

ONLINE DISPUTE RESOLUTION: A NEW APPROACH FOR E-COMMERCE DISPUTES

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ABSTRACT

In the current time, most transactions are moving towards the digital realms. With the increase in e-commerce transactions however, it is inevitable for there to be a raise in e-commerce disputes. E-commerce disputes could arise for many reasons. Some of the common reasons include misleading product information, defective products, and unsecured websites. The important factor nonetheless is, when a dispute arises, every consumer has a fundamental constitutional right to have access to the courts for the purposes of enforcing their rights. The increase in litigation has led to severe backlog of cases in the traditional courts system thus preventing access to justice and resulting in the need to find alternatives to dispute settlement in Malaysia which would satisfy citizen's needs for a system that is speedy, efficient and cheaper. In line with this need, this paper explores the benefits of implementing Online Dispute Resolution (ODR) in order to bridge the justice gap. The paper focuses on understanding ODR as a means of providing access to justice which acts as a solution to the increase in e-commerce disputes. This study is based on secondary data collected from law journals and articles as well as websites of other jurisdictions that support ODR. As it is apparent that ODR is at an infant stage in Malaysia, this paper extracts guidelines from England and Wales as a basis for understanding the concept and development of ODR. This study appreciates the need of working towards the implementation of ODR within Malaysia by creating awareness and providing public legal education to emphasise on the importance of using ODR as a new approach for solving e-commerce disputes. ODR makes the law more accessible to consumers involved in an e-commerce dispute, which as a result reinforces their trust in e-commerce transactions and acts as a driving force for world peace.

Key words: Online Dispute Resolution, E-Commerce, Access to Justice

Introduction

In the current time, most transactions are moving towards the digital realms. The purpose of using the internet varies from one individual to another. Some use the internet for the purposes of social media. Websites such as Facebook and Instagram come in handy for individuals to stay connected with their friends and family. Another common purpose for usage of internet is its vast source of information. Many individuals visit Google.com as a point of reference.

In addition to the above, the internet is also fondly used for e-commerce transactions. Digital technologies offer enormous ways to conduct businesses online. The World Wide Web has become an ideal platform for online business transactions. Global business to consumer e-commerce sales have increased steadily since 2010. In addition, the growth rate has been quite consistent over the last few years, as shown in the figure below (E-commerce Europe, 2016).

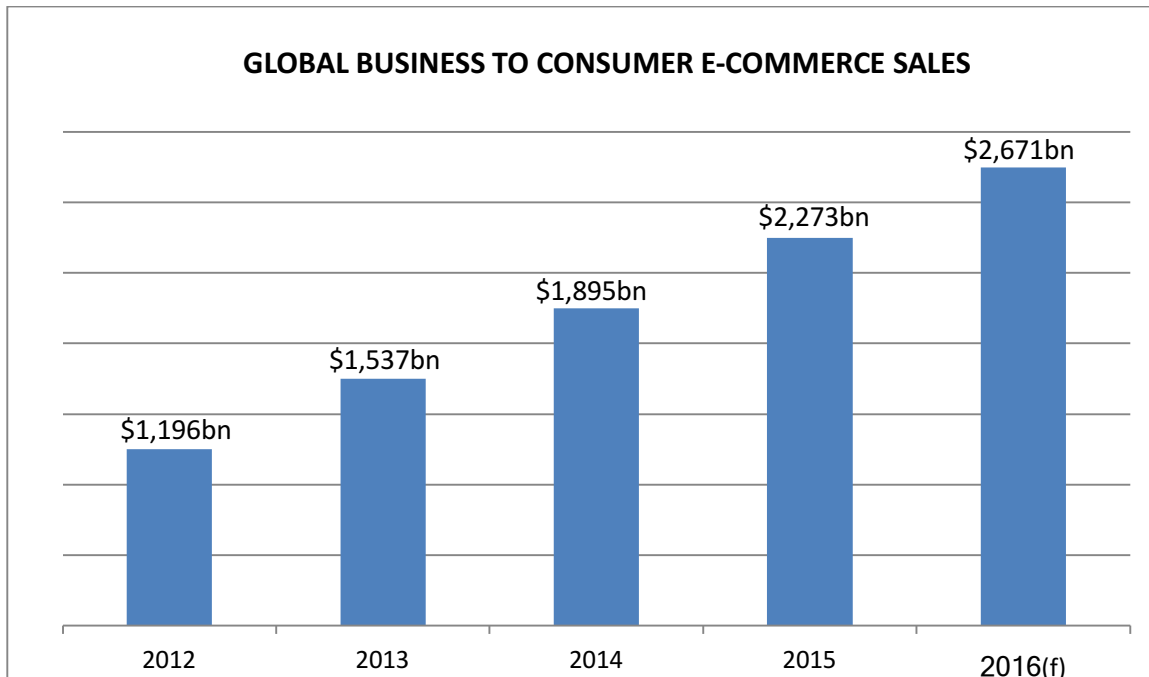


Figure 1 – Total online sales of goods and services
(E-commerce Europe, 2016)

Around South-East-Asia, Malaysia emerged as the third country that recorded the highest percentage of internet users at 67% after Singapore and Brunei from a total of 252.4 million internet users (The Star Online, 2014). Some of the popular e-commerce sites in Malaysia include Zalora Malaysia, Lazada Malaysia, and Lelong.my.

It is noted that despite the economic gloom, with GDP (gross domestic products) growth expected to slow down, the volume of transaction in e-commerce increased to 65% in 2016 (Lum, 2017).

BACKGROUND OF THE STUDY

There are many factors that increase e-commerce transactions over the traditional face-to-face approach. One of the main factors is convenience. Consumers are able to satisfy their needs without having to take the trouble and effort to leave their comfort zone. Furthermore, the online stores are available round the clock (24/7), allowing consumers to shop at their own pace and convenience, independent of the store's opening hours.

Another factor that contributes to the rise in e-commerce transactions would be the variety of products available online. Consumers are able to purchase various products from many different online stores which work as quick as a click from one website to another. This is not just convenient but a paradise for consumers who dislike crowd. Purchases are then delivered to them directly, saving the consumers' travelling cost, energy and time.

An additional factor for e-commerce transactions to increase is the power cost of products. Suppliers are not required to keep their stores open. As a result, they save huge amount of cost from hiring outlets and having to pay rent, as well as the wages required to pay employees needed to run the store. This allows suppliers to provide e-commerce consumers the best prices and best deals, online.

The mode of payment for e-commerce transactions also amount to a factor for e-commerce transactions to increase rampantly. Consumers are able to pay via debit or credit cards, as well as online bank transfer. Although this mode of payment is quite similar to the traditional face-to-face approach, e-commerce consumers' physical safety is protected from the common danger of snatch thefts and store burglaries. This contributes to the drastic move from the traditional face-to-face approach to the digital realm. Thus it is apparent that, the strong pull towards the digital realm not only attracts consumers towards e-commerce transactions, but also generates a conducive platform for sustainable economic growth.

PROBLEM STATEMENT

In e-commerce transactions however, the degree of intimacy and extension of e-relationship is far more limited. Limitation causes consumers actively participating in e-commerce transactions to be exposed to a greater risk. As a result, dispute arises between the e-commerce consumer and the business trader.

In Malaysia, Cybersecurity (2014) reported 4,117 cases of online security incidents involving frauds, including online shopping disputes and this domination is expected to continue in the future (ACCC, 2015).

There are many factors that cause an online dispute. Some of the common factors include misleading product information, defective products that are not of satisfactory quality, and unsecured websites.

The important element is, when a dispute arises, every consumer has a fundamental constitutional right to have access to the courts for the purposes of enforcing their rights. It is accepted that protection for the e-commerce consumers has been considered and revamped as seen in the Consumers Protection Act 1999 which was amended in 2007 to provide protection to consumers who are involved in electronic transactions (Of & Trade, n.d.).

The question however is, “are these consumers expected to undertake the traditional approach of civil litigation to solve their e-commerce disputes or is there a pressing need for a new approach?”

LITERATURE REVIEW

Dr. Sharifah Suhanah Syed Ahmad in ‘*Introduction to the Malaysian Legal System and Sources of Law*’ stated “increased litigation, leading to severe backlog of cases in the traditional courts system has resulted in the need to find alternatives to access justice and dispute settlement in Malaysia which satisfies citizen’s needs for a system which is speedy, efficient and cheaper” (“UPDATE: Introduction to the Malaysian Legal System and Sources of Law - GlobaLex,” n.d.).

The judges and magistrates are found to be facing problems of time and case management, and there is also an issue with their lack of knowledge about the likely length of a case when it comes to fixing hearing dates, which could then affect the conduct and course of a trial (Bhatt, 2005).

Information technology would help our courts to prevent delays, promote consistency of decisions, achieve transparency, restore public confidence, provide a benchmark of judicial standards and allow for manpower planning. Increased IT use has also been found to promote efficiency and cost effectiveness. From the perspective of the ordinary citizen, it would only make the law simpler and more accessible” (Bhatt, 2005).

The traditional courts are dependent on an accessible and effective system of civil litigation. The enduring problems of expense, delay and complexity however, have undermined the right of access. As a result, it is highly likely for consumers to fear for a dispute to take place with no immediate solution. Technological support is needed to address the maxim “justice delayed is justice denied”.

ENGLAND AND WALES

Malaysia has inherited the Common Law system from British, therefore Malaysia has much in common and much to gain from its learnings and recommendations. At present, England and Wales are having similar issues involving access to justice.

It is said, the single most pervasive and indeed shocking weakness of the traditional civil courts is that they fail to provide reasonable access to justice for the ordinary individuals (Cortes. P, 2017). It has become apparent that the traditional courts are simply not accessible to ordinary people and small businesses for the resolution of small and moderate claims at proportionate costs and costs risk (Lord Justice Briggs, 2016).

Although the traditional court system is populated by first-rate judges whose quality of work is very high, the current way of resolving low value civil cases in traditional courts fail to satisfy the majority of the thirteen criteria which includes affordable, accessible, intelligible and proportionate (UK, 2015).

The enduring problems of expense, delay and complexity was further illustrated by Natalie Ceeney, Chief Executive of HM Courts and Tribunals Service when she stated “Britain has the highest rate of online service usage in the world... there is a need for the court system to be accessible, easy to use but digital in design” (Modernising courts and tribunals. (n.d.)). Digital in design because “Many individuals are simply unable to bring good claims and enforce their rights, or adequately defend claims brought against them, due to the inaccessibility of the justice system” (Sir & Burnton, n.d.).

FINDINGS - ONLINE DISPUTE RESOLUTION

As a result, there is a pressing need for a new approach to bridge the justice gap. ODR serves this purpose perfectly. ODR is defined as “a broad term that encompasses many forms of Alternative Dispute Resolution (ADR) that incorporate the use of the internet, websites, email communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when practicing in ODR. Rather, they might communicate solely online”(Abedi, Shaik, & Yusoff, 2011). In short, ODR is the use of information and communication technology to assist parties in resolving their e-commerce disputes.

There are many jurisdictions who agree with the concept of ODR. Some of them include The United States of America where Modria ("Modria – Fast and fair resolution for courts," n.d.) has been introduced since 2005 as a platform to implement ODR. Similarly, New Zealand introduced Complete Online Dispute Resolution ("CODR - The expert online dispute resolution system," n.d.), Canada introduced Civil Resolution Tribunal ("Home - Civil Resolution Tribunal," n.d.) and Singapore hopes to implement ODR, in due course, into their statutory framework, under the Singapore International Mediation Centre (The Singapore International Mediation Centre).

As it is apparent that ODR is at an infant stage in Malaysia, guidelines from England and Wales have been abstracted as a basis for the purposes of understanding the concept and development of the ODR.

The English system has long been inaccessible to ordinary people, due to the exorbitant and disproportionate costs of litigation. Rather than accusing lawyers of having a "sinister interest" (the maximisation of fees exacted from litigants) or of conspiring against their clients to preserve their professional supremacy and financial advantage, Lord Briggs adopts a problem-solving attitude and tries to offer practical solutions (Assy, 2017).

In late July 2015, The Lord Chief Justice and the Master of the Rolls commissioned Briggs LJ to carry out a review of the structure by which the civil courts provide the State's service for the resolution of civil disputes in England and Wales (Lord Justice Briggs, 2016). Briggs LJ published his *Interim Report* in December 2015 ("Civil Courts Structure Review : Interim Report by Lord Justice Briggs," 2015) and completed his review in 2016 with the publication of his impressive *Civil Court Structure Review: Final Report in July 2016* (Lord Justice Briggs, 2016).

As a result of most transactions moving towards the digital realms, the commitment to digitalise the court system made the launch of Briggs LJ's proposal of an HM Online Court (HMOC) to deal with certain disputes of modest value and complexity, a reality.

The aim of HMOC, is to increase access to justice within the English civil justice system. The creation of HMOC articulates such a fundamental change in approach, with its basis in a need to increase efficiency and cost-effectiveness in the administration of justice in an era of reduced public sector expenditure (John Sorabji, 2017).

Both Briggs LJ's interim and final reports recognised the pressing need to make a paradigm shift in the court process. Briggs LJ's reports suggest the need to invest in technology and to incorporate ADR and ODR techniques into the court procedure in order to ensure that access to justice is met for citizens with civil and commercial disputes (Cortes. P, 2017).

The HMOC will create a new process to resolve disputes entirely online using innovative technology while reserving judicial time for the complex and difficult cases (Lord Justice Briggs, 2016). As a result, cases should reach a quicker resolution.

STAGES OF ONLINE DISPUTE RESOLUTION

Briggs LJ's HMOC will consist of three stages that focuses on resolution as opposed to the traditional method of determination:

Stage 1: (Online Evaluation) – will consist of a mainly automated process, using a suite of purpose designed evaluative software, but without third party assistance, from the court or otherwise, by which litigants will be assisted in identifying their claim or defence online and uploading any evidence the parties may wish to rely on, which the court will need for the purposes of resolution.

Briggs LJ explained that stage 1 presented three substantial advantages. Firstly, it enabled the parties to communicate to each other the relevant details and evidence about their respective cases at an early stage and as a result provides "a substitute for the pre-action protocol process used by solicitors in the conduct of most civil litigation" (Lord Justice Briggs, 2016). Secondly, it would open up opportunities for settlement well in advance of the trial (Lord Justice Briggs, 2016). Finally, if the matter is not settled at this stage then it can be managed and made ready for trial with all the necessary information being available for judicial determination.

Stage 2: (Online Facilitation) – will involve a mix of conciliation and case management which will be conducted by case officers (civil servants who are trained lawyers), designed to empower the parties to resolve their dispute, by identifying, understanding and defining the issues, without the need for expensive judicial determination. The case officers will evaluate the claim, encourage as well as facilitate consensual settlement, and carry out basic judicial case management tasks.

The incorporation of conciliation at stage two is intended, as Briggs LJ explained, to "making conciliation a culturally normal part of the civil court process rather than, as it is at present, a purely optional and extraneous process" (Lord Justice Briggs, 2016). The choice of the most suitable conciliation process for each case would be a matter for the case officer in conjunction with the parties themselves (Lord Justice Briggs, 2016).

Stage 3: (Online Judges) – If the matter cannot be settled at stage 2 then the case officer will case manage the matter to stage 3 which will consist of determination by judges either on the documents, on the telephone, by video or at face-to-face hearings, but with no default assumption that there must be a traditional trial (Lord Justice Briggs, 2016). Online judges will have the discretion to transfer cases to the conventional courts on grounds of complexity or public importance.

In addition to Stage 1, His Lordship explained that there must be a stage 0, a stage 0.5 and bypasses.

Stage 0 – will include guidance concerning the need to treat litigation as a last resort as well as providing sources of affordable or free advice and some commoditised summaries of the essential legal principles.

Stage 0.5 – will include provision for a short exchange between the parties designed to ascertain whether there really is a dispute which the court needs to resolve.

Bypasses – would allow legally represented parties not to have to go through the stages that would be needed for a (litigant-in-person) LiP (Lord Justice Briggs, 2016).

The purpose of having Stage 0 and 0.5 is to create opportunities for dispute prevention amongst the parties. Parties will be able to secure the necessary information and advice which will assist them to avoid grievances crystallising into disputes.

Through the implementation of the stages proposed by Briggs LJ, judicial workload is reduced tremendously. Court officials divert claims from the judiciary by claim management and dispute resolution. With resources made available to secure enough trained personnel to run their proposed systems effectively, HMOC could operate on a reduced financial allocation from the government, because more work would be done by lower cost civil servants than by higher cost judges (John Sorabji, 2017).

In addition to that, the transfer of proceedings online would reduce both the cost to upkeep the court buildings as the court estate could be reduced in size, and the cost of administration by enabling it to be carried out online rather than the traditional paper processes (Lord Justice Briggs, 2016).

RECOMMENDATION

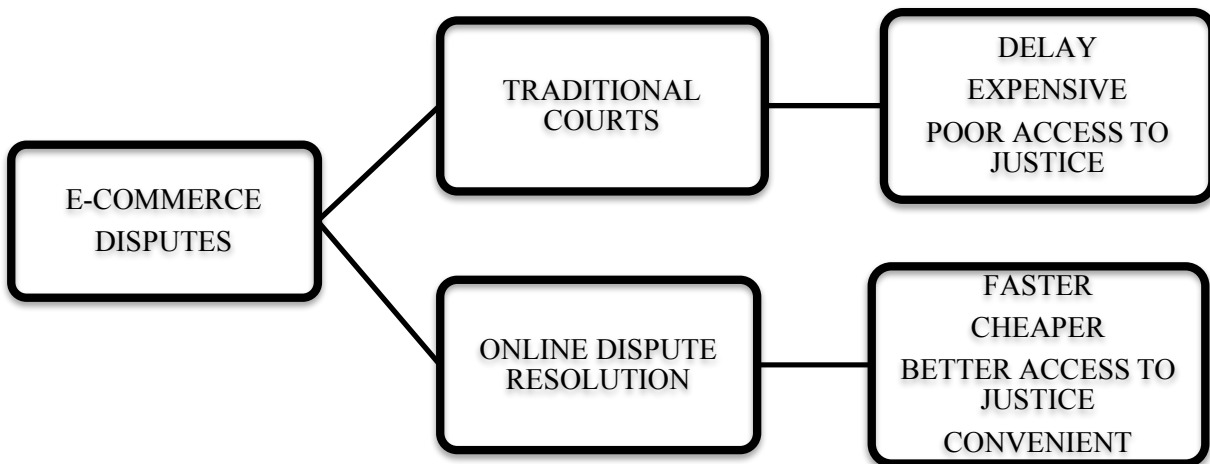


Figure 2 – the comparison in solving e-commerce disputes using the traditional courts and ODR

Emphasis should be given on the importance of using ODR as a new approach to solving e-commerce disputes. Figure 2 expressly shows the benefits of using ODR in solving e-commerce disputes in comparison to the traditional court system.

As mentioned above, the knowledge of ODR is currently at an infant stage in Malaysia. In order to assist Malaysia in sustaining the economy that is moving towards digital realm, there is a strong need to work towards the development of ODR within Malaysia by creating awareness and providing public legal education on the understanding of court procedure, the variety of dispute resolution processes available other than the traditional court system.

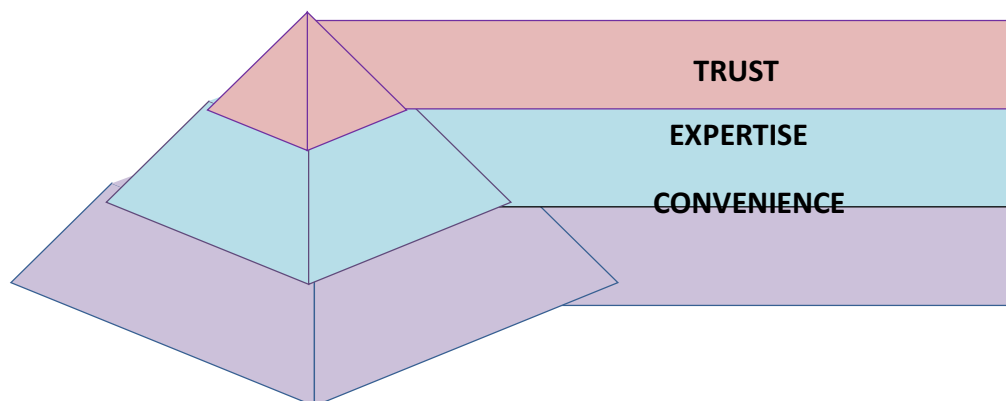


Figure 3 – ODR includes all three elements but not necessarily to the same degree (Katsh & Rule, 2017)

Assuming ODR is launched in Malaysia, as mentioned in Figure 3 ODR would include all three elements of convenience, expertise and trust but not necessarily to the same degree (Katsh & Rule, 2017). ODR is without a doubt a convenient process where consumers are able to prevent or resolve their e-commerce disputes almost as quick as the time taken to engage in an e-commerce transaction. However, the lack of expertise in the ODR field would result in limited trust amongst consumers to resolve their e-commerce disputes using the ODR process. Therefore effort needs to be made in expending the level of expertise in ODR which will automatically increase the trust level amongst e-commerce consumers.

It should be noted that ODR would not abolish the traditional court system but would merely cease to be the default (Lord Justice Briggs, 2016). In addition, better containment and avoidance of disputes will greatly reduce the number of disputes that need to be resolved by judges and this can be achieved through ODR as it extends the scope from beyond dispute resolution to include dispute containment and dispute avoidance (UK, 2015). Traditional courts will, as a result, be restricted to those claims that are otherwise unavoidable.

CONCLUSION

It is difficult to reduce the number of e-commerce disputes as the risk involved in e-commerce transaction is fairly high however effort can be made to resolve those disputes at a quicker and cheaper mode by allowing for easier access to justice.

Justice is not justice at all if it takes too long, is too expensive for people or if it is not available to everyone (Bhatt, 2005). High volumes of relatively low value claims occupy much of the traditional courts' time and could perhaps be handled more proportionately and effectively by ODR. More than this, ODR may provide an accessible method of resolving disputes for the large number of people for whom traditional courts are now too costly (Susskind, 2017).

ODR is a platform that is sophisticated and best designed to maximise the opportunities for e-commerce dispute resolution and minimise the downsides of access to justice. ODR provides a modern and cost effective process to resolve e-commerce disputes in the parties' best interest. It acts as a genuine win-win ("CODR - The expert online dispute resolution system," n.d.).

It is without a doubt that there may be risk of failure involved while implementing the ODR which should be addressed in detail. However the scope of discussion of this paper focuses mainly on the benefits of implementing ODR to make the law more accessible to the consumers involved in e-commerce disputes, as a driving force for world peace.

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