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THE FUTURE OF DISPUTE RESOLUTION: ONLINE ADR AND ONLINE COURTS

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The Future of Dispute Resolution: Online ADR and Online Courts

Michael Legg¹

Abstract

Advances in the capability of technology has seen greater interest in online dispute resolution (ODR) which holds the promise of significantly improving access to justice for many people, including disadvantaged groups. The aim of this article is to provide an introduction to ODR with a focus on design considerations: convenience, expertise, impartiality, fairness and cost. This article draws a distinction between online alternative dispute resolution (OADR) and online courts. While OADR has enormous freedom in relation to design, online courts are constrained by institutional norms and legal requirements derived from the nature of the judicial function. However, both are able to benefit from a clear understanding of the ramifications of the design considerations for effective dispute resolution platforms.

Keywords: online dispute resolution, online courts, alternative dispute resolution; technology; access to justice

Introduction

A key driver of online dispute resolution (ODR) is the need for affordable access to justice. For many lower value disputes what is at stake is worth less than the cost of commencing formal legal proceedings, or even seeking legal advice. Even for disputes that involve a substantial amount of money for the individual, the legal costs to resolve the dispute can be significant and unaffordable. Consequently ODR, with its lower cost structure, provides an opportunity for extending access to justice to many citizens.

ODR also has the potential to enhance access not just generally but for disadvantaged groups specifically. Barriers for disadvantaged groups that can be removed or reduced through technology include: "geographical isolation; mobility impairment; confinement or imprisonment; sight or hearing impairment (eg through voice recognition software); language difficulties (through translating software); lack of confidence or competence in face to face communication; and physical violence or intimidation". ODR may also permit the resolution of disputes between parties from different countries and cultures.

¹ Associate Professor, UNSW Law Australia. An earlier version of this article was presented at UNSW Law Hackathon, UNSW, Sydney, 18 July 2016.

² NADRAC, *Dispute Resolution and Information Technology Principles for Good Practice* (Draft) (March 2002). See also Christine Coumarelos et al., *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of NSW, 2012) 37-38 (discussing barriers to accessing legal advice).

The aim of this article is to provide an introduction to ODR with a focus on design considerations. This article draws a distinction between online alternative dispute resolution (OADR) and online courts. OADR may be defined as "dispute resolution outside the courts, based on information and communications technology". OADR originally emerged in the mid-1990s as a response to disputes arising from the expansion of ecommerce. As a result it focussed on using technology to resolve customer complaints and sought to support negotiation, mediation and arbitration. Today it may go further and give rise to new ways to resolve disputes beyond the traditional categories of alternative dispute resolution (ADR). In contrast, online courts form part of the justice system and are therefore subject to institutional norms and legal requirements derived from the nature of the judicial function. The reason for drawing this distinction is that it assists in understanding both the challenges and opportunities for technology in relation to dispute resolution.

Providing Information - Preventing Disputes?

Before examining ODR it should be remembered that the basic or first step in technology assisting dispute resolution is the provision of information. Access to information can assist in avoiding disputes as well as resolving them. This is often a straightforward guide to the law and may also provide guidance as to where to obtain further assistance. It can be designed to operate as a web page or as an app for a smart phone or tablet. It can be provided in a static format or in an interactive manner, but usually the aim is to employ technology to allow people to find the information most relevant to their particular problem. It can be stand-alone, or as will be seen below, incorporated into an ODR platform.

It needs to be recalled that people may need information to assist them to identify that the problem they confront is a legal problem and legal problems may arise in the context of other problems so that the first place that a person looks for information may not be a traditional source of advice about legal issues.⁴

It has also been observed that courts can no longer rely on lawyers always being sought out for advice or being retained to represent people in disputes. As a result even courts need to support the provision of information to non-lawyers about how to navigate court procedures.⁵

Online Alternative Dispute Resolution

OADR has seen a number of waves or generations of technology use.

³ Julia Hornle, 'Online Dispute Resolution in the EU and Beyond – Keepings Costs Low or Standards High?' in Christoper Hodges and Astrid Stadler, *Resolving Mass Disputes* (Edward Elgar 2013) 294.

⁴ Christine Coumarelos et al., *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of NSW, 2012) 39; American Bar Association – Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (2016) 14.

⁵ Maurits Barendrecht et al, *Trend Report 4 - ODR and the courts: The promise of 100% access to justice?* (The Hague Institute for Innovation of Law, 2016) 34.

OADR may adapt existing technologies such as email, instant messaging, videoconferencing and Skype to allow disputants to communicate directly and to allow facilitators, mediators or arbitrators to be brought into a dispute resolution process as needed. This form of ODR seeks to provide a place or mechanism to resolve the dispute rather than simply providing sources of information or suggested steps but there is still a human performing the mediation or decision making.

OADR can also employ "expert systems" or what is also called simple or rules-based artificial intelligence. To create the expert system the system designers need to acquire expert knowledge from human experts and encode that knowledge into rules which will be applied based on the factual information obtained from the users. Expert systems collect facts from users through interview-style questions and produce answers based on a decision-tree analysis. This form of OADR goes beyond assisting what is otherwise traditional ADR by providing tools for communications and is used for "idea generation, strategy definition and decision making". This has led two of the pioneers of OADR to observe that "[o]nce a process moves online, its very nature begins to change".

Additionally or alternatively, OADR can replace or significantly reduce the role of humans and instead use advanced artificial intelligence (including algorithms, machine learning and big data) to become the third party that performs the mediation or decision making. An example is "blind-bidding" systems which use multivariate algorithms to help parties arrive at the optimal outcome. The technology obtains information from the disputants as to how they rank or value issues within the dispute and then combines those outcomes to suggest solutions.

The conduct of dispute resolution online and the existence of big data now means that information about the source and types of disputes can be captured and employed to determine how disputes might be avoided. There is a secondary research function in addition to the conflict resolution function. Conflicts that arise because of a misunderstanding or lack of clarity around contractual requirements or consumer protection laws could signal a need to better explain those requirements/laws, or possibly suggest reform.¹⁰

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⁶ David Carneiro, Paulo Novais, Francisco Andrade, John Zeleznikow and Jose Neves, 'Online Dispute Resolution: an Artificial Intelligence Perspective' (2014) 41 *Artificial Intelligence Review* 211, 215.

⁷ Ethan Katsh and Colin Rule, 'What we Know and Need to Know About Online Dispute Resolution' (2016) 67 *South Carolina Law Review* 329, 330.

⁸ Scott Shackelford and Anjanette Raymond, 'Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR' (2014) *Wisconsin Law Review* 615, 628; Suzanne Van Arsdale, 'User Protections in Online Dispute Resolution' (2015) 21 *Harvard Negotiation Law Review* 107, 118-119.

⁹ Anjanette Raymond and Scott Shackelford, 'Technology, Ethics, and Access to Justice: Should an Algorithm be Deciding Your Case? (2014) 35 *Michigan Journal of International Law* 485, 514-515.

¹⁰ See Orna Rabinovich-Einy and Ethan Kash, 'Lessons from Online Dispute Resolution for Dispute Systems Design' in Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (eleven International Publishing, 2012) 42 (discussing the approaches used by eBay and Wikipedia); Ethan Katsh and Colin Rule, 'What we Know and Need to Know About Online Dispute Resolution' (2016) 67 *South Carolina Law Review* 329, 330 ('a large amount of data on disputing patterns is now available, and algorithms can

Online Courts

The Chief Justice of the Australian High Court, Robert French AC has pointed out "it is the courts and only the courts which carry out the adjudication function involving the exercise of judicial power". The courts wield the power of the State, they interpret the laws, ensure procedural fairness and render binding decisions in public that authoritatively state the law for the parties and society at large. However court resolutions are also expensive and time-consuming. The former High Court Chief Justice Murray Gleeson explained the conundrum of seeking to address cost and delay in civil litigation as follows:

the court of the future will need to embrace, and respond appropriately to, the demands of the future, while remaining a court. For that purpose, judges themselves, and especially judicial leaders, need a clear idea of what being a court involves. This means understanding the characteristics of the judicial function and discriminating between the essential and the inessential.

It is characteristic of the judicial process that it seeks to be fair. Some people would say another characteristic is that the process is slow and expensive. How do you reverse the second and preserve the first?

ODR is one way in which the judicial process may be made faster and cheaper. However, an important question for ODR that is part of the judicial system is how does the new approach stay true to essential characteristics of a court such as procedural fairness and open justice?

A further issue is whether the physical aspects of a court hearing must change. This includes the physical courthouse open to all with particular locations for the judge, lawyers, witnesses and in some cases jury, particular ways of dressing such as the wig and gown, the centrality of the judges and lawyers to the conduct of the proceedings rather than the parties, and the giving of oral evidence in person after the administering of the oath. This is part history and experience, and part theatre so as to achieve both respect for the law and adherence to the court's processes. In the UK the Online Dispute Resolution Advisory Group reported to the Civil Justice Council of England and Wales that:

Perhaps the most fundamental question that must therefore be posed is this – is court a service or a place? Do we always need to congregate physically in a court building to resolve our

now analyze that data quickly and efficiently, gleaning patterns and lessons that a human would not be able to discern.').

¹¹ The Hon Robert French AC, 'Perspectives on Court Annexed Alternative Dispute Resolution', *Law Council of Australia – Multi–Door Symposium*, Canberra, 27 July 2009. See also The Hon MJ Beazley AO and Chris Frommer, 'The distinctive role of the judge: "The least dangerous branch of government" in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis 2016) forthcoming.

¹² The Hon Murray Gleeson AC, 'The Judicial Method: Essentials and Inessentials' The District and County Court Judges' Conference, Sydney, 25 June 2009.

differences? Or might some of our civil problems be more appropriately resolved using one of a number of online techniques?¹³

To focus on the court as either a service or a place is to miss the point made by Chief Justice French about the distinctive nature of courts that are "not just another provider of dispute resolution services in a market of different providers". ¹⁴ Technology will provide the capacity to reconfigure the court as historically conceived of so that it does not have to be a single physical place. Videoconferencing has already started this change. ¹⁵ However, the truly fundamental question is that raised by former Chief Justice Murray Gleeson as to how can courts embrace technology but maintain the core requirements of a court.

The American Bar Association's Report on the Future of Legal Services in the United States hints at this issue: 16

Courts also should consider whether the physical presence of litigants, witnesses, lawyers, experts, and jurors is necessary for hearings, trials, and other proceedings or whether remote participation through technology is feasible without jeopardizing litigant rights or the ability of lawyers to represent their clients.

However, if the core requirements of a court are seen as only being able to be preserved through adhering to the way litigation has been historically conducted then innovation in online courts may be hobbled.

ODR Examples

To illustrate the operation of ODR three examples are explained below: the Netherland's platform called Rechtwijzer (Roadmap to Justice), the Canadian province, British Columbia's Civil Resolution Tribunal and the recommendations for an online court for the United Kingdom.

Rechtwijzer

An example of a leading ODR system is provided by the Netherland's platform called Rechtwijzer (Roadmap to Justice) for couples who are separating or divorcing. Couples pay €100 for access to Rechtwijzer, which starts by asking each partner for their age, income, education, and other information such as whether they want the children to live with only one parent or part time with each, then guides

¹³ Online Dispute Resolution Advisory Group, *Online Dispute Resolution For Low Value Civil Claims* (Civil Justice Council, February 2015) [1.9]. The question is also contained in Richard Susskind and Daniel Susskind, *The Future of the Professions* (Oxford University Press, 2015) 70.

¹⁴ The Hon Robert French AC, 'Perspectives on Court Annexed Alternative Dispute Resolution', *Law Council of Australia – Multi–Door Symposium*, Canberra, 27 July 2009.

¹⁵ See eg Federal Court of Australia Act 1976 (Cth) ss 47A – 47F.

¹⁶ American Bar Association – Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (2016) 45-46.

them through questions about their preferences. The platform uses algorithms to find points of agreement, and then proposes solutions. If the proposed solutions are not accepted then couples can employ the system to request a mediator for an additional €360 or, a binding decision by an adjudicator.¹⁷ The Legal Aid Board has explained the aim of Rechtwijzer as "to empower citizens to solve their problems by themselves or together with his or her partner. If necessary, it refers people to the assistance of experts".¹⁸ Rechtwijzer is voluntary and non-binding up until the point where the parties seek a binding decision.

Civil Resolution Tribunal

A further example is the British Columbia's Civil Resolution Tribunal which deals with small claims and condominium disputes. ¹⁹ The Civil Resolution Tribunal involves four stages: ²⁰

Stage 1 – an expert system called Solution Explorer uses interactive questions and answers to give people tailored legal information as well as tools and resources, like template letters, to help them resolve their dispute consensually.

Stage 2 – if no consensual resolution is achieved then Solution Explorer provides an online intake process that commences a claim.

Stage 3 – once a claim is commenced there is a further attempt to facilitate a consensual resolution by employing facilitators from around British Columbia. The process can be online or in person. Agreements become orders of the Civil Resolution Tribunal.

Stage 4 – if an agreement is not reached the dispute proceeds to adjudication where a tribunal member, who is a lawyer with relevant expertise, hears the parties' evidence and submissions and makes a binding decision. Hearings will generally take place through electronically submitted written documents, or through telephone or videoconferencing.

Participants can seek legal assistance throughout the process, but if a hearing becomes necessary, a party will require permission to have a lawyer represent them. The design and operation of Solution

¹⁷ Jin Ho Verdonschot, 'In The Netherlands, Online Application Helps Divorcing Couples in Their Own Words, on Their Own Time' (2015) 21 (2) *Dispute Resolution Magazine* 19; Esmée Bickel, Marian van Dijk, and Ellen Giebels, 'Online legal advice and conflict support: a Dutch experience' University of Twente, March 2015 https://www.utwente.nl/igs/icrisp/news/content/online-legal-advice-and-conflict-support-utwente.pdf; Carol Matlack, 'Robots Are Taking Divorce Lawyers' Jobs, Too', *Bloomberg*, 30 June 2016 http://www.bloomberg.com/news/articles/2016-06-30/robots-are-taking-divorce-lawyers-jobs-too

¹⁸ Legal Aid Board, Legal Aid in the Netherlands: a broad outline (2015), 8 http://www.rvr.org/binaries/content/assets/rvrorg/informatie-over-de-raad/legalaid-brochure_online--2015.pdf

¹⁹ https://www.civilresolutionbc.ca/what-is-the-crt

²⁰ Maurits Barendrecht et al, *Trend Report 4 - ODR and the courts: The promise of 100% access to justice?* (The Hague Institute for Innovation of Law, 2016) 57.

Explorer is set out in a detailed article by Darin Thomson,²¹ a lawyer with the Ministry of Justice in British Columbia, Canada.

UK Online Court

A further example is Lord Justice Briggs' Civil Courts Structure Review reports which recommend an online court for claims up to £25,000 in the UK.²² The online court would involve three stages:²³

Stage 1-a largely automated, inter-active online process for the identification of the issues and the provision of documentary evidence. The online portal will guide the litigant through an analysis of his or her grievance so as to produce a document capable of being understood both by opponents and by the court. It will in effect be a simplified pleading.²⁴

Stage 2 – conciliation and case management, by case officers. Once the claim and supporting information is extracted through stage 1 the aim is to then employ ADR where appropriate. Part of the purpose of stage 2 is to educate litigants of small claims about the existence of ADR.

Stage 3 – resolution by judges. There is no presumption that this requires the traditional trial. Rather, the court may choose to determine the matter on the documents, or by communicating with the parties through telephone or video. A face to face hearing if employed, may only be used for resolving particular issues.

In the final report reference was also made to a stage 0 and stage 0.5 so as to acknowledge that there is a need for advice on the law and on alternatives to the online court. Further, it was recognised that some claims will not be disputed and the court is being engaged so as to access the State's enforcement mechanisms.²⁵

²¹ Darin Thomson, 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1(2) *International Journal of Online Dispute Resolution* 4.

²² Lord Justice Briggs, *Civil Courts Structure Review – Interim report* (December 2015) (Briggs - Interim) and Lord Justice Briggs, *Civil Courts Structure Review – Final report* (July 2016) (Briggs - Final).

²³ Briggs – Interim, [6.7], Briggs – Final, [6.108]-[6.114].

²⁴ The interim report provides the following example at [6.8]: "Suppose that A has a dispute with her builder B relating to works carried out at her house. After entering the common Court Service Portal and selecting the OC as the appropriate court (if necessary with online guidance), and after providing her name and contact details, A would be asked to identify the object of her grievance by reference to a series of tick boxes which might include her bank, her holiday company, her next door neighbour and her builder. Having ticked 'Builder' the software would present new questions designed to elicit the essential nature of the dispute, for example whether it was about the quality of the work, the amount charged or delays in completion. Ticking (or clicking) the appropriate box would reveal further successive pages, including a page requiring A to identify B and provide his (or if a company, its) contact details, to state whether the building works were covered by an agreement and, if in writing requiring A to attach any electronic copy, or scan or photograph with her smart phone any paper copy, so that the central document required by the court for determination of the dispute would be lodged electronically from the outset. Further automated pages would question A as to the details of the dispute ..."

²⁵ Briggs – Final, [6.108]-[6.109].

Lord Justice Briggs described the recommendation to create an online court as follows: ²⁶

The development of the Online Court ("OC") is the single most radical and important structural change with which this report is concerned. It provides the opportunity to use modern IT to create for the first time a court which will enable civil disputes of modest value and complexity to be justly resolved without the incurring of the disproportionate cost of legal representation. In my view it offers the best available prospect of providing access to justice for people and small businesses of ordinary financial resources.

To reduce costs the online court is to be designed for use by litigants without lawyers.²⁷ However, lawyers are not excluded. Rather, depending on the recovery of costs mechanism that is adopted, the result could be a lawyer-free online court "by economic means".²⁸ This is because individuals may be dissuaded from seeking legal assistance if those costs must be borne by the individual, even when they are successful. Equally, this may mean that legal advice is not sought on the merits of a claim or defence so that unmeritorious claims are commenced or defended with the result that the online court has many more disputes to address. One suggested solution was to utilise "unbundling" where a person retains a lawyer for an advice on the merits only, and not through a full retainer.²⁹

Even if lawyers are not excluded from the online court, there will still need to be assistance for the many litigants in person in answering the questions posed by the online portal. The interim report states that there will be a need for "substantial assistance online, in the form of digital help, for the purpose of completing online forms" as well as a telephone helpline. In the final report Lord Briggs reported that one of the most widespread issues raised in response to the recommendations in the interim report was how to assist persons who would find using a computer (or paper) to resolve their dispute challenging. The answer to this concern is that there will remain a need for pro bono and litigant in person advice and assistance agencies. This suggests a limitation of technology as well as a guide for the employment of technology, which is discussed below.

The interim and final reports also consider how to define those types of claims that should be excluded from an online court. One area was personal injury claims, on the basis that:³²

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<sup>26</sup> Briggs – Interim, [6.1].
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²⁷ Briggs – Interim, [6.5], Briggs – Final, [6.22].

²⁸ Briggs – Final, [6.25].

²⁹ Briggs – Final, [6.36]-[6.37]. The challenges of unbundling are explored in Michael Legg, "The Financing of Commercial Litigation into the Future: Alternative Fess Arrangements and Unbundling of Legal Services", The Future of Civil Procedure: Innovation and Inertia, Australian Centre for Justice Innovation, Monash University, Melbourne, 17 February 2016.

³⁰ Briggs – Interim, [6.54]-[6.55].

³¹ Briggs – Final, [6.2], [6.11].

³² Briggs – Interim, [6.45].

it is an almost invariable feature of such cases that an injured private individual is ranged against a large insurance company, nothing short of legal representation for the claimant will ensure that the playing field is not so steeply slanted as to prejudice a fair and just outcome.

This raises for consideration whether a technological solution can address disparities in resources, including access to legal expertise.

ODR Design Considerations

A useful starting point for ODR design considerations is the 2001 statement by Ethan Katsh and Janet Rifkin that "no ODR system will be used or be successful unless it is convenient to use, provides a sense of trust and confidence in it use, and also delivers expertise. Described a little differently, such systems need to facilitate access and participation, have legitimacy, and provide value." ³³

Convenience

An ODR website or app must be user friendly so that attention must be paid to design, content, navigation and functionality. In short, user friendly means it must be easy to understand and use for disputants. This may have two conflicting ramifications. Disputants using ODR will have the same expectations of that technology as for other websites and apps that they use for such things as online shopping and banking.³⁴ Equally, in the small claims dispute resolution space this means designing technological solutions that can be used by people with varying levels of education and financial resources.

There is a need for simple, straightforward and accurate language to both communicate information and to illicit responses. OADR may have an advantage over online courts in not being constrained by the jargon of court rules and forms. An online court may need to revise its procedures to make them more in line with plain English³⁵ to improve useability. Nonetheless, even then there may be some users who will be challenged by an ODR website or app. The Law and Justice Foundation of NSW's 2012 Law Survey observed that:³⁶

internet and telephone services can be ineffective modes of delivering legal assistance for people with low levels of legal capability. For example, as already noted, people with poor

³³ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Disputes in Cyberspace* (Jossey-Bass, 2001) 73. See also Ethan Katsh and Colin Rule, 'What we Know and Need to Know About Online Dispute Resolution' (2016) 67 *South Carolina Law Review* 329, 332.

³⁴ Australian Communications & Media Authority, *Communications Report 2014-2015*, 56 (as at June 2015 in the previous 4 weeks, 60% of Australians bought or sold goods or services online and 79% did banking or paid bills online).

³⁵ Australian Government, Office of Parliamentary Counsel, *Plain English Manual* (2013) 6 ('the aim is ... to simplify all official writing by removing unnecessary obscurity and complexity').

³⁶ Christine Coumarelos et al., *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of NSW, 2012) 215.

literacy or communication skills can have difficulty using legal information resources and websites, and other self-help strategies.

Steps can be taken to address this, such as building in translation software for people from a non-English speaking background or providing an "online chat" feature where questions can be asked and answered in real-time. Much may depend on the audience for the ODR system. However, it may also require inperson advice. If so, then the website or app needs to be connected to appropriate sources of assistance.

There may also be a digital divide concern if the target audience for the technological solution does not have the latest smart phone or computer. Indeed they may have neither, and accessing technology may mean visiting a library or friend. Utilising the latest technology may allow for greater functionality but this needs to be balanced with the need for the technology to work on older technology that may be more accessible. The experience in some jurisdictions has been that designing ODR to function on a smartphone rather than a computer increases it accessibility as individuals are more likely to have a smartphone than a computer.³⁷ Information on what technology is used by the target audience for ODR therefore becomes an important step in the design process.³⁸

Lastly while convenience is crucial it also needs to be balanced with security as disputants will be providing personal information. Lack of security has been found to discourage people from purchasing goods and services over the internet.³⁹ Similarly, an ODR platform that is not secure will not be utilised by disputants.

Expertise

Advanced forms of ODR acquire knowledge from human experts to create the ODR platform. It follows that the information obtained and then utilised by the ODR platform needs to be accurate. The relevant expertise or information may differ between an ODR platform seeking to mimic ADR and one that is an online court.

Litigation involves the gathering of facts, the determination of the relevant law and applying that law to the facts to determine the outcome. Lawyers undertake this process for clients and will then advocate for the outcome reached with another person's lawyer or in front of a decision maker such as a judge. A decision maker effectively performs the same process but in a neutral manner. Lawyers and judges would be relevant experts from whom information could be obtained. The ODR system would need to

³⁷ Briggs – Final, [6.18].

³⁸ See eg Australian Communications & Media Authority, *Communications Report 2014-2015*, 42 ('Seventy-nine per cent of online adults used a mobile phone to access the internet in the last six months—an increase of three percentage points since May 2014. The use of a desktop computer to access the internet continued to decline down six percentage points to 61 per cent of online adults at May 2015'); ABS, 8146.0 - Household Use of Information Technology, Australia, 2014-15 (The number of households with access to the internet at home was 7.7 million in 2014–15, representing 86% of all households (up from 83% in 2012–13).

³⁹ ABS, 1370.0 - Measures of Australia's Progress, 2010.

ensure that it accurately modelled the relevant legal principles and adduced from the user the facts that the law considers relevant to determine the outcome. Some forms of ADR, such as arbitration, may proceed in a manner similar to litigation.

However, interest-based negotiation or mediation places less reliance on determining the facts and law and adds an extra dimension, interests. Interests are not about determining who is right or wrong according to the law. Instead, the focus is on determining why a person wants a particular outcome and exploring ways to meet the needs, desires or concerns that are driving the sought after outcome.⁴⁰ A focus on interests adds an extra or different concern for resolving disputes.

Both Rechtwijzer and the Civil Resolution Tribunal concern themselves with issues beyond pure legal analysis by including tools that address emotions, resilience, ability to solve problems and interests.

The expert system used in the Civil Resolution Tribunal seeks to factor into the information obtained from users and recommended actions the need for users to understand their emotions and underlying interests, what is referred to as emotional intelligence functionality.⁴¹ The Civil Resolution Tribunal seeks to assist users to identify their emotional states and provide resources for addressing them.

Similarly the Rechtwijzer website recommends to visitors that they first prepare themselves by reflecting on the conflict, their goals and the goals of the other party. Rechtwijzer also asks whether visitors generally feel capable of resolving problems themselves or whether they prefer help. In divorce conflicts, visitors are asked to reflect on their and their (ex-)partner's cooperative stances and possible consequences of the divorce.⁴²

An OADR system that sought to adopt an interest based approach would need to ask some very different questions to one focused simply on the law.⁴³ It may also then make recommendations which are not legal outcomes.

It should also be noted that in OADR novel approaches to dispute resolution could be devised which may employ quite different expertise than what is used by courts or existing ADR. The technology may allow for expertise that humans alone cannot provide. For example, to take advantage of Big Data requires technology that can collect and analyse the data. This may then produce insights into disputant interests, satisfaction with outcomes and subsequent behaviour (such as, continued or discontinued use

⁴⁰ S Blake, J Browne and S Sime, *The Jackson ADR Handbook* (Oxford University Press, 2013) [14.06].

⁴¹ Darin Thomson, 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1(2) *International Journal of Online Dispute Resolution* 4, 44-41.

⁴² Esmée Bickel, Marian van Dijk, and Ellen Giebels, 'Online legal advice and conflict support: a Dutch experience' University of Twente, March 2015, 4-5.

⁴³ See eg Michael Black QC AC, 'The Relationship between the Courts and Alternative Dispute Resolution' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis 2016) forthcoming (concluding a discussion of the different approaches and skills needed for facilitative mediation and an early neutral evaluation with the observation that 'What is central in one process may be quite beside the point, indeed a no-go area, in another'.).

of an ecommerce site) which may indicate the types of solutions that can be offered and are valued. Equally, privacy restrictions may limit access to data.

As technology advances, its ability to learn and replicate expertise is expected to grow. Accordingly, more complicated disputes may fall within the capacity of an ODR system in the future.

Impartiality

The conditions for a successful ODR system may be expressed in the affirmative as providing the user with trust and confidence by being impartial. Put in the negative, it must be unbiased. Courts have recognised this necessity for hundreds of years and have addressed it through requiring judges to be impartial, to sit in public, to give reasons and be subject to appeal.⁴⁴ For ODR the operation of the platform needs similar protections suitable for its context – "technology is by no means neutral and a particular software design reflects a preference for certain values over others".⁴⁵ For example, algorithms should not favour one or other party, even if unintentionally.

An example of this concern is provided by eBay which has been accused of favouring buyers over sellers. The accusation arose because eBay, like many traditional businesses, adopted a 'buyer-is-always-right' policy which allows buyers who dispute a transaction to keep the items they purchased and receive a refund. The problem with such an approach in an OADR context resolving disputes between buyers and sellers, rather than buyers and eBay, is that the system has a built-in bias.

The need to avoid bias may be addressed in a number of ways. There may need to be ethical requirements for programmers similar to the ethical requirements that have adhered to professional roles such as judges and mediators. A formal accreditation process may be needed for AODR providers that ensures that the system passes tests for impartiality before being accredited. Alternatively, it may be a matter for the marketplace with disputants presumably using OADR platforms that are regarded as trustworthy and fair.

Fairness

⁴⁴ See eg *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 667; *Hogan v Hinch* (2011) 243 CLR 506, [20]; *Ebner v Official Trsutee in Bankruptcy* (2000) 205 CLR 337, [3]-[7].

⁴⁵ Orna Rabinovich-Einy and Ethan Kash, 'Lessons from Online Dispute Resolution for Dispute Systems Design' in Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (eleven International Publishing, 2012) 50.

⁴⁶Anna Tims, 'If eBay's customers are always right, who'll protect its sellers?', *The Guardian*, 11 July 2014 https://www.theguardian.com/money/2014/jul/11/ebay-buyer-complained-decide-against-seller More generally see Maurits Barendrecht et al, *Trend Report 4 - ODR and the courts: The promise of 100% access to justice?* (The Hague Institute for Innovation of Law, 2016) 41.

⁴⁷ Rebekah Kearn, 'Seller May Continue to Press EBay on Refunds', *Court House News Service*, 13 August 2014 http://www.courthousenews.com/2014/08/13/70357.htm

Related to impartiality is the need for the process to be fair. In the judicial system this is referred to as natural justice or procedural fairness. It includes such matters as the need for notice of the existence of a dispute and its planned resolution, as well as a right to be heard, which can include being able to adduce evidence, challenge evidence and make submissions.⁴⁸

The question for ODR is, how is fairness entwined with technology? Further, what is required for fairness in OADR and in an online court may not be the same. An online court may be held to a stricter standard because of the fact that it is a court. This is not to say that an online court must seek to copy all of the features of a traditional court. The courts have shown that they can adapt to changes in society. One example is the High Court's recognition in *Aon Risk Services Australia Limited v Australian National University* that '[s]peed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings'. Another example is the adoption of the concept of proportionality. The High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* cited with approval a passage from the English Court of Appeal in *Jameel v Dow Jones & Co Inc*:51

It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.

Technology permits speed, efficiency and proportionality, but it must also be fair. The holdings in *Aon* and *Expense Reduction* are clear that requirements of minimising delay and cost must be balanced against ensuring fairness.⁵² In the OADR context it may be sufficient to explain the operation of the platform so that the disputants are able to choose whether to use the platform of not. Similarly, if an outcome is not binding unless the disputants agree, such as with mediation, then any lack of fairness may be dealt with by a disputant refusing the outcome. This of course assumes that the disputant is able to effectively evaluate the outcome.

It should not be assumed that a requirement for procedural fairness and open justice means that technological advances cannot be employed in a court. For example open justice may be advanced by broadcasting hearings, indeed full trials, over the internet. Technology may allow for more effective

⁴⁸ Michael Legg and Sera Mirzabegian, 'Appropriate Dispute Resolution and the Role of Litigation' (2013) 38(1) *Australian Bar Review* 55.

⁴⁹ For a contrary view see Maurits Barendrecht et al, *Trend Report 4 - ODR and the courts: The promise of 100% access to justice?* (The Hague Institute for Innovation of Law, 2016) 62.

⁵⁰ Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175, 213 [98].

⁵¹ Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 250 CLR 303, 318 [39] citing Jameel v Dow Jones & Co Inc [2005] QB 946, 965 [54].

⁵² Michael Legg, 'Reconciling the goals of minimising cost and delay with the principle of a fair trial in the Australian civil justice system' (2014) 33(2) *Civil Justice Quarterly* 157.

notice through employing electronic means such as email or SMS or social media. But the need for personal service in relation to initiating process or a subpoena may presently require limits on the use of technology or additional steps to verify that a particular email address or mobile telephone number is that of the intended recipient. Technology may also give people a more structured and fulsome opportunity to convey their evidence and arguments. But there will also be situations where oral advocacy or cross-examination is needed.

An issue raised by Justice Briggs is whether some disputants and some disputes require legal representation to ensure fairness. The complexity of the law, procedure and evidence may mean that the likelihood of successfully bringing or defending suit without legal representation is slim. But technology may be able to achieve greater fairness by simplifying processes and assisting citizens through expert systems or providing affordable expertise, either through unbundling of legal services or employing non-lawyer coaches.⁵³ Much may turn on the capabilities of the technology and the user.

Cost

Much of ODR's popularity in Europe and elsewhere stems from its speed and low cost.⁵⁴ A number of approaches to fees for an ODR service may be employed. ODR might be publicly funded and therefore free or at a minimal price per user. Alternatively, 'user pays' may apply and each user will need to pay for access to the ODR platform. Either might be employed in relation to an online court. ODR might be part of a larger commercial site such as eBay or Amazon and the site covers the cost of ODR as part of its customer experience. ⁵⁵

Affordability will be central to whether ODR provides value and is used. Equally the funding available will influence the quality of the ODR platform, including convenience and expertise. ODR platforms need to be able to cover the initial design and set-up cost as well as the ongoing costs of responding to changes in technology (eg new operating systems for computers and smart phones) and the law. Likewise the sources of those funds may impact the existence or perceptions about the existence of bias in design.

The most financially viable ODR platform is one that serves high volume, recurring disputes that follow a standard course or pattern. This type of dispute is particularly amenable to economies of scale with the marginal cost of assisting an additional person being low.⁵⁶

⁵³ Maurits Barendrecht et al, *Trend Report 4 - ODR and the courts: The promise of 100% access to justice?* (The Hague Institute for Innovation of Law, 2016) 42.

⁵⁴ Amy Schmitz, 'Remedy Realities in Business-to-Consumer Contracting' (2016) 58 Arizona Law Review 213, 242;

⁵⁵ Suzanne Van Arsdale, 'User Protections in Online Dispute Resolution' (2015) 21 *Harvard Negotiation Law Review* 107, 124-125.

⁵⁶ Maurits Barendrecht et al, *Trend Report 4 - ODR and the courts: The promise of 100% access to justice?* (The Hague Institute for Innovation of Law, 2016) 56.

Conclusion

ODR offers the opportunity to use technology to make major advances in access to justice. However achieving access to justice requires that careful attention is paid to the key design considerations, namely convenience, expertise, impartiality, fairness and cost. Different approaches may be available, or be required, in relation to OADR as compared to online courts. OADR is able to start with a blank sheet (or computer screen) and can choose how it will structure the dispute resolution framework by drawing on existing learning about ADR but also through employing technology in a variety of ways. An online court should be seeking to use technology to innovate but it will be constrained by the essential characteristics of the judicial function. However, those constraints should not be equated with requiring adherence to the conduct of litigation as currently conceived. The ODR design considerations speak to the requirements of justice, cost and delay that already guide courts through the overriding or overarching purpose in the courts enabling legislation or rules. However courts might also consider how technology could assist them to deliver on the convenience consideration and enhance possibilities for automating expertise which would in turn assist with justice, cost and delay. The online court has less freedom than OADR but technology will spur the redesign of civil justice procedures.