**International Journal on Online Dispute Resolution**
**2017 (4) 2**

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# Justice Reimagined: Online Dispute Resolution and the Justice System

## Editor's Introduction

*Daniel Rainey*[*]

The material in this section of the journal has been drawn from comments made by participants in the Justice Reimagined conference, held in Liverpool on 27 and 28 June 2018. Some of the comments are presented in their informal context, as they were offered orally during the conference, and some are offered in a more formal context through written notes intended for distribution to the conference attendees. In either case, the comments here are intended to offer a sense of the thinking of current ODR (online dispute resolution) leaders with regard to the various topics highlighted during the conference.

The Liverpool ODR conference was organized by Graham Ross. The conference material can be accessed at this website: www.odrconference.com.

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# Conference Opening Remarks

*Lord Justice Briggs*[*]

**Abstract**

*Lord Justice Briggs has been intimately involved in the development of technology for improving access to justice in the UK. He was the author of a report that energized the move toward online dispute resolution in the courts. These remarks are a retrospective look at his work, now that he is a member of the UK Supreme Court, and no longer involved day-to-day in ODR development.*

**Keywords:** Online Dispute Resolution, online court, access to justice, technology and the law.

It's almost 2 years since I've published, online, my civil court structure review final report. It was a report which I disciplined myself to do in an entirely electronic way, neither receiving nor generating a single piece of paper from start to finish. And as far as I know, a paper copy, at least a public paper copy, of the report doesn't even exist!

I made three, I hope relevant, general recommendations, or headline pieces of advice. Firstly, that a new online solutions court could, solution being short for resolution, greatly improve access to justice for small- to middle-size claims. Where under our current system, legal cost and lawyers' culture make the cost and effort involved in the current process utterly disproportionate to the value at risk. More generally, I advised that in my view digitization could end the tyranny of paper, with big benefits across the justice system in terms of cost, efficiency, transportability, working practices, and not least, the environment. And thirdly, I suggested that procedure in an online solutions court, and indeed in other forms of online court, could be more integrated with what we then called alternative dispute resolution, or ADR, under what I hoisted as the banner 'Taking the A out of ADR.'

Since then, I've spent a year doing implementation of the recommendations in that report, as Deputy Head of Civil Justice, which involved intense day-to-day engagement with the Courts Service Reform Program and then since last October, I've been put out to grass in the Supreme Court. I'm now just judging. So, I'm a sort of watchful has-been, I have no official capacity in the reform process anymore, and what I say now are not in any sense representative of government or the judiciary, they are just my own personal views.

In late 2016, both the government and the judiciary broadly backed my recommendations. And a good slice of the one billion pound public investment in

* Justice of the UK Supreme Court.

the reform program is being devoted to digitization right across the court service, including digitization of, or development of, the online solutions court. The Reform Program has now made large, early strides. There is an ongoing test of a new common platform, based on the Liverpool lower courts, where it brings together under one system of online database documents managed by the prosecution service, the courts, and the defence, and the police, all under one umbrella.

There is great work going on in civil and family tribunals, that is, everything else apart from crime, towards digitization and towards the development of forms for online court.

There is now in beta stage the development and testing of cases related to divorce online, where the error rate in form filling has gone down from 40% when using paper forms to 1% using the online process. You can imagine the improvements that this process generates and the reduction in the levels of frustration of parties who come from a poor background in having their forms sent back because there's some mistake in them. There is online probate at the private beta stage, and there is online civil money claims now at the public beta stage. There is now compulsory e-filing, that is, online filing, and issue of proceedings of the business and property courts, that is mandatory for professional users. This mandatory use is going regional all around the main trial centres in the country later this year.

The Social Security and Child Support Tribunal is getting its process online, and it has a 'Watch my appeal' or 'Track my appeal' process out there, so that users know exactly what's happening in their case in an easily accessible way. The Tax Tribunal is now entertaining online appeals and video hearings, and a process for digitizing and streamlining an arcane and highly inefficient process involving enforcement of judgements is now at the discovery stage, having started earlier this year. And finally, a project to streamline the legal processes for initiating and defending claims of possession of property is about to be launched.

But all these projects are still in their early, minimum, viable project stage. That is, they've been pushed out at a time when, although really skeletal, they're at a sufficient stage of advance to bring real improvements without being anything remotely like the final project product… or part of what's called 'an agile process of development', in sharp contrast with the old system of selling or rather buying from an outside provider a complete system, opening the box and then finding it doesn't work.

Just to give an example, the civil money claims project has launched a system for online commencement of a claim, online defence of a claim, that will take you as far as a default judgement but still goes back into the county court on paper thereafter. This process, with a reversion to paper, is not, and it's not being pretended to be, the online solutions court. It is merely some of the very first building bricks that will eventually be part of the online solutions court. It's being currently rolled out as part of the county court system under the civil procedures where a huge amount of work is being done to develop pilot rules to enable these building bricks to be tested in what might otherwise be thought to be a rather hostile procedural environment.

Meanwhile, in the Supreme Court, a very small and quite separate information technology team (ITT) has been working a quiet miracle, of which I am not the designer, but I am certainly the beneficiary. In the Supreme Court and in the related committee of the Privy Council that hears final appeals from all around the Commonwealth world – the Caribbean, Mauritius, etc. – I heard one from Pitcairn Island the other day and another one from the Cook Islands. We now have all our hearings live-streamed around the world on the Internet, and the Court of Appeals is shortly to follow suit. Parties, especially in the Traditional Committee of the Privy Council, many of whom are poor, don't have huge resources and don't want to spend all of their money putting their lawyers on airplanes to London, are now welcome to appear by video, so we have video hearings. All our documents are now available electronically, although we've maintained a parallel paper path for reasons which I will explain in due course. But it produces a total revolution in working practice.

I am I think, at the moment, the only Supreme Court judge who sits there with twin screens rather than just one, but the wiring is all there under the desk for anyone who wants to join in. I'm still a guinea pig, but my working practices, when compared with a paper-based Court of Appeal, are utterly transformed. I don't have to do all my work in the office. I can work at home, I can work on the train, I can work on my boat and I don't have to carry around piles of files if I want to do homework. I do everything on this laptop which is always connected to the Judicial Intranet within the Supreme Court and to a Skype telephone system; I can, therefore, handle the largest case, or five very large cases, all within the confines of this one laptop or such further screens as I want to plug into wherever I happen to be – and I usually do. This is, I can only say, a total revolution for me, and I assume that it is also for the participating parties who have the same facility.

No doubt, all sorts of out-of-court online dispute resolution (ODR) are being developed in and outside the United Kingdom. Some are being rolled out, for example, the Civil Resolution Tribunal in British Columbia, which is just outside court in the sense that it is an adjudication rather than a court process. Some have been rolled out and then sadly wound up. But at the same time, a quiet revolution is going on in the meaning we ascribe to the acronym ODR.

When I was writing my report in and before 2016, to those to whom it meant anything at all, it really meant new electronic forms of ADR, for example, asynchronous confidential chat line processes and blind bidding as was run by CyberSettle. Like digitization generally, it was all about the facilitation of communication. Now, as this conference agenda shows, ODR has got itself a much wider meaning. The invisible A, because it was Online Alternative Dispute Resolution, has largely gone, as indeed Graham said. The concept of ODR now embraces court processes just as much as out-of-court processes. And, for example, there are now many more links between court dispute resolution and out-of-court dispute resolution, even within an online court process. So, all the early pages that you will encounter if you go onto the civil money claims process will give you links, and guidance, and advice about how to settle your dispute out of court before taking the trouble of litigating. Secondly, the debate is moving on, beyond just commu-

nication. It is moving to artificial intelligence (AI), that is, using IT to decide disputes.

There are, I think, three main drivers for ODR at the moment. The first, not in order of history, is that disputes from the ever-increasing number of online transactions are naturally best resolved online. eBay is an absolutely classic example of this, in which AI plays a central role in the resolution of the very large number of small disputes that are resolved within eBay, a larger number incidentally that are resolved in the civil courts in any given year. Block chain and smart contracts are about to be a huge force which will increase the proportion of our business disputes that have to be resolved online because the contracts, or arrangements or relationships from which those disputes developed originated online. But secondly, modern IT, including digitization and putting everything online, has all sorts of benefits for all kinds of disputes. For example, it's long been used in road traffic accidents, employer's liability, public liability portal, where disputes arise on the road or on the factory floor. The Traffic Penalty Tribunal, about which you're going to hear later, is a very early example of a highly effective ODR, where the dispute arises through people who commit minor infractions of parking obligations, or paying tolls when travelling through tunnels, rather than a dispute originating online. And, of course, the Online Solutions Court, where, when it's been developed and rolled out – it's still in the design stage, what I call in my report Online Stage 1 – Electronic Triage – can enable court users to articulate their grievances in a way that the court can understand and, therefore, get small claims before the court with minimal, but with much more focused, help from lawyers, rather than the lawyer having to hold the client's hand at every stage.

But also bear in mind that the courts are not just for dispute resolution. In fact, most civil claims in this country, in terms of number, are made for the enforcement of undisputed debt. In other words, in that field, there isn't any dispute, but the court is resorted to for enforcement. There are a huge number of debt cases, and the process of initiating those cases through the bulk claims secure data transfer system has been around for years, but that merely gets you so far as a default judgement and nowhere into enforcement, which is currently still entirely paper based. But the Enforcement Project aims to change all this.

So, what are the limits, or constraints upon the advance of ODR? Firstly, they're not I think really technological, except in the very short realm. For example, we still have very incomplete coverage of broadband in the United Kingdom, and this is a very serious constraint. The advances in AI, for example in medical diagnoses, outcome prediction, are constantly accelerating. There's probably nothing that a robot won't eventually be able to do, and no one – bankers, brokers, lawyers, mediators, and even judges – is immune from being *disintermediated*, which is a new buzzword which I learnt the other day at a seminar for judges put on by the Financial Markets Law Committee. It means taking the intermediary out of the link and replacing it with an electronic system operated by AI.

Nonetheless, carrying on with constraints, not technological, but human skills and human preferences, will still be a main inhibitor in the short to medium term. For example, given my own experience in the Supreme Court, fellow judges and senior advocates in the Supreme Court still largely use paper, even when the

electronic alternative is available to them. I am using twin screens, ten of them use single screens, but this means they have to use paper as well because you can't do a case on a single screen or not use a screen at all. When I look at the advocates in front of me, leading counsel almost invariably speak from paper bundles, while their juniors are behind laptops. It's a matter of time, it seems to me.

There are short-term constraints of a funding nature. Online systems, unlike I think paper systems, need teams that are constantly monitoring and improving the product, as you will no doubt hear in relation to the Traffic Penalty Tribunal which has always had a maintenance team alongside the online product, constantly receiving comments from the public and from users, inserting fixes, and publishing them, and inserting them to the main scheme in just the same way as people at Microsoft do with our operating systems. There are other funding constraints. Early take-up may not be sufficient to fund the investment by the payment of fees. This isn't currently a problem with the Court Service Reform Program, which is well funded for the purpose, but we have to ask, whether the funding will be protected to complete the reforms, most of which are in their infancy, bearing in mind the competition from health, now defence, education and dealing with Brexit.

There are other constraints. Even IT gurus make mistakes from time to time, and those responsible for procurement of IT certainly make periodic mistakes. We had something approaching a 10-year delay in getting online issue and filling up and running in the business and property courts, with wrong terms, millions of pounds of product developed and having to be thrown away, rows between the procurers and the IT designers, etc. These things undoubtedly still act as constraints.

There are problems associated with delays in obtaining the necessary primary legislation. For example, we were at committee stage well over a year ago before the last election, where the bill what would have introduced an Online Rule Committee to develop a wholly new approach to procedure across Civil, Family and Tribunals as the base of the introduction of online courts was ready. It was promised in the Queen's speech. The bill has still, for totally understandable reasons of parliamentary management, not been introduced. So, currently, all work on the online civil claims, for example, the Online Solutions Court having to go on under the jacket of Civil Procedure Rules Pilot. Anybody who's read my report will know that is about the worst possible environment in which to have to do it.

There are constraints imposed by reference to the fundamentals of the justice system. Communications in the context of the justice system must be accessible to all, including the many who are digitally challenged. Usually, those who are least able to afford professional help and most in need of it are indeed the most digitally challenged. Using smartphone and tablet technology rather than computer technology is a big remedial factor and is fundamental to what is being done in the reform program, but it's not a complete solution. Assisted digital, with telephone, video, online and face-to-face help is also a vital component in solving this problem, as is the preservation of a parallel paper path for the digitally challenged, at least in the short to medium term.

Secondly, justice must be transparent. Going online risks transparency, unless a new virtual public space is designed. The Supreme Court does well, I think, by live-streaming all its hearings, that is, using IT for bringing about transparency. But of course, the court only streams and makes publicly available that which is actually happening face-to-face in a particular room. The challenge of designing a public forum for what is not happening face-to-face is an altogether different cup of tea. Rest assured, this challenge is being addressed, and nobody regards it as a deal-breaker, but it doesn't prevent it from being a constraint.

Justice is not just about the mechanical application of the existing black letter of law to sets of facts by making reference to a rapid review of previous examples by a robot using a comprehensive database, which is what robots do in medical diagnoses, for example. Incidentally, we don't have such a database in this country; the Chinese are miles ahead of us, in the context of the justice system, in developing such a database, but we will get it soon. It's part of the Reform Program.

Now, robots may well soon do that process of the application of black letter law to fact sets more quickly, and perhaps more accurately, and probably, some would say, with less unconscious bias than judges. But, justice is also about equity, which is a series of principles designed to bring the dictates of human conscience into the justice forum. Justice is also about mercy, that is, tempering the rigid enforcement of the judgement creditor's rights with humanity to the debtor and to mitigate disproportionate hardship both to the debtor and to others; for example, giving time to pay and time to quit if it's a possession case. And if anybody in this room is in doubt about the centrality of mercy as an essential element of a good justice system, just read the book *Just Mercy* by Brian Stevenson, who is a black American lawyer who spent all his career working for prisoners on death row and prisoners with life sentences without parole in the American justice system. And making the losing party feel it has been listened to sympathetically is one of the most important and hardest tasks of a *human* judge. And if we find it difficult, goodness knows how difficult a robot would find it.

Justice is also about molding the common law to address social and other changes. Looking forward, rather than merely back at a database. None of these are suitable for robots, at least yet. There are big challenges in all these respects for their designers.

Ultimately, these constraints may be a matter of democratic choice, or may include a matter of democratic choice. How and by what, or by who, do we, as a society, wish to have our disputes judged and mediated? By people or by robots? Orally or online? Face-to-face or online or on screen? Do we want to have people sent to prison, evicted or ruined financially remotely, or do we want all of these to happen face-to-face? How much are we prepared to take second best because it's cheaper? And these decisions it seems to me are decisions for society to make in a political way, not just for the majority in a poll of court users, still less the government, ministries and judges, although they all have an important contribution to make.

An independent judiciary is currently one of the three foundations of our own written Constitution. Can this judicial arm be replaced wholesale with

robots? And who will design, train, maintain and improve the robots when the judges have all been disintermediated? There is already one recent criticism of online formats that they are looking too much like government, rather than independent court, entities. That criticism was well made in an influential report published by *Justice* a couple of weeks ago. Many disputes involve government as a party; in fact, all criminal disputes do, and almost all public law disputes do, including disputes about the custody of children, as do most tribunal disputes.

Now, I call all these discussions 'constraints', but I don't thereby mean to suggest that we should, therefore, adopt some kind of Luddite resistance movement to these changes. I am uber-keen on bringing as much civil dispute resolution online as is appropriate so as to improve access to justice, though perhaps, I may be unconsciously biased about myself being personally disintermediated. But these constraints are real, and they have to be navigated successfully. So, I'll end this short address by suggesting one or two, although not intended to be comprehensive, rules that might be used as guiding principles in this context.

Let me mention first a few do's. We should be collaborative. There should be collaboration between government and judges as there already is. There should be collaboration with legal professionals, many of whom feel at risk of being disintermediated by these processes, but who have a great deal to contribute. We should be collaborative with related professions and service industries, such as medicine, where huge strides are being made by the introduction of online processes and AI, and we, in the legal profession, would be mad not to listen to their experience. I attended a debate at the Royal Society only a week ago, mainly between lawyers and other professionals – medics, engineers, scientists – in which, for the very first time, the sort of collaboration that I mentioned earlier took place. And the lawyers present readily admitted how much more we need to do of that. There needs to be collaboration with court users and their representatives, including the representatives of those who have no voice of their own, and representatives of those who simply can't or don't go to court in the current environment. There needs to be collaboration with watch-dog bodies like Justice, and there needs to be collaboration as there is this morning, I'm delighted to see, with our overseas colleagues. This problem of collaboration is not something that is related purely to the United Kingdom or that needs a purely UK solution. Colleagues, particularly in British Columbia, have been central to development of ODR for the courts, and collaboration with them has been central to the development of the Online Solutions Court in this country. Blockchains and smart contracts know no national boundaries. And this is another reason why this whole thing has to be done on an international basis. And we must be collaborative with those who are active in politics. For example, in the Westminster Policy Forum, we must talk to politicians, we must bring them on side, we must help them to understand, we must help them to have an informed voice when they go to Parliament and to places where political decisions are made. And we must do this sort of collaboration at conferences like this.

Secondly, there is the issue of public and private investment. I don't think ODR can realistically be entirely funded by the state, nor be entirely funded by private enterprise. There must be a join-up approach between the two. We must

be inclusive in everything we do; we must not leave any class out of the benefits which we are developing. We must retain a perception that justice means more than just resolving disputes. I've mentioned equity and mercy, and I've mentioned that justice also exists for enforcement where there is no dispute. And we must adhere to transparency and develop new systems of online transparency.

A few don'ts. I don't think we should worry too much about getting it perfect the first time. The perfect is the enemy of the good. Modern IT is endlessly adaptable if things aren't quite right. We should not lose sight of or throw away the jewels which make our justice system the best in the world, such as oral hearings where they are needed. People constantly say to me they're astonished how much oral time our Supreme Court gives to really difficult legal issues compared with any other Supreme Court, at any rate in Europe or America that you might mention. Some advice could be given online in a commoditized form, but at the end of the day, there is no substitute for bespoke, early advice on merits. And indeed, there is no substitute for skilled advocacy.. We should not assume that because something can be done technologically, therefore it should, or must be. And we should not assume that one size fits all. Once you get into the justice system, one thing that hits you really hard is how everything is different from everything else. We should not get demoralized when we take wrong turnings. We should, I think, laugh at them and carry on.

And finally, please, we should not disintermediate mediators or judges before my wife, who is a mediator, or I, has retired. But happily, this won't be very long.

Thank you very much.

# Opening Remarks by Conference Chair Graham Ross

*Graham Ross*[*]

As a way to begin this conference, let me review two online dispute resolution (ODR) developments, one in the United Kingdom, the other Europe-wide, and share some disappointment with their roll-out, identifying lessons for those who may wish to follow.

The first item to mention is the European Union's (EU) Regulation on Online Dispute Resolution in Consumer Disputes (524/2013). The regulation requires all companies selling to consumers online to display an 'easily accessible' link to an ODR platform run by the EU that would refer dissatisfied consumers to an alternative dispute resolution (ADR) provider approved for, amongst other matters, having a system on which discussions and exchange of information could take place online. This effectively means that all online retailers throughout the EU, and outside businesses wishing to sell into the EU, would effectively take on the task of promoting ODR in the public's conscience. This impact would be the greater for the fact that far more people will experience consumer disputes than might be involved in a contested court case, and thus it would help generate more knowledge in the society of ADR itself. The sad fact that has emerged from a report released by the EU last December is that levels of compliance are extremely low.[1]

This new, and official, report tells us that, despite a whole year having passed since the regulation had come into effect, some 72% of websites throughout the EU that were looked at were non-compliant. In the United Kingdom, it was higher: 86%. The situation is even worse than the headline figures, since the compliance level derived from the work of 'mystery shoppers' who were asked to find a link as if they already had a complaint. As a result, the report claims that placing the link within Terms and Conditions (or complaint handling pages), to where a consumer might navigate to if he or she already had a complaint, satisfies the 'easily accessible' requirement. I disagree. This ignores and defeats the principle objective of this legislation which was to encourage growth in cross-border online consumer purchases within the Single Market, doing so by building confidence *before* the purchase had been made and a complaint arisen. It would achieve such by notifying prospective consumers of the availability of an EU-managed signposting service to introduce consumers to an officially approved ODR service. That requires placing the link on the home page and 'above the fold'. Burying the link deep down within Terms and Conditions is not going to achieve the pre-pur-

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1 https://publications.europa.eu/en/publication-detail/-/publication/9cafdfce-b4a7-11e8-99ee-01aa75ed71a1/language-en.

chase confidence in the retailer that the legislation was set up to achieve. It is a well-accepted fact, which we know if only from our own conduct, that very few people bother to read Terms and Conditions, unless they have a specific reason to do so, such as to pursue a post-sale complaint. We all lie regularly by clicking to say 'I have read, understand and agree to the Terms and Conditions.' Evidence has been published to reinforce this universal truth.[2]

The reality is that, out of the 28% of retail websites throughout the EU that had any link at all to the EU's ODR platform, and that were described as compliant, 83% had it buried in various legal terms that would not be read by consumers. The true figure for compliance is thus less than 5%. Clearly, the lesson is that each state must do more to inform and enforce.

The second lesson to be learnt is to make participation in the process of ODR offered through the approved provider selected by the consumer mandatory on the trader. The European law does not do this. The result has been that traders can comply with the regulation by placing a link to the EU's ODR platform on their home page and thus gain increased confidence of consumers in the safety of buying from such sites compared with competing sites, yet when dissatisfied customers seek ODR through an approved provider to whom the EU's portal refers them, the trader can simply refuse to participate. To fail to make participation mandatory risks not only slowing down the uptake in ODR use but also damaging the image of ODR in the eyes of those consumers who go to the effort of selecting an approved service only to find it rejected by the trader. One can go further and say that the high level of non-participation, which I am hearing from various providers on the approved list, spoils trust in the whole project.

The second ODR development that I want to highlight is the beginnings of an online court for money claims that will in time embrace ADR delivered online. I have just one concern that we may have started a little early before the full design has been worked out. In reality, it is the online court's first baby steps but, somewhat worryingly, these are being taken before any decision seems to have been reached as to where precisely these baby steps are to lead.

This development can be traced back to the Report of the Civil Justice Council's ODR Advisory Group (of which I am a member) on ODR for low-value civil claims.[3] Our recommendation was that HM Online Court be created and a three-tier journey be offered taking litigants from a first-tier advisory function to a second tier, where various forms of neutral facilitation to resolution would be offered, culminating in the third tier involving judges in interlocutory action and final determination conducted primarily online.

Lord Briggs, in his Final Report on the Civil Courts Structure Review,[4] devoted Chapter 6 to his recommendation for the formation of an online court much in line with the ODR Advisory Group's Report.

2 www.foxnews.com/tech/2010/04/15/online-shoppers-unknowingly-sold-souls.html.

3 https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.

4 https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf.

Now it is here, what does it look like? There seemed to me only one way to best do this. So, I opened a case. I decided to sue Chelsea Football Club for representing on tickets that persistent standing would not be allowed whilst proceeding to turn a blind eye to fans standing throughout the game. The background is that I had bought tickets for myself and my son in the 'away' section for the Chelsea versus Everton football match in February 2015 (the date is important). It was stated on the ticket that 'persistent standing' would not be permitted. Despite the large contingent of stewards around the 'away' section and despite my complaining to the stewards on several occasions that fans were standing throughout the match, thus requiring my having to also stand in order to see the game, they failed to take any action. I was left with pain and discomfort in my back for about 5 days after the game.

The first thing I have to say is that the online court portal looks very little more than Money Claim Online, an e-filing facility for liquidated damages claims that has been around for over 20 years and simply allows for filing of the claim and defence, whereupon the case is transferred to the paper queue.

My main concern is that three key recommendations in the ODR Advisory Group's Report and one in the Advisory Group's response to the Briggs Report[5] appear have been ignored.

Firstly, the report recommended not trying to reinvent the wheel by building in-house. Rather, the recommendation was to take out licences to utilize existing systems. So far, Her Majesty's Courts and Tribunals Service (HMCTS) appears to be building in-house.

Secondly, the report advised against just trying to digitize the current processes, but to create a new process. So far, it appears to be just e-filing for the current offline process.

Thirdly, the report suggested tailoring processes to particular types of disputes and in this way delivering a platform and process more focused so as to better guide the litigant into the framing of the case and to enable the tailoring of resolution processes. So far, the filing journey is generic, taking in all monetary claims of any nature up to £10,000 without any attempt at building specialist branches. By and large, claimants are simply asked to complete a blank box with limited assistance with framing their claims.

The advice in the response to the Briggs Report was not to start at the beginning but rather at the end with Tier 3 and the work of the judges. The rationale was that to start with e-filing would increase significantly the numbers of cases being filed at a time when the processes ahead for this increase in the numbers of litigants would be the existing offline processes. This will likely lead to a jam and slowing down of the speed of the litigation. Of more concern, the vision of an online court with its modern entrance would only disappoint when litigants find nothing new lying ahead. A far wiser approach would have been to begin at Tier 3 (enabling judges to work more efficiently online), then to move on to Tier 2 (enabling court-assisted ADR) and only when these processes were in place and ready

5 https://www.judiciary.gov.uk/wp-content/uploads/2016/04/cjc-odr-advisory-group-response-to-lj-briggs-report.pdf.

to handle a significant increase in cases, to open the doorway to the expected increase in litigation with an online Tier 1. The added benefit of approaching in this way is that the Tier 3 work would be easier and quicker to implement and would also offer the greater cost saving.

Given that HMCTS has decided to start at Tier 1, what has it achieved that is different than the 20-year-old Money Claim Online system? The simple answer is not a lot. The concept in the mind of the Advisory Group was that, at the Tier 1 entry level, the public would be able to obtain information on the law as well as benefit from a form of technology-aided diagnosis of their case and guidance into the options for resolving the matter. Apart from a series of questions designed to identify the basic information about the case, you are given a blank box. Good case framing assists by offering open text input, to enable the party to add anything omitted, only at the end of a set of case defining questions set out in a logic tree of questions. To give a blank box at the outset to a party, especially one unrepresented by lawyers, as online filing encourages, not only risks lengthy rambling statements with irrelevant comments that will take unnecessary additional time for the other party, neutrals and the judge to read and understand, but it also amounts to just copying the existing process rather than exploiting new processes offered by moving online. Further, it loses the opportunity for the system to generate knowledge from a more structured form of case input that would open up the opportunity for meaningful analytics.

I was left with the impression that I could have answered with information indicating my case was totally devoid of merit with just a series of rambling random sentences and the case would have been issued on payment. This is not how an online justice system should operate.

Following this stage, the system then asks the claimant to complete a 'Timeline of Events'. This is meant to be a list of events in the story line of the case with a date and a brief description. However, disappointingly, there are no questions focused on the grounds for bringing the claim.

As much as possible in a good and useful 'guided pathway' one would be asking the parties to respond by ticking boxes in lists of alternative answers and in this way the parties are assisted not to just understand certain basic aspects of the relevant rules but also assisted in better framing of their position and in a way that the system can learn from to help it better provide useful guidance as well as analytics for the court administrators.

The shortcoming of this simplistic case filing process in failing to begin to properly exploit technology is that problems for the parties are missed. In my own case, despite the fact that one element of my claim was for personal injury (the back pain) and despite my stating it dates back to February 2015, that is, just outside the 3-year limitation period, it was happy to take my filing fee without comment. It seems there is no limitation rule checker built into the system to flag this problem and advise.

# Artificial Intelligence and Online Dispute Resolution Systems Design

## Lack of/Access to Justice Magnified

*Leah Wing*[*]

**Abstract**

*Recent scholarship and innovative applications of technology to dispute resolution highlight the promise of increasing access to justice via online dispute resolution (ODR) practices. Yet, technology can also magnify the risk of procedural and substantive injustice when artificial intelligence amplifies power imbalances, compounds inaccuracies and biases and reduces transparency in decision making. These risks raise important ethical questions for ODR systems design. Under what conditions should algorithms decide outcomes? Are software developers serving as gatekeepers to access to justice? Given competing interests among stakeholders, whose priorities should impact the incorporation of technology into courts and other methods of dispute resolution? Multidisciplinary collaboration and stakeholder engagement can contribute to the creation of ethical principles for ODR systems design and transparent monitoring and accountability mechanisms. Attention to their development is needed as technology becomes more heavily integrated into our legal system and forms of alternative dispute resolution.*

**Keywords:** ODR, ethics, alternative dispute resolution, technology, dispute system design, artificial intelligence.

Tens of thousands of algorithms impact our daily lives, providing greater efficiency, protection and access as well as reducing our choices and placing us at greater risk of exploitation. The capacity of algorithms to powerfully influence us and the lack of transparency about how they are being utilized highlight the need for scrutiny as we seek to understand their impact on access to justice.[1] This is

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1 J. de Werra, 'ADR in Cyberspace: The Need to Adopt Global Alternative Dispute Resolution Mechanisms for Addressing the Challenges of Massive Online Micro-Justice', *Swiss Review of International & European Law*, 2016, pp. 289-306; E. Katsh & O. Rabinovitch-Einy, *Digital Justice: Technology and the Internet of Disputes*, Oxford, Oxford University Press, 2017; S.J. Shackelford & A.H. Raymond, 'Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR', *Wisconsin Law Review*, Vol. 3, 2014, pp. 614-657; and L. Wing, 'Ethical Principles for Online Dispute Resolution: A GPS Device for the Field', *International Journal of Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 12-29.

important given the explosion in the use of technology for handling e-commerce disputes in particular, in a landscape in which so many are inaccessible to court redress.[2] While the application of technology to dispute resolution was introduced with hope and a promise to expand access justice, we are finding that it can also magnify the risk of procedural and substantive injustice.[3] Briefly, I will discuss several ways that artificial intelligence (AI)[4] and big data, specifically, can exponentially increase efficiency, access to participation, and even creativity as machine learning, for example, can be harnessed to generate innovative agreement options,[5] and I will explore how they can also amplify power imbalances and reduce transparency in decision making, thereby decreasing access to justice[6] and raising serious ethical questions for online dispute resolution (ODR) systems design.[7]

The ways in which we design ODR systems and manage data within them are central to whether they magnify the risk or the opportunities for access to justice. These new risks and opportunities in ODR are influenced by exponential growth in data size and collection (big data), data processing capabilities, AI and their integration with mega systems;[8] as well as the lack of/potential for transparency and accountability. Simultaneous to acknowledging that it poses dilemmas, it is vital to highlight that technology greatly enhances efficiency (time, costs and reduction of need for human intervention) and communication (both the speed

2 Although there is change afoot as legal systems around the world begin to incorporate technology; for example, the development of the online courts in England and Wales, the Hangzhou Internet Court in China, several state courts in the United States undertaking pilot projects, and British Columbia's small claims tribunal which began using online dispute resolution in 2017 and handled 14,000 cases in its first 7 months, available at: www.americanbar.org/news/abanews/aba-news-archives/2018/02/british_columbiaodr.html (accessed 6 June 2018).

3 Katsh & Rabinovitch-Einy, 2017. *See* related discussions in C. Menkel-Meadow, 'Is ODR ADR?' *International Journal of Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 4-7; N. Welsh, 'ODR: A Time for Celebration and the Embrace of Procedural Safeguards', 15th International Forum on Online Dispute Resolution, The Hague, May 2016, available at: www.adrhub.com/profiles/blogs/procedural-justice-in-odr (accessed 7 October 2016); L. Wing, 'AI & ODR Systems Design: Access to Justice Ethical Challenges & Opportunities Magnified', Online Dispute Resolution Forum, Paris, June 2017; and L. Wing, 2016, pp. 12-29.

4 'AI' is used here as a broad interpretation of what can fall under the category of artificial intelligence.

5 Katsh & Rabinovitch-Einy, 2017; A.R. Lodder & J. Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology*, Cambridge, Cambridge University Press, 2010.

6 *See* A. Barsky, 'The Ethics of App-Assisted Family Mediation,' *Conflict Resolution Quarterly*, Vol. 34, No. 1, Fall 2016, pp. 31-42; A.H. Raymond & S.J. Shackelford, 'Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?', *Michigan Journal of International Law*, Vol. 35, Spring 2014, pp. 485-524; Welsh, May 2016, available at: www.adrhub.com/profiles/blogs/procedural-justice-in-odr (accessed 7 October 2016); and L. Wing, 'AI & ODR Systems Design: Access to Justice Ethical Challenges & Opportunities Magnified,' Online Dispute Resolution Forum, Paris, 2017.

7 L. Wing, 2017; and L. Wing, C. Menkel-Meadow, & J. Martinez, 'Ethics, Technology, and Dispute Resolution Systems Design', American Bar Association Dispute Resolution Section Conference, Washington, DC, April 2018.

8 For example, blockchains, national and private health systems, social media platforms, etc.

and types).[9] Additionally, big data and AI are already demonstrating the ability to contribute to dispute prevention and detection through data analysis and machine learning to make possible *ongoing* systems re-design for early dispute detection and handling which can reduce risk, liability, harm, inefficiency and injustice.[10] These attributes can not only increase access to justice but also make possible the handling of more complex disputes and facilitate effective management of exponentially more cases, issues and stakeholders than face-to-face alternative dispute resolution (ADR). This is particularly good news when we note that by 2019 it is anticipated that there will be more than one billion e-commerce disputes annually[11] and clearly, the overall number is much higher when disputes in other sectors such as labor, family and health care are included.

Turning our attention to the risks helps elucidate how the incorporation of AI within ODR systems design can reduce access to procedural and substantive justice. The unintentional use of incomplete and inaccurate data by AI can escalate the negative impact; for example, in one study of medical records, "the authors reported that some piece of inaccurate information was present in 81 per cent to 95 per cent of patient records."[12] In such circumstances, inaccurate and incomplete data can exponentially increase health and/or legal risks not only for the specific patients and medical professionals involved but for even greater numbers of people when it is incorporated into big data used for algorithmically structured machine learning, insurance policy development, adjudicatory decision making or guidance for negotiated agreements.[13] Another risk can occur when a system is designed in ways that benefit those in power or repeat players at the expense of others.[14] Let's take an example in which inequality is purposefully structurally determined both procedurally and substantively into the software. A system can be designed to harness the power of big data and machine learning to identify characteristics[15] of a complainant to reduce costs and risks for repeat players. The data can then be used to provide different processes and outcomes dependent upon the characteristics of the complainant. For example, a company could employ algorithms in its in-house ODR platform that determines what is offered to a specific customer[16] or business[17] complainant based on their assessed characteristics and the complainant's relationship with the company. The algorithms can be used to determine the likelihood of increasing loyalty to the company if

9 For a rich discussion on this, *see* Katsh & O. Rabinovitch-Einy, 2017.
10 Katsh & Rabinovitch-Einy, 2017.
11 C. Rule, *Workshop on Private International Online Dispute Resolution*, Stanford University, April 2017.
12 Chan *et al*. cited in Katsh & Rabinovitch-Einy, 2017, p. 94.
13 For an excellent in-depth analysis, *see* Katsh & Rabinovitch-Einy, 2017.
14 This can be the case whether or not it is intentionally designed for that outcome.
15 These characteristics can be based on social group categories or personalized data, for example: location of purchaser in a high- or low-income neighbourhood, gender, race, age, country of purchase, purchase power based on credit card usage, the net worth of the complaining business and the likely impact of the complainant's social media footprint on others who have significant purchasing power.
16 In business-to-customer (B2C) disputes.
17 In business-to-business (B2B) disputes.

the complainant is given access to particular types of ODR or steps in an ODR process; or it can assess the outcome least costly to the company that the complainant is likely to settle for without escalating his or her complaint to social media or breaking the complainant's business relationship with the company. While the use of AI to assess the specific characteristics of parties can reduce their access to justice, it can also, ironically, be the lack of attention to the actual life circumstances of some parties that can result in unequal access and even exclusion from ODR processes. By not sufficiently considering the impact of the digital divide and not applying universal design principles to ODR platforms for those with disabilities,[18] ODR systems are often designed without adequately addressing the realities of differential technological access, needs and knowledge.

The significant impact that big data and AI can have on access to justice requires us to face the ethical implications of the centrality of AI and other forms of technology to dispute handling. Under what conditions should algorithms decide outcomes?[19] Should big data specialists control access to justice? How do we regulate the interface between AI, big data and the impact of platform designs on the delivery of justice? Which priorities should impact the development of ODR systems and who should decide? Who should be responsible for the creation and maintenance of regulation, monitoring and accountability? Based on which ethical standards and developed by whom? And quite importantly, while we are busy researching and analyzing these concerns, who benefits and who is most at risk while we lack agreed and effective mechanisms? We have a long history of ethical concerns regarding access to justice for ADR, for example, in terms of power imbalances and disproportionate benefits for repeat players. When we add the impact of big data and AI, we can see that these specific ethical dilemmas are not only magnified but new ethical concerns emerge as well. Examining the risks helps to highlight the importance of addressing the lack of transparency and monitoring needed to ensure ethically driven ODR systems designs that would expand rather than reduce access to justice.

Without international standards, monitoring and global, cross-jurisdictional regulation of ODR, is the software designer becoming a gatekeeper for access to justice?[20] Recognizing some of the potential and risks related to ODR, a growing number of governmental entities have created legislation or begun discussions about its regulation.[21] Wide stakeholder engagement in that process is crucial, and the ODR field has much to contribute not only to influence legislation and

18 For a detailed analysis of the impact of online dispute systems design in constructing or reducing barriers for those with disabilities, *see* D. Larson & L. Feingold, 'ODR for All: Digital Accessibility and Disability Accommodations in Online Dispute Resolution,' Mediate.com, May 2018, available at: www.mediate.com/articles/larsond2.cfm (accessed 8 June 2018); and *see also* C. Menkel-Meadow, 'Is ODR ADR?' *International Journal of Online Dispute Resolution*, Vol. 3, No. 1, 2016, p. 5.

19 *See* Raymond & Shackelford, Spring 2014, pp. 485-524.

20 Thanks to Vikki Rogers for this powerful and apt metaphor.

21 *See* A. Wiener, 'Regulations and Standards for Online Dispute Resolution: A Primer for Policymakers and Stakeholders,' 2001, available at: www.mediate.com/articles/awiener2.cfm (accessed 22 August 2016); and Wing, 2016, pp. 12-29.

regulation, but in leading the way in their creation.[22] And in seeking to do so, we face the fact that not all stakeholders[23] share the same priorities, knowledge, responsibilities and power to influence the design, functioning and regulation of ODR systems. Given this, how can we best encourage thoughtful, inclusive and productive stakeholder engagement? And, how can we ensure a focus on reducing barriers and enhancing access to justice when AI and big data are utilized in ODR systems design? Thus, there is a growing call for ethically driven ODR systems design and for the development of monitoring and accountability mechanisms[24] based on shared ethical principles for ODR.[25] I offer that Ethical Principles for ODR can serve as a GPS for helping to guide us on our journey towards ensuring that access to justice and fair resolution processes are enhanced and not restricted through the application of technology. The National Center for Technology and Dispute Resolution's Ethics Initiative has worked in international and interdisciplinary collaborations on Ethical Principles for ODR *that are values and not rules*[26] that hopefully can help in creating monitoring and accountability mechanisms for the ethical design and functioning of ODR processes. They are built on shared values to provide consistency across jurisdictions; to be responsive to context (*i.e.*, technology, sector, jurisdiction and culture); and to serve as a guide in the creation of legislation, regulation and standards for ODR.

Ongoing multidisciplinary collaboration and stakeholder engagement can further the implementation of Ethical Principles for ODR and in particular, aid in their use in developing standards for ODR systems design and creating transparent monitoring and accountability mechanisms. Recently, one initiative has seen the Ethical Principles for ODR being translated into a set of Ethical Standards for ODR by the International Council on Online Dispute Resolution.[27] Further such work is needed as technology is becoming more integrated into our legal systems and forms of ADR, offering both tremendous risk and potential. In such a context, it is ever more urgent to consider how to structurally determine ethical online dispute systems design to address longstanding and new barriers to access to justice.

22 N. Ebner & J. Zeleznikow, 'No Sheriff in Town: Governance for the ODR Field', *Negotiation Journal*, Vol. 32, No. 4, 2016, pp. 297-323; D. Rainey, 'Third-Party Ethics in the Age of the Fourth Party', *International Journal of Online Dispute Resolution*, Vol. 1, No. 1, 2014, pp. 37-56; and Wing, 2016, pp. 12-29.

23 Consider the diversity of stakeholders which include, among others, advocates (consumer, etc.), businesses, courts, consumers, governments, in-house customer service dispute resolvers, ODR platform providers, ODR practitioners and software designers.

24 Ebner & Zeleznikow, 2016, pp. 297-323; Shackelford & Raymond, 2014, pp. 614-657; A.J. Schmitz & C. Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, Chicago, IL, ABA Book Publishing, 2017, p. 62; Welsh, May 2016, available at: www.adrhub.com/profiles/blogs/procedural-justice-in-odr (accessed 7 October 2016); Wing, June 2017; and Wing, *et al.*, April 2018.

25 L. Wing, 'Lack of/Access to Justice Magnified: Ethics, AI and Online Dispute Resolution Systems Design,' Law and Society Annual Conference, Toronto, June 2018; Wing, *et al.*, April 2018; and Wing, June 2017.

26 *See* Wing, 2016, pp. 12-29.

27 Available at: http://icodr.org/index.php/standards/ (accessed 29 July 2018).

# Creating Standards for ODR

*Daniel Rainey*[*]

My comments today will focus on three issues: (1) The various standards and ethics work being done currently as they relate to online dispute resolution (ODR); (2) some of the problems inherent in creating meaningful standards for a 'creative' field like ADR/ODR; and (3) the limitations of standards when it comes to opening up dispute resolution systems to those who have traditionally been unserved or underserved.

I won't be able to cover all of the efforts that are currently underway to establish ethical and practice standards that may have an impact on the development of ODR systems, but I do want to highlight five projects I think may have some significance in the long run.

First, the National Center for Technology and Dispute Resolution (NCTDR), under the guidance of Leah Wing, has been conducting a dialogue about ethics and ODR.[1] Leah has published an article in the *International Journal of Online Dispute Resolution* that introduces the major issues involved in the discussion of ethics and ODR,[2] which is defined for purposes of this work in ethics as "inclusive of any process or intervention used to handle disputes that employ electronic communications and other information and communication technologies."[3] That's pretty much in line with the definition of ODR that I've been using for some time – the intelligent application of information and communication technology to any form of dispute resolution.

The NCTDR has identified 17 ethical principles that should guide development of ODR systems and ODR practice. Taken at the highest level, these principles speak to creating the ODR environment to which we should aspire.

A second effort takes these aspirational goals and begins to move in the direction of standards for behaviour that may guide those involved in the creation of and application of ODR.

The International Council for Online Dispute Resolution (ICODR) is being formed now, and will probably officially 'roll out' at the International ODR Forum in New Zealand a bit later this year. A central feature of ICODR is the creation of an organization that can work with practitioners and developers across the spectrum of ODR to create standards and criteria broad enough to allow innovation but specific enough to provide real guidance. Additionally, the standards developed and managed by ICODR will be an important element for trust building

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1 *See* the work on the ODR.Info site: http://odr.info/ethics-and-odr/.

2 L. Wing. 'Ethical Principles for Online Dispute Resolution: A GPS Device for the Field', *International Journal of Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 12-29.

3 *See* 'Ethical Principles for ODR', available at: http://odr.info/ethics-and-odr/.

among potential parties who need ODR platforms and practitioners to guide them through the ever-increasing digital conflict environment being created by e-commerce, e-Justice and the near universal incursion of technology into our social relationships.

NCTDR and ICODR are working on ethics and standards that affect everyone in the ODR environment – third parties, applications (fourth parties), developers, service providers, etc. There are a couple of efforts underway that focus more specifically on standards of behaviour for third-party practitioners – mediators, facilitators, conciliators, lawyers, arbitrators, etc.

The International Mediation Institute (IMI), through an ODR Mediation Standards Committee, has developed standards for e-mediators, and standards for educators and trainers who prepare third parties to operate in the ODR environment. The IMI standards are presented in a manner that allows for the establishment of certification programs, evaluation and monitoring of training, and common areas of competency that should be addressed to prepare practitioners to operate responsibly in an ODR environment.

The Association for Conflict Resolution (ACR) and the American Bar Association Section of Dispute Resolution (ABA SDR) have undertaken a review of the Model Standards for Mediators adopted more than a decade ago by ACR, the ABA and the American Arbitration Association (AAA).[4] The ACR/ABA project does not seek to rewrite the model standards, and it does not aim to revise them with just ODR in mind. Instead, the product of the project will be a set of commentaries attached to each of the 10 standards that will address updated approaches to each standard based on changes in the ADR environment over the past decade or more, including the rise of ODR. Like the IMI project, the ACR/ABA project will focus on third-party practitioners, not on platforms, developers or providers, although there may be some suggestions about standards for platforms.

In the United States, the National Center for State Courts (NCSC) is working on a set of standards very different from the ones being discussed for practitioners and providers. The NCSC is putting together guidelines and standards that can be used to write requests for proposals by court systems that want to use ODR as an integral part of their court processes. Essentially, they are setting up standards for the courts that answer the question, "for what should I ask when seeking bidders for ODR systems?"

The fact that all of these efforts are going on in an environment that is only loosely organized is an issue I'll return to later in this presentation. But first, let me speak very quickly to a trend that is making the creation of workable standards for ODR even more important: the adoption of ODR/ADR as a formal adjunct to justice systems.

4 Introductory comments regarding the status of the ACR/ABA/AAA model standards can be found in two publications. D. Rainey, 'Model Standards of Conduct for Mediators', *International Journal of Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 30-40; and S.N. Exon, 'Ethics and Online Dispute Resolution: From Evolution to Revolution', *Ohio State Journal on Dispute Resolution*, Vol. 32, No. 4, 2017, pp. 606-659.

We are all familiar with the 'big bang' birth of ODR in the explosion of e-commerce in the late 1990s and early 2000s. All of a sudden, it seemed, we were creating disputes in an environment unlike any we had before, and we were creating them in numbers that made them impossible to handle in a traditional, face-to-face manner. We had to create ODR, and Ethan Katsh, Colin Rule, and others did so with what has come to be the 'poster child' for e-commerce ODR – eBay.

The need for some coherent ethical principles and standards for ODR practice is being given more recent and urgent emphasis by the increasing adoption of ODR by justice systems around the world. The United Kingdom is perhaps the leader in this move, but others are quickly following the United Kingdom's lead.[5] At the recent Global Pound Conference, two of the strong recommendations from the participants called for the use of dispute system design to revolutionize the justice system by (1) formally integrating ADR into court systems, and (2) increasing education about ADR in law schools and other educational venues.[6] While the Global Pound Conference recommendations did not specify the use of ODR, the significance of this for ODR is that in most cases the energized injection of ADR into court systems is being accomplished through the use of ODR platforms.

If the need for standards is growing, and there are a number of groups working on establishing ODR standards, what are some of the problems we can expect to arise?

First, and probably most often cited as a reason for not establishing firm standards for accreditation is the 'creative' nature of ADR practice. In fact, the ABA specifically cited the desire to encourage innovation as a reason for not establishing certification criteria for lawyer/mediators. Establishing standards for manufacturing widgets is a lot easier than establishing standards that work equally well across the board for third parties engaged in child custody cases and third parties engaged in complex, multi-party environmental cases. The ACR/ABA project I mentioned earlier is focusing on creating commentaries connected to general standards because when the discussion about whether and how to rewrite the standards first began, the only consensus opinion among the group was that each of the areas of practice would need special and specific clarifications to the general standards. Unifying standards in a field that is, by nature, diverse will continue to be a challenge.

5 For examples of the UK interest and research in digital justice, *see*: Criminal Justice Joint Inspection, 'Delivering Justice in a Digital Age: A Joint Inspection of Digital Case Preparation and Presentation in the Criminal Justice System', April 2016, Criminal Justice Joint Inspection – HMCPSI, HMIC. (Arolygiad ar y Cyd Cyfiawnder Troseddol), available at: https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/delivering-justice-in-a-digital-age.pdf and Civil Justice Council. 'Online Dispute Resolution for Low Value Civil Claims', Online Dispute Resolution Advisory Group, February 2015, available at: https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.

6 For a discussion of dispute resolution design, ADR and the Global Pound Conference, *see*: L.P. Love, L.B. Amsler, & M. Karol, 'Dispute System Design Can Help', *Dispute Resolution Magazine,* Spring 2018, pp. 15-19.

Second, the existence of multiple actors in the ODR world calls for not just one set of standards, but standards that address the separate activities of those actors. Standards for practitioners must tell third parties how to behave in relationships with primary parties. Standards for fourth parties (apps and platforms) must set parameters that describe how algorithms and AI must behave in relationships with primary parties. Standards for developers must address a number of issues, including the basic ADR/ODR knowledge that developers should have in addition to their coding skills. Standards for service providers must address issues of privacy and confidentiality in an online world where privacy is, some would argue, an illusion. The fractured nature of the actors and the standards they need will continue to be a challenge.

Finally, the very fact that so many organizations are addressing the ethics and standards issues will itself be a challenge. Some of you may remember the days when there were competing standards for broadcast television (NTSC, PAL and SECAM), and then competing standards for home video (in the United States, VHS and BetaMax). Ultimately, the advancing nature of digital transmission has made those standards 'battles' a quaint memory. But they were not quaint at the time – they meant that the things done in one format were totally shut out of use for formats that might be used literally right next door. The challenge for ODR ethics and standards development will be to find or create an organization that can speak to issues across all of the types of practice and the range of actors to establish credible, acceptable guidelines for development and practice, accessible to and used by all.

As a final note, I'd like to raise an issue that is perhaps only marginally related to standards, but which I think is one of the more important issues facing the worldwide justice system as ODR becomes more common.

Let's assume for the moment that we, as the ODR community, are successful in creating a standards environment that makes sense, is adopted widely and works. What that will do is apparent – it will make ODR systems more fair, efficient and inviting. But lacking any other actions, it will, in my opinion, make ODR access to courts and access to justice more appealing and easier primarily for those who already have access. It will not, I think, automatically mean that those who have been underserved or unserved will see standardized ODR as an open door unless we, as the ODR community, think about how to present our fair and open systems to those who have an inherent bias against entering the justice system.

In the United States, estimates of how many justiciable issues never enter the justice system at all range as high as 70%. Seven out of 10 who have experienced a dispute or trauma that would have standing in a courtroom never get so far as consultation with an attorney.

The most common ways to explain this phenomenon are pretty obvious to anyone who has ever had anything to do with the justice system. The perception, and most often the reality, is that even talking to a lawyer, much less engaging in a legal proceeding, is too expensive in terms of time and money. The perception, and the reality, is that, even if one could afford the initial approach, the system favours those with enough money to use the judicial system as a bludgeon. There

is, generally, a basic lack of understanding of the judicial process among those of limited resources: it is not obvious whether something that has happened is appropriate for legal action, and there is a basic lack of knowledge about how to proceed even if legal action is appropriate. Finally, and perhaps most powerfully, among many there is a basic fear of the justice system. Literature abounds that offers tips on how to overcome anxiety related to the justice system – and this literature is for licensed attorneys and experienced clients. For a great many, if not most of the general population, courts are where things happen *to* you, not *for* you.

In the United Kingdom, the recently released Justice report on digital exclusion raises a number of issues related to the impact of ODR systems used as a formal entry point into the justice system.[7] Our ultimate challenge as ODR practitioners, developers and providers is to create standards that offer fair and open treatment of parties entering ODR systems, and to go out and explain why that fairness and openness really are a reason to approach and trust the justice system.

7 Justice, 'Preventing Digital Exclusion from Online Justice', released 4 June, 2018. Available at: https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf.

# Scrutinizing Access to Justice in Consumer ODR in Cross-Border Disputes

## The Achilles' Heel of the EU ODR Platform

*Fernando Esteban de la Rosa*[*]

I will focus my brief comment on the new European Union Online Dispute Resolution (ODR) Platform, mainly evaluating its role in promoting access to justice. I am not going to insist on how much Consumer Alternative Dispute Resolution, mainly consumer ODR, is a crucial element of the Access to Justice, beyond the traditional litigation frame. And not by chance it has been submitted that the development and deepening of the methods of dispute resolution outside the Courts of Justice is a good thermometer in which one can measure our civilization.[1]

Europe has been a pioneer in recognizing the need for ODR in addressing conflicts that arise in the e-commerce setting. The EU ODR Platform has been created by the European Commission according to the Regulation 524/2013/UE. Finally, with a minor delay, the EU ODR Platform was launched on 15 February 2016. The EU ODR Platform is not still working cent per cent.[2] However, the commission has recently published some statistical data related to its first 2 years of operation.[3] According to the report, 85% of the complaints filed in the EU ODR Platform were automatically closed, but 40% of these cases led to further direct contact between the trader and the consumer in an attempt to solve the problem. Another 9% of the complaints were refused by the trader, although in two-third of these cases, traders made a further direct contact with the consumer. For 4% of the complaints, both parties withdrew from the procedure before agreeing upon an alternative dispute resolution (ADR) body. Finally, only 2% of the complaints were submitted to a specific ADR body, with barely half of them resulting in a final outcome.

According to a first reading of these data, similar to the one made by the European Commission, the EU ODR Platform has shown its usefulness as it has helped consumer dispute resolution as a spillover effect, even if initially it was neither thought nor meant to achieve this goal beyond the proceedings conducted under the EU ODR Platform umbrella. But the data published cannot hide two

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1 Vid. C. Carnicer Díez, 'El acceso a la justicia en España', p. 228. Available at: https://ifc.dpz.es/recursos/publicaciones/29/19/11carnicer.pdf. (consulted the 23 July 2018).

2 As this article was being written, dispute resolution bodies are currently not available in Romania. Spain has just notified to the European Commission the first two ADR entities.

3 Data provided in the Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No. 524/2013 on online dispute resolution for consumer disputes, of December 2017.

realities. On the one hand, the EU ODR Platform continues to be seen, by Consumers and Traders, as a sophisticated and artificial mechanism that is regarded as not to be ready to truly help the parties, who nowadays, even if wanting to solve the disputes, prefer to continue the settlement backstage. On the other hand, the percentage of complaints (85%) which were automatically closed is too high.

For the sake of overcoming the first perspective, better efforts ought to be made to explaining how the platform works to traders and consumers. This is a not really easy task, as the 'intermediary function' developed by the EU ODR Platform does not contribute to its better understanding. Indeed, the EU ODR Platform is not an ADR entity which deals with direct resolution of disputes. This platform has the main aim of supporting consumer dispute resolution through the certified ADR entities established in every member state. The EU ODR Platform is structured to function according to the guidelines set forth by the ADR Directive, which has the task of listing the certified ADR entities.

Related to the second perspective, the legal framework of the EU ODR Platform is in sheer need of review in order to identify the gaps in its legal regime and find the formula to better accommodate a higher number of claims into the actual Dispute Resolution Phase.

The aim of this article is to critically analyse the EU ODR Platform, to discover if its current regime is consistent with the optimization of the access to justice through ODR. Before highlighting the shadows, let's have a look on the main features of the platform willing to promote the access to justice, especially in cross-border cases.

Consumers' access to justice is apparently made significantly easier via the EU ODR Platform. First of all, the platform provides a single entry point for consumers (and traders) for an out-of-court resolution of disputes. The very existence of a single entry point for the claims makes it easier to file a claim, as the consumer doesn't need to waste time and effort in discovering where, when and how to file a claim. Second, the EU ODR Platform provides an electronic complaint form which may be filled in every European language, not obliging the consumer to use a foreign language should the respondent be a foreign trader. The EU ODR Platform also offers an (optional) electronic management tool which enables the dispute resolution procedure online, not to mention free of charge to the parties. Furthermore, when measuring consumers' access to justice, the inclusion of offline claims (Art. 5.2(c) Directive 2013/11/UE) ought to count as a positive element.

A factor closely related to access to justice through the EU ODR Platform has to do with the compliance, by member states' ADR entities connected to it, with the standards established by Directive 2013/11/EU. From this point of view, the principles to be fulfilled by the certified ADR entities may be considered as a genuine European development, especially for Business 2 Consumer disputes, of the ethical principles for ODR which has been an object of permanent attention from the beginning of ODR with the aim of reaching the online dispute resolution

going closer to the ideal of justice.[4] The ADR Directive and the ODR Regulation develop an ODR System trying to endorse the principles of Accessibility, Expertise, Independence and Impartiality, Transparency, Effectiveness, Fairness, Liberty and Legality, principles at the core of European ADR since the commission's recommendations of 1998 and 2001.

The examination of the current regime of the European ODR Platform reveals elements that do not support the resolution of consumer complaints, and therefore prevent an optimized access to justice, as examined in this section.

The European regulation only allows filing of disputes stemming from online sales or service contracts (Art. 2.1 Regulation). This approach is consistent with a view where ODR was used, computer to computer, in cross-border transactions. However, as today's almost every transaction involves a digital (and online) footprint, the distinction between online and offline interactions or disputes is becoming blurred. This is the reason why professors Ethan Katsh and Orna Rabinovich maintain that the conception of ODR as 'a last resort' has become outdated. By not allowing for the admission of offline disputes, the European regulation is ignoring the fact that ODR is now more attractive for a wider array of disputes, many of which would not necessarily fall under the original scope of the ODR – small-scale cross-border consumer disputes that arose.

Following professors Katsh and Rabinovich, the European approach to ODR is rather limited, being perhaps better defined as *online*-ADR and consequently losing opportunities for enhancing access to justice. Besides the displacement of face-to-face interaction, ODR has supposed the shift from a human third party to an automated 'fourth party.' Automated tools have allowed ODR systems to address quantities of disputes impossible for a physically based human-operated dispute resolution process. The EU ODR Platform does fully grasp the meaning of this shift and the growing reliance on algorithms, and the reliance on big data accompanied by a shift from dispute resolution to dispute prevention activities. The inexistence in the EU ODR Platform of tools for online negotiation and automated or assisted negotiation may be considered as one of the main deficiencies of the EU ODR Platform. Whereas EU law in this field is oriented to promote transparency and the monitoring of consumer disputes,[5] this development is, however, left in the hands of the ADR entities in every member state, devaluating the EU ODR Platform and not rising up to the current challenges.

On the same note, it is important to pay attention to the close relationship between the more specialized character of the ADR entities, on the one hand, and the more efficient management of disputes and data, on the other hand. The possibilities for an efficient development of the fourth party in ODR may depend, in some extent, on the own ADR entities' structure in every European member state. For instance, the use of the fourth party will be leaner for a specialized ADR that

4 *See* especially the work of L. Wing, 'Ethical Principles for Online Dispute Resolution. A GPS Device for the Field', *International Journal on Online Dispute Resolution*, Vol. 3, No. 1, 2016, pp. 12-29.

5 Vid. Art. 7 Directive 2013/11/EU.

can sort claims by subject, provide information on outcomes of similar claims and provide statistical data and reliable information on recurrent claims.

According to the EU law (Art. 20.2(f) ADR Directive), even if the parties may file a claim in the single entry point of the EU ODR Platform, it does not guarantee a completely online procedure, as the physical presence of the parties may be required. This requirement bluntly betrays the generalization of ODR as prescribed by the ODR Regulation. Furthermore, the proclaimed full coverage by ADR entities becomes de facto faulty or fake, given that in practice online claims may be discarded if the face-to-face interaction cannot be achieved. We have seen that the EU ODR Platform offers an electronic management tool which enables the dispute resolution procedure online. But this tool is only offered as an option without prejudice of the member states establishing the must to attend. In any case, the Directive should grant the possibility of following an online procedure, being otherwise a violation of the principle of full coverage by ADR entities.

Special attention must be placed on language issues in an increasingly global society. The EU ODR Platform guarantees that the consumers will be able to file a claim in their mother tongue. The possibility of filling the form in any language of the EU does not mean that the selected ADR entity has to process the claim in that language. Once the complaint is transmitted to the designated ADR entity, the platform is simply concerned with informing the consumer about the language in which the procedure will be carried out, even though consumers may have had the impression that they will be able to use their language during the whole process. However, the ADR Directive does not guarantee consumers the use of their mother tongue or even the language used for the purposes of the contract. The EU ODR Platform guarantees an automatic translation. However, this automated translation, although helpful, ends at the time the dispute has been transmitted to an ADR entity. In this field, the EU legislation should strive to prevent the increase of language barriers becoming an obstacle to the access to justice.

One of the reasons for the 85% of claims that were automated archived by the EU ODR Platform is related to the trader's response. If the trader does not answer the requirement, the EU ODR Platform will terminate the claim. According to the legal regime, the EU ODR Platform does not refer the dispute to a competent ADR entity in cases where the trader is obliged to participate in the procedure according to the law or according to a prior agreement. When the trader is adhered by law or because of an agreement to an ADR entity, the beginning of the procedure before that ADR entity should not depend on the existence of the trader's answer. Otherwise, the consumer may be induced to believe that ADR is not feasible, and access to alternative justice would be gravely hampered.

In order for that to happen, the regulation should incorporate specific rules for the processing and transmission of the complaint to ADR entities, taking into account international law. These criteria ought to be taken into account should the parties lack a specific agreement on the competent ADR entity and the complaint may be derived to an ADR entity without the need of acceptance by the parties.

EU legislation admits consumer arbitration to be implemented by the ADR entities in the member states. In cross-border cases, the submission to arbitration means excluding the jurisdictional way. To protect the parties from eventual and unexpected renunciations to the jurisdictional via, Article 10.2 ADR Directive requires a special and informed consent. Given the importance of these declarations, which imply the waiver of the consumer's right of access to court and also of the possibility of benefiting of the forums of his or her country of domicile, it should be required, in cross-border cases that such declarations be made in a language commanded by the consumer. As a consequence, where the solution is arbitration, in cross-border cases, the ODR declaration of consent should be allowed only through the European platform. Therefore, the possibility of giving effect to a declaration of acceptance of consumer arbitration through platforms that do not allow the use of the consumer's language for this purpose should be excluded. As an additional guarantee of the right of access to court, the violation of these language requirements should open up the possibility of challenging the validity of the consumer arbitration agreement.

This article had the aim of shedding light on some elements that shape the EU ODR Platform regime. The ADR Directive and ODR Regulation are called to improve access to justice in the EU. The EU ODR Platform is only a first step in the development of ODR in Europe, far from reaching its destination. However, it is true that EU law has shown some limitations, and a great part of the task is left in the hands of the member states and the ADR entities, as well as the rest of the stakeholders.

It seems that the European legislator chose for now not to further incentivize the alternative and online resolution of disputes, patently ignoring technological driven social changes of which the tip of the iceberg is the fourth party. However, and despite the EU ODR's Platform's limited functions, there is still scope for improvements in order to allow a better access to justice.

The EU ODR Platform should allow disputes stemming offline. Face-to-face procedure should no longer be a must, as this is not compatible with the full coverage by ADR entities established in the ADR Directive. It would also be desirable to incorporate some of the basic features of the fourth party to the EU ODR Platform, for instance a negotiation tool. We have also highlighted the need to pay attention to the difficulties related to language in a multilingual global market and create adequate mechanisms to monitor the results. The transmission of claims to ADR entities is also something that may be improved, taking into consideration a mandatory participation or a prior agreement of the trader. And finally, taking into consideration the consequences, the digital consent to arbitrate ought to be revised and improved, allowing a veritable informed consent of the consumer.

The EU ODR Platform is like a baby taking its first steps. As a pioneer legislative instrument, today it is not completely clear if it will be able to fill the shoes the EU legislator prepared for it. Meanwhile, to prevent the EU ODR Platform from becoming more of an Achilles' heel for EU ODR rather than the solution to a growing concern, the EU has to keep an open mind for improvement, so the creature will able to grow healthy and not hinder an effective access to justice.

# Legislative and Regulatory Moves in England and Wales Impacting on the Future of ODR

## The Claims Portal

*Tim Wallis*[*]

My brief comments will focus on the following: (1) the background of an established electronic online dispute resolution (ODR) platform for personal injury claims, known as the Claims Portal, which operates in England and Wales; (2) the proposed Civil Liability Bill and Whiplash reforms (part legislative and part regulatory change); and (3) how these will impact on the future of ODR.

The Claims Portal, established in 2010, is an electronic platform for low-value personal injury claims. Legislation effectively prescribes that all personal injury claims arising from road traffic, employer's liability (accident and disease) and public liability accidents with a value between £1,000 and £25,000 have to be started online in the Claims Portal.

The Claims Portal is run by Claims Portal Limited, a not-for-profit company, the directors of which represent the users of the service. In 2017, over 827,000 claims were submitted via the Claims Portal and over 192,000 were settled.

At present, all claims made via the portal are conducted by solicitors who recover fixed legal fees from the defendant. Government reforms will change the way in which such claims are made by providing that the value of some of these claims will be decided by a tariff, not the judiciary, and by removing the right to recover legal costs.

One consequence of the reforms, particularly removing the right to recover costs, will be that such claims will have to be bought by the claimants themselves, as litigants in person. To facilitate this, the government has in mind setting up an electronic portal for such claimants.

So, it appears, there will be a new form of claimant-operated ODR. Developing such a portal will involve a number of significant challenges. Clearly, it needs to be designed so that litigants in person can operate it. Additionally, and this is tougher, it needs to enable them to process their claims without, generally speaking, resorting to legal assistance.

In short, the requirement of these reforms is for quite a sophisticated ODR system to deal with a significant volume of claims. The proposed implementation date was 2019. On 17 July 2018, after the Justice Reimagined Conference, the government announced that the implementation of the reforms would now take place in April 2020.

* Tim Wallis is is a mediator and a solicitor with an interest in 'tech'. He is the Chair of Claims Portal Limited and Trust Mediation Limited. He prepared this talk in his personal capacity and not on behalf of Claims Portal Limited.

# Recent ODR Developments in China

*FANG Xuhui*[*]

The presentation topic I selected for the conference was based on a prediction made by Professor Richard Susskind, the Strategy and Technology Adviser to the Lord Chief Justice of England and Wales, after he visited Hangzhou West Lake Court in 2017. Professor Susskind said that he believed that China would become the next world leader in legal technology. I cannot quote this prediction without referring, by way of evidence, to the work of a number of Chinese lawyers for their contributions to recent online dispute resolution (ODR) developments in China who have all helped ODR to now become an essential part of 'Diversified Dispute Resolution' as promoted by the Supreme People's Court (SPC). As a result of their contributions, ODR is no longer now just a theory but is beginning to form part of the accepted practice in China's justice system.

Judge CHEN Liaomin, the vice president of West Lake Court, was the first Hangzhou judge to whom I showed ODR after I had learnt about it from attendance at the annual International Forum on Online Dispute Resolution a few years ago. Since then, she has promoted ODR enthusiastically. Judge CHEN is now known as China's leading judicial protagonist of court technology.[1] In July 2017, Judge CHEN showed Professor Susskind how the legal technology worked in the court. Professor Susskind subsequently wrote:

> I was hugely impressed with what I saw: online legal help for court users; facilities for the e-filing of documents; virtual courts (enabling hearings by video); speaker-independent voice recognition (they have no need now of stenographers); and a demonstration of their first-generation online court services. As I tweeted afterwards, a highlight at the end of the visit was a conversation with Judge Chen using a two-way, real-time voice recognition and translation system.[2]

After visiting Hangzhou Westlake Court, Professor Susskind expressed his impression:

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1 R. Susskind, 'China as the Next Leader in Legal Technology?', 12 August 2017, available at: https://www.scl.org/articles/9979-china-as-the-next-leader-in-legal-technology, last accessed 20 June 2018.

2 *Id.*

> ... it is not a huge leap to imagine Chinese leadership in AI and law. Many of the pieces are falling into place – political support, a growing community of home-grown innovators and enthusiasts, technical capability and infrastructure, the ability to invest and change at scale, and a clear appetite for change.

Professor Susskind had a chance "to imagine Chinese leadership in AI and law" after he had attended the 'Legal+Technology New Champions Annual Convention' organized by the Shanghai Bestone Information and Technology Company Ltd last July. Bestone is a mass customization dispute resolution service provider. Bestone issued the first 'Research Report of the development trend of Legal AI' in China. Two representatives from Bestone attended the Liverpool conference, one its vice president, a former judge at the SPC, the other an attorney who led her legal group to apply a 'mass customization dispute resolution service' mechanism to handle thousands of cases involved with Alibaba in Hangzhou several years ago.

It should be noted that Hangzhou is China's e-commerce capital, being effectively a national-level cross-border e-commerce pilot zone, where companies like Alibaba and NetEase principally operate. It sets standards for procedures and the supervision of e-commerce transactions.

By way of an example of innovative development, an IT student under my instruction has developed a program that shows the advantages of ODR– confidentiality and security – as being suitable for the prevention and resolution of the dispute relating to sexual harassment on campus.

Another example is the application of blockchain technology to Hangzhou Westlake Court with a planned cooperation by the Hangzhou Blockchain Technology Research Institute to use blockchain technology to prevent tampering with digital evidence. In February 2018, the Guangzhou Arbitration Commission issued the first arbitral award based on the 'Arbitration Chain'. This chain is based on the multicentric, tamper-resistant and trustable features of blockchains. The real-time preservation of data forms a chain of evidence through smart contracts, satisfying the requirements for authenticity, legality and relevance of evidence, standardization evidence and trials. In recent years, along with the development of e-commerce and Internet finance, China has put forward a standard for the storage of transaction data, requiring electronic data storage through third-party platforms according to a series of strict regulations and standards on the preservation of evidence.[3]

Judge DU Qian is the president of the Hangzhou Internet Court which was formed on 18 August 2017. It has political support from the central and local authorities. It was at the 36th meeting of the Central Leading Group for Deepening Overall Reform that the move for China's first online Internet court was approved on 26 June 2017. The president of the Supreme Court and the CCP sec-

3 Security Time Reporter, 'Blockchain technology is applied to arbitration by the court', 12 March 2018, available at: http://mini.eastday.com/mobile/180312210909363.html, last accessed 20 June 2018.

retary of Zhejiang province attended the opening ceremony of the Hangzhou Internet Court.

The Hangzhou Internet Court can be distinguished from other courts in the matter of jurisdiction; it has jurisdiction only over Internet-related cases. According to "The Notice Issued by the SPC on 'The Proposal of the Establishment of Hangzhou Internet Court'", since 18 August 2017, Hangzhou Internet Court has centralized jurisdiction over the following Internet-involved civil and administrative cases of the first instance originally under the jurisdiction of the Basic People's Courts in Hangzhou City:

1 contract disputes arising from online shopping, online services, small finance loans, etc.;
2 disputes arising from Internet copyright ownership, infringement;
3 disputes arising from the use of the Internet to infringe another Person's personal rights;
4 product liability disputes arising from online shopping;
5 Internet domain-name disputes;
6 administrative disputes arising from Internet administration.

In addition, the higher-level court may authorize Hangzhou Internet Court to have jurisdiction over other civil and administrative cases involving the Internet. If the judgement at the first trial is not satisfied by the litigant, a written order is appealed, or if the case is opposed by the People's Procuratorate, then the Hangzhou Intermediate People's Court adjudicates the case.

The Litigation Platform uses Internet technology to make a series of steps in the litigation process available on the Internet. These include complaint filing, the case filing Approval Process, service, mediation, evidence submission, direct or cross-examination, pre-trial preparation, trial, ruling and enforcement, etc. The records and documents are automatically generated. The videos of the hearing serve as trial records. The trial record is generated automatically by a speech recognition system. AI technology is used to draft judgements. In cases of online shopping disputes, digital evidence is transmitted from the online shopping websites such as Taobao.com to Hangzhou Internet Court database by just one click. The court clerks are not needed during an online court hearing. A speech recognition system turns spoken words into written documents at the end of the session, greatly improving the efficiency of the court. As of 30 April 2018, the Hangzhou Internet Court handled a total of 7,771 Internet-related disputes and closed 4,798 cases. The average time of a trial was 25 minutes, and the average trial period was 46 days, which saved between a quarter and three-fifths of the time compared with the traditional trial mode. A total of 98.5% of the cases are closed in the first instance without an appeal. The amount of disputed loan is not more than 500,000 yuan (£1 = 8.6 yuan). Thanks to legal technology, all of the cases were litigated under just six judges.

The first trial of an online copyright dispute was litigated at the Hangzhou Internet Court on 18 August 2017.[4] It involved a novelist suing a web company

4 http://n.cztv.com/news/12640840.html?clearcache=1.

that had transmitted her novel to online subscribers without her authorization. The plaintiff showed her evidence online.

Dr. Wang Li, the director of International Commercial Mediation Center for the Belt and Road Initiative in Beijing, has become the first law firm founder to put ODR theory into practice in China since I taught an ODR course at the Beijing Lawyer's Association 2014. The Belt and Road Initiative (BnR) is a development initiative proposed by the Chinese government which focuses on China's connectivity with the countries along the Silk Road Economic Belt and the 21st-century Maritime Silk Road. The role of the International Commercial Mediation Center for BnR is to provide mediation in disputes arising from international commerce in these countries along the BnR. In October, 2016, the mediation center formally announced the set-up of the ODR process and subsequently incorporated the UNCITRAL Technical Notes on ODR (Technical Notes) into the new mediation rule.[5] Moreover, the mediation center should have the cooperation with the courts for connecting litigation with mediation and the recognition and enforcement of a mediation settlement agreement. For example, in December 2016, the mediation center signed an agreement with the Fourth Intermediate People's Court of Beijing to promote the connection between litigation and mediation.[6] In addition, The Judicial Reform Office of the SPC designated the Mediation Center for the BnR as the organization responsible for a project focused on the reform of diverse dispute resolution mechanisms.

The aforementioned only shows that the political and government support that the center is receiving will promote the development of legal technology in China.

Ms. Du Jia, the director of Shenzhen Zhongxin Promotion Center for E-Commerce (E-business service), became particularly interested in ODR following her attendance at the 16th International Forum on ODR held in Beijing. She met with Professor Leah Wing, Ethan Katsh and other recognized experts in the field. Colin Rule introduced ODR mechanisms utilized in the United States to Ms. Du's colleagues when they visited The International Institute for Conflict Prevention and Resolution in 2017. Professor Susskind used Shenzhen an example of the rapid development in China:"I think of the rapid construction of Shenzhen and consider this aim for AI to be entirely feasible." Shenzhen is one of 12 cross-border e-commerce pilot zones approved by the State Council.[7] E-business Better Service is a professional organization dedicated to providing third-party service to e-commerce and establishing a set of regulations and standards to facilitate fair competition and healthy operation of e-commerce. Its website provides the

5 Mediation Center, 'What is the Principle of Online Dispute Resolution Adopted by the United Nations Commission on International Trade Law? Is there any Consistency with the Mediation Center's Mediation Rules?', available at: www.bnrmediation.com/Home/Center/faqList/aid/191/p/17.html, last accessed 20 June 2018.

6 Z. Hui, 'The Fourth Intermediate People's Court of Beijing Signed the Agreement with International Commercial Mediation Center for Belt and Road Initiative to Promote the Connection of Litigation and Mediation', 28 December 2017, available at: http://bj4zy.chinacourt.org/article/detail/2016/12/id/2501190.shtml, last accessed 20 June 2018.

7 EBS, 'Introduction', available at: http://global.ebs.org.cn/, last accessed 20 June 2018.

> End-to-end Process of ODR for the resolution of cross-border e-commerce transaction disputes. This will be a one-stop online service including legal consulting, consumer complaints, dispute reconciliation, mediation and arbitration for cross-border e-commerce disputes.[8]

Judge Long Fei, the director of Guidance Department in the SPC's Judicial Reform Office has enthusiastically promoted ODR. Since February 2017, the SPC has carried out online mediation pilot projects in four provinces (Zhejiang, Hebei, Anhui and Sichuan), two cities (Beijing and Shanghai) and the Shanghai Maritime Court.[9] The pilot higher courts should take the lead in establishing a unified online mediation platform at the provincial level. Judge Long Fei is just one of the SPC advocates for the use of ODR in people's courts. Her colleague, Judge Hu Shihao, director of the SPC Judicial Reform Office, uses the original term 'ODR' directly:

> China's court will combine ODR with modern technology to establish online mediation, online judicial confirmation, online trial, and an electronic handling platform to promote the (ADR) mechanism.[10]

The courts in all over China are learning from the SPC pilot project. For example, the first diversified dispute resolution E-Platform in Jiangxi province started its experiment in the People's Intermediate Court of Fuzhou city, the People's Court of Nanfeng county and the People's Court of Lean County in June 2018. Jiangxi province is an agricultural area. If the courts in the less developed areas such as Jiangxi can use legal technology, then you can imagine how much legal technology will eventually be developed in China.

L.V. Minshu is a senior judge in charge of foreign affairs in the Higher People's Court of Zhejiang Province. She assisted Professor Susskind, Professor Janet Martinez, Colin Rule and other ODR experts when visiting the online courts in Hangzhou. Another contributor to ODR development in China is Ms. Wang Fang, Deputy Secretary General of the Mediation Association of China Council for the Promotion of International Trade, who invited several foreign ODR experts to give presentations at the 2017 International Mediation Summit held in Hangzhou.[11]

I do not mean that all of the legal technology developments have been contributed to by these people, who, incidentally, you will note are all women. I just offer up the contributions of these people as examples of the road map for the recent ODR developments in China. It is true that there are many other ODR con-

8 EBS, 'End-to-End Process of ODR', available at http://global.ebs.org.cn/EntSearch/service6, last accessed 20 June 2018.

9 Supreme People's Court, 'Online Mediation', available at: http://tiaojie.court.gov.cn/, last accessed 20 June 2018.

10 P. Welitzkin, 'Senior judge says China's judicial reform includes mediation', 23 October 2017, available at: http://usa.chinadaily.com.cn/world/2017-10/23/content_33592342.htm, last accessed 20 June 2018.

11 Zhejiang Government, 'Hangzhou's Online Mediation Service Stars at Intl Summit', 20 September 2017, available at: www.ezhejiang.gov.cn/2017-09/20/c_105613.htm, last accessed 20 June 2018.

tributors. I do not have time to mention all the ODR developments in China, but two others to reference are the online arbitration offered by the China International Economic and Trade Arbitration Commission,[12] and The National Internet Platform of Consumer Dispute Resolution in the State Administration for Industry and Commerce of the People's Republic of China.[13] I hope my presentation has given you some examples of recent ODR developments in China. I shall leave it to you to agree whether "China will become the Next Leader in Legal Technology."

12 CIETAC, 'Online Arbitration,' available at: www.cietac.org/index.php?m=Article&a=index&id=179&l=en, last accessed 20 June 2018.

13 SAIC, 'National Internet Platform of Consumer Dispute Resolution', available at: www.12315.cn/, last accessed 20 June 2018.

# How Can ODR Benefit Business?

*Julia Morelli*[*]

Attending quite a few international ODR (online dispute resolution) forums over the years, I witnessed an increase in the breadth and depth of knowledge and application of ODR practices. Much of the discussion in past years has focused on e-commerce, insurance claims and the application of ODR to the justice system in a way that mirrors the application of ODR in commercial venues.

The question, How Can ODR Benefit Business?, acknowledges the potential harm businesses face from B2C conflict due to costs and time lost, damage to reputation from online reviews and disruptions to supply chains. In our discussions of ODR, we have taken into consideration adverse effects from disputes with customers, suppliers, government agencies and other businesses, while we have largely ignored the cost of conflict within organizations.

Whether we look at the business of government or private industry, the amount of time and energy spent on intra-organizational conflicts is high. Additionally, there is a significant impact on reputation, and employee and customer loyalty. The ramifications vary, but the effect is real.

It is time to broaden the discussion now that we have the advantage of understanding best practices for ODR that emerged in the B2C arena. We can learn from them, and from the failures, as we look at the possible applications of ODR to intra-organizational conflict.

Not all workplace conflict can or should be addressed using ODR. The same thought and planning used in the development of ODR platforms and processes for external disputes applies to the use of ODR for internal disputes. There are challenges and circumstances that indicate that the use of ODR for certain kinds of workplace conflict is ill-advised. In general, disputes involving interpersonal and professional relationships and interactions are more complex than B2C conflicts. That said, we could combine best practices from ODR, human resource management and organizational and professional development to guide decision-making.

Here are four observations that support the use of ODR for intra-organizational conflicts:

1 Characteristics are similar to those of the B2C model – workforces that are hard to get together are increasingly common, and this is especially true given the prevalence of telework and distributed work locations. Just as Lord Justice Briggs can work cases while on his boat, he can start conflict on his boat. All of us are capable of getting into conflict anytime we communicate.

* Julia Morelli is President of the George Mason University Instructional Foundation, and the Executive Director of the Capitol Connection, a wireless communications company. She is also a mediator, facilitator and conflict coach.

2 Relationships matters – in B2C dispute resolution, there is a desire to maintain and improve ongoing interactions, and with workplace conflict, there most often is interest in preserving the relationship.
3 Dispute prevention – identification of conflict sources and proactively addressing them can make a difference. Itai Brun's presentation on ODR for kids (Agree-Online) demonstrates the opportunity to get the wisdom of the crowd to increase the number of options for addressing conflict situations. Other ways to use technology to address conflict related to human communication and interaction are gathering anonymous information through surveys or games and the application of technology for executive, life and workplace coaching.
4 Pathways for dispute engagement – they need to be clear and transparent and work in concert with each other.

As Leah Wing and Colin Rule pointed out, we gain loyalty from well-handled disputes and that includes internal customers – employees, managers and executives. Just as the application of ODR to external conflicts is useful, we should explore the uses of ODR for workplace conflicts. The same guiding principles and questions apply. Organizational culture, the venue and jurisdiction make a difference and apply to standards development.

To expand the range of creative options to deal with intra-organizational conflict, we can benefit from the use of games, application of education principles and machine learning to help individuals identify potentially inflammatory language, and the use of wisdom of the crowd. It is time to develop new ways for business to benefit from ODR internally as well as externally.

# ODR and Third Party Injury Claims Processing

*Stewart McCulloch*[*]

I will be speaking in a moment about our vision for the future of insurance third-party injury claims processing. But first a little about our company and why we are here. More to the point why we have an opinion on all the change that we believe is ahead of us.

My background is that of a personal injury solicitor where I have acted on both sides of the claimant/insurer equation. I think that I have probably seen all the things that go on. Some good things are good, but others are not so good. And it was with those not so good things in mind that I was looking for a new, simpler and technology-based way to deal with third-party injury claims. That is how I became involved in NuvaLaw.

What is NuvaLaw? NuvaLaw designs *and* implements inter-party negotiation and adjudication platforms. Those platforms bring together tools processes and services to reduce *the* time and cost of settling claims. NuvaLaw is completely independent and seeks to facilitate claims resolution in a neutral way. Learning from our experiences in South Africa, we are preparing to launch NuvaLaw in the United Kingdom for settling personal injury claims.

So, what does an old battle-hardened litigator like me think about the future of injury claims? First of all, it needs to be understood that I am talking about the situation where one driver has suffered an injury and wishes to make a claim on another driver's policy. It can be a very contentious and adversarial environment.

Is it being suggested that we carry on with what is an old 'them and us approach' to claims and stir in a bit of technology? Absolutely not. Reimagining how we process claims, and collaboration, are core values at NuvaLaw.

There are usually two sides in these claims. One is the insurer and the other is the claimant's solicitor. Right now, they battle it out using email and letters (I gather some still use faxes!) It's a big effort to work like that, and it costs a lot of money. So, there is a need to break down traditional barriers and work together. That requires commitment from both sides of the industry. I am hoping that the word 'sides' will one day disappear from all conversations.

So, let's take a lighthearted, but serious, look at what we are all doing now.

***Tabel 1 Cases Registered to CRU***

| | |
|---|---|
| 2017 | 853,615 |
| 2016 | 978,816 |
| 2015 | 981,324 |
| 2014 | 998,359 |

* Stewart McCulloch is Managing director of NuvaLaw UK Limited.

The problem in the industry is that it has to deal with just under a million personal injury claims every year. And there are plenty more to deal with without injury. Dealing with claims is an intensive activity. If an insurer lets down his or her guard, someone will get one past them. Sadly, there are people who believe that large insurance companies are fair game. They make exaggerated claims. Others are just plain stupid. But, a million personal injury claims?

The number has gone down a bit this last year, but it's still a massive undertaking to deal with them all. Even if everyone could be trusted, the problems caused by sheer numbers are still there. What are those problems?

Despite access to the Motor Insurance Database, players often start off by not being able to find each other. Letters, emails and (possibly) faxes go to the wrong place. There is delay. Delay costs money and increases claim values. To keep costs down, repairs need to be authorized. Temporary replacement cars need to be hired out.

When they do make contact, the recovery and negotiation processes take too long.

The Ministry of Justice provides a portal for dealing with injury claims with a value of £25,000. The portal sets a target of sorting out liability (or not) within 15 days and a strict 35 days settlement period after disclosure of documents. But there is a problem. If liability is in dispute (who caused the road accident), then the cases have to be removed from the portal. And the bit in between the 15 days for admission of liability and the 35 days for negotiation is not regulated. I hear reports from insurers of an average 250 days between those two points. Insurers are left not knowing where they are. Knowing the value of each claim as soon as possible is vital for an insurer's business because it has a bearing on the amount of regulatory capital the insurer has to put to one side and also on his or her ability to write new business.

So, knowing early and then settling outstanding claims is vital for the insurance world. It's also vital for the claimant's lawyers in terms of meeting service standards. What if a case falls out of the Ministry of Justice Portal? It's a bit like the Wild West with everyone running to different rules and no structure around what is done. And then we move into the horrors of litigation.

Some members of the legal profession (not all of them) often appear to have arrived here from Planet Dickensian. I should know – I was one of them. It's not that they are bad people. It's just that they are trained to be risk averse in an adversarial system. It's often a lethal mix. No matter what the economics is, the current litigation process encourages parties to cover every angle. But the system itself as it is now, is archaic and clunky. It consumes tonnes of time and paper. Litigation is always drawn out and then there is the cost.

UK insurers spend 63% of all operating expenditure on dealing with claims. Since the global financial crisis, insurers have found things difficult. The old model of taking premiums and investing them to gain a return before claims are made has been in difficulty. The investment returns are simply not there any longer. Margins are tight. So, it's important to consider very carefully other ways of balancing the books. Driving down the cost of claims is now key. What is the solution then?

A legal information superhighway. It's being built now here in the United Kingdom. It is underpinned by a simple straightforward protocol that is designed to support personal injury claims by ensuring the earliest possible disclosure of information and data. The platform connects all the parties together to allow them to share information. And the best type of information is data – not long-winded reports about this and that. From all *of* that, we lead on to structured negotiation supported by facilitation in the background and assisting parties to take informed decisions about compromise, and yes sometimes asking them to take the pain in equal measure. But always with both parties enjoying significant costs savings. For those few cases that cannot be sorted out, we have the recycling centre.

The platform has a seamless route through into arbitration to sort out those difficult cases. Arbitration is much better than going to court, as many of us in the audience will know. It's legally binding. By using technology that is available now, it is possible to resolve disputes cheaper and faster than 'normal' court-based litigation. And I fail to see anything that is normal about litigation.

So, in simple terms, we capture data in one place, use data to determine settlement amounts, engage in structured negotiation with facilitation and refer seamlessly to arbitration.

We should not ignore the products and services that are already feeding the industry.

There are some very good applications and services out there now which for example detect fraud, support medical reporting, provide CCTV and automatic number plate recognition (ANPR) data and telematics analysis with video analysis. We bring all those systems inside an integration layer – like a virtual shopping mall. That makes these services available to platform users at lower cost due to aggregation. We will then have a complete ecosystem.

It will be the 'go to place' for resolving motor insurance claims fairly and accurately. Users will also have a much better idea of what each claim will cost or will pay at a much earlier stage. Once in use the ecosystem will grow exponentially. Industry costs will be slashed. As you would expect, I have already done a lot of careful testing and analysis with colleagues.

The time taken to settle claims will reduce dramatically as you can see from the slide on the screen. The top line is our end-to-end platform service covering data upload, negotiation, facilitation and arbitration. But with a platform like that, simple no-frills ODR (online dispute resolution) can also be accessed for existing cases that had not been through that end-to-end process.

Final cases to determine damages are obvious candidates. Improved timings for those cases appear in the lower line.

The court process is over 240 days or more, but platform-based arbitration is less than 37 days. By cutting unnecessary procedures designed by the courts to cover all types of cases, our injury-claim-specific protocol and platform provides an average saving of £558 in court costs against an original figure of £1279.This is the platform economy at its simplest and most obvious in terms of financial savings. The benefit to the whole industry is startling. Claimants get paid earlier. Lawyers' working capital will reduce. Insurers' reserves are cleared at lightning

speed, meaning better returns to shareholders or more underwriting capacity or both – just as they choose.

So, is that it? Well, no, actually it isn't. Not at all because that is the easy part. The next bit is the exciting bit. We apply the latest emerging technology.

First of all – *Deploy Blockchain*. It gives us immutable data It's the Holy Grail in the insurance industry – One Version of the Truth. And as an application for sharing data to combat fraud, it's unbeatable. It helps catch the crooks, and the good people get a good customer journey without being asked embarrassing questions. The insurance industry just has to make sure that data is shared and that it doesn't get screwed up by General Data Protection Regulation.

*Next in the technology stakes is Predictive Analysis*: Collect up data relating to cases processed; Get medical opinions into data format and look at the outcomes; Begin to build up a profile of what will happen in any given situation and compare to current cases as they move along. The machine starts to understand what is likely to happen as an outcome and tells one or both of the parties. That leads to improved decision support. And in time the machine will tell both parties at the same time and suggest settlement. The savings in case handling costs, reduced head counts and touches are enormous.

*Then stir in the artificial intelligence*. Get the machines to understand what is going on as well as how to resolve it. The possibilities are almost endless. Medical evidence can be read and values put on the size of a claim.

We will reach the point in the very near future where some decisions will be taken by the machines without any need for human intervention other than authorizing data uploads. I quite like machines running artificial intelligence because they do a good job and never answer back, hardly ever go off sick (unless there is a power cut) and never ask for holidays.

So, where does it all get to? By creating a complete ecosystem where everyone plays, supported by all the latest technology and service providers, costs are slashed and customer journeys across the insurance claims industry are very much improved. The key to all of these innovations is collaboration.

As I said at the start, *there is a need to break down traditional barriers and work together*. Collaboration is required to make this work. The ecosystem will work only if all stakeholders in the claims process recognize that the old ways are costly and can no longer be justified. Collaboration is not just relevant at the outset of these changes but will be part of the lifeblood of the complete claims ecosystem.

I accept that some of this is a vision for the future. But a lot of it is ready now. Platform-based business models are already disrupting revenue and customer engagement all over the globe and in every industry. The insurance claims industry will be the next beneficiary.

There is every reason why, in my view, the whole industry needs to take this leap of faith by sharing data and collaborating in claims settlement and resolution on a platform-based system now, and it is going to around for a long time in the future.

As we heard from Tim Wallis yesterday, some reform within the insurance claims industry is about to be imposed by government. Settlement amounts and allowable costs will be vastly reduced. But the claims will still be there. With

smaller payments, the margins will be smaller also, so there will be an even greater need to mechanize the claims process.

Platform-based claims resolution will enable claimants to continue to be represented but at low cost. That will avoid having DIY claimants wildly roaming the ether with their own ideas about how claims should be processed. If we fail to deal with that issue, there will be chaos. That is why far-thinking lawyers and insurers are already preparing to engage with each other on this platform. They intend to remain in business, turning over higher volumes whilst at the same time focussing on improved customer journeys and lower costs.

That is the future of insurance claims processing as we at NuvaLaw see it.

# Resolving Insurance Claims with Smartsettle ONE™

*Ernest Thiessen & Peter Holt*[*]

This article presents the case for significant reduction in the cost of resolving insurance claims by rewarding good negotiating behaviour using Smartsettle ONE with its online Visual Blind Bidding™ platform.

The resolution of insurance claims is costly for both parties. Costs include:

1 legal fees and expenses;
2 gathering and marshalling evidence (medical reports, surveillance, other experts);
3 mediation, including the cost of the mediator as well as travel, accommodation and meeting rooms;
4 time, money and stress associated with the tedious negotiation 'dance';
5 harmed relationships between the insurer and its customers (the claimants), when things turn adversarial often leading to the termination of the specific relationship (and unhappy claimants tell their family and friends); and
6 for the insurer, the net amount paid to settle the claim.

iCan Systems Inc., headquartered in Canada, has developed a suite of products, powered by artificial intelligence and proprietary algorithms designed to encourage a collaborative approach that overcomes the problems that plague ordinary negotiations, from very simple to the most complex on earth. Negotiators using iCan's negotiation support systems communicate via a secure neutral site server on the Internet (Figure 1). The neutral site allows negotiators to stay in control of a Visual Blind Bidding[1] process that is designed to identify and reward good negotiating behaviour and quickly produce fair and efficient outcomes.

Smartsettle employs a neutral site server on the Internet that acts as an unbiased, super intelligent and totally trusted automated mediator with historical knowledge[2] of similar cases. The server uses optimization algorithms to suggest outcomes that will objectively satisfy both parties – artificial intelligence at its best.

The Smartsettle neutral site employs eight sophisticated patented optimization algorithms to simplify complex negotiations, keep party preferences confi-

* Ernest Thiessen is President of iCan Systems Inc of British Columbia, developers of the Smartsettle eNegotiation and visual blind bidding system. Peter Holt is Chief Product Development Officer at iCan Systems Inc. Adapted from similar paper co-authored with LTD insurance mediator Rick Weiler of Weiler ADR.

1 *See,* https://en.wikipedia.org/wiki/Online_dispute_resolution.

2 The part of the technology dependent on historical knowledge is still in development.

*Figure 1 Neutral Site Server*


dential and generate 'suggestions' for achieving the objectives of fairness[3] and efficiency. iCan has two products that span the negotiation spectrum, Smartsettle Infinity for complex negotiations involving many issues between many parties and ONE for simple negotiations that can be reduced to a single numerical issue between two parties. This article discusses how Smartsettle ONE can be applied to simple insurance claim settlements that can be reduced to one monetary issue between two parties.

The following five algorithms[4] are employed by Smartsettle ONE:

1 Single Negotiating Framework (SNF)
   – focuses parties on the solution
2 Visual Blind Bidding (VBB)
   – saves valuable time without prejudicing parties
3 Automatic Deal Closer (ADC)
   – increases settlement rates with adjustable 'gap-bridging'
4 Reward Early Effort (REE)
   – motivates a collaborative approach
5 Expert Neutral Deal Closer (END)
   – guarantees a collaborative outcome

The Smartsettle process may be entirely online or some combination of online and face-to-face. Whether parties choose to meet face-to-face, depends upon their personal preference and includes a number of factors such as

3 Fairness is like beauty; it exists almost entirely in the eye of the beholder (http://andrewolmsted.com/archives/2007/01/the_beauty_of_f.html). Fairness achieved with Smartsettle is determined by the negotiators themselves. They predetermine the fairness of the outcome by first accepting the process as fair. It's like the slicer-picks-last rule. Most people perceive that to be a fair procedure because it strikes a fair balance between the importance of the outcome and the cost of getting there (http://legaltheorylexicon.blogspot.com/2004/02/legal-theory-lexicon-023-procedural.html).

4 Not described in this document are three more algorithms that are applicable in negotiations that are more complex than typically found in low-value insurance disputes.

- physical distance between the parties,
- time schedules,
- the state of the current relationship and
- the importance of future relationships.

Smartsettle ONE is optimized for negotiations that can be easily reduced to a single monetary issue. It is particularly effective when a motivated and collaborative claimant realizes that he or she will achieve more with a quick settlement using ONE than a long-drawn-out adversarial battle with mounting legal costs.

How ONE works is best explained in the context of a hypothetical dispute. For this illustration, we will settle an insurance dispute between two imaginary parties named Claimant and Insurco and show how they encounter the Smartsettle ONE interface.

The following particulars are adapted from a recent real-world Long Term Disability (LTD) case:[5]

- Claimant date of birth/age: 23 January 1960 (53)
- Change of Definition: 1 August 2017
- LTD Benefit: $1,200 per month, net of CPP/$14,400 per year, non-taxable, no COLA
- Date of Negotiation: 1 April 2018
- Arrears currently owing: $8,400, plus PJI ($20)
- NPV of future to age 65 (3% DR): $88,869
- Value of Past and Future: $97,289

Claimant was paid monthly benefits during the whole 24 own-occupation period and then, based on various assessments, Insurco concluded that Claimant did not meet the definition of 'totally disabled from any occupation' set out in the policy. If Claimant appeals Insurco's decision, it is faced with a negotiation. The reasonable goal of such a negotiation is to reach a fair and acceptable outcome that both parties can agree to on an 'all things considered' basis.

Negotiators will typically start the negotiation with optimistic proposals. In order to reach an outcome, they typically must resort to a 'negotiation dance' and hope for the best. Smartsettle ONE's VBB process does away with the need for that 'dance' and the associated costs.

In our example, Claimant appeals Insurco's decision and, as part of the appeal process, Claimant accepts Insurco's offer to attempt to negotiate a mutually acceptable full and final resolution (this is already a common practice) to the dispute using Insurco's Smartsettle ONE VBB platform.

As part of the appeal process, both sides have exchanged all necessary information. From Claimant's point of view, it all boils down to its *net cash in its pocket*. Obviously, Claimant wants a high value and Insurco wants a low value.

Claimant has decided that the acceptable range of settlement is likely between $40,000 and $60,000. This information may have come from consulta-

5 Compliments of Weiler ADR (rickweiler.com).

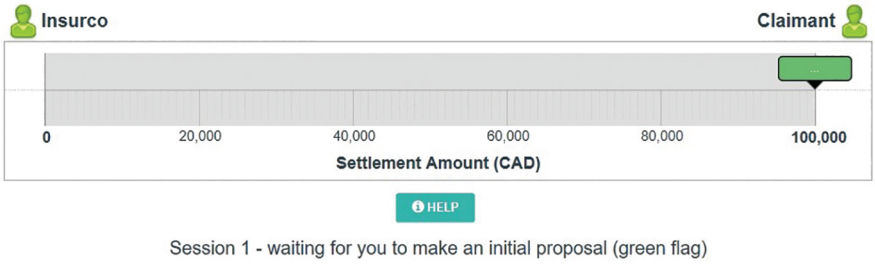
tion with counsel on a limited retainer basis or through artificial intelligence comparing the facts of this case with a historical database.

The process starts with the creation of an SNF. The SNF is identical to the final settlement agreement with just the settlement amount left out. The settlement amount is represented by a blank and a negotiating range. A simplified[6] SNF for this negotiation might look like the following:

| **Single Negotiating Framework** | |
|---|---|
| 1 | Insurco will pay $_____(0–100,000), to settle the matter; |
| 2 | Claimant hereby releases all claims under this policy, past, present or future; |
| 3 | Claimant hereby agrees to keep the terms of settlement confidential; |
| 4 | No T4 will be used in connection with this settlement. |

Once both parties have agreed to the SNF, Insurco sets up the case and invites Claimant. Insurco's moves may be totally automated if desired. Upon responding to the invitation, Claimant sees the following slider bar graphic screen (Figure 2).

*Figure 2 Smartsettle ONE Opening Screen – Claimant Perspective*




This is the opening screen as seen by Claimant. The glowing green icon labelled Insurco indicates that it is presently online. But in fact, it could be the robot playing on Insurco's behalf.

Claimant is invited to make an initial visible bid and moves the green flag from $100,000 to $80,000. Insurco's initial visible bid of $25,000 is also revealed at this time.

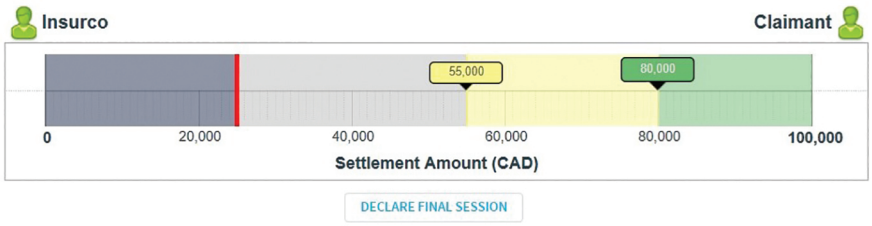
Claimant receives a message by chat text from Insurco that this is a generous offer based on the past plus one year into the future, particularly since there is significant doubt Claimant currently satisfies the definition of totally disabled under the policy.

Claimant responds that it expects more than that and then moves its yellow flag, representing a secret bid to $55,000. Claimant's information about similar cases gives it confidence that this is close to what it should get. Meanwhile, Insurco also makes a secret bid, but only to $40,000, deliberately holding back. We shall see later that this is not a good strategy.

6 A more comprehensive SNF may include details about access to care and other aspects of the settlement that are of particular interest to the Claimant.

On learning that Insurco has also made a secret bid, Claimant agrees to end Session 1. Both parties are hoping for an early settlement but are told that they did not reach agreement in this session. Claimant's view at this point is shown in Figure 3.

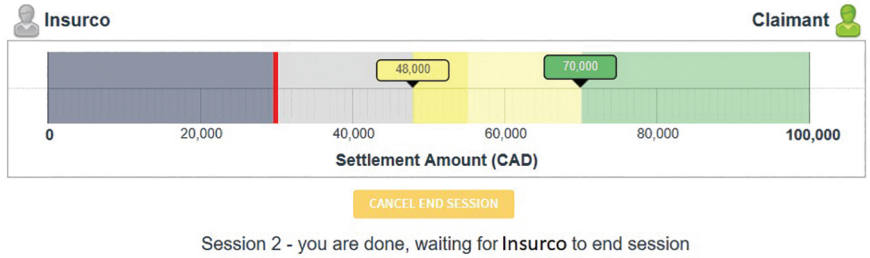
*Figure 3 Claimant's View at the End of Session 1*




Shown on this panel are the initial visible bids of Insurco and Claimant, $25,000 and $80,000, respectively. Also shown, by the yellow flag, is Claimant's secret bid of $55,000. Insurco's secret bid of $40,000 is not shown. There remains an invisible gap of $15,000 that parties will try to bridge in Session 2.

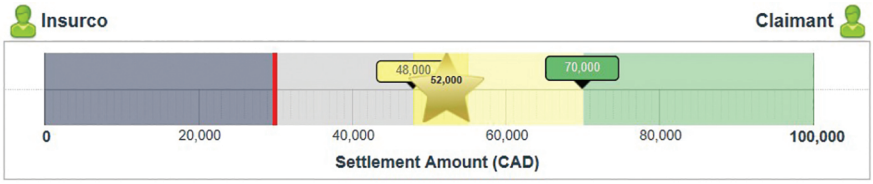
Next (in Figure 4), Claimant sees that Insurco has visibly conceded to $30,000. Insurco says that this represents an additional 6 months of benefits. Claimant summarily declares Final Session while responding that it appreciates the offer and moving its own visible bid flag to $70,000. Claimant also moves its secret bid flag to $48,000. Claimant has decided that this is as far as it will concede and ends Final Session.

*Figure 4 Session 2 Moves from Claimant's Perspective*




Insurco and Claimant have made visible concessions to $30,000 and $70,000, respectively. Claimant has also made a secret bid of $48,000. Insurco is caught off guard, not expecting Claimant to declare Final Session so soon. It responds with a secret bid of $54,000 and ends the session. Claimant is informed that a settlement of $52,000 has been reached – $4000 more than it had secretly conceded to. Claimant is very pleased. Figure 5 shows the final view from its perspective.

*Figure 5 View of Agreement from Claimant's Perspective*

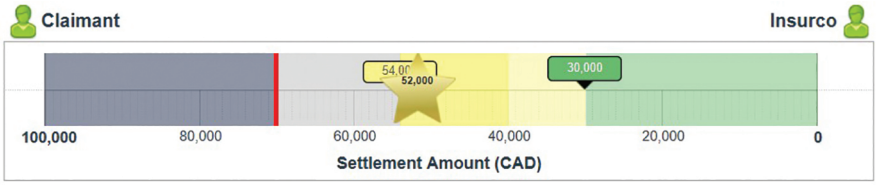



Negotiations have ended with an agreement

There was an overlap in Session 2. Claimant had secretly moved to $48,000 and Insurco had moved to $54,000 (not visible to Claimant). The REE algorithm calculated an agreement of $52,000, which was $4000 more than Claimant was prepared to accept.

Figure 6 shows Insurco's final view from its own screen. Note that Insurco is now on the right and sees only its own secret bidding history. The settlement was less than what Insurco was willing to pay, but Insurco could have achieved even better if it had not held back so much at the beginning. Claimant was favoured because it made more of an effort to settle with its initial moves. How this works is explained in greater detail later in this article.

*Figure 6 View of Agreement from Insurco's Perspective*




Negotiations have ended with an agreement

There was an overlap in Session 2. Claimant had secretly moved to $48,000 (not visible to Insurco) and Insurco had moved to $54,000. The REE algorithm calculated an agreement of $52,000, which was $2000 less than what Insurco was prepared to pay. As a final step in the process, Smartsettle ONE simply replaces the blank and range from $0 to $100,000 with the single accepted value of $52,000 and generates a completed settlement agreement available for download by both parties.

| **Final Agreement** | |
|---|---|
| 1 | Insurco will pay *$52,000* to settle the matter; |
| 2 | Claimant hereby releases all claims under this policy, past, present or future; |
| 3 | Claimant hereby agrees to keep the terms of settlement confidential; |
| 4 | No T4 will be used in connection with this settlement. |

Table 1 summarizes how Smartsettle ONE rewards good negotiating behaviour. Acceptance of a fair outcome is the first prerequisite for achieving an outcome that benefits both parties. Smartsettle enables this behaviour in a process where parties can place secret bids. The party that moves early to the Zone of Possible Agreement is rewarded with a bigger portion of the overlap. The chance of reaching an agreement is increased if parties agree to the ADC.[7] These behaviours all contribute to quickly achieving a fair outcome in a simple negotiation that is only about money.

*Table 1 Smartsettle ONE Rewards for Good Negotiating Behaviour*

| Behaviour | Reward | Objective |
|---|---|---|
| Acceptance of a fair outcome | A timely win-win outcome | Fairness |
| Earlier movement to the Zone of Possible Agreement | Bigger portion of the overlap | |
| Agreement to ADC or END | Increased likelihood of agreement | Efficiency |
| Collaboration | Improved relationships | Customer satisfaction |

Table 2 summarizes how Smartsettle ONE reduces the costs associated with resolving insurance disputes.

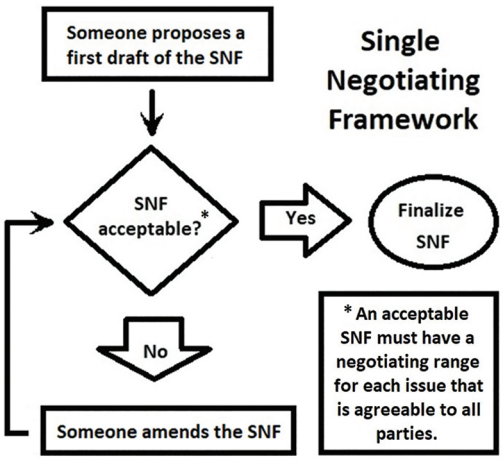
*Table 2 Smartsettle ONE Reduces Costs*

| Cost | How Smartsettle ONE Reduces Cost |
|---|---|
| Legal | Lawyer involvement significantly decreased or eliminated. |
| Gathering and marshalling evidence | Reduced amount of evidence required by settling cases early |
| Mediation | Reduced number of cases going to mediation as result of increased use of online platform |
| The negotiation 'dance' | VBB allows parties to safely identify an acceptable outcome at the outset, which allows a settlement without the usual tedious negotiation dance. Taking advantage of automation results in further savings. |
| Relationship | Less adversarial approach to negotiation will enhance customer retention. |
| Settlement dollars | Given the collaborative incentivized approach of the online platform, an opportunity exists to settle claims at amounts lower than what was historically experienced. |

Smartsettle ONE holds the promise of significantly reducing costs associated with resolving insurance disputes, particularly those involving motivated and collabo-

7 Just as with any negotiation, the possibility of no agreement still exists with the voluntary process described in this document. In development is another algorithm called the Expert Neutral Deal-closer, which will guarantee a settlement for parties that are willing to abide by it. We envision this to initially be suitable for impasses where only a little human intervention is needed to close the gap.

*Figure 7 Single Negotiating Framework Algorithm*




rative claimants. Insurers moving early to incorporate Smartsettle ONE in their dispute resolution processes will enjoy a competitive advantage.

The five algorithms referred to in this article are described herewith in further detail.

## 1. Single Negotiating Framework

The Smartsettle ONE negotiation process begins with the creation of an SNF. The SNF is like a final agreement except for the blank that represents the monetary settlement value not yet agreed. Negotiators identify a negotiating range for that monetary value in the SNF. They may also wish to discuss certain facts of the case that may impact that range. This part of the process starts the negotiation off on the right foot by encouraging negotiators to focus on their own interests rather than on winning. This is designed to avoid adversarial confrontation and clear the path towards mutual gain.

Convenient face-to-face meetings may well be the most productive venue for relationship building and creation of the SNF (see Figure 7). Video or phone conferencing would also work. Once the SNF is in place, parties may proceed efficiently online with the exchange of proposals and then come back to a warm physical handshake at the end of that process.

How to build an SNF is not easy to specify in detail. The artistic skills of a trained facilitator will paint a different picture every time. Still, from a high level you can see an algorithm that produces a comprehensive document with blanks and negotiating ranges for every issue yet to be resolved.

## 2. Visual Blind Bidding

Once their negotiation is modelled, parties may commence to exchange proposals using VBB. This is done conveniently using a slider bar graphical interface where monetary bids can be displayed and compared.

Smartsettle's unique VBB[8] gives Smartsettle negotiators the best of all worlds in that it supports both visible and secret bids.[9] Parties start the first session with visible bids within the established negotiating ranges. At the beginning of any subsequent session, either party may declare Final Session. This feature makes sure that a negotiation does not remain stalled or deteriorate into the same tedious negotiation dance that it is designed to eliminate.

An agreement is declared when the system detects an overlap of the secret bids at the end of a session or if the gap is small enough to trigger the ADC. If there is no deal, the secret bids are not revealed and the parties may try again.

With Smartsettle's server-based technology, progress towards an agreement is made both synchronously and asynchronously to make the best use of each party's scheduling constraints. Structuring the negotiation process with sessions helps asynchronous communications progress more quickly due to the fact that each party can make at least two moves per turn. A session would usually be in progress when a party returns to the negotiating panel. That party would typically make a move to end that session and then, if there has been no agreement, make another move to start the next session. If the party makes both a visible and a secret bid in each session, then one turn could actually consist of four moves (or even six if you count the ADC moves).

The VBB process results in earlier agreements and virtually eliminates the tedious negotiation dance that characterizes most ordinary negotiations.

## 3. Reward Early Effort (aka Smallest Last Move)

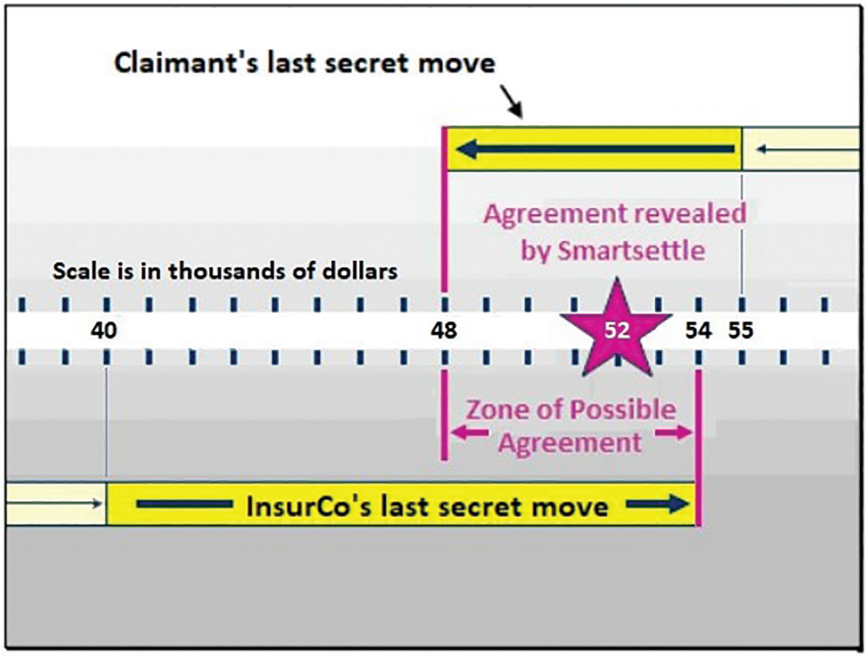
Early settlement is promoted by rewarding the party that makes the earliest reasonable effort to settle. Figure 8 shows how Claimant is rewarded in the example described at the beginning of this article. The reward is calculated by an algo-

8 Smartsettle's method of blind bidding differs from ordinary blind bidding in what is blind. In ordinary blind bidding, the proposals (offers and demands) are blind. In Smartsettle's method, the acceptance of a value or package is secret until there is a deal.

9 We say 'bid' for colloquial clarity, but it's really the acceptance that is secret, not the bid itself. Smartsettle first generates suggestions visible for all to see (not secret) and then the parties decide whether or not to secretly accept them.

rithm[10] that favours[11] whoever made the smallest last move. This encourages parties to move sooner to the Zone of Possible Agreement.[12]

*Figure 8 Reward for Early Effort*




An agreement is declared by Smartsettle ONE when the last moves made by Insurco and Claimant overlap. The yellow bars show the secret moves made by each party in each session. At the end of the first session, Claimant had secretly accepted a fairly reasonable value of $55,000, while Insurco was holding back at $40,000. Neither of these secret bids was revealed to the other party. In the Final Session, Claimant accepted a value of $48,000 and Insurco responded with a relatively large move to $54,000. The final agreement could have been anywhere between $48,000 and $54,000 since all those values had been mutually accepted.

10 The formula used for determining the agreement value when there is an overlap simplifies to the following for the example shown in Figure 6:
Agreement = (Tc × Ac + Ti × Ai)/(Tc + Ti) where
Ac = final secret bid of Claimant
Ai = final secret bid of Insurco
Tc = size of Claimant's move in the last session
Ti = size of Insurco's move in the last session

11 This algorithm is in contrast to 'split-the-difference', which is commonly used in other blind bidding solutions. Research has shown that parties will hold back more if they expect the overlap or difference to be split evenly.

12 Each negotiator has a zone of acceptability. If they are to find agreement, then these zones must overlap. This is the Zone of Possible Agreement in which the final agreement on whatever is being negotiated may be found.

Smartsettle declared the agreement to be $52,000, which proportionately rewarded Claimant, which made a greater early effort to settle, evidenced by the smallest move in the Final Session.

### 4. Automatic Deal Closer

In spite of all the incentives, there may still be a gap at the end. But much experience has shown that parties will still agree to settle a case if the gap is small. The ADC lets parties automatically close the gap by asking them to choose a maximum amount that their own bid may be extended by.

In our example with the same background, imagine a scenario where Claimant makes the same moves in Session 1, but Insurco doesn't hold back so much with its first secret move and agrees to the ADC. If the parties are at $45,000 and $55,000 and each agrees to extend by at least $5000, then the ADC will close the gap and the parties will have a fair deal at $50,000 right away in Session 1 as shown in Figure 9.

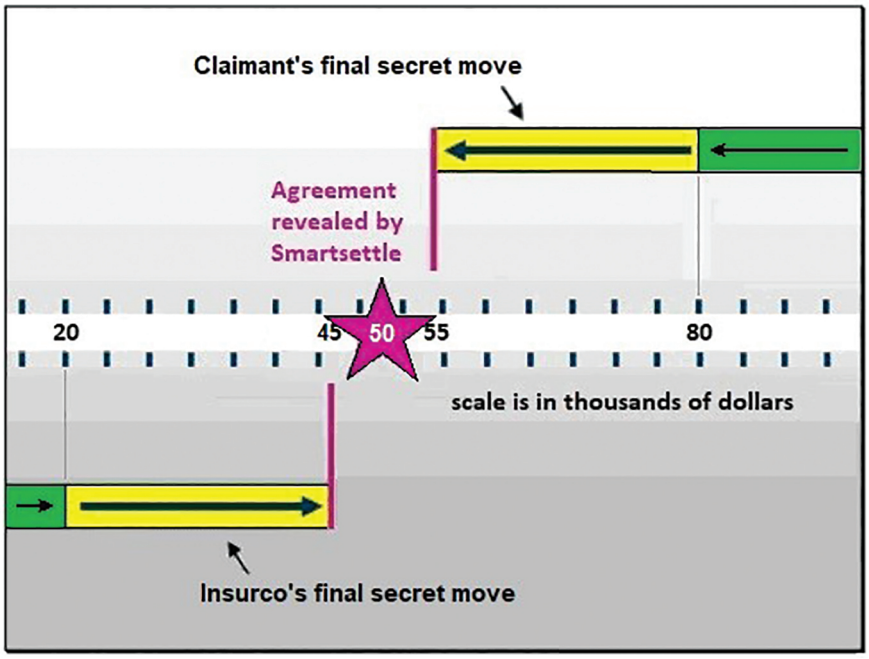
Parties can opt to close a small gap at the end of a session and arrive at a settlement earlier by agreeing to use Smartsettle's ADC. In this scenario, Insurco and Claimant make visible proposals of $20,000 and $80,000 and secret bids of $45,000 and $55,000. They also agree to mutually extend their bids by $5000 when asked by the ADC. Since their initial secret moves are identical, the ADC using REE splits the gap evenly and declares the agreement to be $50,000.

If the last secret moves are lopsided, then REE would favour the party that made the smallest last move. If those extensions are enough to close the gap, then Smartsettle will divide the gap using the REE algorithm.

### 5. Expert Neutral Deal Closer

In cases where the gap is too large to close with the ADC but not large enough for court to be economical, parties may opt for human intervention using the END. In this case, three members from a public Expert Neutral roster will independently attend the case and give their private opinion of fair without being biased by the proposals or secret bidding history. The Expert Neutrals must make their section of 'fair' from a range of values that is centred on the gap and includes at least one of the most recent visible proposals. The middle opinion is selected as the official 'fair' and then the party closest to fair is favoured by declaring the outcome halfway between.

*Figure 9 Automatic Deal Closer*



# ODR and Blockchain

*Tina van der Linden*[*]

This presentation is about blockchain in the context of ODR. My job is threefold: explain to you what blockchain is, how it operates and why it is relevant for ODR.

In the programme it says: "A primer, and discussion, on what is the blockchain and consideration of its potential role in resolving, if not pre-empting, disputes and thus its relevance to ODR." However, later this afternoon, there is a session on smart contracts. So for now: just the basics, very briefly.

Blockchain technology was invented in 2008 by someone using the pseudonym Satoshi Nakamoto, in the search for anonymous currency online, an ongoing quest since the early 1990s. Blockchain technology was a solution, providing anonymity, solving the double spending problem and creating trust without the need to a so-called trusted third party (TTP). The result was the first so-called cryptocurrency: Bitcoin. The technique underlying Bitcoin is the blockchain. So, Bitcoin is the first application of this technique.

Blockchain is, basically, a new way to store data, that enables a new way to do business. Data are stored in blocks that are linked together creating a chain. The links are created by hashes; a hash is a mathematical way to 'seal' data, one-way only. The hash of the previous block is included in the data covered by the new block. In this way, blocks are securely chained together.

Transactions themselves are secured by asymmetric cryptography. Transactions are validated, lumped together and added to the blockchain by a successful mining operation. Mining consists of finding the nonce that gives, together with the transactions and the hash of the previous block, the hash that meets a certain predefined criterion. Finding the nonce is a bit like a Sudoku: solving it is really difficult, checking that the answer is correct is easy. This 'proof of work' method is a rather energy-consuming process: alternatives are available.

The resulting blockchain is often compared to a distributed ledger: because of the interlocking hashing, it is practically speaking immutable, and because it is stored by all the computers in a network, there is no central authority.

Thus, this is a revolutionary new and different way of creating trust between parties that don't know each other and have no reason to trust each other. Importantly, for this trust, no TTP is needed, no reputation is needed and no enforcement is needed. We might even say that for blockchain transactions, no law is needed! This is, of course, a rather radical statement to make in a room full of lawyers.

In addition to cryptocurrencies, blockchain technology also enables so-called smart contracts, conditional transfer of values between parties. Smart contracts will be introduced and discussed in this afternoon's session.

* Professor Tina van der Linden is Lecturer in Law, Ethics, and Technology for the Vrije Universiteit Amsterdam.

As far as I can see, there are at least three ways in which blockchain technology (in the form of smart contracts) is relevant for ODR.

First, disputes may be pre-empted by the use of smart contracts. Breaking promises is impossible, evidence of everything is available. Moreover, ODR may be included in the smart contract itself (possibly by use of so-called "Oracles" – human intervention in the automatic execution of the smart contract).

Then, ODR itself may be implemented as a smart contract. Thus, enforcement is ensured. An example is Kleros: crowdsourced ODR by jurors incentivized by game theory.

Finally, smart contracts may very well generate disputes. Parties to the contract may not understand the code implementing their agreement. The code may not reflect correctly the parties' intentions or may contain mistakes – there is no software without bugs! And finally, unforeseen circumstances may arise.

# Smart Contract Panel Opening Comments

*Daniel Rainey*[*]

This is the second panel of the conference addressing smart contracts. The first panel focused on establishing what a smart contract is – in this panel we are going to look at the question of how smart contracts may affect the practice of law and dispute resolution. Specifically, my colleagues Derric and Alexander will be asking whether smart contracts pose a threat or offer an opportunity related to the practice of arbitration, but to start us off, I'm going to set the stage by looking at smart contracts and their impact more generally.

First, again, a short definition to get us all on the same page. Smart contracts, for the purposes of this discussion, are simply self-executing contracts, with terms of agreement written into lines of code, existing across a decentralized, distributed blockchain network. Theoretically, they can exist with no central authority, no prevailing legal system or venue and no external enforcement mechanism.

Smart contracts have been referred to as a 'transparent, conflict-free' means of exchange. And, relative to their relationship to traditional legal systems, a post on Blockgeeks was entitled, 'Smart Contracts: The Blockchain Technology That Will Replace Lawyers.'[1]

Let's first think about the 'conflict-free' concept. I suppose that alludes to the automatic nature of the execution of contract terms, but let me be clear about this: the notion that the relationships created through smart contracts will be conflict-free is a fantasy. To paraphrase a Biblical saying, wherever there are two or more gathered together, virtually or actually, there will be conflict.

I won't even try to catalogue all of the things that can go wrong with smart contracts – I'll just mention a couple of examples of potential areas of conflict where there may be institutional or organizational ways to prepare for disputes involving the contracts themselves or the execution of the contracts.

To begin, the code is only as good as the people who write it. There will be code errors and unanticipated actions, so that the 'perfect' self-executing contracts will self-execute in a way that is surprising, and perhaps advantageous to one or another party. These kinds of problems, and the disputes they generate, will be somewhat more interesting than disputes arising in the traditional contracting process. Not to belabour the issue, when there are code bugs in a smart contract, there are no easy ways to 'fix' the bugs. The entire system is designed to make it very difficult to intervene and change the terms of the contract once they have been embedded in code and memorialized in the blockchain network. As smart contracts become more common, I think the same pattern that coding has seen generally will emerge. Standard contract elements will be developed (per-

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1 'Smart Contracts: The Blockchain Technology That Will Replace Lawyers', Blockgeeks.com. Available at: https://blockgeeks.com/guides/smart-contracts/.

haps in DAPPs – distributed apps) that can be pasted into code to perform functions that are common and repetitive, and these will be integrated into a unique code to make a full contract. There are obvious problems lurking in this process.

Given this, there are some interesting questions related to the handling of disputes in the smart contract world. Let me offer some quick observations about these issues.

The first issue could be, who creates the code and/or decides what the code should do? This question relates to the standards discussion on a panel at this conference. If the use of smart contracts is decentralized, lacking a central authority and lacking what in the 'real' world is known as standing in a venue, how do we establish trust in the creators of the code? It is undoubtedly the case that not every individual who uses a smart contract will be able to create, or even understand, the code. If you draft a contract in the non-virtual world, you generally have to have been admitted to a bar somewhere. The only bar you have to be admitted to in order to create smart contracts serves pints of beer.

What happens when conflict occurs? Even in the non-virtual world, it is increasingly the case that disputes about performance under contracts are happening across venues and borders and are not as straightforward as they were in a pre-Internet age. In the virtual world of smart contracts, it will be even more 'interesting', and it is unclear how disputes could be effectively and efficiently handled, or how disputes would be resolved in a way that is enforceable.

What will dispute resolution systems for smart contracts look like, and who are the trusted third or fourth parties who can handle the disputes? In the non-virtual world, there are licensed counsellors operating within a set of rules and standards, and mediators and facilitators who have at least some set of loosely shared ethical standards. Who will have the standing and expertise to intervene in disputes involving smart contracts?

Another interesting source of potential conflict arose recently with the publication of a study indicating that there was probably currency manipulation of the value of Bitcoin by a group using another cryptocurrency to artificially inflate the value of Bitcoin.[2] The cryptocurrency used to bolster Bitcoin was pegged in value to the dollar, and Bitcoin, as we all should know, is given value primarily by the willingness of its owners to accept a certain valuation. I could go on about this, but the short-term issue related to conflict and smart contracts is that many executable elements of smart contracts will be based on currencies that are volatile, and may not return the value that is expected on the creation of the contract.

So, from my semi-pessimistic view, there are some conflict resolution issues to be worked out in the world of smart contracts. Let's hold that thought for a moment and consider the 'replace the lawyers' assumption.

What functions do lawyers currently serve in the contracting process? We could create a comprehensive list, but to think simply, counsel advise on contract terms, ensure that the terms are, in fact, enforceable, suggest language that pro-

2 N. Popper, 'Bitcoin Price was Artificially Inflated, Fueling Skyrocketing Value, Researchers Say', *The New York Times*, 13 June 2018. Available at: www.nytimes.com/2018/06/13/technology/bitcoin-price-manipulation.html.

tects clients, and in the case of disputes, they represent clients in litigation or in mediation. And, sometimes they step out of the counsel role and serve as third parties in mediation, arbitration or other third-party roles. In other words, lawyers and mediators are the trusted actors who handle issues related to the creation of, execution of, and enforcement of, contracts.

Henry Ford once said that if he had asked his customers what they wanted, they would have said they wanted a faster horse. The model T was not just a faster horse, and smart contracts held in a blockchain are not just a metaphorical faster horse. Traditional legal and dispute resolution professionals who try to apply their well-learned methods and standards to the creation and management of smart contracts will be left in the dust. But, those who look at the issues created by smart contracts and other distributed agreements and interactions, develop ways to add value to the process and position themselves as trusted third parties should prosper.

Simply put, looking from the outside, it seems to me that the essential elements of advice and counsel I've described will be carried out in a very different environment, but they will still be needed. I would make the argument here that I've made in other venues regarding the relationship of technology to the justice system: The practice of law and dispute resolution will look very different in the world of smart contracts, but the practice will still be there for those who want to adapt to the new environment. To stretch my Henry Ford metaphor a bit, shade tree mechanics who did not adapt to the technology driving modern automobiles have faded away. Mediators, lawyers, arbitrators and other third parties who adapt to technology will prosper. Those who do not, will not.

# Smart Contracts

## Challenges and Solutions

*Adam Sanitt*[*]

A 'smart contract' includes a piece of software that automates some or all of the performance of a contract, often by generating transactions on a distributed ledger or blockchain. The use of smart contracts on public blockchains raises some unique challenges:

- Parties are pseudonymous;
- There is no clear jurisdiction;
- There is no clear governing law;
- Transactions are immutable; and
- There are reality mismatch errors.

A 'reality mismatch error' occurs when the blockchain and the physical or legal reality that it reflects are inconsistent. This might occur when an object referred to on the blockchain is lost, stolen or destroyed or when a smart contract is vitiated for mistake, illegality or duress.

These challenges – and, in particular, reality mismatch errors – can be mitigated by establishing dispute resolution mechanisms that are integrated into the blockchain at the start of any transaction. This is one of three laws of successful blockchain smart contract platforms:

- Fail safe – Ensure that the person who is able to update the blockchain is the person who has the motivation to do so.
- Baked-in dispute resolution procedures – Minimize friction between the blockchain and the real world by allowing arbitration directly integrated into the blockchain.
- Embrace trustlessness – Prefer proven consensus arrangements within an active community.

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# Blockchain in Arbitration Development

## Multi-Signature Wallet Showcase

*Alexander Gurkov*[*]

### 1. The Promise of Blockchain Technologies

The flexibility of arbitration impeccably suits the needs of fast-developing relations in the sphere of blockchain economy. Proceedings are tailored by the parties and accommodate the needs of different types of relationships. At the moment, most national regulators are not able to keep up with the pace of development in the use of technology in this sphere. Arbitration, on the contrary, can be adapted to the demands of the specific situation. At the same time, flexibility of proceedings, when used improperly, may not lead to the desired legal outcome. In turn, that can taint arbitration as an unreliable dispute resolution method unable to provide access to justice.

The pseudonymous nature of relations in many cryptocurrency-based transactions provides a challenging ground to establish trust between participants to relations. Arbitration can aid this sphere by establishing a mechanism of redress for rights violation and providing a layer of trust between the parties.

One of the instruments that the use of blockchain technology provides to aid this problem is a 'multi-signature wallet' technology. Authorizing a transaction from such wallet requires two or more keys whereby each party and an arbitrator hold keys to the wallet. The underlying nature of relations in using this technology resonates considerably with establishing an escrow. The 'wallet' serves as an escrow account. The difference from traditional escrow is that the role of an escrow agent is shifted towards that of an adjudicator: the agent (arbitrator) does not take an active role in the execution of transactions. Multi-signature wallet allows an arbitrator to remain dormant when the contract is performed by the parties without disagreements. Parties use their keys to authorize a transaction from the multi-signature wallet. It is only when a dispute occurs and one of the parties does not use the key to authorize a transaction, an arbitrator steps in to resolve the altercation. After rendering an award, an arbitrator, jointly with a prevailing party in arbitration, authorizes a transaction of favour of such party.

Party receives a redress for rights' violation without the need to seek the assistance of national courts. The award made by an arbitrator is consequently performed by an arbitrator and a winning party. The award is performed even if the losing party in arbitration disagrees with an award and is not willing to voluntarily perform it. The described nature of multi-signature wallet relations is

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advantageous for cross-border relations where difficulties in award enforcement may be foreseen.

## 2. Problems in Implementation

Following is a more specific consideration of the difficulties that may arise in the implementation of this technology. Beyond the scope of the commentary are the problems in connection with entering into an arbitration agreement in such relations. A closer look at the way that parties enter into such relationship would reveal that the validity of an arbitration agreement can be questioned. These considerations are left aside because technically parties are able to enter into a legally binding arbitration agreement in relations that utilize multi-signature wallets. The technology is not the problem in this case. It is only unawareness of the parties and the lack of required legal knowledge that can create problems of validity.

One of the major limitations in the use of multi-signature wallet technology lies in the nature of relations where it can be utilized. To use multi-signature wallets, parties must perform a transaction in the confines of cryptocurrency. For the majority of industries, the use of cryptocurrency remains an uncharted territory. Cryptocurrencies are extremely volatile and transacting in them is a big risk for many businesses, except for some specific industries. The use of escrow itself, even if there is no need to actively engage an escrow agent, may prove inflexible for anything bigger than a low-value consumer-type transaction. Using escrow accounts, despite all its potential benefits, requires freezing assets for a certain amount of time. With this being said, the multi-signature wallet technology still may find its way into commercial relationships. The technology may be used in an implementation of a part of a bigger contract to regulate and provide a safety mechanism in a sphere that welcomes this technical solution.

For those who do enter into such relations and use the arbitration mechanism, it is crucial to ensure that parties to a dispute are given access to justice. At the moment, the majority of arbitrators acting in these relations are technical experts and not lawyers. This is dictated by the lack of the required technical awareness that prevents lawyers from taking a part in these relations, as well as the low value of transactions in question.

If the said technical experts are not able to provide access to justice to the parties, that will have a negative reputational effect on arbitration as an alternative dispute resolution method. Similar to other arbitration agreements, when parties transacting through a multi-signature wallet choose to arbitrate their disputes, they waive the right to seek redress in national courts. The need for taking the extra care is emphasized by the fact that parties, if they use a multi-signature wallet, will not need to seek the assistance of national courts in enforcing an arbitral award.

The flexible nature of arbitration may offer technical experts-arbitrators more freedom and autonomy than they are trained to handle. Acting in good faith and having the intention to help the blockchain economy grow could be insufficient to provide all the required procedural guarantees in resolving a dispute, and

to organize and lead the proceedings in a way that would provide parties with an opportunity to present their case.

A similar problem can be evidenced when considering the applicable rules of law in this form of arbitration. Arbitrators resolve disputes following what they seem fair and without clear rules on what law to apply to a dispute. This form of adjudication closely resonates with resolving a dispute *ex aequo et bono* in commercial arbitration. In commercial arbitration, arbitrators may assume the powers of an *amiable compositeur* but only if both parties expressly agree to have a dispute resolved in this way.[1] In a multi-signature wallet arbitration, parties do not express any desire to vest arbitrators with the powers to apply the principles deriving from *ex aequo et bono*. Yet, due to the lack of any procedural rules governing the resolution of a dispute, a substantial number of arbitrators act as *amiable compositeurs*. Despite all the novelties that blockchain brings to the market, resolution of disputes needs to follow the existing legal framework to provide parties with predictable and reliable results.

1 ICC Rules of Arbitration, Art. 21(3); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Art. 22(3); LCIA Arbitration Rules, Art. 22.4.

# BREXIT 2.0 Negotiation Simulation with Smartsettle Infinity™

*Peter Holt, Graham Ross, Ernest Thiessen & Diana Wallis*[*]

## 1. Summary

Guided by trained facilitators, the United Kingdom, the European Union Member States (EUMS) and the EU Parliament collaborated in resolving seven key BREXIT issues in a simulated negotiation with the help of a sophisticated system called Smartsettle Infinity. A model of the problem was built with preferences of the parties that were deduced from public information on the Internet. The final phase of the negotiation was played out in fast-forward at the 2018 Liverpool ODR Conference, where attendees were invited to engage from the point of view of the EUMS, while the other two parties were played in the background by intelligent robots.

Optimistic proposals were exchanged at the beginning of a process called Multivariate Visual Blind Bidding, which requires negotiating parties to create proposals as complete packages, so that all issues can be negotiated simultaneously. Well-represented confidential preferences analyzed by Smartsettle's neutral site produced semi-optimal suggestions for consideration. Overlapping secret acceptances quickly produced a baseline agreement. Further examination uncovered remaining hidden value in order to generate an Improvement that was worth even more to each party.

## 2. Smartsettle Infinity Challenged to Resolve BREXIT

Invited by the organizers of the ODR conference at Liverpool's recent International Business Conference to demonstrate Smartsettle Infinity's ability to encourage collaboration and solve complex disputes, the Smartsettle team just couldn't resist BREXIT. Their mission was to resolve BREXIT during a one-hour conference session. To accomplish this admittedly tall order, a new hypothetical scenario was created called BREXIT 2.0, which was simplified to a small number of key issues. The team imagined three parties that would be involved in the negotiation, the United Kingdom, the EU Parliament and the EUMS. The EU was split into two parties to reflect the fact that not all members agreed wholly with

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the EU negotiators' approach and that their views would need to be taken into account if the final agreement was to be ratified. For the simulation, one team member assumed the role of facilitator, while the other three were each assigned to one of the three parties.

Smartsettle Infinity is an application that does what human minds alone cannot manage; it models the dispute, manages preference information, negotiates all issues as a package and optimizes solutions. Infinity supports an unlimited number of quantitative or qualitative issues between any number of parties in any combination of real-time and asynchronous negotiations, whether face-to-face or between remote locations. The technology is hosted at a secure neutral site where parties' behaviours are transformed from adversarial to collaborative.

The Smartsettle Infinity process requires parties to develop a Single Negotiating Framework (SNF). Building the SNF is a joint exercise in which the parties agree on the issues to be negotiated and the range within which a suitable outcome likely exists. The SNF for BREXIT 2.0 was developed prior to the conference and presented to the audience as a handout. The following list shows the issues that were addressed. Included (in uppercase) are two derived issues (Issue 3 and Issue 9), which allowed a more precise representation of party preferences.

1 Amount of the separation payment to be paid by the United Kingdom:
   - *Range £20–£70 billion (preference covered by issue 3)*
2 The period over which the separation payment would be paid:
   - *Range 12–120 months (preference covered by issue 3)*
3 Separation payment present value[1]
   - *Range: £20–£70 billion*
4 Customs Union Options: *Options are as follows:*
   - *UK Remain in CU*
   - *UK-CU Bespoke Deal*
   - *UK leave CU-Ireland Maximum Facilitation*
   - *UK leave CU-No Deal*
5 Rights of EU and UK citizens currently resident in the United Kingdom and the EU: *Options are as follows:*
   - *Current UKEU resident's rights preserved*
   - *Aligned to new UKEU reciprocal resident's rights agreement*
   - *Current UKEU resident's rights preserved for 20 years*
   - *Current UKEU resident's rights preserved for 10 years*
   - *No special privileges for UKEU residents*
6 Irish land border issues: *Options are as follows:*
   - *All Ireland Customs Union*
   - *UK match EU tariff post 2020*
   - *Soft border for Industrial Goods and UK/Irish Citizens using Tech*
   - *Soft border for Industrial Goods using Tech*
   - *Hard border controls*

1 Each party specified their own private discount rate in order to derive present value as a function of the amount of the separation payment (Issue 1) and the period over which the payment will made (Issue 2).

7 Access to single market for industrial goods:
   – *Range 0%–100%*
8 EU tariff to be imposed for industrial goods access:
   – *Range 0%–25%*
9 EU revenue from proposed EU tariff on UK industrial goods:[2]
   – *Range: £0–£14 billion/year*
10 Passport regulatory equivalence transition
   – *1 year*
   – *2 years*
   – *3 years*
   – *4 years*
   – *5 years*
   – *Ongoing*

Once the issues are identified and agreed and the ranges established, parties define any constraints that should be shared between all the parties. An example would be that if the United Kingdom agreed to be part of the Customs Union, the Irish border issue would no longer be an issue. A shared constraint would link the two issues, so that they could not be in conflict such as UK part of the Customs Union and border controls.

Following the establishment of shared constraints, parties may create private constraints that apply only to their own preferences and strategies. The other parties have no visibility of a party's private constraints.

Each party defines how it would become satisfied with respect to each of the issues being negotiated. Parties must assign a relative importance to each issue. In some cases, issue importance is specified indirectly with derived issues. The specified level of importance (preference) to the party is the difference in satisfaction that would result from the most and least preferred outcomes for that issue. Therefore, the most preferred outcome on an issue valued at 20 would be worth twice as much as the most preferred outcome on an issue valued at 10.

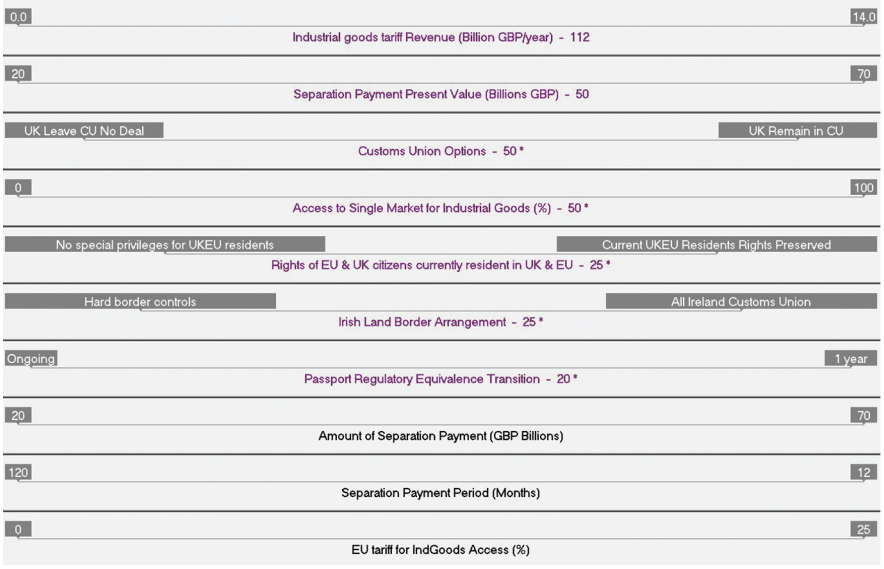
The Infinity user interface presents the user with a horizontal bar graph for each issue. A package of issue values (either numerical values or options) can be displayed on the interface and adjusted with sliders. As the slider is moved along the bar, the issue value changes, as well as the amount of satisfaction contributed from that value to the overall satisfaction of a package. The default is to arrange the negotiating range for each issue, so that the most preferred value is on the right-hand side. As a result, each party's view of the problem is particular to its own preferences.

The audience was asked to imagine how the three parties collaborated in creating the SNF and modelling the problem. The parties went through many iterations in which the issues evolved and preference representations were fine-tuned. The final phase of the negotiation was reached just prior to the conference session. The audience was shown the remainder of the negotiation only from the pri-

2 Each party specified their own private parameters in a formula to estimate of future UK trade of industrial goods to the EU.

vate viewpoint of the EUMS. The other two parties each have their own private view in which the package ratings will be much different based on their own preferences. Following are a few screenshots of the process from the viewpoint of the EUMS.

*Figure 1 Issues with Ranges and Relative Importance Shown from the EU Member States' Perspective*




The negotiating ranges were oriented so that the EUMS preferred the values on the right-hand side of the panel (Figure 1). The EUMS have assigned a relative importance to each issue. With the given negotiating ranges, the most important issue to the EUMS was 'Industrial Goods Tariff Revenue' worth 112 points. The second most important issue was 'Separation Payment Present Value' worth 50 points. From this, one can deduce that one point is worth a billion £ ((70 – 50)/50).

The issues at the bottom of the panel are excluded from preferences because they are represented by derived issues. 'Industrial Goods Tariff Revenue' was derived from 'EU tariff for Industrial Goods Access' and 'Access to Single Market for Industrial Goods'. Separation Payment Present Value is derived from 'Amount of Separation Payment' and 'Separation Payment Period'.

**Numerical example:** All parties agree that the final agreed separation payment will likely lie somewhere between the values of £20 billion and £70 billion. For the EUMS, £70 billion is the most desirable. These preferences would be reversed from the UK perspective (not shown here).

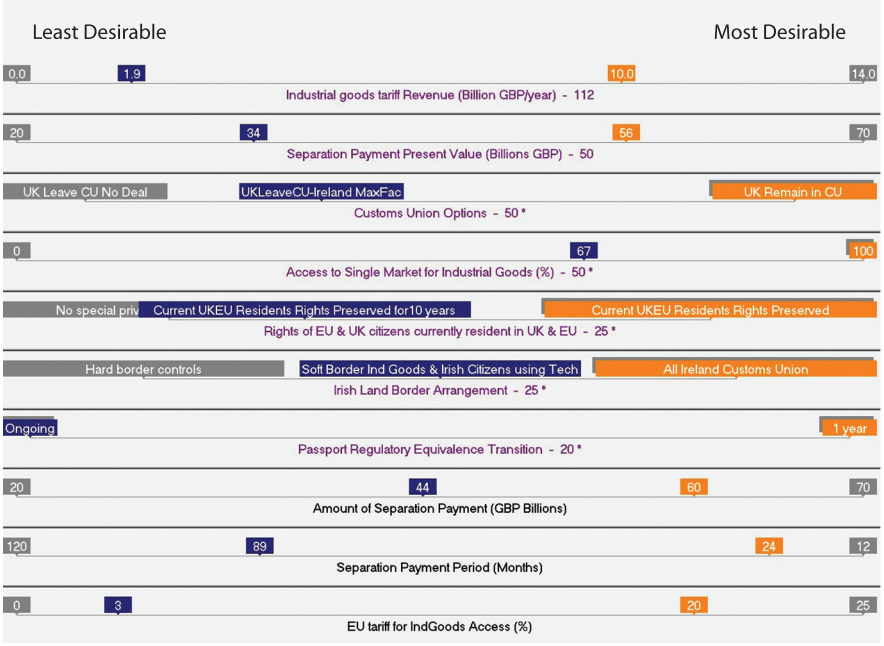
**Optioned example:** The parties have simplified Custom Union options to four possible outcomes: UK Leave CU-No deal/UK-CU Bespoke Deal/UK leave CU-Ireland MaxFac/UK remain in CU. There could be many more options in a real-life

negotiation. Of these options, the EUMS prefer 'UK remain in CU'. The worst and best options from the UK perspective (not shown here) were 'UK remain in CU' and 'UK-CU Bespoke Deal', respectively.

***Figure 2 EU Member States Opening Proposal***

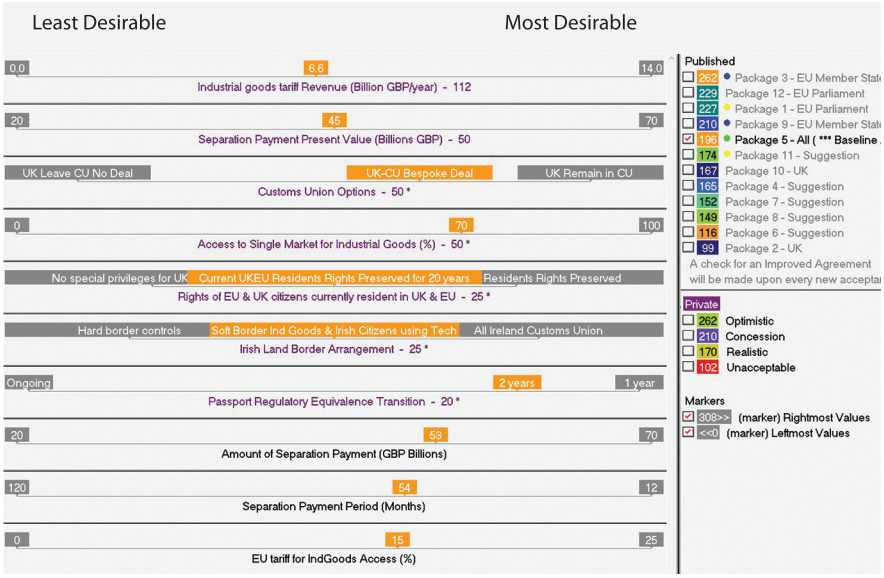

The opening proposal of the EUMS is displayed here in Orange (Figure 2). As the sliders are near the right-hand side, this package is highly desirable. The EUMS are prepared to concede relative to this position.

*Figure 3 EU Member States and UK Opening Proposals from the EUMS Perspective*



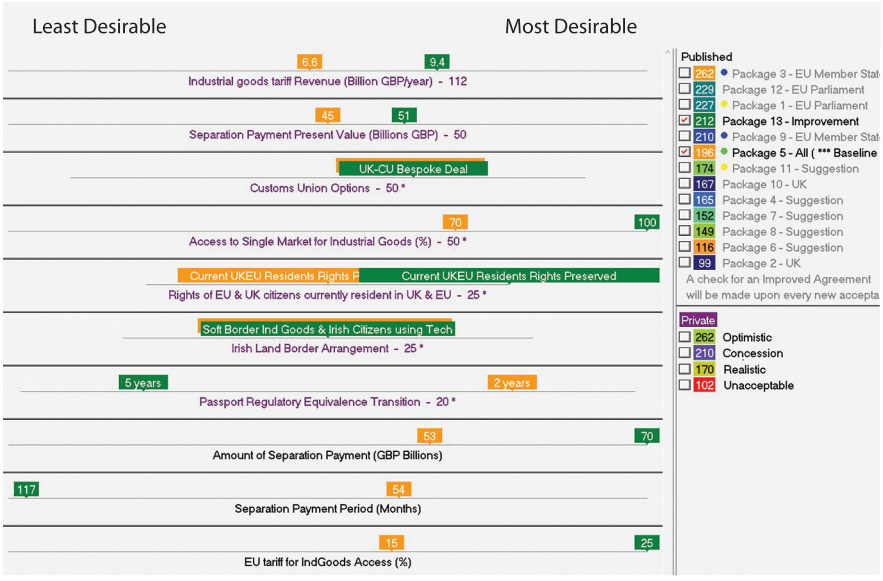

The UK opening proposal (Blue) is near the left-hand side and is, therefore, not very desirable to the EUMS compared with the opening proposal made by the EUMS (**Orange**) (Figure 3).

***Figure 4 Baseline Agreement Reached after Several Sessions***




Numerous packages were exchanged, including suggestions generated by the system. Every package has a rating based on EUMS preferences. The package ratings are derived from the relative importance of each issue and its satisfaction function, which may be nonlinear. It can be seen from the markers that all package ratings vary between zero and at least 308. The baseline agreement (Figure 4) lying somewhat to right of centre of the ranges is worth 196 points, even better than 'Realistic' worth 170 points.

*Figure 5* ***EU Member States – Improvement over Baseline Agreement. Improved from a rating of 196 to 212. Orange = baseline, Green = improvement.***




Using its proprietary algorithm 'Maximize the Minimum Gain', Smartsettle Infinity was able to uncover hidden value and distribute it fairly among all three parties (Figure 5). To the EUMS, the Improvement was worth 16 points more than the previously agreed Baseline. Compared with their unacceptable package, this Improvement represents a 17% increase.

# The Promise and Potential of Online Dispute Resolution in Japan

*Hiroki Habuka & Colin Rule*[*]

**Abstract**

*Information technology has dramatically changed the way consumers and businesses transact around the world. Many consumer goods (such as videos, music and software) are purchased online through the Internet instead of through physical stores. Businesses have similarly migrated many of their commercial transactions online, including proposals, due diligence, negotiation and signing. However, most dispute resolution processes have not yet made a similar move; they occur face-to-face, even when the dispute arose online. This has led to a new type of dispute resolution, called ODR (or Online Dispute Resolution). ODR is the use of technology to resolve disputes, and it is being promoted in many countries around the world as a model for civil justice in an online age. North America and the European Union (EU) have aggressively promoted ODR, and there are many ODR projects currently underway. As one of the leading online economies in the world, Japan is facing many of the same challenges as the rest of the world in providing fast and fair resolutions to online consumers. But to date, ODR has not gotten much traction in Japan. Recently, the Japanese Consumer Network published a report about ODR for cross-border e-commerce transactions and encouraged the government to establish a working group for implementation of ODR. However, discussion by multiple stakeholders towards practical implementation of ODR has not yet started in earnest. This article aims to focus the discussion about how to implement ODR in Japan, providing information about the latest developments in global ODR frameworks and envisioning the challenges ODR faces in the Japanese market.*

**Keywords:** Online Dispute Resolution, ODR, ADR, e-Commerce.

## 1. What Is ODR?

The field of ODR focuses on the use of information and communications technologies to prevent, manage and resolve disputes. ODR is an outgrowth from the Alternative Dispute Resolution (ADR) field, which is focused on face-to-face dis-

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pute resolution practice. ODR marries the tools, techniques, ethical standards and best practices of the ADR field, honed over decades, with cutting-edge technology. The objective of ODR is to expand access to justice and provide fast and fair resolutions to as many disputants as possible using the power and reach of information technology.

ODR first emerged in the late 1990s as a means of resolving disagreements regarding purchases conducted over the Internet. Early ODR pioneers like the global eBay marketplace and the Internet Corporation for Assigned Names and Numbers demonstrated how high volumes of disputes could be efficiently resolved even in cross-jurisdictional transactions. Since that time, ODR has grown into a global movement backed by many dozens of providers around the world, undergirded by a strong academic and theoretic foundation. The National Center for Technology and Dispute Resolution (odr.info) serves as a hub for this global movement, supporting a global network of ODR Fellows and an Annual Conference that has met more than 16 times on five continents.

## 2. The Importance of ODR to e-Commerce

ODR is essential to e-commerce because large online marketplaces and merchants (companies like eBay, Amazon and Alibaba) must provide their users with fast and fair redress processes so as to bolster user trust. Consumers can now pick up their laptop or phone and, with just a few swipes of their finger, purchase an item or service from any seller around the globe. However, if consumers are worried that they will not be able to get quick resolutions to problems they encounter with regard to these purchases, they will be less likely to buy. Consumers may be particularly concerned about getting redress in cross-border transactions, because the redress processes they depend upon for domestic face-to-face purchases are not effective if the transaction partner is in another country or even on another continent. ODR is particularly well-suited for low-value, high-volume, cross-border transactions, because ODR is jurisdiction independent, meaning it can provide redress across borders without having to reconcile conflicting legal regimes.

After more than 20 years of analysis and research, governments around the world are now promoting ODR as a means of expanding access to justice for their citizens. A consensus has emerged among regulators, consumer advocates and marketplace administrators that ODR is the best option for resolving cross-border consumer issues. As a result, there has been a wave of laws and regulations encouraging (and in some cases requiring) the expanded availability of ODR. But these initiatives have not developed at the same rate in every region. Some countries are far ahead in deploying ODR, while other countries are behind. But all countries now know that the future of commerce is online. Any economy that wants to be a leader in global e-commerce must have a robust infrastructure in place to reassure consumers, both domestic and international, that they will be able to get redress should a problem arise. That is why ODR must be a priority.

## 3. The Global Trend Towards ODR

Global e-commerce is growing at a rate of 20% per year. There were more than 50 billion e-commerce purchases globally in 2017, which means that in 2018 there will be 60 billion or more. Studies have shown that approximately 1% to 3% of e-commerce transactions generate a dispute, so that means there were about 1 billion global e-commerce disputes in 2017, and that number will continue to grow at the same rate as e-commerce grows.

Large e-commerce marketplaces have responded to this growth in disputes by building their own redress processes. In 2004, eBay launched the Resolution Center, which has since resolved hundreds of millions of disputes. Similarly, the Chinese e-commerce giant Alibaba also has an ODR-based resolution process that processes an even greater volume of cases. Even sharing economy companies like Airbnb and Upwork have integrated Resolution Centers into their marketplaces to provide quick and efficient resolutions to any problems that arise. And not all redress processes look the same: the TaoBao online marketplace in China has resolved millions of disputes through a crowdsourced resolution process which utilizes online juries.

But relying on each individual marketplace to build effective redress is not enough. Many e-commerce transactions take place outside of large marketplaces, and individual merchants do not have the resources to build robust ODR systems. National consumer protection authorities have dealt with consumer complaints regarding cross-border e-commerce purchases since the late 1990s, but they had no effective way to pursue these cases to resolution. As a result, momentum has built behind international proposals to deploy ODR to assist consumers in these kinds of cases. International organizations have promoted ODR as a solution to access to justice challenges since 2002. UNCITRAL, the United Nations organization in charge of harmonizing global laws, convened a working group devoted to ODR with more than 66 participating national delegations, and the group issued its final recommendations in 2016.

In Europe, the number of private and public ODR start-ups has grown steadily. Certain countries have led the way as early adopters (e.g., England, The Netherlands), but now the more conservative governments on the continent are following suit.[1] In 2015, the EU adopted a new regulation requiring all merchants in EU member states to notify their consumers about the availability of ODR, and the EU launched its own ODR filing form to collect buyer complaints and distribute them to regionally appropriate ODR service providers. An excellent example of the expansion of dispute resolution in Europe is the *Directive 2008/52/CE de le Parlement Européen et de Conseil de 21 Marz, 2008*,[2] which made mediation mandatory in EU member states in certain cases such as torts and contract disputes,

1 G. Ross & M. Poblet. 'ODR in Europe', *in* M. S. A. Wahab, E. Katsh, & D. Rainey (Eds.), *Online Dispute Resolution: Theory and Practice*, The Hague, Eleven International Publishing, 2013.

2 European Parliament & The European Union Council. (2008). Directiva 2008/52/CE do Parlamento Europeu e do Conselha – May 21st, 2008 relates certain aspects of the civil and commercial mediation. Estrasburgo, Jornal Oficial da União Europeia.

where the parties were from different countries. Now, the International Standards Organization is evaluating a proposal to make ODR a *de facto* standard for all international e-commerce transactions.

The momentum behind ODR appears to be growing around the world. Those who have seriously considered the problem of access to justice, especially for high-volume/low-value cross-jurisdictional disputes, have come to the conclusion that ODR is the best option for the future. Judges, Bar Association presidents, regulators, general counsels and legal aid attorneys are all confronting shrinking budgets, growing numbers of self-represented litigants and changing expectations among the constituencies they are trying to serve. The track record that ODR has already achieved in a wide variety of global applications is encouraging them to think seriously about how ODR can work in their home geographies.[3] With all of this momentum, it is clear that ODR's time has truly arrived.

## 4. Why Does Japan Need ODR?

But while ODR has gained immense traction in geographies like China, North America and Europe,[4] the development of ODR in other regions of the world has been more inconsistent. One example of a leading e-commerce region that has lagged behind in the deployment of ODR is Japan. An international survey of the growth of ODR by Melissa Conley Tyler in 2005 indicated that Japan's use of ODR lagged behind initiatives in other geographies,[5] but the potential of ODR approaches in tackling the challenges being experienced in Japan was clear even before ODR experiments began in earnest. The delay in Japan's adoption of ODR approaches might have even been a benefit in retrospect, as other geographies have since tested and refined ODR tools, ensuring that Japanese businesses and regulators can now leverage other countries' best practices in designing their own initiatives. The geographies that were most successful in implementing ODR were those that coordinated its launch between many stakeholders, including governmental organizations, foundations, chambers, private start-ups or individual enthusiasts. Now that the global consensus around ODR's value is clear, Japan can begin to convene a similar set of stakeholders.

The Japanese e-commerce market is enormous. Japan has the fourth largest Business-to-Consumer (B2C) e-commerce market in the world, following China, the United States and the United Kingdom.[6] In 2017, B2C e-commerce transac-

3 E. Katsh & C. Rule, 'What we know and need to know about Online Dispute Resolution', *South Carolina Law Review*, Vol. 67, No. 329, pp. 5-6.

4 "As of July 2004, at least 115 ODR services had been launched worldwide, settling more than 1.5 million disputes. ODR services offer examples of using technology to resolve everything from eBay disputes to commercial litigation; from family disputes to the Sri Lankan peace process. There are now ODR services in all regions." (M. Conley Tyler, 115 and Counting: The State of ODR 2004. *Proceedings of the Third Annual Forum on Online Dispute Resolution,* University of Melbourne, 2004, p. 1).

5 M. Conley Tyler, 2004, p. 2.

6 Information Economy Division, METI, '2017 Establishing a Base for Data-Driven Society in Japan (Market Research for E-Commerce)', METI Report 2017, 2018, p. 92.

tions of goods amounted to $95.3 billion, which comprises 5.79% of all the B2C transactions in the country.[7]

Consumer-to-Consumer e-commerce (or C2C), sometimes referred to as the 'sharing economy', is also on the rise. C2C e-commerce transaction volumes in 2017, including both direct sales and online auctions, amounted to JPY 840 billion ($7.64 billion), which is more than 8% of overall B2C transaction volumes.[8] Besides the sales of tangible goods, there are also various other successful C2C markets such as renting rooms, hiring transportation or other services. The total market size of these C2C e-commerce transactions in Japan is reported to have reached more than JPY 1,000 billion ($9.1 billion).[9]

A unique aspect of Japan's e-commerce marketplace is the large volume of exports compared with imports. Purchases from Japanese businesses by US consumers totalled JPY 713 billion ($6.48 billion) in 2017, while purchases by Japanese consumers from US business was only JPY 233 billion ($2.12 billion). Likewise, e-commerce sales from Japan to China totalled JPY 1.30 trillion ($11.8 billion), while sales from China to Japan amounted to only JPY 24.3 billion ($0.22 billion).[10] This means that Japan realizes a significant economic advantage from its e-commerce trade surpluses.

## 5. The Growth in Transaction Problems

As Japan's e-commerce market has expanded, both domestically and internationally, the number of problem transactions has also grown. In 2017, the National Consumer Affairs Center (NCAC), an independent administrative agency established under both the Basic Consumer Act and the NCAC Act, received 77,318 complaints relating to consumer e-commerce purchases, which is more than double the number of complaints received in 2012 (31,934 cases).[11] These reports, covering both online direct sales and online auctions, typically focus on non-delivery, product defects or non-payment.

According to a survey asking people the reasons why they do not use home-sharing services (like Airbnb) or ride sharing services (like Uber), more than 50% of Japanese consumers answered that they are concerned about how effectively any problems they experience will be addressed. Interestingly enough, even though consumers expect the quality of services delivered in Japan to be high, the consumers' concern about possible disputes is much higher than in the United States, United Kingdom, Germany and China, where the same question indicated that only around 30% of consumers indicated that they are concerned.[12] This

7 METI Report, 2018, p. 62.
8 METI Report, 2018, p. 83.
9 Nikkei MJ, March 7, 2016.
10 METI Report, 2018, p. 97.
11 NCAC website, www.kokusen.go.jp/ncac_index_e.html.
12 Information Economy Division, METI, '2016 Establishing a Base for Data-Driven Society in Japan (Market Research for E-Commerce)', METI Report 2016, 2017, p. 71. Multiple answers were allowed for this survey.

result indicates that potential transaction problems are more stressful for Japanese consumers, as well as how the current redress options available are not adequate to put their concerns at ease. Based on this data, an interim report published by the Review Conference of Sharing Economy (an expert council established under the Japanese Cabinet Secretariat) recommended strongly that businesses take proactive measures to put redress processes in place that will mitigate consumer anxiety around sharing economy transactions.[13]

## 6. Existing Redress Options in Japan

Despite the increasing volume of complaints, and strong consumer concern around potential transaction problems, to date, there have not been enough avenues for effective redress for Japanese consumers. While several options do exist, none are a good fit with e-commerce transactions. The primary paths available to Japanese consumers include the following:

a Court Processes

Under the current Japanese court rule, parties can bring a claim for any amount less than JPY 600,000 ($5,455), which covers e-commerce disputes, to the Small Claims Trial (SCT) established as part of the local summary courts.[14] Oral arguments within the SCT finish in just one day, and the judgement is delivered immediately after completion of the oral argument.[15] The whole process takes around 2 months from the filing of the case to the final judgement. In order to make SCT navigable by parties without representation, the court provides a wide variety of guides and forms to demystify the procedure.

However, the filing cost makes SCT an inconvenient redress path for most online transactions. The cost to file a case is around JPY 4,000 ($36.4), which is almost half of the value of an average e-commerce purchase. In addition, even though guides and forms are available, the complainant usually has to prepare a written petition and submit evidence (in addition to other administrative documents), which usually means that the complainant is going to have to get at least some advice from the court or a lawyer. In addition, the procedure is conducted entirely offline, meaning that the parties must attend the oral argument held in the court.[16] In some cases, upon the defendant's request, the case will be transferred to the normal court, which means the complainant is always at risk that he or she will be pulled into a costly and time-consuming process. In fact, there were only 11,030 cases concluded in SCT in 2016, which comprises only 1.3% of the cases completed in the normal summary courts.[17]

13 METI Report, 2016, pp. 30-31.
14 Art. 368(1), Code of Civil Procedure (CCP).
15 Arts. 370(1), 374(1), CCP.
16 Art. 370(1), CCP.
17 Justice Statistics 2015, available at: www.courts.go.jp/app/files/toukei/179/009179.pdf.

As to cross-border transactions, Code of Civil Procedure was amended in 2012 to admit the jurisdiction of the Japanese court for disputes filed by a consumer against foreign business as long as the consumer is a resident of Japan.[18] However, even if the judgement is made for the consumer complainant, it is nearly impossible to enforce the judgement unless the business defendant owns assets in Japan, which means the consumer really is back at square one.

b Consumer ADR

In contrast to the options available through the courts, the most common alternative redress process for online consumers would be the NCAC. As described earlier, the NCAC deals with more than 75,000 consultations per year regarding online purchases. NCAC provides consumers information and advice, and in some cases, encourages and supports direct negotiations between the parties, which resolves 6% of the reported cases.[19] However, since the advice and negotiation support is not binding on the parties, NCAC's processes are effective only when both parties are cooperative. If the seller does not respond to a contact from NCAC, or if the seller is unhappy with the recommended solution, the seller can just ignore the process and the NCAC cannot take any further action. Also, the NCAC only supports transactions between businesses and consumers, so its services are not helpful in C2C or sharing economy transactions.

Now if the case is categorized as an 'important consumer dispute,' the consumer can file the case into the more formal dispute resolution mechanism operated by NCAC, which includes both mediation and arbitration.[20] This process is handled by neutrals and case managers with extensive expertise in resolving consumer disputes. The process is provided free of charge, and it is expected to take about 4 months from filing to case resolution. The problem with this mechanism is that it is available only when a case is deemed an 'important consumer dispute,' which involves transactions that affect larger groups of consumers (e.g., mass claims) or transactions that have caused or will cause material damages to individuals. Therefore, ordinary e-commerce problems like item non-receipt or item not-as-described are unlikely to meet these requirements. In addition, like the negotiation support we outlined earlier, this more formal dispute settlement system still requires the counterparty's consent, because the NCAC has no enforcement power. The NCAC Settlement Committee does have the right to disclose the name of the seller if the seller does not cooperate with the suggested settlement, or if the seller has a pattern of similar disputes with buyers, but that disclosure is rarely enough to enforce the outcomes achieved.[21] Perhaps due to this limited authority, in 2017, only 172 cases were referred to this 'important consumer

18 Art. 3-4(1), CCP.

19 Consumer Affairs Agency, 'Report about implementation of consumer protection policy', 2015, p. 12. Available at: www.caa.go.jp/policies/policy/consumer_research/white_paper/pdf/28hakusho_summary.pdf.

20 Art. 11, NCAC Act.

21 Art. 36, NCAC Act. Art. 52, Para. 3, Operational Rules for NCAC Dispute Resolution Committee.

dispute' process, which is a tiny percentage of the overall volume of likely e-commerce transaction problems experienced by consumers in Japan.[22]

NCAC has a branch that deals with cross-border transactions called the CCJ (which stands for Cross-border Consumer Centre Japan). The function of the CCJ is to receive complaints from Japanese consumers, translate them appropriately and work with the appropriate foreign organization to communicate with the foreign seller. The CCJ has established partnerships with 11 official foreign organizations, including the United States, Taiwan, Singapore, Vietnam, Thailand, Spain, Russia, Korea, Middle and South America, the Philippines and Malaysia. It handled 4,380 cases in 2016.[23] The limitation of CCJ is, as with the domestic NCAC process, that it cannot resolve consumer disputes without the cooperation of the responding party. As a result, only 13% of the cases reported to CCJ are finally resolved.[24]

c Consumer's Self-Redress

Like many other jurisdictions around the world, Japanese law has a cooling-off period within which consumers may cancel a purchase, return goods and obtain a full refund for any reason. This period extends for 8 days from the time of delivery of the item purchased. However, online sellers can be exempted from this rule as long as they disclaim the cooling-off period in their initial advertisement.[25] For example, Amazon.jp declares that the customer can get a full refund only if the delivered goods were unopened and unused; once an item is opened, the consumer can receive a refund of only 50% of the price paid.[26] Likewise, most online sellers in Japan disclaim the cooling-off rule and implement their own refund policies, which limits its ability to protect consumers.

Another possible recourse for Japanese consumers is credit card chargebacks. Under this process, consumers can contact their credit card issuer to reverse the charge on a problem transaction. However, in Japan, the acceptable reasons for filing chargeback are limited to some specific circumstances, such as (i) the purchase was never made, (ii) the purchase was made but the item was not received, (iii) the purchase was made with a stolen or unauthorized credit care, (iv) the seller made an error in the purchase or (v) the seller never had authority to complete the purchase. Therefore, credit card chargebacks are difficult if not impossible to use in cases of item quality disputes or delays in delivery.[27]

As a matter of fact, the vast majority of online disputes in Japan are currently resolved through direct communication between consumers and mer-

22 NCAC website, www.kokusen.go.jp/adr/hunsou/hunsou.html.

23 Consumer Affairs Agency, 'Consumer White Paper', 2017, 1-1-3-(2), available at: www.caa.go.jp/policies/policy/consumer_research/white_paper/2017/white_paper_109.html.

24 T. Matsumoto, 'Achievements and Challenges about CCJ', 2016, p. 19.

25 Art. 15-2, Act on Specified Commercial Transactions.

26 Amazon.jp website, https://www.amazon.co.jp/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=202063080&language=en_US.

27 Y. Sekizaki, 'Credit Card Chargeback', 2015, p. 2, available at: http://myspace.private.coocan.jp/odr/2015/2015_12.pdf.

chants. In the case of B2C transactions, professional sellers are likely to make concessions in order to maintain good relationships with their customer base and to preserve a trustworthy reputation. However, if professional sellers refuse to compromise, or simply ignore the buyer complaint, usually the consumers will just give up their claim since they do not have an economically reasonable path to resolve the problem. In fact, a survey shows that 33% of domestic e-commerce consumer disputes were not resolved and 12% were resolved in a way unsatisfactory to the consumer.[28] And in the case of C2C transactions, sellers tend to be even less motivated to be responsive, because it is unlikely that they will have a continuing relationship with the buyer. Rather, C2C sellers simply want to collect the payment as soon as possible and then have nothing to do with the buyer beyond that.

These challenges exist for domestic e-commerce transactions, where the buyer and the seller both reside in Japan. Throw in the confusion of cross-border transactions and you can see how the problems become even more daunting. Not only are there jurisdictional complexities and contradictions, there are also language differences and enforcement challenges. In practice, it is hard for any consumer, domestic or international, to get access to justice unless the seller is cooperative. If the seller decides not to participate, there are almost no current options in Japan to compel them to do so.

As we discussed previously, B2C and C2C e-commerce has become a significant part of the overall Japanese economy, and its importance will only grow as e-commerce volumes continue to rise. Since the current redress options are not effectively resolving these low-value, high-volume and frequently cross-border disputes, lack of redress will act as a brake on the expansion of e-commerce in Japan, and consumers will be inclined to spend their dollars elsewhere. To hold on to Japan's lead in e-commerce, and to encourage Japanese e-commerce to grow, Japan needs to make the deployment of ODR a priority, because ODR provides the redress options which meet the needs of consumers in this new digital economy.

## 7. The History of ODR in Japan

For the past two decades, several Japanese public organizations and industrial groups have tried to implement ODR to address e-commerce disputes. However, to date, none of those initiatives have become a sustainable and scaled option for consumer redress. The most prominent of these efforts include the following:

1 The ECOM Online Shopping Consultation Center

The ECOM (Electronic Commerce Promotion Council of Japan) was an organization composed of EC-related business entities, established in 2001 and disbanded in 2010. As a government-commissioned project, from 2003

28 Mitsubishi Research Institute, 'Trends in Cross-border Online Commerce', MRI Report, 2015, p. 32, available at: www.caa.go.jp/policies/policy/consumer_policy/policy_coordination/internet_committee/pdf/150930shiryo1.pdf.

to 2006, the ECOM Online Shopping Consultation Center (OSCC) ran a demonstration project providing online ADR, which offered advice for consumers, promoted negotiation between parties and conducted mediation online. The project was funded by government agencies (primarily the Ministry of Economy, Trade and Industry) and consumers could access all the services provided at no cost.[29]

The main challenge with this process, similar to the NCAC described earlier, was that the OSCC did not have authority to compel the respondent (usually the seller) to participate in negotiation or mediation. Also, the mediation provided through ECOM was too costly: at the beginning of the project, three expert mediators held a meeting for each case to draft mediation plan (later, it was amended to allow one mediator to handle one case). As a result, only 8.5% of the cases reached negotiation and 0.5% of cases went to mediation.[30]

On the other hand, the online advice that was provided in these cases was evaluated positively by nearly 80% of consumers.[31] As an outcome of the 3 years' consultation, ECOM published the *Online Consultation and Dispute Resolution Manual*, which covers not only relevant regulations but also ethics, attitudes and techniques for consultants.[32]

It has been more than 10 years since the OSCC's online ADR experiment terminated, but the know-how of online consultations accumulated during the 3 years still provide very valuable lessons for us to design and implement new ODR processes that fit well with the Japanese e-commerce marketplace.

2 *Shirogane-Cyberpol*

At about the same time as the experiment of OSCC, in 2003, a non-profit organization named Shirogane-Cyberpol conducted an online ADR experiment for online auction disputes for 2 months (*SOMPro: Shirogane-Cyberpol Online Mediation Project*).[33] Once SOMPro received a complaint, it contacted the counterparty and confirmed its willingness to join a negotiation. If the counterparty agreed, a lawyer designated by SOMPro supported the negotiation. The lawyer's work was provided to the parties free of charge (largely because the lawyer performed it as a volunteer).

One of the unique aspects of this project is that it coordinated with the largest auction platform in Japan (Yahoo! Auctions) to make it possible for the parties to erase any review posted on the site as part of the settlement agreement. This arrangement provided a strong incentive for the seller to participate in the negotiation, because sellers were well aware of the negative

29 METI, 'ECOM's Practical Experiment of ADR with respect to BtoC eCommerce', available at: www.meti.go.jp/policy/economy/consumer/consumer/tyui/pdf/shiryou7_adrgaiyou.pdf.

30 ECOM, 'Report on Demonstration of Internet-Related ADR', ECOM Report, 2005, p. 32, available at: www.jipdec.or.jp/archives/publications/J0004243.

31 Y. Harada, 'Experience from ECOM Online Shopping Consultation Center', 2016, p. 5, available at: http://myspace.private.coocan.jp/odr/2015/2015_09.pdf.

32 www.jipdec.or.jp/archives/publications/J0004244.

33 Y. Machimura, 'Report for the Result of Online ADR Experiment', 2003. Available at: http://myspace.private.coocan.jp/odr/2015/2015_11.pdf.

impact such bad reviews could have on the continued success of their online businesses.

Among the 36 cases filed to SOMPro over the 2-month experiment, seven cases proceeded to the supported negotiation phase and six reached final resolution. The average period for reaching an agreement was 46.6 days per case with 95 emails exchanged. In the final report of this pilot project, Prof Machimura pointed out that the main challenges in providing the type of ODR the project envisioned are the costs, financing, automation and data security.[34]

3 Challenges in Expanding ODR

Unfortunately, these demonstration projects in the early 2000s did not lead to the actual implementation of ODR in practice. One of the reasons for the failure of these efforts was that it was difficult to get parties to agree to participate in the negotiation. Since the ODR mechanisms utilized were not binding for parties, and there was no enforcement power, the respondent (often the seller) did not have enough incentive to join the negotiation. In fact, the number of respondents who actually took part in negotiation was less than 20% in both pilots. Second, the cost per case was too high to make the system financially sustainable. Even though the online process was less expensive than face-to-face ADR, there was still large of cost for the human consultants and mediators who actually gave advice or handled each case.

In the past experiments, technology was used merely as a communication tool, substituting for mail or telephone. Therefore, ODR could not fundamentally solve the problems that existed in offline ADR, typically, lack of incentive for participation and prohibitive costs.

However, things have changed in these 10 years. Now that online transactions are much more commonplace, it is more important for both business and consumers to have fast and fair redress for online disputes. We now have new mechanisms to incentivize sellers to join negotiation, such as the threat of credit card chargebacks and the even greater resonance of consumer evaluations. Also, ODR technology has improved to the point where the per case cost is much lower. It is no longer true that the cost increases at the same rate as dispute volumes. By leveraging data analysis, business rules and algorithmic resolutions, we can reduce the cost per dispute as the number of cases goes up.

## 8. Practical Considerations in Developing ODR for Japanese e-Commerce

Promoting the development of ODR in Japan requires us to first answer a central question: Who will develop and host the system? Courts would play this role, but the courts do not have a very strong track record when it comes to innovation and legislative reforms. Members of the judiciary are usually much more conser-

34 Machimura Report, p. 5.

vative in their management style, which contrasts with the rapid pace of innovation required for effective technology projects like ODR deployment.

Another possibility is government agencies. Japan Consumer Network has suggested that the Consumer Affairs Agency or the Ministry of Economy, Trade and Industry could establish an expert committee to discuss system development of ODR.[35] This blueprint mirrors the approach that has been taken in the EU, which is government led with private sector participation. This approach would be particularly effective for implementation of ODR in NCAC or other public ADR institutions.

The third approach would be initiative by the private sector, specifically the online business merchants or the marketplace administrators, as a part of their services to their customer base. These private parties can best develop ODR systems that are fully integrated into their own businesses. If the government creates economic incentives for these private actors, it could spur the creation of ODR systems. However, there are always concerns about independence, impartiality and compliance when private actors retain control of ODR systems. Japan's Lawyer Act prohibits non-lawyers from delivering legal services for profit, with the specific exception of judicial scriveners in the case of small amount claims (equal to or less than JPY 1.4 million (approximately $12,727)) or Certified Dispute Settlement Services,[36] so there is some precedent for private ODR systems to be granted a similar exception.

If ODR systems are designed and deployed by customer service teams within private merchants or marketplaces, regulations could require that mediations are conducted by an independent lawyer, judicial scrivener or panellist drawn from a limited number of Certified Dispute Settlement Services. But what about negotiation services? Could a marketplace administrator use ODR to support negotiation between the seller and the buyer by encouraging communication and providing information about its policies? Those kinds of services do not require participation from an outside ADR panel or non-profit. Presently, it is not clear whether such a service would fall within the 'reconciliation for the purpose of gaining reward' prohibition inside the Lawyer Act, but if the marketplace does not render a decision regarding the dispute, and it does not directly profit from the resolution process, it is not likely to be regarded as a breach of the Lawyer Act.

### *8.1 Encouraging Parties to Participate*

One of the most difficult challenges in building ODR systems is appropriately incentivizing respondents to participate. In most private disputes these is no way to force the respondent to take part in the process short of going to court. Some online marketplaces can compel respondent participation by threatening account suspension or financial penalties, but short of that enforcement power, many respondents elect not to respond to new disputes because all of the possible outcomes are negative from their perspective.

35 JACONET report, p. 28.

36 Art. 72 of Lawyer Act, Art. 3, Para. 1, Item 7 of Judicial Scrivener Act, Arts. 5, 6 of Act on Promotion of Use of Alternative Dispute Resolution.

A possible solution to this challenge would be to establish a new regulation that requires that all consumers have easy access to ODR, and that merchants would be required to participate in the process. However, it is difficult to convince legislators to pass such a regulation without successful ODR systems already in place, and a record of successful resolutions. It is possible to promote ODR solely through voluntary implementations by merchants or marketplace administrators. But past efforts along those lines have achieved only spotty compliance, with huge variation in ODR quality. In order to motivate private sector actors to implement ODR in their own platform, there needs to be a compelling economic rationale.

Large-scale studies of the ODR processes at eBay have demonstrated that there is a strong economic rationale for businesses to invest in redress systems. Data drawn from the eBay data warehouse indicates that businesses that provide fast and fair ODR resolutions enjoy significantly higher buyer loyalty and consumer reactivation rates, which can generate significant boosts in profits. According to the study conducted by eBay, consumers who reported a transaction problem and achieved a resolution through mutual agreement with their seller increased their activity on eBay at an average of 15% in the 6 months following the disagreement. Also surprising was the finding that consumers who filed a dispute had higher loyalty on average than consumers who did not file a dispute, regardless of its outcome (*i.e.*, no matter whether the buyer 'won' and got a refund or 'lost' and did not get a refund).[37] This result demonstrates that fast and fair redress is a core component of user trust, and that businesses who implement ODR will enjoy a sustainable competitive advantage over their competitors who do not make similar investments.

This advantage would be especially significant in the Japanese market, since consumers in Japan have indicated that they are more concerned about potential purchase problems than consumers in other countries (as explained earlier). Therefore, private merchants and marketplaces in Japan, regardless of the kinds of transactions they host, have a strong financial incentive to develop and deploy ODR systems independent of any regulatory or legal pressure.

### *8.2 Enforcing ODR Outcomes*

The number one determinant of a successful ODR program is enforceability. If the resolution achieved within an ODR process is not enforceable, the consumer will be frustrated, because the outcome they achieved is highly unlikely to become a reality. In ODR processes where agreements are achieved by mutual agreement, enforcement is less of an issue, because there is a high degree of compliance with resolutions agreed to by both parties. But the lack of enforcement becomes a major challenge in ODR processes where the parties could not reach agreement, so the matter is decided by a third-party neutral.

Could the parties agree in an initial purchase agreement (usually, terms and conditions prepared by the seller or the platform and agreed to by the consumer)

37 C. Rule & A. Schmitz, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, Chicago, IL, American Bar Association, 2017, pp. 54-58.

that the outcome of any eventual ODR negotiation or mediation is legally enforceable? These pre-dispute binding resolution agreements are becoming more popular in the United States, but Japanese law does not allow settlements or mediation agreements made outside the court to be enforceable.[38] Likewise, an agreement to go to binding arbitration will not work since the Japanese Arbitration Act allows consumers to unilaterally cancel arbitration clauses in their consumer contracts. As a result, private merchants usually have no motivation to embed arbitration clauses in their customer agreements.

There are several options for enforcement of ODR outcomes in Japan. The first is *de facto* enforceability, sometimes described as chargeback and escrow. *De facto* enforceability gives the consumer power to compel merchant enforcement. The simplest example of this kind of enforcement is credit card chargebacks. Consumers can file a chargeback for any payment made on their credit card just by calling their card issuer and filing a chargeback. Merchants cannot block the chargeback from being filed, though they can 're-present' the charge if they feel the chargeback was inappropriate. ODR processes do not infringe on consumer chargeback rights, but merchants are likely to prefer ODR because they enable the possibility of a resolution by mutual agreement, which the chargeback process does not account for.

If the marketplace administrator has an escrow function (i.e., the buyer deposits the purchase amount in the escrow account of the marketplace and releases it only when he or she has confirmed delivery of the ordered goods and acceptable quality), this *de facto* enforcement is even more flexible. The consumer is never out of control, even after he or she has sent the money, because the merchant does not receive payment until the consumer has indicated that he or she is fully satisfied with the transaction. Most of the time the escrow process will work without external intervention, but if a dispute does arise, then a third-party mediator or arbitrator can decide the appropriate outcome and then the marketplace can move the funds held in escrow as the outcome requires. This approach makes ODR outcomes *de facto* enforceable even without a legal agreement between the parties.

As an example, suppose that in a case of delayed delivery, the buyer and seller cannot agree about appropriate compensation, so the arbitrator decides that the seller should give the buyer a 30% refund on the original purchase price. After receiving the decision from the arbitrator, the marketplace administrator could pay 70% of the buyer's payment from the escrow account to the merchant and refund the remaining 30% to the buyer. The escrow functionality enables the ODR process to have *de facto* enforceability even after the payment is done, even if the respondent (the merchant) disagrees with the arbitrator's decision.

### *8.3 ODR and Reputation Systems*

In addition to this *de facto* enforceability, there are other possible tools to encourage parties to comply with outcomes delivered by the ODR system. For example, buyers can be given the ability to publicly review the performance of their sellers.

38 Art. 22, Civil Execution Act, Art. 267, Code of Civil Procedure, Art. 16, Civil Mediation Act.

These reviews are critical for the seller's reputation within a particular marketplace, because if future potential buyers read critical reviews of a particular seller, they will be less likely to purchase items from that seller. Therefore, sellers are strongly motivated to comply with ODR outcomes in order to protect their public reputation. Furthermore, as was the case in the Shirogane-Cyberpol experiment, if the system allows merchants to erase bad reviews as part of their compliance with an ODR process, the sellers will be strongly motivated to use and comply with ODR outcomes.

*8.4 Funding ODR Systems*

A final concern is the funding and sustainability of ODR programmes. One of the reasons why consumers do not pursue redress through the courts for their e-commerce problems is the challenge of cost. No one wants to spend $100 on a lawyer to resolve a $50 dispute. As a result, ODR systems need to be as inexpensive as possible, especially if they are going to process low-value cases. Automation and algorithmic resolutions within ODR processes can improve the efficiency and expense per case, which can improve this cost curve.

In fact, ODR can dramatically reduce cost for customer service. Using the power of software algorithms within its ODR platform, eBay succeeded in resolving 90% of disputes without human intervention from an eBay employee. Likewise, ODR mechanisms at PayPal saved the company more than $7.5 million in customer service headcount costs in the first year alone, and each year after that the savings compounded.[39] These savings improve the cost leverage for ODR, which makes the expense per case manageable.

Each ODR deployment should go through a cost–benefit analysis to ensure that the amount expended in building the system is less than the economic benefit of the system once it comes live. Automation to reduce the cost per case combined with increases in customer loyalty and retention should improve leverage to the point where any private entity would quickly realize that ODR investments more than pay for themselves in a short period of time. Add in the government's interest in providing fast and fair redress to citizens, and the business case for ODR becomes quite strong.

*8.5 Neutrals*

The final question regarding ODR focuses on the neutrals who will be providing services within the ODR process. In Japan, the mediator should probably be an attorney or a judicial scrivener qualified within that country itself. The reason for this limitation is not only to assure consistent quality of mediation services, but also to comply with Japanese laws. As described previously, Japan's Lawyer Act allows only legal experts (lawyers or judicial scriveners) or Certified Dispute Settlement Service to deal with reconciliation for the purpose of gaining reward. In order to comply with these regulations, Japanese ODR systems should probably select their neutrals from these approved panels.

39 C. Rule & A. Schmitz, 2017, p. 53.

The problem with this relatively limited pool of neutrals is that these neutrals are usually quite expensive. But the challenge of this expense is minimized by three factors:

- First, because only a small percentage of cases generate a dispute, and only a small percentage of disputes go to mediation, the merchants or marketplace administrators have enough reason to bear the cost for these professionals.
- Second, working as a mediator in a simple e-commerce case is a good opportunity for customer service staff to engage in professional development. In fact, many individuals are willing to provide such services for free: in an open Q&A service run by the biggest attorney-client matching service provider in Japan, Bengoshi.com, about 18,000 answers per month to legal questions were answered by attorneys for free.[40] Managing online mediations could be a good opportunity for legal professionals to demonstrate their skill at providing legal advice, which can open professional doors. Considering this benefit, professionals will likely be willing to handle these online mediations for significantly lower fees.
- Third, if an ODR system partners with a Certified Dispute Settlement Service, non-certified panel members such as past NCAC consultants or students could also work as mediators. In general, such service providers are significantly cheaper than hiring legal experts at their stated hourly rates.

## 9. Conclusion

Access to justice is an essential and fundamental right. As our society moves online, we must ensure that citizens and consumers can get just resolutions to their online problems as easily as they can get justice offline. That is why developing and expanding ODR is essential for the expansion of e-commerce both within Japan and around the world. As e-commerce grows, government must invest in ODR so as to ensure continued and improving access to justice from customers. This is essential to maintain trust.

To date, this door has been closed to Japanese e-commerce consumers. Existing options do not provide adequate access to redress. The court process is too costly and time-consuming. Governmental ADR processes are not binding, making them largely ineffective. The scenarios in which cooling-off rights or credit card chargebacks can provide just resolutions are relatively limited. As a result, consumers do not reach a satisfactory settlement in nearly half of Japanese e-commerce cases. That is a problem.

In fact, Japan was a leader in experimenting with ODR in the early 2000s. Unfortunately, those experiments failed because of the expensive running cost and lack of enforcement power. However, by making use of modern innovations in ODR (including automation and algorithmic resolutions), and by encouraging merchants and marketplace providers to invest in ODR in order to make their business more efficient and profitable, Japan will be able to reclaim its leadership

40 Bengoshi.com website (as of July 31, 2018), available at: https://www.bengo4.com/.

and develop sustainable ODR systems to support the continued growth of e-commerce.

Even though ODR is nascent in Japan, there is a huge potential. With just a little push, ODR can become a fundamental part of Japanese infrastructure in the near future. It is time for business, government, lawyers and consumers alike to work together to develop ODR in Japan to ensure better access to justice and to lay the groundwork for prosperity in the expanding online economy.

# The Law of Consumer Redress in an Evolving Digital Market

## Upgrading from Alternative to Online Dispute Resolution

*Pablo Cortés*[*]

**Abstract**

*This article contains the Introduction of a book with the same title recently published by Cambridge University Press, which is reproduced here with its permission. The book offers an updated analysis of the various consumer dispute resolution processes, its laws and best practices, which are collectively referred as the Law of Consumer Redress. The book argues that many consumer redress systems, and in particular publicly certified Alternative Dispute Resolution (ADR) entities, are more than a mere dispute resolution mechanism as they provide a public service for consumers that complements, and often replaces, the role of the courts. In examining the current redress models (i.e., public enforcement, private enforcement and other market options), the book calls for greater integration amongst these various redress options. It also advocates, inter alia, for processes that encourage parties to participate in ADR processes, settle meritorious claims and ensure extrajudicial enforcement of final outcomes. Lastly, the book calls for a more efficient rationalization of certified ADR entities, which should be better coordinated and accessible through technological means.*

**Keywords:** e-Commerce, Online Dispute Resolution, Alternative Dispute Resolution, consumer redress.

### 1. The Law of Consumer Redress

In recent years, the digital world established itself as a convenient market for people, consumers and businesses, who come together and practice the essential actions of a functioning economy: selling and buying goods and services. Consumer expenditure represents the majority of the Gross Domestic Product (GDP). In the European Union (EU), consumer expenditure accounts for 56% of the total GDP,[1] while in the United Kingdom, the consumer GDP is 60%,[2] and in the Uni-

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1 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, 'A European Consumer Agenda – Boosting Confidence and Growth', COM(2012) 225 final, p. 1.

2 Consumer Council of Northern Ireland, 'Back to Business: Are Businesses Getting Consumers' Rights Wrong?', December 2013, p. 3.

ted States, it is over 70%[3] (though different techniques are employed to arrive at these figures).

A growing level of regulation in the field of consumer protection is taking place in the EU – a body of law which is commonly known as *Consumer Acquis*. The rationale behind consumer regulation is supported by the view that a degree of consumer protection is required for a market to function more effectively.[4] Although it is possible to argue that the EU has adopted a paternalistic or interventionist approach with the expansion of consumer protection rights, in practice, however, these rights are as significant as the consumers' ability to enforce them, which is particularly challenging in the cross-border context. Consequently, legal certainty and consumer trust in the market can be achieved only when there are mechanisms that ensure compliance with the consumer protection legislation, and thus their legitimate expectations can be met.[5] The existing formal and informal processes (and their regulations) that consumers use to achieve compensation and justice are what this book refers to as the *Law of Consumer Redress*. Hence, this book deliberately merges concepts of justice and redress when examining different consumer redress systems.

When consumers and traders have unresolved disputes, they are understandably reluctant to consider formal judicial proceedings as a forum for finding redress, especially so when the loss is relatively small, as litigation is costly, slow and stressful.[6] Additional reasons include the perceived complexity of a court process and unclear legal advice – as legal representatives can rarely assure consumers on the outcome of a judgement, who then face the risk of having to pay legal costs without the guarantee of obtaining redress.[7] As a result, many organizations, including the EU and national governments, have decided to invest and promote out-of-court redress options. Extrajudicial redress is often the preferred option for most disputes as it can provide informal resolution in an independent, fast and effective manner. This is why many consumer disputes are increasingly been channelled directly through Alternative Dispute Resolution (ADR) schemes, which are replacing courts in many jurisdictions as the main redress providers in areas such as in financial matters and utilities.[8]

Consumer ADR systems differ significantly from traditional out-of-court processes employed between commercial parties – namely commercial arbitration and mediation processes. For that reason, leading academics have even referred

3 Federal Reserve Bank of St. Louis, 'Personal Consumption Expenditures (PCE)/Gross Domestic Product (GDP)', 2013. Available at https://fred.stlouisfed.org/graph/?g=hh3.

4 M. Armstrong, 'Interactions between Competition and Consumer Policy', *Competition Policy International*, Vol. 4, No. 1, 2008, pp. 97-147.

5 European Commission Staff Working Paper, Impact Assessment Accompanying the Document of the Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes and the Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes, SEC(2011) 1408 final (hereinafter Impact Assessment), p. 5.

6 *Ibid*. *See also* S. Weatherill, *EU Consumer Law and Policy*, Edward Elgar, 2014, p. 283.

7 University of Lincoln, Lincoln Law School, 'Representative Actions and Restorative Justice', 2008. Available at: www.bis.gov.uk/files/file51559.pdf, last accessed 12 January 2017.

8 C. Hodges, 'Consumer Ombudsmen: Better Regulation and Dispute Resolution', *ERA Forum,* Vol. 16, 2015, p. 14.

to Consumer ADR (CADR) to distinguish it from traditional ADR models, or Consumer Dispute Resolution (CDR) to emphasize that for the great majority of consumer disputes judicial redress is not an option.[9] Thus, consumer ADR is very different from traditional ADR processes employed for resolving civil and commercial disputes. While traditional ADR is seen as an alternative to the court system, where parties may compare what they might get in court to what is being offered in a settlement,[10] consumer ADR often presents itself as the only resort for the consumer to find redress in a cost-effective and proportionate manner. Another defining feature of consumer ADR models is that given that most consumers did not obtain legal advice prior to contacting the ADR scheme, many procedures (especially ombudsman schemes) provide consumers with some level of advice and with processes that operate a triage or diagnosis stage that filters cases based on eligibility criteria. Lastly, while commercial ADR schemes are privately run and decisions are largely confidential, many consumer ADR schemes are either run by public regulators or closely controlled by them.

This book examines what I describe as the emerging Law of Consumer Redress, which encompasses the regulation affecting processes that enable consumers to resolve disputes and obtain compensation from traders, including dispute resolution procedures, best practices and the certification of providers. In so doing, this book discusses the regulatory transformation that this field is experiencing in the EU and elsewhere in the context of an evolving digital market. Dispute system design analysis takes place in order to identify best practices that can inform the regulation and design of consumer redress policies and processes.[11] It must be acknowledged that the terminology in this field can be confusing as it adopts different meanings for those who use it. The meaning of consumer redress adopted by this book includes ADR or out-of-court processes when used for consumer disputes (i.e., what has been termed as CADR or CDR) as well as regulatory and judicial processes in so far as these schemes have been designed for consumer cases in mind. Although the Law of Consumer Redress may be used as an umbrella term to describe the policy and the regulation affecting public and private enforcement options as well as judicial and ADR redress, the main purpose of this book is to contribute to the analysis of the transformation of consumer ADR techniques, increasingly underpinned by online dispute resolution (ODR) technology, as these schemes are expected to become the main redress option for the digital consumer.

9 *See* C. Hodges, I. Benohr, & N. Creutzfeldt-Banda, 'Consumer-to-Business Dispute Resolution: The Power of CADR', *ERA Forum*, Vol. 13, 2012, p. 199.

10 M. Moffitt 'Three Things to Be Against ("Settlement Not Included")', *Fordham Law Review*, Vol. 78, 2009, pp. 1203-1245, p. 1207.

11 Dispute System Design has been established as a field of its own. *See* Harvard Negotiation Law Review, 'Symposium on Dispute System Design', *Harvard Negotiation Law Review*, Vol. 14, 2009, pp. 1-343.

## 2. Technology as the Vehicle for Resolving Consumer Disputes in the Digital Era

Currently, around half of EU consumers shop online.[12] Conflicts arising from a typical purchase online (e.g., a tablet or a photographic camera that never arrives or that is damaged) are almost never resolved in the courts because the cost of bringing such claims outweighs the value of the dispute, especially when parties are located in different jurisdictions. Hence, the use of traditional face-to-face dispute resolution methods for settling disputes arising in this forum is nearly always impractical, time-consuming and expensive, particularly for settling low-value cross-border disputes.[13] Despite this, the practice of online purchasing is still growing, so is the number of disputes between online consumers and suppliers. The European Commission observed that the lack of available out-of-court redress mechanisms for resolving effectively low-value disputes triggers buyers' mistrust of sellers, which in turn constrains competition and limits the growth of the digital market.[14]

Consumer redress is not only a topic of theoretical significance, but it is also a topic of high practical relevance, especially for the digital consumer. According to Which?, an UK-based charity defending consumer rights, nearly half of UK consumers (46%) who bought goods online over the past 2 years had a problem with their purchase.[15] The three most common problems are deliveries arriving late (19%), goods arriving faulty or damaged (13%) and goods not arriving at all (12%).[16] It has been estimated that approximately 3% of all online transactions end up in a dispute, which is an impressive number if we consider that there are billions of online transactions a year.[17]

A society that is increasingly interacting online[18] would prefer to take advantage of the online forum for resolving its grievances. Indeed, statistics in many

12 N. Mimica, EU Commissioner for Consumer Policy, 'EU Consumer Summit 2014: Ensuring that Consumers Reap the Benefits of the Digital Economy', Press Release IP/14/353 (1 April 2014). In the EU, the proportion of consumers engaging in e-commerce has grown significantly in recent years. According to Consumer Scoreboard, 20% of consumers participated in e-commerce in 2004, but this figure rose to 45% by 2012. *See* http://ec.europa.eu/consumers/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf

13 P. Cortés, *Online Dispute Resolution for Consumers in the EU*, Routledge, 2011 and R. Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, Oxford University Press, 2013, Chapter 10.

14 Impact Assessment, 2011.

15 E. Snow, 'Millions experience problems with online purchases', *Which?*, 7 March 2014. Available at: www.which.co.uk/news/2014/03/millions-experience-problems-with-online-purchases-357861/.

16 *Ibid*.

17 C. Rule, 'How the Internet Is Changing the Way Disputes Are Resolved', Wire Innovation Insights,' 24 June 2014. Available at: www.pewinternet.org/2013/09/25/whos-not-online-and-why/.

18 According to Pew Research, 85% of Americans use the Internet. *See* K. Zickuhr, 'Who's Not Online and Why', 25 September 2013, available at: www.pewresearch.org/fact-tank/2013/11/08/whos-not-online-5-factors-tied-to-the-digital-divide/.

sectors show that the preferred vehicle of communication is the Internet.[19] This is even more predominant in those countries, such as in the United States, the United Kingdom and the Netherlands, where there is a high level of Internet penetration with over 90% and where the majority of the population uses Internet services, such as online banking. In the United Kingdom, this figure was already set in 2013 at 83% of households, where 73% of adults were accessing Internet every day and around half used online banking.[20] But even in those countries where the Internet penetration is relatively low, such as in Greece with just over 40%, the figure grows every year.[21] The growth rate is exponential with regard to online access via smartphones – while in 2015, the number of smartphones in the world was estimated to be over 2 billion, this figure is expected to double to 4 billion by 2020.[22]

Similarly, online retail is growing very fast, even when brick-and-mortar retail is going down in the wake of economic crises. According to the Centre for Retail Research in 2013, online retailing in Europe grew in one year by a weighted average of 21.1% to £111.2 billion, which was around 12 times faster than conventional outlets.[23] The British Retail Consortium found that around 20% of all non-food spending is through online shopping, and this figure is expected to increase.[24]

Digital consumers are interacting increasingly through online marketplaces, such as eBay or Amazon, that enable transactions between consumer and businesses, as well as what is known as the Shared Economy, services such as Airbnb and Uber, which essentially allow users to sell services to consumers. These new business models are affecting (and often threatening) traditional brick-and-mortar businesses, which are either transforming to the online sphere or disappearing. Traditional brick-and-mortar businesses such as DVD rentals, sale of CDs, travel agencies and broadsheet newspapers are gradually moving online.

At the same time, the Internet has empowered consumers with information about their rights that previously was available to them only via professionals.[25] Although the notion of empowering consumers is increasingly becoming central to the EU consumer policy strategy, not all consumers are the same, with some being more vulnerable than others. Vulnerable consumers are mostly those who are the oldest, the least educated and those who do not know or have access to

19 For tax claims in the property sector, *see* W. Sapp, 'Creating an Online Property Guide and Resolution Center', *Fair & Equitable*, April 2014, p. 3.

20 UK Office for National Statistics, 'Statistical bulletin: Internet Access – Households and Individuals, 2013,'.

21 Special Eurobarometer 381, 'E-Communication Household Survey', June 2012.

22 'The Truly Personal Computer', The Economist, 28 February 2015.

23 Centre for Retail Research, 'Online Retailing: Britain, Europe and the US 2014'. Available at: www.retailresearch.org/onlineretailing.php.

24 Online Retail Monitor, British Retail Consortium, 2016.

25 J. MacFarlane, 'ADR and the Courts: Renewing our Commitment to Innovation', *Marquette Law Review*, Vol. 95, No. 3, 2012, p. 927 and 930.

computers.[26] The definition of a vulnerable consumer in the EU led to a definition of an average consumer,[27] which became the benchmark for the majority of individuals. The Court of Justice defined an average consumer as someone who is reasonably well informed and reasonably observant and circumspect.[28] An added challenge is that the concept of consumer varies from country to country. Whereas some jurisdictions, notably within the EU, are adopting a more expansive consumer concept, for instance, including legal persons, other countries such as the United States have adopted a more restrictive approach.[29]

Consumer expectations about redress are also moving online. Currently, the vast majority of consumer redress mechanisms use some type of distance means of communication. These can be as basic as emails and telephone communications to deal with consumer queries and the various aspects of the complaint. Dispute resolution processes that allow for distance communications are frequently referred as ODR. ODR, originally an offshoot of ADR, offers online access to extrajudicial conflict settlement methods, such as negotiation, mediation, arbitration, complaint boards and ombudsmen schemes. ODR takes advantage of the speed and convenience of the Internet and online case management tools, making it the best (and often the only) option for providing redress to consumer grievances, strengthening their trust in a more reliable e-commerce.[30] ODR technology changes the paradigm of traditional redress procedures as it can support or replace the role of the third-party neutral – for example enabling direct party-to-party negotiations through software that encourage settlement. This role has

26 This is a heterogeneous group "comprised of persons who, on a permanent basis, are considered as such because of their mental, physical or psychological disability, age, credulity or gender." *See* European Parliament Resolution of 22 May 2012 on a Strategy for Strengthening the Rights of Vulnerable Consumers (2011/2272(INI)).

27 J. Davies, 'ADR/ODR: Too Much Optimism in the Promotion of Cross-Border Trade?', *in* B. Hess, M. Bergstrom, & E. Storskrubb (Eds.), *EU Civil Justice: Current Issues and Future Outlook,* Hart, 2016, p. 43.

28 Green Swann C-299/12.

29 US federal courts have often restricted the application of consumer state law under the use of free services. For instance, while Facebook users were not considered consumers under Californian law, they were considered consumers by the French court of Cassation because Facebook users were considered an important source of funding due to the advertising schemes operating in the social media platform. *In Re Facebook Privacy Litigation*, 791 F.Supp.2d 705 (2011), (N.D. Cal. May 5, 2011). Available at: http://leagle.com/decision/In%20FDCO%2020110516720;D. Martic, 'Redress for Free Internet Services Under the Scope of the EU and UNCITRAL's ODR Regulations', *Revista Democracia Digital e Governo Electrônico*, Vol. 10, 2014, pp. 360-373; C. Hoofnagle & J. Whittington, 'Free: Accounting for the Costs of the Internet's Most Popular Price', *UCLA Law Review*, Vol. 61, 2014, pp. 606-670; A. Cunningham, 'Caveat Consumer? Consumer Protection and Cloud Computing – Part I', Queen Mary School of Law Legal Studies Research Paper no. 130, January 2013, pp. 1-29.

30 Cortés, 2011; E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass, 2001; G. Kaufmann-Kohler & T. Schultz, *Online Dispute Resolution*, Kluwer Law International, 2004; J. Hörnle, *Cross-border Internet Dispute Resolution*, CUP, 2009; M. Wahab, E. Katsh, & D. Rainey, *Online Dispute Resolution: Theory and Practice*, Eleven International Publishing, 2012.

been termed as the fourth party in the dispute resolution process, given its key role as facilitator in managing and framing the information exchange.[31]

The design of consumer redress mechanisms has two interlinked goals. Firstly, it increases access to justice by providing consumers, even vulnerable ones, with an easier pathway, than, for instance, the courts in small claims procedures, to meet their legal needs.[32] Secondly, effective redress mechanisms enhance consumer trust and contribute towards building a more competitive market. The success of large online market places that provide effective ODR technology has been exemplified by the eBay dispute resolution paradigm, which acts as the third- (and fourth)-party neutral, and has claimed to resolve over 60 million disputes a year between its buyers and sellers.[33] This is a significant number, particularly if we take into account that English courts receive around 1.5 million civil claims every year. Effective ODR tools have the potential to impact on the willingness of consumers to raise complaints reflecting substandard transactions, thus leading to higher trading standards.

Yet, there are still too many unresolved consumer disputes for which a redress option is needed. The European Commission believes that in the EU the usage of ADR is well below its potential. In 2015, the European Commission reported that only around half of the retailers (54%) knew about ADR schemes for consumers, either in their sector or in another sector – the breakdown of this percentage was as follows: 30% of traders were willing or legally required to use it, 16% said there was no ADR in their sectors and the remaining 8% declared their unwillingness to use it.[34] Moreover, empirical data shows a very low consumer ADR use.[35] The European Commission estimated that consumer disputes amount to financial losses estimated at 0.4% of the EU's GDP and that a well-functioning and transparent ADR for their disputes could save around €22.5 billion a year, corresponding to 0.19% of EU GDP.[36] Consequently, the EU passed legislation that aimed to promote consumer ADR: the directive on consumer ADR and the regulation on consumer ODR, which have transformed the foundations of con-

31 Katsh & Rifkin, 2001, pp. 93-116.

32 H.W. Micklitz, 'The Future of Consumer Law – Plea for a Movable System', *Journal of European Consumer and Market Law*, Vol. 2, No. 1, 2013, pp. 5-11 and C. Hodges, I. Benohr, & N. Creutzfeldt-Banda, *Consumer ADR in Europe (Civil Justice Systems)*, Beck/Hart, 2012, pp 367-453.

33 N. Rogers, R. Bordone, F Sander, & C McEwen, *Designing Systems and Processes for Managing Disputes*, Kluwer, 2013, pp. 24-25; S Smith & J Martinez, 'An Analytical Framework for Dispute System Design', *Harvard Negotiation Law Review*, Vol. 14, No. 4, 2009, pp. 1401-1446; L. Del Duca, C. Rule, & Z Loebl, 'Facilitating Expansion of Cross-Border E-Commerce-Developing a Global Online Dispute Resolution System', *Penn State Journal of Law & International Affairs*, Vol. 1, No. 1, 2012, p. 59.

34 DG Justice and Consumers, European Commission, Consumer Conditions Scoreboard, 2015, p. 47. Available at: http://tinyurl.com/hrbltnl.

35 DJS Report, 'Understanding Consumer Experiences of Complaint and Handling', Citizens Advice, June 2016. Available at: http://tinyurl.com/gljmkv6.

36 Impact Statement, 2011.

sumer redress in the EU.[37] The ADR Directive requires member states to ensure the availability for consumers of quality ADR entities that observe procedural standards,[38] while the ODR Regulation that establishes a pan-European website, called the ODR platform, redirects consumer complaints arising from online contracts to nationally approved ADR entities. These two innovative regulatory initiatives have initiated a process of institutionalizing and professionalizing consumer ADR, which is becoming the main pillar of the Law of Consumer Redress.

## 3. Contribution of This Book to the Academic Debate and Methods

This book examines the emerging legal framework for consumer redress in the digital era. In so doing, it examines how this field is evolving while it tries to identify best practices and regulatory recommendations that help to achieve the policy aim of designing and promoting the use of ADR and ODR methods that assist in invigorating e-commerce. Accordingly, the main theme that acts as a thread to this book is a shift in consumer redress, which is changing the priorities of policymakers; their focus is no longer on guaranteeing the protection of consumers by their national judicial processes and public enforcement bodies, but there is an emerging layer of ADR and ODR structures that provide a public service helping consumers to obtain accessible and tangible redress. Yet, this book seeks to identify best practices for redress schemes that offer consumers both, effective individual redress and better compliance with the consumer protection law, thus raising industry standards.

The book critically discusses the sociolegal developments in this field and argues, inter alia, that consumer redress is more effective when complemented with incentives that encourage parties to participate in these out-of-court processes, settle meritorious claims early and ensure extrajudicial enforcement of final outcomes. This book calls for a more holistic approach to consumer redress that integrates through technology consumer ADR techniques and other redress options, including the courts, regulators and public enforcement bodies, moving upstream from dispute resolution to dispute prevention, and providing consumers with greater protection.

While there are already some important sociolegal studies on best practices for consumer ADR schemes in Europe,[39] most of these studies have not examined the impact of the ADR Directive and the use of technology in the field of con-

37 Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes OJ L165/63 (hereinafter the ADR Directive) and Regulation 524/2013 on Online Dispute Resolution for Consumer Disputes OJ L165/1 (hereinafter the ODR Regulation). *See also* P. Cortés (Ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford University Press, 2016.

38 Arts. 6-11 ADR Directive.

39 *See, e.g.,* J. Stuyck, E. Terryn, V. Colaert, T. Van Dyck, N. Peretz, N. Hoekx, & P. Tereszkiewicz, *Study on Alternative Means of Consumer Redress Other Than Redress Through the Ordinary Judicial Proceedings*, Catholic University of Leuven, 14 January 2007; and Hodges *et al*., 2012.

sumer ADR, which remain a fairly unarticulated subject.[40] Furthermore, there is no empirical work on how technology and economic incentives can be pivotal in ensuring the success of voluntary extrajudicial schemes.[41] Hence, this book hopes to fill this gap by contributing to our understanding on the impact that recent legal developments and best practices in ODR techniques could have in transforming traditional ADR redress schemes into more accessible and efficient online redress mechanisms.

This book summarizes some of the key findings of a research project funded by the Nuffield Foundation to identify how consumer redress schemes are being transformed. The research project focused on the regulatory and technological changes affecting consumer redress in the EU. It examined a range of reports, opinions and insights that can help to inform about best practices and strategic developments in the field of consumer ODR. The research has identified a number of challenges (such as their lack of awareness and the voluntary nature) and opportunities (to improve consumer redress of non-complainants) facing these emerging redress systems and the need for policymakers, competent administrative authorities, regulators and individual redress bodies to develop their strategic aims in response. It is hoped that this book can provide a helpful reference point in that context.

This book evaluates the main consumer redress schemes in the EU with a particular focus of those operating in Italy, Spain and the United Kingdom. These schemes are currently adapting their processes to the European legislation and to a society progressively interacting in the digital sphere. The book notes that the consumer redress landscape is diverse and often incoherent; consequently, identifying issues that will be equally relevant to all types of schemes is not always possible as national traditions and narrow sectorial pressures heavily influence the need for a 'menu of process pluralism'[42] in consumer redress. Thus, recommendations are often made on *ad hoc* basis rather than for the whole field of consumer redress.

This book seeks answers to the following research questions: firstly, how are traditional redress schemes adopting ODR technology into their processes (Chapters 1 and 3); secondly, what is the impact of the new regulation on consumer redress on ADR schemes (Chapters 4 to 6) and thirdly, how redress processes, and in particular ADR schemes, are designed to, inter alia, increase access to redress while discouraging unmeritorious claims, facilitate voluntary compliance of final decisions and encourage traders to tackle causes of complaints as well as consequences (Chapters 7 and 8).

40 Cortés, 2011 and M. Stürner, F. Gascón Inchausti, & R. Caponi, *The Role of Consumer ADR in the Administration of Justice – New Trends in Access to Justice under EU Directive 2013/11*, Selp, 2015. In the Spanish language *see*, *e.g.,* F. Esteban de la Rosa, *La protección del consumidor en dos espacios de integración: Europa y América*, Tirant lo Blanch, 2015.

41 See a first approximation of this topic at P. Cortés, 'A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How to Move Forward', *Legal Studies*, Vol. 35, No. 1, 2015, pp. 114-141.

42 C. Menkel-Meadow, L. Love, A. Schneider, & J. Sternlight, *Dispute Resolution: Beyond the Adversarial Model*, 2nd ed., Aspen, 2011.

The field of consumer redress is multidisciplinary as it draws concepts inter alia from law, sociology, political science, economics and psychology. Accordingly, the main methods used throughout this book have been doctrinal, normative, comparative and sociolegal approaches. The doctrinal method, sometimes referred as the 'black-letter approach',[43] has been described by Richard Posner as "not a field with a distinct methodology, but an amalgam of applied logic, rhetoric, economics and familiarity with a specialized vocabulary and a particular body of texts, practices, and institutions".[44] This method is employed to examine legislation and policy rules. The analysis often adopts a normative approach critically examining how the legislation ought to be in order to provide an effective and holistic redress structure for consumers. The comparative method is employed when national rules and traditions are contrasted. Although this book has a distinctive EU approach, the analysis often draws comparisons with practices in the United States, and it compares the national approaches adopted in various EU jurisdictions (though the most in-depth analysis within the EU limits to Italy, Spain and the United Kingdom).

Last, but not least, the sociolegal approach is employed to examine consumer redress models in their social context and in seeking to influence government policy in the provision of consumer redress. Thus, to inform and contrast the views expressed in this book, I have conducted qualitative research through interviews with stakeholders representing the academia, ADR schemes, ODR providers, consumers, businesses and policymakers, in order to extract best practices that inform consumer redress. Accordingly, a total of 40 qualitative interviews were carried out to establish a detailed understanding of the transformation in this sector. Most of the qualitative fieldwork was conducted between February and December 2015.[45] The interviews lasted around 1 hour and were carried out on the phone and face-to-face to enable participants to express their views on these changes. This generated valuable insights into the challenges and opportunities facing consumer redress. However, the views expressed here are those of the author; and while they have been informed by those interviewed, unless otherwise stated, it does not necessarily express their own views.

## 4. Structure of the Book

This book examines best practices on consumer redress schemes, with a particular focus on ADR processes as the primary route of consumer redress and on the impact of technology in the dispute resolution process. The book is divided into eight chapters.

Chapter 1 contrasts the role of public enforcement bodies and pan-European networks in seeking traders' compliance with consumer law with the role of pro-

43 M. Doherty & P. Leighton, 'Research in Law: Who Funds it and What is Funded? A Preliminary Investigation', *Law Teacher*, Vol. 38, No. 2, 2004, p. 182.

44 R. Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline', *University of Toronto Law Journal*, Vol. 38, 1988, p. 333, p. 345.

45 See the list of interviewees at the beginning of this book.

cesses ADR schemes typically offer consumers with individual redress. This chapter calls for greater collaboration between public enforcement bodies and ADR schemes in order to ensure that more consumers (and not only complainants) have access to redress. It argues that effective data exchange will lead to more effective redress as well as dispute prevention strategies and higher industry standards, thus meeting the goal of increasing consumer trust in the market.

Chapter 2 considers the state of play of technology in CDR and the challenges that those technologies face in their growth. It analyses how ADR has been adapted to meet the needs of consumer disputes, the concept of ODR and its main processes. It notes that the new online paradigm changes the dynamics of traditional face-to-face ADR procedures, and it evaluates the main obstacles slowing down the expansion of ODR.

Chapter 3 discusses developments in the field of civil procedure to resolve consumer disputes. In so doing, it examines the interplay and potential synergy that the European Small Claims Procedure and collective redress mechanisms have (or could have) with extrajudicial redress options. These two types of court procedures lend themselves to be complemented with technology and ADR. This chapter proposes new strategies to better integrate court processes with ADR/ODR techniques and explores specific pathways of collaboration. It calls for the provision of procedural pathways that promote settlements and for an online uniform process that facilitates the enforcement of judgements.

Chapter 4 analyses the core regulation of the Law of Consumer Redress, which is the new EU legal framework for consumer out-of-court redress: the ADR Directive and ODR Regulation. This chapter critically examines the two pioneered legislative European initiatives and proposes a number of functions in the design and revision of the European ODR platform, such as an online negotiation tool to encourage early settlements. However, this chapter notes that the present legal framework will not meet its policy-stated aims of improving redress and increasing cross-border e-commerce in so far as it does not meet the objectives of closing the gaps in consumer ADR, ensuring the quality of ADR processes and raising awareness about their availability. This chapter argues that these objectives will be met only if national governments ensure that traders inform and participate in ADR/ODR and if these entities are properly monitored to ensure that they comply with the quality requirements set in the regulatory framework.

Chapter 5 discusses consumer redress in three completely different jurisdictions: Italy, Spain and the United Kingdom. Accordingly, it examines the implementation of the ADR Directive and the impact it had on the main nationally approved ADR entities in these three jurisdictions. This chapter offers a picture of three radically different dispute resolution traditions that reflect three diverse redress cultures in the EU. Currently, the main redress models in Italy are mediation and 'representative negotiations or joint conciliations' (where representatives of consumers and businesses resolve disputes on their behalf), while Spain has a public arbitration system, and the United Kingdom relies mainly on sectorial ombudsman schemes. This chapter recommends making business adherence mandatory in the regulated sectors, facilitating access through a national ODR platform and ensuring that national competent authorities provide adequate

supervision in order to ensure that traders comply with the information obligations and that certified ADR entities remain independent and impartial.

Chapter 6 evaluates the Technical Notes developed by UNCITRAL Working Group III (ODR) for e-commerce disputes which are characterized for being cross-border and of low value. The notes envisage a three-stage online procedure that starts with automated negotiation between the parties without a human neutral, and it is followed by a conciliation and finally by either an arbitration process or a recommendation, which may be complemented by self-enforcement mechanisms. The main thrust behind the UNCITRAL initiative was to establish an internationally accepted and trusted, normative framework for ODR. This chapter argues that although this initiative was the most important international legal effort in the field of consumer redress, it failed short to establish new legal framework due to incompatible views that the United States and the EU had on pre-dispute arbitration. This chapter contrasts the discussions carried out in UNCITRAL Working Group III with the EU initiatives in consumer ODR, and it submits that the legally binding nature of arbitral awards will not guarantee their out-of-court enforcement, and the confidentiality of the awards may let market abuses go undetected. Hence, in order to ensure transparency, this chapter calls for adequate monitoring by accreditation agencies and for the publication of binding awards.

Chapter 7 examines when and why traders participate in consumer redress. In some regulated sectors, traders have a statutory obligation, in the remaining of the sectors, they decide to opt in either voluntarily or as a part of belonging to a trade association. This chapter argues that the new information obligation set in the ADR Directive should be complemented with a residual mandatory ADR scheme (or a truly accessible online court or tribunal that incorporates ADR techniques) that encourages traders to opt in specialized ADR entity. The chapter also examines how ADR entities can ensure an adequate coverage in the provision of consumer redress by fleshing out the procedural grounds upon which ADR entities can refuse complaints. This chapter argues that even though the directive assures the availability and awareness of quality ADR entities, it does not ensure that traders participate in these processes, which poses the risk of undermining consumer trust in the whole redress system. This risk will be augmented if traders, who can often choose and pay for these ADR entities, engage in forum shopping, especially if procedural restrictions contained in the directive are not adequately monitored by the competent authorities.

Chapter 8 looks at the dispute system design used in consumer redress; in particular, this chapter discusses two essential elements for a successful consumer redress scheme: a high level of settlements and out-of-court compliance with final outcomes. It argues that the online forum offers the possibility to design multi-tiered procedures that promote early settlements and facilitate out-of-court compliance with outcomes. It submits that since consumer ADR models are providing a public service, they must incorporate appropriate governance structures that favour dispute avoidance strategies. This is indeed a feature of some statutory ADR schemes that collaborate with regulators (such as certain ombudsman schemes underpinned by sectorial legislation), which, in addition to offering dispute resolution services, provide consumers with advice, and the

industry and the regulator with intelligence data that help to prevent future disputes.

The book concludes summarizing the findings and arguing that if these dispute system design features spread into other consumer redress processes, they will deliver greater benefits for the society at large, thus realizing the often overstated policy aims of consumer ADR; that is, providing consumer protection, increasing access to justice and boosting consumer trust in e-commerce.

# European Regulation on Online Dispute Resolution

## A Comment on Its Enforcement in Italy

*Rebecca Berto*[*]

**Abstract**

*The European single market is a symbol of European integration. Certainly, the European internal market brings great opportunities to its citizens and professionals, especially when the European legislators enact new provisions in order to boost the internal market.*

*In May 2013, the European legislator enacted two legislative measures, whose aim was to encourage the employment of out-of-court mechanisms in order to solve consumer disputes: the European Regulation establishing the Online Dispute Resolution interactive website and the Directive on Alternative Dispute Mechanisms. Taking its cue from the first report issued by the European Commission on the Online Dispute Resolution, this article focuses on the enforcement of the European Regulation in Italy and concludes that, due to legal incongruence, no enforcement means have been dictated in order to sanction infringements to the European Regulation carried out by Italian professionals.*

**Keywords:** European Regulation, ODR, ADR, Italian enforcement.

### 1. Introduction

Cross-border consumer contracts within the internal European market can give rise to several problems, such as, for example, to which court a consumer should lodge his claim or what would be the applicable law when the parties' obligations are not executed as agreed. European Regulation 593/2008/EC on the law applicable to contractual obligations, the recast of the European Regulation (EC) 2015/2012 on jurisdiction, recognition and enforcement of foreign judgements in civil and commercial matters, as well as European Regulation 861/2007/EC on the European Small Claims, as amended by European Regulation (EC) 2015/2421, all aim at ensuring a uniform legal framework within the European single market.

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Though the goal of these European laws is to provide a common legal framework, consumers continue to renounce going to court when an agreement is infringed: the low sums involved or the court's proceedings fees, which may exceed the benefits expected by consumers, are often cited by consumers as explanations for their inactivity in carrying on with complaints.[1]

In this context, it should also be kept in mind that consumers have a particular approach in consumer-to-business disputes: consumers usually focus their attention on the solution of a dispute and not on the technique involved. Taking advantage of this way of thinking, alternative dispute resolution (ADR) schemes may be considered as an effective tool and an alternative to court litigation as regards consumer disputes.

This potential benefit was pointed out in the Commission Recommendation (EC) 98/257 in 1998.[2] However, this recommendation has been partly disregarded by member states, leading to a different availability and coverage of ADR mechanisms between European member states. In Germany, for example, a consumer could take advantage of a wide range of out-of-court settlement schemes, while in Bulgaria, no ADR scheme was available.[3]

Faced with this fragmented patchwork, the European legislator decided to adopt Directive (EC) 2013/11 on ADR and European Regulation (EC) 2013/524 on ODR for consumer disputes. The former requires member states to provide for each consumer contract an out-of-court settlement mechanism that meets the directive requirements as indicated in Article 6. The latter ruled the establishment of an interactive website, the ODR platform, which would provide an entry point for consumer complaints. In order to encourage the use of this new technological tool, traders and marketplaces, active in online selling, are obliged to inform consumers about this instrument by adding its link to their websites. In order to secure the enforcement of this information duty, member states are called to dictate effective sanctionative means against its infringement.[4]

This article focuses its attention on the enforcement of the information obligation as indicated by Article 14 of European Regulation (EC) 2013/524.

This article is organized into three parts: the second part describes the ODR interactive website, as appointed by the European legislator. The third part focuses on the enforcement of Articles 14 and 18 of European Regulation (EC) 2013/524 in Italy and points out a legal incongruence and its consequences.

1 European Commission, Special Eurobarometer No. 342, 2011, p. 204, available at: http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_342_en.pdf.

2 European Commission Recommendation of 30 March 1998, (EC) 98/257, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998H0257.

3 The Study Centre for Consumer Law – Centre for European Economic Law Katholieke Universiteit Leuven, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings*, Belgium, 2007, p. 103, available at: www.eurofinas.org/uploads/documents/policies/OTHER%20POLICY%20ISSUES/comparative_report_en.pdf; *see* C. Hodges, I. Benohr, & N. Creutzfeldt-Banda, *Consumer ADR in Europe*, 1st ed., Hart/Beck, 2012, p. 195.

4 Art. 18 Regulation 524/2013/EC "Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive."

Finally, this article drafts the conclusion that the infringement of Article 14 of European Regulation (EC) 2013/524 has not been clearly sanctioned by the Italian legislator. This legal gap cannot be overcome by employing legal interpretation techniques because this would imply a serious violation of the principle of legality.

## 2. ODR Website

At first glance, the ODR website may be considered only as an entry point for consumer complaints. However, the real purpose of this interactive website is not to quantify the number of complaints submitted or to compile statistics. The goal of the ODR platform is to provide a virtual place where parties can reach an agreement to solve their dispute by identifying the appropriate ADR mechanism. Once this arrangement is reached, the second phase of the ODR procedure implies the involvement of the ADR body, chosen by the parties, in the online procedure.

However, before dealing with the substance of the complaint, the chosen ADR body verifies if its competence requirements are met. Indeed, out-of-court settlement schemes may have a limited subject or territorial competence. The competence of the Italian Conciliareonline.it, for example, is limited to consumers or traders based in the Trentino Alto-Adige Region.

If the competence conditions are met, the ADR body begins to deal with the matter by taking advantage of the ODR online chat. Through this remote communication means, the conciliator can dialogue with the parties and ask for further documents or for technical expertise. The online chat provided by the ODR platform grants an active and effective participation in the ODR/ADR procedure, though the parties are not physically present in the same room with the conciliator. Moreover, language barriers are significantly diminished by the employment of an automatic translator tool. These technical means – online chat and automatic translator – are tools thought to grant respect of the parties' right to present their case.

The ODR procedure has been indicated and fragmented into these two stages because, as well known, under the European consumer laws, the parties can agree to refer their dispute to an out-of-court mechanism only after the dispute has arisen. According to the ODR procedure, within a 30-day deadline, parties should reach an agreement on the ADR mechanism. Otherwise, the first stage will be closed because of the parties' inactivity, even if only one of the two parties did not respect the above-mentioned deadline.

Consequently, the ODR procedure is based on the parties' common consent to solve their dispute and to employ the chosen out-of-court mechanism.

Being the ODR procedure based on mutual consent, the European legislator introduced Article 14(1) (EC) 2013/524 in order to encourage the use of this procedure. This provision requires online traders and marketplaces, established within the European Union (EU), to provide on their websites an electronic link to the ODR website. This link should be easily accessible: this means it should be

added in general terms, in the trader's impressum, in its complaint handling procedure or in another place on the professional's website, accessible in two or at most in three mouse clicks. Moreover, if the offer is made by email, the email should include the link to the ODR interactive website.

Generally and legally speaking, according to Article 288 of the Treaty on the Functioning of the European Union, a European Regulation is a legislative act that has general and direct application in all member states. Accordingly, also the information duty indicated in Article 14 of European Regulation (EC) 2013/524 should be directly implemented by the rule's recipients.

However, the Achilles' heel of every law provision is the absence of effective enforcement means and the failure to properly address and sanction infringements. In order to secure compliance with this information duty about the ODR platform, as established by the European legislator, Article 18 of European Regulation (EC) 2013/524 compels member states to lay down penalty rules applicable to violations of Article 14 of European Regulation (EC) 2013/524. Furthermore, member states should also take the necessary measures to ensure their implementation.

This provision is clear in setting goals: an example of clear and straight enforcement of the Online Dispute Regulation is provided by the Austrian law, which implemented the ADR Directive. According to paragraph 29, the missed or imprecise advice about the ODR platform is an administrative infringement and is sanctioned with a monetary penalty of EUR 750.00.[5]

In Germany, courts decided that traders active in e-commerce and who failed to provide the link to the ODR website committed an infringement of the Competition Law (Landesgericht Hamburg, Beschluss vom 07.06.2016, Az. 315 O 189/16). This decision has been followed by the Court of Mainz (**Landesgericht Mainz**, Beschluss vom 01.04.2016, Az. 11 HK O 18/16) and by the Court of Dortmund (**Landesgericht Dortmund**, Beschluss vom 28.04.2016, Az. 13 O 35/16). In this context, a very interesting sentence has been issued by the Court of Appeal of Munich (Oberlandesgericht München, Urteil vom 22.09.2016, Az. 29 U 2498/16), according to which compliance with Article 14 of European Regulation (EC) 2013/524 requires a clickable link in order to be readdressed to the ODR website. Consequently, mere information about the link text has been judged insufficient.

These straight implementations of Article 14 of European Regulation (EC) 2013/524 are confirmed by the data provided by a web scraping study, commissioned by the EU and published on 13 December 2017.[6] According to the figures published in the study, German and Austrian traders active in online commerce

5 Bundesgesetz über alternative Streitbeilegung in Verbraucherangelegenheiten (Alternative-Streitbeilegung-Gesetz – AStG) StF: BGBl. I Nr. 105/2015 (NR: GP XXV RV 697 AB 772 S. 85. BR: AB 9411 S. 844.) §29 "Nimmt ein Unternehmer in die gemäß § 19 oder Artikel 14 Abs. 1 und 2 der Verordnung (EU) Nr. 524/2013 gebotenen Informationen falsche Angaben auf oder erfüllt er die Informationspflichten gemäß § 19 oder Artikel 14 Abs. 1 und 2 der Verordnung (EU) Nr. 524/2013 nicht oder nicht vollständig, begeht er eine Verwaltungsübertretung und ist mit einer Geldstrafe bis zu 750 Euro zu bestrafen."

6 European Commission, *Online Dispute Resolution: Web-Scraping of EU Traders' Websites*, Belgium, 2017, available at: https://ec.europa.eu/info/online-dispute-resolution-1st-report-parliament_en

show the highest compliance rate with the information duty laid down by the European Regulation, while the compliance rate of Spanish, British and Italian professionals is below average.

As will be seen in the following paragraphs, an explanation for this low compliance rate in Italy may be found in a legal gap because the Italian legislator erroneously applied sanctions for missed or imprecise information relating to the ADR schemes instead of to the ODR website. Furthermore, this legal gap cannot be solved through interpretative means.

## 3. The Implementation of Articles 14 and 18 of (EC) 2013/524 in Italy

The data of the ODR web scraping study pointed out a legal incongruence that occurred when the Italian legislator implemented into national law the Directive (EC) 2013/11 on the ADR schemes: at the same time, penalty rules applicable to infringements of Article 14 of European Regulation (EC) 2013/524 have been laid down.

In Italy, following the implementation of Directive (EC) 2005/29 into Italian national law via legislative decree No. 147 of 2007, the competences of the Italian Competition Authority have been broadened and currently comprise the assessment of unfair commercial practices put in place by professionals to the detriment of consumers, and the ascertainment whether a professional violates the discrimination prohibition based on nationality or place of residence, as provided by law No. 161 of 2014. Moreover, the Italian Competition Authority is called to ensure that the rights granted to consumers by Directive (EC) 2011/83 are implemented by Italy-based traders.

In this legal context, it would make sense to expand the competence of the Italian Competition Authority also to infringements of Article 14 of European Regulation (EC) 2013/524 committed by professionals based in Italy.

However, this point is unclear. This lack of clarity is due to a legal incongruence, occurred when the Italian legislator implemented Directive (EC) 2013/11 into the national law through legislative decree No. 130 of 2015, which amended legislative decree No. 206 of 2005, commonly known as the 'Italian Consumer Code'.

Therefore, two articles of the Italian legislative decree No. 130 of 2015 are going to be considered: Article 141-decies § 4 and § 6 and Article 141-sexies §§ 1, 2 and 3. The terms of Article 141-decies § 4 amended Article 139 of the Consumer Code by extending the competence of consumer associations. Reading together Articles 139 and 66 of the Italian Consumer Code, a consumer association can validly lodge a report to the Italian Competition Authority listing those traders not complying with Article 14 of European Regulation (EC) 2013/524. Indeed, the competence of the Italian Competition Authority has been broadened by Article 141-decies § 6, so that the authority is called to sanction the infringements indicated by Article 141-sexies §§ 1, 2 and 3.

This is the point where the legal incongruence becomes evident: Article 141-sexies §§ 1, 2 and 3 implements into national law Article 13 of Directive (EC) 2013/11, which reads as follows:

> Member States shall ensure that traders established on their territories inform consumers about the alternative dispute resolution entity or alternative dispute resolution entities by which those traders are covered, when those traders commit to or are obliged to use those entities to resolve disputes with consumers. That information shall include the website address of the relevant alternative dispute resolution entity or alternative dispute resolution entities.

This information should be made available to consumers in an easy and accessible way on the trader's website. Article 141-sexies §§ 1, 2 and 3 makes no mention of the duty to advise consumers about the ODR platform by providing the link to its website, though Article 14 §§ 2 and 3 of European Regulation (EC) 2013/524 reads as follows:

> Traders established within the Union engaging in online sales or service contracts, which are committed or obliged to use one or more alternative dispute resolution entities to resolve disputes with consumers, shall inform consumers about the existence of the online dispute resolution platform and the possibility of using the online dispute resolution platform for resolving their disputes [...] and paragraphs 1 and 2 of this Article shall be without prejudice to Article 13 of Directive (EC) 2013/11 and the provisions on consumer information on out-of-court redress procedures contained in other Union legal acts, which shall apply in addition to this Article.

Actually, legislative decree No. 130 of 2015 includes a general reference to other information duties about out-of-court resolution schemes foreseen in other legislative acts and to their application (Art. 141-sexies § 4 of legislative decree No. 130 of 2015). This generic provision would have been useful if recalled in Article 141-decies § 6. However, this has not been done by the Italian legislator, thus determining the legal incongruence.

Legally speaking, according to the implementation of Directive (EC) 2013/11 through legislative decree No. 130 of 2015, the Italian Competition Authority finds itself to be competent in sanctioning infringements on a failure to inform about out-of-court settlement schemes, voluntarily adhered to by traders. Ironically, the authority has no legal authority to fine those professionals who omitted or provided imprecise information about the ODR website. This appears to be evident in three decisions issued in 2017, in the online trading cases Iphoneme, Triveo and Pneus.[7] In these three decisions and in the more recent Girada case,

7 *See Italian Competition Authority v. Iphoneme*, decision n. 26673; *see also Italian Competition Authority v. Triveo*, decision n. 26877; *see also Italian Competition Authority v. Pneus online Trading*, decision n. 26674.

the Italian Authority, during the ascertainment procedure of unfair commercial practices, pointed out the infringement of Article 14 of European Regulation (EC) 2013/524. However, the mentioned professionals were not sanctioned for this lack of compliance with a European Regulation provision.[8] The Italian Competition Authority accepted the traders' commitments addressed to correct the unfair commercial practices and to add a link to the ODR platform on their website along with the necessary information.

From the above-mentioned decisions, there is a European law that requires compliance from traders, but in Italy, there are no effective enforcement means.

This legal gap cannot be overcome through interpretative techniques because in Italy, Article 1 § 551 of Law No. 311 of 2004 expressly states that measures related to European legislative provisions can be challenged by employing the remedies established by Law No. 689 of 1981. "I provvedimenti amministrativi relativi alle misure comunitarie sono impugnabili con i rimedi previsti dalla legge 24 novembre 1981, n. 689." Accordingly, the failed compliance with a European provision contained in a European Regulation is an administrative offence and is consequently subject to the guarantees provided by Law No. 689 of 1981.

*3.1 Administrative Offences in Italy: Law No. 689 of 1981 and Its Guarantees*

In a constitutional state, no sanction may be inflicted without an underlying reason, and in any case, the fundamental guarantees should be granted.[9] In Italy, general provisions about the administrative offences were laid down by Law No. 689 of 1981. The first 12 articles of Law No. 689 of 1981 repeat those law principles that guarantee the fundamental constitutional rights of a citizen, such as the principle of legality, the principle of non-retroactivity and the prohibition of analogy reasoning in *malam partem*.[10] Accordingly, the principle of legality implies that an administrative offence and its pecuniary sanctions should be based only on a prior enactment of a prohibition that is expressed with adequate precision and clarity. Consequently, the employment of the analogy reasoning in *malam partem* is not allowed, because this would mean to ascribe a new administrative offence that is not clearly proscribed by a legal provision. Indeed, the problem of guaranteeing the legal rights of a citizen or professionals sanctioned for administrative offences exists to the same extent as the penalties for civil or criminal offences. For this reason, a citizen or a professional should be granted those fundamental guarantees whenever a pecuniary sanction is inflicted.

According to the first 12 articles of Law No. 689 of 1981, by determining the amount of the fine, the Italian Competition Authority is legally bound to respect four criteria: the offence's seriousness, the trader's activity in cancelling or diminishing the consequences of the infringement, the trader and the economic condition of the trader. Therefore, according to Article 27 § 7 of the Consumer Code and Article 8, § 7 of Legislative decree No. 145 of 2007, the Italian Competition Authority may not only impose fines which can range up to 5 million Euros but

8 *See Italian Competition Authority v. Girada*, decision n. 27056.

9 R. Riz, *Lineamenti di diritto penale parte generale*, 4th ed., Cedam, Padova, 2002, p. 57.

10 F. Mantovani, *Diritto penale, parte generale*, 3rd ed., Cedam, Padova, 1992, p. 974.

may also settle with professionals to end the administrative procedure when they agree to specific commitments for correcting the ascertained violations. This is possible under the condition that the authority has evaluated the professional engagements as suitable to eliminate the practices which determined the administrative offence. At least, according to Article 27 of the Italian Consumer Code, the Italian Competition Authority, faced with an ascertained incorrect practice, can also apply moral suasion to persuade the professional to remove the controversial practice. However, this moral suasion activity without enforcement has limited impact on an uncooperative professional.

Keeping in mind this legal framework about the administrative offences in Italy, the employment of analogy reasoning in order to sanction infringements to Article 14 of European Regulation (EC) 2013/524 would clearly break the principle of legality. Therefore, no sanction is clearly foreseen for the infringement of this information duty because, as has been seen, Article 141-decies § 6 did not recall Article 141-sexies § 4.

It should be possible to find another legal basis on which the information duty as designated by art.14 of European Regulation (EC) 2013/524 can be understood. The example of the German Courts could be followed, which judged the omission of the link to the ODR platform as an infringement of the Competition Law.

In Italy, Article 49 § 1 of the Consumer Code lists all of the information a trader engaging in online sales or services should provide a consumer with. Again, there is no specific reference to the information duty about the ODR link. Article 49 § 1 lett. v of the Consumer Code repeats the duty of a professional to inform the consumer about the ADR scheme it adhered to. It is clear that the rule refers to an extrajudicial complaint mechanism to which a trader is subjected to. When a complaint arises, a consumer can take advantage of the trader's complaint handling procedure that may foresee an out-of-court-dispute settlement mechanism.

However, the ODR platform provides a virtual place where the parties can reach an agreement to solve their dispute: this implies an action of the parties in order to identify the appropriate ADR body to which the dispute should be submitted and to keep active during the whole ODR procedure. Because of this main difference, Article 49 § 1 lett. v cannot be assumed as a legal basis for backing a pecuniary fine for failed compliance with Article 14 of European Regulation (EC) 2013/524.

No legal grounds can be found in Article 33 of the Consumer Code that lists misleading or unfair clauses, either. Again, the Italian legislator expressly specified that obstacles to the recourse of an ADR scheme by a consumer would be presumed as an unfair term. No mention of the ODR website is made.

It is clear that interpretative techniques do not help to overcome the legal gap caused by an imprecise legislative act. Accordingly, every attempt to find another legal basis on which to ground the Italian Competition Authority to oversee compliance with the information duty, as indicated by Article 14 (EC) 2013/524, is questionable for two reasons: the Italian rules do not allow broad interpretation, and an extensive or analogical interpretation could lead to the infringement of the principle of legality, as set out by Law No. 689 of 1981.

## 4. Conclusion

Consumers are not particularly concerned about the technique involved to solve their disputes with a trader because what matters is the resolution of the dispute.

The goal of the introduced ODR interactive website was not only to provide a common entry point for consumers' claims but also to make available a virtual place where the parties can reach an agreement to solve their dispute by taking advantage of an out-of-court settlement scheme. The employment of this tool would mean a change in consumer habits: they should be aware of complaint handling procedures, be more active and pay attention to deadlines when the chosen out-of-court scheme foresees one. Consequently, pieces of legislation whose aim is to shape the habits of a society should include effective means of enforcement.

As was seen in Section 2, member states were called to design sanctionative measures in case of failed compliance with Article 14 of (EC) 2013/524. Austria, for example, dictated a clear rule, while German courts provided a constant jurisprudence on this topic.

As has been seen in Section 3, in Italy, a legal gap occurred because Article 141-sexies § 4 has not been recalled by Article 141-decies § 6. This oversight has an absurd consequence, *id est*; the Italian Competition Authority can sanction those professionals who omitted to inform a consumer about the availability of an ADR mechanism they voluntarily adhered to, while failure to comply with Article 14 of European Regulation (EC) 2013/524 is not expressly sanctioned.

Moreover, as illustrated in Section 3.1, this legal incongruence cannot be overcome through interpretative techniques because the infringement of a European Regulation provision is an administrative offence and for this reason subject to the guarantees laid down by Law No. 689 of 1981.

In conclusion, even if the Italian Competition Authority is willing to employ moral suasion to induce traders engaging in online sales and services to comply with the information obligation as set out by Article 14 of European Regulation (EC) 2013/524, a reluctant trader would not comply because the risk to be fined is low. Actually, only an amendment from the Italian legislator can correct this legal incongruence