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Blockchain and Online Dispute Resolution - Paper

Submitted by: Doshisha University



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In this presentation, I will talk about the possible impact of the blockchain technology on the ODR rule making.

1. Conventional understanding of “ODR”

Starting with a definition. ODR stands for “online dispute resolution.” It may be read in two ways: either “online resolution” of disputes (focusing on the method of resolution) or the resolution of “online disputes” (focusing on the type of disputes). The former reading, online resolution of disputes, seems to accord with the conventional understanding of the word. This is also indicated in the UNCITRAL Technical Notes on Online Dispute Resolution (2017). It states:

Section V — ODR definitions, roles and responsibilities, and communications
24. Online dispute resolution, or “ODR”, is a “mechanism for resolving disputes through the use of electronic communications and other information and communication technology”.

2. Online disputes as the main target area of ODR

On the understanding that “ODR” means the “online resolution” of disputes, it does not matter whether the disputes arise online or offline. Notwithstanding this, there is a noticeable tendency to treat online disputes as the main target area of ODR. The UNCITRAL Technical Notes, for example, state:

Section I — Introduction
Purpose of the Technical Notes
5. The Technical Notes are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications.

The EU Regulation No 524/2013 on Online Dispute Resolution for Consumer Disputes clearly limits its scope to online disputes. It provides:

This Regulation shall apply to the out-of-court resolution of disputes ... stemming from online sales or service contracts ... (Article 2(1))

[※] Professor at Doshisha University Law School (Kyoto, Japan).

3. Consumer protection

Online disputes can arise from B2B (business-to-business), B2C (business-to-consumer), or C2C (consumer-to-consumer) transactions. Notwithstanding this, the EU Regulation is only applicable to B2C disputes. And the earlier work of UNCITRAL was preoccupied with a consumer protection issue and had difficult negotiations over it. As if to dodge that hot potato, only in one place do the UNCITRAL Technical Notes mention the word “consumer.” Surreptitiously, the Notes state:

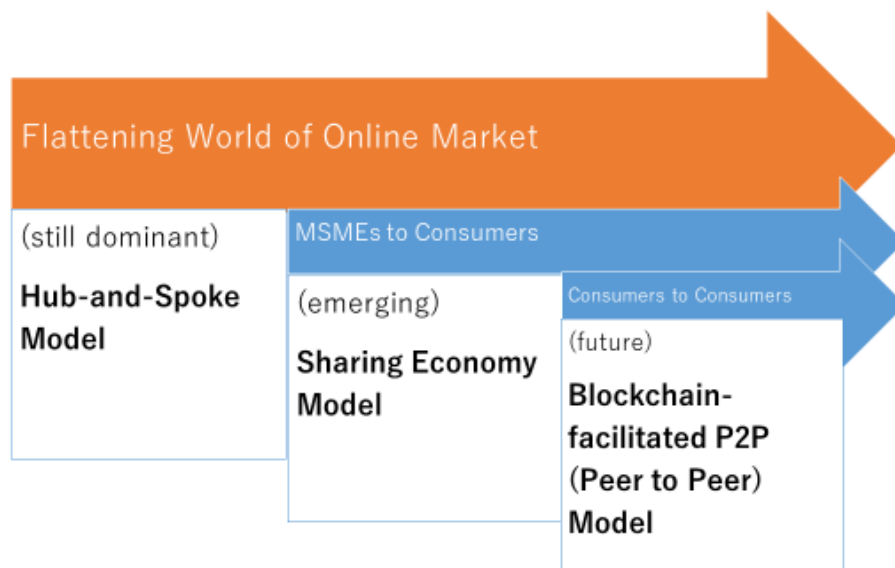
Section IV — Scope of ODR process

22. ... An ODR process may apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.

I think a work in international or regional arena should steer clear consumer protection issues. It is not only to avoid a major stumbling block as experienced by the UNCITRAL. Another reason, which I will expound in this presentation, is the flattening world of online market. In the course of this change, the characterization of consumers as the weaker parties will become less real or relevant, rendering consumer protection less of a legislative priority.

4. Flattening world of online market

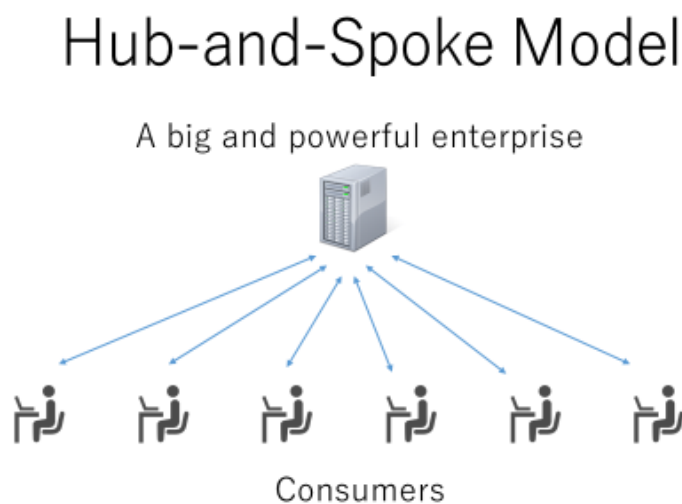
Here is how one might see the trend in the world of online market.



As we progress from the hub-and-spoke model, which is still dominant today, to the sharing economy model, which is emerging, the domination of big and powerful enterprises will be eroded with a growing profile of less powerful enterprises as well as individual traders. This trend may be accelerated if we progress further to the P2P (peer to peer) model, a model which may be facilitated by the blockchain technology. Then, consumer-to-consumer transactions may also claim a growing share in the market. Let us look at each model in a little more detail.

5. Hub-and-spoke model

The model still dominant in today's online market is the hub-and-spoke model. In this model, big and powerful enterprises like Amazon dictate the terms of transactions with consumers.

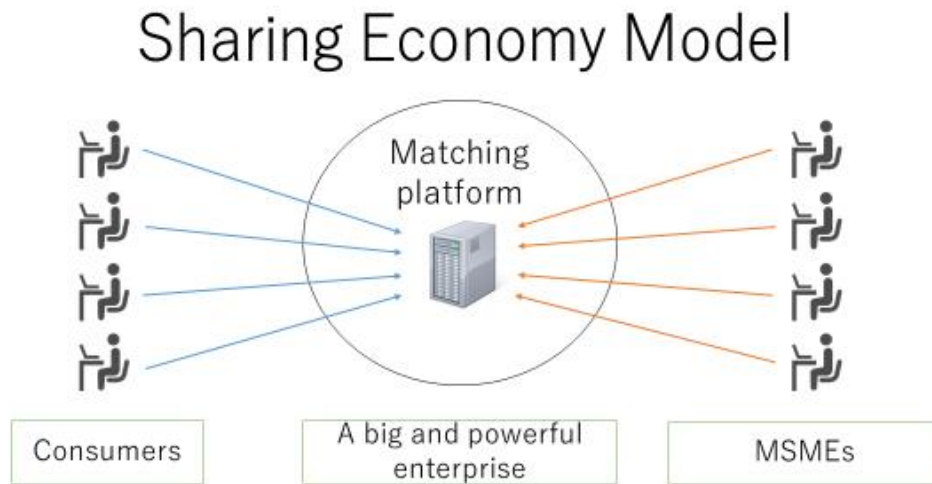


With this image of online market, online disputes quite naturally evoke the need for consumer protection. It is then understandable why the EU Regulation focuses on B-to-C disputes and why the earlier work of UNCITRAL was preoccupied with consumer protection issues.

6. Sharing economy model

In the sharing economy model which is emerging, the offers of consumers and traders are matched on an online platform organized by an intermediary. Through the intermediary, it is often with individual traders or MSMEs that consumers enter into contractual

relationships.



The intermediary, such as AirBnB and Uber, tends to be a big and powerful enterprise. But its role is essentially limited to match making. AirBnB, for example, says in its terms of service:

1.2 ... When Members make or accept a booking, they are entering into a contract directly with each other. Airbnb is not and does not become a party to ... any contractual relationship between Members

1.3 ... Airbnb ... does not guarantee (i) the existence, quality, safety, suitability, or legality of any Listings ...

So if something goes wrong, the dispute will usually not be played out between the consumer and the powerful intermediary. Rather, it will be fought between the consumer and the MSME.

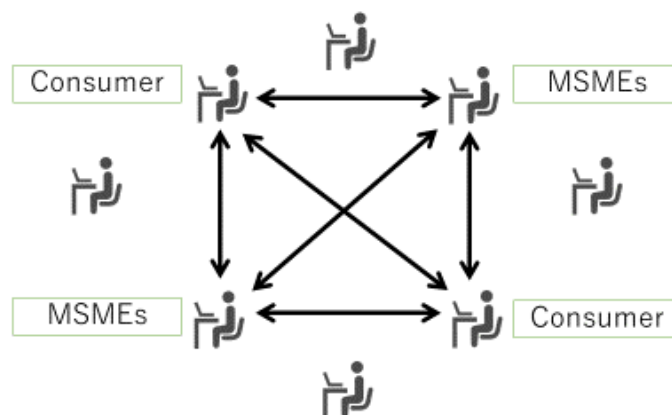
The asymmetry of bargaining power between consumers and MSMEs is not as stark as between consumers and big enterprises. To the extent MSMEs have a high profile in the sharing economy, the characterization of consumers as the weaker parties will become less real.

7. Blockchain-facilitated P2P model

More into the future, we may see the emergence and growth of the P2P model. It may be facilitated by the blockchain technology as it can create a platform for P2P trading of cryptocurrencies and other tokens. Such platforms already exist for exchanging different

cryptocurrencies (DEX: decentralized exchange)¹ and for exchanging goods with cryptocurrencies.²

Blockchain-facilitated P2P Model



The P2P trading will increase if the value of cryptocurrencies becomes more stable so that they will be widely used as a medium of payment. This may naturally come about with the transformation of economy or it may be brought about by the central banks circulating their national currencies on a blockchain.

The P2P trading model will grow further if the law recognises tokens on a blockchain as representing real-life objects such as shares, bonds and what have you. The transfer of such tokens would then be legally treated as equivalent to the transfer of the underlying objects.

In the P2P model, consumers trade directly with traders or other consumers without involving any intermediary. Many of such traders will be individual traders or MSMEs. So if this model spreads, it will further flatten the world of online market.

8. Legislative priority

If we treat online disputes as the main target area of ODR as if to understand the word “ODR” to mean the resolution of “online disputes,” consumer protection is important as long as the hub-and-spoke model stays dominant. But as the world of online market flattens with a growing profile of MSMEs, the domination of big and powerful enterprises will be eroded. C-to-C transactions may also claim a growing share in the market. As a

¹ They are not free from controversy because they may be used for money laundering through anonymous trading.

² Again, they are not free from controversy because they may be used to trade illegal items.

result of these developments, the characterization of consumers as the weaker parties will become less real or relevant. Consumer protection should, therefore, command less of legislative preoccupation. To the extent consumer protection remains important, the task can be left to national legal systems because their mandatory rules to protect consumers will be applicable in appropriate cases. Internationally harmonized law should, therefore, be blind to the types of parties involved in disputes.

A work on international harmonization should rather start with the conventional understanding of the word “ODR.” As we have seen at the beginning, it signifies the “online resolution” of disputes, with a focus on the method of resolution. So the legislative attention should be directed to the implications which various technological possibilities may have for the resolution of disputes.

For example, there is a method called ‘blind bidding’ allowing the parties to submit their settlement offers to a computer program which then produces an award by splitting the difference. This method may have implications for the due process notion, in particular the requirement of impartiality.

The use of artificial intelligence and big data may have implications for rules applicable to the substance of disputes, in particular the notion of amiable composition or arbitration *ex aequo et bono*.

These technological possibilities will also raise the question of enforceability of the resulting awards.

And finally, cryptocurrencies and other tokens on a blockchain will raise the question of executory jurisdiction. Since the blockchain on which they are recorded is borderless, it is not clear how jurisdiction to seize them should be determined.