

Technology and access to justice during the pandemic: online dispute resolution development in Brazil and Japan

ABSTRACT

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Online Dispute Resolution (ODR) covers conflicts settled over the Internet. As it does not rely on face-to-face interactions, ODR plays an important role during the COVID-19 pandemic and may be an important tool for enhancing access to justice. There is, however, scarce literature addressing Brazilian and Japanese cases, which are studied herein. This study aims to present a brief framework on the development of ODR, its use during the pandemic and main advantages and challenges observed. Methodological procedures were developed through a qualitative approach, based on bibliographic and documentary research on ODR. It was found out that ODR is not yet fully implemented, neither in Brazil nor in Japan. Brazil experiences cultural challenges regarding its prevailing culture of litigation, but used ODR throughout the pandemic, after a periodo of transition. Japan faces barriers as ODR costs and lack of enforcement power, while its citizens could not properly access justice during the pandemic.

KEYWORDS: Technology. Online Dispute Resolution (ODR). COVID-19. Brazil. Japan.

INTRODUCTION

The fourth industrial revolution is expected to create value through disruptive and innovative technology, reshaping cultural and social contexts and the way people interact (Koizumi, 2019). These changes favour a faster development of Online Dispute Resolution (ODR) methods, which constitutes an implementation of existing Alternative Dispute Resolution (ADR) methods through the internet and via modern forms of communication (Mania, 2015).

ADR methods have been developed since a century ago for dealing with conflicts in an opposite way courts have been dealing throughout their existence, that is to say, focusing on solving the case without escalating the conflict between the parties. ADR development was pushed forward by the United States judicial system, whose cases have increased both in number and complexity in this century. Costs, delays and lack of efficiency also played a major role in the cultural change for Alternative Dispute Resolution implementation (Singer, 2018). Although ADR is currently in development and fully implemented within some industries, other conflicts are better treated by using Online Dispute Resolution, because of their nature.

ODR was born in the late 90s, because of the rapidly evolving internet-based commerce (e-commerce) and cross-border transactions, since it is difficult to determine which court and law would be the best fit for the case. Because of the distance between the parties, which might be separated by thousands of miles, traditional out-of-court mechanisms cannot solve such conflicts (Wang, 2009).

The COVID-19 world pandemic also weighed high in the fast development of ODR in 2020, as courts needed to resume hearings without that imposing a health threat to the judiciary and all the parties involved in a lawsuit.

As a consequence, ODR methods have gained momentum and are becoming a mainstream solution for resolving specific types of conflicts that would not be fully resolved by any other method (Koulu, 2016). ODR, therefore, seems time and money-saving, since the parties can be in multiple countries because there is no need for physical meetings; flexible, because the parties can choose neutrals from all over the world; and secure, since there is traceability in the actions taken and the involvement of two additional parties: service providers and technology (Haloush & Malkawi, 2008; Latifah, Bajrektarevic, & Imanullah, 2019; Lodder, 2006; Wang, 2009).

On the verge of these changes, Japan has already established concrete plans to respond to the fourth industrial revolution with robot development and global issues solutions (Pang-ryong, 2018). But ODR mechanisms, in turn, seem poorly developed in the country since the 2000s, because of low government investment and cultural and political complexities (Habuka & Rule, 2017; Yun, Sze, Li, & Nagarajan, 2012). Cultural complexities are also found in Brazil and the country's difficulties in implementing ODR methods, once the judicial model of conflict resolution is often the preferred path for the Brazilian population to solve its disputes (Fernandes, Rule, Ono, & Cardoso, 2018).

Faced with this background in these two countries, this study aims to present a brief framework on the development of ODR from the 90s until this day, its main advantages and challenges to be overcome. Furthermore, it was sought to analyse the establishment of ODR in Brazil and Japan, comparing existing cases and

scenarios, as well as to answer whether there is potential for ODR implementation in both countries.

In order to achieve such purposes, methodological procedures were developed through a qualitative approach, based on bibliographic review on ADR and ODR, and documentary research on a Japanese newspaper.

The first part of this study is composed of the introduction above; the next section brings an Online Dispute Resolution overview, which encompasses historical remarks; the third and fourth sections deals with ODR development in Brazil and Japan; and the last part of this paper concludes what has been discovered by the authors.

ONLINE DISPUTE RESOLUTION OVERVIEW

Until 1991, access to Internet was restricted to the military, governmental and academic sectors, with relatively few users (Wang, 2009). However, according to Ethan Katsh and Leah Wing (2006), there was two major shifts during the early 1990s that changed that scenario and led people to recognize the need for more comprehensive systems of dispute resolution: first, university's networks became accessible to students with personal computer skills, and second, the removal by the National Science Foundation of long standing restrictions on commercial use of the Internet. With a larger and more global user base, the range of online interactions – as well as disputes – began to grow.

Karolina Mania (2015) presents that there have been four phases in ODR development, which progressed at a fast pace. The first phase ran from 1990 to 1996 and was basically an amateur stage in which electronic solutions were beginning to be tested. ODR developed dynamically in the next period (1997-1998), when the first commercial websites that provided services in this area were established. From 1999 to 2000, given the favourable setting for economic development, especially for IT services, ODR entered a “business” phase, in which several companies initiated projects based on electronic mechanisms for dispute resolution. Finally, the year 2001 marked the beginning of the institutional phase, during which ODR techniques were introduced in courts and administration authorities.

It is interesting to note that many of the ODR web portals established at the end of the 1990s were replaced by new competitive platforms, that use modern technology and improved services in comparison to the outdated solutions of the first websites (Mania, 2015). ODR is progressively seen as an important tool for economic development and progression in emerging economies (Schmitz, 2018). Although still in its infancy, there is no doubt that there is an ongoing and growing need for ODR, as there is an increasing number of disputes stemming from online activities. (Katsh & Wing, 2006).

As mentioned previously, ODR constitutes an implementation of existing ADR methods though the internet and via modern forms of communication (Mania, 2015). The major factor that differentiates ODR from its face-to-face forms is that a third entity – technology – inevitably plays a pivotal role in the dispute settlement process (Ojiako, Chipulu, Marshall, & Williams, 2017). Faye F. Wang (2009, p. 40) explains the characteristics of the main online forms of ADR, as presented in Table 1.

Table 1 – Main forms of ODR	
E-negotiation	Automated negotiation: the parties successively submit to a computer a monetary figure as a settlement proposal. The computer then compares the offer and the demand and reaches a settlement for their arithmetic mean.
	Assisted negotiation: the parties communicate with one another over the internet, using for instance e-mails, web-based communication tools or video conferences.
E-mediation	The online form of traditional mediation. A third neutral person with no decision power tries convincing the parties to reach an agreement (the only difference with offline mediation is that the third neutral person and the parties always communicate via the internet).
E-arbitration	Similar to traditional arbitration, in the sense that a third party chosen by the parties, or nominated by the institution chosen by the parties, renders a decision on the case after having heard the relevant arguments and seen the appropriate evidence.

Source: Wang (2009, p. 40).

There are different forms of conducting ODR, allowing varying levels of human intervention so to ensure disputants' participation in the process and outcome acceptance. For example, there are fully automated dispute resolution websites, some of them using software algorithms that arrive at decisions that are communicated to the parties, with little or no human intervention. In other instances, human assessors may determine final outcomes, a costlier option that can be preferable where familiarity with ODR technology is limited (Ojiako, Chipulu, Mashall, & Williams, 2017). ODR may also be complemented with Information and Communications Technology (ICT) in different phases of the processes, including initial filing, the neutral appointment, the evidentiary processes, oral hearings, discussions, and even the rendering of binding decisions (Cortés, 2011). Mania (2015) highlight that ODR systems may also be distinguished according to the forms of communication used, which can be synchronous, through real time communication via Messenger or Skype, or asynchronous, via e-mail, for example. Table 2 presents some comparisons between different forms of ODR systems.

Table 2 – Comparison of ODR Methods					
Main ODR Methods	Negotiation	Mediation	Arbitration	Med-Arb	Cybercourt
Type of Process	Settlement	Settlement	Adjudicatory	Settlement and adjudicatory	Adjudicatory
Main online technologies	E-mail; software; bulletin; boards and chat rooms	E-mail; list services; bulletin; boards and chat rooms	E-mail; video conferencing; streaming video over web	E-mail; list services; bulletin; boards; chat rooms; video conferencing streaming over web	Interactive forms and any methods used in med-arb

Table 2 – Comparison of ODR Methods (continuation)					
Role of third party neutral	None	Mediator	Arbitrator	Mediator and arbitrator	Judge and juries
Nature of party participation	Voluntary	Voluntary or by agreement	Voluntary or by agreement	Voluntary or by agreement	By agreement only
Use of witnesses and documentary evidence	Not generally used	Not generally used	Allowed, but may be limited	Allowed, but may be limited	Generally used
Privacy of proceedings	Confidential	Confidential, unless otherwise agreed to by parties	Confidential, unless otherwise agreed to by parties	Confidential, unless otherwise agreed to by parties	Publicity (open hearing)
Nature of outcomes	Non-binding, unless parties enter into settlement contract	Non-binding, unless parties enter into settlement contract	May be non-binding or binding with limited grounds for appeal, depending on party agreement	May be non-binding or binding with limited grounds for appeal, depending on party agreement	Binding result or by party agreement
Enforcement of outcomes	By contract	By contract	Valid arbitration awards enforceable in court	By contract for mediation; valid arbitration awards enforcement in court	Judicial awards enforcement in court

Source: Wang (2009, p. 46-47).

There are notable advantages of ODR implementation. Among them, there is the comparatively cheaper and faster alternative to court-based litigation, as disputants are generally not required to travel and due to avoidance of certain legal processes such as discovery (Ojiako, Chipulu, Marshall, & Williams, 2017). ODR is not tied to geography, time zones or jurisdiction, being a perfect fit for issues that involve parties scattered around the globe, such as international e-commerce and global markets (Fernandes, Rule, Ono, & Cardoso, 2018; Schmitz, 2018). As another positive aspect, ODR incorporates some ADR virtues, such as parties' control and participation throughout the whole decision process (Lima &

Feitosa, 2016). It is also notable how some aspects of the ODR culture tend to infiltrate into the standard judicial system, thus providing technology advance and new use for ICTs (Lima & Feitosa, 2016).

On the other hand, there are also challenges for ODR implementation, such as how to build trust and security requirements, including standards for authenticity, privacy and confidentiality. As ODR transcends physical frontiers, another challenge is the lack of consensus regarding procedural due process, regulation and viable means of enforcement of outcomes, as well as the lack of high-end tools to be used, relying mostly on less modern tools, such as forums and e-mails (Mania, 2015). The asynchronous communication between the parties, which might seem another positive aspect (Lima & Feitosa, 2016) may as well be an issue, since it is easier to build trust through face-to-face contact in regular ADR mechanisms (Mania, 2015). There are also cultural and generational challenges, which highlight the importance of creating a general public sense of trust and ease with the use of online methods of dispute resolution (Aresty, 2006; Ojiako, Chipulu, Marshall, & Williams, 2017).

ODR needs development and better implementation through research and ICTs, even though some scholars state that its advantages already offsets its disadvantages (Lima & Feitosa, 2016). Anyway, it is already clear that ODR has grown out of ADR ordinary methods, even using its own and modern type of language that distinguishes the former from the latter – although it is not yet an official terminology acknowledged by international agreements (Latifah, Bajrektarevic, & Imanullah, 2019).

ODR AND THE COVID-19 WORLD PANDEMIC

The Sars-Cov-2 (commonly known as COVID-19) world pandemic had its first case back in December 12, 2019 in Wuhan, China. The patient had, among other flu-like symptoms, acute breath shortage. In a matter of a month, there were thousands of cases reported the country, as well as the first casualties due to COVID-19 (Taylor, 2020).

The virus spread vastly to the rest of the world and the World Health Organization (WHO) classified the disease a pandemic of worldwide proportions (World Health Organization, 2020). In March, of European and Asian countries had already been hit by COVID-19 high rates of contamination, hence imposing lockdown and social distancing measures to stop the virus from spreading . In April, the Americas were already imposing such measures (Pereira & Pessoa, 2020). The COVID-19 world death toll kept escalating and in September 2020 it reached one million casualties (“Coronavirus: Global Covid-19 death toll...”, 2020).

After a period of controlled casualties during the Summer in the Northern hemisphere, the numbers picked again, as the second wave of contamination hit, imposing harsher measures of social distancing and shutdown of venues (Pollet, 2020), which included public services and offices, such as judicial courts, centres of conflict resolution and other means of accessing justice.

In the context of the COVID-19 world pandemic, ODR seems to have been a crucial process through which the parties would still be capable of solving their conflicts and accessing justice as they would be able to before. However, the world was initially caught off guard, causing great delay of lawsuits and hearings due to

the pandemic, hampering access to justice altogether (McIntyre, Olijnyk, & Pender, 2020).

But the courts and extrajudicial centers of conflict resolution needed to adapt themselves as the virus kept its spread rates high. Courts in all the world have been slowly developing digital access, but scholars emphasize how rapidly they adapted themselves when faced with the challenges imposed by the need for social distancing, with remote and online hearings (Shang, Guo, & Mak, 2020).

COVID-19 caused ODR to expand its scope, in order to encompass matters not yet thought of, so they could still be solved notwithstanding the ongoing pandemic scenario. It also impacted in competition, as private owned informational systems were developed and commercialized, improving the existing tools to be used in ODR. Accordingly, for-profit services also grown during the pandemic, and, ultimately, the push for ODR regulation became stronger (Shang, Guo, & Mak, 2020).

Sourdin, Li and McNamara (2020) state that ODR methodology was used in different degrees throughout Europe, Asia, Oceania and North America. The authors highlight their study on methods used during the pandemic in the United States, India, the United Arab Emirates, Australia, New Zealand, Uganda, South Africa, the United Kingdom, Hungary, Italy, Ireland, Canada and China, even reporting the use of disruptive technologies in Beijing Internet Court (Sourdin, Li, & McNamara, 2020).

Shope (2020) reports that decrees and orders were enacted to emphasize the need to resume the judiciary and the conflict resolution hearings and sessions during the pandemic without undue delay, as a right of the parties to access justice. However, this can be seen as a double-edged order, as in diverse parties of the world, people not yet are able to afford or access the Internet. Because of that, McIntyre, Olijnyk and Pender's (2020) remarks on access to justice, technological limitations and equality seem much appreciated and needed.

ODR IN BRAZIL

The Latin-American juridical tradition has established its pillars in an evident tendency to solve its disputes through judicialization, relegating to the State the power to enforce law and resolve its conflicts. Nevertheless, the litigation hegemony has not prevented ADRs – and ODRs – from spreading all over the continent (Amorim, 2017). María Mercedes Albornoz and Nuría González Martín (2012) observe that ODR is still in an embryonic state of evolution in Latin-America, but it has already proven its flexibility and efficiency within its regional context, offering an affordable and speedy alternative to the official justice system, besides contributing to the development of emerging economies by boosting e-commerce and, hence, the general economy. Thus, ODR development is highly beneficial for the region, especially for countries that are engaged in cyberspace activities, such as Brazil.

Traditionally, Brazil has always faced reluctance to ADR implementation, a scenario that has been changing over the last years, with a significative change on how Brazilian law professionals conceive ADR (Amorim, 2017). Some milestones on the cultural shift towards ADR are the National Justice Council (CNJ) Resolution 125 (2010), which provided for a national judicial policy of adequate treatment of

conflicts by means appropriate to their nature and peculiarity, and the new Code of Civil Procedure (Law No. 13105, 2015), which defined the promotion, whenever possible, of consensual conflict settlement and the encouragement of non-contentious methods such as mediation and conciliation. It is also important to highlight the Mediation Law (Law No. 13140, 2015), which designs important guidelines for the legal and practical application of these mechanisms. Together, these documents established a legal microsystem for ADR utilization in Brazil, including its online forms and remembering the literature distinction between mediation and conciliation (Yi, 2009).

Despite the lack of specific ODR regulation in Brazil, the existing legal bills do enable its application. For example, as stated in Article 334 of the Code of Civil Procedure, “the conciliatory or mediation audience may be realized electronically in the terms of the Law” (Law No. 13105, 2015). Similarly, Article 46 of the Mediation Law affirms that: “Mediation may be realized by internet or by any other means of communication that permits distance transactions, since the parties agree” (Law No. 13140, 2015). Moreover, the modifications brought by 2016 2nd Amendment to the CNJ’s Resolution 125 have also expressly made provisions for the electronic usage of alternative methods of conflict resolution. These normative changes sought to optimize dispute settlement in Brazil and promote the development of ODR in the country, which moved from the traditional offline means, typical of the analogical era, to the digital scenario characteristic of Revolution 4.0 (Rosa & Spaler, 2018).

The first Brazilian ODR platforms started being developed during the 2000s, taking advantage of the benefits offered by the new information and communication technologies. Since then, the Brazilian legal market has been experiencing an effervescence of companies offering ODR techniques. Camila da Rosa and Mayara Guibor Spaler (2018) mention that private ODR companies are hosted by the Brazilian Association of Lawtechs and Legaltechs (AB2L), launched in 2017 and which already has 17 associated legal startups that call themselves service providers in this segment, an exponential growth in a short time which denotes the disruptive force of the irrepressible technological march.

Ricardo Vieira de Carvalho Fernandes, Colin Rule, Taynara Tiemi Ono and Gabriel Estevam Botelho Cardoso (2018) state that the Brazilian ODR mechanisms are still in the initial stages, but rapidly advancing. They also note that the vast majority of them are focused primarily on the disputes involving consumption. This comes as no surprise considering the increasing volume of e-commerce and cross-border transactions, from which may arise disputes that transcend geographical barriers and require the development of new mechanisms able to handle those issues, such as e-mediation and e-negotiation (Fernandes, Rule, Ono, & Cardoso, 2018).

With that said, it is essential to present some important experiences that have been developed, such as “Consumidor.gov.br”, a platform launched by the Brazilian government in 2014 with the purpose of promoting alternative resolution of consumer disputes through the Internet, by enabling direct dialogue between consumers and businesses. The platform’s advantage over other consumer ODR systems available in Brazil comes from the fact that it is a State initiative, hence available only to companies that voluntarily join the program and sign a commitment term in which they are required to provide a solution within a maximum of ten days. The platform has a reasonable rate of disputes solved, and

provides statistical indicators on its the activities, with information and graphs on the average company response time, consumer satisfaction and complaint resolution index (Amorim, 2017).

The evolution of ODR in Brazil, thus, is a direct result of both legislation promoting its usage and external influences, such as the expansion of e-commerce and cross-border transactions (Fernandes, Rule, Ono, & Cardoso, 2018). Nevertheless, the prevailing “litigation culture” represents a major obstacle to the expansion of ODR, once the judicial model of conflict resolution is still the preferred path for the Brazilian population to solve its disputes (Watanabe, 2005).

Fernandes, Rule, Ono and Cardoso (2018) highlight other possible barriers for ODR in Brazil, such as professional e-mediators training, the lack of mechanisms to ensure adherence to the terms accorded by the parties, the implementation costs of machine learning processes, the deficiency on common data standards in the Brazilian legal environment, scarce qualified developers able to build ODR tools that fit exact specifications, and the absence in the Brazilian market of necessary hardware infrastructure to support ODR platforms.

Despite those challenges, it is undeniable that Brazil presents a quite promising environment for ODR development and exploration, principally regarding the huge Brazilian market and the significant support from the judiciary in promoting ODR as an alternative to the courts. Moreover, Brazil is a continental country, with remarkable income and infrastructure contrasts across its regions, and ODR may provide online case filing and communication with counterparties to those who are physically separated by great distances. In the short and medium term, ODR services may significantly diminish the volume and the costs of litigation, besides delivering fast and fair resolutions to Brazilian citizens while expanding access to justice (Fernandes, Rule, Ono, & Cardoso, 2018). Therefore, the social and economic benefits coming from ODR deployment may boost enthusiasm for its implementation.

During the COVID-19 pandemic, courts throughout the country closed their doors without prior notice or a given date to resume their activities, which systematically hampered access to justice in the country. However, courts have already adapted themselves to the digital arena and hearings were taking place via videoconference. Brazilian lawsuits are digital since 2012, which also facilitated the implementation of the system of virtual hearings (Tomaz, 2020).

Remembering McIntyre, Olijnyk and Pender’s remarks on access to justice, technological limitations and equality (2020), is however crucial, as 28% of Brazilian households are not yet connected to the Internet, as data from 2019 shows (Brigatto, 2020). Because of that, public measures to ensure proper access to justice should be taken.

It is also relevant to report the November 2020 incident on the Brazilian Superior Court (STJ) digital system. An unknown hacker broke into the Court’s system in the beginning of that month, stealing all data from lawsuits filed in the Court, as well as e-mails and data from civil servants and justices (Shalders, 2020). This incident also reinforces the importance of investing in data protection softwares and departments to deal with cyber security when treating sensitive information, as those dealt with by courts and extrajudicial means of online dispute resolution, as supported by Mania (2015).

ODR IN JAPAN

If on the one hand Brazilian ODR initiatives have been developed with consistent growth despite the litigation culture history, ODR in Japan, on the other hand, goes on an opposite way. Japan has been a worldly known case of low litigation rates (Cole, 2007; Feldman, 2009; Nottage & Weeramantry, 2012; Ramseyer & Nakazato, 1989), a leading e-commerce region and one of the unequivocal world leaders in ICTs (OECD, 2006, as cited in Wang, 2009; Yun, Sze, Li, & Nagarajan, 2012), ingredients that might seem proper for ODR growth. Nevertheless, this scenario did not give birth to solid ODR practices and its use in Japan lagged behind initiatives in other geographies.

According to Hiroki Habuka and Colin Rule (2017), ODR has not yet gotten much adherence in Japan. Zhao Yun, Timothy Sze, Tommy Li and Chittu Nagarajan (2012) present that ODR is still in experimental or start-up phase in Japan, being considered by most of users or service providers as an online consultation tool rather than a reliable dispute resolution mechanism.

Japan's first discussions on ODR mechanisms started in the early 2000s, moment when Japan took the leadership in experimenting these methods in two pilots. The first initiative was the Electronic Commerce Promotion Council of Japan (ECOM) Online Shopping Consultation Centre, a government-commissioned project launched in 2003. It consisted in a free demonstration project that provided online ADR, offered advice for consumers, promoted negotiation between parties and conducted remote mediation. Even though the ECOM OSCC's online advice service was positively evaluated by nearly 80% of consumers, it not had the authority to compel the respondent to participate in online negotiation or mediation. Moreover, each case was too costly as at least three expert mediators handled each dispute. It was then discontinued in 2006, but the experience provided by these online consultations taught valuable lessons for designing ODR processes that fit well within Japanese e-commerce marketplace (Habuka & Rule, 2017).

The second pilot was led by a non-profit organization named Shirogane-Cyberpool in 2003. During a two-month period, the SOMPro: Shirogane-Cyberpool Online Mediation Project conducted online auction disputes. Once it received a complaint, SOMPro contacted the counterparty to confirm its willingness to join a negotiation, which was supported by volunteer lawyers. It is interesting to highlight one unique aspect of this project, which was its coordination with Yahoo! Auctions, the largest auction platform in Japan: as part of the settlement agreement, the parties were able to erase any review posted on the site, an arrangement that provided strong incentives for sellers to participate in the negotiation. During the period the project was ran, 36 cases were filed and 6 reached a resolution. However, the final report of SOMPro pilot project stated that the main challenges for this type of ODR experiment were the costs, financing, automation and data security (Habuka & Rule, 2017).

These pilots, therefore, did not succeed because of a high cost per case and lack of enforcement power. As explained by Habuka and Rule (2017), even though the online process was less expensive than face-to-face ADR, the costs for the human consultants, mediators, advisors who actually gave advice or handled each case was still too high. Also, the lack of enforcement often made the seller not to

commit to the negotiation, being the final numbers of attendance on both pilots lower than 20% (Habuka & Rule, 2017).

Because of the bad outcome of the aforementioned pilots, an international survey conducted in 2005 detected that Japan was left behind in the deployment of ODR (Tyler, 2005 as cited in Habuka & Rule, 2017), a position that has not yet been overcome by the country after two decades, despite the relevance of access to justice in designing trustful relations between customers and sellers and public and private efforts.

Notwithstanding the first pilots, Yun, Sze, Li and Nagarajan (2012) also address a successful Japanese model that uses online application and case filing. Private organizations provide full ODR services, such the EC Network, one of the most popular providers in Japan with expertise in terms of handling complaints related to cross-border e-commerce, resolving small claim disputes via e-mails (Yun, Sze, Li, & Nagarajan, 2012). One of the several systems is operated by Japan's own Ministry of Justice. It is also important to mention that two other Japanese ministries, the Ministry of Public Management, Home Affairs, Post and Telecommunications and the Ministry of Economy, Trade and Industry, play relevant roles in designing online transactions of any kind initiatives, which confirms the government's will to cooperate to the ODR agenda domestically (Habuka & Rule, 2017).

Furthermore, in 2011 the consumer agency in Japan created the International Consumers Advisory Network ("ICA-Net"), a platform that provides cross-border ODR in southern and eastern Asia, allowing parties to communicate with each other through chat rooms, to share documents and participate in discussions in a secure online environment (Schmitz, 2018). On 2015, the Japanese Consumer Network published a report on ODR usage for cross-border e-commerce transactions, urging the Japanese government to implement a working group for ODR prototype development and its application in practice (Habuka & Rule, 2017). Recently, the Japanese government has announced that it will set up an online system to resolve civil disputes such as divorces and traffic accidents, introducing next-generation legal services that utilize artificial intelligence (Nikkei Newspaper, 2019).

Although the potential of ODRs to solve the problems experienced in Japan was clear even before Japan's own pilots were developed, the proper discussions with a number of stakeholders is still about to begin in earnest (Habuka & Rule, 2017). The described Japanese background and reiterated lack of implementation of ODR mechanisms therefore hinders Japan's own capability of addressing conflicts, since court procedures are too lengthy and expensive, public ADR initiatives are non-binding and usually ineffective and the cultural imposed claim for harmony (Haley & Takenaka, 2014) makes citizens choose not to litigate. All these factors, in summary, creates unsatisfactory and unjust settlements in nearly half of Japanese e-commerce cases (Habuka & Rule, 2017).

As mentioned above, there are still several challenges and uncertainties that difficult ODR implementation in Japan, including cultural and political complexities, besides law, standards and language barriers. Nevertheless, the country is undoubtedly on the verge of a new era for ODR, especially as international e-commerce grows and Japan becomes a world leader in ICTs (Yun, Sze, Li, & Nagarajan, 2012). By making use of modern innovations such as automation and

algorithmic resolutions and by encouraging marketplace providers to invest in ODR so to make their business more efficient and profitable, ODR has a huge potential to become a central part of Japanese infrastructure and to ensure better access to justice in the near future (Habuka & Rule, 2017).

With regard to COVID-19, on the other hand, Japan seems to have had a rapid response to the virus spread, curbing the infection rate rapidly (Rich & Ueno, 2020). Regarding access to justice, however, the country seems to struggle with managing court schedules during the pandemic. Japanese hearings were first delayed by four to five months when the pandemic first broke out (Japan, 2020). Then, hearings resumed using a system the country has been testing since February, in a non-related to COVID-19 initiative. The system has not been mastered as of yet, so not all judges and courts are able to use it, as sources report difficulties when holding hearings online. Another problem is that the system is not used, for example, in family courts, so cases related to domestic violence are not being conducted online, thus awaiting judgement when courts resume its operations (Osumi, 2020). Japan's plans to fully implement the online system are set to 2021, which seems rather worrying, as number of domestic violence against women peaked during the pandemic (Telles, Valença, Barros, & da Silva, 2020).

CLOSING REMARKS

This study sought to present a brief framework on the development of ODR, its main advantages and challenges to be overcome, the specific situation imposed by the COVID-19 world pandemic when it comes to ODR, an analysis on the establishment of ODR in Brazil and Japan and to answer whether there is potential for ODR implementation in both countries. Undoubtedly, cross-border transactions and the evolving e-commerce hinders the use of traditional out-of-court mechanisms, giving rise to ODR methods, which are becoming a mainstream solution for resolving specific types of conflicts that would not be fully resolved by any other method, especially within internet-based disputes.

Despite of the Japanese leadership in ICTs and e-commerce, its access to justice, in turn, seem poorly developed, because of the lack of implementation of ODR mechanisms, court procedures are too lengthy and expensive, public ADR initiatives are non-binding and usually ineffective and the cultural imposed claim for harmony makes citizens choose not to litigate. Notwithstanding the current scenario, the Japanese government has successfully implemented a model that uses online application and case filing, the consumer agency created a platform for providing cross-border ODR in southern and eastern Asia and private organizations are providing full ODR services. The Ministry of Public Management, Home Affairs, Post and Telecommunications and the Ministry of Economy, Trade and Industry, are also playing relevant roles in designing online transactions, which confirms the government's will to cooperate to the ODR agenda domestically. Because of that, ODR has a huge potential to become a central part of Japanese infrastructure and to ensure better access to justice in the near future.

If regard to the COVID-19 pandemic context, the results corroborate the literature findings, as Japan seems to be unable to tackle the challenging environment imposed by the pandemic: its courts are more delayed than before, its online systems only benefits certain courts and judges, and important issues

that gained momentum during the pandemic, such as domestic violence, are not being addressed, leaving victims without proper access to justice.

Cultural complexities are also found in Brazil and the country's difficulties in implementing ODR methods, once Brazilians have an evident tendency to solve their disputes through judicialization, relegating to the State the power to enforce law and resolve conflicts. Brazil's first Laws that encompasses ADR dates only to 2010 and 2015, hence the embryonic state of Online Dispute Resolution methods domestically. The evolution of ODR in Brazil, thus, is a direct result of both legislation promoting its usage and external influences, such as the expansion of e-commerce. Nevertheless, the prevailing litigation culture represents a major obstacle to the expansion of ODR, followed by the lack of mechanisms to ensure adherence to the terms accorded by the parties, the implementation costs of machine learning processes, the deficiency on common data standards in the Brazilian legal environment, scarce qualified developers able to build ODR tools that fit exact specifications and the absence in the Brazilian market of necessary hardware infrastructure to support ODR platforms.

However, ODR has already proven its flexibility and efficiency within regional contexts, such as the Brazilian government platform "consumidor.gov.br", offering an affordable and speedy alternative to the official justice system, besides contributing to the development of emerging economies by boosting e-commerce and, hence, the general economy. In the short and medium term, ODR services may significantly diminish the volume and the costs of litigation, besides delivering fast and fair resolutions to Brazilian citizens while expanding access to justice. Therefore, the social and economic benefits coming from ODR deployment may boost enthusiasm for its implementation.

During the COVID-19 pandemic, Brazilian courts experienced delays, but the activities were resumed through online hearings after the due period of adaptation. It is important to remember that Brazilian lawsuits are digital since 2012, which may have helped in this moment. It is important, however, that the country improve its cyber security measures, as in November 2020 its Superior Court was attacked by a hacker, that broke into the court system as stole all data, including access to e-mails of justices and civil servants.

As summarized, ODR experiences in both countries are yet to be fully implemented through government support and encouragement. Both countries rely on ODR to enhance the overall access to justice, hindered by costs and efficiency, followed by the litigation culture in Brazil, which floods the judicial system, and by the cultural imposed harmony in Japan, which makes citizens decide not to litigate. Furthermore, the countries present a great potential for ODR mechanisms, especially Japan, which is one of the world e-commerce and ICT leaders. However, the enforcement of ODR agreements also seems a common challenge, as well as the costs for implementation of such platforms, not only during the pandemic but also in a post-pandemic environment.

Tecnologia e acesso à justiça em tempos de pandemia: desenvolvimento de *online dispute resolution* no Brasil e no Japão

RESUMO

Online Dispute Resolution (ODR) cobre conflitos resolvidos por meio da Internet. Como não depende de interações face-a-face, ODR desempenha um papel importante durante a pandemia de COVID-19 e pode ser uma ferramenta importante para melhorar o acesso à justiça. No entanto, existe escassa literatura abordando os casos brasileiros e japoneses sobre o tema, sendo eles explorados por este artigo. Esse estudo tem como objetivo, então, apresentar um breve panorama sobre o desenvolvimento da ODR, seu uso durante a pandemia e principais vantagens e desafios observados. Os procedimentos metodológicos foram desenvolvidos por meio de uma abordagem qualitativa, com base em pesquisa bibliográfica e documental sobre ODR. Constatou-se que a ODR ainda não está totalmente estabelecida, nem no Brasil, nem no Japão. Brasil enfrenta desafios culturais em relação à cultura de litígio, todavia, usando ODR ao longo da pandemia, após período de adaptação. Japão enfrenta barreiras com custos operacionais e falta de executividade da ODR no país, enquanto, durante a pandemia, seus cidadãos não conseguiam acessar adequadamente a justiça.

PALAVRAS-CHAVE: Tecnologia. *Online Dispute Resolution* (ODR). COVID-19. Brasil. Japão.

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