Operationalizing Ethical Principles in ODR: Moving to Action

ODR Forum
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Presenters

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Key Points

Enduring value of using Principles

Differences between principles and standards

Introduction to Ethical Principles for ODR

Suggestions for applying ODR Ethical Principles to development of ODR standards, software & systems design and to practice
ADR & ODR: Old & New Ethical Concerns

History of ethical concerns re: A2J for ADR
- power imbalances
- preferences for repeat players

New ethical concerns for ODR => new risks
- new input points & methods
- data size & collection (big data)
- data processing capabilities & integration w/mega systems (Internet, social media, government, etc.)
- lack of transparency & accountability

Need for ethically driven systems design, monitoring & accountability mechanisms based on shared ethical principles & standards for ODR
State of Play: ADR & technology

Alternative Dispute Resolution (a background & vacuum)
- Shared values (in legislation, regulation, standards, norms)
- ODR & technology are virtually absent from ADR standards, regulation, legislation

Online Dispute Resolution (vacuum filling up)
- Increasing legislation, regulation, discussions about standards
- Opportunity for stakeholder-driven impact on standards development & implementation
- Faces challenges of standardization & regulation across legal jurisdictions, sectors and cultures
Groups Considering/Endorsed ODR Rules or Standards (sample)

- American Bar Association
- Association for Conflict Resolution
- Alternative Dispute Resolution Institute of Canada
- Australian National Alternative Dispute Resolution Advisory Council
- Canadian Working Group on Electronic Commerce and Consumers
- Consumers International
- Council of the European Union
- European Parliament
- European Consumers’ Organisation
- Global Business Dialogue on Electronic Commerce
- International Council on Online Dispute Resolution
- International Mediation Institute
- Internet Corporation for Assigned Names and Numbers (ICANN)
- Judiciary of England and Wales
- National Center for Technology and Dispute Resolution (NCTDR)
- Transatlantic Consumer Dialogue
- United Nations Commission on International Trade Law
- U.S. Fed. Trade Commission
Difference between Principles and Standards?

Principles are overarching values

Standards are rules-based, can be measured
Why Principles as well as Standards?

- Functional in absence of standards, guiding while building standards
- Provides guidance for the gaps: across jurisdictions, with new technology,
- Can be responsive to/reflective of values & traditions in different jurisdictions, sectors, & cultures in ways standards may not
- Allows for flexible interpretation supporting innovation over time
Ethical Principles for ODR*
(shared values not rules)

- GPS for creating monitoring & accountability mechanisms for ethical ODR design & function
  - Shared values: provides consistency across jurisdictions
  - Responsive: flexible by technology, sector, jurisdiction, culture
  - Guidance: for creation of legislation, regulation, standards, certification

Ethical Principles for ODR

National Center for Technology and Dispute Resolution
http://odr.info/ethics-and-odr/
<table>
<thead>
<tr>
<th>Accessibility</th>
<th>Informed Participation</th>
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<td>Accountability</td>
<td>Innovation</td>
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<td>Competence</td>
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<td>Equality</td>
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<td>Honesty</td>
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Applying ODR Ethical Principles to Development of ODR Standards, Practice, Software & Systems Design
A challenge highlighted

Example of increased risk w/use of technology

Merely importing an ADR confidentiality standard into ODR => party risk

Requiring only at start parties agree to participate in process & maintain confidentiality, does not address increased risks
A challenge

Example

Clicking “yes” a party may assume only exchange of text/documents w/o being informed of risks:

- exposure to video conferencing which other party could tape
- exposure to tools including location features w/o consent
- required use of software without necessary skills can => party power imbalance
- potential loss of right to access court (parties outside EU)
- use of algorithms in ODR process impacting options & outcomes w/o consent
Application of ODR Ethical Principles to Challenge in ODR Practice

Example

- Identify ODR Ethical Principles related to the risk:
  - ie: Confidentiality, Informed Participation, Protection from Harm, Transparency

- Recognize and utilize interdependency between Principles

- Develop practice protocol that reduces party risk:
  - *ie: as each new form of technology is introduced, state any risk & ask parties’ consent for new technology usage*
Principle of Protection from Harm

ODR design and implementation seek to prevent and minimize harm and risk for those involved in dispute resolution processes, with particular attention to those most marginalized and with least access to justice.
Principle of Informed Participation

In the development and implementation of ODR systems and processes active effort is made to ensure

- (1) explicit disclosure to participants of all information about risks and benefits of the process,

- (2) the competency of participants to evaluate the information about participation in the process,

- (3) understanding by participants of the information,

- (4) whenever possible, the voluntary acceptance by the participants of the risks of participating; and whenever voluntary consent is not possible due to the mandatory nature of participation than that is made transparent.
Applying ODR Ethical Principles to Software Design

In the absence of ODR standards but with a commitment to informed ethical application of technology to dispute resolution:

1) An app development team is creating a protocol within the software designed based on the principles of Legal Obligation, Informed Participation & Security

2) An ODR start up is using the Accessibility Principle to structurally determine pathways to decision making in their platform that reflects different frameworks on decision making; responding to research on gender and culture
Principle of Accessibility

The design and implementation of efficient and effective processes provide for their usage not only to the broadest range and number of people but also by accounting for the reality of cultural differences within and between jurisdictions, differential access to resources and experiences of marginalization that can hinder access to dispute resolution and justice processes whether formal or informal.

ODR systems and processes effectively facilitate and do not limit the right to representation for parties in processes of dispute resolution.
Applicability of ODR Ethical Principles to Constructing Standards
Creating ODR Standards from Accessibility Principle

Identify target of the standard:

- dispute system design: software/product
- algorithmic/machine learning/AI
- human neutrals/ODR practitioner
Brainstorm some attributes for ODR Standards based on Principle of Accessibility

Remembering to account for:
  - efficient and effective processes
  - not only the broadest range and number of people
  - but also the reality of cultural differences
  - differential access to resources
  - marginalization can hinder access

When considering:
  • **Placement**: integrated into courts/merchant’s eco-system, separate track for ODR, listed on website?
  • **Visibility**: what ways & when users should be made aware of ODR system?
Brainstorm some attributes for ODR Standards based on Principle of Accessibility

• **Mandatory**: when/if ever & who is required to use it?
• **Multi-linguality**: when/if ever required?
• **Multi-media**: when/if ever required to offer more than text ie: sound, visuals, etc.?
• **Choice**: When/if ever required to offer choice of types of dispute resolution processes that include technology?
• **Costs of participation** ie: for public dispute resolution processes?
• **Length of time**: between submission of complaint, acknowledgment, assignment of case to algorithm &/or human for intervention, response, decision?
Ethical Principles for ODR
@ odr.info

Ethical Standards for ODR
@ icodr.org
IACCM Contracting Principles
Applying the Principles in Practice
What are the IACCM Contracting Principles?

- Fair, balanced, industry adopted, guidelines for contract clauses
- Created and reviewed by the IACCM community
- Used at the outset of negotiations
- Incorporated into templates, playbooks & platforms
- Adopted as a whole or used on a case by case basis
Purpose: Speed to Contract “S2C”

- Streamlines contract drafting and negotiations
- Shortens time to signature
- Addresses terms that frequently absorb significant time and resources
- Allows focus on commercial terms and deliverables
# Contracting Principles

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<td>Intellectual Property Rights and Indemnification for Third Party IP Claims</td>
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<td>Liability Caps and Exclusions from Liability</td>
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Example: Data Security & Privacy

Underlying each Principle are notions of:
- Transparency
- Security
- Legal Obligation
- Innovation
- Informed Participation
- Impartiality, Equality
- Empowerment,
- Confidentiality
The Contracting Principles

The IACC M encourages companies to incorporate them to the degree appropriate into their contract documents.

Organizations are always free to use the Principles on a case by case basis. They may agree with their counter-party to adopt them in their entirety or to choose elements that, in the context of their specific negotiations, will most effectively lead to reaching a final agreement. Local laws and practices and industry-specific standards may warrant deviations from individual Principles, but endorsement of the concepts embodied in the Principles still represent a sea change in how parties negotiate agreements.

Download the booklet or check them out online at Contract Standards.com

- Compliance With Laws
- Customer Audit of Suppliers
- Data Security and Privacy
Application of Principles into Online Contract Drafting & Negotiation Platforms:

Use the Principles to develop negotiation positions that parties can choose on the platform (e.g., Quislex theContract.App)

Make the Principles available as a reference on the platform during a negotiation (e.g., Simplifire)

Use the Principles to develop **standard contract clauses** (template language) (e.g., IACCM Contract Standards, https://www.iaccm.com/contract-standards/)

More detail see https://www.iaccm.com/resources/contracting-principles/
Challenges and Considerations When Applying Principles to the Online Platforms:

- Who determines when a Principle has been incorporated into a platform (or Standard Clause)?
- What does it mean when a Principle has been “incorporated”?
- Can the Principles be incorporated in part, or only in their entirety?
- What is the implication if the Principles are partly edited/modified; are they still incorporated?
- Should the platform expressly identify if they were incorporated?
- How should updates to the Principles be incorporated into the platforms (and standard clauses)?
Incorporating Principles into Platforms
Observations for the Way Forward:

• There is an unique entanglement in the organization, presentation and engagement with the substantive content and process in online drafting, negotiation and dispute resolution platforms. To resolve challenges and considerations outlined satisfactorily, there may be a need to have a set of ODR-like Ethical Principles to work alongside Contracting Principles to guide the develop of these platforms.

• Principles are not enveloped in Standards (even Standards based on Principles). But rather, Principles, with their varying scope and purpose, co-exist alongside Standards (and also applicable policies, laws & regulations) to inform a platform’s content (substance) and process.
IACCM – setting the Global Standard

Thank you!

Questions or comments?

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Designing and Regulating Online Dispute Resolution

Janet Martinez
October 2019
Dispute System Design

Analytic Framework*

- **Goals**
- Stakeholders
- Context and culture
- Processes and structure
- Resources
- Success and accountability

Possible Goals for System

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Tradeoffs and Tensions

• Interests and rights
• Equity and efficiency
• Voice and administrative feasibility
• Prevention and enforcement
Who Decides?

• Who Designs the System?
  • Single party
  • All parties
  • Third party

• Who Selects the Process for a Case?
  • One party
  • All parties
  • Third party
Regulating AI: Some issues to consider

• Other applications of AI, potentially subject to regulation
  • Medicine
  • Autonomous vehicles
  • Autonomous weapons

• Sources of regulation
  • Courts/case law – torts, contracts, 14th Amdt...
  • Agencies
  • Legislature
  • International Organizations
  • Companies
  • Civil Society
  • ...
Thank you!

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