Predicting the Behavior of Techno-Social Systems’ (2009) 325 *Science* 425 <<http://www.gleamviz.org/wp-content/uploads/2009/04/science2009.pdf>> accessed 21 September 2016.

⁸¹ LB Curzon (n 57) 163; Peter Sasvari (n 74) 5; Alessandro Vespignani (n 80) 425; David Nelken (n 58).

⁸² Clemens Mattheis, ‘The System Theory of Niklas Luhmann and the Constitutionalization of the World Society’ (2012) 4 *Goettingen Journal of International Law* 625, 631; Riikka Koulu (n 54).

⁸³ Cristina Mele, ‘A Brief Review of Systems Theories and Their Managerial Applications’ (2010) 2 *Service Science* 126, 126; Riikka Koulu (n 54).

technology, politics and commerce.⁸⁴ These systems operate in structural couplings in various instances, for example where law and commerce couple up into contract and property, and law and politics couple up into constitutions.⁸⁵ These systems operate both independently and dependently.⁸⁶

A possible conflict between technology and the law is where technology is global, connecting people from different countries and operating indiscriminately across borders; while law enforcement is state-specific.⁸⁷ The law enforcement agencies in a particular country in principle have the authority to effect the law only within that jurisdiction.⁸⁸ This creates a problem where technology with a global effect may allow performance of an act in one part of the world which offends the laws in another part of the globe.⁸⁹ A dispute may therefore arise due to conflicting definitions of what can and cannot be done, under technology on the one hand, and under law on the other hand.

The theoretical framework of this study relies on the sociological approach to jurisprudence. According to this approach, technology influences society, which in turn influences the law. In the context of ODR, technology has a positive impact on societal issues of dispute resolution. The result of the impact of technology of dispute resolution is ODR. If aspects of ODR are incorporated in the law, the result is a legal framework for ODR. Through this process, the law adopts an aspiration of society to have disputes resolved in an innovative way. The law is therefore seen to relate with society, as argued through the theories on the sociology of law.

⁸⁴ David Seidl, 'Luhmann's Theory of Autopoietic Social Systems' (Munich School of Management 2004) 4 <http://www.zfog.bwl.uni-muenchen.de/files/mitarbeiter/paper2004_2.pdf> accessed 21 September 2016; Riikka Koulu (n 54); Michael Hein, 'Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoretical Approach' (2011) 2 *Studies of Transition States and Societies* 5 <<http://www.tlu.ee/stss/wp-content/uploads/2011/06/vol3-issue-1-hein.pdf>> accessed 21 September 2016.

⁸⁵ Clemens Mattheis (n 82) 631; Riikka Koulu (n 54); Michael Hein (n 84) 5.

⁸⁶ Alexander Laszlo and Stanley Krippner, 'Systems Theories: Their Origins, Foundations, and Development' in J Scott Jordan (ed), *Systems Theories and A Priori Aspects of Perception* (1 edition, Elsevier 1998) 8 <<http://terras-altas.net.br/MA-2013/statistics/Systems%20Theories/SystemsTheory-Alexander%20Laszlo%20and%20Stanley%20Krippner.pdf>> accessed 21 September 2016; Riikka Koulu (n 54).

⁸⁷ Riikka Koulu (n 54).

⁸⁸ *ibid.*

⁸⁹ *ibid.*

1.4 Literature Review

This section presents a review of literature available concerning ODR. The literature sheds light on the phenomena of ODR from authors across the globe. The first sub-section follows the emergence of ODR in the USA and its development in the USA and in other parts of the world, including in the EU. It also discusses the nature of ODR as a dispute resolution process. The second sub-section considers the views of various authors who argue that ODR is suitable to resolve B2C e-commerce disputes. While the scope of the present study is limited to ODR for B2C e-commerce disputes, it is acknowledged that ODR may also be suitable for other forms of disputes. These other forms of disputes are not included in the present study. The third sub-section evaluates literature on whether the law is needed to support the practice of ODR. The last sub-section of this literature review considers the work of various authors on the law relating to ODR in Kenya. Many authors have considered ODR and law from the perspective of developed countries. This study discusses ODR and law from Kenya, a country representing the perspective of a developing country. The main gap identified in the literature is that the issue of whether or a developing country should develop law relating to ODR for B2C e-commerce disputes, or whether it should allow ODR to develop without actively developing law, has not been adequately answered in existing scholarship.

1.4.1 History and Nature of ODR

The history of ODR may be traced back to the 1990s.⁹⁰ Katsh notes that ODR developed approximately 20 years after the emergence of the internet in 1969.⁹¹ Ahalt describes Katsh as a ‘leading researcher and developer of concepts of ODR’ who has been involved in the creation and operation of various pioneer ODR platforms including eResolution, Disputes.org and Squaretrade.⁹² According to Katsh, legal practitioners and judges perceive that the courts are the ‘primary’ form of dispute resolution while ADR is the ‘alternative’ to the courts.⁹³ Katsh argues that ODR may be helpful in dispute resolution due to its embrace of the internet, a revolutionary and constantly changing aspect of everyday life.⁹⁴

⁹⁰ Karolina Mania (n 21) 77.

⁹¹ Ethan Katsh, ‘Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace’ (2006) 10 *Lex Electronica*.

⁹² Arthur M Monty Ahalt, ‘What You Should Know About Online Dispute Resolution’ [2009] *The Practical Litigator* 22.

⁹³ Ethan Katsh (n 91).

⁹⁴ *ibid.*

In the USA, Ahalt, a former judge affiliated with an ODR platform known as VirtualCourthouse.com, and Katsh, both show the development of ODR independent from the law.⁹⁵ Katsh takes a historical approach in discussing ODR.⁹⁶ While acknowledging that ODR has a future, Katsh does not offer ways in which the ODR law may be fashioned.⁹⁷ Ahalt takes an evaluative approach of the ODR system in the USA,⁹⁸ but does not discuss the legal framework under which ODR operates in the USA. The present study takes a forward-looking approach, addressing the shortfalls in the work of Katsh and Ahalt respectively, suggesting possible ways in which the legal framework for ODR may be put in place.

The definition of ODR is problematic, according to Kauffmann-Kohler and Schultz.⁹⁹ While some authors define ODR as a *sui generis* dispute resolution mechanism, others view it as online ADR.¹⁰⁰ Ossowski views that while the term ‘ODR’ has been used to include only those processes carried out exclusively online, some ODR programs may be used on stand-alone computers without internet connectivity.¹⁰¹ These programs including Adjusted Winner, Family_Winner and Smartsettle use game theory to provide negotiation services.¹⁰² The shortfall of Ossowski’s work is that most of the writers are based in European countries, further accentuating the need for a perspective on ODR from developing countries.

In the EU, Petrauskas and Kybartienė note that ODR is an emerging dispute resolution mechanism that continues to develop with the advancement of technology.¹⁰³ Gill and others argue that technology has the potential to improve resolution of disputes.¹⁰⁴ Rabinovich-Einy and Katsh support this view, stating with approval that digital technology has had an increasingly positive effect on dispute resolution over time, where technology augments

⁹⁵ Arthur M Monty Ahalt (n 92) 21 – 28; Ethan Katsh (n 91).

⁹⁶ Ethan Katsh (n 91).

⁹⁷ *ibid.*

⁹⁸ Arthur M Monty Ahalt (n 92) 22.

⁹⁹ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004) 5, 6.

¹⁰⁰ *ibid.*

¹⁰¹ Sascha Ossowski (ed), *Agreement Technologies, Law Governance and Technology Series*, vol 8 (Springer 2013).

¹⁰² John Zeleznikow and Emilia Bellucci, ‘Family Winner: Integrating Game Theory and Heuristics to Provide Negotiation Support’, *Frontiers in artificial intelligence and applications* (IOS Press 2003) <<http://jurix.nl/pdf/j03-03.pdf>> accessed 21 September 2016; Sascha Ossowski (n 101).

¹⁰³ Feliksas Petrauskas and Eglė Kybartienė (n 9).

¹⁰⁴ Chris Gill and others, ‘Models of Alternative Dispute Resolution (ADR): A Report for the Legal Ombudsman’ (Queen Margaret University, Consumer Insight Centre 2014).

traditional ADR.¹⁰⁵ This is especially since ODR, the result of this interaction, breaks down physical, conceptual, psychological and professional barriers.¹⁰⁶ ODR offers a platform that has transparency, a high level of participation of the parties, and change.¹⁰⁷ The supportive role of technology in ODR, standing alongside the two disputing parties and the one dispute resolution practitioner, has earned it the endearing reference as the fourth party in ODR.¹⁰⁸

Using economic models, Deffains and Gabuthy carry out a case study of Cybersettle, an electronically administered system which uses algorithms to select key information from a dispute between parties.¹⁰⁹ The authors find that Cybersettle is not a relevant settlement tool because among other factors, it fails to take into consideration the peculiarities of human interaction that are part and parcel of negotiation and contracts as a whole.¹¹⁰ In the present study, ODR is presented as an aspect of B2C e-commerce dispute resolution that seeks to appease profit-making proprietors as opposed to benefiting the society.¹¹¹ While Deffains and Gabuthy highlight the economic effects of ODR, they do not present the legal basis for ODR, leaving room for research on the legal system governing ODR for B2C e-commerce disputes.

Though Deffains and Gabuthy study a situation where ODR systems are entirely dependent on technology in processes including making the decision based on facts fed into the program, ODR in Kenya has not yet developed to that point. The ODR envisioned in the present study involves support of technology in B2C e-commerce dispute resolution, where the system is used to aid humans in conducting ADR. The failure for the system to appreciate human realities may therefore be countered by a larger involvement of humans in the ODR system in Kenya. Deffains and Gabuthy are based in France. Information and Communications Technology (ICT) is more advanced in France than in Kenya: while France is the twenty-second most innovation-driven economy in the world, Kenya ranks at eighty-seventh.¹¹² Their study

¹⁰⁵ Orna Rabinovich-Einy and Ethan Katsh, 'Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment' (2014) 1 *International Journal of Online Dispute Resolution* 5.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass 2011).

¹⁰⁹ Bruno Deffains and Yannick Gabuthy, 'Efficiency of Online Dispute Resolution: A Case Study' [2015] *Communications and Strategies* 201.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² World Economic Forum and INSEAD, 'The Global Information Technology Report 2015' (World Economic Forum 2015) xiv, xv <http://www3.weforum.org/docs/WEF_Global_IT_Report_2015.pdf> accessed 19 May 2016.

therefore does not incorporate views from a developing country. The present study seeks to address this gap.

In the UK, Gill and others investigate various dispute resolution mechanisms, offering ODR as a means of improving G2C interactions by the Legal Ombudsman.¹¹³ The authors also present a case study of resolution of disputes arising from ODR by citing eBay, an American online market which has an in-built semi-autonomous ODR mechanism which allows the resolution of B2C and C2C disputes.¹¹⁴ Cortés, a Professor of Civil Justice at the University of Leicester in the UK, recommends ODR as a means for consumers to obtain access to justice and redress in B2C transactions.¹¹⁵ Cortés' writing is important to this study because it discusses the legal framework for ODR in the EU.¹¹⁶ While the contribution made by Gill and others, and Cortés, is invaluable to the present study, their works are limited to the EU as a geographical focus. The authors do not give an appreciation of the legal framework in developing countries.

Various challenges including insufficient access to technology plague developing countries such as Kenya.¹¹⁷ The United Nations Commission on International Trade Law (UNCITRAL) recognises the importance of involving developing countries in the discourse on formulating a global legal framework for ODR due to the effects of the digital divide.¹¹⁸ According to Kagwara and Wanjiru, the digital divide refers to the low levels of technological development in many developing countries in comparison to countries where access to ICT is widespread, such as in various developed countries.¹¹⁹ Hargittai defines the digital divide as '(t)he gap between those who have access to digital technologies and those who do not; or the gap

¹¹³ Chris Gill and others (n 104).

¹¹⁴ *ibid.*

¹¹⁵ Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011).

¹¹⁶ *ibid.*

¹¹⁷ Martin Hilbert, 'Digital Gender Divide or Technologically Empowered Women in Developing Countries? A Typical Case of Lies, Damned Lies, and Statistics' (2011) 34 *Women's Studies International Forum* 479, 1; Kennedy Odiwuor Okong'o, 'Bridging Digital Divide in Kenya Using Access-Involvement-Interaction Policy Model Empirical Exploration of Nairobi and Environs' (Master of Science in ICT Policy and Regulation, Jomo Kenyatta University of Agriculture and Technology 2011) 8

<<http://ir.jkuat.ac.ke:8080/bitstream/handle/123456789/1473/Okong%E2%80%99o,%20%20Kennedy%20Odiwuor-%20Msc%20ICT%20Policy%20and%20Regulation-2011.pdf?sequence=1&isAllowed=y>> accessed 30 September 2016; Sam Brooks, Paul Donovan and Clint Rumble, 'Developing Nations, the Digital Divide and

Research Databases' (2005) 31 *Serials Review* 270 – 278

<<https://www.ebscohost.com/uploads/imported/thisTopic-dbTopic-873.pdf>> accessed 30 September 2016.

¹¹⁸ United Nations (UN), 'Report of the United Nations Commission on International Trade Law (UNCTAD), Forty-Third Session' (United Nations 2010) A/65/17 para 254.

¹¹⁹ Angela Kagwara and Maureen Wanjiru (n 11); Kenneth Keniston, 'The Four Digital Divides' in Kenneth Keniston and Deepak Kumar (eds), *The Four Digital Divides* (Sage Publishers 2003) 2 – 11; Roger G Noll and others, 'The Digital Divide: Definitions, Measurement, and Policy Issues', *Bridging the Digital Divide: California Public Affairs Forum* (2000) 1; Sam Brooks, Paul Donovan and Clint Rumble (n 117) 271.

between those who use digital technologies and those who do not... understood in binary terms (as the gap between) the “haves” from the “have-nots”.¹²⁰ The digital divide is a pressing problem in developing countries.¹²¹ The present study contributes to literature from a developing country perspective concerning the formulation of law on ODR. This stance helps to understand the effect of technology on B2C e-commerce dispute resolution processes not only in Kenya, but also in other developing countries where the effects of the digital divide are apparent.

The advantages of ODR have been explored. According to Petrauskas and Kybartienė, ODR is beneficial due to its flexibility, speed of decision-making and convenience.¹²² Knoetze and Smith are of the view that ODR has the potential to promote access to justice.¹²³ Further, ODR leaves room for creativity in decision-making, and offers cost savings compared to travel costs for parties involved in cross-border transactions.¹²⁴ Parties may consider ODR for international B2C e-commerce disputes because the possibility of access to the internet from anywhere in the world minimises jurisdictional issues, a procedural hurdle present in ADR and litigation.¹²⁵ This may however also be considered a challenge of ODR, where in the physical dispute resolution world, issues of jurisdiction are important especially for cross-border disputes.¹²⁶ Parkatti argues that since there is no global international law for ODR for B2C e-commerce disputes, ODR does not offer a guaranteed solution to jurisdictional issues.¹²⁷ For example, based on Parkatti’s opinion, a consumer in Kenya who purchases health supplements from a

¹²⁰ Eszter Hargittai, ‘The Digital Divide and What To Do About It’ in Derek C Jones (ed), *New Economy Handbook* (Academic Press 2003) 2.

¹²¹ Christian Fuchs and Eva Horak, ‘Africa and the Digital Divide’ (2008) 25 *Telematics and Informatics* 99, 104 – 105.

¹²² Feliksas Petrauskas and Eglė Kybartienė (n 9); Joseph W Goodman, ‘The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites’ (2003) 2 *Duke Law & Technology Review* 1.

¹²³ Izette Knoetze, ‘Courtroom of the Future – Virtual Courts, E-Courtrooms, Videoconferencing and Online Dispute Resolution’ (2014) 28 *De Rebus* <<http://www.saflii.org/za/journals/DEREBUS/2014/200.pdf>> accessed 23 September 2016; Roger Smith, ‘Online Dispute Resolution: Ten Lessons on Access to Justice’ (2015) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/02/ODR-access-to-justice.pdf>> accessed 23 September 2016.

¹²⁴ Richard Susskind, ‘Online Courts and Online Dispute Resolution’ <<http://wbc.advocates.org.uk/richardsusskind.pdf>> accessed 22 September 2016; Feliksas Petrauskas and Eglė Kybartienė (n 9); Joseph W Goodman (n 122).

¹²⁵ Julia Hörnle, ‘How Does Online Dispute Resolution Empower Consumers?’ (CCLS and Youstice 2014) <<http://www.qmul.ac.uk/media/news/items/hss/133780.html>> accessed 22 September 2016; Feliksas Petrauskas and Eglė Kybartienė (n 9).

¹²⁶ Isabelle Manevy, ‘Online Dispute Resolution: What Future?’ 24 <<http://lthoumyre.chez.com/uni/mem/17/odr01.pdf>> accessed 22 September 2016.

¹²⁷ David R Parkatti, ‘Online Dispute Resolution: Overcoming the Problems and Shackles of Territory’ (Winter 2001) <http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/17438-online_dr.pdf> accessed 22 November 2016.

supplier based in the USA may face jurisdictional challenges if the consumer intends to commence action in the event that the health supplements are unfit for consumption. Cupido also acknowledges that jurisdictional issues may arise where a B2C e-commerce transaction takes place online and between parties in different countries. The scope of the present study does not extend to a theoretical evaluation of the advantages and disadvantages of ODR. While this study acknowledges that these strengths and shortfalls of ODR may influence the development of the dispute resolution mechanism, the present study addresses the issue whether there is need for a developing country such as Kenya to provide for ODR in the law.

There is also literature available on the disadvantages of ODR. Goodman notes that ODR is impersonal, where most of the processes do not involve face-to-face interactions, eliminating the use of non-verbal communication.¹²⁸ Petrauskas and Kybartienė view that ODR is a favourable dispute resolution process for a limited type of disputes where there are few issues and low value subject matter.¹²⁹ Zhang and others identify access to the internet and the digital divide as a challenge, making participation in most ODR processes an inconvenient task.¹³⁰ Rao views that cultural misunderstandings may arise in the use of ODR where a language barrier, lack of face-to-face interaction inhibiting processing of non-verbal cues, and the effect of silence, may complicate the interactions.¹³¹ Femenia however views that these cultural challenges may be overcome by acknowledging that cultural differences exist, and integrating responses to these cultural challenges in the ODR systems.¹³²

ODR also presents ethical challenges owing to its dispute resolution function and its facilitation of interaction on online spaces.¹³³ According to Manevy, electronic records raise issues of

¹²⁸ Joseph W Goodman (n 122); Feliksas Petrauskas and Eglė Kybartienė (n 9).

¹²⁹ Feliksas Petrauskas and Eglė Kybartienė (n 9).

¹³⁰ Wusheng Zhang, John Zeleznikow and Berend Vries, 'Online Dispute Resolution: The Benefits Of Enhancing Alternative Dispute Resolution Through The Use Of Internet Technology' (2004) Paper 79 ACIS 2004 Proceedings <<http://aisel.aisnet.org/cgi/viewcontent.cgi?article=1198&context=acis2004>> accessed 22 September 2016; Feliksas Petrauskas and Eglė Kybartienė (n 9).

¹³¹ Sharanya Rao, 'The Cultural Vacuum in Online Dispute Resolution' in Melissa Conley Tyler, Ethan Katsh and Daewon Choi (eds), *Proceedings of the Third Annual Forum on Online Dispute Resolution* (International Conflict Resolution Centre, University of Melbourne in collaboration with the United Nations Economic and Social Commission for Asia and the Pacific 2005) <<http://ukrmediation.com.ua/files/content/cultural-vacuum.pdf>> accessed 23 September 2016; Feliksas Petrauskas and Eglė Kybartienė (n 9).

¹³² Nora Femenia, 'ODR and the Global Management of Customers' Complaints: How Could ODR Techniques Be Responsive to Different Social and Cultural Techniques?' (2000) 6 – 8 <<http://www.oecd.org/internet/consumer/1879749.pdf>> accessed 23 September 2016.

¹³³ Jo DeMars and others, 'Virtual Virtues: Ethical Considerations for an Online Dispute Resolution (ODR) Practice' [2010] *Dispute Resolution Magazine* 6 – 10 <<http://colinrule.com/writing/virtualvirtues.pdf>> accessed 23 September 2016; Daniel Rainey, 'Third-Party Ethics in the Age of the Fourth Party' (2014) 1 *International Journal of Online Dispute Resolution* 37.

confidentiality of data, where honest communication between the parties may be prejudiced by fraudulent activity.¹³⁴ Rainey supports the view that ODR raises peculiar ethical issues touching on the right to confidentiality, self-determination and impartiality, competence of the ADR practitioner, quality of process and withdrawal.¹³⁵ DeMars and others point out that transparency concerning the codes used in systems design is important to ensure ODR is not prejudiced by systemic bias.¹³⁶ While the literature sampled in this sub-section discusses the pros and cons of ODR, their works do not analyse the underlying legal instruments. With the prospects and challenges in mind, the present study evaluates whether there is a need for a legal framework for ODR in Kenya.

1.4.2 ODR for Disputes Arising from B2C E-Commerce Transactions

The present study focuses on ODR for disputes arising from B2C e-commerce transactions. In the EU, Petrauskas and Kybartienė argue that ODR may be a favourable resort for parties from different geographical locations involved in offline cross-border transactions, but acknowledge that ODR is normally associated with resolution of disputes that arise from e-commerce transactions.¹³⁷ In the UK, Cortés notes that while ODR may be touted as a progressive dispute resolution mechanism, it may only be suitable for certain, and not all disputes.¹³⁸ Kauffmann-Kohler notes that Small and Medium-sized Enterprises (SMEs) may benefit from external rather than in-house B2C ODR.¹³⁹ The International Chamber of Commerce recommends businesses to use ODR when the consumer has exhausted the business' internal dispute resolution mechanism.¹⁴⁰ These authors support the view that ODR is a suitable dispute resolution mechanisms for B2C e-commerce transactions. The present study adopts this perspective, focusing on ODR for B2C e-commerce transactions.

There are two main factors that link ODR and B2C e-commerce, according to Liyanage: ODR developed as part of the e-commerce market, and technology is used in both fields.¹⁴¹ In regard

¹³⁴ Isabelle Manevy (n 126) 27; Feliksas Petrauskas and Eglė Kybartienė (n 9).

¹³⁵ Daniel Rainey (n 133).

¹³⁶ Jo DeMars and others (n 133) 6 – 10.

¹³⁷ Feliksas Petrauskas and Eglė Kybartienė (n 9).

¹³⁸ Pablo Cortés (n 115).

¹³⁹ Gabrielle Kaufmann-Kohler and Thomas Schultz (n 99) 106 – 107; Pablo Cortés (n 115).

¹⁴⁰ International Chamber of Commerce, 'ICC Best Practices for Online Dispute Resolution (ODR) for B2C and C2C Transactions' <<http://www.it-retten.dk/bog/bilag/23/ICC%20Best%20Practices%20for%20Online%20Dispute%20Resolution.pdf>> accessed 27 September 2016.

¹⁴¹ Kananke Chinthaka Liyanage (n 41) 254 – 255.

to the efforts at the UNCITRAL and the EU to develop ODR regulations, Philippe argues that the term ‘ODR’ refers to all ADR processes that involve the use of technology, whether or not the dispute resolution process is carried out exclusively online.¹⁴² Del Duca and others support Philippe’s argument that ODR usually involves B2C or C2C disputes because they are predominantly low value transactions with straightforward issues.¹⁴³ The present study focuses on ODR for B2C e-commerce disputes owing to their suitability to the dispute resolution mechanism.

The uptake of ODR for B2C e-commerce disputes is not without challenge. Bygrave identifies jurisdictional issues in cross-border transactions, limited internet literacy and internet wariness, as drawbacks to the use of ODR.¹⁴⁴ Hörnle notes that the need for human interaction and lack of trust hinder use of ODR due to its impersonal character.¹⁴⁵ Bygrave’s and Hörnle’s works examine the law in the EU and Australia, therefore presenting the critique of the legal bases for ODR in a limited fashion. Their perspective deals neither with Africa nor other developing countries. It does not address the gap in literature on Africa or Kenya in particular as this study seeks to contribute to. In recognising that the EU countries and Australia are part of the developed world, this study adds to the discourse on ODR from the developing world.

1.4.3 ODR Practice and the Law: Is Law Needed?

The supporters of provision for a legal framework for ODR view that adaptation of the law to recognise ODR will promote the development of e-commerce.¹⁴⁶ Schultz argues for governmental regulation of ODR, arguing that regulation may spur development of ODR.¹⁴⁷ In Australia, Sourdin and Liyanage attribute the advancement of ODR for family disputes to the development of the legal framework mandating mediation before litigation, and the budding

¹⁴² Mirèze Philippe, ‘ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & EU Regulation on ODR’ (2014) 1 *International Journal of Online Dispute Resolution* 57.

¹⁴³ Louis F Del Duca, Colin Rule and Brian Cressman, ‘Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume Global E-Commerce ODR Systems’ (2015) 4 *Penn State Journal of Law & International Affairs* 242; Mirèze Philippe (n 142).

¹⁴⁴ Lee A Bygrave (n 4).

¹⁴⁵ Julia Hörnle, ‘Online Dispute Resolution-The Emperor’s New Clothes? Benefits and Pitfalls of Online Dispute Resolution and Its Application to Commercial Arbitration’ (2002) <<http://www.bileta.ac.uk/content/files/conference%20papers/2002/Online%20Dispute%20Resolution%20-%20The%20Emperor's%20New%20Clothes%20-%20Benefits%20and%20Pitfalls%20of%20Online%20Dispute%20Resolution.pdf>> accessed 27 September 2016.

¹⁴⁶ Mirèze Philippe (n 142).

¹⁴⁷ Thomas Schultz, ‘Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust’ (2004) 6 *North Carolina Journal of Law and Technology* 71.

technology industry.¹⁴⁸ While Sourdin and Liyanage, and Schultz support regulation, the argument is not juxtaposed with the opposing view that regulation is not necessary. The present study seeks to fill this gap through evaluating whether legal provisions for ODR are necessary for Kenya, a developing country, based on the comparative analysis of the UK and USA, where ODR has already taken root in the legal framework.

Addressing the discussion on the legal framework for ODR in the EU and the USA, Benyekhlef and Gélinas study the concept of cyber-justice and identify ODR as one of the avenues of achieving cyberjustice.¹⁴⁹ In their study, cyberjustice refers to the use of technology to contribute to the administration of justice in cyberspace.¹⁵⁰ The authors argue that ODR contributes to increasing legal certainty among consumers of e-commerce, building consumer confidence, and reducing the workload from actors in the court system in the EU and USA.¹⁵¹ It is further noted that these perspectives are centred around the operation of ODR in the EU and USA, therefore giving the interrogation of the legal system of ADR a limited geographical scope.

A Professor of Internet Law at Queen Mary University of London, Hörnle argues for ODR as a favourable dispute resolution process between companies and individuals and concludes that there is a need for the improvement of access to justice to which ODR may contribute.¹⁵² Raymond supports the view that ODR assists in promoting access to justice, deploring a stalemate at the UNCITRAL on the development of uniform legal standards for ODR, a position which Raymond argues puts consumers at a disadvantage.¹⁵³ The perspectives of Hörnle and Raymond are important to guide efforts to create a legal framework for ODR in Kenya. They show the relevance of this study to existing literature that supports the view that

¹⁴⁸ Tania Sourdin and Chinthaka Liyanage, 'The Promise and Reality of Online Dispute Resolution in Australia' in Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution Theory and Practice* (Eleven International Publishing 2013) 494 <https://www.mediate.com/pdf/sourdin_liyanage.pdf> accessed 27 September 2016.

¹⁴⁹ Karim Benyekhlef and Fabien Gélinas, *Online Dispute Resolution* (2005).

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² J Hornle, 'Online Dispute Resolution in Business to Consumer E-Commerce Transactions' [2002] *Journal of Information, Law and Technology* <https://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2002_2/hornle/> accessed 30 November 2015.

¹⁵³ Anjanette Raymond, 'A Meeting of the Minds: Online Dispute Resolution Regulations Should Be Opportunity Focused' (2016) 16 *U.C. Davis Business Law Journal* 1 – 33.

regulation of ODR is important to promote access to justice for consumers in B2C e-commerce transactions in Kenya.

In New Zealand, Liddicoat traces the development and implementation of the Dispute Resolution Service Policy, the legal process created in the country to deal with domain name disputes.¹⁵⁴ Liddicoat concludes that the Dispute Resolution Service in New Zealand is operating effectively as a high quality, value for money alternative to litigation for domain disputes.¹⁵⁵ Schmitz compares the ODR systems in the USA and EU and their corresponding legal frameworks, stating that while in the EU there is a heightened focus on providing for ODR in the law, the USA legal framework does not actively support ODR, and the systems have therefore developed in private sector.¹⁵⁶ Schmitz argues that this failure to provide for ODR in the law has led to an unfavourable position for consumers, where businesses take advantage of the *laissez-faire* arena.¹⁵⁷ These perspectives from Liddicoat and Schmitz are important to the present study which addresses the need for embedding ODR in the law. Accordingly, the present study generates data from Kenya, a country with different levels of uptake of e-commerce from New Zealand, the USA and EU which are the focus of Liddicoat's and Schmitz' studies.

In Malaysia, Omoola and Oseni argue that there is a need for developing countries to adopt a legal framework to regulate ODR.¹⁵⁸ In Africa, Wahab discusses the strides that South Africa, Tunisia and Egypt have made in developing ODR systems.¹⁵⁹ Cupido hails South Africa as the 'only sub-Saharan African country to show any growth in e-commerce'.¹⁶⁰ South Africa is described as a pioneer in Africa's initiatives that 'may well qualify for ODR processes' in the area of domain name disputes and consumer disputes: South Africa's ZA Domain Name Dispute Resolution Regulations (ZADRR) of 2006 creating a dispute resolution mechanism for domain-name disputes, and the Onlineombud initiative for consumer disputes.¹⁶¹ Both

¹⁵⁴ Joy Liddicoat, 'Domain Name Disputes: Is Private Dispute Resolution Working?' (LLM Dissertation, Victoria University of Wellington, Department of Law 2010).

¹⁵⁵ *ibid.*

¹⁵⁶ Amy Schmitz (n 34) 1 – 32.

¹⁵⁷ *ibid.*

¹⁵⁸ Sodiq O Omoola and Umar A. Oseni (n 41) 281.

¹⁵⁹ Mohamed S Abdel Wahab, 'Online Dispute Resolution for Africa' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2012) 561 – 583.

¹⁶⁰ Robin Cupido, 'Online Dispute Resolution: An African Perspective' (2016) 183 <http://ase-scoop.org/papers/IWLP-2016/3.Cupido_IWLP.pdf> accessed 22 September 2016.

¹⁶¹ Mohamed S Abdel Wahab (n 159) 577 – 581.

Wahab and Cupido capitalise on the legal framework for ODR in South Africa as a benchmark for ODR systems in Africa. However, as Omoola and Oseni note, there is little evidence of regulation of ODR in Africa.¹⁶² The present study therefore relies on the rich history in the USA and UK to give an engrained tried-and-tested basis to evaluate the need for a legal framework for ODR in Kenya.

In the East Africa Community, Mambi observes that laws such as the Arbitration Rules of the East African Court of Justice do not adopt technology in the provision, for example through expanding the definition of ‘in writing’ to include e-mail communication and ‘signature’ to include e-signature’.¹⁶³ Kenya is a member of the East African Community therefore the provisions of the Arbitration Rules of the East African Court of Justice are relevant to the present study.¹⁶⁴ While Mambi supports the view that ODR is not provided for in the Arbitration Rules of the East African Court of Justice, a country-specific investigation on the applicable rules dealing with ODR in Kenya is not done. The present study therefore contributes to the East African story by offering an examination of the relevant law dealing with ODR with specific attention to Kenya.

With reference to Tanzania, Mambi finds that there is no room for paperless dispute resolution in the ADR law, as the law is silent on matters such as e-mailing documents and electronic signatures for pleadings.¹⁶⁵ However, Mambi gives an example of *Tanzania Cotton Marketing Board v Cogecot Cotton Company SA 1997 TLR 165 (CA)* where the Court of Appeal of Tanzania found that sending the award to the Registrar of the Court by courier service opposed to regular mail, was permissible.¹⁶⁶ Hoseah adds to this discourse by quoting from the *Tanzania Cotton Marketing Board* case where the Court of Appeal of Tanzania stated that ‘the law cannot be and is not ignorant of modern business practices (methods) and must not shut its eyes to the mysteries of the computers’.¹⁶⁷ Kapinga and Ng’maryo argue that it is yet to be seen whether the courts in Tanzania would take such a liberal approach to acknowledge development of technology from this 1997 decision to include aspects of ODR including transmission of

¹⁶² Robin Cupido (n 160) 189.

¹⁶³ Adam J Mambi, *ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community* (African Books Collective 2010) 160 – 165.

¹⁶⁴ The Treaty for the Establishment of the East African Community 1999 art 3.

¹⁶⁵ Adam J Mambi (n 163) 155 – 160.

¹⁶⁶ *ibid* 156.

¹⁶⁷ Edward G Hoseah, ‘The Foundations of the Law of Evidence and Their Implications for Developing Countries: The Background of the Tanzania Law of Evidence Project’, *Conference of the law of evidence* (Northwestern University, Law School 2014) 6.

documents electronically, such as in Portable Document Format (PDF).¹⁶⁸ Mambi and Hoseah focus their respective works on Tanzania. However, they do not offer an in-depth look at the laws in Kenya, leaving a gap in literature on the subject. The present study is therefore justified because it builds on the literature on ODR in East Africa and introduces an analysis of Kenya's law concerning ODR. This study intends to address the gap in literature through discussing the situation in Kenya, where the findings may then be relevant to other developing countries to determine whether or not there is a need for a legal framework for ODR.

1.4.4 Law on ODR in Kenya

The history of ICT in Kenya may be traced to the late 1990s.¹⁶⁹ Africa Online, the first internet service provider in Kenya, was set up in 1994, and in 1995 there were approximately 100 internet users.¹⁷⁰ The United Nations Conference on Trade and Development (UNCTAD) notes that the drive for reform of cyber laws in Kenya began in the year 1997 when the Postal and Telecommunications Sector Policy Statement set the pace in terms of policy for adaptation of the laws to the changing ICT environment.¹⁷¹ Omwansa writes that in January 2006, Kenya put in place the National ICT Policy.¹⁷² The policy change and the revolutionary emergence of M-PESA formed a backdrop for initiatives to adopt a domestic regulatory framework to conform to global best practice in the ICT law sector.¹⁷³

M-PESA is the global brand of Vodafone's mobile money service.¹⁷⁴ Developed by Vodafone, M-PESA was launched in Kenya by Safaricom Limited, a telecommunications company and

¹⁶⁸ Wilbert B Kapinga and Eric S Ng'maryo, 'Registration and Enforcement of Arbitral Awards in Tanzania' [2013] *The European, Middle Eastern and African Arbitration Review* 95.

¹⁶⁹ Clare Akamanzi and others, 'Silicon Savannah: The Kenya ICT Services Cluster' [2016] *Microeconomics of Competitiveness* 11 <<http://www.isc.hbs.edu/resources/courses/moc-course-at-harvard/Documents/pdf/student-projects/Kenya%20ITC%20Services%202016.pdf>> accessed 28 September 2016.

¹⁷⁰ Nixon Muganda Ochara, Jean-Paul Van Belle and Irwin Brown, 'Global Diffusion of the Internet XIII: Internet Diffusion in Kenya and Its Determinants – A Longitudinal Analysis' (2008) 23 *The Communications of the Association for Information Systems* 131 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.509.6056&rep=rep1&type=pdf>> accessed 28 September 2016.

¹⁷¹ UNCTAD, 'Harmonizing Cyberlaws and Regulations: The Experience of the East African Community' (UNCTAD 2013) 18.

¹⁷² Tonny Omwansa, 'M-PESA: Progress and Prospects' (2009) 109 <<https://profiles.uonbi.ac.ke/tomwansa/files/innov-gsma-omwansa.pdf>> accessed 27 September 2016; Glen Farrell, 'ICT in Education in Kenya' (2007) 3 <https://www.infodev.org/infodev-files/resource/InfodevDocuments_409.pdf> accessed 27 September 2016.

¹⁷³ UNCTAD (n 171) 18.

¹⁷⁴ Vodafone Group, 'M-PESA FAQs' (2016) <<http://www.vodafone.com/content/index/what/m-pesa/m-pesa-faqs.html#>> accessed 28 September 2016; Nick Hughes and Susie Lonie, 'M-PESA: Mobile Money for the "Unbanked": Turning Cellphones into 24-Hour Tellers in Kenya' [2007] *Innovations* 63

part of the Vodafone Group; in partnership with Faulu Kenya, a microfinance company; and the Commercial Bank of Africa, a traditional banking company.¹⁷⁵ The present study builds on this history to determine whether in 2016, twenty-two years since the first internet service provider was set up in Kenya, there is a need to regulate ODR.

The present study focuses on ODR for B2C e-commerce disputes. Kinyanjui and McCormick examine the use of B2B e-commerce in the garment industry in Kenya to demonstrate that very few firms use a full online system to carry out trade.¹⁷⁶ Their study is important because it uses both a survey method and key informant interviews, noting that the key informants were most knowledgeable on the interplay between the law and technology.¹⁷⁷ The authors were of the view that the respondents were therefore best placed to raise concerns about the need for an appropriate legal and institutional framework for e-commerce.¹⁷⁸ The use of key informant interviews for the present study is therefore justified. However, Kinyanjui and McCormick do not focus on B2C e-commerce and further do not consider the dispute resolution mechanism available in e-commerce transactions. The present study therefore builds on the analysis of e-commerce in Kenya from Kinyanjui and McCormick's perspective, delving into the resolution of B2C e-commerce disputes through ODR.

Literature on B2C e-commerce in Kenya is instructive. Kilonzo identifies electronic banking as a form of B2C e-commerce.¹⁷⁹ Lule, Omwansa and Waema use the Technology Acceptance Model (TAM) to study mobile banking uptake in Kenya, focusing on the M-KESHO application as a case study.¹⁸⁰ M-KESHO is a mobile-based application developed by Equity Bank, a traditional bank, and Safaricom, to offer micro-savings, micro-credit and micro-

<http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2012/06/innovationsarticleonmpesa_0_d_14.pdf> accessed 28 September 2016.

¹⁷⁵ Tonny Omwansa (n 172) 110; Vodafone Group (n 174); Nick Hughes and Susie Lonie (n 174) 63; Kate Holton, 'Vodafone Brings Africa's M-Pesa Mobile Money to Europe' *Reuters* (31 March 2014) <<http://www.reuters.com/article/vodafone-money-idUSL5N0MS2SG20140331>> accessed 28 September 2016.

¹⁷⁶ Mary Njeri Kinyanjui and Dorothy McCormick, 'E-Commerce in the Garment Industry in Kenya: Usage, Obstacles and Policies' (London School of Economics and Political Science and Institute of Development Studies 2002) 24.

¹⁷⁷ *ibid* 25, 26.

¹⁷⁸ *ibid*.

¹⁷⁹ Kethi Kilonzo, 'An Analysis of the Legal Challenges Posed by Electronic Banking' (2007) 1 *Kenya Law Review* 323–341.

¹⁸⁰ Isaiah Lule, Tonny Kerage Omwansa and Timothy Mwololo Waema, 'Application of Technology Acceptance Model (TAM) in M-Banking Adoption in Kenya' (2012) 6 *International Journal of Computing and ICT Research* 33.

insurance.¹⁸¹ Lule, Omwansa and Waema do not mention the regulatory framework as a factor influencing consumer use of mobile banking applications.¹⁸² An enabling legal environment is not identified among the ‘critical’ factors consumers consider in using mobile banking platforms.¹⁸³ This may indicate that consumers may not be concerned about the legal and institutional framework that governs B2C e-commerce. The study by Lule, Omwansa and Waema may therefore point to the little relevance of consumers’ views on whether or not a legal framework for ODR would promote the use of ODR in the country.

There is literature available on the regulatory framework of mobile money solutions in Kenya. Okonjo highlights the relevance of regulation of innovative developments in Kenya through an evaluation of the development of mobile banking in Kenya.¹⁸⁴ According to Okonjo, mobile banking fused telecommunications and banking, two formerly distinct subjects of regulation brought closer through regulatory overlap caused by innovation.¹⁸⁵ ODR is a fusion of dispute resolution and technology. Therefore, the present study envisions a fusion of disciplines in a similar way as that between telecommunications and banking. Borrowing from Okonjo’s study, the present study examines whether there is a need to proactively regulate ODR or whether technology and innovation should take their course in the absence of direct legal provision.

ODR in Kenya is evident in respect of domain name disputes. Murungi analyses the dispute resolution mechanisms in the ICT industry in Kenya, discussing domain name dispute resolution under the Kenya Network Information Centre (KeNIC) Alternative Domain Name Dispute Resolution Policy, based on the Internet Corporation for Assigned Names and Numbers (ICANN) Uniform Domain Name Dispute Resolution Policy.¹⁸⁶ KeNIC is a non-profit organisation that manages and operates the .ke country code Top-Level Domain (ccTLD).¹⁸⁷ ICANN is an internationally recognised global non-profit organisation that among

¹⁸¹ Vodafone Group, ‘M-KESHO - Vodafone’ (2013) <http://vodafone360.com/content/index/about/about_us/money_transfer/mkesho-faq.html> accessed 28 September 2016.

¹⁸² Isaiah Lule, Tonny Kerage Omwansa and Timothy Mwololo Waema (n 180) 33.

¹⁸³ *ibid.*

¹⁸⁴ Jeremmy Odhiambo Okonjo, ‘Convergence Between Mobile Telecommunications and Financial Services: Implications for Regulation of Mobile Telecommunications in Kenya’ (LLM Thesis, University of Nairobi 2013) 19.

¹⁸⁵ *ibid* 19, 50, 110 – 113.

¹⁸⁶ Michael Murungi, *Cyber Law in Kenya* (Kluwer Law International 2011) ch 4.

¹⁸⁷ Kenya Network Information Center (KeNIC), ‘Background’ (2015) <<http://www.keNIC.or.ke/index.php/en/background>> accessed 27 November 2015.

other roles manages ccTLD systems through entering public-private partnerships with governments and related entities in different countries in the world.¹⁸⁸

The KeNIC Alternative Domain Name Dispute Resolution Policy procedure recognises online arbitration and online mediation for resolution of domain-name disputes.¹⁸⁹ However, Murungi's study does not include ODR in B2C disputes which has not yet gained prominence in the law in Kenya. The present study draws from Murungi's analysis of the development of ICT law in Kenya to determine whether since the law on ODR in Kenya includes domain name disputes, the scope should also extend to B2C e-commerce disputes.

There is scanty literature specifically dealing with ODR in Kenya. Mugo argues that ODR should be applied to resolution of B2C e-commerce disputes.¹⁹⁰ However, Mugo does not conduct a systematic analysis of the existing laws relating to ODR in the country. There is therefore a gap in available literature specifically addressing whether or not Kenya should adopt ODR in the legal framework. The present study therefore builds on Mugo's argument by addressing the question of regulation of ODR for disputes arising from B2C e-commerce transactions. Kinyua advises against introduction of an independent legal framework for online arbitration in Kenya, instead suggesting amendments to the Arbitration Act to recognise online arbitration.¹⁹¹ Kinyua's study is limited to online arbitration, while the present study involves the entire body of ODR. Kinyua uses India as a case study because India is a developing country like Kenya, and Canada because it has legislation to protect electronic documents.¹⁹² The present study considers different countries for the comparative view, evaluating the law in the UK and USA to determine whether development of a dedicated legal framework for ODR in Kenya is necessary or not.

There is no justification offered in available literature, for regulation of ODR in Kenya, where ODR has not taken root in the Kenyan society. In the USA, Castro indicates that direct

¹⁸⁸ Internet Corporation For Assigned Names and Numbers, 'About ICANN' (2014) <<https://www.icann.org/resources/pages/cctlds-21-2012-02-25-en>> accessed 27 November 2015.

¹⁸⁹ Alternative Domain Name Dispute Resolution Policy 2003 ss 7(3), 40(2).

¹⁹⁰ Wanja E Mugo, 'The Implementation of Online Dispute Resolution to Resolve E-Commerce Consumer Dispute in Kenya' (LLB Dissertation, University of Nairobi 2014).

¹⁹¹ Isolina Kawira Kinyua, 'Online Arbitration: The Scope for Its Development in Kenya' (LLM Thesis, University of Nairobi 2012) 113

<http://erepository.uonbi.ac.ke/bitstream/handle/11295/15699/Kinyua_Online%20arbitration%3a%20the%20scope%20for%20its%20development%20in%20Kenya.pdf?sequence=1&isAllowed=y> accessed 19 May 2016.

¹⁹² *ibid* 23.

provision for new internet-related phenomena in the legal framework, may be premature.¹⁹³ According to Castro's argument, enacting legislation whenever a new technological advancement is made may lead to enactment of unnecessary laws.¹⁹⁴ However, Dutta and others suggest that uncertainty in the regulatory framework for ICT in the EU has led to a lag in investment in the industry and therefore limited development of technology in this respect.¹⁹⁵ In the EU, Pelkmans and Renda support the position that rigid regulation may hamper development of technology and lower compliance burdens have a positive effect on innovation.¹⁹⁶ Many authors hold the view that over-regulation stifles innovation, and that an increased regulatory and compliance burden limits the development of technology.¹⁹⁷ Based on this argument, it may be assumed that a legal framework for ODR is not necessary to support the development of ODR.

This review of the literature on ODR makes it clear that there is limited academic focus on developing countries in the discussion on ODR law. The present study is justified because it addresses the need for a legal framework for ODR in Kenya, a developing country. Kenya is studied as a representative of developing countries. The present study may therefore be useful to other developing countries with similar challenges as Kenya. This study seeks to address not

¹⁹³ Daniel Castro, 'Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising' (Information Technology and Innovation Foundation 2011) 11 <<http://www.itif.org/files/2011-self-regulation-online-behavioral-advertising.pdf>> accessed 23 November 2016.

¹⁹⁴ *ibid.*

¹⁹⁵ World Economic Forum and INSEAD (n 112) 61.

¹⁹⁶ Jacques Pelkmans and Andrea Renda, 'Does EU Regulation Hinder or Stimulate Innovation?' (Centre for European Policy Studies 2014) 96 27 <<https://www.ceps.eu/system/files/No%2096%20EU%20Legislation%20and%20Innovation.pdf>> accessed 23 November 2016.

¹⁹⁷ Derek Khanna, 'Regulations stifle innovation' (*The Hill*, 15 September 2015) <<http://thehill.com/blogs/congress-blog/technology/253625-regulations-stifle-innovation>> accessed 24 November 2016; Joe Harpaz, 'How Regulation Stifles Technological Innovation' (*Daily Reckoning*, 6 May 2014) <<https://dailyreckoning.com/how-regulation-stifles-technological-innovation/>> accessed 24 November 2016; Herbert Grubel, 'Too Much Regulation Is Stifling Canada's "Innovation Economy"' (*Financial Post* <<http://business.financialpost.com/fp-comment/too-much-regulation-is-stifling-canadas-innovation-economy>> accessed 24 November 2016; Fred Hilmer, 'Over-Regulation of Universities Stifles Innovation' (*Financial Review*, 3 March 2013) <<http://www.afr.com/news/policy/education/overregulation-of-universities-stifles-innovation-20130303-j12gm>> accessed 24 November 2016; John Allison and Ron Johnson, 'Regulations Stifle Economic Growth' (*POLITICO*, 4 October 2011) <<http://politi.co/oaIBMn>> accessed 24 November 2016; Michael Greibrok, 'Health Regulations Stifle Innovation, Raise Costs' (*FreedomWorks*, 24 July 2015) <<http://www.freedomworks.org/content/health-regulations-stifle-innovation-raise-costs>> accessed 24 November 2016; Nik Donovic, 'Are Government Regulations Stifling Innovation?' <<http://www.wildlaw.org/environmental-law/are-government-regulations-stifling-innovation/>> accessed 24 November 2016; Mandar Kagade, 'Stifling Innovation with Regulation' (<http://www.livemint.com/>, 17 March 2016) <<http://www.livemint.com/Opinion/p4EX68moInnibP3Iox2BSI/Stifling-innovation-with-regulation.html>> accessed 24 November 2016.

only the geographical gap in the literature, but also the insufficiency of literature on the need for a legal framework for ODR from the perspective of a developing country.

1.5 Research Questions

The central research question explored in this study is: Is there a need for regulation of ODR in Kenya?

The following are sub-questions addressed in this study:

1. What is the relationship between law and technology, if a relationship exists?
2. How is ODR provided for in the legal framework in the UK and the USA, if at all?
3. Should Kenya prioritise provision for ODR in the legal framework, or should ODR develop first and legal provision follow?

1.6 Null Hypothesis

The following is the null hypothesis that this study seeks to disprove:

H₀: There is no need for a legal framework for ODR in Kenya.

1.7 Objectives of the Research

The main objective of this study is to evaluate the need for a legal framework for ODR in Kenya. The study therefore contrasts the legal underpinnings of the ODR systems in the UK and the USA to determine whether there is a need for regulation of ODR in Kenya. The specific objectives of this study are:

1. to contrast the development of ODR systems in the UK and USA in relation to development of ODR regulation.
2. to evaluate the need for a legal framework for ODR in Kenya.

1.8 Thesis Outline

Chapter One has presented a background to the study, the statement of the problem, and theoretical bases underlying this study. In addition to exploring the theories relating to technology and the law under the sociological school of thought, the chapter has evaluated available literature on the subject. The research question, null hypothesis and objectives of the

study have also been outlined. Chapter One has formed the basis for the discussion on the legal frameworks for ODR in the UK and the USA, which is expounded in the following chapter.

Chapter Two compares and contrasts the legal frameworks for ODR in the UK and the USA. While the USA system prefers a free market approach with minimal state regulation, the UK gives more focus to regulation of the sector. These are presented as opposite poles in observing which of the two approaches may be considered more favourable to the Kenyan landscape.

Chapter Three evaluates the context of ADR in Kenya, describing the place of ODR in the legal framework. While there is no centralised ODR law, there are provisions in the law on ADR and dispute resolution in general which adapt to the changing times, and may adopt technology to facilitate the processes. The chapter addresses the issues essential for smooth operation of a legal framework for ODR. This chapter critically assesses whether, from a theoretical perspective, there is a need to consolidate provisions on ODR into an identifiable ODR law.

Chapter Four outlines the steps taken in the fieldwork carried out to support the study. It contains an analysis of the findings of the study on the viability of ODR from a practical perspective. The findings from the fieldwork are analysed with reference to the null hypothesis, to show if the null hypothesis has been disproved.

Chapter Five concludes this study and summarises the responses to the research questions posed at the beginning of the study. This chapter also proposes recommendations to the legal framework based on the analysis of the legal frameworks in the UK and the USA governing ODR.

CHAPTER TWO: LEGAL FRAMEWORK FOR ONLINE DISPUTE RESOLUTION IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA

2.0 Introduction

This chapter gives an outline of the legal framework for ODR in the UK and the USA. From these systems, preliminary issues are identified in response to the question whether there is a need for a legal framework for ODR in Kenya. The chapter compares and contrasts the legal frameworks for ODR in the UK and the USA. While the USA system favours a free market approach with minimal state regulation, the UK gives more focus to regulation of the sector. These are presented as opposite poles in observing which of the two approaches may be considered more favourable in Kenya.

2.1 Legal Framework for ODR in the United Kingdom

2.1.1 Introduction

In the UK, the level of internet use was estimated at 92.6% in the year 2016 contrasted against Kenya's 45%.¹⁹⁸ This section argues that the UK position promotes state regulation of ODR, based on the stance that regulation is essential for consumer protection in the area. This section includes EU law on the basis that the UK is a member of the EU, and its legal system is affected by ODR law in the region. This section therefore also provides a note on UK law in relation to EU law, to contextualise the impact of laws at the regional level, on the legal system of the UK.

2.1.2 Importance of studying the legal framework for ODR in the United Kingdom

A study of the legal framework for ODR in the UK is important to this study because the legal framework in Kenya has its origin in English common law.¹⁹⁹ Kenya is a member of the Commonwealth of Nations, an organisation of 53 countries with a history linked to the British Monarchy.²⁰⁰ Evolution of the legal frameworks in the UK and Kenya took different paths from

¹⁹⁸ Internet Live Stats (n 12).

¹⁹⁹ Jacob K Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1 International Journal of Humanities and Social Science 227 <http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf> accessed 28 September 2016.

²⁰⁰ The Crown, 'Commonwealth Members' (*The Official Website of the British Monarchy*) <<http://www.royal.gov.uk/monarchandcommonwealth/commonwealthmembers/membersofthecommonwealth.a>

1963 when Kenya gained independence.²⁰¹ The Independence Constitution of Kenya of 1963 as transplanted from Britain was amended thirty-eight times.²⁰² Coupled with numerous legislative amendments, the values and orientation of the legal system changed.²⁰³

The legal system in the UK took a tangent after incorporation into the EU (then the European Community) in 1973, the enactment of the Human Rights Act of 1998 and adoption of decisions of the European Court on Human Rights.²⁰⁴ However, there are various aspects in the inherited common law where Kenya and the UK still display commonality, by way of ‘doctrine, taxonomy, underlying approaches, philosophies, principles or policies’.²⁰⁵ English cases are cited more than Kenyan cases in the justice system, and statutory amendments in Kenya have been successively copied from the UK.²⁰⁶ These considerations make the UK an appropriate case study for the development of the law relating to ODR.

The UK has provisions in the law that make direct reference to ODR, and therefore it is an appropriate legal jurisdiction to study. Kenya does not have any direct provision for ODR. Therefore, this study examines whether the UK experience offers any insight on whether there is a need for a legal framework for ODR in Kenya. However, it must be noted that the UK

spx> accessed 25 February 2016; Brian Moseti, ‘Kenya: Lobby Wants Govt to Exit Commonwealth’ *The Nation* (Nairobi, Kenya, 19 July 2016) <<http://allafrica.com/stories/201607190036.html>> accessed 28 September 2016.

²⁰¹ Bonnie M Mathooko, ‘Adapting Research and Library Services in Parliament to the Changed Constitutional Framework in Kenya’ (Parliament of Kenya 2014) 4, 8 <http://www.ifla.org/files/assets/services-for-parliaments/preconference/2014/mathooko_kenya_paper.pdf> accessed 28 September 2016; Sandra F Joireman, ‘The Evolution of the Common Law: Legal Development in Kenya and India’ (2006) Paper 68 Political Science Faculty Publications 19, 20 <<http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1076&context=polisci-faculty-publications>> accessed 29 September 2016.

²⁰² Constitution of Kenya Review Commission, ‘Report of the Constitution of Kenya Review Commission’ (2003) 41 <http://katibainstitute.org/Archives/images/VOLUME%20I%20-%20Main%20Report%20_Orange%20Book_.pdf> accessed 28 September 2016; Njeri Thuki, ‘A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England’ (2013) 19 *Annual Survey of International & Comparative Law* 45, 50; Tom Ojienda, Leonard Obura Aloo and Mathews Okoth, ‘Researching Kenyan Law’ (*Globalex - Hauser Global Law School Program, New York University School of Law*, February 2016) <<http://www.nyulawglobal.org/globalex/Kenya.html>> accessed 29 September 2016.

²⁰³ Constitution of Kenya Review Commission (n 202) 41; Njeri Thuki (n 202) 50.

²⁰⁴ Njeri Thuki (n 202) 61; Human Rights Act 1998; Organisation for Economic Co-operation and Development (OECD), ‘Development Assistance Committee (DAC) Peer Review of the European Community’ (OECD 2007) Peer Review 7 <<http://www.oecd.org/development/pcd/38965119.pdf>> accessed 29 September 2016; Kristin Archick, ‘The European Union: Current Challenges and Future Prospects’ (Congressional Research Service 2016) 3 <<https://www.fas.org/sgp/crs/row/R44249.pdf>> accessed 29 September 2016.

²⁰⁵ Andrew Robertson and Michael Tilbury, ‘Unity, Divergence and Convergence in the Common Law of Obligations’, *The Common Law of Obligations* (Hart Publishing 2016) 4.

²⁰⁶ Holger Spamann, ‘Contemporary Legal Transplants - Legal Families and the Diffusion of (Corporate) Law’ (Harvard Law School 2009) Discussion Paper 28 18, 19 <http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_28.pdf> accessed 29 September 2016.

Parliament legislates in a developed country where ICT has made great strides, while Kenya lags behind in the uptake of technology. This study acknowledges that the provisions may not be directly transplanted into the legal framework in Kenya.

2.1.3 Relationship between the legal framework for ODR in the European Union and the United Kingdom

EU treaties have different levels of application. While some are binding, others are not. A ‘regulation’ is ‘a binding legislative act’ that ‘must be applied in its entirety across the EU’.²⁰⁷ In *Fratelli Variola SPA v Amministrazione italiana delle Finanze*²⁰⁸ the European Court of Justice held that regulations apply directly in member states.²⁰⁹ The Court found that Italy was under an obligation not to obstruct the direct applicability through national law.²¹⁰ Regulations are legal instruments that seek to apply common standards for all EU countries.²¹¹ Two important EU regulations are the Regulation on Consumer ODR and the subsequent Regulation (EU) No 2015/1051. These Regulations are binding, and set the stage for the minimum legal requirements for ODR in all EU states.

A ‘directive’ is ‘a legal instrument that sets out a goal that all EU countries must achieve’.²¹² These are aspirational pieces of legislation, which set an aim for all countries to reach.²¹³ Implementation of directives is left to the individual states to apply through national legislation. However, as the European Court of Justice held in *Inter-Environnement Wallonie ASBL v Région Wallonne*,²¹⁴ member states addressed by a directive have a negative obligation to refrain from adopting measures that may compromise the intended result of that directive.²¹⁵ An example of a directive is the Directive 2013/11/EU of the European Parliament and of the

²⁰⁷ European Union, ‘Regulations, Directives and Other Acts’ (*European Union*, 16 December 2015) <http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm> accessed 18 February 2016; Alberto Alesina, Ignazio Angeloni and Ludger Schuknecht, ‘What Does the European Union Do?’ (National Bureau of Economic Research 2001) Working Paper 8647 11, 12 <<http://www.nber.org/papers/w8647.pdf>> accessed 4 October 2016.

²⁰⁸ *Fratelli Variola SPA v Amministrazione italiana delle Finanze* [1973] European Court of Justice 34-73, European Court reports 00981.

²⁰⁹ *ibid.*

²¹⁰ *ibid.*; Alina Kaczorowska, *European Union Law* (Routledge 2008) 293.

²¹¹ European Union (n 207); Alberto Alesina, Ignazio Angeloni and Ludger Schuknecht (n 207) 11, 12.

²¹² European Union (n 207); Arno R Lodder and John Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press 2010) 32.

²¹³ Alberto Alesina, Ignazio Angeloni and Ludger Schuknecht (n 207) 11, 12.

²¹⁴ *Inter-Environnement Wallonie ASBL v Région Wallonne* [1997] European Court of Justice C-129/96, European Court reports I.

²¹⁵ *ibid.*

Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR). The directive seeks to regularise the standards of ADR in the different EU states, recognising that the ‘quality levels vary considerably in the Member States’ and therefore urging Members lagging behind to adopt national legislation to boost the sector.²¹⁶

A ‘decision’ is a determination on a particular issue.²¹⁷ A decision is binding on those to whom it is addressed and is directly applicable.²¹⁸ The subject of a decision may be a member state, natural person or legal person.²¹⁹ In *Franz Grad v Finanzamt Traunstein* the European Court of Justice held that a decision, when read in conjunction with a directive and treaty, attracts binding obligations that are enforceable before national courts.²²⁰ The European Union issues recommendations and opinions in areas where it does not have legislative powers.²²¹ A ‘recommendation’ is a non-binding statement that proposes a course of action but does not place any legal duty on the subjects’.²²² In *Salvatore Grimaldi v Fonds des Maladies Professionnelles*²²³ the European Court of Justice held that while recommendations are not legally binding, national courts must take them into account when considering cases. An ‘opinion’ is a non-binding statement by the EU, for example a comment on an area in which an EU institution is developing a law.²²⁴

The UK has adopted various ODR provisions guided by EU law, through the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 made by the Secretary of State designated for the purposes of section 2(2) of the European Communities Act 1972(a), in relation to matters relating to consumer protection. ODR is therefore well seated in the law in the UK. The aim of the provision for ODR in the law in the UK is to improve consumer confidence for both online and offline transactions.²²⁵

²¹⁶ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC 2013, art 5.

²¹⁷ European Union (n 207); Alberto Alesina, Ignazio Angeloni and Ludger Schuknecht (n 207) 11, 12.

²¹⁸ European Union (n 207); Alberto Alesina, Ignazio Angeloni and Ludger Schuknecht (n 207) 11, 12.

²¹⁹ European Union (n 207); Alberto Alesina, Ignazio Angeloni and Ludger Schuknecht (n 207) 11, 12; Alina Kaczorowska (n 210) 296.

²²⁰ *Franz Grad v Finanzamt Traunstein* [1970] European Court of Justice 9-70, European Court Reports 00825.

²²¹ Alina Kaczorowska (n 210) 224.

²²² European Union (n 207).

²²³ *Salvatore Grimaldi v Fonds des Maladies Professionnelles* [1989] European Court of Justice C-322/88.

²²⁴ European Union (n 207).

²²⁵ UK Department for Business, Innovation and Skills (n 33).

2.1.4 Regulation on Consumer ODR - Regulation (EU) No. 524/2013

The Regulation on Consumer ODR – Regulation (EU) No. 524/2013 – amended Regulation (EC) No 2006/2004 and Directive 2009/22/EC. The Regulation on Consumer ODR was passed in light of the consumer rights under Article 38 of the Charter of Fundamental Rights of the European Union and Article 169(1) and point (a) of Article 169(2) of the Treaty on the Functioning of the European Union which place a duty on the EU to strive toward achievement of high levels of consumer protection. The regulation is therefore important to this study on the legal system for ODR in B2C disputes because it provides safeguards for consumers in these disputes. This points to the consumer-focus in the EU, and the development of the laws on ODR from a rights-perspective. The regulation is binding in its entirety and directly applicable in all EU member states, including the UK.

The argument emerges, whether the focus for regulation of ODR in the EU is on consumer protection or on pursuing development of business, technology and ODR itself. Is the aim of the regulation to improve the sector, or is the aim to protect consumers? The response may be found in section 8 of the Regulation on Consumer ODR which states as follows:

“ODR offers a simple, efficient, fast and low-cost out-of-court solution to disputes arising from online transactions. However, there is currently a lack of mechanisms which allow consumers and traders to resolve such disputes through electronic means; this leads to consumer detriment, acts as a barrier, in particular, to cross-border online transactions, and creates an uneven playing field for traders, and thus hampers the overall development of online commerce.”²²⁶

From section 8 of the Regulation on Consumer ODR, it is observed that the motivation of putting in place the regulation is not only consumer protection but also improvement of trade. The thesis is that where consumer confidence and trader confidence are improved, then e-commerce will increase. Further, the improvement in e-commerce will act to boost trade in the region. The EU intends that the Regulation on Consumer ODR will boost ODR, ease uptake of e-commerce, and support cross-border trade which is a key determinant of achieving the Single Market.²²⁷

The Regulation on Consumer ODR provides for the EU to establish an ODR platform to facilitate ODR through linking consumers and businesses on the one hand, with ODR

²²⁶ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC 2013 s 8.

²²⁷ *ibid* 3, 5.

practitioners on the other hand.²²⁸ The EU ODR platform is a user-friendly, interactive website accessible by parties all across the EU in their respective languages.²²⁹ Through the ODR platform, a party may lodge a dispute, the dispute would be transmitted to an ADR entity, case management services would be offered, and parties may give their feedback on the operation of the website to allow for development.²³⁰ Testing of the ODR platform was to conclude on 9th January, 2015.²³¹ The platform was launched on 9th January, 2016.²³² It was made accessible to consumers and businesses on 15th February, 2016.²³³ The link to the ODR platform is <http://ec.europa.eu/odr>, which leads the consumer or business to a page allowing selection of preferred language.²³⁴

The UK as a member state of the EU is mandated to provide an ODR contact point.²³⁵ The contact point provides support to the ODR system by assisting with submissions of complaints and supporting documents where applicable.²³⁶ The contact point provides information on the ODR platform, consumer rights, and procedural rules used by the ADR entities engaged in the process.²³⁷ The contact point is also responsible for directing the aggrieved party to other methods of dispute resolution where the ODR system does not offer sufficient redress.²³⁸ The ODR contact point in the UK coordinates with ODR contact points in the other EU member states under the European Commission framework.²³⁹

The ODR platform is a boost to regulation of ODR for B2C e-commerce disputes in the UK, owing to the mandatory nature of participation in the initiative. The legal implication of the

²²⁸ Regulation on Consumer ODR (n 226), art 1, 2.

²²⁹ *ibid*, art 5.

²³⁰ *ibid*, art 5.

²³¹ *ibid*, art 6.

²³² European Commission, 'Commission Launches New Platform for Alternative Dispute Resolution between Consumers and Online Traders' (*European Commission: Press Release Database*, 8 January 2016) <<http://europa.eu/rapid/midday-express-08-01-2016.htm>> accessed 23 February 2016.

²³³ European Commission, 'Solving Disputes Online: New Platform for Consumers and Traders' (*European Commission: Press Release Database*, 15 February 2016) <http://europa.eu/rapid/press-release_IP-16-297_en.htm> accessed 23 February 2016.

²³⁴ European Commission, 'Online Dispute Resolution' (*Online Dispute Resolution*, 2016) <<https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.chooseLanguage>> accessed 29 September 2016.

²³⁵ Regulation on Consumer ODR (n 226), art 7.

²³⁶ *ibid*, art 7.

²³⁷ *ibid*, art 7.

²³⁸ *ibid*, art 7.

²³⁹ *ibid*, art 7.

Regulation is that all member states of the EU including the UK must engage in upholding the objectives of the law, to promote ODR for B2C e-commerce disputes.

2.1.5 Directive on Consumer ADR – Directive 2013/11/EU

The Directive on Consumer ADR – Directive 2013/11/EU – seeks to regularise the standards of ADR in the different EU states.²⁴⁰ The directive recognises that there are different levels of quality of service provision for ADR in the Member States and urges Members lagging behind to adopt national legislation to boost the sector.²⁴¹ The directive acknowledges that it is closely intertwined with the Regulation on ODR because establishing a network of ADR service providers across the region is needed for the ODR platform envisaged under the Regulation on ODR to function properly.²⁴²

The Directive on Consumer ADR applies to all consumer disputes except those relating to non-economic services such as healthcare services, and services provided by the government at no cost, and healthcare services.²⁴³ It provides for parties to freely access ADR services from ADR entities, which are establishments of a durable nature that offer ADR procedures.²⁴⁴ In relation to ODR, the directive mandates that parties should have the right to submit a complaint and supporting documents either online or offline.²⁴⁵ The consumer-focus is evident in the provision for access to ADR procedures for free or for a nominal fee for consumers.²⁴⁶ This is an indication of the suitability of the ADR procedures supported by the directive, in resolving B2C e-commerce disputes of low value and high volume.²⁴⁷ The consumers' access is not hindered by the cost of the interaction with the ADR entity.

2.1.6 Arguments on the United Kingdom approach

In the UK, a consumer retains the right to access a court even though the matter is referred to ADR or ODR.²⁴⁸ The directive embodies the principle that limiting the consumer's access to

²⁴⁰ Directive on Consumer ADR (n 216), art 5.

²⁴¹ *ibid*, art 5.

²⁴² *ibid* 12.

²⁴³ *ibid* 13, 14.

²⁴⁴ Directive on Consumer ADR (n 216), art 5.

²⁴⁵ *ibid*, art 5.

²⁴⁶ *ibid*, art 8 (c).

²⁴⁷ Karolina Mania (n 21) 85.

²⁴⁸ Christopher Hodges and Naomi Creutzfeldt, 'Implementing the EU Consumer ADR Directive' (The Foundation for Law, Justice and Society 2013) Policy Brief 3, 7

<https://www.law.ox.ac.uk/sites/files/oxlaw/implementing_the_adr_directive.pdf> accessed 6 October 2016.

courts would be a breach to the consumer's right of access to justice.²⁴⁹ Arguments for regulation of ODR in the UK approach mostly arise from a perspective of consumer protection.²⁵⁰ It is argued that the ODR law in the UK will contribute to popularising ODR as a dispute resolution mechanism of choice for B2C e-commerce disputes.²⁵¹

The legal framework for ODR in the EU and consequently in the UK faces various challenges in its impact: the growth of ODR as a dispute resolution mechanism for e-consumers is lagging, with little awareness among consumers and businesses of the alternatives to resorting to courts.²⁵² The lack of legal standards for the practice has led to a situation where accreditation of ODR service providers becomes difficult, which further dampens the aims of achieving consumer trust.²⁵³ The high cost of the technology required to establish an ODR system has led to low uptake, with the need for state-backed initiatives becoming apparent, therefore giving legitimacy to state involvement in ODR.²⁵⁴

The lack of compulsion to participate in ODR initiatives and the insistence on freedom of parties leads to a reluctance for traders to engage in ODR processes.²⁵⁵ As a result, some businesses may have to be compelled to participate through legal or economic mechanisms, for example legally-sanctioned trust-marks or positive consumer reviews.²⁵⁶ The agreements to use ODR are generally not enforceable especially for domestic ODR, which is not covered under the regulation or the directive.²⁵⁷

The theoretical argument guiding this study is that the law embodies aspirations of society including technology. The law therefore may guide the society, as society influences the development of the law. In the UK, with consumer protection as an interest of society, the law has taken into account the realities of interactions through technology. The EU laws applied within the UK provide a binding legal framework which is moulded around progress of society through technology. The legal framework also balances an interest of society in protecting the

²⁴⁹ *ibid* 7; Directive on Consumer ADR (n 216), art 12.

²⁵⁰ Sodiq O Omoola and Umar A. Oseni (n 41) 281.

²⁵¹ Karolina Mania (n 21) 85.

²⁵² Pablo Cortés and Arno R Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress' [2014] *Maastricht Journal of European and Comparative Law* 5.

²⁵³ *ibid* 6.

²⁵⁴ *ibid*.

²⁵⁵ *ibid* 7.

²⁵⁶ *ibid*.

²⁵⁷ *ibid*.

consumer in B2C e-commerce transactions. The sociological approach to law is therefore evident in the discourse on ODR law in the UK.

2.2 Legal Framework for ODR in the United States of America

2.2.1 Introduction

This section outlines the legal framework supporting ODR in the USA. First, an evaluation of the relevance of the USA experience is given. This places the need to study the USA experience in context, and justifies the involvement of the jurisdiction in this study. Secondly, a brief overview of the relevant laws supporting ODR in the USA follows. The legal framework supports market regulation, therefore the limited statutory provision for ODR is noted, against a backdrop of a robust ODR uptake. Thirdly, some case studies of ODR mechanisms operating in the USA are presented, for a practical approach on the aspirations of ODR practitioners. Lastly, a succinct presentation of the arguments relating to the legal framework for ODR in the USA are outlined, to set the pace for the evaluation of whether Kenya may learn from the USA experience.

2.2.2 Importance of studying the legal framework for ODR in the United States of America

The internet developed in the USA from the early 1960s.²⁵⁸ An analysis of the legal framework for ODR in the USA is important to this study because the USA is the origin of the internet.²⁵⁹ In the USA, the level of internet use was estimated at 88.5% in the year 2016 contrasted against Kenya's 45%.²⁶⁰ With a wealth of experience in the development of ICT systems, the USA is therefore a global leader in the development of the law to adapt to changes in technology and the potential for the law to influence technology. Experience with ODR systems is therefore evident, with the USA also being home to the founders of ODR.²⁶¹

²⁵⁸ Raphael Cohen-Almagor, 'Internet History' (2011) 2 *International Journal of Technoethics* 46; Leonard Kleinrock, 'An Early History of the Internet' [2010] *IEEE Communications Magazine* 26 – 36.

²⁵⁹ Karolina Mania (n 21) 76, 77.

²⁶⁰ Internet Live Stats (n 12).

²⁶¹ Arthur M Monty Ahalt (n 92) 22.

It is argued that ADR was first introduced in the USA and spread to other countries.²⁶² According to this view, a study on ADR would be incomplete without deferring to the vast experience and useful information of the USA.²⁶³ This is a contested position, with scholars arguing that ADR is not new to Africa.²⁶⁴ Critics opine that mechanisms of dispute resolution such as negotiation, mediation and traditional dispute resolution were in place in Africa from the beginning of time.²⁶⁵ Further, the biblical story of King Solomon arbitrating between two women over maternal claims over a child indicates that ADR has been in place in other parts of the world and was not ‘invented’ in the USA.²⁶⁶ The ‘origin of ODR’ angle may therefore be a preferred justification for involving the USA experience in this study, considering the disputed position on the origin of ADR.

The USA position is that regulation of ODR is not needed because the system developed in spite of the law, and therefore should continue in the hands of private players. The USA Federal Arbitration Act of 1970 mandates strict use of arbitration for B2C disputes.²⁶⁷ However, the law in the USA does not proactively support ODR systems through regulation.²⁶⁸ As a result, ODR systems in the USA operate in the private realm.²⁶⁹

2.2.3 Relationship between the levels of the legal framework for ODR in the United States of America

The legal system of the USA is based on English common law introduced to the North American colonies from England.²⁷⁰ However, the evolution of common law in the USA took

²⁶² Winnie Sithole Mwenda, ‘Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia’ (D Phil (Law) Thesis, University of South Africa 2006) 32.

²⁶³ *ibid.*

²⁶⁴ Kariuki Muigua and Leonard Aloo, ‘Introduction to ADR’ (International Commercial Arbitration Seminar - University of Nairobi, School of Law, Nairobi, Kenya, 11 February 2016); Kariuki Muigua, ‘Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya 2010’ 1 – 3 <<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>> accessed 24 February 2016.

²⁶⁵ Kariuki Muigua and Leonard Aloo (n 264); Kariuki Muigua, ‘Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya 2010’ (n 264) 1 – 3.

²⁶⁶ Arthur M Monty Ahalt (n 92) 21.

²⁶⁷ Amy Schmitz (n 34) 3.

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

²⁷⁰ The Regents of the University of California, ‘The Common Law and Civil Law Traditions’ (University of California at Berkeley 2014) 1, 4 <<https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf>> accessed 29 September 2016.

a different path than in the UK.²⁷¹ Many south-western states, however, have traces of civil law from their history with European early legal heritage.²⁷² On one hand, in the USA are laws that apply to all states, known as federal laws.²⁷³ State laws, on the other hand, apply only within particular states.²⁷⁴ Similar to the law in Kenya which does not make direct reference to ODR, the legal framework supporting ODR in the USA is constituted by laws backing ICT in the areas of e-commerce, e-contracting and digital signatures; e-evidence; and protective laws including intellectual property rights laws, consumer protection laws, and information and cyber-security laws.²⁷⁵

2.2.4 Law on e-commerce, e-contracting and digital signatures in the United States of America

The USA has various laws on e-commerce, e-contracting and digital signatures. Of prime importance are the Electronic Signatures in Global and National Commerce (ESIGN) Act of 2000.²⁷⁶ The ESIGN Act is a federal law enacted to facilitate the use of electronic records and signatures in interstate or foreign commerce.²⁷⁷ The main concern for ODR is the link between ADR and technology. ODR advocates for the resolution of disputes by electronic means. The ESIGN Act provides that the term ‘electronic’ means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.²⁷⁸ This puts into context the parts of an ODR system where there is electronic transmission of claim documents, electronic communication between parties and electronic delivery of the decision.

In the USA, a signature, contract, or other record relating to an e-commerce transaction has equal legal effect, validity, and enforceability as the physical alternative.²⁷⁹ Under the ESIGN

²⁷¹ Thomas Fleiner, ‘Common Law and Continental Law: Two Legal Systems’ (University of Fribourg 2005) Tip Sheet 4 <http://www.thomasfleiner.ch/files/documents/legalsystems_fulltext_final.pdf> accessed 29 September 2016.

²⁷² The Regents of the University of California (n 270) 1, 4.

²⁷³ Thurgood Marshall Law Library, ‘Researching a Federal Law Problem’, *Thurgood Marshall Law Library Guide to Legal Research* (2016) 10–2 – 10–5 <<https://www.law.umaryland.edu/marshall/researchguides/tmlguide/chapter10.pdf>> accessed 29 September 2016; United States Department of State, *Outline of the U.S. Legal System* (George Clack, Rosalie Targonski and Mildred Solá Neely eds, United States Department of State 2004) 7 – 13 <<http://usa.usembassy.de/etexts/gov/outlinelegalsystem.pdf>> accessed 29 September 2016.

²⁷⁴ United States Department of State (n 273) 16.

²⁷⁵ Mohamed S Abdel Wahab (n 159) 24.

²⁷⁶ Electronic Signatures in Global and National Commerce Act 2000 (US Code).

²⁷⁷ *ibid.*

²⁷⁸ *ibid* 106.

²⁷⁹ *ibid* 101.

Act, the term ‘electronic signature’ means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.²⁸⁰ E-signatures are important in ODR because they form the basis for the argument that agreements may be concluded online in e-commerce transactions. Since the main focus in this study is B2C e-commerce transactions, the ESIGN Act therefore gives legitimacy to the subject matter of the type of disputes to which ODR may be effectively applied.

The ESIGN Act guides the conduct of ODR processes and mandates ODR service providers to keep electronic records. According to the Act, physical and electronic records are accorded the same level of respect. This gives validity to the existence of e-contracts. The Act provides that an ‘electronic record’ means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.²⁸¹ The e-contracts made between businesses and consumers and the subject of this study, are therefore covered under the ESIGN Act.

The laws on e-evidence in the USA are closely linked to those of e-commerce, e-contracts and digital signatures.²⁸² Of particular importance are the provision for maintenance of electronic records, the legitimisation of communication using electronic systems and the adoption of technology in collection of evidence.

2.2.5 Protective laws in the United States of America

Protective laws in the USA include intellectual property rights laws, consumer protection laws, and information and cyber-security laws.²⁸³ This section focuses on consumer protection laws, because this study has a leaning towards the legal framework for ODR in B2C e-commerce disputes. The consumer protection provisions are therefore key in assessing whether the consumers are well provided for in ODR systems.

²⁸⁰ *ibid* 106.

²⁸¹ *ibid*.

²⁸² Lucy L Thomson, ‘Mobile Devices: New Challenges for Admissibility of Electronic Evidence’ (2013) 9 *The SciTech Lawyer* <http://www.americanbar.org/content/dam/aba/events/science_technology/mobiledevices_new_challenges_admissibility_of_electronic_device.authcheckdam.pdf> accessed 29 September 2016.

²⁸³ Alan Charles Raul, Tasha D Manoranjan and Vivek Mohan, ‘United States’ in Alan Charles Raul (ed), *The Privacy, Data Protection and Cybersecurity Law Review* (1st edn, Law Business Research Ltd 2014) 262 <http://www.sidley.com/~media/files/publications/2014/11/the-privacy-data-protection-and-cybersecurity-la__files/united-states/fileattachment/united-states.pdf> accessed 29 September 2016.

Consumer protection is provided for under the ESIGN Act. The Act states that the term ‘consumer’ means an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.²⁸⁴ Dissemination of information to consumers may be done through either physical or electronic means, where the definition of ‘information’ includes data, text, images, sounds, codes, computer programs, software, or databases.²⁸⁵ This supports the ODR framework for B2C e-commerce disputes especially where the main point of issue is on provision of inaccurate information by a business.

Consumer protection in e-commerce transactions is further strengthened by the Electronic Fund Transactions Act (EFTA) of 1978 which legitimises the use of technology to effect payments, especially in relation to banking procedures. Electronic banking is a source of disputes that may be resolved by ODR, though electronic banking does not necessarily involve a B2C relationship. However, with the key role that electronic payments have in e-commerce, then the EFTA is important to back the conduct of parties in engaging in e-commerce. This, therefore, impinges on the legal framework for ODR.

The Federal Trade Commission (FTC) is the main consumer protection institution in the USA, established under the Federal Trade Commission (FTC) Act of 1914. Section 5(a) of the FTC Act affects the B2C relationship between the parties in many potential ODR disputes because it prohibits deception and other unfair trade practices that the business may be engaged in. This is an important provision in e-commerce because it allows the FTC to take civil action against businesses that do not adhere to the minimum standards for consumer protection. This creates a starting point for determining B2C e-commerce disputes in an ODR procedure. The USA Federal Arbitration Act of 1970 mandates strict use of arbitration for B2C disputes, but ODR systems in the USA operate in the private realm because the USA law does not proactively support ODR systems through regulation.²⁸⁶ Businesses must therefore have consumer protection in consideration in their interactions with consumers, to avoid situations where mandatory arbitration for B2C e-commerce disputes becomes inapplicable for failing to respect the rights of consumers.

²⁸⁴ ESIGN Act (n 276).

²⁸⁵ *ibid.*

²⁸⁶ Amy Schmitz (n 34) 3.

2.2.6 Arguments on the United States of America approach

The market-led approach in the USA leaves the development of ODR to the private sector, leaving out regulation by the sovereign. This laissez-faire approach recognises that while there may be an urge to regulate on every area of society, the dynamic nature of technology leads to disruptive developments in various areas either in the absence of, or in spite of law. This is the thinking of leading scholars in the USA, such as Professor Paul Schiff Berman, Walter S. Cox Professor of Law at The George Washington University Law School.²⁸⁷ From his perspective, there is an assumption that once laws are passed, then they immediately take effect and form a ‘legal regime’.²⁸⁸

The insistence with the view that state law can fully moderate cyberspace is complicated by the flux in the relationship between humans and machines, where new dynamics are presented and driven by data and people.²⁸⁹ From such a stance, the mind-set of the law and that of technology are different. Both bring about regulation of human behaviour. Regulation of technological advances in areas such as ODR may therefore be seen as an inhibition.

The sociological approach to law is seen in the recognition that there are other mechanisms of ensuring regulation of behaviour outside the law. The market-led approach in the USA implies that law, a product of society, may inhibit the development of technology, another product of society. Society is the main user of both law and technology. It may therefore either permit technology to be regulated by the market itself, or put in place laws to play this role. In the market-led approach in the USA, technology is left in the hands of the market out of society’s consideration that technology may be hindered if it is regulated through the law.

2.3 Conclusion

This chapter has outlined the basic tenets of the legal framework for ODR in the UK and the USA. While the system in the USA favours a free market approach with minimal state regulation, the UK gives more focus to regulation of the sector. These are presented as opposite

²⁸⁷ The George Washington University Law School, ‘Paul Schiff Berman’ (*The George Washington University Law School*, 2016) <www.law.gwu.edu/paul-schiff-berman> accessed 23 February 2016.

²⁸⁸ Paul Schiff Berman, ‘From International Law to Law and Globalization’ (2005) 43 *Columbia Journal of Transnational Law* 498.

²⁸⁹ Orna Rabinovich-Einy and Ethan Katsh (n 105) 31.

poles in observing which of the two approaches may be considered more favourable for development of the sector in Kenya.

The next chapter delves into an overview of the legal framework relating to ADR in Kenya. It acknowledges that there is no central system for ODR in Kenya. It therefore pieces together the provisions in ADR law, that hint at the possibility of ODR. Chapter three lays the basis for the question whether the legal system for ADR in Kenya would need to be adjusted in any way in anticipation of the development of ODR.

CHAPTER THREE: LEGAL FRAMEWORK FOR ONLINE DISPUTE RESOLUTION (ODR) IN KENYA

3.0 Introduction

This chapter evaluates the ADR situation in Kenya, describing the place of ODR in the legal framework. While there is no centralised ODR law, there are provisions in the law on ADR and dispute resolution in general. ADR may adapt to the changing times and adopt technology to facilitate the processes. The chapter presents a snapshot of the legal framework dealing with ADR and technology in the Kenya. It lays a background for the question whether there is any need for a legal framework for ODR in Kenya.

3.1 Laws Supporting ODR in Kenya

ADR in Kenya has been slow to adopt technology.²⁹⁰ There is no consolidated law on ODR in Kenya. Instead, this study uses the law relating to ADR as a reference point to evaluate whether there is any mention of ODR. Read together, the provisions relating to ADR in Kenya appear to support ODR without explicit mention of the concept. The present study acknowledges that, as the High Court of Kenya at Nairobi stated in *Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex parte Barclays Bank of Kenya Limited*,²⁹¹ the law is dynamic: it develops to take into account legal problems society faces: new legal problems as well as those that metamorphose from old legal problems into complex and coloured issues.²⁹² This section presents a discussion on key provisions in the legal framework in Kenya that refer to activities which may be found to support ODR.

B2C e-commerce disputes may be resolved through the court process, administrative process or ADR.²⁹³ The Constitution recognises the place of technology in development of the country, entrenches the rights of consumers, and promotes ADR.²⁹⁴ Litigation through the courts is provided under the Civil Procedure Act (Cap 21) and the Civil Procedure Rules of 2010, which

²⁹⁰ Paul Ngotho, 'Expediting Ad Hoc Arbitrations Through Emails: The Experience of a Kenyan Arbitrator' (2015) 3 Alternative Dispute Resolution 134, 131.

²⁹¹ *Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex parte Barclays Bank of Kenya Limited* [2015] High Court of Kenya at Nairobi Miscellaneous Civil Application 46 of 2013, eKLR.

²⁹² *ibid* 108.

²⁹³ Feliksas Petrauskas and Eglė Kybartienė (n 9); Pablo Cortés (n 19) 172, 173; Llewellyn Joseph Gibbon (n 39) 4, 5, 11 – 15; Colin Rule, Vikki Rogers and Louis Del Duca (n 39) 225 – 228; Urša Jeretina (n 39) 191 – 192.

²⁹⁴ Constitution of Kenya (n 49), art 11, 16, 159.

give recognition to the use of ADR to facilitate resolution of disputes outside the brick-and-mortar courts.²⁹⁵ In *Hanif Sheikh v Alliance Nominees Limited & 17 others*,²⁹⁶ the High Court of Kenya at Nairobi found that while the consent of the parties is a prerequisite to refer the dispute to arbitration, the courts may refer matters for determination through other forms of ADR apart from arbitration, on its own motion.²⁹⁷ Applying this reasoning to ODR, this would mean that the courts in Kenya have the power to refer parties to e-mediation and e-negotiation, which are alternative forms of ADR apart from arbitration.

The Kenya Information and Communications (Dispute Resolution) Regulations made pursuant to the Kenya Information and Communications Act of 1998 provide for a consumer in a B2C e-commerce dispute with a telecommunications service provider to file a complaint with the Communications Authority of Kenya.²⁹⁸ A consumer may also resort to ADR as envisioned under Article 159 of the Constitution of Kenya of 2010 which provides that the courts and tribunals shall support the use of ADR.

The discussion on whether there is a need for a legal framework for ODR in Kenya is based on the evaluation of the various provisions in different areas of ICT law in Kenya. This chapter therefore takes the approach of appraising the law in the areas of e-commerce, e-contracting and digital signatures; e-evidence; and protective laws including intellectual property rights laws, consumer protection laws, and information and cyber-security laws.²⁹⁹

3.1.1 Law on e-commerce, e-contracting and digital signatures in Kenya

At the regional level, the East African Community Electronic Transactions Bill of 2014 is envisioned to provide for the use, security, facilitation and regulation of electronic transactions and to encourage the use of e-Government services.³⁰⁰ While it has promise to deliver provisions to promote e-commerce, the Bill does not yet have force of law. Notably, the Bill provides for consumer protection in e-commerce transactions.³⁰¹ The Bill mandates businesses in B2C e-commerce to include on their websites and electronic communication such

²⁹⁵ Civil Procedure Act 2010 ss 59 – 59D; Civil Procedure Rules 2010, order 46.

²⁹⁶ *Hanif Sheikh v Alliance Nominees Limited & 17 others* [2014] High Court of Kenya at Nairobi Civil Suit 241 of 2012, eKLR.

²⁹⁷ *ibid* 25; Constitution of Kenya (n 49), art 159 (2)(c); Civil Procedure Rules (n 295), order 46; Civil Procedure Act (n 295).

²⁹⁸ Kenya Information and Communications (Dispute Resolution) Regulations 2010.

²⁹⁹ Mohamed S Abdel Wahab (n 159) 24.

³⁰⁰ Electronic Transactions Bill 2014, preamble.

³⁰¹ *ibid*, part VI.

information as the full name, legal status, contact details, any code of conduct to which the business subscribes, and any ADR code the business adopts. An analysis of this Bill shows that at the regional level, consumer protection concerns are included in the proposed law on e-commerce.

The Kenya Information and Communications Act of 2009, amended in 2013 by the Kenya Information and Communications (Amendment) Act of 2013 makes provision for e-commerce, e-contracting and digital signatures. The Act supports e-contracts through acknowledging that contracts may signed either physically or electronically by way of an e-signature.³⁰² The Communications Authority of Kenya is established under the Kenya Information and Communications (Amendment) Act in 2009 and has since its establishment been a forerunner in the development of ICT law.

The place of the Communications Authority of Kenya in development of ODR in Kenya is observable in its role in supporting e-commerce, e-contracts and e-signatures. The functions of the Communications Authority of Kenya relevant to ODR include its role in facilitating electronic transactions by ensuring the use of reliable electronic records; facilitating electronic commerce and eliminating barriers to electronic commerce such as those resulting from uncertainties over writing and signature requirements; promoting public confidence in the integrity and reliability of electronic records and electronic transactions; fostering the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium; promoting and facilitating efficient delivery of public sector services by means of reliable electronic records; and developing sound frameworks to minimize the incidence of forged electronic records and fraud in electronic commerce and other electronic transactions.³⁰³ With e-commerce, e-contracts and e-signatures firmly in place in ICT law in the country, ODR may have a resting place in terms of legitimacy of the ICT-assisted relations involved.

Similar to the USA approach, Kenya's provision for e-evidence is supported by the law on e-commerce, e-contracts and digital signatures. In *Republic v Mark Lloyd Steveson*,³⁰⁴ the High Court of Kenya at Kiambu confirmed that an email may be used as evidence if it complies with

³⁰² Kenya Information and Communications Act 2009 s 2.

³⁰³ *ibid* 83(C).

³⁰⁴ *Republic v Mark Lloyd Steveson* [2016] High Court of Kenya at Kiambu Criminal Revision 1 of 2016, eKLR.

the conditions for admissibility set out under the Evidence Act.³⁰⁵ In *Vimalkumar Bhimji Depar Shah & another v Stephen Jennings & 5 others*,³⁰⁶ the High Court of Kenya at Nairobi stated that the court should have been given access the electronic sources of the allegedly defamatory words to verify the authenticity of the contents, which the court remarked could easily be manipulated.³⁰⁷ These decisions show that while e-evidence is supported in Kenya, its use in dispute resolution must be guided by the knowledge that there is potential for misuse. ODR systems may adopt the provisions for communication using technology, making and storing electronic records and collection of evidence through the use of technology, such as in the use of stenographer services in ADR.

3.1.2 Protective Laws in Kenya

The protective laws that touch on ODR in Kenya include provisions for intellectual property, consumer protection, and information and cyber-security laws. As in the USA approach, this section on the Kenyan approach concentrates on provision for consumer protection, recognising that ODR is favourable for resolution of B2C e-commerce disputes that mostly arise through failure for businesses to respect consumer rights.

The Constitution is the bedrock for consumer rights. It provides that consumers have the right to goods and services of reasonable quality; to the information necessary for them to gain full benefit from goods and services; to the protection of their health, safety, and economic interests; and to compensation for loss or injury arising from defects in goods or services.³⁰⁸ ODR supports the right for consumers to receive compensation for loss or injury, as the dispute resolution system aids the consumer to gain redress. The Constitution mandates Parliament to enact legislation to provide for consumer protection and for fair, honest and decent advertising.³⁰⁹ This justifies the need for substantive consumer protection safeguards in ODR systems for B2C e-commerce disputes.

Consumer rights in Kenya apply to goods and services offered by public entities or private persons.³¹⁰ Accordingly, they apply to G2C, B2C and arguably also to C2C e-commerce

³⁰⁵ *ibid*; Evidence Act (Cap 80) s 106A – 106I.

³⁰⁶ *Vimalkumar Bhimji Depar Shah & another v Stephen Jennings & 5 others* [2016] High Court of Kenya at Nairobi Civil Case 300 of 2015, eKLR.

³⁰⁷ *ibid*.

³⁰⁸ Constitution of Kenya (n 49), art 46(1).

³⁰⁹ *ibid*, art 46(2).

³¹⁰ *ibid*, art 46(3).

transactions. The suitability of ODR for B2C e-commerce disputes has been argued in this study. It is therefore notable that the Constitution calls for respect for consumer rights in all laws, including any law that may be put in place to support ODR. Enforcement of consumer rights may be pursued through ODR, as it provides a platform for accessing resolution of B2C e-commerce disputes. This is further supported by the recognition that science and technology are important in the development of Kenya.³¹¹ From this reading of the Constitution, the establishment and promotion of ODR systems in Kenya already has a constitutional backing.

The aspirations in the Constitution in the area of consumer protection are actualised through legislation. The Consumer Protection Act of 2012 contains substantive provisions on the expression of the rights of consumers in Kenya. However, the statute poses a potential challenge to the development of ODR for B2C e-commerce disputes. This potential challenge arises under section 88 of the Consumer Protection Act which may appear to downplay the finality of e-arbitration, a component of ODR. Section 88 of the Consumer Protection Act states:

“88. (1) Any term or acknowledgment in a consumer agreement or a related agreement that requires or has the arbitration effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.”

It is argued that section 88 of the Consumer Protection Act diminishes the finality of arbitration for B2C e-commerce disputes because it allows the consumer to override the arbitral clause in the agreement and commence an action in court.³¹² The concept of finality is central to arbitration. In *Anne Mumbi Hinga v Victoria Njoki Gathara*,³¹³ the Court of Appeal of Kenya noted that finality is a major objective of arbitration. Any attempt to diminish the finality of arbitration may therefore appear to hinder a major objective of the dispute resolution mechanism. If section 88 of the Consumer Protection Act stands in the way of fulfilment of a major objective of e-arbitration, then it may be seen as a hindrance to development of e-arbitration, a facet of ODR.

³¹¹ *ibid*, art 11(2)(b).

³¹² Kariuki Muigua, ‘Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises’ (n 40) 29; Daisy Owuor Ajima (n 50) 74.

³¹³ *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] Court of Appeal of Kenya at Nairobi Civil Appeal 8 of 2009, eKLR.

ODR refers to a merger of ADR and technology. If section 88 of the Consumer Protection Act applies to arbitration in the brick-and-mortar world, then this study assumes that the provision would also apply to e-arbitration, a component of ODR, in the cyberspace. An analysis of the concept of finality in arbitration suggests that section 88 of the Consumer Protection Act would not hinder e-arbitration and therefore would not impede development of ODR. In *Evangelical Mission for Africa & another v Kimani Gachuhi & another*,³¹⁴ the High Court of Kenya at Nairobi stated that finality of arbitral awards is important, finality should not be desired at any cost. According to the High Court of Kenya, courts have a duty to do justice according to the Constitution. Justice would take precedence over finality of an arbitral award. It is in the interests of justice, then, that the High Court may intervene through an application to set aside an award for limited reasons provided for in the law,³¹⁵ or through an appeal as agreed to by the parties to an arbitration.³¹⁶

In the context of the application of section 88 of the Consumer Protection Act to ODR through e-arbitration, the rights of a consumer may be infringed as a result of an e-arbitration, for example where the consumer is not given adequate information. If this happens and an e-arbitration award is made, justice would take precedence: the consumer may file a suit at the High Court for redress. In light of this argument, it appears that section 88 of the Consumer Protection Act does not downplay ODR. First, section 88 of the Consumer Protection Act may only apply to e-arbitration, one aspect of ODR. It would not apply to other components of ODR such as e-mediation or e-negotiation. Its feared effect of reducing respect for arbitration in specific and ODR in general, is therefore limited. Secondly, the finding that justice must be done even in ODR is important. This challenges the argument that consumers or businesses may opt out of e-arbitration because of a lack of finality suggested by section 88 of the Consumer Protection Act. To the contrary, if section 88 of the Consumer Protection Act ensures that justice is done and a consumer whose rights are infringed gains redress, then only a fair e-arbitration award would stand. This would imply that section 88 of the Consumer Protection Act instead supports just practice of arbitration and e-arbitration. It would be

³¹⁴ *Evangelical Mission for Africa & another v Kimani Gachuhi & another* [2015] High Court of Kenya at Nairobi Miscellaneous Civil Application 479 of 2014, eKLR.

³¹⁵ Arbitration Act 1995, s 35.

³¹⁶ *ibid* 39.

improper, therefore, to conclude that section 88 of the Consumer Protection Act may limit the development of ODR.

3.2 Laws Supporting ADR in Kenya

3.2.1 Constitution of Kenya of 2010

The Constitution of Kenya, 2010 is the main law governing all activities carried out in the country.³¹⁷ The present study therefore considers provisions under the Constitution that support dispute resolution with specific focus on ADR to form a basis for the discourse on ODR. Further, provisions for consumer protection under the Constitution give legitimacy to the promotion of ODR for B2C e-commerce disputes.

The Constitution provides for the right to fair hearing.³¹⁸ ODR platforms must be independent and impartial dispute resolution tribunals. Each party involved must be assured of a fair hearing before the ODR platform. Independence must be assured, and the possibility of irregularities in the system must not arise. While technology may replace the judge or decision-maker in ODR, the system must therefore have safeguards that the persons involved would have the dispute resolved in a fair manner.

ODR mechanisms contribute to the realisation of justice. ADR is recognised under the Constitution which states that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.³¹⁹ The promotion of ODR finds its place in this provision, where the courts and tribunals established under the Constitution are guided by the principle of promotion of ADR. In *Telkom Kenya Limited v Rapid Communications Limited*³²⁰ the High Court of Kenya at Nairobi acknowledged that ADR is a quasi-judicial function which should only be used to promote the rule of law and principles of justice under the Constitution.³²¹ Since ODR is ADR with the influence of

³¹⁷ Constitution of Kenya (n 49), art 2.

³¹⁸ *ibid*, art 50 (1).

³¹⁹ *ibid*, art 159 (2)(c).

³²⁰ *Telkom Kenya Limited v Rapid Communications Limited* [2015] High Court of Kenya at Nairobi Civil Case 344 of 2014, eKLR.

³²¹ *ibid* 12.

technology, then it should also be promoted by the courts and tribunals. With such an approach, then, ODR may also be an avenue of resolving inter-governmental disputes.³²²

3.2.2 Arbitration Act of 1995

A reading of the Arbitration Act of 1995 with attention to its references to technology suggests that the statute is already tailored to support ODR. First, the Act recognises that an arbitration agreement must be in writing, which includes exchange of messages on an electronic platform such as e-mail 'or other means of telecommunications which provide a record of the agreement'.³²³ Secondly, where the communication made relating to an arbitration agreement happens using electronic platforms, then the addresses may similarly be electronic addresses for example e-mail addresses or Instant Messaging profiles.³²⁴ In general, it is envisioned that communication under an ODR system takes place using electronic platforms. Therefore, it may be concluded that the Arbitration Act of 1995 supports e-arbitration, a component of ODR. It also suggests that the addresses for the parties and even the ODR service provider may be electronic addresses. Since the main rubrics of technology-assisted ADR forming a likeness of ODR are the recognition of agreements by use of electronic means, and communication using technology, then it appears that the Arbitration Act of 1995 supports ODR.

3.2.3 The Nairobi Centre for International Arbitration Act of 2013

The Nairobi Centre for International Arbitration Act of 2013 provides for the establishment of a regional centre for international commercial arbitration and the Arbitral Court, as well as providing for mechanisms for ADR.³²⁵ The Nairobi Centre for International Arbitration (NCIA) is established under the Act³²⁶ to perform various functions including promoting, facilitating and encouraging the conduct of international commercial arbitration;³²⁷ and administering domestic and international arbitrations as well as ADR techniques under its auspices.³²⁸ The NCIA Act and the Arbitration Act are the primary pieces of legislation

³²² Constitution of Kenya (n 49), art 189 (4).

³²³ Arbitration Act (n 315).

³²⁴ *ibid* 9.

³²⁵ The Nairobi Centre for International Arbitration Act 2013, preamble.

³²⁶ *ibid* 4.

³²⁷ *ibid* 5(a).

³²⁸ *ibid* 5(b).

governing arbitration in Kenya.³²⁹ The establishment of the NCIA is promising to the development of ADR in Kenya, offering an attractive solution to resolution of commercial disputes in the East African region.³³⁰

One of the challenges facing arbitral institutions in Africa is inadequate ICT infrastructure.³³¹ The NCIA is charged with providing facilities for hearing, transcription and other technological services.³³² The technological services referred to in the NCIA Act imply assistance of technology in ADR conducted with the NCIA. The extent of involvement of technology in the ADR process is however not expounded. However, a plain reading of this provision suggests that technology under the NCIA is limited to facilitation through hearing devices and transcription. Applying the *ejusdem generis* rule shows that this does not extend to replacing the ADR professional in the process.

3.2.4 Kenya Network Information Centre Alternative Domain Name Dispute Resolution Policy

The KeNIC ADRP creates the policy framework that KENIC uses to resolve disputes between existing and potential registrants of internet domain names relating to the .ke ccTLD.³³³ While this may be policy and not law, it provides an enabling environment to the practice of ODR in domain-name disputes under the ICANN benchmark.³³⁴ KeNIC is a non-profit organisation that manages and operates the .ke ccTLD.³³⁵ ICANN is an internationally recognised global non-profit organisation that among other roles manages ccTLD systems through entering public-private partnerships with governments and related entities in different countries in the

³²⁹ Wilfred A Mutubwa, 'The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013' (2016) 82 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 135.

³³⁰ *ibid*; Kariuki Muigua and Ngararu Maina, 'Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration' 18 <https://profiles.uonbi.ac.ke/kariuki_muigua/files/effective_management_of_commercial_disputes_opportunities_for_the_nairobi_centre_for_international_arbitration> accessed 20 May 2016.

³³¹ Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' 22.

³³² The Nairobi Centre for International Arbitration Act (n 325).

³³³ Alternative Domain Name Dispute Resolution Policy (n 189), preamble.

³³⁴ Michael Murungi (n 186) 4.

³³⁵ Kenya Network Information Center (KeNIC) (n 187); Lex Synergy, '.KE Alternate Dispute Resolution Policy (ADRP)' <<http://blog.lexsynergy.com/2013/11/ke-alternate-dispute-resolution-policy.html>> accessed 7 October 2016; Mary Gatune Mbengi, 'Competitive Strategies Adopted by Kenya Network Information Centre (KeNIC)' (Master of Business Administration, University of Nairobi 2012) 9 <[http://erepository.uonbi.ac.ke:8080/xmlui/bitstream/handle/11295/96771/Gatune_Competitive%20Strategies%20Adopted%20By%20Kenya%20Network%20Information%20Centre%20\(KeNIC\).pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke:8080/xmlui/bitstream/handle/11295/96771/Gatune_Competitive%20Strategies%20Adopted%20By%20Kenya%20Network%20Information%20Centre%20(KeNIC).pdf?sequence=1&isAllowed=y)> accessed 7 October 2016.

world.³³⁶ The KeNIC ADRP procedure recognises online arbitration and online mediation for resolution of domain-name disputes.³³⁷ This illustrates the incorporation of ODR under the auspices of the private sector.

The involvement of technology in the dispute resolution mechanisms under the KeNIC ADRP is limited to communication. The policy provides that communication between parties, KeNIC and the arbitrator may be in electronic form.³³⁸ The communication may therefore be through e-mail, and the sender should keep a copy of the sent message as evidence.³³⁹ Any e-mail communication made under the policy should be in plain text.³⁴⁰

With the provision on electronic communication in mind, a large part of the process for resolution of domain name disputes may be carried out using electronic means. All notifications, including appointment of an arbitrator,³⁴¹ change of contact details,³⁴² and pursuit of legal proceedings at a court of law,³⁴³ may be made electronically. This is a big boost to ODR for domain name disputes. However, the limited use of technology to matters of communication is noted. Technology under the policy does not extend to decision-making processes, but simply acts as a facilitator to the process.

Express provision is made for initiating a domain name dispute in electronic format.³⁴⁴ Once the complaint is filed, the person that owns the domain name in dispute (the registrant) is deemed to have been notified of the dispute when KeNIC ‘has sent the complaint in electronic format including annexures, to the extent available in electronic form, to the e-mail addresses of the registrant and their technical, administrative, and billing contacts’.³⁴⁵ The registrant may equally respond by electronic means.³⁴⁶ Service may similarly be deemed to have been effected when KeNIC ‘has sent the response in electronic format including annexes to the extent available in electronic form, to the e-mail addresses of the complainant’.³⁴⁷ Lastly, the

³³⁶ Internet Corporation for Assigned Names and Numbers (n 94).

³³⁷ Alternative Domain Name Dispute Resolution Policy (n 189).

³³⁸ *ibid* 10(1).

³³⁹ *ibid* 10(2).

³⁴⁰ *ibid* 10(8).

³⁴¹ *ibid* 30.

³⁴² *ibid* 10(4).

³⁴³ *ibid* 15(4).

³⁴⁴ *ibid* 22.

³⁴⁵ *ibid* 23(3)(b).

³⁴⁶ *ibid* 24(1).

³⁴⁷ *ibid* 24(3)(b).

complainant may also file a reply in electronic format.³⁴⁸ The decision of the arbitrator or mediator may be delivered by e-mail, and KeNIC may publish this decision on its website.³⁴⁹

However, for the parties to enter into a consent to settle the matter, ODR is seemingly excluded because it is mandatory for the parties to deliver a ‘written signed settlement’ to the arbitrator.³⁵⁰ This is also the case where KeNIC acts as the mediator in the matter.³⁵¹ It may be argued, though, that the reference to writing may include typing and that signature may extend to electronic signatures. This interpretation would therefore support the use of technology in concluding a domain name dispute through settlement by the parties.

3.3 Conclusion

This chapter has evaluated the ADR situation in Kenya, describing the place of ODR in the legal framework. While there is no centralised ODR law, there are provisions in the law on ADR and dispute resolution in general. ADR may adapt to the changing times and adopt technology to facilitate the processes. The chapter has presented a snapshot of the legal framework dealing with ADR and technology in the Kenya. It has laid a background for the following chapter which deals substantively with the question whether there is a need for a legal framework for ODR in Kenya.

³⁴⁸ *ibid* 26(1), 26(3)(b).

³⁴⁹ *ibid* 14, 35.

³⁵⁰ *ibid* 16.

³⁵¹ *ibid* 27.

CHAPTER FOUR: ADDRESSING THE NEED FOR REGULATION OF ONLINE DISPUTE RESOLUTION (ODR) IN KENYA

4.0 Introduction

This chapter contains an analysis of the data collected from the study, tying in the desktop study with the primary data gathered from the field. The research methodology employed is discussed. This includes a description of the process followed to obtain the research license, the criteria used to select the respondents for the field work, and the research methods used to collect data. The study population is discussed, and the views of the respondents, collected through semi-structured interviews, are analysed. This chapter contains opinions that support the main findings of the study, through the qualitative data collected from the field, on whether or not there is a need for a legal framework for ODR in Kenya.

4.1 Research Methodology

This section outlines the choices made about the cases studied, methods of data gathering, process of obtaining the research license, and forms of data analysis used in planning and executing this study.³⁵² This study employed a qualitative methodology.³⁵³

4.1.1 Research License

A research license was obtained from the National Commission for Science, Technology and Innovation (NACOSTI).³⁵⁴ NACOSTI is a statutory body established under the Science, Technology and Innovation Act 2013 with a mandate to ‘approve all scientific research in Kenya’ and to ‘coordinate, monitor and evaluate, as appropriate, activities relating to scientific research and technology development.’³⁵⁵ The approval to carry out the research served as a confirmation to all respondents that the research was for official purposes therefore instilling confidence in them. NACOSTI has an online system for application for a research license which was used to submit the proposal of this study for consideration and clearance by

³⁵² David Silverman and Amir Marvasti, *Doing Qualitative Research: A Comprehensive Guide* (Sage Publications Inc 2008) 134.

³⁵³ *ibid.*

³⁵⁴ National Commission for Science, Technology and Innovation (NACOSTI), ‘Research Clearance Permit No. NACOSTI/P/23384/1147, Serial No. A9990’; Letter from National Commission for Science, Technology and Innovation (NACOSTI), ‘Research Authorization’ (6 July 2016).

³⁵⁵ Science, Technology and Innovation Act 2013 ss 3, 6(f), 6(l).

NACOSTI.³⁵⁶ The application letter addressed to NACOSTI, requesting authorisation to carry out the fieldwork, is annexed at Appendix I. The research license granted by NACOSTI is annexed at Appendix II.

4.1.2 Inclusion Criteria

This chapter is based on data collected to evaluate the need for introduction of a legal framework for ODR in Kenya. The study focused on dispute resolution in online and mobile B2C e-commerce transactions. However, there are other disputes that arise in society and that may be resolved through ODR. These other disputes are not discussed in this study. The focus on disputes arising from online and mobile B2C e-commerce transactions is justified in that participants in e-commerce transactions already use technology and would therefore be inclined to use technology in resolution of disputes arising from the B2C e-commerce transactions. The issue here is consumer trust. A subject who does not trust the use of technology in transactions would be reluctant to trust the use of technology in resolving any disputes.

4.1.3 Research Methods

A qualitative approach was employed to collect data from a desk-based research supported by views of key informants on the formation of a legal framework in the area of ODR. The desk-based research included both primary and secondary sources of information. Primary sources of law explored in this study include constitutions, statutes, case law, and regional instruments. Secondary information on ODR was drawn from books, journal articles, conference papers, academic theses, dissertations, and other scholarly works. These sources of information provide a basis for the main claims in this study. From these sources, the researcher developed the comparative analysis of ODR from a theoretical perspective, and the salient features of the relationship between ODR and the law in the UK and the USA.

Semi-structured interviews were conducted involving key informants identified using a purposive sampling technique. Key informants are individuals who have pertinent information

³⁵⁶ National Commission for Science, Technology and Innovation (NACOSTI), 'Research License' (*National Commission for Science, Technology and Innovation (NACOSTI)*, 2015) <<http://www.nacosti.go.ke/research-license>> accessed 27 November 2015.

which may not be gathered through other means.³⁵⁷ Key informant interviews were found to be a suitable method of data collection because key informants are knowledgeable in the area and would be best placed to advise on whether introduction of a legal framework is necessary.³⁵⁸ The key informant interviews were conducted to query the need for regulation of ODR in Kenya. The key informants were incorporated in this study because ODR is a new area in Kenya and has not gained significant attention. Therefore, information on whether the area should be regulated or not in the Kenyan context may not be found simply through a desk-based research.

Interviews are a favourable method to respond to the main research question because they allow the researcher to collect respondents' opinions of regulation of technology. The researcher had the opportunity to probe respondents to obtain explanations about motivations.³⁵⁹ The researcher could also clarify questions and obtain as much relevant information as possible.³⁶⁰ The limitation of using interviews for this study is that there is a potential of interviewer bias.³⁶¹ Qualitative research such as the research in the present study, is criticised because the same researcher draws the interview questions, conducts the interview, and comes into personal contact with the respondent, therefore creating a risk of subjectivity.³⁶² In this study, the researcher contributed to limiting bias by introspection to promote 'self-awareness', identify personal prejudices and reduce preconception.³⁶³

The two criteria used to select the key informants were the type of information sought, and a willingness of the key informant to work with the researcher.³⁶⁴ The respondents are legal practitioners, technology experts and scholars in the area of ODR. An introductory email was sent to the potential respondents introducing the researcher and the purpose of the study, then

³⁵⁷ Valerie J Gilchrist and Robert L Williams, 'Key Informant Interviews' in Benjamin F Crabtree and William L Miller (eds), *Doing Qualitative Research* (2nd edn, Sage Publications Inc 1999) 73; JP Goetz and MD LeCompte, *Ethnography and Qualitative Design in Educational Research* (Academic Press 1984).

³⁵⁸ Mary Njeri Kinyanjui and Dorothy McCormick (n 176) 25, 26.

³⁵⁹ Olive M Mugenda and Abel G Mugenda, *Research Methods: Quantitative and Qualitative Approaches* (African Centre for Technology Studies (ACTS) 2003) 83, 84.

³⁶⁰ *ibid.*

³⁶¹ *ibid* 84, 85; N S Rajendran, 'Dealing with Biases in Qualitative Research: A Balancing Act for Researchers', *Qualitative Research Convention 2001: Navigating Challenges* (2001) 2
<<http://nsrajendran.tripod.com/Papers/Qualconfe2001.pdf>> accessed 18 August 2016.

³⁶² N S Rajendran (n 362) 2.

³⁶³ *ibid* 6; Susan L. Morrow, 'Quality and Trustworthiness in Qualitative Research in Counseling Psychology' (2005) 52 *Journal of Counseling Psychology* 250, 254.

³⁶⁴ Valerie J Gilchrist and Robert L Williams (n 357) 76, 77; JD Johnson, *Selecting Ethnographic Informants* (Sage Publications Inc 1990).

an appointment to conduct the interview was set. Interviews were conducted by Skype and telephone for the respondents not immediately physically available. Skype and telephone. Skype is a computer software that allows users to place voice and video calls to other Skype users over the internet.³⁶⁵ The questions asked during the interview were forwarded to the respondents in advance to allow for preparation. During the interview, the researcher asked questions already forwarded to the respondent.

4.2 Study Population

The study involved a total of ten respondents. This was not intended to be a representative sample. Rather, the study sought to draw opinions on whether there is a need to develop ODR law in Kenya. Figure 3 shows the details of location of respondents involved in the study. Five of the respondents were domiciled in Nairobi, Kenya, and were available for a face-to-face interview.³⁶⁶ One respondent based in Nairobi, Kenya, responded to the interview questions through email.³⁶⁷ Four of the interviews of respondents from outside Kenya – the UK,³⁶⁸ the USA,³⁶⁹ the Netherlands³⁷⁰ and Tanzania³⁷¹ – were conducted through Skype and telephone.

³⁶⁵ Salman A Baset and Henning Schulzrinne, 'An Analysis of the Skype Peer-to-Peer Internet Telephony Protocol' (Columbia University 2004) <<https://arxiv.org/ftp/cs/papers/0412/0412017.pdf>> accessed 4 October 2016.

³⁶⁶ Interview with Edward Muriithi Rinkanya, Principal Legal Officer for Dispute Resolution and Commercial Services, Communications Authority of Kenya, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (7 August 2016); Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet), 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (29 June 2016); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu), 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (23 June 2016); Interview with Mark Lavi, Senior In-house Counsel, Safaricom, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (10 June 2016); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (29 June 2016).

³⁶⁷ Interview with Michael Murungi, Policy & Government Relations Manager, East Africa, Google Inc., Author of 'Cyber Law in Kenya (2011)', 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (21 June 2016).

³⁶⁸ Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (17 June 2016).

³⁶⁹ Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (15 June 2016).

³⁷⁰ Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (15 July 2016).

³⁷¹ Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)', 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (9 July 2016).

Interviews included eight men and two women. A list of the respondents and their designations is annexed at Appendix III.

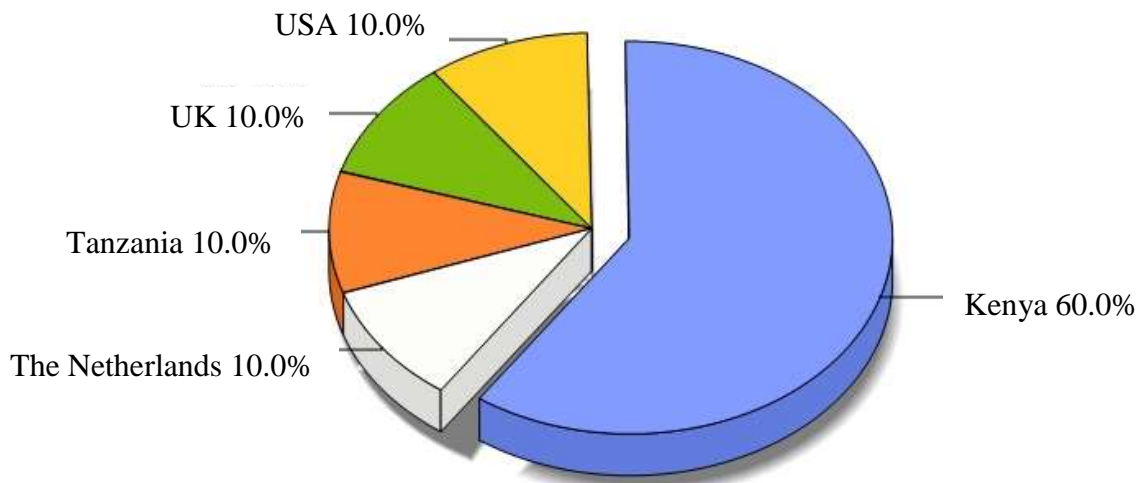


Figure 3: Location of respondents

The interviews were recorded. Each respondent was asked to confirm consent on two levels: consent to participate in the study, and consent to have the interview recorded. Recording was only done for the respondents who provided consent.

The interviewer introduced himself at the beginning of the interviews, informing the respondents that the study was part of a thesis for the Master of Laws course at the University of Nairobi, School of Law. Questions on the relationship between the law and technology started off the conversation, to lay a foundation for the core interest of this study: questions on the need for a legal framework for ODR in Kenya.

4.2.1 Data Analysis

Audio recordings of the interviews were transcribed by a third party transcription consultant. The researcher imported the set of transcripts into the Quality Data Analysis (QDA) Miner Lite software,³⁷² which was used for coding, exploring, analysing, synthesising and presenting data.³⁷³ Computer-Assisted Data Analysis (CAQDAS) using QDA was beneficial because it

³⁷² Provalis Research, 'Qualitative Data Analysis Software for Mixed Methods Research' (*Provalis Research*, 2016) <<http://provalisresearch.com/products/qualitative-data-analysis-software/>> accessed 18 August 2016.

³⁷³ Tanuka Bhowmick, 'Building an Exploratory Visual Analysis Tool for Qualitative Researchers', *AutoCarto 2006 Research Symposium* (2006) 3 <http://www.geovista.psu.edu/publications/2006/Bhowmick_AutoCarto_QualRes_06.pdf> accessed 18 August 2016.

assisted in organising data, facilitated in developing theory, and allowed the researcher to create different analyses and interpretations with pre-tested tools.³⁷⁴

A priori codes were derived from the desk-based research and grounded codes formulated from a reading of the transcripts from the interviews.³⁷⁵ Codes were assigned to sections of the transcribed text based on the research questions, themes and concepts in the study.³⁷⁶ Descriptive analysis was used and interpretation deduced from the data presented in charts and graphs.

4.3 Research Findings

To ensure a common understanding of the purpose of the interview, the interviews began with a background to the study. The interviewer informed the key informants that the main outcome of the interview was to determine whether Kenya should adopt a regulation-led approach like the UK, or a market-led approach like the USA. The interviewer then explained the meaning and purpose of ODR.

The working definition for ODR used in the present study was explained to the respondents. In Chapter One, ODR is defined as ‘a form of appropriate dispute resolution that utilizes telecommunication (usually internet-based, but to a lesser extent, telephones and cellular phones) to facilitate speedy and efficient resolution mainly by compressing or reducing the time, costs and geographic space that is shared between disputing parties’.³⁷⁷ The definition of ODR proposed by Respondent B is as follows:

“ODR is ... technology supported dispute resolution. In that sense it can be any form of dispute resolution: technology supported mediation, technology supported arbitration, technology supported anything really.”

³⁷⁴ *ibid* 2; Sharlene Hesse-Biber, ‘Analyzing Qualitative Data: With or without Software’ (Boston College, Massachusetts, USA, 2010) <<http://www.bumc.bu.edu/crro/files/2010/07/Hesse-Bieber-4-10.pdf>> accessed 18 August 2016.

³⁷⁵ Graham R Gibbs and Celia Taylor, ‘Online QDA - How and What to Code’ (*Online QDA*, 19 February 2010) <http://onlineqda.hud.ac.uk/Intro_QDA/how_what_to_code.php> accessed 18 August 2016; Sharlene Hesse-Biber (n 376).

³⁷⁶ Graham R Gibbs and Celia Taylor (n 377); Sharlene Hesse-Biber (n 376).

³⁷⁷ Sara Parker (n 1) 7.

With an understanding of the definition of ODR, questions on the relationship between law and technology were posed, as well as questions on whether ODR should be regulated or not. The following questions were posed, with variations depending on the respondent:

1. What is the relationship between the law and technology, from your perspective?
2. From the (USA/UK/Kenyan) experience, does the law support or inhibit technology?
3. Perspectives on regulation of technology have been considered to be those of developed countries.
 - a. What is your comment on this view?
 - b. What considerations may be taken by a developing country in evaluating the need for regulation of ODR?
4. Would a legal framework for ODR be of any use in Kenya? Should Kenya prioritise development of legal standards for ODR in the country drawing from the UK experience, or alternatively should ODR develop independent of the law drawing from the USA experience?

In an effort to minimise the likelihood that the data provided by the respondents is traced back to them, the respondents have been anonymised. Many ethical guidelines for social science research suggest that it is important to anonymise research participants through assigning pseudonyms.³⁷⁸ While attempts to remove personal identifiers have been made, it is acknowledged that it is impossible to completely hide the identity of respondents, as contextual identifiers in the responses may still be present.³⁷⁹ Further, their views have not been documented in any particular order: neither in the text nor in the footnotes.

4.3.1 Relationship between Law and Technology

Interview Question 1: What is the relationship between the law and technology, from your perspective?

It was the unanimous opinion of the respondents that there is a relationship between law and technology. While the question of the nature of the relationship attracted different views, 100% of the respondents considered that the two disciplines have a relationship whether positive or negative. This ties in with the theoretical argument raised in this study, that there is a

³⁷⁸ Rose Wiles and others, 'Anonymity and Confidentiality' (ESRC National Centre for Research Methods 2006) Working Paper 2/06 <<https://www.sussex.ac.uk/webteam/gateway/file.php?name=esrc-paper-on-anonymity-and-confidentiality.pdf&site=377>> accessed 28 September 2016; Benjamin Saunders, Jenny Kitzinger and Celia Kitzinger, 'Anonymising Interview Data: Challenges and Compromise in Practice' [2014] *Qualitative Research* 1, 2, 3.

³⁷⁹ Benjamin Saunders, Jenny Kitzinger and Celia Kitzinger (n 380) 2, 3; Karen Kaiser, 'Protecting Respondent Confidentiality in Qualitative Research' (2009) 19 *Qualitative health research* 1632.

relationship between technology and the law. Only with this as a starting point can we consider the nature of the relationship. According to Respondent B:

“Mediation, arbitration, basically any form of dispute resolution other than perhaps war revolves around (communication) and processing of information. The manner in which information is communicated and processed is what distinguishes the different forms of dispute resolution. Litigation has strict rules of evidence. Mediation has almost no rules of evidence. Arbitration is a little more formal. Arbitration involves decisions. Mediation does not involve decisions. Mediation involves communication among the parties to try to reach an agreement, a consensus. Arbitration and litigation involve a judge... evaluating information and making decisions. For me there's a very close connection between information technologies and law.”

As society moves online, for example through e-commerce, the disputes that occur offline replicate on online spaces. According to Respondent Q:

“Society is increasingly moving online. The issues that you have offline in terms of disputes are going to replicate online. There is definitely a nexus between law and technology, it's just that people may not have started looking deeply in the same area in order to prepare for the obvious eventuality, particularly in ... Africa.”

Figure 4 shows the results of the question on the existence of a relationship between law and technology. The figure shows that 100% of the respondents were of the view that there is a relationship between the law and technology. On the other hand, 0% expressed a contrary view. All 10 respondents took the position that law and technology have a relationship, while none held a different view.

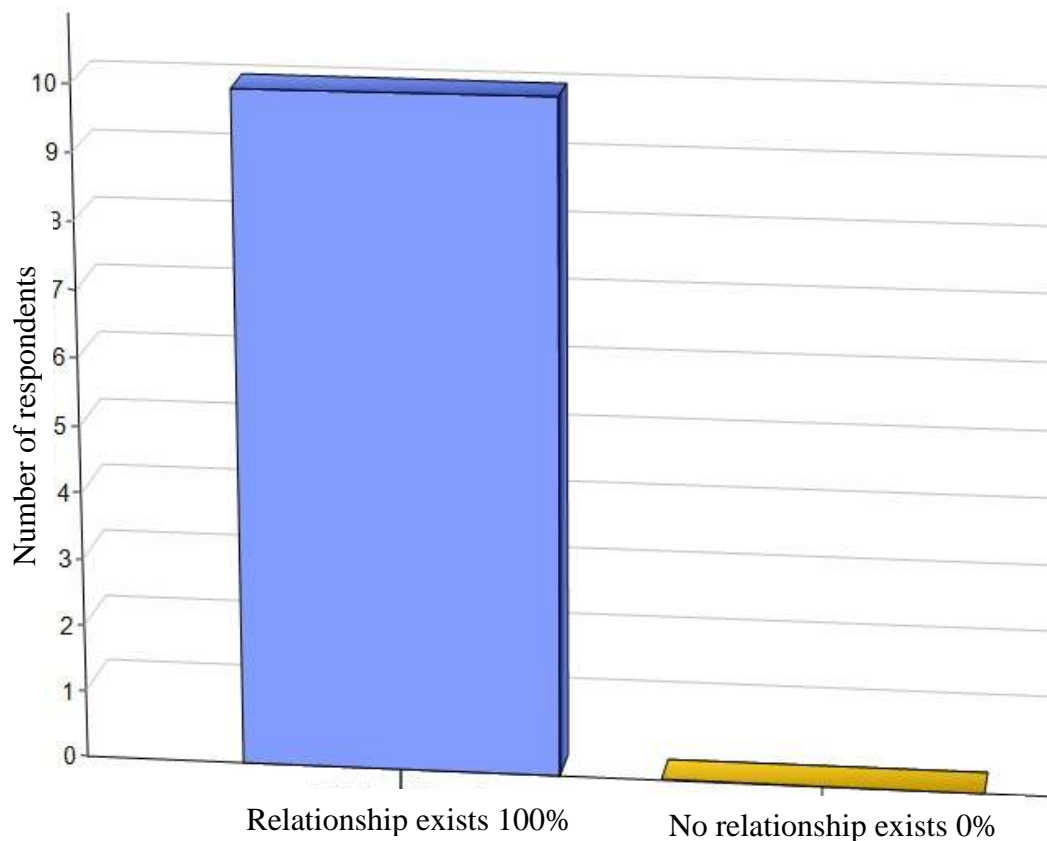


Figure 4: Existence of a relationship between law and technology

With it established that there is a relationship between the law, the next consideration is the nature of the relationship. The theoretical approach to this study is that the law influences technology, and similarly technology influences the law. The mutual relationship allows changes in law to nudge changes in technology. Similarly, disruptive technology sprints ahead of the law, which then adjusts to take into consideration the new way of life. According to Respondent V:

“Yes. I would say that there is a relationship between law and technology. The technology came before the introduction of the law. When we started with technology we didn't have the law, especially information and communication technologies. That's ICT.”

Respondents, however, observed that the influence of technology on the law is greater than the influence of law on technology. This may be attributed to the dynamic nature of technology, and especially ICT in this context. An example of this vitality of technology prompting a

reaction by the law is in the development of M-PESA, a mobile financial service platform.³⁸⁰

The nature of the relationship between law and technology is characterised by Respondent X as follows:

“There are many incidences of the relationship between law and technology. Technology can be a tool for enforcing the law for example passwords protect privacy, (and) firewalls protect against online trespass. The law can be a tool for the growth (and death) of technology for example laws that promote innovation and competition. Technology can be a tool for challenging the legal status quo and pushing the frontiers of law for example digital currencies: are they legal tender? Mobile money – should Safaricom have applied for a banking licence, or should the law have evolved to allow a (telecommunications) company to operate a (mobile) money service?”

In 2016, 98.2% of Kenyans used mobile financial service accounts such as M-PESA, Airtel Money and Orange Money, to receive or send money from or to friends and family.³⁸¹ With regard to e-commerce, 20.2% of the Kenyan population used mobile financial service platforms to pay for goods, services and bills.³⁸² This has not always been the case. According to Respondent Q:

“M-PESA is a reference point. Before M-PESA we really didn't think about electronic or online disputes. There was no law in that space up to ... M-PESA came in 2007. There was really nothing in our legal books in that space until 2013 there was an amendment to the ... KICA ... in 2013 where they now officially recognize electronic transactions or electronic messages, of which M-PESA and others are part of.”

This view suggests that the emergence of technology may spur a reaction by provision for that aspect in the law. Technology and innovation in many occasions run ahead of the law.³⁸³ For example, M-PESA developed in response to a social need for fast, efficient, and accessible financial service.³⁸⁴ This corresponds with the theoretical framework of this study which posits

³⁸⁰ Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 369); Ethan Katsh (n 91); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 372).

³⁸¹ Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya, ‘The 2016 FinAccess Household Survey’ (Financial Sector Deepening (FSD) Kenya 2016) 18 <<http://fsdkenya.org/publication/finaccess2016/>> accessed 16 September 2016.

³⁸² *ibid.*

³⁸³ Tonny Omwansa (n 172) 110.

³⁸⁴ Patrick Obathi, ‘The Role of Private Enterprise as an Engine of Growth for Kenya and East Africa: Opportunities and Challenges; Role of Foreign Investors and Key Partners for Stability in Kenya and the Region’ (Annual Advantage Forum, Fondazione Giorgio Cini, Venice, Italy, 27 April 2015) <http://www.advantagefinancial.net/wp-content/uploads/2015/05/Obath_synopsis.pdf> accessed 28 September 2016.

that society drives technology, which influences development of the law, and in turn impacts society. This is corroborated by Respondent H who notes that:

“...technology always predates the law... It moves faster than (the law). Technology is mostly about innovation and new things coming up. If you sat back... 20 years ago, who would have thought that you can actually use your mobile phone to transfer money? In such cases most of the times the transfer of money was done... by cheques or through your bank via wire transfer or through what postal services corporation used to offer... No one could have really thought that you can actually use a phone medium to transfer money.”

Innovation sparked a new concept never before dealt with under the law, leading to the birth of regulation of the area.³⁸⁵ Safaricom, in consultation with the Central Bank of Kenya, designed M-PESA outside the prescribed banking regulatory model.³⁸⁶ M-PESA operated in a regulatory vacuum.³⁸⁷ Only later did the Central Bank of Kenya seek to mainstream the regulatory treatment of M-PESA to bring the system under the legal framework.³⁸⁸ In 2007 when Safaricom launched M-PESA, the Central Bank of Kenya sought to extend the existing traditional banking law to the technological innovation.³⁸⁹ It took four years, up to 2011, for the Central Bank of Kenya to issue the sector-specific Electronic Payment Guidelines of 2011 and Retail Electronic Transfer Guidelines of 2011, and for Parliament to pass the National Payment Systems Act (NPSA) of December 2011.³⁹⁰ Respondent Q, of a similar opinion as Respondent H, notes that the development of M-PESA before the law provided for its operation, is an example of the fast-moving nature of technology in relation to regulation:

“...technology moves ahead of the law. In Kenya, it has happened in the case of M-PESA where ...the regulations from Central Bank came after the fact. Similarly, I believe the technology has indeed gone ahead of the law if you refer to Safaricom having its own corporate customer care dispute (resolution mechanism). They are trying to fill a vacuum. There's no global law but they have put together ... guidelines they are using to resolve disputes. In a sense the technology has been ahead of the law for quite a while.”

³⁸⁵ Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 369); Ethan Katsh (n 91); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 372); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367).

³⁸⁶ Ignacio Mas and Dan Radcliffe, ‘Mobile Payments Go Viral: M- PESA in Kenya’ (Bill & Melinda Gates Foundation 2010) 10, 11 <http://siteresources.worldbank.org/AFRICAEXT/Resources/258643-1271798012256/M-PESA_Kenya.pdf> accessed 28 September 2016.

³⁸⁷ Tonny Omwansa (n 172) 120.

³⁸⁸ Ignacio Mas and Dan Radcliffe (n 388) 22.

³⁸⁹ Mercy W Buku and Michael W Meredith, ‘Safaricom and M-Pesa in Kenya: Financial Inclusion and Financial Integrity’ (2013) 8 Washington Journal of Law, Technology and Arts 375, 395 – 396.

³⁹⁰ *ibid.*

To match up the speed of development of technology, Respondent N views that there is a need for a responsive legal system. The proactivity should emerge from the executive in formulating progressive pro-technology policies, the legislature in developing technology-neutral laws, and the judiciary in implementing the regulation. Respondent N states:

“Technology will always develop faster than the law. The law has to go through the House of Parliament ...Technology is you sitting in your room one weekend coming up with a certain app which is applicable, say, to iPhones. You send it to Apple, they pay you some money, it's put on the app store and you're done. By the time law comes to regulate what you've done to protect you in your contractual relationship with Apple, you've either lost or gained depending on how Apple perceived the worth of your creation.

“...the law will always and forever play catch up to the dynamics of business, dynamics of technology. That's why you need a very fast-moving Parliament and government especially that can come up with policy ... and legislation ... (that is) ... technology neutral. You can't address in legislation specific technologies. You have to just leave it open. Address technology as technology--so that whatever technology you employ to contract, be it to e-commerce, B2B, B2C, C2C, is not hindered because the law didn't mention that type of technology ... If you have a government that's very quick ... (creating an environment where people) can contract with certainty, foreign direct investors, people who can bring in a lot of investment and employment opportunities (will) have the trust in our legislation to address disputes when they arise; which then of course runs into the fact that we need to have a very reliable Judiciary.”

While ODR is a new area, ICT is not. ODR may use the avenues for communication and e-commerce created by ICT. According to Respondent B:

“...the hope is that mobile technologies will make it possible for less developed countries to adopt ODR... (D)isputes arise because of one of two things: either some transaction that encounters a problem or some relationship that encounters a problem. If mobile phones are being used for transactions, as they may be even in less developed countries, then there's a need for dispute resolution. There's no reason why a mobile phone can't be the technology for that... (A)ny law would allow a technology that seems to function well. More and more people rely on mobile technologies for buying things, selling things, doing business. It should be possible to use the same technologies to resolve those disputes.”

Figure 5 shows the frequency of responses relating to the nature of the relationship between law and technology. Most respondents were of the view that technology influences law. Fewer references were made to the interrelation between law and technology. Even fewer references touched on the position that law influences technology.

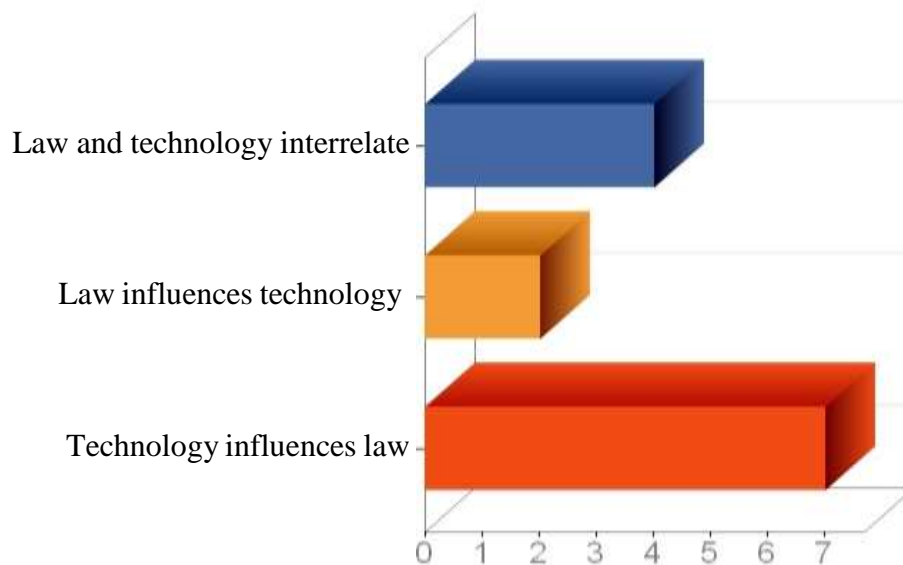


Figure 5: Nature of the relationship between law and technology

Interview Question 2: From the (USA/UK/Kenyan) experience, does the law support or inhibit technology?

Law has a potential to inhibit technology, and a similar potential to promote technology. The respondents were more concerned about the potential of the law to inhibit the development of technology than they were with its promoting capabilities. Thus, indications of the potential of the law to inhibit growth of technology arose with a frequency of 61.9% in the conversations, while the potential for the law to encourage growth of technology occurred with a frequency of 38.1%. According to Respondent H:

“if you are too strict in regulating technology ... you may inhibit technology or you may also discourage those who want to invest in technology.”

Law has a potential to inhibit technology where it does not adapt to the changing times. This is the view of pro-technology arguments in the discussion about Uber.³⁹¹ The ‘car calling’ service is facing bans and court cases in the USA and in the EU including in the UK, France, Germany and Spain on account of whether it is classified as a ‘taxi service’ requiring special

³⁹¹ Murad Ahmed, ‘Judge Refers Spanish Uber Case to European Court of Justice’ *Financial Times* (20 July 2015) <<http://www.ft.com/cms/s/0/02e83fde-2ee6-11e5-8873-775ba7c2ea3d.html#axzz4KR6aqjCV>> accessed 16 September 2016; Jenny Gesley, ‘Legal Challenges for Uber in the European Union and in Germany’ <<https://blogs.loc.gov/law/2016/03/legal-challenges-for-uber-in-the-european-union-and-in-germany/>> accessed 16 September 2016.

licences or not.³⁹² Uber argues that it offers an ‘intelligent telephone and technological platform’ interface for customers to book a ‘private driver’, a payment system software, and a powerful database of service providers, and therefore does not fall under regulation requirements.³⁹³ It is argued that regulation drove Uber out of markets like Spain, inhibiting the growth of this technological advancement.³⁹⁴ According to Respondent J:

“I think the law could try to bring an answer to this new challenge that technology (has brought). The idea is ... to encourage the use of technology but without restricting the use. Sometimes the law can also be a hindrance to the development of technology... (W)e are learning how to do it without becoming a hindrance. Yes, new challenges arise with technology that the law has to provide answers (to). Sometimes we do it in the courts. Sometimes we do it through legislation.”

Respondent J alludes to the debates about Uber. In that scenario, the courts ‘make law’ through their pronouncements that may either promote or inhibit the development of technology. This recognises the potential of the law to hinder the development of technology if it is not flexible. According to Respondent Z:

“...one of the biggest problems within the legal system is that its processes have remained unchanged ... Every single other area of life has embraced the benefits that technology can bring apart from the law. It has remained staunchly opposed to law... if the law isn't flexible or willing to be flexible about ... due process ... then it will always come up against the barrier of online processes. What technology is, in essence, trying to do is to change the structure of the legal process itself by doing a lot of the information capture. That's really the best place to do it.”

Law has a corresponding potential to promote technology. The law has provided the backbone for dispute resolution systems in some countries to thrive through the use of technology. According to Respondent Z:

“You look at Austria and (it’s) incredible what they've done there with bringing courts vastly online... in British Columbia ... the civil resolution tribunal is ... the first online civil court. That was actually brought in (through) legislation first and then made manifestly possible through the technology. It's the same story that we're seeing in the UK with (the) Lord Justice Briggs ... commission ... (with) Susskind.

³⁹² Julia Fioretti and Andrew Callus, ‘Spanish Judge Asks EU Top Court for Key Uber Ruling’ *Reuters* (20 July 2015) <<http://www.reuters.com/article/us-uber-eu-ecj-idUSKCN0PU1LP20150720>> accessed 16 September 2016; Murad Ahmed (n 393); *Transport for London v Uber London Limited & 2 others* [2015] High Court of Justice, Queen’s Bench Division, Administrative Court CO/1449/2015; Jeremy Hodges, ‘London Transport Asks Court to Rule on Uber’s Use of Phones’ *Bloomberg.com* (2 October 2015) <<http://www.bloomberg.com/news/articles/2015-10-02/london-transport-asks-court-to-rule-on-uber-s-use-of-phones>> accessed 16 September 2016.

³⁹³ *Asociación Profesional Élite Taxi v Uber Systems Spain, SL - Request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain) lodged on 7 August 2015* European Court of Justice C-434/15; Murad Ahmed (n 393); Jenny Gesley (n 393).

³⁹⁴ Jenny Gesley (n 393).

Respondent Z refers to the efforts in the UK at introducing small claims courts that use ODR. The ODR Advisory Group of the Civil Justice Council chaired by Professor Richard Susskind was established to explore the viability of using ODR for small claims in the judicial system.³⁹⁵ The ‘Susskind Report’ in February 2015 found that ODR offers two significant benefits to the civil justice system: a lower cost and increased access to justice.³⁹⁶ The report recommended establishment of an internet based ODR mechanism known as Her Majesty’s Online Court in the UK, as a pilot project for ODR in the court system.³⁹⁷

A report in July 2016 by Lord Justice Briggs suggests that the ODR-based courts should have a soft-launch first, then eventually grow to a point where it is made compulsory for small claims cases within its jurisdiction.³⁹⁸ Similarly, Respondent J acknowledges that it is not until the ADR directive and ODR regulations of the EU were put in place, that there was a significant development in ODR law. According to Respondent J:

“...there was not any legislation up until recently that dealt in any way with ODR. I think the two most significant pieces in the UK and in Europe is first the ADR directive, which is complemented by the ODR regulation, which requires certified bodies to provide services at a distance for consumer disputes. Basically they do encourage the use of ODR. Now in the UK they are looking at creating online courts for global claims. I think that the law is being developed in order to support the use of ODR rather than to inhibit its use.”

Technology may be stifled through unwarranted early regulation of innovation including through stringent rules, excessive fees, and high taxes on unprecedented projects.³⁹⁹ Figure 6 illustrates the potential influence of law on technology. It shows that the potential of the law to inhibit growth of technology emerged with a frequency of 61.9% in the discussions with respondents, while the potential for the law to encourage growth of technology arose with a frequency of 38.1%.

³⁹⁵ Online Dispute Resolution Advisory Group, ‘Online Dispute Resolution for Low Value Civil Claims’ (Civil Justice Council 2015) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>> accessed 22 September 2016.

³⁹⁶ *ibid* 4 – 6; Richard Susskind (n 124).

³⁹⁷ Online Dispute Resolution Advisory Group (n 397) 4 – 6; Richard Susskind, ‘Civil Justice Council Online Dispute Resolution Advisory Group Response to Lord Justice Briggs’ Interim Report on “Civil Courts Structure Review” (December 2015)’ (31 March 2016) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/04/cjc-odr-advisory-group-response-to-lj-briggs-report.pdf>> accessed 22 September 2016.

³⁹⁸ Michael Briggs, ‘Civil Courts Structure Review: Final Report’ (Judiciary of England and Wales 2016) 115 – 124 <<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>> accessed 22 September 2016.

³⁹⁹ Tonny Omwansa (n 172) 120.

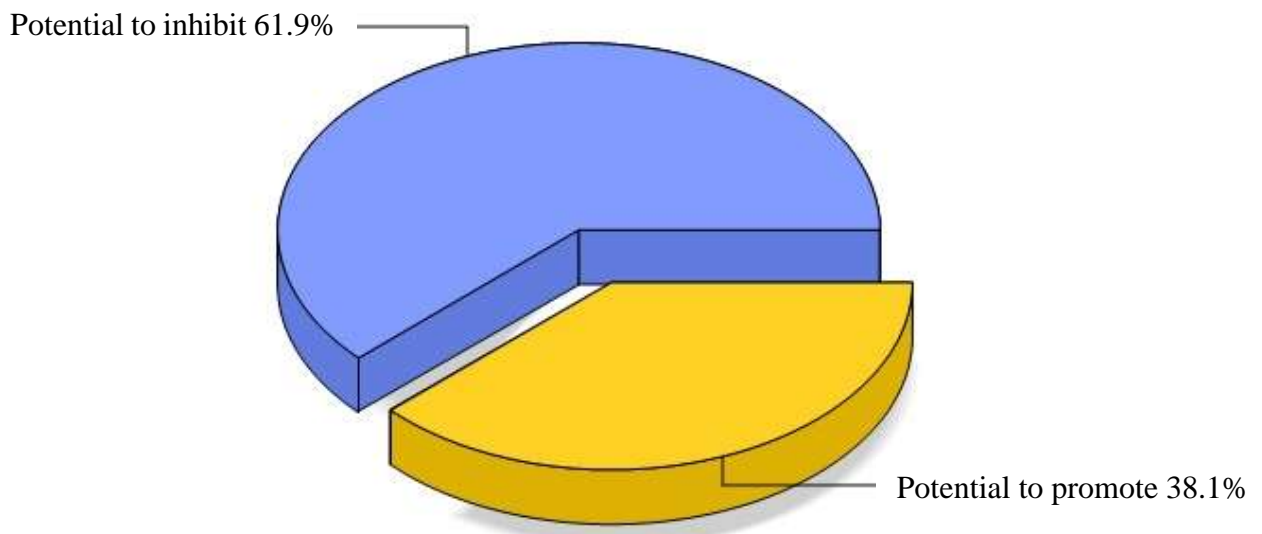


Figure 6: Potential influence of law on technology

Law has a relationship with technology. Technology influences law, and in turn, the law also influences technology. This synergy raises concern for the development of technology, where the law has a potential either to promote or inhibit technology. With this in mind, it is important to draft technology-neutral laws.⁴⁰⁰ Technology-neutral laws recognise that there is a greater fear for the possibility of the law to inhibit technology, than there is confidence in its potential to promote. This makes it crucial to carefully consider whether there is a need for regulation of ODR, or whether, based on this fear that improperly drafted laws may inhibit technology,⁴⁰¹ then ODR should develop first before developing regulation.

⁴⁰⁰ Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 372).

⁴⁰¹ Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 372); Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands (n 371).

4.3.2 To regulate or not to regulate?

Interview Question 4: Would a legal framework for ODR be of any use in Kenya? Should Kenya prioritise development of legal standards for ODR in the country drawing from the UK experience, or alternatively should ODR develop independent of the law drawing from the USA experience?

The dominant view of whether Kenya should adopt a regulation-led approach towards ODR, or whether the technology should develop first, leaned in favour of the regulation-led approach. While the frequency of references to a regulation-led approach stood at 55%, the frequency of references to a market-led approach was 30%. There was a third approach that emerged from the responses: a hybrid approach which carved a frequency of 15%. These respondents were of the view that the two dominant approaches may be merged, with the best of the UK regulation-led direction fused with the USA market-led direction.

Figure 7 shows the frequency of responses concerning the question on the need for regulation of ODR in Kenya. The figure shows a 30% frequency favouring the market-led approach, a 55% frequency tending towards the regulation-led approach, and a 15% frequency in support of a hybrid approach.

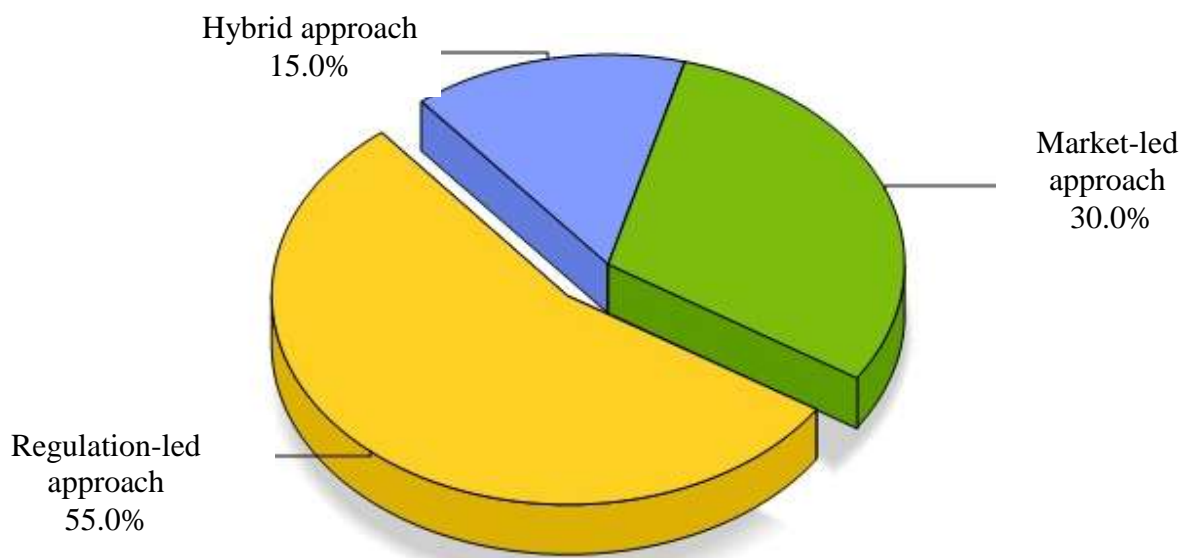


Figure 7: The need for regulation of ODR in Kenya

Respondent Q was emphatic about providing for ODR in the law. The provisions on ODR should however not be transplanted from another country without concern for the local realities

in Kenya, but instead should take into account the society the law seeks to regulate.⁴⁰² Highlighting the development of M-PESA before regulation was put in place for it, Respondent Q remarks:

“...it is time to codify (technology into law) getting the practices of ... corporates, getting the practices of our advanced nations and then customizing our own local instance of the law...It is high time we had the law because the technology has been ahead of it anyway as we speak today.”

According to Respondent H:

“I know there are those who say that the industry should regulate itself. That it shouldn't (have) the law. You have to have the law because there is the question of cyber security. You need the law to regulate the technology. The kind of law(s) you need (are) the so-called...technologically neutral laws... Or the laws with technologically neutral provisions because the technology is always changing. They're always changing. If you have...laws that are static and ... not dynamic, it means ... the law (will also need to) chang(e).”

Similarly, Respondent N noted that if the development of the law is proactive, responding to potential issues that may be presented by technology before they arise, then the result would be fewer disputes. On the contrary, if the development of the law is reactive, addressing the problems presented by technology when they arise, then the instances of disputes may be high:

“(T)echnology has become a very key facet of how business is conducted across the world, including in (Kenya). You need to have the law saying something about how those relationships are entered. How, for example, in terms of contracting what's the effect of the postal rule in an online situation? Effectively the law has to say something about technology so there has to be a more direct than in indirect relationship. If it's indirect which means as and when disputes come up then the law would address those then it takes a very reactive role as opposed to a proactive role, which then can take care of a lot of loopholes and solve a lot of disputes before they actually come up.”

The regulation-led approach draws from the UK experience. This approach has provision in the law for issues including consumer protection, as safeguarded in the EU ODR and ADR laws. According to Respondent B:

“... the EU is a model that could work in other places as well...if the EU system works well it will be a lot more comprehensive than ODR in the US. ODR in the US is mainly used by some very large companies, consumer oriented companies: EBay, Facebook, Twitter and so forth. They generate huge numbers of disputes and they need systems for dealing with that. The EU regulation applies to everybody.”

⁴⁰² Jacob K Gakeri (n 199) 240.

While an ODR system is online, there is still a need to have the same consumer protection safeguards as offline dispute resolution systems. While courts carry out dispute resolution, due to the nature of ODR, public-private partnerships may be useful. According to Respondent Z:

“a lot of it will come down to in the end if the courts are going to be adopting more and more technology and more and more technology based solutions within courts, that you have to depend first of all on whether or not the courts want to do that in-house or whether they want to do that externally...businesses have much greater freedom and motivation to improve services, to make them faster, better, more efficient and better for the client, which is obviously much better than courts can do. As a result, you need to regulate the businesses that are providing these sorts of services to make sure that they are meeting the standards of current legal procedure. I think you have to legislate quite strongly. Just because something's online does not mean that it should be any less legally binding nor held to any lower standards. It should absolutely be of the same standards and you should legislate to that effect.”

The views of Respondent Z are backed up by those of Respondent J who, noting that using the law to positively impact the development of ODR would need support from the government, states:

“... Kenya...has two options... The government could develop their own platform and form a public body dealing with these matters. Or ... like in the UK, (the government could invite) ...a public tender ... where they say, “We need somebody to do this. Who is willing to do it and for which price?” Then the government chooses the best of those who apply to do the job...”

Respondent D, while expressing a need for regulation, expressed a reservation whether it would be high in priority noting as follows:

“We still haven't gotten to the volumes that rationalize us spending money to get legislation on it, but it's something that we'll have to deal with I think sooner than later”

The existing laws on ADR may be amended to provide for ODR. This approach favours amending existing law instead of putting in place a dedicated legal instrument. This is the view taken by Respondent X displayed in the following excerpt:

“For B2B and B2C disputes, already an elaborate system has been established for ADR which can be evolved into the online space... The Arbitration Act has been put in place to give some legal force and recognition of this mechanisms... Kenya should not actively seek to regulate ODR but rather, to work with arbitrators and arbitration bodies to continually improve ADR and ODR, especially by clarifying that the existing mechanisms/regulations for ADR can be extended to ODR with the necessary modifications.”

This view supports reference to ODR in the existing ADR law. In doing so, it still lends support for regulation of ODR. Respondent X supports the approach of building on the legal framework already in place relating to dispute resolution, noting that amendment may be required for ODR to operate efficiently:

“Since the law recognises freedom of contract, contracting parties are free to opt into the form of ADR they would like to govern any dispute in their contractual relationship. This would include ODR – the existing rules for ADR can possibly be applied – with the necessary modification... - to ODR, without the need for new regulations for ODR; or possibly with a slight amendment of the ADR rules to clarify that they can also be applied online. The above applies to B2C and B2B disputes. When it comes to disputes that have to go to court, if we are saying that courts can adopt the use of technology in resolving cases for example conducting hearings through video conferencing, this might call for the passing of a few regulations/amendments on the laws governing court procedures.”

The regulation-led approach recognises consumer protection as a key confidence-builder in e-commerce and ODR.⁴⁰³ Consumers must be comfortable that the law guarantees their protection from unscrupulous traders.⁴⁰⁴ They must be sure that if they share information over the ODR system, their information is protected through a robust data protection framework.⁴⁰⁵ Consumers must have confidence in the viability of e-commerce, the stability of the public infrastructure providing these services, and the integrity of the system from cybercrime.⁴⁰⁶

Section 88 of the Consumer Protection Act preserves the right of the consumer to resort to the High Court after an unfavourable decision in arbitration.⁴⁰⁷ It is argued that section 88 limits

⁴⁰³ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 370); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 369); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 367).

⁴⁰⁴ Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 370); Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 369); Interview with Grace Mutung’u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 367).

⁴⁰⁵ Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 367).

⁴⁰⁶ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 367); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 372).

⁴⁰⁷ John Kamau (n 40); Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 372); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with Grace Mutung’u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 367); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 367).

the use of arbitration, and should therefore be repealed.⁴⁰⁸ However, those in favour of the regulation-led approach were of the view that this provision is a necessary milestone in upholding consumer protection.⁴⁰⁹ The view is that this section does not inhibit ADR or ODR, because a consumer would only exercise this right where there is an infringement of rights. According to Respondent J, this provision would only rarely be called upon, except where the ODR system violates mandatory consumer protection law:

“In practice that's hard to happen. In theory, it could only happen if the consumer first of all opted voluntarily to go to ODR, to arbitration, to online arbitration. If the outcome does not respect the mandatory law of the consumer, then only in those circumstances the consumer could challenge the outcome in court; so basically, when the arbitrator has not applied the consumer law. Only in those circumstances. In reality the consumer will not go back. It's very unlikely that the consumer will do that.

“It makes sense that you allow the courts to review decisions when the arbitrators are not respecting the consumer protection law, which is a matter of public policy at least in Europe. The consumers (do not) have bargaining power when they enter into a contract with the trader. That's why you have consumer law which says, “Yeah, consumers have this right and the trader or the business cannot ignore those rights.” If those rights are ignored in arbitration, then the consumer in theory should be able to challenge the (outcome).”

The High Court must at all times be the guardian of human rights, and especially consumer rights which are enshrined in the Constitution of Kenya 2010.⁴¹⁰ As such, the effect of section 88 of the Consumer Protection Act on ODR is that of promotion of consumer protection, which is anticipated to buttress development of the dispute resolution process.⁴¹¹ Contrary to the

⁴⁰⁸ Kariuki Muigua, ‘Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises’ (n 40) 29; Daisy Owuor Ajima (n 50) 74.

⁴⁰⁹ Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 372); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with Grace Mutung’u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 367); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 367).

⁴¹⁰ Constitution of Kenya (n 49), art 46; Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 372).

⁴¹¹ Constitution of Kenya (n 49), art 46; Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 372).

proposition that section 88 should be repealed or amended,⁴¹² the present study finds that the provision is necessary to promote consumer protection in ADR and therefore ODR.

4.3.3 Way forward for regulation of ODR

Interview Question 3: Perspectives on regulation of technology have been considered to be those of developed countries. What is your comment on this view? What considerations may be taken by a developing country in evaluating the need for regulation of ODR?

A number of issues arise that must be taken into consideration if Kenya is to develop the regulation on ODR. The form of the regulation to be put in place must be decided. It may either be through independent legislation,⁴¹³ reference to ODR in existing ADR law,⁴¹⁴ or through issuance of guidelines that encourage certain legal standards to be upheld.⁴¹⁵ The starting point is the view that the legal framework for ADR as at 2016 is inadequate to meet the peculiar challenges presented by ODR. According to Respondent Z:

“...the most sensible thing is to set up first of all a framework. Then once you have a framework that you are happy with things operating within that you then use that to promote actively bringing ODR into a country. You know exactly where you can operate within, how it's going to work. Then you give companies a real opportunity to open up an entirely new market waiting for them. It's huge not only in terms of revenue itself but the promise of access to justice is huge.”

The UK has put in place the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 recognising the use of the EU ODR platform established under Article 5 of Regulation (EU) No. 524/2013.⁴¹⁶ This serves as a reference to ODR in existing ADR law, through an amendment of the ADR statute or regulation. Another benchmark law in the UK is the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, which provides for approval of ADR entities that are

⁴¹² Daisy Owuor Ajima (n 50) 74.

⁴¹³ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 369); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 372); Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands (n 371).

⁴¹⁴ Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367).

⁴¹⁵ Interview with Edward Muriithi Rinkanya, Principal Legal Officer for Dispute Resolution and Commercial Services, Communications Authority of Kenya (n 367).

⁴¹⁶ Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015, art 2.

competent to resolve disputes, including ODR-related disputes.⁴¹⁷ Further, the EU ODR Regulation, effective January, 2016 is also instructive in considering developing a legal framework for ODR in Kenya.⁴¹⁸

All EU laws applicable in the UK before Brexit will still be in force until the exit is legally complete (possibly in 2019) or further into the future, if the UK enacts a separate Act or passes regulations to adopt the EU law.⁴¹⁹ There is no need to re-invent the wheel, but there is a need to adapt the legal framework in other jurisdictions to conform to local realities.⁴²⁰ Kenya may draw lessons from the UK experience, therefore, in considering preparing a legal framework for ODR. According to Respondent N:

“...there's no shame in not wanting to reinvent the wheel. There's absolutely no shame in copying... Why would I need to reinvent the wheel and come up with a triangular wheel instead of something circular? Or I come up with something which is a lot more native?”

A potential challenge for consideration that may limit development of ODR even if provision is made in the law, is the weak legal provision for e-commerce in Kenya.⁴²¹ Respondent N outlines the development of ICT law in Kenya, highlighting the provision for e-commerce:

“... the national ICT policy ... promulgated in 2006 ... addressed issues of electronic commerce and sought to ... recognize electronic transactions... That led to the Kenya Communications (Amendment) Act 2009, which is now known as the Kenya Information and Communications Act ... (of) 2013. That was an attempt by government, both Parliament and the ... recognize e-transactions.

Respondent N deplors the inadequate provision for e-commerce in the law:

⁴¹⁷ Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, Schedule 3.

⁴¹⁸ Regulation on Consumer ODR (n 226).

⁴¹⁹ Ashley Cowburn (n 30); Swati Dhingra and others, ‘The UK Treasury Analysis of “The Long-Term Economic Impact of EU Membership and the Alternatives”’: CEP Commentary’, *Brexit 2016 Policy analysis from the Centre for Economic Performance* (London School of Economics and Political Science 2016) <http://cep.lse.ac.uk/pubs/download/brexit08_book.pdf> accessed 15 August 2016; Jiries Saadeh, ‘The European Union, Investment Treaties and Investment Arbitration Post-Brexit | Arbitration Blog’ <<http://arbitrationblog.practicallaw.com/the-european-union-investment-treaties-and-investment-arbitration-post-brexit/>> accessed 16 August 2016.

⁴²⁰ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 370); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 369).

⁴²¹ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 367).

“I think that (the law on e-commerce) is insufficient as it currently is drafted and that's why we still need to have an Electronic Transactions... Act. Digital signatures...(have) been working ... for over a decade in many Western countries. Since the law recognized that digital signatures can be used on documents in 2009, which was technologically speaking still fairly late, the (Communications Authority) has only started putting in place regulations on licensing of the entities that would supply these digital signatures ... From 2009 will be a decade in the next three years. Nothing has happened.”

According to Respondent N, while the law recognises the digital signatures may be used, without regulations from the Communications Authority of Kenya on how they apply, the law is not implemented. Further, in relation to B2C transactions, there is a challenge with low levels of appreciation of how e-commerce works, including how digital signatures are used. This removes the utility of having laws in place, if they are not beneficial in practice:

“(T)he law says, “We recognize that you can use digital signatures for purposes of attesting to certain documents that you've entered into with the purpose of contracting.” I have been in a situation where my bank cannot allow me to electronically sign a document. They need me to go to the bank and physically do that. The (Communications Authority) has not licensed ... entities that will offer (digital signatures). It does not mean they're not offered. There are people who offer (digital signatures) abroad...There's a high level of ignorance in the commercial sector as to the utility of (digital signatures). There are companies who in terms of e-bills internally allow people to append electronic signatures. Depending on who their client (or) suppliers are... It's good to have it in the law but we're not practical.”

Another stumbling block would be to encourage wilful adoption of ODR by parties, as stated by Respondent B:

“I think the challenge for online dispute resolution, which is the same challenge for mediation, is to get both parties to agree to it. If only one party wants to have mediation or ODR and the other party doesn't, then you can't force anything.”

It is believed that stronger e-commerce laws than those present in Kenya would promote development in the area of ODR.⁴²² The issue of unreliable electricity connection came to light.⁴²³ The development of e-commerce and ODR alike, would require better public infrastructure than what is currently available.⁴²⁴ This would also require greater effort in

⁴²² Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 367).

⁴²³ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367).

⁴²⁴ Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 372); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 367).

increasing internet penetration in the country in light of the comparative lower levels than in the UK or the USA.⁴²⁵ In 2016, only 16% of Kenyan adults had a smart phone, and only 18% accessed the internet at least once a month.⁴²⁶

Beyond this, Kenya does not have an effective addressing system.⁴²⁷ The UK and the USA have well laid out addresses not only in the urban areas but also in the far-flung areas, facilitating efficient delivery of goods and services. Kenya lags behind with unmarked addresses making it difficult for e-commerce to progress, therefore creating an unfavourable environment for development of ODR.⁴²⁸ It is therefore noted that aligning the laws with the emergent technology is not the solution to all problems. It is not a guarantee that once the laws are put in place, then ODR would thrive in Kenya. According to Respondent J:

“...it would be beneficial if there is some governmental support. I don't think legislation is a panacea. I think what you need more is resources and maybe legislation in terms of muscle to require traders or businesses to have the legal obligation to form or even to participate in ODR. For instance, if you have complaints against utilities or financial bodies it should be somehow monitored. It should also enable an ODR route for customers and consumers to complain when they have a reason to do so, and not just to force them to go to the court to elevate a complaint against a business. In that sense, I think the European approach would be better to enable the use of ODR.”

4.3.4 Possible Benefits of ODR for Kenya

The benefits of ODR make the prospect of its development apparent. An interactive B2C e-commerce dispute resolution system that may be accessed online may appeal to tech-savvy Kenyans, especially the youth.⁴²⁹ ODR is suitable for resolution of B2C disputes in general.⁴³⁰

⁴²⁵ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 370).

⁴²⁶ Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya (n 383) 19.

⁴²⁷ Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 367).

⁴²⁸ *ibid.*

⁴²⁹ Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367); Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands (n 371).

⁴³⁰ Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 369); Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 370).

As a suitable mechanism for resolving both online and offline B2C disputes,⁴³¹ ODR may contribute toward reducing court backlog because it is touted to have a simpler process than resorting to litigation.⁴³² According to Respondent Z:

...the use of technology not only promotes getting more people access to justice. It's much easier for people to get hold of a telephone or a tablet and go online or send a text message than it is going to your nearest court. Geography aside, courts are incredibly busy. They have no time nowadays, which the technology helps with.”

ODR makes information capture easier and more efficient. According to Respondent Z:

“... legal professionals – lawyers, judges – they're all highly trained people and they're all brilliant at their job. They have years and years and years of experience and work and everything goes with it... a large part of ... a lawyer's life ... is collecting information, asking questions, uploading documents, making sure that all of those things are there. Obviously, not only is this financially unbeneficial for the client but it's hugely time consuming. Everything's done in paper and it's not just the best way of going about things.

“Technology ... is the best way of capturing information and of forcing a discourse between parties to reach solutions rather than simply looking for a decision, say, from a judge within a court system. That's what we seek really ... fostering that interaction between parties, capturing that information and doing so in the (quickest) and efficient way.”

ODR may also serve to speed up existing B2C dispute resolution processes, such as that offered by the Communications Authority of Kenya.⁴³³ Similar to ADR, ODR may also contribute towards preserving the reputation of businesses through the confidentiality and private nature of the dispute resolution process.⁴³⁴ ODR, as a process founded on the mutual consent of the parties, is not polarising like the courts, leaving room for amicable solutions.⁴³⁵ Parties may decry the limited human interaction, especially where they would prefer to have face-to-face interaction with the other party and the facilitator.⁴³⁶ Overall, however, the opportunities ODR presents to efficiently resolve B2C e-commerce disputes cannot be ignored.

⁴³¹ Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367).

⁴³² Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands (n 371); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 370).

⁴³³ Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367); Interview with Edward Muriithi Rinkanya, Principal Legal Officer for Dispute Resolution and Commercial Services, Communications Authority of Kenya (n 367).

⁴³⁴ Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367).

⁴³⁵ Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands (n 371).

⁴³⁶ *ibid*; Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367).

4.4 Conclusion

This Chapter contains an analysis of the data collected from the study, tying in the desktop study with the primary data gathered from the field. It covers the research methodology employed and the key findings of the study. The key informant interviews bolstered the theoretical framework for this study, recognising the interrelation between technology and the law. The primary data collected and analysed favours the regulation-led approach to encourage development of ODR in Kenya. Challenges such as low internet penetration and low levels of relevant knowledge in the area do not dim the prospects for ODR to develop as an effective mechanism for resolving low-value high volume B2C e-commerce disputes.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This Chapter presents the conclusions of this study, in light of the research questions it sought to answer. It also offers recommendations in line with the need for regulation of ODR. The main objective of this study was to contrast the legal underpinnings of the ODR systems in the UK and the USA to determine whether it is necessary for Kenya to recognise ODR in the legal framework. The study sought to answer the following research question: Should Kenya prioritise development of legal standards for ODR in the country drawing from the UK experience, or alternatively should ODR develop independent of the law drawing from the USA experience? The examination of this research question was guided by a null hypothesis that Kenya should not prioritise development of legal standards for ODR in the country drawing from the UK experience. The null hypothesis has been disproved: Kenya should prioritise development of legal standards for ODR in the country drawing from the UK experience.

While there is no central theory on ODR, this study relies on the sociological approach to law which considers that the interests of society must be embodied in the law. One of these interests, bringing general progress of society, is science. Technology, born from science, therefore impacts society, which translates into the need for changes in the rules governing the human race. Thus, the study theorises that as technology leaps before the law is changed, society must incorporate these changes in the law. As a ‘snap-shot of society’, the law reflects the attitudes, aspirations and goals held dear. This study therefore contends that the law should accommodate the changes in society. The change here, is ODR. Where the law does not cater for ODR, it does not live up to preservation of the social interest.

This thesis has outlined the basic tenets of the legal framework for ODR in the UK and the USA. From these systems, lessons are drawn based on the issues that must be considered in a legal framework for ODR. The thesis has compared and contrasted the legal frameworks for ODR in the UK and the USA. While the USA system prefers a free market approach with minimal state regulation, the UK gives more focus to regulation of the sector. These are presented as opposite poles in observing which of the two approaches is more favourable for development of the sector in Kenya.

The study has also evaluated ADR in Kenya, describing the place of ODR in the legal framework. While there is no centralised ODR law, in Kenya there are provisions in the law on ADR and dispute resolution in general, which adapt to the changing times, and adopt technology to facilitate the processes. The study has addressed the issues essential for smooth operation of a legal framework for ODR. It critically assesses whether, from a theoretical perspective, there is a need to consolidate provisions on ODR into an identifiable ODR law.

This thesis contains an analysis of the data collected from the study, tying in the desktop study with the primary data gathered from the field. It covers the research methodology employed and the key findings of the study. The key informant interviews bolstered the theoretical framework for this study, recognising the interrelation between technology and the law. The primary data collected and analysed favours the regulation-led approach to encourage development of ODR in Kenya. Challenges such as low internet penetration and low levels of relevant knowledge in the area do not dim the prospects for ODR to develop as an effective mechanism for resolving low-value high volume B2C e-commerce disputes.

5.1 Summary of findings

This section revisits the research questions, to determine the responses arrived at through the study. The research questions are presented, the null hypothesis outlined, and a summary of the findings in the study is laid out. The problem addressed in this study is that there is no provision for ODR in the legal framework for ADR in Kenya. On a regional and international level, there is no hard law governing ODR. The area is governed by soft law, through recommendations and guidelines. It is argued that uncertainty arising from inadequate provision for ODR coupled with underdeveloped ODR mechanism reduces consumer confidence in B2C e-commerce.⁴³⁷

This study sought to respond to a central question, and three sub-questions. To evaluate the outcome of this research, the responses to each sub-question will be briefly presented, to determine whether the overarching question was addressed. The study set out to explore the following central question: Is there a need for regulation of ODR in Kenya? It sought to address the following sub-questions: What is the relationship between law and technology, if a relationship exists? How is ODR provided for in the legal framework in the UK and the USA,

⁴³⁷ Fahimeh Abedi and John Zeleznikow (n 44).

if at all? Should Kenya prioritise provision for ODR in the legal framework, or should ODR develop first and legal provision follow?

Sub-Question 1: What is the relationship between law and technology, if a relationship exists?

This sub-question was addressed in the desk-based research and in the field work. The theoretical framework guiding this study emerges from the sociological approach to law. This approach suggests that there is a relationship between law and technology. It proposes that law influences technology, and technology influences law. As products of society, both law and technology relate. At times, there are positive outcomes such as ODR. In other interactions, there may be a conflict between law and technology, for example where technology applicable throughout the world may allow or even encourage activities which are against the law in a particular jurisdiction. As confirmed in the field work, the relationship between law and technology exists. It may be either positive or negative. To ensure that the law does not inhibit development of technology, there is a need to put in place technology-neutral laws. This sub-question has therefore been addressed.

Sub-Question 2: How is ODR provided for in the legal framework in the UK and the USA, if at all?

This sub-question was addressed in the desk-based research and in the field work. ODR is provided for in the legal framework in the UK and in the USA. In the UK, there are laws that specifically refer to ODR. In the UK, regulation of ODR is driven by consumer protection concerns. The regulation-led approach seeks to protect consumers from abuse, and to promote the use of ODR. On the other hand, in the USA there is no central law providing for ODR. The USA takes a market-led approach, where ODR developed in the hands of private actors with minimal state regulation. While there is no direct provision for ODR in the USA, the law relating to dispute resolution and the law relating to B2C e-commerce collectively form the body of law relating to ODR. The approaches taken in the UK and the USA are therefore different. This sub-question has therefore been addressed.

Sub-Question 3: Should Kenya prioritise provision for ODR in the legal framework, or should ODR develop first and legal provision follow?

This sub-question was addressed in the desk-based research and in the field work. The literature review identified a gap in existing scholarly work. There is little focus on whether a developing country such as Kenya should prioritise provision for ODR in the legal framework, or whether ODR develop first and legal provision follow. The study on the legal framework for ODR in the UK and the USA revealed that law may be beneficial to regulating technology due to consumer protection concerns. The regulation-led approach emerged as the preferred one, leading to a suggestion that Kenya should prioritise provision for ODR in the legal framework. While the market-led approach in the USA has still seen development of ODR for B2C e-commerce disputes, there is concern that consumers may not adequately be protected under these private-led systems. This position was further supported in the field work. The frequency of references to a regulation-led approach was 55%, the market-led approach drew a frequency of 30% in the responses. A hybrid approach was also suggested, adopting parts of the regulation-led approach to certain aspects of ODR, and parts of the market-led approach to other aspects of ODR. References to a hybrid approach had a frequency of 15%. In response to this sub-question, the present study found that Kenya should prioritise provision for ODR in the legal framework. This sub-questcion has therefore been addressed.

Central Question: Is there a need for regulation of ODR in Kenya?

The three sub-questions build on the response to this central question. This study has found that there is a need for regulation of ODR in Kenya. Borrowing from the UK experience, it has been found that introduction of either a soft law or hard law regulatory framework for ODR in Kenya may contribute to increasing consumer confidence in e-commerce. While ODR in the USA developed with minimal regulation, concerns for consumer protection make it more suitable for Kenya to consider recognition of ODR in the law. This would permit the government to oversee activities and prevent unscrupulous businesses, for example, from abusing the B2C e-commerce dispute resolution process. Further comfort to the development of ODR is provided in section 88 of the Consumer Protection Act, placing the High Court as the guardian of consumer protection in the event that a business uses ODR to abuse consumer rights. The central research question has therefore been addressed.

Null Hypothesis: there is no need for a legal framework for ODR in Kenya.

The null hypothesis of this study was that there is no need for a legal framework for ODR in Kenya. Based on the response to the central research question, this study has disproved the null hypothesis, showing that there is a need for a legal framework for ODR in Kenya.

5.2 Recommendations

This study has found that Kenya should adopt a regulation-led approach to promote the development of ODR. The legal framework for ODR in Kenya may be developed either through enacting a law dedicated to the area, or through recognising ODR in the existing ADR law. Alternatively, ODR may be included in the legal system through preparation of ODR regulations under the ADR law, or through the Kenya Information (Dispute Resolution) Regulations of 2010. According to Respondent G:

“The best way under the law is (to) give the Minister the power to make regulations from time to time.:

Once ODR is provided for in the law, Kenya may consider development of a pilot ODR system. The cost implications of establishing ODR systems must be taken into account. A pilot ODR system may be developed by the Communications Authority of Kenya to address the question of viability of ODR. Development of ODR systems may be taken up as a government-led initiative, where an internal department initiates a pilot project.⁴³⁸ The Communications Authority of Kenya, for example, already has the Kenya Information and Communications (Dispute Resolution) Regulations, 2010 which may be used as a launch-pad for ODR regulation.⁴³⁹ This should be accompanied by public awareness campaigns on the benefits of ADR in general, and ODR in specific, to further give life to the constitutional provision hailing the importance of out-of-court solutions to disputes.

Cybersecurity issues must also be addressed, for e-commerce to flourish and ODR to bud.⁴⁴⁰ Further, levels of awareness among consumers, businesses, the judiciary and Advocates must

⁴³⁸ Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 369); Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands (n 371).

⁴³⁹ Interview with Edward Muriithi Rinkanya, Principal Legal Officer for Dispute Resolution and Commercial Services, Communications Authority of Kenya (n 367); Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 367); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 367).

⁴⁴⁰ Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 372); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily

be checked to create room for adoption of ODR.⁴⁴¹ Government bodies for example the Communications Authority of Kenya would be key information points to disperse knowledge not only on ODR but also on the existing ADR mechanisms, making the different stakeholders amenable to the dispute resolution mechanisms.⁴⁴² According to Respondent N:

“ODR ... draws heavily from the principles used in ADR. People need to be sensitized that you need not have necessarily contracted through online means. You might have contracted in the brick-and-mortar world but you can use that dispute to take it onto an ODR platform and use it to settle... People need to be (made aware by) ... the relevant regulatory institutes, ... (the Communications Authority) being one of them... (It is) a government mandate to publicize and let people know.”

Further research into the type of system that may work well in the Kenyan local context, and into the provisions required in a legal framework for ODR in the country, is encouraged.

Nation (www.nation.co.ke/jwalu) (n 367); Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 367).

⁴⁴¹ Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 372); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367); Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 367); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation (www.nation.co.ke/jwalu) (n 367).

⁴⁴² Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 367).

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APPENDIX I: APPLICATION FOR RESEARCH LICENSE

Alvin John Gachie
University of Nairobi,
School of Law
PO Box 30197-00100
Nairobi

1 March, 2016

The Secretary
National Commission for Science, Technology and Innovation (NACOSTI)
Utalii House, 8th and 9th Floor
P.O Box 30623
Nairobi, Kenya.

Dear Sirs,

Re: Application for Research License: University of Nairobi School of Law, Master of Laws (LL.M) Thesis on “An Evaluation of the Need for Regulation of Online Dispute Resolution (ODR) In Kenya”

The above matter refers.

I am a student at the University of Nairobi, School of Law currently undergoing the Master of Laws (LL.M) programme. I hereby apply for a license to conduct research for my thesis. The data collected from this research will be used for academic purposes. The research will be conducted in Nairobi County.

I undertake to abide by all the requirements under this license, including submission of two bound copies of the thesis upon completion.

Please find attached the application form and supporting documents.

Thank you for your assistance.

Yours faithfully,

Gachie Alvin John
Registration No.: G62/82350/2015

APPENDIX II: RESEARCH LICENSE

THIS IS TO CERTIFY THAT:

MR. ALVIN JOHN GACHIE
of UNIVERSITY OF NAIROBI, 0-505
Nairobi, has been permitted to conduct
research in All Counties


on the topic: AN EVALUATION OF THE
NEED FOR REGULATION OF ONLINE
DISPUTE RESOLUTION (ODR) IN KENYA

for the period ending:
4th July, 2017

Alvin John Gachie
Applicant's Signature


[Signature]
Director General
National Commission for Science, Technology & Innovation

Permit No : NACOSTI/P/16/23384/11473
Date Of Issue : 6th July, 2016
Fee Received :Ksh 1000



CONDITIONS

- 1. You must report to the County Commissioner and the County Education Officer of the area before embarking on your research. Failure to do that may lead to the cancellation of your permit.**
- 2. Government Officers will not be interviewed without prior appointment.**
- 3. No questionnaire will be used unless it has been approved.**
- 4. Excavation, filming and collection of biological specimens are subject to further permission from the relevant Government Ministries.**
- 5. You are required to submit at least two(2) hard copies and one(1) soft copy of your final report.**
- 6. The Government of Kenya reserves the right to modify the conditions of this permit including its cancellation without notice**

REPUBLIC OF KENYA

National Commission for Science, Technology and Innovation

RESEARCH CLEARANCE PERMIT

Serial No. A 9990

CONDITIONS: see back page

APPENDIX III: LIST OF RESPONDENTS

NAME OF RESPONDENT	SCHEDULE OF INTERVIEW
<p>Adam Mambi (Justice) Judge of the High Court of Tanzania Expert on ICT/Cyber Law & Intellectual property law Author of “ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)”</p>	<p>10 June 2016 – Introductory email sent; 9 July 2016 – Interview conducted via telephone.</p>
<p>Edward Muriithi Rinkanya Principal Legal Officer, Dispute Resolution and Commercial Services Communications Authority of Kenya P.O. Box 14448 Westlands 00800, Nairobi</p>	<p>22 June 2016 – Introductory email sent, confirmation of interest received on 22 July 2016 7 August 2016 - Interview conducted via face-to-face meeting at Java House at The Junction Mall, in Nairobi.</p>
<p>Ethan Katsh (Professor) Director, National Center for Technology and Dispute Resolution Professor Emeritus of Legal Studies, University of Massachusetts Amherst 2014-2015 Affiliate Researcher, Harvard University Berkman Center for Internet and Society</p>	<p>23 Feb 2016 – Introductory email sent, confirmation of interest received 15 June 2016 – Interview conducted via Skype.</p>
<p>Frances Singleton-Clift Justice Technology Advisor The Hague Institute for Innovation of Law (HiIL) Bezuidenhoutseweg 16A, 2594 AV P.O. Box 93033, 2509 AA The Hague, The Netherlands www.hiil.org</p>	<p>10 June 2016 – Introductory email sent 15 July 2016 – Interview conducted via Skype.</p>
<p>Grace Mutung’u ICT Lawyer Kenya ICT Action Network (KICTANet)</p>	<p>31 May 2016 – Introductory email sent; 29 June 2016 – Interview conducted via face-to-face meeting at Java House at Embassy House next to Harambee House in Nairobi.</p>
<p>John Walubengo Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT Blogger at Daily Nation (www.nation.co.ke/jwalu)</p>	<p>31 May 2016 – Introductory email sent; 23 June 2016 – Interview conducted via face-to-face meeting at Pizza Inn Oil Libya Westlands restaurant in Nairobi.</p>
<p>Mark Lavi Senior In-house Counsel Safaricom</p>	<p>9 June 2016 – Introductory email sent; 10 June 2016 – Interview conducted via face-to-face meeting at Safaricom House, Westlands, in Nairobi.</p>
<p>Michael Murungi Policy & Government Relations Manager, East Africa</p>	<p>31 May 2016 – Introductory email sent;</p>

<p>Google Inc. Author of “Cyber Law in Kenya (2011)”</p>	<p>21 June 2016 – Response to interview questions received via email.</p>
<p>Pablo Cortés (Dr) Senior Lecturer Leicester School of Law University of Leicester, University Road, Leicester, LE1 7RH, UK</p>	<p>23 Feb 2016 – Introductory email sent, confirmation of interest received on 15 June 2016 17 June 2016 – Interview conducted via Skype.</p>
<p>Stephen Kiptiness Lead Partner at Kiptiness & Odhiambo Associates Lecturer at the University of Nairobi School of Law</p>	<p>31 May 2016 – Introductory email sent; 29 June 2016 – Interview conducted via face-to-face meeting at Kiptiness & Odhiambo Associates offices, 4th Ngong Towers, 7th Floor, North Wing, 4th Ngong Avenue, in Nairobi.</p>