BOOK REVIEW

Daniel Rainey, Ethan Katsh, and Mohamed S. Abdel Wahab (eds.), *Online Dispute Resolution: Theory and Practice*, 2nd ed., The Hague: Eleven, 2021

In lieu of a traditional book review, the following is a transcript of an online discussion among the editors of *ODR Theory and Practice*, introducing the book and discussing some of the major issues raised by the authors. Leah Wing, co-director of the National Center for Technology and Dispute Resolution and faculty in the Legal Studies Program at the University of Massachusetts Amherst, moderated the discussion with Daniel Rainey, Ethan Katsh and Mohamed S. Abdel Wahab.

Leah Wing
Today we are going to be talking with the editors of the brand new treatise on online dispute resolution: *Online Dispute Resolution: Theory and Practice*, 2nd Edition. Ethan Katsh is the director of the National Center for Technology and Dispute Resolution; Daniel Rainey is a Fellow of the Center and a principal in Holistic Solutions, Inc., and Mohamed Abdel Wahab is also a Fellow of the Center and founding partner of Zulficar and Partners in Cairo, Egypt.

Mohamed S. Abdel Wahab
Thank you very much, Leah. It's a great pleasure to join you today with my esteemed colleagues with whom I had the pleasure of co-editing the first edition of the book. The idea for the first edition of the book was basically inspired by Ethan Katsh and Janet Rifkin's book, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*. When I started reading and researching the field, there were actually two books out there - Ethan and Janet's book and Colin Rule's book on online dispute resolution for business and commerce. I had a great interest in the field at the time, but I thought perhaps a more inclusive approach, tracking the trajectory of ODR and perhaps shedding light on more aspects of the field in 2010 and onwards to the future would be in order. So I contacted Ethan and Dan and said I have this idea for a book, could you be the co-editors? It took a couple of years to get the book together, with about twenty-four chapters starting with the history, focusing on the present, and looking to the future. What we saw as the future then turned out to be the present now - and now the future is even brighter than we thought it would be.

We also tackled different aspects that we thought were interesting in terms of theory, system design, artificial intelligence (AI), courts, consumers, e-commerce as

well as in relation to mediation, negotiation and arbitration. The second part of the book deals with a continental perspective addressing Africa, Asia, Australia, Europe, Latin America and North America. So basically at the time we wanted that book to serve as the leading treatise about ODR for students, universities, and practitioners that would be the go-to book in relation to ODR. The other aspect we thought of was to be sure the field gained the recognition and visibility that now it has deservedly gained. Indeed it also helped with establishing the UNCITRAL Working Group III that released certain ODR technical notes and guidelines. So pretty much at the time the book was intended to give people an idea about what the cost in terms of ODR is, the present as we saw it, and the future trajectory of ODR. And then, ten years later, we thought it's timely to update the book.

Leah Wing
When you worked on the book and you envisioned the future, did the future arrive more quickly than you anticipated or more slowly than you anticipated?

Mohamed S. Abdel Wahab
I must say, and I'll be very candid, the future arrived faster than anticipated – the reason is that COVID has accelerated the use of technology and so the adoption of ODR. I recall at the time that we wanted arbitration to benefit from the ODR revolution, leading figures in the world of international arbitration thought that ODR was a luxury and perhaps was for low-value high-volume B2C or C2C online disputes but not really for offline disputes.

The thought at the time was that arbitrations, all the way across the globe, will not change anytime soon. Then COVID pushed everyone out of their comfort zone, and we were forced to adopt technology even in those societies and regions that were not prepared – then everyone began to use technology so I think that it has definitely accelerated the future as compared to what I thought would be the case at the time.

Daniel Rainey
The basic question that we're faced with has changed. Back in 2010-2012, the question was, 'is ODR possible?', and most of our colleagues were basically saying it was not possible – that it wouldn't work. That's not the question or the attitude anymore. After the COVID big bang for technology, the question shifted rather to 'it will work, so how do we make it work well?'

Leah Wing
Ethan, if you look back between 2011 and today, what has been the pattern of change? Where's the growth and where are things stymied? How would you characterize where we are now?

Ethan Katsh
I think Mohamed's point about tracking the trajectory is an interesting frame for all this. COVID came along 2 years ago or year-and-a-half ago, and the first book was written in 2010 or 2011, so we had a period of time before it was an influence.

Over time several things changed, but I think one of the things that changed was people stopped asking me about the possibility of resolving disputes without being face to face. I used to get that question all the time, mostly from the ADR community - how can you resolve disputes if you're not face to face? Frankly, I don't get that question anymore.

We didn't have any trouble finding authors. I think that even before COVID ODR became part of the dispute resolution landscape there were changes in how we practice and about how we think about things, but I think the other big change was the nature of disputes and disputing as opposed to dispute resolution. Over the last 10 years, it was not the dispute resolution part of it alone that changed – it was rather the disputing part of it because the last 10 years have seen an increasing number of disputes.

A most obvious example, currently, I think at least in the United States is all the issues involving vaccines. I think a year or so ago the people who were developing vaccines and the politicians who were promoting them assumed everything would go smoothly. Obviously, it hasn't, and I think there's a lesson that with every new technology comes along a fair number of disputes that are hard to anticipate. So the need for ODR is not simply that doors of the courthouse closed, although that's certainly a part of it, but there are needs everywhere outside the courthouse and inside the courthouse and on the street. Every time some new facet of technology is discovered, it brings with it a set of disputes. My own interest lately has been in healthcare, and healthcare has become the battleground over not only intellectual property but disputes over the use of data and the value of data. Inherent in most of the developments involved in healthcare is somebody perceiving that there's a way to provide value, and every little piece of data on the screen or off the screen is a bit of potential value.

My general point is that a lot of the changes being generated are more about what's happening in the background.

Leah Wing
I was struck by your point about how there seems to be a shift today towards where people stopped asking 'how could you handle disputes without being face to face?' One thought that came to my mind was I wonder how much that coincided with the ability to do videoconferencing where it's a different kind of face to face but there still is an ability to do face to face. Connected to that is the fact that you, early on in work that you were doing especially with Orna Rabinovich-Einy, talked about the blurring of boundaries that technology as a disruptor has created in so many disciplines, not just our discipline. With those blurring of boundaries, fields have had to adjust and see how to respond. I guess I'm just wondering if you could speak a little bit to that.

Ethan Katsh
Well, I think the part about being asked about non-face-to-face resolution predated COVID, but you were absolutely right that pre-COVID online conferencing really was a negligible activity. I think that if you look, Zoom has a history of seven or eight years - obviously its acceptance changed radically a year or two ago, but I

think the idea that ODR existed and was recognized in the dispute resolution field goes back a little bit more than that but not as far back as 2010 and the first edition, but certainly when we were thinking about this edition. As far as the other part about boundaries - that's what technology does. It changes boundaries and things that have been difficult in the past now become possible. The present and future point I would make is that the shifting of those boundaries, however positive, also brings a fair number of negatives, and the demand for ODR can only accelerate.

Leah Wing
Dan, to bring you into the conversation, I guess I would ask how these changes that you all have talked about, and others that you want to bring forward, are reflected in the book in particular. And in general how do you see that things have changed?

Daniel Rainey
If you look at the table of contents, this edition of the book isn't broken into sections, but if you pay attention to the topic areas that are included in the book I think the chapters group basically into four different areas or four different sets of questions: Background and Context, Practice, Innovation and Geography.

What you find in the Background and Context chapters is Ethan's updated history chapter from the first edition of the book that looks back to the mid-1990s and the first use of the term ODR. We've now developed a couple of decades of the 'history' of ODR - the chapter gives good context for where we are now.

There is a chapter on ethics, and this has been a topic that has been more and more at the forefront of the last two to three years with the IMI, ICODR, the National Center, the ABA and others. All of these organizations have been working to establish standards for alternative dispute resolution practice and to introduce the impact of technology into those pursuits. Finally, there is a chapter on dispute system design. When one begins thinking about the introduction of technology into any alternative dispute resolution process what you're really doing is asking questions about design, so there is a discussion of the current thinking on how system design generally affects ODR.

Under the practice section, there is information about ODR and the courts, which I think is particularly important because that is arguably one of the places where there's the most activity in terms of integrating ODR into existing systems. One great improvement over the first edition is a chapter on how you adapt and accommodate disabilities in the use of ODR platforms. This is an area in ODR that has been very under-discussed. There is a chapter that reviews the impact of culture, an update on ODR in e-commerce, a chapter on ombudsmanship and a discussion of ODR in all of the different aspects of practice: mediation, arbitration, peacebuilding, negotiation and so on. A basic question for ODR practitioners is simply how to remain 'human' while injecting technology into dispute resolution. How do we or should we deal with emotions, and so on? Noam Ebner's chapter is a robust discussion of how to 'humanize' online practice.

The area that probably is the most changed and updated since the first edition is addressed by the chapters on innovation and advancement of the field. We were

talking about all the cutting-edge issues before, but the way we talk about them now is quite different because of the rapid advance of technology and the ubiquitousness of some of the technology. There are chapters on data security and cyber-security (not the same thing). There are also chapters on smart contracts and blockchain, and, of course, AI. It's impossible to write anything that is going to be absolutely accurate even one day after you write it, but in these chapters, we have the best minds in the world in terms of ODR addressing these issues.

Finally, the section that I have called geography has surveys of what's happening now in the United States, Canada, Europe, Latin America, Africa and China. We asked ODR experts from those areas to look around and tell us what's current and what's happening in the area where they practice.

Leah Wing

I want to invite you to answer the question that Ethan and Mohamed spoke to. You inferred that the greatest change you're seeing is in technological advancement around AI, data analytics and privacy and security. Are there other things that you're seeing if you look back over the last decade where there's been a significant change?

Daniel Rainey

We talk about smart contracts, AI, and all of that, but if you think about it all of the technology has become more accessible and easier to use. Back in the 1990s when I was trying to integrate technology into the work we're doing at the Mediation Board, we could do videoconferencing, but in order to do it, you had to go to a place that had a videoconferencing centre. It was very cumbersome and it was resisted because it was not much more convenient than travelling to work face to face. Now every grandparent in the world talks to and sees the grandkids across the country and across the world on zoom, not even thinking twice about it. So even though we can talk about all of the other truly remarkable things that are coming along, even the baseline, the basics of the work that we do in technology, has changed for the better and I can't help but think, Ethan, that's one of the reasons why you stopped getting some of those questions a few years ago - technology simply became a part of our lives.

The red flag that goes up for me in the future does revolve around AI and machine learning, but I don't think that's the only technological advance that has made a big difference in the way we think about ODR.

Mohamed S. Abdel Wahab

I fully agree with Dan on this one. Just please note that people may overlook certain subtle differences between the first edition and the second edition. For example, the first edition of the book has a chapter entitled 'lessons for system design', when at the time we did not have sufficient systems in place so the book helped people design systems. The new edition of the book has a chapter entitled lessons learned from system design. That is, I think, an important distinction because systems will continue to change, and perhaps radically, with the advent of AI. In the first edition, we were mainly talking about ICT, information and communication

technology, and now we're way beyond that – we're talking about AI, robotics systems, analytics and so on, and I think that will change the roadmap and really the trajectory of ODR.

Daniel Rainey
If I could just stick a little coda on the end of that, I think that makes the discussion about ethics and standards of practice even more important because it should be driven by the notion that we are stepping into new territory with the new technology.

Leah Wing
What are you most excited about – what do you think is coming around the bend – where do you see the most promise? And building on this, drilling down a little further, what are you most worried about?

Ethan Katsh
Well, I am definitely worried. I'm worried about a lot of things but broadly speaking I'm worried about the transition into the use of new tools that are very attractive and that seem all positive and then turn out to be problematic. An example that everyone can relate to is social networks, which were social when they began, but now it's fair to call them antisocial networks. That's one example. An even bigger example is cell phones, mobile phones. Obviously, as you point out, people can see their grandchildren at no cost really over great distances. I know that there are a myriad of issues that we've never had to face before the iPhone came along.

Mohamed S. Abdel Wahab
Ethan is the one who came up with the term 'Fourth Party'. When Ethan referred to the fourth party, we had already known three parties and he had the foresight to add technology as the fourth. My greatest concern is that we could be on a path back to three parties, but this time the third-party neutral as the human may disappear and the fourth party will take over. That is a huge concern, and I think this is an area where indeed the field of AI is more likely than not moving in that direction to replace the human element. The greater the move to replace the third party with the fourth party, the greater the concern for many of us.

Daniel Rainey
I have a two-sided coin - some optimism and some pessimism. The optimism is that we seem to be in a situation where people are willing to consider out-of-the-box approaches to our profession, and so I think what that suggests is that as we move forward, there are going to be a good number of very interesting, very innovative and very useful adaptations using technology in conjunction with face-to-face work. Another positive I see is that we are beginning to talk more and more about the dangers of AI and dangers with all the new technology, which may lead to conversations about some standards and restrictions. But I also see that as a danger because I'm not sure that we will do it coherently, I'm not sure that we will do it in a consensus manner. I'm not optimistic about the notion that we're going to have

a unified approach to control technologies that we are creating and are going to turn loose in our profession.

Leah Wing
I'd like to turn back to this idea of boundaries being broken down by the destructive force of technology. In thinking about who regulates there always will be government entities that will have an interest in the courts and other spheres of society as well. Those government entities are sometimes cross-jurisdictional, cross-national boundaries, but then there are also our professional organizations or disciplines that are connected to dispute resolution and are used to putting out membership expectations or standards or requirements. But we have an entirely different industry that we are now deeply linked to which is the technology sector that trains software developers in different ways of thinking without dispute resolution or equality or access to justice as its core. How do we make sure the software developer is not a gatekeeper for access to justice, to quote our colleague Vikki Rogers. What do we do when our disciplines are breaking down and we're connecting across disciplines to harness technology but at the same time we're still in our silos about regulation? Is there a concern about leaving certain populations behind, especially by courts?

Daniel Rainey
I do worry about leaving people behind. Our court system minus technology didn't serve everyone and I would argue that there's no reason to think that when technology is added to the mix all of a sudden, that's going to bring everyone in and be completely inclusive. Not only is there no reason to believe things will get more inclusive and open, there's a reason to assume that we might make the situation worse by adding a technology door to the physical door that is already the entry point to the justice system.

Moving away from the courts and formal legal systems, the field of mediation itself is in fact a fractured field. There are many approaches to mediation as a practice around the world, and the hubris associated with that is that each one assumes it is right. So we have many 'right' ways to go about doing mediation and we have many right ways to develop technology. I think it's a fool's errand to try to homogenize either the practice or the tech development process. We have to look elsewhere and think about common approaches to fundamentals that say, OK I'm going to leave your uniqueness alone but I'm going to give you some guidance about how your uniqueness fits in with the rest of everybody else's uniqueness.

Leah Wing
That was the impetus behind the Center's trying to speak to this by creating shared overarching principles to help stimulate thinking about values as opposed to assuming the standards will be the same in every jurisdiction.

Ethan Katsh
I think the courts are one area that I'm a little less pessimistic about than some of the others I mentioned. I only feel less pessimistic about the courts because we're

seeing some examples of online courts and online small claims courts and the data that is being generated along with those processes is going to be public data. I hope that some of the people whose work is more empirical in nature will have an opportunity to say something and find out things that we either didn't know about before or kept hidden before. If one wants to struggle to find optimism, that's one possibility.

Mohamed S. Abdel Wahab
On the issue of leaving people, I think you can see it from different perspectives. There is definitely the risk that Dan has highlighted, but there's also the upside of it which is basically in many societies, at least in my part of the world, people may not have access to courts in remote locations, so one would think that this could bring about denial of justice. Technology could offer online justice to them and that could be an upside, a positive development. They have already been left behind, so giving them access to technology may bring them within the justice system, online, that was not at all available offline in whatever locations or distant localities they may be in.

Leah Wing
I'm wondering as you read over the chapters that looked at regional development, but also the chapters that look at technological development, do you see any stark patterns about how ODR is being embraced differently in different regions and whether you are seeing patterns of extending access to justice, or are we seeing some of the same patterns about who is not being included?

Mohamed S. Abdel Wahab
I'll give you an example. China is very advanced - they have the Beijing Internet court where they are using not only AI but also robots to prepare cases, and they have during the pandemic just in a few months resolved around 400,000 cases online. But there are other places in Africa, for example, where people don't have Internet connection - they don't have basic dial-up connections which are obsolete in my own country. That is, I think, why the risk of leaving them behind is real. Even though we talk about inclusion and we talk about everyone being on board and globalization, still the digital divide is a reality.

Daniel Rainey
I'll be the pessimist to Ethan's optimist. What I perceive in terms of access to justice around the world is that the rich get richer and the poor fall further behind. There are great technological systems for courts, which means that if you are someone who would normally use the courts or use the justice system, you now have an easier time doing so, you have an easier pathway. If you're somebody who traditionally would not have entered the justice system, you are yet one more step removed by technology unless there is some effort to overcome Mohamed's digital divide and what for lack of a better term I'll call the 'tech comfort' divide. As we develop the technology, we should really ask questions about how it affects, to use an old phrase, the least among us.

Leah Wing

If we don't include access to justice, equity, and equality as part of our call for proposals or requests for software developers or ODR providers, why would we expect them to be included in the system? If we don't have a code or standards, we won't end up with justice. What advice would you like to offer to those of us who care about the field becoming more equitable? What's your advice for the next 10 years?

Ethan Katsh

I have trouble looking at the impact of technology five minutes from now, much less ten years in the future. I once wrote a book, and there was a review of the book and the author of the review said that she found the book quite optimistic. It took me by surprise - I thought I was writing something that was carefully neutral, so I'm not confident anymore in my own ability to make these predictions. At ten years out, it's almost a fool's errand. But what we can say is that use of technology is accelerating and on that level alone I think we need to be careful. A few years ago, I was involved in a dispute that ended up being in the courthouse annex near where I live. The courthouse was pretty old, and I was told that this was the courthouse in which Sacco and Vanzetti were tried in the 1920s. Sitting around that courthouse 100 years later was a depressing experience, so I'm optimistic at least that some people can find access to justice through technology. Whether that will create a shift in society so that people have more or less access is hard to say.

Daniel Rainey

I'll try to let some of your optimism rub off on me, Ethan. In response to the last question about what would you suggest, I would say this to anybody who's in the field - make noise. Be active in organizations where you can talk about and lobby for standards related to fairness and equity. Be agitators. Left to their own devices, technology people generally say I can do this, so I'm going to do it - they don't ask whether they should do it. That, I think, is normal and one of the ways things advance. If we don't have a voice as a profession, a loud voice saying think about fairness think about equity think about access think about all these issues we think are very important they're not going to get addressed in the way they should be addressed. So that's my advice. Make noise.

Mohamed S. Abdel Wahab

I will simply say the following. Perhaps in three years' time, we will look at this with a big smile and say OK what were these people thinking about these obsolete technologies and tools we are discussing because we will have gone above and beyond what our minds could contemplate about the future. I will say that this second edition does invite food for thought in a way rather than giving answers to all questions. It sets out to the field the issues at stake when it comes to using technology, and we hope that we would have managed to put together not only a list of brilliant authors and chapters, but topics and issues that we believe are of great importance to the field as it progresses and evolves. I think ICODR specifically has a role to play in setting standards and principles. It's not one of those institutions that offer dispute resolution services - I firmly believe that entities that work towards regu-

lating should not be players in the game, so ICODR is one example of an organization distancing itself from offering platforms and more dedicated to advancing the field at large by setting proper standards, ethical guidelines and principles. So I would encourage those who are not members to join.

Daniel Rainey
I hope you all have found this discussion more than just a plug for the book - the topics we and our co-authors have written about are central to ODR and central to the effective and ethical delivery of a wide range of dispute resolution services.

Ethan Katsh
I'm curious after the session to see eight years out whether or not there's another edition of this book. I think ODR is certainly here to stay, and we live in a time when it's possible to have some impact on what ODR becomes.