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.