

Future Trends in ODR

Mediator – Orna Rabinovich

Aled Davies: Hi everyone, my name is Alan Davies, founder of mediatoracademy.com, home of the passionate mediator. This is where we interview the very best mediators and thought leaders from right around the world. We learn about new opportunities in the field of mediation as well as how to overcome some of the challenges and dilemmas we often face. In this interview, I want to understand how the online dispute resolution landscape is changing, and what trends we might see in the future with mediation and ODR.

Now my guest today is a senior lecturer with tenure at the faculty of law at the University of Haifa in Tel Aviv. Her areas of expertise are ADR, ODR, and civil procedure, with research areas focusing on the relationship between formal and informal justice systems, dispute resolution system design, and the impact of technology on dispute resolution.

She's a fellow of the Haifa Forum of Law and Society, the Haifa Center for Law and Technology, and the Center for Information Technology and Dispute Resolution at U Mass Amherst. She holds a doctorate in law from Columbia University, and was admitted to the bar in Israel in 1998 and New York in 2001, and was certified as a mediator as well in New York.

So it's a real pleasure to welcome onto Mediator Academy Orna Rabinovich. Orna, welcome.

Orna

Rabinovich: Hi, thank you very much. Good to be here.

Aled: Orna, I'd like to start with a question. I've covered a lot with Ethan looking back at the evolution of online dispute resolution. I'm interested in understanding more about what the landscape of the online dispute resolution field is looking like in the future.

Orna: Okay, with pleasure. I think the most immediate thing I'd have to say is we're going to see a lot more of technology, a lot more of online dispute resolution. When I say a lot more of online dispute resolution, I guess we also need to understand what online dispute resolution is. If we initially thought of online dispute resolution as avenues that are parallel to what we know as alternative dispute resolution, and are conducted online on the Internet, to address online disputes, I think the people who are in this field today think about ODR very differently.

It doesn't have to address online disputes. It doesn't have to be online. It could be software. It doesn't have to be exclusively online. It could be

hybrid processes. It doesn't have to imitate or mimic existing ADR processes. It can actually celebrate the new possibilities that are ingrained in technology and create new types of processes that have no offline equivalent. It doesn't have to accept the formal/informal distinction that has come with ADR, and it can be incorporated into courts as well.

So I think today I would look at ODR as technology meets dispute resolution. Whether formal or informal, whether the dispute arose online or offline, and we're going to see a lot more of that. Our entire lives have changed so dramatically in the last few decades, and if you look at the last decade alone I think it's overwhelming.

Some of these changes, I think, if someone would have told us about them twenty years ago, we would've laughed. We would've said this doesn't make sense, right? So it's kind of surprising to see that one of the fields that has been the most immune to these changes is the field of dispute resolution, which when you . . .

Aled: Why is that?

Orna: Well, I think there are a few strong barriers that are happening here. First of all, the legal field, which has also come to be the field that dominates alternative processes as well, sort of is a very conservative field, so there is that professional issue here, and [inaudible 00:04:31] sense Ethan in one of his earlier books called this a Trojan horse, and it could be. On the other hand, it could prove, as Richard Susskind has suggested, a great opportunity. I'm sure it could, but for a conservative field that can see the dangers that come with this change and can see the difficulties that come with the change it's always difficult to change the ways we do things. That's an issue. There are also, I think, financial issues. Change comes with financial constraints. There are technological issues.

Some things I've talked about changes in the more recent years, and I think nowadays things are possible that weren't possible ten years ago. I think the shift from mobile to PC has made a huge difference. I mean, we don't have to think of ODR as taking place while we're sitting by our laptops or computers, whatever it is, but this is something that can happen all the time wherever we are, so that's.. And I think maybe the deepest challenge is a conceptual cultural challenge. Even though I've described these changes about what ODR is, I think in the back of our minds, certainly in the back of jurists', we still have these two main distinctions that take place.

One of them has to do . . . It's the distinction between the online and the offline world. So we think of offline as the real world, and online as this distinct sphere where certain activities take place that are appropriate for the online world, okay? So that's one distinction. And the other distinction is between formal and informal processes, so we think of courts as one thing, and then we have this stark distinction as to what ADR is and what is

appropriate for ADR, what types of characteristics these different processes have. Now if we look carefully at each of these distinctions, we come to see they've been blurred in the past few decades very, very . . . You know, to a large extent.

The distinction between online and offline maybe was true in the 90's. When you think of eBay disputes, it's the sort of typical dispute that would occur online, but nowadays, I mean, we converse with the people most close to us online, on Facebook, right? Text them sometimes even when they're in the next room, we'll text them just because it's easier. People are more comfortable with using technology to discuss very sensitive things.

So our whole understanding of what's appropriate for the online setting changes dramatically and with it our understanding of what's appropriate to dispute about and to resolve online. So that's one arena. The other arena, the distinction between formal and informal, has also been changed dramatically. Because we can hardly think of courts without thinking of their conducting some kind of alternative process, encouraging settlement. Sending us to mediation, and we can hardly think of mediation taking place outside of the courtroom.

Many of the mediation centres, you know, we'd love for mediation to take place pre-litigation, and some of it does, so, you know, we have pre-action protocols. We have different mechanisms for encouraging that, but the shadow of formal law is there. So we see the two, to a large extent, enmeshed. So I think these paradigms in the back of our minds are still very strong even though they're being challenged in recent years, and that, I think, is a strong barrier, especially for us legal folks.

Aled: So it's almost like the limits of our imagination.

Orna: Exactly. Exactly. Part of what I've been doing in my work is saying that ODR, we talked about future trends, so I said we're going to see a lot more of ODR, so that's sort of one thing, and then we need to think more broadly and imaginatively about what ODR is. How it can fit into our system of justice and into our dispute resolution landscape. So that's one realm.

The other realm is to use ODR to rethink our face to face processes. Because we've had this wonderful opportunity. We have had this new playground designed for us that has different characteristics. Initially we saw these different characteristics as limitations. The fact that everything is documented was scary.

We think of mediation as this totally private confidential process. We promise the parties that everything is going to be discarded right after the mediation. We're just taking the notes for our own use. All of these phrases that we don't even rethink as we say them.

Part of the changes we've described are also changes in attitudes toward confidentiality and privacy. Do we need to offer this blanket confidentiality? Also changes in technology. There are new ways in which we can actually ensure privacy despite things being documented. There's always a risk, you know. There are different kinds of risks that come with different kinds of processes.

So the other lesson is, we can look at what's happening in ODR. What were seen initially as constraints can be seen as opportunities because more documentation may be less privacy, but it may mean much more quality control and learning. What's going on? How do we ensure quality? Who performs best? Why? What can we learn from that? Who performs the worst? Let's get rid of them or let's teach them how to perform better.

One of the biggest problems with ADR institutionalisation has always been a quality control question because what were considered as the main traits, of mediation, in particular, the confidentiality and the flexibility, were also major barriers to conducting quality control efforts.

So I think ODR, we're going to see much more of it because our lives are much more online and digital. So inevitably we're going to see much more of it whether formally or informally. But it's also going to free our minds and imaginations not only where we use digital technology, but also how we address our face to face processes and cause us to question and think about processes that were designed decades, even hundreds of years ago, and come to redesign them.

Aled: Yeah, when you were talking I had an image of a Snap Chat sort of feature in a mediation. You know, everything gets deleted, just to maintain that confidentiality.

Orna: Right.

Aled: But you know, it's interesting you talk about the real benefits of online dispute resolution and what some of the developments could mean for increasing the quality, the standards in mediation, which could, you know, increase participation in mediation once people feel reassured that the quality they're going to get is consistent. I mean, I'd love to talk about accountability, I'm resisting going down there, but I feel that's an important topic to cover. But we'll come back to that. I just want to come back to something that you said a while back. You talked about the difficulties and dangers potentially from ODR. When you said danger, what did you mean?

Orna: I mean, many people see the challenges in ensuring privacy as a potential danger. I think these are exaggerated concerns. I think there are certainly high quality means for ensuring the privacy of digital communication. We also see leaks. We see that all the time, from embarrassing pictures to court drafts of decisions. We've had that in Israel. I'm sure you've had similar

things happen here. But I think we tend. . . It's very similar to what ADR proponents used to say about people who owe, you know, about Owen Freese [sounds like 00:12:49] and Judith Resnik. They say they're court romanticists, right? So we're all kind of romanticists. We see the dangers in the new route and the changed avenue, but we tend to discount the dangers that exist with the old way of doing things.

I think documentation and learning is a super important values that we don't give enough weight to, maybe because we haven't really experienced the benefits. Those who have experienced the benefits are actually a lot of private companies that are online. You can see that in the sharing economy. They do a lot of dispute prevention. They have big data, they have many, many users, and they can learn a lot from what's going on, on how to prevent disputes actually from happening. So I think we're going to see some of that knowledge infiltrate more traditional dispute resolution arenas.

Aled: Okay. Are there any particular areas or particular disputes that you think we'll see ODR really take hold and develop quickly?

Orna: I think . . . You know, I'm not sure I would prejudge. I think, you know, it's very easy for us to experiment first with this sort of small claims types of disputes, and I think that's a safe and sound route to take. I wouldn't . . . An area where, surprisingly maybe for some, ODR people have found interests in ODR avenues is family law. Which I think for many people was a surprise because they thought people really need to sit in a room and yell at each other, and surprise surprise, we discovered that people who get divorced maybe don't want to spend time in a room together.

Maybe it's actually easier for them to weigh their options and think about things and think about their own interests in a clearer way, when they're not in the room with the person they're not getting along with very well. Distance may prove to be an advantage in many types of disputes, maybe especially for disempowered parties where they need the time where they can consult, or they can have someone else with them . . .

Aled: Yeah.

Orna: . . . Might not have come to the room, to the courtroom, or to the ADR conference room or whatever it was. So I think we're in . . . Again I'm thinking of our imagination limiting us here in this respect. I think small claims is easier for everyone to go there. Definitely I think there's a lot of potential there, but I think we may be surprised with the types of cases that could prove to be appropriate.

Definitely makes sense to bring ODR to those places where we have a lot of backlog because it's going to help get rid of some of that backlog. But I think it's really important to think of ODR not only because of its

contribution in terms of efficiency, but also because of some of the qualitative advantages it can give us.

Aled: Yeah.

Orna: Perhaps a different kind of participation, perhaps a different sense of empowerment, perhaps different types of processes that can bring us to different types of results.

Aled: Yeah.

Orna: Interesting. Maybe I'll say one thing about another challenge, which I don't know if it will prove to be a challenge, but I think that's an area where we don't know enough. There needs to be much more research, that's the area of procedural justice.

Aled: Okay.

Orna: So procedural justice is this understanding. Basically it's a theoretical strand that relates to the significance disputants attach to procedural aspects that relate to dispute resolution avenues. What they've discovered is A, people care a lot more about procedure than about the outcome, surprisingly, and B, there's certain attributes of procedure that when they exist, people actually see that dispute resolution avenue as being not only more fair, but more legitimate.

These attributes include, for example, the ability to voice my concerns, to talk about the dispute, to have a voice in the process, because if I have a voice I feel like I'm being heard, I feel like I can influence the type of outcome that would happen. What they found was that sometimes when people didn't have a voice in the process but got an outcome, you and I would think is favourable and they should be very happy with, they were still . . . They had a high level of discontent, some would say outrage. Surprising perhaps.

So this is an area where I don't think we've measured enough what it means to shift from the face to face offline medium to digital medium. Would people view a conversation like you and I are having right now as a chance for voice? How do they perceive written communication, digital communication? Maybe if they're writing the text themselves it means more than sitting in a courtroom with your lawyer. These are all question marks.

I mean, we don't have definitive answers. But I think in all of these areas it's very interesting to look at young people today, how they use these mediums, how they interact with one another, what they feel about online interaction with their friends.

Aled: Interesting you talk about, sort of attributing value to procedure, mediators often talk about the process as very much part of the outcome. Just being able to participate in a conversation with an adversary. Just being in the room, being able to look across the table at them and try and have a productive conversation. That in a sense is part of the process. It's not just about the result.

I also realised that when I asked you the question, it was . . . My question was really contaminated by my limited paradigm, you know, it was . . . I was asking with a particular view in mind. Again, you know, that's part of the problem, isn't it? We're seeing it as one thing. What are we seeing ODR? We did a conference in London and Colin Rule talked about ODR, and he said look, if you're sending e-mails, if you're using an electronic calendar, if you're Skyping, all of those things..

Orna: You're doing ODR.

Aled: You're doing ODR.

Orna: I had a similar experience with a large consumer organisation in Israel. They wanted to consult with me. They'd heard about the field, what could they do to be doing ODR? So I visit their offices, and it turns out they actually have an online complaint filing platform and they kind of deal with the complaints online. You know, maybe it's not very sophisticated, maybe they could be doing more, but I said, "You do have ODR." They were shocked.

It's also interesting to see obviously I know a lot about what's going on in ODR, but sometimes you discover there were people who were doing ODR and basically invented everything from bottom up without being aware of their being a field at all. We have one such example in Israel. It was very successful. It's called Benoam. So Benoam is this online arbitration entity that was set up in Israel to address fender benders, subrogation claims between insurance companies, and they filled in a vacuum. Basically these companies were looking for a more effective way to deal with these disputes, that was outside of the court system.

The court system didn't want them there and they didn't want to be in the court system. They needed another kind of solution. So these folks who were involved with ADR, we're talking about the late '90s, initially thought of maybe mediation, but they figured out this wasn't for mediation. These were small monetary claims of a repetitive nature. They needed some kind of finality and a quick process, so they opted for arbitration. As they were designing this process, they realised that if they were going to need space for meeting and for storing documents and all that, they were really replicating the inefficiencies of the court system.

So the internet was expanding in those days, communication was better, service was better, and they had this idea why don't we do it online? They were totally unaware that there was a whole industry out there, not very developed, people who were doing this, people who were thinking about this. They developed a beautiful system which was very effective and turned out to do a lot more than just streamline these claims.

They actually became this kind of a private court where they had even a space they called news where they would post precedential decisions by the arbitrators. So they created this sort of private system that was also not only being effective but it was also sending signals to its users, that it was fair, because it was consistent in decisions, there were precedents. They adopted all kinds of principles that ensured consistency in their arbitrators' decision making, and I think it showed some of the potential of ODR.

Still, kind of, the claims are not very . . . I guess these are the types of claims we would think are appropriate for ODR, but this was taking place in Israel, where people are very close to one another. Distances are not, you know, immense, so kind of a surprise, and among quite traditional conservative bodies. You wouldn't think they would be the first to design such an advanced system.

Aled: I mean, it's interesting that posting news, you know, is almost something about transparency there as well.

Orna: Yes. I think that's an important point. So when we're talking about potentially privacy being a barrier in some people's minds using these systems, there's so many . . . You know, transparency and privacy are on a spectrum.

Aled: Yeah.

Orna: And we typically . . . Again, if we talk about our preconceptions and frameworks, we think of them as binary states, and I think Ben-Ami is an example where they found some kind of place along the spectrum that made sense. Internal transparency but external privacy. They were doing some of that and I think that's a good example of how we can rethink the way we do things, certainly online but also offline.

Aled: Yeah.

Orna: Do we need blanket privacy mediations? I don't think so. I think we need to ensure that these are high quality, fair, and effective processes, and if we offer very, very broad confidentiality, I'm not sure whose interests we're serving.

Aled: Yes. Yeah, very interesting. When did this company start up?

Orna: They started designing it in the late '90s. I think they were up and running in 2001.

Aled: Wow.

Orna: Yeah. So a very interesting example. Also of how evolutionary ODR is. You start out with one conception of what this process is supposed to deliver and do, and I think it turned out to be a very different entity and service than what they had initially imagined. They loved it. They embraced it. Also impacted the way these companies worked. If we talk about changes and fearing changes, these companies all shifted from a geographical spread to a centralised administration of claims, because it didn't make sense to be spread geographically if you don't go to courts, right?

Aled: Yeah.

Orna: And they also had different types of people handling these claims, not necessarily lawyers. By the way, a rise in the number of single parents working for them once they shifted to the online system was easier for people to handle that kind of work so you see all these ripple effects in the way technology can really make a change.

Aled: Fascinating. Fascinating how, you know, technology can impact on. . . I mean, I've been posting these interviews now for years, and I get people watching these interviews . . . I mean, they're free to watch. There's a chap out in Phnom Pen in Cambodia, and he dropped me an e-mail and he said I've just watched an interview with Ken Cloke. I don't know if you know Ken Cloke? I mean he's just an inspiring mediator. He said, you know, I've read a dog-eared book that I found To see this guy . . .

Orna: Live. Yeah.

Aled: Was just incredible.

Orna: Wow.

Aled: And you know, you just don't know who's watching, who can access this stuff, but you know, you can . . . It's like, there's a Buddhist expression, cut a blade of grass and the whole world quivers, you know.

Orna: Yeah.

Aled: You don't quite know where these ripples will end and again it's, you know, it's about your limited paradigm. We need things to stretch our thinking.

Orna: I think when we're thinking of our limited paradigm, I think one of the main advantages of an ODR system or a system that has a strong digital component, is the fact that it can learn on an ongoing basis. So if someone

is there looking at what's coming out of the system and how it's developing, and actually studying what's happening, it's really limitless how this system can evolve and what we can learn from it and where we can apply these lessons later on.

Aled: Look, Orna, it's been really . . . I mean you've got an amazing quality about you. I wish that we could talk for hours. I just want to say a huge thank you for . . .

Orna: Oh, sure. My pleasure.

Aled: . . . giving up your time and I definitely want to burrow into the . . .

Orna: Sure.

Aled: The tensions between confidentiality and flexibility, but on the other hand . . .

Orna: The need for accountability, yeah.

Aled: . . . the need for accountability, I think that's crucial, particularly in the U.K., where, you know, I think we're struggling at the moment really finding out from a mediation perspective, really establishing ourselves as a credible alternative. I think if we were able to bring some accountability into it . . . And also in light of there are a number of different approaches to mediation. You've got facilitative, transformative . . . And these are all espoused approaches, right? You've got people saying "Hey, I know, I'm impartial, I'm a complete neutral" but you know, do you take into account your unconscious bias, for example?

Orna: Yeah. There have been studies where mediators, when you actually videotape them, they do things they're totally unaware of, even if they're . . .

Aled: Myself included, you know.

Orna: Of course. It's natural.

Aled: Yeah, so it's natural. Having said that, we do need to do that, so that's the next interview, definitely.

Orna: With pleasure. It was a great experience for me as well. Good luck with ODR in the U.K.

Aled: Thank you very much, Orna.

Orna: Okay. Bye.

Aled: Bye-bye.