

# What Does It Take to Bring Justice Online?

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## Abstract

*Technology has revolutionized the world in the last century, although computation devices have existed for millennia and punched-card data processing for two centuries. After 70 years of progress in technology and telecommunications with all the knowledgeable computer specialists and the sophistication of online services, it is high time public and private justice offered fair access to a fundamental human right: justice online. The role of technology in dispute resolution is high on the agenda, and the topic is increasingly at the centre of discussions. In a world that is rapidly developing, it is surprising to observe that online dispute resolution (ODR) is lagging behind.*

**Keywords:** ODR, access to justice, courts, online justice, remedy for small disputes.

Technology has revolutionized the world in the last century, although computation devices have existed for millennia and punched-card data processing for two centuries. The era of modern computing began in the 1930s<sup>1</sup> and has developed since then. The mid-1970s saw a number of personal computers hit the market, and the World Wide Web became publicly available, and in the mid-1980s computers progressively entered our homes followed by the Internet. Mobile telephones became an indispensable tool in the 1990s. A lot has happened since the middle of the 20th century, and almost the entire world's population is connected through the Internet or mobile phones. In the current year, 2019, over four billion people use the Internet, representing 56% of the global population.<sup>2</sup> Both personal computers and the Internet have become indispensable in all aspects of our lives; we do everything online, including paying taxes or ordering sandwiches.

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1 History of computers: a Brief timeline. Available at: <https://www.livescience.com/20718-computer-history.html>.

2 Number of Internet users as of July 2019. Available at: <https://www.statista.com/statistics/617136/digital-population-worldwide/>.

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After 70 years of progress in technology and telecommunications with all the knowledgeable computer specialists and the sophistication of online services, it is high time public and private justice offered fair access to a fundamental human right: justice online. The role of technology in dispute resolution is high on the agenda, and the topic is increasingly at the centre of discussions. In a world that is rapidly developing, it is surprising to observe that online dispute resolution (ODR) is lagging behind.

Over two decades have passed since building platforms, promoting ODR, holding annual ODR Forums in addition to all conferences discussing the potentials of ODR, publishing about the benefits and the need for online justice, discussing standards and best practices. One would think that given the time spent on theoretical and practical issues with international ODR thought leaders, justice would already be available online, and yet it is not.<sup>3</sup> It is unrealistic to continue progress without including justice in the revolution that technology has operated. Less than 10% of 195 countries give access to justice online. Millions of small civil and commercial claims remain without remedy.

There is a huge demand for redress mechanisms in consumers and small disputes, mainly cross-border disputes. ODR is considerably underexplored despite its remarkable advantages. Online justice is extremely limited, although signs of progress exist. In the 21st century we should no longer be discussing the benefits of or need for ODR; rather, we should be already using it just like any other service available online. ODR services are long overdue. Public and private justice can contribute to filling the gap. It concerns everyone – the courts, dispute resolution organizations, ODR providers and marketplaces. A few private initiatives exist but are extremely rare, and people hardly know about them. ODR experts who have invested in this field for over twenty years and who built platforms know that online justice is possible. If we do not build online systems and make ODR an opt-out as opposed to an opt-in, it will be 2100 before people can access justice online!

Why is online justice still missing, and what does it take to make it available? “Is court a service or a place? Do we always need to congregate physically in a court building to resolve our differences?” observed Richard Susskind.<sup>4</sup> Where have we failed in making ODR part of our lives?

One of the major mistakes to deplore is the fact that platforms were built and discontinued soon after for many reasons developed in this article. The lack of continuity has contributed to the users’ scepticism about the feasibility of online justice. Building trust requires proven results that are so far lacking as no statistics exist to measure efficiency and progress. A dominant mistake is also the lack of promotion and education on the use of technology in dispute resolution. Online trade gained success over time as users needed to discover how useful and

3 M. Philippe, ‘We Walked On The Moon, Justice Is Not Yet Online’, *Revue Pratique de la Prospective et de l’Innovation*, March 2017, p. 48.

4 Online Dispute Resolution for Low Value Civil Claims, report published by a working group under the chairmanship of Professor Richard Susskind, February 2015. Available at: <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>.

reliable it can be before shifting from offline to online trade for most products and services. Likewise, trust may be gained with visible, measurable, efficient dispute resolution services provided online. Much remains to be done to familiarize all stakeholders and users with the utility of online justice. The courts' progressive involvement is a positive sign.

I therefore ask, where have we failed in building platforms, and why is online justice lagging behind? To answer this question, it would first be useful to raise awareness and remind all stakeholders of the undeniable advantages of ODR (I) and, second, to learn lessons for the future as past experiences may help avoid future mistakes (II).

This article follows a talk delivered at ODR Forum 2019 (Forum) in Williamsburg (Virginia, USA), which was held from 28 to 30 October 2019.<sup>5</sup> The Forum was jointly organized by the National Center for Technology & Dispute Resolution (NCTDR) and the National Center for State Courts (NCSC).<sup>6</sup> In addition to being a successful event, it was extremely interesting. Some presentations are available on the Forum's website and the speakers' papers are published in this *International Journal of Online Dispute Resolution*.<sup>7</sup> It was attended by nearly 300 people from various fields and brought a broader perspective to the topic because it gathered ODR experts and non-experts from all profiles, including state courts, ODR providers, dispute resolution organizations and universities, and also people participating for the first time in these forums. Current online services, ongoing and future initiatives discussed demonstrate not only that ODR is gaining ground but also, most importantly, that stakeholders who may not yet be involved in bringing justice online are realizing that they must invest in ODR now before they get outdated, lose business and lose the objective of access to justice. This observation is supported by the fact that several conferences on legal tech have been organized around the world in the recent years. Two recent conferences at which the author also made a presentation discussed precisely the topic of access to justice<sup>8</sup> and the effects of technology on legal practice.<sup>9</sup>

The most striking novelty at ODR Forum 2019 was the massive participation from practitioners coming from state courts in the United States; several courts are bringing justice online, and these efforts are certainly driving change in public

5 Programme of the ODR Forum 2019. Available at: <https://www.ncsc.org/Microsites/ODR2019/Home.aspx>.

6 <http://odr.info/> and <https://www.ncsc.org/>.

7 [www.international-odr.com/](http://www.international-odr.com/).

8 Conference on 'Access to Justice and Arbitration' held in London on 7 June 2019 and organized by Professors Sara Hourani and Leonardo de Oliveira from the Royal Holloway University of London; information available at: <https://www.eventbrite.co.uk/e/access-to-justice-and-arbitration-tickets-59311373916>.

9 Conference on 'Lawyering in the Digital Age', held in Amsterdam from 17 to 19 October 2019 and organized by Professors André Janssen and Pietro Ortolani, of Radboud University, Michel Cannarsa, of Lyon Catholic University, Larry DiMatteo, of University of Florida, Francisco de Elizalde, of IE University Madrid, and Mateja Durovic, of King's College London; information available at: <https://www.ru.nl/law/radboudbusinesslawinstitute/news/events/redactionele-structuurkoppelingen/lawyering-digital-age/>.

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justice. The ODR Forums started putting the accent on technology in state courts since 2016 at the ODR Forum in The Hague and continued to do so at the ODR Forum in Paris in 2017, then in Liverpool in 2018 and in Williamsburg in 2019. The latter Forum was the most important one in addressing the experience of state courts that offer access to justice online. Some courts are inspiring models that may convince other courts to invest in bringing justice online. It is to be hoped that in the next 5 years online justice will stop lagging behind.

## 1 Undeniable Advantages of ODR

ODR has a huge potential. ODR, like Ombuds,<sup>10</sup> are considerably underexplored not only for dispute resolution but also for dispute prevention. The objective of ODR is not to move away from human beings but to make more effective the resolution of disputes and to prevent the difficulties of access to any form of remedy from keeping people in an unfair situation. It is a misperception to think that technology will dehumanize people; it simply offers other avenues. Learning about advantages of ODR will hopefully convince stakeholders to invest in ODR for the short, medium and long term.

### 1.1 Human Rights and Impact on Business and Society

Access to justice and access to the Internet are human rights.<sup>11</sup> Impeding access to justice equates to denial of justice for many people who have no other means of seeking remedy. Such denial may be effectively cured through ODR. In the same spirit, disputes submitted to arbitration and litigation can be more time and cost effective if they are conducted in major part online. Users hesitate to file claims with state courts because procedures are extremely long, they can be costly, especially if users are represented by lawyers, and the value of the claims may not be worth going through such a process. Half of the disputes submitted to courts can be settled online, which may significantly reduce the backlog from which all jurisdictions suffer and which generate considerable delays in rendering decisions, in addition to being unintelligible for the great majority of non-lawyers.<sup>12</sup> Users and small enterprises have expectations that are not satisfied. Offering remedy is not just a human right; it impacts business, generates trust in online systems and helps in establishing a long-term consumer-merchant relationship. Prosperous small enterprises that can have their disputes settled promptly are able to con-

10 The American Bar Association celebrated Ombuds Day on 10 October 2019, to recognize and support ombuds as a valuable form of alternative dispute resolution serving as third parties to address and resolve individual and systemic issues outside formal channels. Available at: [https://www.americanbar.org/groups/dispute\\_resolution/events\\_cle/ombuds-day/](https://www.americanbar.org/groups/dispute_resolution/events_cle/ombuds-day/).

11 United Nations International Declaration of Human Rights (UDHR); see Research paper by Paul T. Jaeger, available at: <https://ojphi.org/ojs/index.php/fm/article/view/6164/4898>.

12 Foreword of Richard Susskind in "Digital justice", Ethan Katsh & Orna Rabinovich-Einy, 2017.

centrate on their business. Resolving a high volume of small disputes,<sup>13</sup> through simple, swift and inexpensive channels, impacts society and the economy as a whole.

### 1.2 *Levelling the Playing Field*

ODR helps level the playing field and facilitates access to justice for people who relinquish the option of seeking remedy for various reasons: they cannot hire lawyers owing to their low income; they are in remote locations with no physical access to courts; they suffer from any form of disabilities and cannot travel to courts; they face language barriers; they have cross-border disputes. A report on persons with disabilities indicates that 15% of the global population have some form of disability and experience discrimination exacerbated by the barriers they face in accessing justice.<sup>14</sup> The report also specifies that “[t]echnology can support efforts to help access to justice for persons with disabilities, including in rural or remote areas”.

### 1.3 *Neutral Space for Litigants*

ODR offers the participants equal and simultaneous access to information that is essential when a party is not represented. Furthermore, it removes the discomfort of courtrooms and of being intimidated by opponents, lawyers and judges. It offers a more neutral space for discussions between the parties as opposed to sitting face-to-face, although it does not remove the quasi in-person meeting. A party may panic and not be able to present its case, while it may take time to prepare its claim or defence without pressure and without having to answer on the spot. It also prevents parties from being advantaged or disadvantaged by their temporal proximity to a court. It eliminates the financial burden incurred in attending hearings. Moreover, parties can file claims or negotiate any time, any day and from anywhere. It is therefore an ideal way to put parties on an equal footing in case a party is more powerful.

### 1.4 *Resolution of All Types of Disputes out of Court*

ODR eliminates complications of forum selections, especially in cross-border disputes; parties only need to select an ODR mechanism. It is adaptable to nearly all types of disputes arising out of offline or online transactions. Although most ODR programmes focus on consumer and commercial disputes, ODR expanded to

13 L. Del Duca, V. Rogers, & C. Rule, ‘Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value High Volume Claims’, *Uniform Commercial Code Law Journal*, Vol. 42, 2010, p. 221. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1635463](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635463).

14 Access to justice for persons with disabilities: From international principles to practice, Annual Conference of the International Bar Association (IBA), Sydney, October 2017. Available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=9D5D0EAF-690B-4DAE-8D21-50F40C143A88>.

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employment, family,<sup>15</sup> neighbourhood disputes,<sup>16</sup> real estate, insurance and even certain criminal disputes. Malaysia started its first cybercourt in 2016 specializing in hearing cybercrime cases, such as bank fraud, hacking, falsifying documents, defamation and online gambling.<sup>17</sup> It was reported that in 2015 alone, CyberSecurity Malaysia received 3,752 cases of online fraud and hacking independently of the cases that may have gone unreported or unnoticed by the victims.<sup>18</sup> Malaysia hopes to settle such disputes swiftly online.

### 1.5 Flexibility of Procedures

Furthermore, ODR enjoys flexibility of procedures and of hybrid mechanisms, such as automated settlement, assisted settlement, negotiation, mediation, arbitration or a combination of one or several mechanisms. It can start with a negotiation phase through automated settlement or technology-enabled negotiation where parties negotiate directly with one another online. Should this phase fail, it can be submitted to a facilitated online settlement through mediation, and only where attempts are unsuccessful can it escalate to arbitration or litigation, although this is not recommended for small disputes.<sup>19</sup> The successful mechanisms used by marketplaces<sup>20</sup> have proven that settling small disputes online through automated systems is possible; once the algorithms are created, no human intervention is necessary, unlike other types of mechanisms.

### 1.6 Undeniable Progress in Digitalizing Courts

It was pointed out that “arbitral institutions must invest in technology or they will be forced to play catch up with the courts”.<sup>21</sup> This statement is worthy of note because twenty years ago private initiatives were numerous mainly in North America, while courts did not invest in bringing justice online. Courts were aware of the need, but public projects face the complication of decision-making processes at the level of governments including financing projects. Also, governments change and agendas change, a new government may consider that online justice is not a priority or may simply not understand the benefits of online jus-

15 See, for instance, SIÈSDE Dispute Resolution Technologies. Available at: <https://www.advocatedaily.com/profile/siesde-dispute-resolution-technologies---darren-gingras.html>.

16 Singapore announced in February 2018 that CDRT will provide an affordable forum to resolve online conflicts between neighbours. Available at: <https://www.straitstimes.com/singapore/neighbours-can-now-settle-disputes-through-online-mediation>.

17 Malaysia’s first cybercourt specializing in hearing cybercrime cases was launched in 2016. Available at: <https://www.nst.com.my/news/2016/09/169883/malaysias-first-cyber-court-begins-operations-today>.

18 <https://gltlaw.my/2018/05/24/special-cyber-court-and-e-court/>; according to a UK-based market research firm, Juniper Research, global cybercrime losses were projected to reach US\$2 trillion by 2019.

19 *Brower v. Gateway*, Supreme Court of New York, Appellate Division, First Department, 13 August 1998, the Court found that ICC arbitration clause was unconscionable in consumer contracts and unenforceable; 676 New York Supplement, Second Series, p. 569 *et seq.*; 1998 N.Y. App. Div. LEXIS 8872.

20 For example, e-Bay uses automated systems and SmartSettleOne uses blind-bidding.

21 Essam Al Tamimi made this statement at a conference held in Dubai on 15 November 2018, reported by Global Arbitration Review on 17 January 2019.

tice. This impediment is slowly changing in some jurisdictions. Courts are aware that it is no longer sustainable to keep technology outside the courts, and many see ODR as the assistance needed to deal with small claims online so that judges can concentrate on more pressing matters and complex disputes. A number of countries have opted for giving access to state courts online and wisely invested in digitalizing courts. Some courts are inspiring models, such as British Columbia (Canada), Estonia, Lithuania, Singapore and the United Kingdom. In Lithuania, any person can file a claim online simply using the identity card number to identify him or herself in the online court system.<sup>22</sup> England and Wales have, since 2016, established a six-year programme to modernize and upgrade courts and tribunals systems and dedicated a budget of £1.2 billion to achieve the reforms.<sup>23</sup> Nearly 70 courts in the United States are using technology, although ODR is utilized in only a small fraction of the States.<sup>24</sup> Digitalizing courts is undeniably progress; their success will increase users' confidence in public and private justice conducted online.

### 1.7 *Great Value in All Societies*

ODR can be of great value in all societies, particularly in emerging economies and conflict zones, where convening to negotiate or mediate may be impracticable. Negotiating or mediating may be undertaken online, provided an Internet connection is available, and avoids meeting in person where risks of violence may exist between the parties and in the region. It can be conducted on a dedicated platform or simply using available technology.<sup>25</sup>

### 1.8 *Saving the Environment*

Climate change is a worldwide concern, and ODR contributes, on the one hand, to saving the environment by considerably reducing transportation, in addition to saving significant time on transportation for all people involved in the process. On the other hand, going paperless saves trees and storage space.

## 2 **Lessons for the Future**

After having built platforms, seen many ODR platforms successfully built but soon after interrupted<sup>26</sup> and heard experiences of ODR fellows, it seemed to me

22 Lithuanian Court e-Services, e.teismas.lt (<https://www.teismai.lt/en/news/news-of-the-judicial-system/the-start-of-operation-of-the-lithuanian-court-e-services-portal-e.teismas.lt/1404>) enables any citizen or company to file a claim, upload documents and pay the stamp-duty online.

23 Transforming courts and tribunals, fifty-sixth report of session 2017-19, downloadable here: <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/976/976.pdf>.

24 A.J. Schmitz, 'Expanding Access to Remedies through e-Court Initiatives', *Buffalo Law Review*, Vol. 67, No. 1, January 2019; and Case Studies in ODR for Courts: a view from the front lines, version 1.0 adopted on 29 November 2017, JTC Resource Bulletin.

25 Mediators Beyond Borders International is doing an amazing job in this field. Browse their website to learn about their mission and achievements. Available at: <https://mediatorsbeyondborders.org/>.

26 Such as NetCase, Modria, e-Just and others.

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necessary to analyse what has happened in the last two decades to understand why online justice is lagging behind and where we have failed in building online systems. I came to the following conclusions to avoid common and major mistakes in the future.

First, there has been reluctance on the part of several stakeholders to adopt technology, lack of trust in resolving disputes online, in addition to the fact that nobody wants to be the first user of a new system, and fear of insufficient security, which is wrong. People must stop thinking whether access to justice online is possible. Many of us have built platforms which were used successfully but were regrettably interrupted for the reasons developed in this article. Online justice is not science fiction. Decisions makers should not be bystanders; they must take bold initiatives and be innovators; otherwise we will get nowhere.

Second, dispute resolution practitioners fear losing business, and people fear that technology is eliminating many jobs. The reality is that it also creates new jobs that represent different opportunities, just as the industrial revolution changed many jobs owing to the transition to new manufacturing processes in the late 1700s and early 1800s. Transition periods and adaptation may be successful if change is properly anticipated and if people are accompanied and trained.

Third, building ODR platforms and interrupting the services soon after is the worst of all. Wasting important investments made instead of building on the work achieved and the experience gained, and thus upgrading systems, is a phenomenal mistake. Moreover, discontinuing platforms is disappointing for users who end up perceiving ODR as science fiction. Continuity is essential and is a good business plan.

Fourth, limiting the project to building a platform is another common mistake. Building platforms is not like building and delivering a house. It must be compared to bringing up a child who needs continuous care. Sadly, those who invest funds in building platforms do not understand the benefit of long-term projects and grant more importance to immediate income benefit as opposed to sustainable solutions. It is therefore essential to have long-term business plans and proper budgeting.

Fifth, we run the risk of missing the objective of a platform if we neglect time and effort on drafting detailed and clear specifications, as is commonly done. Similarly, being too ambitious is wrong; we need not build pipelines if they are not needed. The budget must be used wisely by building projects in phases and moving on to ensuing phases after consolidating the previous ones. It is sometimes useful to slow down while taking measured risks; otherwise no progress is possible. Being ambitious is positive, but being realistic and revising priorities is wiser. Moreover, we cannot build platforms on assumptions, but must take into account the expectations of end users who must be involved in the tests after each phase. Taking users' feedback into consideration to improve the system shows that their opinions matter and contribute to the success of a platform. A customer service is similarly another factor of success. Furthermore, platforms must be user friendly and accessible to any layperson and must be inclusive so that no one is disadvantaged.



Sixth, a lack of common think tank may contribute to project failure. Sharing experience with peers, avoiding reinventing the wheel and learning from existing mechanisms may help to avoid mistakes. Improper or insufficient market survey may equally increase the risk element.

Seventh, another major failure is the lack of regular promotion of ODR. In addition to dissemination, which has been very poor, users need to be familiarized with programmes through trainings and presentations. You trust what you see and test. Marketing a project on a regular basis and familiarizing users with ODR are components of success.

Eighth, hard data reporting about numbers and proven results is a missing component. If providers do not publish annual data on cases registered and solved, and information such as types of disputes and remedies offered, users who visit the ODR platform will not know whether the provider is active and reliable. Publishing reports about services provided is nowadays a common practice that should not be neglected. Similarly, feedback collected and analysed should form part of the reports in order to share the users' opinions and show that the system is being used and to demonstrate how the providers respond to any need expressed.

Ninth, a bad choice of technology suppliers is the beginning of a long and painful journey. While it is extremely difficult to find proper developers, as there are several who pretend to be capable but do not deliver, investing time in analysing offers by bidders from various countries before making a choice is certainly wise. To the extent possible, choice should not be dictated by considerations of a lower contract price.

Tenth, lack of information about ODR providers, lack of predictability in the processes, striking differences among services offered have discouraged users. No centralization of information exists to assist users in learning about ODR providers and processes and potential remedies to enable them to make a learned choice. Similarly, the type of information that ODR providers should display on their platforms is not standardized. Useful information that users need to have is mainly (i) the contact details of the provider with names and roles of people operating the platform, (ii) whether the provider is a member of a certification programme confirming that it complies with standards,<sup>27</sup> (iii) when it started operating, (iv) settlement mechanisms used, (v) types of disputes handled (e.g. family and divorce disputes), (vi) up to what amounts in dispute, (vii) in which countries and languages, (viii) the procedural steps with an average duration to resolve a dispute, (ix) potential costs, (x) whether the decision is binding or non-binding, (xi) what are the other available remedies if a party does not participate or does not carry out the decision and (xii) annual statistics. Therefore, centralization and standardization of information are essential to create confidence in the resolution systems offered online.

27 Ethical Principles for Online Dispute Resolution (<http://odr.info/ethics-and-odr>) and ICODR Standards (<https://icodr.org/standards>); see also P. Cortes, 'Online Dispute Resolution for Consumers in the European Union (Open Access)', Routledge Research in IT and E-Commerce Law, September 2010, p. 62.

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### 3 Conclusion

We must make online justice a priority and bring justice online, as with any other service existing online. Any litigant has a right to access justice. Success of online settlement of disputes is everyone's business, including public and private justice. Progress is in our hands. State courts' backlogs in all jurisdictions are enough to convince all stakeholders, governments, judges and lawyers to use other methods for settling disputes. Online justice in the 21st century is indispensable, and any investment made now will benefit the users, the legal professionals and the courts in the short, medium and long term. Creating ODR systems for resolving cross-border, low-value, high-volume disputes, in B2C, B2B, C2C disputes, is essential. Building platforms may be a challenge but is perfectly feasible. We can learn from existing mechanisms. A redress mechanism through ODR is not science fiction, nor rocket science. It requires pragmatism, common sense and perseverance.