

NEWS

The Online Court

Misunderstandings and Misconceptions when Delivering a Vision for the Future of Justice

An ODR Advisory Group set up in 2014 by the Civil Justice Council of England and Wales to research and advise on the opportunities for introducing ODR into the justice system has produced a Report (<https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>) that recommends an extensive online dimension to the court system in England and Wales. The Report raises the novel perspective of a court being seen more as a service rather than as a physical venue, seeking to place its primary focus on informing and assisting the public in containing and resolving, if not avoiding in the first place, disputes and to do so with less intervention by a judge. When judges do become involved they also will be encouraged to work more online than in a courtroom. The Report, therefore, does not look simply at ODR as aiding ADR (Alternative Dispute Resolution), as may have been the case hitherto for most applications of ODR, but as its being integral to the court process itself. The twin benefits the Group sees as being achieved are to both significantly widen access to the courts while, at the same time, reducing the burden of public cost incurred in operating and maintaining the court system.

It is becoming clear from comments on the Report published online that there is a significant level of misunderstanding over certain aspects of the Report. This is to be expected to a degree, especially given the wide publicity for the Report. Indeed, the early comments are welcomed as they give the opportunity to all proponents of the Report to advance the debate by minimizing such misunderstandings.

The website (<https://www.judiciary.gov.uk/reviews/online-dispute-resolution/>) accompanying the Report provides a suitable venue to continue the debate.

Keywords: online courts, online judges, civil justice, Alternative Dispute Resolution, mediation.

For many of us who have been researching, writing about and, in some cases, helping develop systems of Online Dispute Resolution, there has, for quite some time, been an unspoken fourth word in the phrase, namely 'Alternative' – as in Online Alternative Dispute Resolution. Developments in 2014/15, however, have seen a number of court services looking to embrace ODR. One can perhaps look forward with some confidence to ODR being part of the established form of dispute resolution within formal justice systems rather than just the alternative. That is, of course, as it should be since technology can equally benefit any process of dispute resolution, whether or not within the formal justice system.

One development in this field is the work undertaken by the ODR Advisory Group set up in 2014 by the UK's Civil Justice Council (a statutory body established under the Civil Procedure Act 1997 with responsibility for overseeing and coordinating the modernization of the civil justice system of England and Wales), and that published its initial report, in February 2015, containing its vision for the future of the court service in England and Wales.

The Advisory Group's brief was to advise on change for the handling of civil disputes up to £25,000 in value. In brief, the Advisory Group recommended a root-and-branch change to the way the civil courts currently operate, with the setting up of an Internet-based court service called HMOC (Her Majesty's Online Court).

The Advisory Group felt that its recommendations would achieve both an improvement in access to justice and a reduction in the public cost of running a court service. It would achieve them by using technology to help provide more of an emphasis on avoiding disputes arising in the first place and, when they do, assisting with their speedy resolution rather than, under current norms, directing most court resources into the traditional court-based adversarial process of resolving disputes. The overall objective was that the court should be seen as a service rather than as a building. If the Irish judge Sir James Mathews (1830-1908) was around, he might be looking to amend his famous cynical quotation about the law being available to all 'like the Ritz Hotel' to 'like a Travelodge' (UK budget chain of lodges).

Potential litigants would be taken through a three-tier system, all operated within the same online space.

At the Tier 1 entry level the public will be able to obtain information on the law as well as a form of technology-aided diagnosis of their case and guidance on the options for resolving the matter. This tier will be accessible without the filing of a claim and is intended not simply to help the public better resolve disputes but to better avoid disputes arising in the first place.

In Tier 2, the public will find various forms of help online from a team of trained and experienced facilitators to resolve the dispute through negotiation and mediation. Note that the generic term 'facilitators' has been used to focus on the nature of the skill they will offer rather than the term 'mediators', which focuses more on a process and which can have different meanings according to what form and level of mediation people may have experienced, or heard about, previously. This will not only include assistance with resolution delivered online by people but a degree of automated artificial intelligence delivered negotiation and resolution.

Tier 3 will be where the judges can be encountered, working under standard procedures but online. In cases in which the judge feels evidence needs to be heard in person so as to offer the opportunity for challenge, he or she will direct that it be heard in a physical courtroom.

The Report does not dictate any specific form of ODR. It strongly recommends making use of what has been already developed, or will be in the future, rather than building a system from scratch. That approach chimes with the UK Government's Digital Marketplace strategy to encourage public bodies to access

approved software as a service facility rather than always seeking to build anew. Chapter 4 of the Report contains case studies of the sort of different systems of ODR that have been developed. Although the remit of the Advisory Group was to look at civil claims up to £25,000 in value, the recommendation is to not close minds to consideration of future expansion into other areas such as family and tribunal cases.

There have been negative reactions to the report, but the official responses have been largely positive. The negative comments, and reactions to those negative comments, are important. The Chair of the Advisory Board, Professor Richard Susskind, in his keynote speech¹ told the 5th International Forum on Online Dispute Resolution that ODR proponents should not simply preach to the converted but should seek out those who may not naturally warm to the introduction of technology. The publication of this Report does just that, and the responses people are making will inform the Advisory Group on the nature of the discussion.

Producing a vision for the future of something so significant to the justice system as the way in which the court service should operate is very much the first step. What the publication of the Advisory Board's Report has shown is that, before work can commence in encouraging implementation, there is inevitably much preliminary work to be done in correcting the misunderstandings of the recommendations in the Report, some of which are highlighted here. If these are left unchallenged, an incorrect version can gain ground in the perception of the professions and others affected by the proposals and, more importantly, those responsible for instituting change.

The extent of misunderstandings, particularly those on matters made clear within the Report itself, indicates, for many people, that their assessment of the Report may have been based on the reporting and comments by others rather than by a reading of the Report itself.

It is worth pointing out that 'Online Dispute Resolution' is a title that, through its acronym, is already subject to much misunderstanding. For example, sellers on Amazon understand ODR as 'Order Defect Rate'.² Amazon ODR is calculated as the percentage of the value of those sales in a given period that receive negative customer reviews or challenges. If this value reaches 1% of the total value of sales, Amazon may impose financial penalties on the seller.

The initial response from HMCTS (Her Majesty's Court and Tribunal Service) has been positive:

We welcome the publication of this important and thought-provoking report. We agree that ODR is an important area and one that we are actively exploring in more detail in the context of the reform of court and tribunal services.

1 <www.youtube.com/watch?v=4rayXatSvtw>.

2 <www.amazon.com/gp/help/customer/display.html?nodeId=12880481>.

We are keen to continue to engage with the ODR advisory group on its report and any future work that the Civil Justice Council may commission it to do.³

This is not the first time that the Ministry of Justice has considered ODR in the court service. In 2009, there was a 25-case pilot of online mediation for two small claims courts in Yorkshire using an asynchronous online mediation platform developed for <www.themediationroom.com>.

Interest in the Ministry of Justice may possibly have been reignited in 2013 when, coincidentally, on the final day of the International Forum on ODR in Montreal, the most senior judge in England and Wales, Lord Neuberger of Abbotsbury, gave a speech in which he said:

We may well have something to learn from on-line dispute resolution on e-Bay and elsewhere.⁴

Lord Neuberger also pre-empted the most frequent criticism of the Advisory Group's Report (that in reducing the opportunity for testing the evidence in a physical court ODR may lower the level of justice) by saying:

More radical solutions may be required – such as dispensing with disclosure of documents and cross-examination, even with an oral hearing, in smaller cases. Better to have a judge's summary decision quickly at proportionate cost, than a disproportionately delayed decision at exorbitant cost, or no decision because it is too expensive to get to court.

Proportionality, as highlighted in Lord Neuberger's statement, is central to the thinking within the Advisory Group's Report.

1 Misunderstandings

1.1 *This Is Just Ebay and Ebay Is Not Justice*

Most of the reporting has featured reference to an 'eBay court'. This is one misunderstanding we brought upon ourselves.

A post in UK Business Forums said:

The Ebay comparison is fundamentally misconceived - firstly whether they are prepared to admit it or not, their first duty is to their customers, not their vendors. Also, the vendors understand that if they don't swallow a little pride every now and again, they will not last long. Secondly, the legal issues thrown up by Ebay sales are, for the most part, very straightforward, and lend themselves to an arbitrational approach. In short - the law is not complex. On

3 <www.legalfutures.co.uk/latest-news/time-state-backed-online-dispute-resolution-says-susskind-led-cjc-group>.

4 <www.telegraph.co.uk/news/uknews/law-and-order/10128484/Courts-can-learn-from-eBay-says-Britains-top-judge.html>.

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cases involving disputes with tradesmen, defective work, etc, the law can be extremely complex. With the greatest of respect, I do not agree that Ebay is a suitable model for an impartial dispute resolution service and was surprised to see it in there.⁵

‘Smallclaimsassistance’ said:

It is truly a laudable success story that Ebay can resolve 60 million trading disagreements every year, but, as I said, just because such a system can resolve 60 million trading disagreements every year, does not mean that a similar system would be able to resolve large volumes of potentially complicated consumer and small business disputes, involving construction, vehicle claims, consumer protection issues, consumer credit issues, landlord and tenant disputes, employment issues (other than tribunal).... The list goes on.

A comment on E-commerce Bytes from sk13255:

All you have to do is read the community boards on Ebay to see how people feel about Ebay’s dispute resolution. It is almost entirely slanted in the buyer’s favor. Seller’s lose all the time to scammers, have their items stolen, and pay for returns because buyers abuse the dispute resolution process. Read the horror stories as there are hundreds of these cases. It’s enough to make anyone afraid to sell on Ebay. If the buyers don’t pay, your items are held up from relisting for lengthy periods. If Ebay gave real consideration to the seller’s side of the transaction issues perhaps people would be happier. Moreover, seller’s are not able to leave negative feedback for non-paying buyers, and those who abuse the system. Therefore, these buyers are able to continue hurting other sellers, and scamming people. It is very difficult to identify these people due to the lack of seller feedback. Dishonest buyers can hurt the sellers with unwarranted defects and Ebay refuses to delete them. Although I sell on Ebay I have been fortunate because I sell in a niche area where it’s difficult to scam. Partly because I won’t sell internationally, and don’t sell in high risk categories.⁶

On a LinkedIn Forum, a contributor said:

Another potential downside of having an entirely online court procedure is the very nature of an online system for dispute resolution. The comparison has been made about the eBay dispute resolution system, but for anyone who has experience selling items on eBay’s marketplace, there is a tendency for disputes to be settled unfairly with a large bias with decisions disproportionately being made in favour of buyers rather than sellers. As such, is it possible that having an online system with limited human interaction cause bias judg-

5 <www.ukbusinessforums.co.uk/threads/her-majestys-online-court.339449/>.

6 <www.ecommercebytes.com/C/blog/blog.pl?pl/2015/2/1424141431.html>.

ments? Will the fact that not having to physically see and analyse the body language of the various parties to a dispute mean less ability to judge dishonest submissions?⁷

In the Law Society Gazette, a contributor responded to an article on the subject to say:

The ebay system works as follows:

- 1 Buyer complains about seller.
- 2 Ebay finds in favour of buyer (since it is in their commercial interest to do so as they advertise extensively their 'buyer protection').⁸

The Bar Council issued a response focused on the potential for the quality of justice to be compromised by what it saw as an overly simplistic process.⁹

Like the authors of this report, we are deeply concerned about the rise in litigants in person in many areas of law. Making processes easier, more accessible, and simpler are laudable objectives. But we must be wary of creating a system which is over-simplified and does not do justice to the circumstances of particular cases. Justice will not be served if people with complex claims find themselves funnelled down routes that are designed for a quick result at the expense of proper consideration of relevant facts in their case. Dispute resolution, online or in court, must deliver the same quality of justice as more traditional routes.

A Shoemsmiths contributor wrote a comment on his firm's blog saying:

Notwithstanding the above, there are also some concerns about whether HMOC would provide a fair trial. While the report concludes that ODR can provide a fair hearing under Article 6 of the European Convention on Human Rights, it will be interesting to hear the findings of Mr Jordi Xucla, a member of the Parliamentary Assembly of the Council of Europe, who is currently preparing a report on the human rights of ODR.¹⁰

The use of 'eBay' was simply short form for using online technology to the reinvention of the process of resolution, in much the same way as the complex subject of Alternative Business Structures for law firms has often been trivialized as 'Tesco Law'.¹¹ Of course, we refer to eBay, but only as an example of how technol-

7 <https://www.linkedin.com/pulse/online-dispute-resolution-can-work-simon-phillips?trkInfo=VSRPsearchId%3A13016801427017088650%2CVSRPtargetId%3A5973172563474415616%2CVSRPcmpt%3Aprimary&trk=vsrp_influencer_content_res_name>.

8 <www.lawgazette.co.uk/law/cjc-calls-for-online-claims-revolution/5046775.fullarticle>.

9 <www.lawgazette.co.uk/law/online-courts-will-cut-need-for-lawyers-it-guru/5046796.fullarticle>.

10 <www.shoosmiths.co.uk/client-resources/legal-updates/will-online-dispute-resolution-have-its-day-in-court-9270.aspx>.

11 <www.theguardian.com/law/2011/mar/25/tesco-law-alternative-business-structures>.

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ogy can enable huge volumes of disputes (60 million a year as between eBay and PayPal combined) to be dealt with, and, importantly, how it helped most of them to be resolved directly between the parties themselves. The main problem with eBay itself lies in the quality of adjudication by eBay staff. The ODR Advisory Group, as made clear in the Report, envisage professionally trained and experienced neutrals as well, of course, as judges. Further, the eBay model is very simplistic and does not utilize the sort of technology and processes outlined in the Report. However, it is a lesson for others seeking to promote ODR that care must be taken when using reference points like eBay, in respect of which many people will have developed an existing perspective from past experiences or from comments from others.

The reference to the work of Mr Jordi Xucla at the Council of Europe is relevant. ODR does obviously lower many of the hurdles in the way of access to justice, but we have to always be concerned that in so doing, the fundamental right to a fair hearing in an open court is not compromised. I do not believe, however, that the court has to be a physical court, save only when the interests of justice require evidence to be heard in person and subject to challenge. The Advisory Group Report specifically allowed for that eventuality at the discretion of the judge.

2 Confidentiality Cannot Be Maintained or Identity Assured

On the LinkedIn Forum of the Association of Northern Mediators:

Many parties are used to sharing very widely in a social media context and regard that as the norm. I am thinking really of the confidentiality between the mediation as a whole and the outside world, rather than the confidentiality that the mediator keeps when going between caucus rooms. Another mediator whom I was talking to also mentioned the issue about not knowing who else may be in the physical room with the party - there may be influences which the mediator will not necessarily know about.¹²

On the UK Business Forum thread:

Personally an online court sounds like a great idea, however how could you be assured that the people giving any required evidence are actually that person and not someone else?¹³

On E-commerce bytes:

12 <https://www.linkedin.com/groupItem?view=&gid=3223097&type=member&item=59729847954524200968&commentID=5977372723284832256&trk=groups_items_see_more-0-b-cmn#commentID_5977372723284832256>.

13 <www.ukbusinessforums.co.uk/threads/her-majestys-online-court.339449/>.

How can you be certain that hackers or privacy is maintained? With the development of technology, hackers improve their methods to exploit information or data.... It is a good topic to delve in but if the old way of Dispute Resolution works then why change? A skill which is fundamental in Dispute Resolution is the ability to read body language, an online dispute resolution process would hinder this unless if you are using webcams however, if you use webcams then why not simply meet in person in a neutral environment?¹⁴

The answer to these concerns lies in the effectiveness of the highest level of online identity/security. While even the highest level cannot be 100% protection against impersonation, it is worth bearing in mind that courts in civil cases (criminal trials were outside the focus of the Report) do not currently require any form of verified identification of those who stand in the witness box. An online court at least will be able to offer greater protection as well as legacy data for later investigation.

3 Concerns That It Will Lead to an Increase in Cases

On UK Business Forums:

Sounds like a great idea in theory provided it doesn't lead to an increase in the number of cases being brought due to it being seen as easier than going to court.¹⁵

Implementation of an ODR system will, indeed, lead to a greater number of cases entering into the HMOC. That is the whole point – increasing access to justice. However, the entry point is Tier 1, where the public is given information, guidance and assistance in better understanding whether they have a case, and if so on ways to resolve directly with the other party. Only afterwards they then filter to Tier 2, where they will be offered a great variety of ways to resolve, whether using automated blind bidding systems, expert negotiation aides and human facilitators offering newer and more creative forms of mediation. Only a very small number of cases will escalate to Tier 3, at which point the judges become involved and then primarily acting online and not in a costly physical court.

Where the judge feels a physical court is necessary, *e.g.*, to test the quality of evidence under cross-examination or where a significant point of law has to be addressed and argued, then he or she has power to direct it to a physical hearing.

Overall, while the numbers of cases will rise, the number being dealt with at Tier 3 will likely be much less than at present. In this way there is delivered increased access to justice yet at much lower cost both to the parties (as fees will be lower for online services) and to the court service.

14 <www.ecommercebytes.com/C/blog/blog.pl?pl/2015/2/1424141431.html>.

15 <www.ukbusinessforums.co.uk/threads/her-majestys-online-court.339449/>.

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4 How Can There Be Justice without Personalized Legal Advice

On the UK Business Forum, small claims assistance said:

Someone who has lost £25,000 in a consumer or business deal that has gone south, is much more seriously financially affected and could lose their business or suffer serious adverse financial consequences. To risk that sort of sum without professional legal advice, at the click of a mouse, is risking the same outcome that Lord Dyson was referring to here.¹⁶

An article in the *Law Times* included this comment:

The system for online dispute resolution, called HM Online Court, would engage facilitators who aren't lawyers working online to settle low-value claims — roughly at the Small Claims Court level — through automated negotiations.¹⁷

Solicitor Ross Pierrepoint was quoted in an article in the Nottingham Post as saying:

The biggest proportion of court costs come from legal representation but costs are a small price to pay to ensure that claims are dealt with fairly. Removing this access to expert legal advice will lead to an influx of people making claims where they are not entitled to.¹⁸

Nothing in the proposals will deter or prevent people from taking legal advice and/or being legally represented. For those who choose to be represented the cost of time is the major element in a lawyer's fee, and therefore speeding up the process can only help reduce those fees. The overall shortening of the length of a case from beginning to end will inevitably reduce the time charged in reviewing the file and in the number of letters/emails and telephone calls. The lower incidence of cases that end up in a physical court will avoid the cost of time in attending at, and waiting around in, a court building. For those who are not represented the processes will better empower them to represent themselves.

The proposal does not seek to remove in any way access to expert legal advice. Quite the contrary. The technology will in fact make legal information and advice, whether delivered through intelligent IT or personal consultation (or a combination of both) far more available and at more proportionate cost than at present. Rather than being a threat to lawyers, Her Majesty's Online Court will open up huge opportunities for lawyers to reinvent themselves as a more accessible and

16 <www.ukbusinessforums.co.uk/threads/her-majestys-online-court.339449/>.

17 <www.lawtimesnews.com/201503024521/headline-news/move-towards-online-dispute-resolution-gathers-steam>.

18 <www.nottinghampost.com/eBay-style-online-courts-short-sighted-say/story-26037261-detail/story.html>.

relevant service to a greater proportion of society than currently is the case. Increasing access to justice increases the whole market.

5 Nothing New in It

A solicitor commented on his firm's blog:

Tier Two of HMOC should provide 'Online Facilitation', whereby the service will provide 'online facilitators' 'to bring a dispute to a speedy, fair conclusion without the involvement of judges'. This seems to me to just be a fancy way of referring to mediation, some of which will be via the 20th Century technology of telephone. There will also be some 'automated negotiation', which sounds like a contradiction in terms to me, but is probably little more than a system through which the parties can negotiate directly between themselves – who would have thought of such a thing?¹⁹

Tier 2 will not simply be "a fancy way of referring to mediation". First, we use the term 'facilitators' to avoid preconceptions as to the form of the process they will choose to follow. Secondly, the Report specifically includes other forms of neutral resolution such as adjudication and non-binding recommendation, which will be guided by dynamically generated and constantly growing 'machine learning' knowledge such as on how previous disputes of similar profile have been evaluated and resolved.

There is in this comment an incorrect assumption that the use of the term 'automated negotiation' is "probably little more than a system through which the parties can negotiate directly between themselves". The Report, and especially the additional documentation on the Report website, gives examples of computer-assisted negotiation such as blind bidding and crowdsourcing and the application of game theory in helping parties better prioritize their requirements and expectations. We considered Tier 2 as the key area that will grow in time to reflect constantly developing technology as it expands the power of artificial intelligence, knowledge management and the exploitation of Big Data.

6 Conclusion

The recommendations in the Report²⁰ of the ODR Advisory Group are truly groundbreaking. The Report turns on its head the idea that a court service should focus the bulk of its resources on facilities and processes for determining in an adversarial manner the outcome of disputes. Instead, it repositions the primary focus on informing and assisting the public into containing and resolving, if not avoiding in the first place, disputes, and doing so with less of a need for interven-

19 <www.marilynstowe.co.uk/2015/02/17/could-we-have-online-family-courts-by-john-bolch/>.

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

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tion by judges. It is inevitable that some involved in the judicial system may, at first, see the Report as a threat to the traditional norms and, more particularly, to their own practices and careers. This may have led to some misunderstandings about some of the core elements in the Report.

Misunderstandings are not unexpected, especially given the wide publicity for the Report and, thus, the extensive commentary that has followed in its wake. It is, nevertheless, important to seek to minimize them going forward while stimulating continuation of informed debate.

Graham Ross

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