

8 We walked on the moon but justice is not yet online !

Technology revolution and Online Dispute Resolution (ODR)

Nous avons marché sur la Lune mais la justice n'est pas encore en ligne !

Révolution technologique et résolution de litiges en ligne



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Synthèse ¹

La technologie a révolutionné le monde au cours du dernier siècle, comme rien auparavant. Elle a facilité les communications et a donné accès à toute la planète à des millions d'informations, de nouvelles et de contacts. Les habitants du monde entier utilisent le *world-wide-web* pour leurs besoins quotidiens. Presque tout est disponible en ligne, sauf la justice ! Après près de 70 ans de progrès en matière de technologie et de télécommunications, il est grand temps que la justice publique et privée offre un accès équitable et facile à travers le monde.

Les plateformes de résolution de litiges en ligne proposent pléthore de processus pour divers types de différends. Elles offrent des fonctionnalités uniques pour gérer des millions de conflits et permettent d'augmenter considérablement l'accès à la justice devant toutes les juridictions. Il est essentiel que tous les acteurs de la société prennent conscience de ce potentiel et l'utilisent.

La résolution de litiges en ligne (ODR) est une solution clé pour l'accès à la justice ². Les fournisseurs ODR ont essayé de suivre la voie du changement rapide, mais les tribunaux étatiques et les organismes de règlement des différends évoluent trop lentement, ce qui ne correspond pas à un monde en évolution rapide.

Le commerce et les services en ligne ont été des industries florissantes au cours des deux dernières décennies. Les fournisseurs ODR ont construit des plateformes basées sur leur propre expérience, offrant tous types de mécanismes pour résoudre des conflits civils et commerciaux. Pour illustrer les différentes possibilités, les exemples de Modria, e-Just, AnOliveBranch et HiiL seront présentés. Bien que ces initiatives restent limitées, elles peuvent être source d'inspiration pour offrir des services d'ODR. Les processus ODR supposent que tous les utilisateurs aient accès à une technologie, ce qui est réaliste aujourd'hui, même dans des endroits reculés.

À travers le monde, quelques tribunaux étatiques ont mis en place des programmes dédiés et certains d'entre eux fonctionnent exclusivement en ligne, comme les tribunaux de Singapour, ou principalement en ligne, comme certains tribunaux en Chine, aux Pays-Bas et en Colombie-Britannique. La Malaisie a lancé un *cyber-court* en septembre 2016, spécialisé dans la cybercriminalité. Enfin, un plan ambitieux pour la « Cour en ligne de Sa Majesté » est actuellement en cours d'implémentation au Royaume-Uni. Au 21^e siècle, un système judiciaire en ligne est incontournable. Tout investissement effectué maintenant profitera aux utilisateurs, aux professionnels du droit et aux tribunaux à court et à long terme.

Quant aux institutions de règlement des différends, peu d'entre elles ont offert ou offrent encore à leurs utilisateurs un service de dépôt en ligne et d'administration des différends sur des plateformes dédiées.

1. L'article complet est disponible en version anglaise ci-après. – L'auteur remercie Cristian Boruzi qui a rédigé le résumé en français

2. À venir UNESCO (Paris), *Conference on « Equal access to information & justice – Online Dispute Resolution »*, on 12 & 13 June 2017 ; le programme : www.iccwbo.org/Training-and-Events/All-events/Events/2017/Equal-Access-to-Information-Justice-Online-Dispute-Resolution.

L'Organisation mondiale de la propriété intellectuelle (OMPI) a prouvé que le règlement des litiges des noms de domaine pouvait être réglé exclusivement et efficacement en ligne. La Cour internationale d'arbitrage de la CCI a offert des services en ligne sur sa plateforme, – ou NetCase un temps –, destinés à faciliter les communications entre les utilisateurs et le Secrétariat de la Cour dans un cadre convivial.

Certaines causes, dont la réticence à la technologie, empêchent les entreprises et les organisations de construire une plateforme dédiée. Cette réticence à la technologie peut être attribuée à une combinaison de facteurs dont l'expérience insuffisante dans ce domaine, et l'approche conservatrice des tribunaux étatiques, des organisations de règlement des différends et des cabinets d'avocats. Or, l'industrie juridique ne pourra continuer à se montrer efficace à long terme qu'en adaptant ses services aux besoins du marché et au 21^e siècle. Donner accès à la justice par le biais de mécanismes en ligne permet de surmonter la difficulté que certaines personnes peuvent avoir pour accéder aux tribunaux et aux avocats, principalement pour des petits différends. Cette facilité est tout simplement équitable.

La mise en place d'une telle plateforme requiert : une expertise dans le domaine, d'être réaliste dans la conception d'un projet, et conscient de la nécessité de budgétiser le projet en prenant notamment en considération le coût pour la construction de la plateforme, son amélioration constante et son développement au moins pendant cinq ans après sa livraison.

L'expérience montre que les projets en ligne progressent rarement comme prévu. Utilisateurs et professionnels doivent comprendre que l'informatique est en mutation permanente. C'est à cette condition seulement qu'il sera possible d'envisager des projets réalistes. Une approche judicieuse consisterait à mettre en œuvre les améliorations progressivement.

La clé du succès pour des caractéristiques bien pensées et préparées est d'inclure tous les utilisateurs finaux d'une entreprise, dont l'expérience et les retours sont indispensables. L'expérience montre également que confier un projet web à des personnes inexpérimentées dans des programmes en ligne ou n'ayant pas assez d'expérience dans l'expertise requise pour construire des systèmes dédiés, au motif qu'un regard neuf serait utile, a souvent été un échec.

En outre, il est extrêmement difficile de trouver des fournisseurs de technologies prêts à investir du temps dans la compréhension d'un projet et à contribuer à la rédaction de spécifications adaptées aux besoins des clients et du projet.

Il est grand temps de construire et d'offrir des services de règlement des différends en ligne au 21^e siècle permettant à toute personne privée d'accès aux tribunaux et à la justice ou se trouvant dans des endroits reculés, de chercher réparation. Étant donné que des options existent et qu'elles peuvent offrir l'accès à la justice, empêcher un tel accès est un déni de justice. Construire des plateformes est réalisable avec l'expertise, le bon sens et la détermination. Nous ne pouvons pas arrêter le progrès et l'innovation, alors pourquoi ne pas rejoindre le processus.

Technology has revolutionised the world in the last century like nothing before. It has facilitated communications and has given access to the entire earth to zillions of information, news and contacts. People around the world use the world-wide-web for their daily needs. Almost everything is available online except justice ! After nearly 70 years of progress in technology and telecommunications, it is high time public and private justice offer fair and easy access to justice around the globe. Platforms of online dispute resolution offer a plethora of online processes for various types of disputes. They offer unique features for handling millions of disputes and have the potential to significantly increase access to justice across all legal jurisdictions. It is essential that all constituents of the society become aware of this potential and use it.

1 - Technology has revolutionised the world in the last century like nothing before. Over 6 000 satellites were launched since the first successful launch of satellite Sputnik in 1957. Mars and its moons have been a target for many spacecraft with flyby, orbiter, lander and rover missions visiting the planet since the 1960s. Men walked on the moon in 1969 and in 1971 a satellite landed on planet Mars. Electronic computers started developing in the 1950s. Personal computers and workstations spread in the late 1980s and internet entered in our homes as of the 1990s. Mobile telephones became an indispensable tool in the late 1990s. A lot has happened since the middle of the 20th century and almost all the world population is connected through internet or mobile phones.

We are invaded by technology and communication and are using them as an indispensable tool in our daily life. Technology has facilitated communications and has given access to the entire earth to zillions of information, news and contacts. Trade has been taking place online for the last two decades, and almost all services are purchased online, such as bookings or registrations at universities. Governmental services are provided online, including applications for visas and payment of taxes for instance. People around the world use the world-wide-web for their daily needs, naturally, like taking a cab or eating a sandwich. Instantaneous access to information has become normal and indispensable, and online services have made our life easier. Almost everything, good – and even bad regrettably – is available online.

2 - Everything ? No, not exactly. You would think that in the interconnected world in which the humanity lives and works, justice is connected to people. But justice has not yet succeeded to cross the border of offline to go online and this deprives a number of people from access to justice ! It is a question of human rights and of equal access to justice. Any individual has the right to have his/her case heard and the right to remedy. Therefore the traditional business model no longer matches with the needs of the society. Considering that options exist and can offer access to justice to any individual including in remote places where internet exists, preventing such access is a denial of justice !

Justice is available online to a very limited extent and in a few countries only. Is this conceivable ? How about people who cannot afford going to courts or who are in remote places, have they other means of seeking remedy ? Do we still need to use paper documents and snail delivery services to file cases with state courts and conduct dispute resolution offline in the 21st century ? After nearly 70 years of progress in technology and telecommunications, it is high time public and private justice gets on board and offers fair and easy access to justice around the globe.

3 - Platforms of online dispute resolution began appearing two decades ago offering a plethora of online processes for various types of disputes. Online Dispute Resolution (ODR) refers to the use of technology to support the settlement of civil and commer-

cial disputes. ODR has grown exponentially and offers unique features for handling millions of disputes annually and has the potential to significantly increase access to justice across all legal jurisdictions. Today, in an era where technology is naturally part of our life, individuals, businesses, organisations, state courts and other constituents of the society are not familiar or sufficiently aware of this potential or are aware of it but do not use it, and miss the opportunity of benefiting from a practical, accessible and affordable means to resolve disputes.

Equal access to information and justice will be at the centre of discussions at a two-day conference to which all profiles of the society are invited to take part³. The objective of this conference is to demystify ODR which is underexplored and to explain why and how it offers increased access to information and justice, a great value in all societies and of particular importance in emerging economies, conflict zones and remote places where individuals do not even have the benefit of judiciaries to resolve their disputes. The ultimate result is undeniably the benefits that individuals, societies, businesses and courts draw from facilitated resolution of disputes, avoidance of bureaucracy and congestions of courts, and the right of access to justice.

4 - The author has since year 2 000 pleaded in favour of using ODR to resolve all types of disputes, partially or exclusively online. Users and consumers expect an efficient and rapid redress system that they can afford for their low value disputes. Companies need to do business not to resolve disputes and cannot afford wasting time, money and energy in getting redress. Giving access to justice and redress systems through online dispute resolution constitutes the main discussion in this paper in advance of the above mentioned conference. It explains why online programmes may have an impact on our civil, societal and commercial life in general and how it benefits the administration of dispute resolution in particular. ODR is a key solution of access to justice (1). The author also shares some views about avoidable mistakes and the undeniable benefits of working online, any reluctance in this respect being unjustified (2).

Issues related to legal techs and legal start-up, artificial intelligence, smart contracts, tools and platforms used by the legal profession, and other related technology applied to legal matters will not be discussed.

1. Key solution of access to justice : Online Dispute Resolution mechanisms

5 - The issue of technology and improved access to justice through dispute resolution services is regularly addressed at the

3. UNESCO (Paris), Conference on « Equal access to information & justice – Online Dispute Resolution », on 12 & 13 June 2017 ; the programme is available on <http://www.iccwbo.org/Training-and-Events/All-events/Events/2017/Equal-Access-to-Information-Justice-Online-Dispute-Resolution>.

Global Pound Conferences (« GPC »)⁴. The Queen Mary International Dispute Resolution Survey of 2015 about Improvements and Innovations in International Arbitration⁵ reported about the improvements requested by users in international arbitration which include the need for an electronic case management and for shifting to electronic over paper filings. ODR providers have tried to follow the path of rapid change (A), but state courts (B) and dispute resolution organisations (C) are moving too slowly which does not match with a fast-moving world. The latter must disrupt their traditions by offering what the users need and not what the dispute resolution organisations can offer, as underlined by Louis Degos in a paper in which he explains the concept of disruption and discusses about innovations related to access to services in a world where sharing seems more adapted to the modern life than possessing⁶.

A. - Online Dispute Resolution providers

6 - Online trade and services have been a booming industry in the last two decades. Businesses realised very quickly that transactions will potentially generate disputes and that they will need online services for resolving e-commerce disputes. ODR providers blossomed⁷ and offered all types of mechanisms to resolve disputes, such as computer assisted negotiation and automated settlement⁸.

Some businesses have entrusted universities to undertake pilot programmes for resolving disputes online ; this was the case of eBay that adopted an online mechanism following a pilot programme⁹. They have used and keep using technology to settle thousands of disputes each year or, as in the case of eBay and Alibaba, to handle millions of disputes quickly, effectively and inexpensively. These mechanisms have also been used for resolving small disputes or disputes in certain business sectors such as insurance/re-insurance. ODR facilitates transactions and eliminates trade obstacles.

Others built platforms to offer various mechanisms of online settlement of disputes based on their own experience and on potentials of business generated by this type of online disputes, like Smartsettle, iCourthouse, Mediation Room¹⁰.

7 - To illustrate the various possibilities of online mechanisms to solve civil and commercial disputes, the examples of Modria, e-Just, AnOliveBranch and Hiil are hereafter provided.

The team behind Modria is the one who helped eBay and PayPal solve millions of cases¹¹. It has drawn on its experience and around 2010 it built a platform to assist parties resolve their disputes online. Modria provides services to public organisations (consumer protection agencies in Canada, tax assessor counties throughout the US, legal air boards in the Netherlands, United Kingdom, and Canada), and private companies (mostly in the context of e-commerce). It does not itself solve disputes.

Whereas e-Just is an arbitration start-up launched in 2016, providing an online settlement of commercial disputes through a simple, swift and confidential procedure¹². It is a classical arbitration procedure with an innovative process adapted to the modern world. While being a standard arbitration procedure ending with enforceable awards benefiting from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it is a much simpler procedure conducted online, awards are rendered much faster and with limited costs which do not compare with usual arbitration costs. e-Just has already settled a number of disputes and the firm is expanding rapidly. It administers cases for amounts in dispute up to one million Euros and intends to administer cases for higher values in the future.

AnOliveBranch is yet another interesting example. It is a novel, quick, economic and simple form of mediation process. Individuals, enterprises and dispute resolution professionals can use it to settle civil, personal and commercial disputes. It enables those professionals to do their jobs faster and at low-cost, and serve their clients online or offline, present or remotely. Designed as a « friendly » mediation process, its 3-stage approach delivers early effective intervention for swift resolution. The platform was launched in 2016¹³.

Finally, the Hague Institute for the Internationalisation of Law (Hiil) is an organisation that describes itself as being a community of people who are dedicated justice change catalysts and movers, reflected in its logo bearing the words « Innovative Justice »¹⁴. Their « mission is to sustainably improve the justice journeys experienced by users of the justice system when they most need it ». One of their missions the « Rechtwijzer Project » existed in the Netherlands for over ten years which resulted in the first ODR platform that succeeded in innovating online mechanisms for complex relation disputes like divorce and landlord-tenant issues.

In 2016 the European Council implemented an ODR initiative recognising it was instrumental to fostering cross-border trading. The European ODR platform was developed by the European Commission with the objective to help consumers and traders resolve their disputes out of court at a low cost, simply and swiftly¹⁵.

8 - While these initiatives remain limited, inspiration may be taken from the successful mechanisms and projects to offer ODR services. It is true that ODR projects require funds and experts, and information technology developers capable of developing workable algorithms, but such type of projects are not the most complicated.

Civil and consumer claims represent nearly half of the disputes submitted to courts which increase their congestions or which leave consumers without remedy if they do not submit their claims to the courts. If these claims are settled through online mechanisms, this will significantly reduce the backlog of state courts and the time required to obtain a court decision, and will notably increase access to justice.

Most of the consumer disputes may be settled with the help of online providers. If we consider one basic example of classical claims by unsatisfied clients, in general the dissatisfaction is generated namely by (i) the non-delivery of the product or the service purchased (ii) a late delivery (iii) the non-conformity of the product or the service with the description provided, or (iv) a defective or malfunctioning product or service. The standard

4. See <http://globalpoundconference.org> for further information.

5. www.arbitration.qmul.ac.uk/docs/164761.pdf.

6. L. Degos, *Un nouveau décalogue pour le futur exercice des professionnels du droit ? : RPPI 2016, dossier 5 (A new decalogue for the future exercise of legal professionals)*. It is a fascinating discussion about how our environment evolved and continues to evolve.

7. For further information about the multiple ODR providers and mechanisms see G. Kaufmann-Kohler & T. Schultz, *Online Dispute Resolution challenges for contemporary justice* : Ed. Kluwer Law, 2004 ; and also Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* : Routledge Research in IT and E-Commerce Law, 2011.

8. SquareTrade was one of the first to offer ODR services ; it modified the type of its services over the years.

9. eBay was originally called AuctionWeb : <http://mashable.com/2010/08/07/eBay-facts/#5rurBJMNBuqh>.

10. www.smartsettle.com. - www.icourthouse.com. - www.themediationroom.com.

11. <http://modria.com/>.

12. www.ejust.fr.

13. www.anolivebranch.com.

14. www.hiil.org.

15. http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm.

remedies offered by merchants dealing fairly with such problems and which keep the clients satisfied are usually (i) to deliver the product or service and potentially offer a discount on a future purchase (ii) likewise, to offer a discount on a future purchase, (iii) and (iv) to reimburse the client or to provide it with another product or service. Merchants may offer out of courts redress mechanisms either through an online claims and remedies service or through the services of an ODR provider. Issues in consumer disputes are more of facts rather than law and solutions proposed are standard and adapted to typical problems.

9 - The International Chamber of Commerce (ICC) published a Policy Statement on Jurisdiction and Applicable Law in Electronic Commerce dealing with B2C transactions and consumer protection¹⁶. The Statement recommended to governments a systematic approach for resolving consumer disputes by utilising a company's internal customer satisfaction mechanisms, or utilising an online alternative dispute resolution, and only if a dispute persists, then to resort to legal action. This recommendation remains true and should be adopted for an easier administration of disputes, for clients' satisfaction and for avoiding the congestions of courts.

10 - Although ODR providers blossomed in the last two decades, a significant number discontinued after a short while of existence (for example clickNsettle which provided arbitration and mediation services for all kinds of disputes) for various reasons, namely : lack of sufficient visibility as potential users were not properly informed of their existence, lack of proper information on their website related among others to the types of services they offered, confusing multiplicity of unclear mechanisms, lack of centralisation and organisation of information related to the multiple providers and the services they offered, absence of trust in unknown providers and mechanisms, lack of sufficient marketing, and therefore lack of business. The author recommended ways to solve these problems, namely through (i) standardisation of some practices in order to avoid striking or chocking differences and to offer the users predictability, (ii) centralisation of information about the providers to enhance ease of access to information and enable potential users to make an informed choice, and (iii) promotion of ODR mechanisms as an out-of-court settlement procedure¹⁷.

An attempt was made to have standards with the UNCITRAL Working Group III on ODR. After several rounds of discussions during which a consensus was not always achieved, the group has come up with a draft non-binding descriptive document reflecting elements and principles of an ODR process. The document was titled « Draft Outcome Document Reflecting Elements and Principles of an ODR Process ». It provides basic guidelines for potential users and providers who intend to put in place or use online mechanisms to resolve disputes¹⁸.

Offering ODR mechanisms helps level the playing field as resolving disputes online does not require appearing before a court. ODR processes presuppose that all users have access to technology which is largely possible today even in remote places. This eliminates the financial burden incurred in court proceedings, offers the users equal and simultaneous access to the information, and prevents parties from being advantaged or disadvantaged by their temporal proximity to a court. Resolving

disputes online also enhances the participants' comfort level. This is especially true for unrepresented parties who may feel more at ease making its submissions online because it gives them time to think and write, instead of having to answer on the spot. Also, some people may feel more comfortable expressing themselves in writing than in speech.

Finally, displaying online some decisions rendered for example in consumer disputes, enhances confidence and offers users a predictable outcome of the disputes.

B. - Online systems for state courts

11 - Only a few state courts have created dedicated programmes and some of them today operate exclusively online like the courts in Singapore, or mainly online like some courts in China, the Netherlands and British Columbia.

Malaysia has started in September 2016 its first cyber court specialising in hearing cyber criminal cases, including bank fraud, hacking, falsifying documents, defamation, spying, online gambling¹⁹. The court hopes to expand the e-court services to civil cases. The Singapore courts went online almost two decades ago and offer online facilities to all profiles and for various types of disputes, including self-represented users in civil and criminal matters, small claims tribunals, claims against neighbours, protection from harassment, a dedicated page for lawyers²⁰.

An ambitious plan for « Her Majesty's Online Court »²¹ is currently being implemented in the United Kingdom. In a press-release about the UK government radical plan to digitise the management and administration of justice, Ben Rigby cites the Lord Chancellor who stated that : « We want a justice system that works for everyone. That means creating a system that is just, efficient and simple. We have the tools and the technology to cut unnecessary paperwork, to deliver swifter justice and to make the experience more straightforward »²². This statement summarises perfectly well how justice should be made available for everyone.

12 - An online court system in the 21st century is indispensable and any investment made now will benefit the users, the legal professionals and the courts on the short and long run. The allegation that such system is unrealistic because it requires courts and users to be technologically-savvy does not stand. There exists ways to train and guide users. It is rather unrealistic to stop progress and innovation on the ground that such projects are difficult. First and in general, all generations of people use technology every day in their private and professional life and have become naturally savvy at least with intuitive online programmes. Second, every firm and organisation benefits from the support of an information technology team who can train and assist the users. Third, where necessary, a short demo may be made available on the platform to guide users. Transition may take some time but successful online services will help speed up any transition.

Some governments have proved that working online is possible ; others will hopefully follow. Changes are indispensable in a digital age to cope with the world in which we live and to avoid being off tune. The backlog of state courts may be significantly reduced if consumer disputes, small and even some large

16. Policy Statement on Jurisdiction and Applicable Law in Electronic Commerce dated 6 June 2001 (document n° longer available).

17. See from the author, *Where is everyone going with Online Dispute Resolution (ODR) : RD aff. Internationales 2002*, n° 2, p. 167 at p. 171-178 ; and *Now where do we stand with Online Dispute Resolution (ODR) : RD aff. Internationales*, 2010, n° 6, p. 563 at p. 571-575.

18. See <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/089/59/PDF/V1508959.pdf?OpenElement>.

19. See www.nst.com.my/news/2016/09/169883/malaysias-first-cyber-court-begins-operations-today.

20. See <https://www.statecourts.gov.sg/Pages/default.aspx>.

21. www.themediationroom.com/single-post/2015/02/16/Her-Majestys-Online-Court.

22. B. Rigby, *Digitising justice by degrees : Commercial Dispute Resolution (CDR)*, 20 sept. 2016 : www.cdr-news.com/categories/litigation/6715-digitising-justice-by-degrees.

civil and commercial disputes were resolved online, either through an online court system or through private ODR providers as explained above. Resorting to state courts should be the last step. Justice is rendered much faster and parties are satisfied with the swift decisions rendered while continuing their life and their business without wasting time and money.

C. - Online services of Dispute Resolution Organisations

13 - The World Intellectual Property Organisation (WIPO) has been offering its services for settlement of domain names disputes since 1999 and has proven that settlement of such kind of disputes can be settled exclusively and efficiently online. It is unfortunately a unique example as no other dispute resolution institution has succeeded this challenge so far. The ICC created a dedicated webpage on its website for online filings only for the settlement of gTLD domain names disputes in 2012 when it was selected as one of the institutions in charge of the settlement of such disputes.

A very small number of dispute resolution institutions has offered or still offer to their users the service of online filing and administration of disputes on dedicated platforms. Their reluctance to offer dedicated platforms is probably due to the costs of building online programmes, insufficient experience in this field on which to build and the difficulty of finding efficient technology suppliers capable of building such platforms.

Some organisations have offered online services for a period but have not persevered when they were faced with some problems to solve ; this was the case of the International Court of Arbitration of the ICC with the NetCase platform. Drawing on her experience, the author shares her views about the success of the platform and the reason why this service was suspended. This will help illustrating that it is perfectly possible to create online programmes which are efficient, provided some pitfalls are taken into consideration as explained in the second part of this paper.

14 - NetCase was a platform created for ICC arbitration users to enable parties and arbitrators to conduct their procedures in a dedicated environment²³. It was meant to facilitate communications between them and the Secretariat of the ICC Court in a user-friendly setting, offering them instantaneous and round-the-clock information, allowing exchanges in a secure environment, and enabling them to have access to documents during a hearing without having to carry around mounds of paper. It was not meant to rule out the transmission of documents offline, nor did it imply that the case would be conducted exclusively online or that there would be no hearings. It was simply an option available to users, offering security, rapidity and greater comfort in the conduct of the procedure.

NetCase offered a significant number of added values. Every communication and document travelling between the users' browsers and NetCase was encrypted. As soon as a document or a message was posted in NetCase an alert was sent to all players. The speed of posting was equal to an email with the important difference that documents and messages did not travel unprotected like emails, but within a secured system to which access was restricted. NetCase therefore combined speed and security. All documents were stored in an intranet devoted to a given case and in a chronological order. Documents were assigned to a specific section depending on whether they were

correspondence, memoranda, procedural orders, Terms of Reference or awards. It was easy to identify not only the documents themselves but also their origin. A powerful search engine offered the huge advantage of searching documents no matter their form and their language. The platform comprised different sections with different kinds of information, namely an address book, an overall picture of the case with information about the progress of the proceedings, information related to the constitution of the arbitral tribunal, details about the financial aspect of a case, a calendar of the proceedings. Players could communicate amongst themselves in dedicated spaces only accessible to the group, for example only between the arbitrators.

It was organised in a very pragmatic way. Information and documents were displayed in a standard manner and in a single environment, thereby avoiding the risk of conflict and confusion likely to arise if counsel and arbitrators use their own filing systems. A uniform system of organisation enabled all players to see the same material, in the same presentation, in the same environment, and at the same time.

Upgrades were regularly undertaken and once or twice a year a novelty was added, sometimes simple such as a chronological list of documents, some other times more complex such as a more powerful search engine. The upgrades followed evaluations issued by users at the end of a case whereby they shared what they have appreciated and the improvements they would recommend. In a big majority of cases conducted on NetCase over the few years of its life, users were very satisfied and therefore very disappointed when the service was no longer available. In one huge case involving a state party, an army of lawyers and para-legals on each side, thousands of documents posted on NetCase, the entire case was administered through NetCase and the parties were immensely satisfied. In two cases satisfaction was not complete, because in one of them the arbitrator was not able to organise the space as he wished – but this was not the purpose of NetCase in its initial version – and in the second case, a bug in the system did not allow on one or two occasions the sending of an alert upon the posting of a document, although the bug was quickly repaired and the parties and the arbitrators were immediately informed by email that a document was posted.

The reason for the above details about NetCase is precisely to explain that, while building such a platform requires expertise in the field of the service to be offered and determination, it is not rocket science and dispute resolution institutions can very well offer to their users an online mechanism based on their rules. It obviously requires budgeting for such project properly as explained below.

Despite the success of NetCase and the overall satisfaction of the users who found the system practical and useful, the ICC decided to suspend this service awaiting the construction of a more modern platform built with new technology. Such platform does not yet exist. The reason for this decision was due to the fact that no budget was allocated for further fixings and improvements to a platform considered outdated because it was built in the early 2000, although it was working well.

2. Avoidable mistakes and undeniable benefits of working online

15 - Why are ODR mechanisms not widespread? In this section the author shares her experience to explain some of the reasons stopping firms and organisations from building a dedicated platform, namely (A) the reluctance to technology, (B) the problems of budgeting online projects (C) the difficulty of conducting realistic projects (D) the complexity of drafting requirement specifications by learned people, and (E) the difficulty of

23. For more information see from the author *NetCase : a new ICC Arbitration facility* : *Bulletin of the ICC International Court of Arbitration*, 667 *Special Supplement on Using technology to resolve business disputes*, 2004, p. 53. – *NetCase : Keep going where progress leads you* : *University of Toledo Law Review*, 2006, vol. 38, n° 1, p. 417. – *New upgrades to ICC NetCase* : *Bulletin of the ICC International Court of Arbitration*, 2008, vol. 19, n° 1, p. 23.

finding appropriate technology suppliers, engineers and developers.

A. - Reluctance to technology and denial of justice

16 - The reluctance to technology to resolve disputes online makes one wonder whether such reluctance is due to insufficient experience in this field on which to build, or whether state courts, dispute resolution organisations and law firms are very conservative and privilege tradition over efficiency that technology permits. It may be a combination of both and potentially other factors. However, no matter the variety of factors, working offline is no longer realistic in a world where justice should be accessible to all.

It is true that reluctance to technology may be in part due to the lack of ideal technology solutions and to solutions which may not correspond to certain expectations. Any platform needs in general to be customised to the needs of the client on the one hand, and on the other hand, if state courts, dispute resolution organisations and law firms do not make the effort of testing solutions and improving them, who else can do it? Start-ups are taking the initiative of filling the gap, but absence of cooperation between the various constituents is probably not a good policy, and start-ups cannot alone fill the gap.

State courts and dispute resolution organisations have a responsibility to build online services and a duty to offer efficiency to their users. The legal industry can continue to be efficient on a long run only if it adapts its services to the needs of the market and to the 21st century. Dispute resolution organisations have the expertise in administering disputes, all they need is to add technology to their expertise and build platforms to offer streamlined processes.

17 - Lawyers may fear that ODR will take away clients and will make them lose business. This is utterly wrong. First, since the ODR boom no law firms complained about losing business. Second, individuals and very small businesses who cannot afford hiring a lawyer to go to court or to file a case with a dispute resolution organisation are not among existing clients and probably not potential clients that lawyers fear to lose. Existing or future clients who need the services of lawyers will call on lawyers anyway irrespective of whether dispute resolution organisations offer online services and whether the online procedure is partially or exclusively conducted online. Third, if a case requires the assistance of a lawyer and the submission to court, the client will use this option; if the case does not warrant lawyers' costs and if a client cannot afford using the services of lawyers, the client will have the option of using an online mechanism and seek remedy which otherwise would not be available to it. If such mechanism does not exist, in a significant majority of cases the clients will not file a case and will have no remedy, which is not only unfair but is also denying justice to a person who cannot invest in the expenses of a procedure with a lawyer. Lawyers will not lose business – quite to the contrary – they may gain in efficiency and save time and money.

Also, the fear of losing control over a case if conducted online is groundless. Technology is made to facilitate the life of the users and the professionals and can in no way replace lawyers, professionals of dispute resolution and judges.

18 - With respect to state courts, offering the lawyers the possibility to file and access documents online round the clock, to ask for a postponement of pleadings or any other task, makes their life easier. In addition, instead of using emails, using an online space dedicated to a given case where documents and communications can be accessed makes life easier for the clerks and the lawyers, and makes work more efficient.

Giving access to justice through online mechanisms and bypassing courts and lawyers to offer remedy to people who cannot

afford them mainly in small disputes, is simply fair and does not support controversy. It is obviously very important to make sure that online dispute settlement mechanisms offer proper services and lawyers can help in this process. They bring their experience, and joining the process can only be beneficial to all. They prove that their objective is not only to earn living and generate revenues for their law firms, but is also meant to assist people in obtaining remedy. This creates confidence for users and may potentially bring new clients who initially did not want to go through the expense of hiring a lawyer, but who may consider that some instances warrant the services of a professional.

State courts' congestion in all jurisdictions around the globe and the courts' backlog should be enough to convince governments, judges and lawyers that other methods of settling disputes should be made available and should be able to address denial of justice. Small disputes which may be settled online will reduce such congestion and backlog significantly. A change will be rapidly visible after the implementation of online dispute resolution mechanisms offering a private justice mainly to individuals, consumers and small businesses. As above mentioned, online services to settle civil disputes for instance already exist in the US, Canada and the Netherlands.

Solutions and mechanisms exist and if they do not yet exist, they may be built by learning from existing schemes or by building mechanisms from scratch. As above mentioned, it is not rocket science. It only requires knowledge of a field, experience, common sense and to be convinced about the project. Once convinced that an online mechanism to resolve disputes or to assist in administering resolution of disputes is necessary, the next steps are the budget, the specifications and finding the proper suppliers to build the online programme.

B. - Budgeting for online projects

19 - One of the most common mistakes some businesses do is budgeting for the building of a platform like they would budget for the building of a house. Building a house may sometimes involve overrunning of the initial costs, but once a house is built and all equipment installed, a family may live in it. It can improve the equipment and refurbish the house after a few years, but it remains a house which can be inhabited as soon as finished. Building a platform is different, because unlike a house in which a family can live for several years before refreshing it, it is not possible to live with a platform for several years if it is not constantly upgraded. A house may potentially be considered old after twenty years, whereas a platform may become outdated less than two years after its delivery.

A platform is rather like a child. Once a child is born, the child must be dressed with a different size of cloths every few months or every year, and it needs constant care. Likewise, a platform needs constant care and a plan of development or improvement over a few years.

20 - The budget must therefore include the cost of building the platform, improving it and developing new features at least over five years after its delivery. The cost of building the platform comprises among others, not only the supplier who will build the platform but also the project manager who is an indispensable intermediary between the computer engineers and the end users, as well as the team of end users who must work closely with the project manager and the engineers, the drafting of the requirement specifications, the server for hosting the future website and any related costs during the phase of the building and testing. Maintenance is as important as building the platform, because it must cover the costs for fixing any malfunction that may appear once the website is in production, despite all the tests conducted before delivery and which may have not revealed all poten-

tial weaknesses during the tests. Improvements may be necessary in order to upgrade any module used for the website such as a search engine.

Development of new features over the next months or years after delivery of a website is an indispensable aspect that some businesses miss. A website may have been well thought, built and tested, but the moment it goes live and is used by thousands of people, it is only then that the owner of the website may become aware of some features that users find useful. It also happens sometimes that users are so satisfied by the service that their expectations become higher and they request further improvements or new features. This by itself is a success. Making regular improvements helps securing the loyalty of the clients by showing them that their suggestions have been seriously considered, and is an excellent marketing tool. On this last aspect the ICC had succeeded to make regular improvements on the NetCase platform, but the budgeting on a long term was not sufficient and thus offering the services of this platform was jeopardised after a few years only.

Alleging that building a platform is costly without weighing the pros and cons does not constitute an accurate analysis. An online service for administering dispute resolution procedures carries with it a number of advantages for the society as a whole, for dispute resolution organisations, ODR providers and courts and not only for the users and the clients.

21 - First, repetitive administrative tasks may be significantly reduced with a computerised system which can remove some tasks from the staff in charge of administering the case load, like registering a case, preparing a list of documents, sorting and filing documents, issuing alerts messages for various steps of the procedure. Second, information and documents are available at all times and no need to copy a binder for any new comer to the procedure, be it a lawyer, an arbitrator or a joined party. Third, savings may be considerable, for instance by avoiding printing documents for all players in a case, dispatching them and archiving tons of documents. Forth, the staff no longer wastes time on administrative tasks that may be handled by the computerised system, and can use more efficiently its knowledge and experience on tasks that computers cannot perform (although artificial intelligence now tends to prove the contrary when sufficient data exists). In addition, the staff is freed from repetitive tasks and can put to benefit its time by offering additional services.

Users also do appreciate the costs saving and all above mentioned advantages. They welcome the facility of accessing information and documents round the clock, from anywhere and at any time. In addition to encryption, posting of messages and documents on a platform rather than emailing them avoids jamming email boxes, losing emails and sending emails inadvertently to recipients not involved in a case.

Time saving including on travelling is certainly an appreciated factor by all users and providers. Saving the environment is yet another benefit not sufficiently underlined by stopping the printing of tons of papers which waste trees and by avoiding using energy for travelling which affects the atmosphere.

Moreover and on a different aspect, visibility in the last two decades has become vital. Until ten years ago few firms and organisations had business development teams or marketing teams dealing with promotion and public relations, in addition to teams in charge of organising events. Today, every single firm, including law firms and organisations, has a team in charge of making the firm or organisation constantly visible on the market. They all publish newsletters and organise events. Showcasing about online services for dispute resolution and regular upgrades may be an important marketing tool. It offers immediate and wider visibility, locally and internationally. Aware of the benefits of online services, lawyers or their clients may be inclined to

choose an organisation or a provider as opposed to another that does not offer such facilities.

Therefore, the benefit of building an online platform to administer dispute resolution is for the short, the middle and the long term, and the return on investment can be relatively fast depending on the budget invested, the number of staff members benefiting from the computerised system, the time that the staff can invest in more important tasks and in offering additional services, and potentially the revenue generated by administering more cases.

C. - Realistic projects

22 - In most of the papers on ODR, the author has referred to a paper published by Information Security Solutions Europe in which it was remarked that « the one thing about IT that never changes is that it is in a constant state of change²⁴. The day users and professionals understand this indisputable fact, only then we will be getting closer to realistic projects. Unless a platform is a simple information webpage, no platform is an exception, and like any development, platforms need constant adaptation and improvements. This is necessitated by a number of factors namely, the technology which constantly evolves, the experience building with the use of such platforms, the needs of the users, the evolution of the market.

Experience demonstrates that the requirements laid down at the start of a project may be very ambitious and that the market survey carried out prior to the launch of the project may be an inadequate basis for developing the project, given the speed with which IT tools progress and new requirements which may arise. Online projects rarely progress as initially envisaged and it is difficult to anticipate all situations and problems likely to occur. Time and budget may be used beneficially by delivering a service in phases. A wise approach would be to develop a service step-by-step, starting with the most urgent features in light of day-to-day practice and leaving to following stages additional features which may not immediately be indispensable when the time or the budget allocated to a project do not allow integrating all features from the outset. Furthermore, whenever an improvement is felt necessary, the users' comments and opinions should be collected so as to make sure that the improvement may meet their expectations. Consequently, improvements may be implemented progressively, each being consolidated before moving on to another.

23 - Being ambitious is in general positive. Human beings would not have climbed the Everest, sailed the oceans on a sole race or dived in deep waters without oxygen if they had no ambitions. Therefore ambition is essential for any undertaking in life. However, revising ambitious programmes to adopt more realistic decisions at a given time and deciding to evolve in phases do not mean failure of the project. Quite to the contrary, measuring limitations is wise, be it financially, in terms of deadlines, technology wise or otherwise.

It is better to step back and analyse how best to proceed further in order to offer a more performing service, then to stop a project on the ground that a step has failed or that the budget does not allow to improve the system. What a mistake it would be for a business to lose its image and the funds invested. No one wins from stopping a web project on the ground of some malfunctions. For every problem there is a solution.

Although dispute resolution services are specific, with specific set of rules and specific practices and entail the building of a dedicated platform from scratch, it remains possible to build a

24. Issue of 7th-9th october 2003, p. 2 : ISSE website's address : www.eema.org/isse.

platform using off-the-shelf software products when the budget or the time for building a platform do not allow otherwise.

D. - Drafting specifications and teams in charge of web projects

24 - Model of specifications exist on internet but serve no purpose when the drafter has no expertise and experience in the field for which a platform must be built. The key to success for well thought and prepared specifications is to include all end users of a firm or an organisation, including new comers, whose experience and feedback are indispensable.

For example, building a platform for an arbitration institution requires the help of a lawyer from the institution who is not only an expert in arbitration but also knows perfectly well how the arbitration rules of the institution apply on a day-to-day basis. It also requires the assistance of every component of the in-house end users, namely the lawyers, the para-legals, the assistants, the accountants, the documentation centre, the persons in charge of storing and retrieving information, and any support service. The external users namely the businesses, the lawyers, the arbitrators, the administrative secretaries, the experts, and even students must be interviewed and later involved in the tests phase.

Some professionals prefer entrusting a web project to people who have no experience in online programmes or no sufficient experience in the expertise required for building dedicated systems on the ground that a fresh look would be helpful. Experience demonstrates that this has often been a failure. How can a fresh look be successful if it does not take into account the knowledge of colleagues who can share significant feedback about successes and failures and their reasons? Diversity is essential and so are talents; new comers are necessary but are useless if they are not supported by those who have the experience.

The 2016 Queen Mary International Dispute Resolution Survey about Pre-empting and Resolving Technology Media and Telecoms Disputes reports about reasons for IT systems disputes; requirements specification were identified among very common grounds of disputes²⁵.

25. See p. 12 of the Survey : www.arbitration.qmul.ac.uk/docs/189659.pdf.

E. - Technology suppliers, engineers and developers

25 - The above mentioned factors are not the only responsible for the success or failure of an online project. Despite the huge number of technology suppliers, engineers and developers building platforms around the world in a century where technology is embedded in every minute of our life, it is extremely difficult to find appropriate professionals who are ready to invest time in understanding a project and contributing to the drafting of specifications adapted to the needs of the clients and the needs of the project. Many allege to be up to the mission but in reality many projects end up being entrusted to technology suppliers who do the job without caring about the short and long term results, or even worse, who take a project and learn the job while doing it but often unsuccessfully. Such non-professional suppliers do not have enough experience and feedback to avoid pitfalls and offer proper solutions. The clients who select such suppliers either have no experience or are not correctly advised, or have a small budget and chose the less expensive supplier. In such cases, this is the beginning of a long and painful journey with lots of time, energy and money wasted, although the initial purpose was to save money. That does not mean that developers who offer their services for a decent price are not efficient. The difficulty lies in finding the appropriate technology suppliers, engineers or developers.

26 - It may be said in conclusion, that it is high time to build and offer online dispute resolution services in the 21st century. Equal access to justice is a question of human rights. Online dispute resolution services allows any individual who cannot afford going to courts or who is in remote places and have no access to justice, to seek remedy. Considering that options exist and can offer access to justice, preventing such access is a denial of justice.

Online dispute resolution services facilitate the life of users and professionals, and help saving time and money. In a world where technology is embedded in our lives, using such online services is essential. Building platforms is not rocket science and is achievable with expertise, common sense and determination. We cannot stop progress and innovation, so why not join the process. ■

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