

CHAPTER 11

Access to Justice Through Online Dispute Resolution Is Not Science Fiction: A Practitioner's Perspective on the Good, the Bad and the Future

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Are people waking up to online dispute resolution (ODR) was a question that the author asked and commented in a blog on Global Pound Conference. The hot topic of the role of technology in dispute resolution was high on the agenda in the recent years and the topic is being increasingly at the centre of discussions. Although innovation and technological advancements are occurring at a constantly rapid pace, services to resolve disputes online remain extremely limited or almost non-existent. The absence of such services providing access to justice can potentially end up in a denial of justice. The use of technology in the legal process and in any redress system is inevitable. Regrettably, countless practitioners take cognisance of ODR's unique potential but are incapable of investing the relevant time and resources to fatten the 'golden goose'. Ironically, we walked on the moon, justice is not yet online! Many platforms and initiatives failed because it is not money generating. But who deals then with complaints? Why cannot justice be rendered and on time? Why do small claims have to be dropped because it is not worth wasting time and money? Millions of disputes remain without remedy because people are not aware of mechanisms which can offer remedy without going to courts. What are the reasons for which online justice is lagging behind? What has gone wrong and what lessons can we learn from past experiences to avoid repeating the same mistakes? Is now not the time to bring ODR where it is missing and fully implement the benefits that ODR has to offer to settle

* The views expressed are those of the author and do not reflect those of ICC, ICC Court or its Secretariat.

disputes out-of-court or in courts but online? The author shares in this article her strong belief that online justice is possible. The article will address in turns the undeniable advantages of ODR, the lessons to learn from past mistakes, and recommendations for the future.

§11.01 INTRODUCTION

Access to justice is a human right and impeding such access equates to denial of justice. Providing access to justice through online dispute resolution (ODR) is an effective way to contribute to cure denials of justice for many. ODR can enhance access to justice for individuals who may have little or no access to adequate legal remedies such as individuals with low income, in remote locations or with disabilities. It is time to make ODR available where it is missing and fully implement the benefits that ODR has to offer to settle disputes out-of-court or in courts. Providing remedy is not only a matter of justice, it also impacts business and generates trust which is a crucial element of success. For example, marketplaces which offer remedies to their clients ensure that their clients are satisfied with the goods and services purchased online and invest in long-term relationships. Likewise, resolving disputes out-of-court, through simple, swift, and inexpensive channels impact the entire society and the economy in general. There is a dire need for out-of-court redress mechanisms in civil small claims and consumer disputes, whether domestic or cross-border, which may be resolved online and contribute to reducing the courts' backlogs. Court systems are indeed sometimes 'unintelligible for the great majority of non-lawyers' as observed by Richard Susskind,¹ and parties should not be compelled to be assisted by lawyers in small claims. Furthermore, it is unrealistic to continue progress without including justice in the revolution that technology has operated.²

Scholarly and practitioner discussions have propelled ODR to where it currently stands as the solution to many of the disputes that are arising in this digitised millennium. The role of technology in dispute resolution has become high on the agenda as the topic is increasingly occupying the centre of discussions. 'Are people waking up to online dispute resolution?' was a question discussed in a blog post in which it was observed that there has been a surge of interest in the legal community to discuss ODR.³ The use of technology in the legal process and in any redress system is inevitable. The service expected by the users is long overdue. In a world that is rapidly

1. Foreword by Richard Susskind in Ethan Katsh & Orna Rabinovich-Einy, in M. Ethan Katsh, Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press 2017).
2. Globally the number of Internet users increased from 413 million in 2000 to over 3.4 billion in 2016, <https://ourworldindata.org/internet#growth-of-the-internet> (accessed 28 August 2019) & <https://ourworldindata.org/how-many-internet-users-does-each-country-have> (accessed 28 August 2019). The one-billion barrier was crossed in 2005. Every day over the past five years an average of 640,000 people went online for the first time, which increases the potential number of disputes, <https://ourworldindata.org/internet-history-just-begun> (accessed 28 August 2019).
3. Mirèze Philippe, *Are People Waking Up To Online Dispute Resolution*, <https://www.immediation.org/2017/05/22/people-waking-online-dispute-resolution/> (accessed 28 August 2019).

developing it is surprising to observe that ODR is lagging behind. Regrettably, thus far, ODR has suffered the treatment of the ‘golden goose’. Countless practitioners take cognisance of ODR’s unique potential but are incapable of investing the relevant time and resources to fatten the goose. Instantaneous access to information and services has become normal and a must. Everything is online, and yet, justice cannot be accessed online like any service. Ironically, we have walked on the moon, but justice is not yet online.⁴

Over the past two decades many authors and ODR experts have highlighted the advantages of settling disputes online. Two ODR pioneers, Ethan Katsh and Janet Rifkin, published in 2001 the first book about conflict resolution in cyberspace and showed how ODR can be used as a supplement to dispute resolution.⁵ Another ODR pioneer, Colin Rule, published the result of studies showing the value of investment in dispute resolution tools and systems, which evidences the economic benefits of effective redress processes and how satisfaction as a metric of success counts.⁶ Ethan Katsh and Colin Rule have amply published about ODR, and Colin Rule has built several dispute resolution systems; both are considered the ‘fathers’ of ODR.

Graham Ross, a mediation practitioner and ODR advocate, has observed that the current main development is ‘the growing interest in courts around the world in creating online court facilities and integrating ODR tools into their justice system’.⁷ Undeniably, this is progress because the digitalisation of the courts will increase users’ confidence in justice provided online and remove distrust in ODR out-of-court mechanisms. A number of countries have been at the forefront of applying ODR in courts, like Lithuania or Singapore. Efforts are undertaken in various countries by public and private initiatives, but they are only a handful. Dispute resolution, whether public and private, remains severely missing online. This gap affects litigants as they should have the freedom to select the mechanism they consider best appropriate to their type and value of dispute.

Indisputably, courts cannot absorb a massive number of complaints ever growing and justice is not rendered on time. Users hesitate to file claims with state courts because procedures are extremely long, they can be costly especially if users are represented by professionals, and the value of the claims may not be worth going through such a process. Millions of disputes remain without remedy as most people are not aware of out-of-court mechanisms. Although many platforms and initiatives failed

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4. Mirèze Philippe, *We Walked On The Moon, Justice Is Not Yet Online*, *Revue Pratique de la Prospective et de l’Innovation* 48 (2017).
 5. Ethan Katsh and Janet Rifkin, *Online Dispute Resolution – Resolving Conflicts in Cyberspace* (Jossey-Bass 2001); the authors have founded in 1998 the National Center for Technology and Dispute Resolution (NCDR) linked to the University of Massachusetts (see odr.info (accessed 28 August 2019)).
 6. Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution*, 34(4) *University of Arkansas at Little Rock Law Review* 767 (2012).
 7. Graham Ross, *Online Dispute Resolution Moves to the Courts*, 17 December 2018, https://www.themediationroom.com/single-post/2018/12/17/Online-Dispute-Resolution-Moves-to-the-Court-s?utm_campaign=b445c545-f262-4d11-a483-46ab7dbfe1fc&utm_source=so (accessed 28 August 2019).

for the reasons that will be discussed in this chapter, we can learn lessons from past experiences and avoid repeating the same mistakes.

Technology is critical to enhance the efficiency of justice, provided standards and ethics are applied.⁸ The advantages of ODR are undeniable and it is worth reminding the most significant benefits to convince professionals and users that investing in ODR is indispensable for the short, medium, and long-term. Consumer to consumer (C2C), business to consumer (B2C), and business to business (B2B) disputes, including in domestic and cross-border disputes, can be settled using online resolution mechanisms, and so can civil claims and certain criminal claims like cybercrimes claims handled by the Malaysian cyber court. ODR is mostly used for the settlement of disputes which have arisen out of online transactions but is also used for offline transactions.

ODR is an indispensable redress mechanism and is no longer science fiction. Although several ODR providers were successful, it is however still considerably under-explored. The keys to ODR's success are available. Models exist as discussed in this chapter and can serve to inspire other initiatives. It is not rocket science. It requires pragmatism and perseverance.

In 2010, Colin Rule, Vikki Rogers and Louis Del Duca observed that:

Ever since the field of online dispute resolution (ODR) started in the late 1990s, there has been talk about creating a global system for resolving cross-border consumer issues. Significant progress has been made over the years with some impressive attempts, but none of the efforts have truly taken root.⁹

Over two decades have passed since building platforms, holding annual ODR Forums in addition to all conferences discussing 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 by thought leaders on discussing theoretical and practical issues, justice would already be available online. What are the reasons for which online justice is lagging behind and what does it take to make it available? Should we not start by going back to the basics to be aware of the benefits of ODR?

To understand how ODR can enhance access to justice, this chapter will first address the undeniable advantages of ODR, the 'good' (§11.02). It will then explain why access to justice through ODR has so far not been successful and what mistakes we need to learn from, the 'bad'. Once the advantages highlighted and the mistakes discussed, the chapter advances proposed recommendations for the 'future' of ODR (§11.03).

8. Daniel Rainey, *Third-Party Ethics in the Age of the Fourth Party*, 1(1) International Journal of Online Dispute Resolution 37, 42 (2014). See also ICODR Standards <https://icodr.org/standards/> (accessed 28 August 2019).

9. Colin Rule, Vikki Rogers & Louis Del Duca, *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-border Small Value – High Volume Claims – OAS Developments*, 42(3) Uniform Commercial Code Law Journal 221 (2010).

§11.02 UNDENIABLE ADVANTAGES OF ONLINE DISPUTE RESOLUTION

Raising awareness about the numerous benefits of ODR remains topical. No doubt that underlining the benefits and usefulness of online redress mechanisms will convince all stakeholders that ODR services are long overdue.

[A] Out-of-Court Dispute Settlement

In 2000, reports and guidelines were issued by organisations recommending online mechanisms to resolve disputes. Merchants were encouraged to participate in ‘reputable, independent third-party dispute resolution programmes, including online dispute resolution processes’, as provided by Guidelines for Merchant-to-Consumer Transactions drafted by a group of leading technology companies which created the Electronic Commerce and Consumer Protection Group (E-Commerce Group).¹⁰ The dispute resolution clause in such Guidelines stated that the ‘merchants should provide consumers with fair, timely, and affordable means to settle disputes and obtain redress’. The International Chamber of Commerce (ICC) published a policy statement on Jurisdiction and applicable law in electronic commerce, dealing with B2C transactions and consumer protection, in which it was recommended a systematic approach for resolving consumer disputes by utilising a company’s internal customer satisfaction mechanism, or utilising an online alternative dispute resolution, and only if a dispute persists, to resort to legal action.¹¹ The Organisation for Economic Co-operation and Development (OECD) Guidelines for consumer protection in the context of electronic commerce¹² was designed to protect consumers in their online shopping, the same way they are protected in other forms of commerce, recommended among others, to provide consumers with the option of alternative dispute resolution mechanisms that offer effective resolution in a fair, timely manner and without undue cost or burden to the consumer. Thus, international organisations, businesses as well as consumers’ representatives agreed and recognised the need for out-of-court disputes settlement.

A report on Access to Justice and the Internet, Potential and Challenges, stated that:

The Assembly reiterates that access to justice is a cornerstone of any democratic State based on the rule of law, and a prerequisite for people’s effective enjoyment of their human rights. However, it notes that accessing the justice system often entails high costs in terms of time and money and may be impeded by the courts’ limited resources.¹³

10. Electronic Commerce and Consumer Protection Group, www.ecommercegroup.org/guidelines.html (accessed 28 August 2019); the Guidelines were available in 2001 but no longer exists on the Internet.

11. Policy statement on Jurisdiction and applicable law in electronic commerce, published by ICC on 6 June 2001, but no longer exists on the Internet.

12. OECD Guidelines for consumer protection in the context of electronic commerce, 9 December 1999: <http://www.oecd.org/internet/consumer/34023235.pdf> (accessed 28 August 2019).

13. Jordi Xuclà, *Access to Justice and the Internet: Potential and Challenges*, published by the Committee on Legal Affairs and Human Rights of the Council of Europe, 2015, <https://pace.coe>

It further encouraged:

member States to promote and further develop ODR mechanisms, acknowledging the potential of ODR procedures for settling disputes more speedily, cheaply and less conflictually than through litigation. ODR mechanisms may provide more flexibility in terms of procedures employed and remedies prescribed.¹⁴

These examples prove that ODR mechanisms recommended since 2000 are still relevant although change is extremely slow. Online mechanisms have the potential to significantly increase access to justice across all jurisdictions, including resolving cross-border disputes. We can witness successful applications of ODR which confirm that online mechanisms are an answer to offer remedy and can thus draw inspiration from successful processes to offer similar services.

Internal mechanisms used by marketplaces such as eBay,¹⁵ Amazon,¹⁶ Alibaba,¹⁷ enable the online settlement of millions of low-value disputes every year and have proved that settling disputes online through automated and non-automated systems is possible. No similar service exists for disputes arising on platforms that do not have integrated resolution systems, and no platform for resolving cross-border consumer disputes online currently exists.

Big firms such as Cisco and COFCO benefit from in-house online amicable settlement mechanisms avoiding that any problem escalates to litigation or arbitration. Businesses often observe that they are in the business of doing business, not litigating.

Using the Matterhorn platform to settle family and traffic disputes online has been successful.¹⁸ Judges interviewed by Matterhorn explained the benefit of resolving many family disputes online, as they save hundreds of people to show up in person in courts for disputes which may be swiftly settled from home or any place, and they save time for judges to concentrate on more pressing cases.¹⁹ The Civil Resolution Tribunal in British Columbia (Canada)²⁰ resolves thousands of disputes as demonstrated in their statistical reports.²¹ The message displayed on Ombudsman Services platform summarises clearly the double benefit of resolving disputes online, it states '[w]e're here to support consumers and empower businesses'.²²

.int/pdf/f0ea4673550f14e5a517db5c09bc47d06cd8ec193326667a8259ffe25682ae848428feba12/doc.%2013918.pdf (accessed 28 August 2019).

14. *Ibid.*

15. <https://resolutioncenter.ebay.com/> (accessed 28 August 2019) and <https://resolutioncentre.ebay.co.uk/> (accessed 28 August 2019).

16. <https://pay.amazon.com/uk/help/201754740> (accessed 28 August 2019).

17. https://service.alibaba.com/ensupplier/faq_detail/20435717.htm (accessed 28 August 2019).

18. <https://getmatterhorn.com/> (accessed 28 August 2019); *see also* other ODR providers dealing with family and divorce disputes <https://www.itsovereasy.com/>; <http://resolvedivorce.co.uk/> (accessed 28 August 2019).

19. Judges interviewed by Matterhorn, *see* <https://getmatterhorn.com/get-results/family-court/> (accessed 28 August 2019).

20. <https://civilresolutionbc.ca/> (accessed 28 August 2019).

21. *See* March 2019 statistics: <https://civilresolutionbc.ca/crt-statistics-snapshot-march-2019/> (accessed 28 August 2019).

22. <https://www.ombudsman-services.org/about-us> (accessed 28 August 2019).

[B] Levelling the Playing Field

ODR helps level the playing field in many ways:

- (1) Communication: ODR facilitates communication between people from different countries and cultures and enhances worldwide understanding by assisting disputants in reaching settlement of their disputes easily and swiftly.²³ The objective is to get disputants to participate and feel that they can communicate in a user-friendly environment and on an equal footing.
- (2) Neutral place: ODR helps resolving disputes in a user-friendly, non-aggressive digital space, to negotiate, mediate or arbitrate where necessary, and avoiding that complaints escalate to serious conflicts. It allows reducing any discomfort of being present in the same room with the other party, the lawyers, the neutrals or the judges, if the meeting had to take place in person. This is particularly true for unrepresented parties. Disputants can take the time to think and write and avoid being intimidated in court. Moreover, it enables the parties to reach an amicable solution and not being imposed a decision they have not reached together. Although settlements proposed cannot affect the parties' liberty to file a claim with a competent court, a wise party will not risk incurring additional costs and wasting more time if the solution proposed is acceptable.
- (3) Self-representation: ODR offers access to justice and redress mechanisms to any person entitled to obtain remedy and to use ODR without being a professional of dispute resolution. This is particularly meaningful in consumer disputes and in civil and commercial small claims where users cannot afford paying the services of professionals to represent them.
- (4) Equal access: parties have equal opportunities to access simultaneously the same information, in a standard environment, and this prevents parties from being advantaged or disadvantaged by their temporal proximity to a court.
- (5) No forum selection: ODR avoids the complications of forum selection and jurisdictional issues mainly in cross-border disputes. Wherever ODR providers and their servers are physically located, they are neutral and can offer their services worldwide unless they exclude certain countries. In the past, some providers had excluded countries where human rights were not respected and where breach of confidentiality was recurrent. ODR used in consumer or small disputes is much simpler and consists in a streamlined process adapted to low-value disputes that should not require more time than

23. Some aspects of ODR advantages were discussed in Mirèze Philippe, *NetCase: Keep going where progress leads you*, 38(1) *University of Toledo Law Review* 417 (2007); Mirèze Philippe, *ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & EU Regulation on ODR*, 1(1) *International Journal of Online Dispute Resolution* 57 (2014); Mirèze Philippe, *Equal Access to Information & Justice: A report on the Online Dispute Resolution (ODR) Forum 2017 - The Huge Potential of ODR Greatly Underexplored*, 4(1) *International Journal of Online Dispute Resolution* 53 (2018), articles available on <https://www.arbitralwomen.org/author/mireze-philippe/> (accessed 28 August 2019).

a few hours or days. Usually, the complainant completes an online form stating his/her version of the facts and any proposed solutions to resolve the dispute.²⁴ The respondent is notified and given a few days to respond; it can respond and propose different solutions; the parties can continue to negotiate or decide to escalate the dispute to another dispute resolution mechanism or to terminate the process. If the opponent does not respond it may receive a message reminding it of the benefit of the streamlined online process and possible consequences for refusing to participate in the process, such as having the claim submitted to courts. They may be reminded of the economic benefit and the benefit of preserving a relationship, be it commercial or a family or a neighbourhood relationship. Disputants who experience a fair process would be more willing to participate and to accept the solution proposed.

There seems to be confusion between settling consumer and small disputes online through automated or assisted systems or through negotiation or mediation without any reference to any applicable law, and settling disputes through arbitration. Unlike arbitration, there is no need for a forum which will determine the applicable law to the procedure. The settlement is not a jurisdictional decision and does not end with an award that may require enforcement. Where the ODR procedure is arbitration, conducting the arbitration online makes no difference for the place of arbitration. The applicable law to the procedure will be the law of the place determined as being the seat of arbitration, whether the procedure is taking place online or offline. Hearings may be held anywhere, including virtually. The only difference resides in conducting a procedure using web platforms which allow users to benefit, among other advantages, from swift communications and instantaneous access to information.

- (6) Predictability: the outcome of disputes resolved online and displayed by ODR providers on their platforms offer predictability as to how disputes may be settled.
- (7) Limited costs: ODR providers usually charge low fees, knowing that the low-value but high-volume disputes likely to be submitted to them will compensate the low charges.
- (8) Access for disadvantaged people: ODR gives access to justice to people with lower incomes or living in remote places far from the courts. Likewise, it offers equal access to justice to persons with disabilities. Access to the Internet is an affirmative human right, as established in the United Nations International Declaration of Human Rights (UDHR).²⁵ A report on persons with disabilities was presented at the Annual Conference of the International

24. Rule et al. (*supra* n. 9) 13.

25. Paul T. Jaeger, *Disability, human rights, and social justice: The ongoing struggle for online accessibility and equality*, 20 (9) *First Monday* (2015), <https://firstmonday.org/ojs/index.php/fm/article/view/6164/4898> (accessed 28 August 2019).

Bar Association²⁶, indicating that around one billion people which represents 15% of the global population 'have some form of disability and experience discrimination in many areas of life, exacerbated by the barriers they face in accessing justice'. The report specifies that:

Technology can support efforts to help persons with disabilities overcome marginalisation in society and by the justice system. ODR offers a good example of the potential for increasing access to justice for persons with disabilities, including in rural or remote areas, by using technology-facilitated platforms. It is important that the legal community be open and alert to effective uses of such solutions where they can enhance inclusion of persons with disabilities, even if these may be at an early stage of evolution and may not be specifically aimed at persons with disabilities.

Recognising that ODR can help cure unfair situations where persons with disabilities have no or little access to justice is remarkable. Persons with physical disabilities need more than anyone else to purchase goods and services online and may be more exposed to lack of satisfaction which may require remedy.

[C] Additional Key Advantages of ODR

In addition to the usefulness discussed above, ODR presents further benefits:

- (1) Permanent access: one of the noteworthy advantages of ODR is the capability of accessing the platform to file a claim, negotiate, and follow-up a procedure anytime, any day, and from anywhere. Needless to wait for office hours or to line up at the doors of tribunals to file a complaint, users can continue their activities without wasting time and follow-up their case from home or while travelling.
- (2) Secure environment: ODR offers access to information and documents in a secure environment. Messages and documents are posted on a platform rather than sent through unprotected emails. It removes the risk of sending emails inadvertently to wrong recipients.
- (3) Satisfaction and trust: the key to growing business is providing satisfaction to customers and generating trust through accessible online redress systems. Similarly, while the process may be confidential, publishing the outcome of the disputes eliminates uncertainties and demonstrates that sellers apply a transparency policy and are willing to compensate buyers when justified. Additionally, conducting surveys enable customers to share their positive or negative experience, which may lead to new business as 'there's no better

26. Julinda Beqiraj, Lawrence McNamara and Victoria Wicks, *Access to justice for persons with disabilities: From international principles to practice*, International Bar Association, October 2017, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=9D5D0EAF-690B-4DAE-8D21-50F40C143A88> (accessed 28 August 2019).

way to collect direct feedback from (your) customers and improve (your) product or service'.²⁷

Likewise, if providers are part of a certification programme this will contribute to generating trust. ODR providers must adhere to such a programme meant to confirm that they comply with certain standards of good practices²⁸ and are trustworthy. The certification seal must be displayed on the providers' platforms, and must be removed if the certification is not renewed after an annual evaluation.

Furthermore, publishing annual statistics about the type of disputes, their outcome, and the number of disputes settled through online mechanisms also contributes to generating trust and enabling users to assess the providers' activity.

- (4) ODR for online and offline transactions: disputes arising from transactions either conducted online or offline may be resolved through ODR.
- (5) ODR adaptable to nearly all types of disputes: although most ODR programmes focus on consumer and commercial disputes, ODR expanded to employment, family, real estate, insurance, and even certain criminal disputes. Malaysia started its first cyber court in 2016 specialising in hearing cybercrime cases, such as bank fraud, hacking, falsification of documents, defamation, and online gambling.²⁹ It was reported that in 2015 alone, CyberSecurity Malaysia received 3,752 cases of online fraud and hacking independently from the cases that may have gone unreported or unnoticed by the victims.³⁰ Malaysia hopes to settle such disputes swiftly online.
- (6) ODR mechanisms: they encompass the flexibility of resolving disputes through a variety of 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. Failing settlement, it can escalate to arbitration or litigation.
- (7) Courts' decongestion: consumers and businesses are equally concerned by resolving disputes without the need for physical presence at a meeting or hearing. Typically, in online negotiation and mediation the meeting room is replaced by a virtual space. It brings people together without requiring them to appear in person at court or travel for a hearing in arbitration. In general,

27. Steven MacDonald, *Why Customer Complaints are Good for your Business*, 5 March 2019, <https://www.superoffice.com/blog/customer-complaints-good-for-business/> (accessed 28 August 2019).

28. See Cortés (*supra* n. 68) 62.

29. <https://www.nst.com.my/news/2016/09/169883/malaysias-first-cyber-court-begins-operations-today> (accessed 28 August 2019).

30. <https://gltlaw.my/2018/05/24/special-cyber-court-and-e-court/> (accessed 28 August 2019); according to a UK-based market research firm Juniper Research, global cybercrime losses were projected to reach USD 2 Trillion by 2019.

consumers and small businesses either do not file complaints for small disputes, or they do but rarely obtain judgements before several months or years. All jurisdictions around the world suffer from significant backlogs, due to budgetary constraints, lack of tools, and understaffing. Consumer, civil, and commercial small claims represent nearly half of the disputes submitted to courts. If such claims are settled through online mechanisms, they would considerably reduce the courts' congestion, which can then concentrate on disputes less likely to be settled online, at least for the moment, and users will obtain decisions in a few days or weeks if the parties participate efficiently in the procedure.

- (8) Economy and environment: going paperless avoids the trouble of printing, photocopying, and dispatching documents by normal postal mail, and thus, spares time and money, respect the environment and saves space for filing mounds of documents. Noam Ebner wrote that ODR also contributes to saving the environment because parties and professionals need not travel to meet.³¹

[D] Scenarios of Typical Disputes and Examples of Out-of-Court Online Settlement Mechanisms

A few scenarios will illustrate typical simple and small disputes which may be resolved out-of-court and where ODR's assistance may be the solution.

[1] Scenarios of Typical Simple and Small Disputes

In a case where an online purchase of a dysfunctional device for the value of 100€ was delivered, can a buyer obtain remedy without submitting its claim to courts? The merchant may have an integrated settlement mechanism, and if this is not the case, the buyer may use an ODR platform dedicated for resolving disputes online. Can a claim following an online purchase of a travel package deal for the value of 1000€ which was not in conformity with the advertisement on the seller's platform be resolved online? A claim for refund may indeed be resolved through an automated settlement mechanism, for example by using the SmartSettle platform³². Likewise, how about a claim arising out of a cancelled booking of an event venue, can it be resolved online? In this scenario, the venue owner retained 80% of the deposit instead of 5% as per the contract on the ground that the cancellation was made allegedly out-of-time. The parties may use an assisted online negotiation or mediation to resolve their dispute out-of-court.

Offline transactions may similarly be settled using online settlement services. In a scenario where, following a presentation made by a seller, a small enterprise

31. Noam Ebner and Colleen Getz *ODR: The next green giant* 29(3), 283-307 (Conflict Resolution Quarterly, 2012).

32. <https://smartsettle.com>.

purchased equipment for 30.000€ but issues arose as to whether the equipment was fit for the purpose. The enterprise sought to return the equipment and be refunded. In this case, the parties can use an assisted online negotiation or mediation or submit the claim for example to iCourthouse, which is a streamlined version of a courthouse.³³ The enterprise has indeed no time and money to waste on seeking remedy in courts and needs a swift solution to enable it to run its business and reinvest the 30.000€. What happens in a scenario where the renovation of a classroom was scheduled during Christmas holidays, and where the service provider failed to do the work? The school in this scenario was compelled to find another provider and had to pay an extra 5.000€. Can the school claim compensation and use an online settlement service to resolve the dispute? The school may indeed, as in the previous scenario, use an assisted online system or an online courthouse system.

How about family disputes, can they be settled online? In a scenario where the husband and wife cannot agree on the terms of the divorce, or after the divorce where the husband does not pay the alimony dues, do they need to go to courts to resolve their disagreement? An online mediation may be conducted for example through SIËSDE Dispute Resolution Technologies³⁴ or iMEDIATE.³⁵ Online resolution of this type of disputes has proven in many instances to be effective. Can neighbourhood disputes be a type of disputes submitted to ODR? As in all scenarios presented, they can likewise be resolved online. If a property owner decides to trim the overhanging branches of a tree leaning on his property but the neighbour refuses to bear the costs, an online mediation may be the solution. ODR services dedicated to neighbours' disputes exist, for example, on the Community Disputes Resolution Tribunals (CDRT) platform.³⁶

[2] Examples of Out-of-Court Online Settlement Mechanisms

A few ODR platforms will be mentioned to demonstrate through which mechanisms such scenarios may be resolved.

[a] Automated Settlement

Hundreds of thousands of transactions occur every day in marketplaces which are opportunities for conflicts that need to be resolved swiftly. Issues are in general simple and need no human involvement to offer remedies. Algorithms permit resolving recurrent and similar complaints. For a list of typical complaints, a list of available remedies is offered. Typically, a buyer complains about the non-conformity of the product with the description provided, the non-delivery or the late delivery of the

33. <http://www.i-courthouse.com/main.taf> (accessed 28 August 2019).

34. <https://siesde.com/>.

35. <http://www.ichatmediation.com/> (accessed 28 August 2019).

36. Singapore announced in February 2018 that CDRT will provide an affordable forum to resolve online conflicts between neighbours: <https://www.straitstimes.com/singapore/neighbours-can-now-settle-disputes-through-online-mediation> (accessed 28 August 2019).

product, a broken or dysfunctional product. The algorithm proposes potential remedies such as the refund of the product, or its replacement, or a different product.

[b] *Blind-Bidding*

A recent case demonstrated that disputes may be resolved using algorithms in blind-bidding systems which are different from automated settlement systems. In reporting about this case, it was observed that ‘ODR history was made this week when a court case, issued in the new Online Civil Money Claims Court for England and Wales, was resolved by use of an online tool that enabled the parties to participate in an advanced version of blind-bidding’.³⁷ The article further reported that ‘after three months in the court process, including an unsuccessful telephone mediation, the parties were able to settle the dispute within an hour of first use of the blind-bidding tool’, using SmartsettleONE, developed by ICan Systems Inc. of British Columbia, and provided through the website of The Resolver.

SmartsettleONE enables the parties to make offers and counter-offers by each moving up or down a flag along a slider any number of times until a resolution is reached. Such processes demonstrate that ODR might be the forum for dispute settlement in the near future.

[c] *Online Mediation, Ombudspersons*

Some types of disputes may be submitted to negotiation or mediation mechanisms, which have also proven to be successful, a few examples are hereafter provided. Graham Ross indicated that online mechanisms ‘should not be looked at as a threat to the work of mediators, but as a great opportunity to improve the service they provide’.³⁸

RisolviOnline.com,³⁹ is a mediation platform administered by the Milan Chamber of Commerce. Once the online complaint form is completed, RisolviOnline contacts the other party to invite it to take part in a negotiation. If the other party agrees to participate, a mediator will assist in finding a reciprocal satisfying solution.

AnOliveBranch,⁴⁰ based in Ireland, offers 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. Its three-stage approach delivers early effective intervention for swift resolution. A user of the platform stated:

37. Graham Ross, *First Case in the Online Court to be Resolved by Algorithm*, 15 February 2019, https://www.themediationroom.com/single-post/2019/02/15/First-Case-in-The-Online-Court-To-Be-Resolved-by-Algorithm?utm_campaign=0432c51a-641a-4703-95d1-d0fe0c5663c5&utm_source=so (accessed 28 August 2019).

38. *Ibid.*

39. <https://www.risolvionline.com> (accessed 28 August 2019).

40. www.anolivebranch.com (accessed 28 August 2019).

'I was not ready to get formal, so AnOliveBranch provided a discreet and confidential way to address the situation'.⁴¹

Immediation,⁴² is a new ODR platform offering services to users in Australia. It intends to expand its services to other jurisdictions once it moves into international arbitration in addition to mediation. Businesses and consumers can file claims to be resolved through this platform. A claimant uploads a claim and then the platform sends an invitation to the respondent to participate. If the respondent participates, the claimant either decides to bear the costs or request the respondent to pay, or also ask the respondent to pay half. If the respondent does not wish to participate, the process stops here.

On a mediation platform called The Resolver,⁴³ users can select TheMediation-Room for mediation generally or BoardroomResolve for shareholder mediation.⁴⁴ Videos demonstrate mediation procedures conducted online and how efficient they can be.

Ombudsman Services,⁴⁵ based in the UK, indicates on its website that its job is to resolve complaints so that consumers are put back into the position they were in before the issue occurred, and to help businesses understand their customers so they can serve them better and resolve problems faster.

[d] *Hybrid Mechanisms*

Resolver Group, a very successful provider founded in 2012 and based in the UK, has received by the end of 2018 over 3 million cases and resolved over two billion pounds of issues.⁴⁶ The service was until recently offered in the UK but has expanded to Canada and India. Resolver occupies a unique place in the market as stated by its founder James Walker,⁴⁷ 'offering a free service to consumers that helps businesses built an insight into the behaviour of their consumers'. The reasons that motivated his founder to create Resolver, are similar to those for which the author has been militating for the past two decades: to offer remedy through ODR. Walker found it inexplicably hard to resolve an issue, find information about his rights and find templates. He stated: '[w]hy was there not somewhere that had all of these together? Why was there no single site that helped me record my case, told me what to do (and when to do it) and, if my issue remained unresolved, knew when and where to go to get independent resolution'.

Resolver helps consumers and small businesses to resolve issues through an automated process by asking what happened, what was the impact and what is the

41. A client in the UK mentioned this to the mediator Nancy Radford, who reported it on AnOliveBranch platform: <http://www.anolivebranch.com/testimonials/2017/6/11/client>.

42. www.immediation.com (accessed 28 August 2019).

43. www.theresolver.com (accessed 28 August 2019).

44. www.themediationroom.com (accessed 28 August 2019); www.BoardroomResolve.com (accessed 28 August 2019).

45. <https://www.ombudsman-services.org/about-us> (accessed 28 August 2019).

46. <https://www.resolvergroup.com/> (accessed 28 August 2019).

47. James Walker, *Building Better Markets*, 4(1) 48 International Journal of Online Dispute Resolution (2017).

most appropriate way to resolve the issue in the opinion of the person filing a complaint. It then presents the information in the best way to help the business understand, address, and resolve the issue. If the issue is not resolved, the consumer can then escalate its case; there exists a number of escalations within the company level, and a possible escalation to Ombudsman or ADR. If neither of these possibilities exists, Resolver provides consumers with three choices: a consumer support service provided by the government; a legal advice provided by the UK consumer association or raising a case with the courts. Resolver provides consumers with their rights, what they should know and key outcomes before they file a complaint to help them know if they should be raising an issue and if they do, to have a better set of expectations. In addition to being facilitators, it will soon provide mediation and arbitration services in energy, banking, and telecoms disputes.

[e] *Private Court System*

iCourthouse⁴⁸ defines itself as the web's destination for justice and as being a streamlined version of courthouse. According to the information on iCourthouse, justice moves swiftly and surely. iCourthouse serves the community of Internet users in many of the ways that a brick-and-mortar courthouse serves its community. It is an online courthouse where disputes can be presented for trial before a jury of peers, any time, for any reason.

[f] *Arbitration*

The Cyberjustice Laboratory in Montreal, Canada, created by Karim Benyekhlef and Fabien Gélinas has been active since 2010 and is a hub for thought and creativity.⁴⁹ It created open source applications, some of which served for the foundation of the Condominium Authority Tribunal of Ontario platform meant to resolve condominium disputes.⁵⁰ If the negotiation phase does not end amicably, parties may ask for an online hearing with a tribunal member who would render a decision through the platform.⁵¹

Online arbitration is a mechanism which may be chosen by parties who wish to obtain an enforceable award. Some providers offer the possibility to conduct arbitrations exclusively online, such as FastArbitre.⁵² This allows businesses to remain focused on their business while having a dispute conducted exclusively online and an award rendered within two months. The procedure starts with an amicable phase that is free of charge. If the parties fail to reach a settlement agreement, the platform moves

48. <http://www.i-courthouse.com/> (accessed 28 August 2019).

49. <https://www.cyberjustice.ca/en/laboratoire/presentation/> (accessed 28 August 2019).

50. <https://www.condoauthorityontario.ca/en-US/tribunal/the-cat-process/stage-3-tribunal-decision/> (accessed 28 August 2019).

51. Amy J. Schmitz, *Expanding Access to Remedies through E-Court Initiatives*, 67(1) *Buffalo Law Review* 89 (2019).

52. <https://fast-arbitre.com/en/> (accessed 28 August 2019).

the parties to the arbitral phase if parties so wish. The cost for this phase varies between 750€ and 2,250€, depending on whether it is a small commercial dispute such as claims for unpaid bills, a dispute related to contracts or to intellectual property or to disputes between associates and/or investors.

Finally, a few dispute resolution organisations built their own platforms to offer their arbitration users the opportunity to conduct their proceedings exclusively or partially online. ICC, AAA-ICDR, and WIPO were among the first organisations to build platforms.

ICC built the NetCase platform to enable parties and arbitrators to conduct their procedures in a dedicated secure environment and access files from anywhere without having to carry mounds of documents.⁵³ NetCase facilitated communications between all stakeholders in a case in a user-friendly setting. It offered instantaneous and round-the-clock information. The speed of posting was equal to an email with the important difference that documents and messages were encrypted and did not travel unprotected like emails, but within a secured system to which access was restricted. Documents were stored in a chronological order and assigned to a specific section depending on whether they were correspondence, memoranda, exhibits, procedural orders, Terms of Reference or awards. It was easy to identify the documents and their origin. A powerful search engine enabled searches no matter the format and language of documents.

The platform comprised different sections with different kinds of information namely: an address book, the stage of progress of the proceedings, information on the constitution of the tribunal, details about the financial aspect, a calendar of the proceedings. Stakeholders could communicate among themselves in dedicated spaces only accessible to the group, for example only between arbitrators. 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. They followed evaluations issued by users at the end of each case whereby they shared their comments and recommended improvements.

In a big majority of cases conducted on NetCase over the years of its life, users were very satisfied and therefore very disappointed when the service was interrupted. In one important case involving a state party, several lawyers and paralegals on each side, thousands of documents posted on NetCase, the entire case was administered through NetCase, and the parties were immensely satisfied. NetCase was an opt-in service and if one party or one arbitrator refused to use the platform no party and no arbitrator could benefit from the advantages of the platform. Despite the success of NetCase and the overall satisfaction of users who found it practical and useful, the ICC decided to suspend this service awaiting the construction of a more modern platform.

53. The NetCase platform was built by the author, for further information see Mirèze Philippe, *NetCase: a new ICC Arbitration Facility*, Bulletin of ICC International Court of Arbitration, Special Supplement of the ICC Bulletin, Using technology to resolve business disputes 53 (2004); Mirèze Philippe, *New upgrades to ICC NetCase*, 19(1) ICC International Court of Arbitration Bulletin, 23 (2008); Philippe (*supra* n. 22).

[E] Examples of Online State Courts

Some countries wisely invested in digitalising courts. Some of them are inspiring models. A few examples are provided to illustrate the variety of initiatives.

The Abu Dhabi Global Market Courts (ADGM Courts)⁵⁴ launched in 2018 the digital courtroom which will have the authority to handle civil and commercial disputes.

The Provincial Court of British Columbia in Canada launched in 2017 the nation's first online Civil Resolution Tribunal (CRT)⁵⁵ for civil claims up to \$5,000, allowing to resolve debt or damages, and to recover personal property. It offers services in three phases: a negotiation phase by which the complainant is encouraged to communicate online with the other party and try to quickly settle the dispute; a facilitation phase if the negotiation fails and by which trained CRT staff will try to help parties settle their dispute; and an adjudication phase by which, failure to settle, a tribunal member may make a decision that can be enforced like a court order in Provincial Court, unless any of the parties files an objection.

China is the country where going electronic for private and public justice is happening fast. In addition to private initiatives for ODR platforms to settle consumer disputes, the country intends to move justice online. The Litigation Platform of Hangzhou Internet Court⁵⁶ launched its first cyber court in 2017 to handle cases such as online trade disputes, copyright lawsuits, and product liability claims for online purchases.

Estonia which started building the information society two decades ago became one of the world's most developed digital societies. On the e-Estonia platform, a sentence on the homepage resonates particularly with the message this chapter tries to convey: '[w]e have built a digital society, so can you'.⁵⁷ In 2006, Estonia launched the Court Information System (KIS)⁵⁸ offering a single information system for all types of court cases.⁵⁹

Hawaii Judiciary's Electronic Filing and Service System (JEFS)⁶⁰ allows eligible and registered attorneys and registered unrepresented parties to electronically file documents for all cases in the Hawaii courts.

In India, operating e-courts in some states has been very successful, including using videoconferencing, and the model was replicated in other states.⁶¹

In Lithuania, any person can file a claim online by simply using an identity card number to identify oneself in the online court system. Lithuanian Court e-Services e.teismas.lt⁶² enables any citizen or company to file a claim, upload documents, and

54. <https://www.adjd.gov.ae/EN/Pages/Courts.aspx> (accessed 28 August 2019).

55. <https://civilresolutionbc.ca/> (accessed 28 August 2019).

56. <https://www.netcourt.gov.cn/portal/main/en/index.htm> (accessed 28 August 2019).

57. <https://e-estonia.com/> (accessed 28 August 2019).

58. <https://www.rik.ee/en/international/court-information-system> (accessed 28 August 2019).

59. <https://e-estonia.com/solutions/security-and-safety/e-justice> (accessed 28 August 2019).

60. <https://jimsps1.courts.state.hi.us/JIMSEExternal/login.iface> (accessed 28 August 2019).

61. https://services.ecourts.gov.in/ecourtindia_v6/ (accessed 28 August 2019).

62. <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> (accessed 28 August 2019).

pay the stamp-duty online. People who use the platform save one-quarter of the stamp-duty. Ninety standard forms are available to assist users in preparing their case.

In the state of Nuevo Leon, Mexico, the Virtual Tribunal⁶³ which started with civil claims in 2002, has now reached a situation where 90% of all files are authorised in the virtual environment. The system is accessible anywhere in the world providing real-time information, with possibility for searches, videoconferencing, thus significantly reducing costs and time. A dashboard was developed to follow the workload of courts and give advance notification of possible delays or bottlenecks. This has permitted for a more strategic deployment of resources.

Rwanda has an Electronic Case Management System (IECMS)⁶⁴ in all courts countrywide which started operating in 2017. Anyone filing a case with the courts, except in some primary courts, must use it and will automatically receive feedback through email or SMS.

In September 2016, the UK launched an ambitious programme to reform the justice system and bring technology and modern ways of working.⁶⁵ Online services have already been launched to apply for divorce, making a money claim, and appealing to the tax tribunal. Her Majesty's Online Court's 'turns the concept of a court away from being a building with all the cost and inconvenience such involves, into a service'.⁶⁶

In USA many state courts are on their way to become paperless with an obligation for lawyers to electronically file documents that judges can access via devices. A few states have implemented pilot projects to settle a variety of types of disputes. Some projects are successful; the city of Columbus for example seems to have saved on costs of negotiating and mediating income tax small claims and has increased its collection of recovered unpaid taxes⁶⁷.

§11.03 LESSONS TO LEARN FROM THE PAST AND RECOMMENDATIONS FOR THE FUTURE

The ODR advantages are undeniable as discussed above and ODR is the perfect tool which can offer access to justice to millions of people deprived from remedy. Levelling the playing field should be a convincing argument to make such a service available online in all regions of the world. However, ODR is not taking off as expected.

When online trade and services were a booming industry since the mid-1990s, around 200 ODR providers had built platforms to offer an online mechanism for resolving disputes arising from online transactions (the estimation results from a

63. <http://www.tcanl.gob.mx/uniscripts/mgrqispi.dll?APPNAME=sitcav&PRGNAME=CapturaR ecupContrasena> (accessed 28 August 2019).

64. <https://iecms.gov.rw/en/> (accessed 28 August 2019).

65. <https://www.gov.uk/guidance/the-hmcts-reform-programme> (accessed 28 August 2019).

66. Graham Ross *Her Majesty's Online Court*, 16 February 2015, <https://www.themediationroom.com/single-post/2015/02/16/Her-Majestys-Online-Court> (accessed 28 August 2019).

67. Schmitz (*supra* n. 46); pilot projects were for example implemented in the States of Michigan, Ohio, New York, Texas, Utah.

research conducted around 2000).⁶⁸ Providers were mostly in Canada and USA, and a few in Europe and Asia. A large number has since fallen along the way⁶⁹ for many reasons discussed below.

The downside of ODR is that it presupposes that participants have access to technology which is not true for everyone. Access is however likely to exist in public places, such as libraries, town halls, cybercafés. It may not be available in remote places and broadband connection may be slower in some areas, although the network coverage is constantly growing.

Also, some lawyers fear that ODR will take away clients and will make them lose business which is utterly wrong, because people do not hire lawyers for small disputes.

Undoubtedly readers will wonder why ODR is still lacking two decades after having started building platforms and reflecting on such service. What have the pitfalls been and why are we not there yet? The reasons will be discussed in this second part which will address the mistakes to avoid and the lessons to learn from past experiences, while sharing some recommendations for the future which may contribute to the success of online projects.

[A] First Key to Success: Do Not Be a Bystander, Be an Innovator

Offering remedy through online mechanisms to people who cannot afford going to courts and using the services of lawyers in small disputes is a human right and does not support controversy. State courts' congestions in all jurisdictions should convince governments, judges, and lawyers that other methods should be made available. Questioning whether access to justice online is possible is groundless – many ODR providers have proven that it is not science fiction – and is no longer a sustainable business strategy, no matter the challenges for building platforms to settle disputes online. We must stop being bystanders; we must dare to take initiatives and be innovators. We must offer online justice like any other online service and make it a priority. Successful online services demonstrate that transition to online justice can be faster than anyone could anticipate. The success of ODR is everyone's business including public and private justice. Any investment made now will benefit the users, the professionals and the courts in the short, medium, and long-term. Solutions and mechanisms exist, and if they do not exist, they can be built by learning from existing models or by building mechanisms from the ground up. It is not rocket science. It requires expertise in the field for which the platform is built, common sense and to be convinced by the project.

68. Mirèze Philippe, *Where is everyone going with online dispute resolution (ODR)*, 2 *Revue de Droit des Affaires Internationales* 167 (2002). For information about ODR providers and mechanisms, although not up to date, see Gabrielle Kaufmann-Kohler & Thomas Schultz, *Online Dispute Resolution Challenges for Contemporary Justice* (Wolters 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).

69. Lists of ODR providers are available on <http://odr.info/provider-list/> and <http://www.odreurope.com/odr-services/odr-platforms-apps> (accessed 28 August 2019) (not exhaustive and not up to date).

[B] Second Key to Success: Continuity

One of the major mistakes to deplore is building platforms and abandoning them. Lack of continuity has contributed to users' scepticism about the feasibility of online justice. A platform may have satisfied the users or not entirely satisfied them, but the minute a service is available in the market users have expectations; interrupting such service without offering a service in replacement – pretending it needs improvement – is an appalling mistake. Platforms must be regularly upgraded as technology is constantly developing; any plan for upgrading should consider which aspects of the features may be maintained, modified or upgraded, but getting rid of all the coding and the functionalities is unnecessary. No one wins from stopping a web project on the ground of some malfunctions; it is a bad business plan because a provider loses its image and the funds invested. For every problem there is a solution, we can learn from our mistakes. Therefore, the rule of the day is perseverance.

Two platforms illustrate such lack of continuity. They were funded by the Commission of the European Communities and launched in 2001. They offered valuable services which were shortly thereafter interrupted.

The first is the European Extra-Judicial Network (EEJ-NET). In 1998, the Commission considered that most consumer disputes were characterised by a disproportion between the economic value and the cost of the judicial settlement and decided to create a database of out-of-court dispute resolution bodies. It addressed a recommendation to such bodies⁷⁰ emphasising 'the need to boost consumer confidence' by settling disputes out-of-court. In 2001, the Commission issued a recommendation setting principles to be respected by existing and future bodies. EEJ-NET's role was to act as a one stop contact point where consumers could seek information about out-of-court bodies existing in their jurisdiction, and to which they could address their complaint.

The second is Electronic Consumer Dispute Resolution (ECODIR). The same consideration of access to justice, a key element for consumers, motivated the Commission to create this project. The Universities of Namur (Belgium) and Dublin (Ireland) developed the platform and benefited from the expertise of eResolution, a Canadian ODR (which no longer exists). The ECODIR process was voluntary and dealt exclusively with disputes arising out of online transactions involving at least one consumer. The process included three phases: a negotiation phase of eighteen days at the expiry of which and failing a settlement a mediation which could not exceed fifteen days would start; if such second phase failed, the mediator would send to the parties within two days a motivated recommendation; if the parties did not approve the recommendation within seven days the case would terminate.

In addition to the investment wasted, over fifteen years passed during which no service existed. ECODIR and EEJ-NET were complementary and offered exactly the type of services that consumers need. EEJ-NET was a contact point and ECODIR an ODR provider.

70. http://europa.eu.int/comm/consumers/policy/developments/acce_just/index_en.html, the page is no longer active.

EEJ-NET was replaced by the European Consumer Centres Network (ECC-Net),⁷¹ launched in February 2016. ECC-Net provides information on consumer rights and who to contact. When a consumer clicks on ‘Resolve your consumer complaint’ and selects ‘Online Dispute Resolution’, then ‘File a complaint’, he or she must answer three questions: if the consumer resides in the European Union, Norway, Iceland or Lichtenstein; if the complaint concerns a product or service bought online; and if both previous answers are positive the consumer can then complete a form to file a complaint. A report dated 6 December 2018 provided information about the traffic on the platform and the number of complaints.⁷² It indicated that complaints lodged on the platform in its second year of operation amounted to 36,000 cases; 37% of consumers would have been successfully contacted directly by the trader to try and settle the dispute rapidly.

It is to be hoped that this service will continue developing and will not be suspended like its predecessor. However, ECC-Net is not an ODR provider meant to resolve disputes. Such a platform does not exist in Europe.

[C] Third Key to Success: Business Planning and Adequate Budgeting

Another significant mistake is the lack of long-term business planning and thus lack of adequate budgeting. Unless a platform is an information webpage with no other features, the investment required for building a platform cannot realistically be for a short term or for a temporary marketing action. It is a business and strategy matter having an impact on a firm and the project must be given all the attention it requires. Budgeting for building a house is different from budgeting for building a platform. A house may be considered old after a decade or two, whereas a platform will be outdated in a very short period. Budgeting for building a platform can be compared to budgeting for bringing up and educating a child who requires constant care.

Budgeting for building a platform must cover every phase from drafting specifications to conducting several tests phases, maintenance of the website, 24/7 support, dissemination of information to familiarise users with the features offered, rapid fixing of any malfunction, and regular upgrading as part of a marketing plan. This includes the team to put in place for a project comprised mainly of in-house experts who know the needs of the firm and how it works on a daily basis, and of a project manager to liaise between the end users and the computer engineers.

Alleging that building a platform is costly without weighing the pros and cons does not constitute an accurate analysis. Long-term business development must be seriously considered rather than immediate costs. An online service for administering dispute resolution procedures carries with it advantages for dispute resolution organisations, ODR providers, courts, and not only users. The return on investment can be relatively fast depending on the efforts invested.

71. https://ec.europa.eu/info/live-work-travel-eu/consumers/resolve-your-consumer-complaint/european-consumer-centres-network_en (accessed 28 August 2019).

72. https://ec.europa.eu/info/alternative-dispute-resolution-reports_en (accessed 28 August 2019).

One of the difficulties lies in the fact that some projects are funded by external funders who may be less interested by long-term benefits than by the revenue generated on the short or medium term.

[D] Fourth Key to Success: Clear Specifications and Realistic Projects

Another repeated mistake is neglecting the time and effort for drafting detailed and understandable specifications. Determining the needs and drafting every step of the processes, the results expected, how each process interacts with another one, is a long and an essential investment. Every time this sequence was neglected, it resulted in malfunctions and incorrect processes or missing processes. The 2016 Queen Mary International Dispute Resolution Survey about Pre-empting and Resolving Technology Media and Telecoms Disputes identified requirements as a very common reason for dispute.⁷³

The key to success for well-thought specifications is to include people with expertise and experience. If such people are not involved, models of specifications serve no purpose. In-house experts, project managers, and computer engineers must work permanently together to draft clear and detailed specifications and to ensure a close follow-up and understanding of the needs and expectations of end users. The latter needs a user-friendly system that any person can use whether IT literate or not, a permanent and instantaneous access to their files, to retrieve information easily among several documents, and to have online assistance where necessary.

Moreover, projects must be realistic. Being ambitious is in general positive, but it would be wise to step back and analyse how best to proceed further than to stop a project. If the budget, time, drafting of specifications, building, and testing the platform cannot encompass all phases envisaged from the outset, splitting into several phases may be a solution. The benefit would be to consolidate each phase before developing the next one. It also helps learning about how users appreciate the services offered and implement improvements progressively.

Online projects rarely progress as initially envisaged, it is difficult to anticipate all situations and problems likely to occur, but many problems may be avoided if all necessary phases are properly planned as opposed to skipping phases considered not important for the sake of gaining time. A company may spend more money fixing mistakes than investing appropriate efforts from the inception.

[E] Fifth Key to Success: Think Tank and Proper Market Survey

For competition reasons, businesses in general do not share their knowledge and experience as much as academics do. Technology however requires such sharing with all stakeholders, especially in the young field of ODR.

73. See page 12, www.arbitration.qmul.ac.uk/media/arbitration/docs/Fixing_Tech_report_online_singles.pdf (accessed 28 August 2019).

In addition, one of the mistakes in this field is the improper or insufficient market survey before building and launching platforms. It could have assisted in estimating the number of disputes in a market at a certain point in time and the likely evolution of that number over a certain period. Market research companies can assist providers in planning potential evolutions.

In 2001, Gabrielle Kaufmann-Kohler has invited to a colloquium in Geneva various stakeholders from the legal and technology fields. She gathered various profiles including academics, professionals who built ODR platforms, and computer engineers, with the objective of starting a dialogue aimed at finding solutions to conduct dispute resolution online. Since then a group was constituted and meets annually in ODR Forums to share experience with peers, information about research conducted, new technologies, standards, and projects.⁷⁴ It is essential to remain informed about advancements made and to take inspiration from existing solutions instead of reinventing the wheel.

On 4 April 2019, FastArbitre⁷⁵ published a free licence of its online dispute resolution platform developed by Seraphin.legal.⁷⁶ The source code of the technology is available online.⁷⁷ This constitutes an essential contribution by Consortium eJustice⁷⁸ to the development of public digital justice. It is also a major participation of the French community to the ODR bricks already available on Cyberjustice,⁷⁹ and anticipates an international community of Open Justice.

[F] **Sixth Key to Success: Involvement of End Users and Intensive Testing**

As mentioned above, budgeting to build a house or to build a platform is entirely different, but one thing is common: delivery delays. They are inevitable and must be foreseen in the planning. Regrettably, testing is often neglected when delivery cannot be postponed.

Platforms must not be built on assumptions; expectations of end users and clients count. They need to see that their feedback was considered and potential improvements made accordingly. Each phase of the project must be intensively tested with them to ensure that all aspects of a service were duly examined. They are allies and their feedback forms part of the marketing plan and ultimately of the success of a project.

It is also essential to involve magistrates, dispute resolution organisations, and law firms to test ODR platforms. Who else is better positioned to share insights about the functionalities? Start-ups are taking initiatives to build ODR platforms and to fill the

74. Mirèze Philippe, *Equal Access to Information & Justice: A report on the Online Dispute Resolution (ODR) Forum 2017 - The Huge Potential of ODR Greatly Underexplored*, 4(1) International Journal of Online Dispute Resolution 55 (2018).

75. <https://fast-arbitre.com/en/> (accessed 28 August 2019).

76. <https://www.seraphin.legal/> (accessed 28 August 2019).

77. <https://github.com/Open-Justice/ODR> (accessed 28 August 2019).

78. <http://consortium-ejustice.org/> (accessed 28 August 2019).

79. <https://www.cyberjustice.ca/en/> (accessed 28 August 2019).

gap of dispute resolution needs, but co-operation with legal services is vital to ensure the success of mechanisms to put in place.

[G] Seventh Key to Success: Proper Communication and Marketing

Another dominant mistake is the lack of regular promotion of ODR services and of education of users to learn about their benefits. As part of the marketing campaign, before delivering a phase of a project, tests and results may be reported to start disseminating the information and educating future users. Users are eager to discover out-of-court dispute resolution services and to test them until they become familiar with such services and trust them. Online trade gained success over time until users discovered how useful it can be, before shifting from offline to online. Likewise, trust may be gained with visible, measurable, efficient dispute resolution services provided online. Presentations are indispensable in public meetings, companies, consumers' associations, universities, town halls, cybercafés, and any forum where users may gather and learn about these features. Videos must be available on ODR platforms, on the Internet and blogs, to contribute to promoting ODR services. Thanks to technology and available media, marketing means are accessible to anyone who needs to spread the word.

The European Commission organised an ADR Assembly in June 2018⁸⁰ to discuss how the EU framework for alternative dispute resolution (ADR) for consumers is currently applied in practice and how it can be made fully effective for consumers and traders. The summary report states that 'by promoting accessible, high quality, and cost-effective dispute resolution, the European Commission aims to protect consumers, increase consumer confidence, and foster prosperity and growth in the Single Market'.⁸¹ It further notes that:

promoting success stories, having ambassadors, publishing decisions, and using social and traditional media were suggested ways in which awareness, understanding and support for ADR could be promoted. Communication was also identified to be a vital part of quality case-handling, educating and empowering consumers and ensuring transparency in the dispute resolution process.⁸²

[H] Eighth Key to Success: Hard Data Records

The lack of reporting about a service was one of the reasons for which many ODR providers failed. The usefulness of settling disputes online cannot be measured if no statistics demonstrate the efficiency of the system and whether an ODR provider is trustworthy. Only a few ODR providers publish annual statistics. Gaining users'

80. European Commission ADR Assembly 11-12 June 2018, Brussels, Summary Report: https://ec.europa.eu/info/sites/info/files/com_2019_425_f1_report_from_commission_en_v3_p1_10455_45_0.pdf (accessed 28 August 2019).

81. *Ibid.*

82. *Ibid.*

confidence is crucial, especially when they have no direct contact with the people in charge of the resolution of their dispute, irrespective of the mechanism used.

Evaluating the efficiency of a service can be assessed through hard data reporting about proven results, such as the number of claims filed on an ODR platform, their nature, how many were resolved, the time needed to resolve them, if the settlement reached was satisfactory, what the value of the claim was and the remedy obtained, what mechanisms are mostly used.

A report on Joint Technology Committee ODR for Courts,⁸³ indicates that courts have implemented ODR for low-dollar personal injury claims, landlord-tenant, small claims, and minor traffic and code enforcement violations. The report goes on indicating that ODR 'is a proven tool with a documentable record of success over a sustained period of time: billions of disputes have been resolved outside of court using ODR' and that ODR 'is becoming central to the discussion of the future of courts'. The statement about the record of success of disputes resolved out-of-court through ODR is remarkable especially coming from state courts.

[I] Ninth Key to Success: Appropriate Choice of Computer Engineers

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 lives, it is 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. The time-efficiency requirements may lead to investing less time in certain phases, but efficiency requires time. When technology suppliers are not selected properly, this is the beginning of a long and painful journey with lots of time, energy, and money wasted.

The agreement between the client and the supplier should include among others two important clauses: one dealing with the planning of delivery and what is expected to be delivered at each phase, and a dispute resolution clause that clearly defines how potential conflicts may be resolved. Suppliers often request a first down payment of forty to fifty per cent of the contract price. It is recommended to ensure that they were able to understand the project and implement correctly the first phase for which a down payment was made. If such phase was not properly understood and tests were not satisfactory, it might sometimes be wise to terminate the agreement before investing too much time and funds. It happened that clients were not satisfied with the first phase but were compelled to continue with the selected provider because an agreement was signed, a substantial payment made and work invested. It is worth terminating an agreement when it is possible to mitigate damages than to have to live with a platform which does not meet the expectations reflected in the specifications.

83. *Joint Technology Committee Resource Bulletin – ODR for Courts*, version 2.0 updated and adopted on 29 November 2017, https://www.ncsc.org/__data/assets/pdf_file/0031/18499/2017-12-18-odr-for-courts-v2-final.pdf (accessed 28 August 2019).

[J] Tenth Key to Success: Centralisation and Standardisation of Information – Procedural Rules

The cornerstone to successfully motivate consumers and professionals to use ODR is, first to centralise and standardise information about available services and make them easily accessible, and second to propose model procedural rules.

[1] *Centralisation and Standardisation of Information*

One of the main reasons for the failure of many ODR providers is the lack of centralisation and standardisation of information about ODR providers. Many ODR providers existed and others still exist but users do not know about them, how to choose a provider for a given type of dispute and how reliable they are. Information is often found incidentally.

Therefore, the first recommendation is to centralise information to grow awareness about ODR services, enhance ease of access to information, and enable potential users to make an informed choice. There is a dire need for such service that is currently lacking.

In 2000, OECD and ICC had issued lists of ODR providers. However, keeping lists up to date required an investment that no organisation considered worth pursuing considering the frequent changes. The odr.info platform hosted by the National Center for Technology & Dispute Resolution (NCTDR) lists a few providers although the list needs updating as some providers are no longer operational. It was recommended that an international organisation should centralise information on ODR providers and potentially evaluating them,⁸⁴ but no organisation has so far been interested in such a mission that requires a dedicated service to follow-up on providers and update an online database. Listing information could comprise: their business address and weblink to the platform, type of disputes they handle, for which amounts in dispute, in which countries, in which languages, and if they are members of a certification programme. The organisation could be a contact point and could also assist complainants in selecting the most appropriate ODR provider for a given dispute.

The second recommendation is to adopt general standards for any ODR mechanism and to display standard information on ODR platforms, which is indispensable to offer users predictability and avoid striking differences.

The main information to provide concern the following aspects:

- contact details with business address, telephone, and email;
- names and roles of people operating the platform;
- when the provider started operating;
- if the provider is a member of a certification programme;
- the types of disputes it handles, for example family disputes;
- cap amounts above which the provider will not handle disputes;

84. The author recommended centralising information about ODR providers, *see* Philippe (*supra* nn. 23 and 68).

- languages that it can handle;
- if the services offered are limited to a certain number of countries, for example only China;
- rules used for the administration of the disputes;
- a chart of the procedural steps with time limits and an average duration to resolve a dispute;
- the dispute mechanisms proposed, such as blind-bidding, assisted negotiation, mediation, arbitration, hybrid mechanisms;
- how to file a complaint and what should it contain, for example the required solution by the claimant;
- the time limit for the answer and what should it contain;
- if the dispute settlement is not made through an automated system, the method of selecting the third party or neutral or professional designated to assist in resolving the dispute, and his/her role;
- the time limit for the provider to propose a solution or submit a decision depending on the mechanism used;
- what happens in case of delays;
- what happens if a party does not participate and what are the other available remedies;
- whether the decision is binding or non-binding, and if the losing party does not carry out the decision, what are the other available remedies;
- whether the provider will publish on its website the list of disputes and the settlements reached;
- what are the reasons for terminating a procedure, for example when either or both parties stop participating, or when they do not pay the fees requested by the provider;
- whether the procedure is confidential;
- the costs to be expected and how they will be allocated;
- finally, annual statistics are very informative.

[2] *UNCITRAL Technical Notes on Online Dispute Resolution*

Furthermore, model rules are needed. The UNCITRAL Technical Notes on Online Dispute Resolution provide practical guidance but they are not procedural rules like the UNCITRAL Arbitration Rules or the ICANN Rules for Uniform Domain Name Dispute Resolution Policy.

The UNCITRAL has put in place in 2010 a Working Group III on ODR, entrusted with the drafting of a set of rules for a global ODR system to handle cross-border, low-value, high-volume claims.⁸⁵ The various reports of the Working Group available on UNCITRAL⁸⁶ show that the discussions have departed from the initial mandate of

85. Rule et al. (*supra* n. 9).

86. www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html (accessed 28 August 2019).

creating a simple redress system for low-value, high-volume B2C disputes arising from Internet transactions. Delegates ended up including B2B disputes and discussing arbitration and enforceable awards. This was utterly wrong considering that the system envisaged concerned small disputes resolved online without the complications of arbitration which is better adapted to high-value disputes. Moreover, arbitration mechanisms in B2B disputes already existed and needed not be created within the framework of this Working Group meant to deal with an inexistent system. Delegates having participated in the Working Group were from different cultures;⁸⁷ the variety of backgrounds could have been an enriching factor. Regrettably, differences emerged, and consensus remained out-of-reach on many aspects.

Finally, the Working Group delivered in February 2016 UNCITRAL Technical Notes on Online Dispute Resolution,⁸⁸ aimed at assisting providers and users with certain aspects. They are non-binding and take the form of a descriptive document reflecting elements of an ODR process. They are neither best practices, nor exhaustive or exclusive. They do not impose legal requirements binding on parties and other entities. They do not imply modification to any ODR rules that parties may have selected. Although, they are not standard ODR procedural rules, they are useful and provide guidance, such as definitions of ODR, ODR providers, ODR platforms, techniques of settlement of disputes, transparency and independence, stages of an ODR proceeding, scope of an ODR process, roles and responsibilities, steps for the commencement of an ODR proceeding, explanations on a negotiation phase, facilitated settlement and the final stage, appointments, powers, and functions of neutrals. There exists so far no feedback about whether and how the UNCITRAL Technical Notes have been used, by which type of population and for which purposes. An interesting report presents the different ways such Notes can be used to assist in the implementation of ODR systems.⁸⁹

§11.04 CONCLUSION

To conclude, moving public and private justice to the digital world in all jurisdictions is possible. Public and private online justice in the twenty-first century should be a priority. The advantages of access to justice through ODR demonstrate that investment in online justice made now will benefit the users, the legal professionals and the courts in the short, medium, and long-term. Progress is in our hands, we must contribute to give any litigant access to justice online. Creating a global ODR system for resolving cross-border, low-value, high-volume disputes, in B2C, B2B, C2C disputes, and civil

87. See interesting discussion by Daniel Rainey, 'ODR and Culture', in Mohamed Abdel Wahab, Ethan Katsh & Daniel Rainey (eds.), *Online Dispute Resolution Theory and Practice* (Eleven International Publishing 2012) 197.

88. UNCITRAL Technical Notes on Online Dispute Resolution, April 2017: http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf. (accessed 28 August 2019).

89. Report of Workshop for Developing an APEC Collaborative Framework for Online Dispute Resolution, 2019/SOM1/EC/009, 4-5 March 2019, http://mddb.apec.org/Documents/2019/EC/EC1/19_ec1_009.pdf.

claims is essential. Building platforms may be a challenge but is perfectly feasible. We can learn from existing mechanisms. A redress mechanism through ODR is certainly not science fiction. It is neither rocket science. It requires pragmatism and perseverance.