



**Asia-Pacific  
Economic Cooperation**

---

**2021/CTI/DIA1/011**

Session: 4

## **Fostering Access to Justice: Online Dispute Resolution Ethics and Governance**

Submitted by: University of Massachusetts Amherst



**Public-Private Dialogue on Promoting  
Consumer Protection in the Dispute  
Resolution and Redress Mechanisms in E-  
Commerce  
27-29 April 2021**

# **Fostering Access to Justice: ODR Ethics & Governance**

**Leah Wing**

Co-director, National Center for Technology and Dispute Resolution  
VP, Board of Directors, International Council for Online Dispute Resolution  
Senior Lecturer II, Legal Studies Program, U. of MA Amherst (USA)

Promoting Consumer Protection in Dispute Resolution  
and Redress Mechanisms of eCommerce  
APEC April 2021

## Need for ODR ethics & governance

1. Technology in DR → magnifies A2J opportunities & risks
2. ODR system designers, programs, & practitioners have high level of:
  - discretion
  - impact on process & potentially on outcome
  - legal liability with increased risks due to technology
  - responsibility for fostering equitable access to justice
  - input on process compared to other end-users

## ODR => magnifies A2J opportunities & risks



creativity,  
participation,  
efficiency



prevention &  
detection



threatens  
procedural &  
substantive A2J



## Threats to A2J via AI & ODR systems design

### Data management failures & imbalances

- Collecting & using incomplete/inaccurate data unknowingly\*
- Intentionally designing to benefit those in power (public or private entities, repeat players, etc.)

\*In one study: “inaccurate information was present in 81 percent to 95 percent of patient records” (Chan et al cited in Katsh and Rabinovitch-Einy. *Digital Justice*, Oxford: OUP, 2017, 94).



## Threats to A2J via AI & ODR systems design

### Lack of prevention & accountability mechanisms

- Lack of infrastructure, training, & use of ODR ethical standards increases risks for all but particularly for vulnerable populations re: data security, confidentiality, & privacy
- Lack of transparency & monitoring for ethically-driven ODR systems design & functioning

## ADR standards are insufficient re: technology

### Historically, they haven't addressed:

- data transparency
- accessibility regarding use of technology
- artificial intelligence
  - machine learning
- technological integration w/other systems (social media, courts, Internet, apps)

# Opportunity to address old & new ethical concerns

## History of ethical concerns re: A2J for ADR

- power imbalances
- preferences for repeat players, etc.

+

## New ethical concerns for ODR

- data size & collection (Big Data)
- data processing capabilities & integration of mega systems
- lack of transparency & accountability

**→ chance to create ethically driven ODR systems & monitoring & accountability mechanisms based on shared ethical principles for ODR**



# ODR governance & accountability mechanisms

## Rules-based

- Standards
- Regulation
- Legislation

## Values/Guidance-based

- Ethical Principles
- Guidance
- Technical Notes

# Ethical Principles for ODR\*

Shared *values* (not rules)

## GPS for creating monitoring & accountability mechanisms for ethical design & function of ODR\*\*

- Shared values => provides consistency across economies
- Responsive: flexible by technology, sector, economy, culture
- Guidance: for creation of legislation, regulation, standards, certification

## ➔ ODR Standards for governance, accountability & implementation

[\\*http://odr.info/ethics-and-odr/](http://odr.info/ethics-and-odr/)

\*Wing, L. "Ethical Principles for Online Dispute Resolution: A GPS Device for the Field." *International Journal of Online Dispute Resolution*, 3(1), 2016, 12-29.

©2021 Leah Wing

# Ethical Principles for ODR

**Accessibility**

**Accountability**

**Competence**

**Confidentiality**

**Empowerment**

**Equality**

**Fairness**

**Honesty**

**Impartiality**

**Informed Participation**

**Innovation**

**Integration**

**Legal Obligation**

**Neutrality**

**Protection From Harm**

**Security**

**Transparency**

National Center for  
Technology and Dispute  
Resolution  
odr.info

# ODR Ethical Principle: Competence

## Competence

ODR systems, processes, and practitioners will be competent in or provide access to relevant technological or human competency required for the effective implementation of the dispute resolution process that they undertake to assist with. This includes but is not limited to relevant dispute resolution, legal, and technical knowledge; languages; and culture.

# Applying ODR Ethical Principles to standards, systems design & integration

## Standards development

- regional, governmental, sectoral, membership organizations

## Software development & selection

- ODR systems, software, platforms, apps

## Integration

- dispute management flow & technology within & across economies

# ICODR ODR Standards

International Council for Online Dispute Resolution

## **Accessible:**

ODR must be easy for parties to find and participate in and not limit their right to representation. ODR should be available through both mobile and desktop channels, minimize costs to participants, and be easily accessed by people with different physical ability levels.

## **Accountable:**

ODR systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve.

## **Competent:**



ODR providers must have the relevant expertise in dispute resolution, legal, technical execution, language, and culture required to deliver competent, effective services in their target areas. ODR services must be timely and use participant time efficiently.

<https://icodr.org/standards/>

# ICODR ODR Standards

## **Confidential:**

ODR must maintain the confidentiality of party communications in line with policies that must be made public around a) who will see what data, and b) how that data can be used.

## **Equal:**

ODR must treat all participants with respect and dignity. ODR should enable often silenced or marginalized voices to be heard, and ensure that offline privileges and disadvantages are not replicated in the ODR process.

## **Fair/Impartial/Neutral:**

ODR must treat all parties equally and in line with due process, without bias or benefits for or against individuals, groups, or entities. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance of commencement of ODR services.

<https://icodr.org/standards/>

# ICODR ODR Standards

## **Legal:**

ODR must abide by and uphold the laws in all relevant jurisdictions.

## **Secure:**

ODR providers must ensure that data collected and communications between those engaged in ODR is not shared with any unauthorized parties. Users must be informed of any breaches in a timely manner.

## **Transparent:**

ODR providers must explicitly disclose in advance a) the form and enforceability of dispute resolution processes and outcomes, and b) the risks and benefits of participation. Data in ODR must be gathered, managed, and presented in ways to ensure it is not misrepresented or out of context.

<https://icodr.org/standards/>



# Applying ODR Ethical Principles to guidelines

## ICODR Video Mediation Guidelines

### 1. Accessible

Confirm individually with each party their willingness to use technology for the session. Ensure both you and each participant have an effective connection (e.g. audio clear, adequate lighting, good bandwidth). Use a videoconferencing platform that is free to parties, reliable, and easy to log into. Send reminders to parties with log in information a minimum of two days before and two hours before the scheduled start time.

### 2. Competent

Practice the software you are using before you utilize it with your parties and offer to try it out with the parties individually in advance of the session. Inform parties what technology will be employed prior to the session. Learn the additional ethical obligations that come along with mediating over video (see links below) as well as addressing the parties' ethical obligations for video mediation in your ground rules.

### 3. Confidential

Let the parties know you will not record video or audio in your online mediations. Get a written commitment from the parties in advance that they will not record audio or video as well, nor take screen shots. If parties want to show a document or photo in the session have them share their screen and show it instead of emailing it to other participants. Once all parties have joined, lock the room so others cannot join in.

### 4. Fair/Impartial/Neutral

Begin the session with everyone's video and microphone on, as if they were in the room. If one party disconnects, suspend the session until they can re-join. If a party's audio cuts out or becomes distorted, notify them once the audio resumes and ask them to repeat what was said during the outage. Always have a back-up option for sound, for instance dialing in by phone. Join 10 minutes early to troubleshoot any problems.

### 5. Secure

Use a secure videoconferencing platform with end-to-end encryption. Do not use apps or software that require location information to be shared, or inform the parties that they have the ability to turn that off (and explain how to do so). Ensure the videoconference will not "time out" or close down after a certain duration. Have all videos on screen at the same time as opposed to only highlighting the speaker.

**ICODR**  
THE INTERNATIONAL COUNCIL  
FOR ONLINE DISPUTE RESOLUTION

The International Council for Online Dispute Resolution  
[www.icodr.org](http://www.icodr.org)  
April 2020

ICODR's Ethical Standards: <https://icodr.org/standards/>  
NCTDR's Ethical Principles: <https://odr.info/ethics-and-odr/>

# ICODR Video Mediation Guidelines

## 1. Accessible

Confirm individually with each party their willingness to use technology for the session. Ensure both you and each participant have an effective connection (e.g. audio clear, adequate lighting, good bandwidth). Use a videoconferencing platform that is free to parties, reliable, and easy to log into. Send reminders to parties with log in information a minimum of two days before and two hours before the scheduled start time.

## 2. Competent



Practice the software you are using before you utilize it with your parties and offer to try it out with the parties individually in advance of the session. Inform parties what technology will be employed prior to the session. Learn the additional ethical obligations that come along with mediating over video (see links below) as well as addressing the parties' ethical obligations for video mediation in your ground rules.

## Collaborations on ODR standards

### **ABA, ICODR, & NCTDR**

- American Bar Association
- International Council for Online Dispute Resolution
- National Center for Technology and Dispute Resolution

1. ODR standards development

2. Collection of ODR standards worldwide (public archive @ [odr.info](http://odr.info))

# Rules, Regulation, Technical Notes

## Examples\*

- **APEC**
  - *Model Procedural Rules for the APEC Collaborative Framework for ODR of Cross-Border B2B Disputes (2019)*
  
- **EU**
  - *Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)*
  
- **United Nations Commission on International Trade Law**
  - *UNCITRAL Technical Notes on Online Dispute Resolution (2017)*

\*See public archive @ [odr.info](http://odr.info)

# UNCITRAL Technical Notes on ODR

descriptive & non-binding

## Section II — Principles

7. The principles that underpin any ODR process include **fairness, transparency, due process and accountability.**

8. ODR may assist in addressing a situation arising out of cross-border e-commerce transactions, namely the fact that traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.

9. ODR ought to be simple, fast and efficient, in order to be able to be used in a “real world setting”, including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.

### Transparency

10. It is desirable to disclose any relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest.

11. The ODR administrator may wish to publish anonymized data or statistics on outcomes in ODR processes, in order to enable parties to assess its overall record, consistent with applicable principles of confidentiality.

# UNCITRAL Technical Notes on ODR

descriptive & non-binding

12. All relevant information should be available on the ODR administrator's website in a user-friendly and accessible manner.

## **Independence**

13. It is desirable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.

14. It is useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interest.

## **Expertise**

15. The ODR administrator may wish to implement comprehensive policies governing selection and training of neutrals.

16. An internal oversight/quality assurance process may help the ODR administrator to ensure that a neutral conforms with the standards it has set for itself.

## **Consent**

17. The ODR process should be based on the explicit and informed consent of the parties.

Contribute to  
ODR standards & guidance public archive  
@ odr.info



**Leah Wing**  
[lwing@legal.umass.edu](mailto:lwing@legal.umass.edu)