

# Mediation mediums: the benefits and burdens of online alternative dispute resolution in Australia

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## A Introduction

Online dispute resolution (ODR) is a term used to describe dispute resolution that is facilitated or assisted by information and communication technology.<sup>1</sup> It comprises facilitative mechanisms such as online mediation, advisory mechanisms such as online case appraisal, and determinative mechanisms such as online arbitration or adjudication.<sup>2</sup>

ODR can provide a platform to resolve disputes that are either synchronous or asynchronous.<sup>3</sup> Synchronous platforms provide access to communication between parties in “real-time”, with all parties being actually or virtually present during the ADR process. Software applications such as Skype facilitate synchronous communication by way of videoconferencing technologies.<sup>4</sup> Asynchronous platforms enable communication to occur at different times for each party. An example of an asynchronous model is in circumstances where parties commence discussions about a dispute by way of email such that all parties are not engaged in the resolution process at the same time.<sup>5</sup>

In addition to more common ODR technologies such as Skype and email, there exist other technologies whereby artificial intelligence (AI) systems aim to simulate the role traditionally played by an ADR practitioner.<sup>6</sup> Some of these AI systems offer fully automated cyber negotiation which primarily focuses upon negotiating monetary settlements,<sup>7</sup> and providing a neutral platform to exchange settlement offers without the involvement of, or need for, a mediator.<sup>8</sup> These AI systems allow for either synchronous or asynchronous ODR.

This article will focus upon three formats in which ODR manifests in practice, namely: AI dispute resolution; online or electronic mediations and arbitrations; and online courts. It will first examine how these systems have developed both domestically and internationally, before discussing the benefits and burdens of ODR. It will then highlight potential ways in which ODR may develop and evolve in future. **Ultimately, it will be concluded that while there are certainly advantages to integrating ODR into more traditional models of ADR, it is unlikely online platforms and information and communication technologies will replace the role of mediators and arbiters given the irreplaceable value of human insight and judgment in legal matters. Instead, ODR will increasingly assist traditional models in facilitating more efficient and cost-effective methods of resolving matters through ADR.**

## Online dispute resolution: an overview

Unlike the medical and financial sectors, the law has been somewhat dilatory in joining the digital revolution.<sup>9</sup> However, while there was initially some reticence about ODR in the legal field, not least because of concerns regarding dehumanisation of human-centric processes and an inability for technology to handle the varying complexity of legal cases, increasing client demand has required adaptation by justice systems to incorporate and interface with online platforms to resolve disputes.

The development of ODR has been recognised both internationally and domestically.<sup>10</sup> There have been four primary phases in the development of ODR to date, namely:<sup>11</sup>

- the hobbyist phase
- the experimental phase
- the entrepreneurial phase
- the institutional phase

Internationally, the Fourth United Nations Forum on Online Dispute Resolution Report and Recommendations<sup>12</sup> influenced ODR approaches at a global level. Domestically, Australia has reached the fourth developmental stage of ODR – the institutional phase.<sup>13</sup>

While initial ODR platforms were directed towards e-commerce disputes, these platforms are increasingly expanding to other areas of the law.<sup>14</sup> Examples of ways in which ODR has been, or is anticipated to be, incorporated into existing legal systems, both internationally and domestically, are discussed below.

## ODR internationally

### UNITED STATES OF AMERICA

Perhaps the most revolutionary ODR platform to date is the San Francisco-based “Modria”, established in 2011.<sup>15</sup> Modria provides a software as a service (SaaS) product which can be used by anyone operating an online store.<sup>16</sup> Modria utilises a variable mapping system which collects and analyses relevant data to automatically attempt to resolve disputes that arise

between vendors and purchasers. Modria maps the collected data to a list of rules nominated by the vendor, which define policies regarding refunds, returns, exchanges and credits.<sup>17</sup>

Modria has also been utilised outside the e-commerce space. In 2014, the Ohio Board of Tax Appeals engaged Modria as the software behind its new online resolution centre for tax appeals, which allows parties to file all documents online, access documents, and check the progress of the appeal and similar details, including access to the decisions once made, via an online portal.<sup>18</sup>

In addition to Modria, there are other SaaS products developed in the US which facilitate ODR, including Smartsettle, Cybersettle and eQuibbly.<sup>19</sup> Like Modria, most of these platforms utilise asynchronous, fully automated cyber negotiation processes to resolve disputes, at least at first instance.

Developers in the US have also created software, such as OneAccord, which enables synchronous negotiations with the involvement of a neutral third-party facilitator.<sup>20</sup> Mediation firms have also developed websites, such as Internet Neutral, SquareTrade and WebMediate,<sup>21</sup> which facilitate the resolution of disputes using traditional ADR methods, supplemented by online technology.

### CANADA

One of the first examples in the world of the integration of ODR into the public law system was the Civil Resolution Tribunal (CRT) in British Columbia, Canada, which “encourages collaborative dispute resolution and makes binding decisions” when parties are unable to compromise their disputes.<sup>22</sup>

The CRT was established in 2012 under the Civil Resolution Tribunal Act SBC 2012 (CRTA) as a voluntary service<sup>23</sup> with jurisdiction over small claims<sup>24</sup> and strata property disputes.<sup>25</sup> In 2015, the CRTA was amended to make the CRT mandatory for such claims. The CRT began accepting strata property claims in July 2016 and by July 2017<sup>26</sup> began resolving most small claims involving damages of up to \$5000,<sup>27</sup> with a view to increasing the damages limit in future. The aim of the CRT is to provide “fair, affordable, flexible, and timely access to justice for the public”.<sup>28</sup>

The CRT operates in three primary stages:<sup>29</sup>

- **Stage 1** – Solution Explorer: An electronic tool named the “Solution Explorer” uses expert knowledge to provide users with legal information and resources, derived from interactive questions and answers between the electronic interface and the human users, to assist in managing or resolving their disputes.
- **Stage 2** – Tribunal process: If the dispute is unable to be resolved with the assistance of Solution Explorer, the Solution Explorer initiates an online intake process which asks for information about the parties and the dispute and commences a claim with the CRT. The parties will pay a fee to commence the process, and will notify others involved in the dispute who have an opportunity to respond. The dispute then proceeds to a quick negotiation in which parties attempt to resolve the dispute. After the quick negotiation, a facilitator will attempt to assist the parties to reach a compromise. This facilitation may occur in person or online. If a compromise is reached, the agreement can be made into orders, which have the same power and effect as court orders.
- **Stage 3** – Tribunal decision: If a decision cannot be reached by way of negotiation or facilitation, an independent CRT member will decide the outcome of the dispute, usually by way of electronically submitted documents and/or through telephone and videoconferencing platforms. The decision of the CRT member is enforceable and binding, although parties are entitled to seek leave to appeal to the courts.

On 23 April 2018, the Government of British Columbia proposed amendments to the CRTA in Bill No 22 of 2018. The Civil Resolution Tribunal Amendment Act SBC 2018 subsequently received Royal Assent on 17 May 2018.<sup>30</sup> These amendments, inter alia, extended the jurisdiction of the CRT to include certain disputes arising under the Cooperative Association Act SBC 1999,<sup>31</sup> the Societies Act SBC 2015,<sup>32</sup> and the Insurance (Vehicle) Act RSBC 1996.<sup>33</sup>

## THE NETHERLANDS

In 2014, SaaS ODR platform “Rechtwijzer” was launched in The Netherlands.<sup>34</sup> It was the first ODR platform for managing and resolving difficult issues associated with divorce and separation, tenancy disputes, and employment disputes. Rechtwijzer moved away from the values of traditional ODR platforms relating to speed and efficiency, and instead focused on empowerment, interests and placing people ahead of rules.<sup>35</sup>

Initially, Modria and the Hague Institute for Innovation of Law (Hiil) guaranteed the hosting, maintenance and support issues, user testing and updates, with assistance also being provided by the Dutch Legal Aid Board (DLAB).<sup>36</sup> However, in March 2017, Modria, Hiil, and the DLAB ceased their cooperation around the Rechtwijzer platform.<sup>37</sup> Despite requiring approximately €2 million to develop the different versions of Rechtwijzer, as at April 2017, only 813 couples had used Rechtwijzer since its inception, and most matters were funded by the DLAB with very few involving private paying clients.<sup>38</sup> The issues associated with the success, or lack thereof, of Rechtwijzer were attributed to a lack of marketing, and an underestimation of the significant need for legal advice for users from the beginning of the separation or divorce process to the final resolution.<sup>39</sup>

In September 2017, the DLAB commenced working with a new ODR organisation, Justice42, to recreate Rechtwijzer, in the form of a new product called “uitelkaar.nl”. Like Rechtwijzer, uitelkaar.nl aims to enable parties to work together in resolving disputes relating to divorce, with the assistance of experts as required.<sup>40</sup> One improvement made in the course of this recreation was the incorporation of more human assistance to users. The success of this recreation is not yet known, although it was reported that eight couples had successfully finalised their disputes in the first 3 months of the new platform going live.<sup>41</sup>

## UNITED KINGDOM

In July 2016, Briggs LJ of the Judiciary of England and Wales published the Civil Courts Structure Review: Final Report, in which the merits and criticisms of the development of an online court in the UK were examined and discussed.<sup>42</sup>

The proposed Online Court comprises three stages in its procedure:<sup>43</sup>

- **Stage 1** – Triage: An automated online triage stage intended to assist unrepresented litigants articulate their claim in a form the courts can resolve, and to also upload the relevant documents and evidence in support of their case.
- **Stage 2** – Conciliation: This stage is handled by a case officer, who attempts to facilitate a resolution of the matter between the parties.
- **Stage 3**—Determination: Matters that have failed to resolve are determined by a judge, either by way of face to face trial, video or telephone hearing, or a determination on the papers.

Overall, Briggs LJ noted that the predominance of feedback regarding the Online Court had been “firmly supportive of the essential concept of a new, more investigative, court designed for navigation without lawyers”.<sup>44</sup> His Lordship identified that most of the criticism had been directed towards specific aspects of the design of the Online Court and the potential ramifications arising from same. In particular, the greatest concern had been in relation to the need to cater for litigants who would experience significant difficulty in communicating with the court via computer.<sup>45</sup>

Proposed amendments to legislation to enable the establishment of online court services were contained in the Prisons and Courts Bill 2016-17 (UK) which was first tabled in the House of Commons on 23 February 2017. However, despite reaching the committee stage in the House of Commons on 20 April 2017, the Bill fell with the dissolution of the UK Parliament on 3 May 2017.<sup>46</sup> It therefore remains to be seen whether the UK will pursue the transition to ODR platforms in its justice system in the near future.

## ODR in Australia

While ODR has grown significantly in Australia, the progress has not been as rapid as some may have anticipated.<sup>47</sup> In 2003, it was predicted that ODR would be adopted and used by a significant proportion of the Australian population by 2010.<sup>48</sup> While the expected growth rates for ODR in the Australian market have not reached the predicted levels, there have been significant, albeit gradual, ODR initiatives commenced both in the form of synchronous and asynchronous methods in facilitative, advisory and determinative ODR processes.<sup>49</sup>

The growth of ODR in most sectors within Australia has been principally focused upon e-commerce and consumer-based systems which operate as first-tier complaints handling and dispute resolution procedures.<sup>50</sup> As ODR platforms have evolved, various changes in technology have transformed the way in which dispute resolution is undertaken. Advancements in technology and internet speed have resulted in processes including eCallovers,<sup>51</sup> eLodgment,<sup>52</sup> eTrials,<sup>53</sup> eCourts, and witness teleconferencing in applications and trials. For example, s 39PB of the Evidence Act 1977 (Qld) requires that expert witnesses provide evidence by audio-visual link or audio link. Practice Direction 1 of 2008 of the Supreme Court of Queensland stipulates the procedure for parties to follow should they wish to adduce evidence by telephone and video link.<sup>54</sup>

Perhaps the most comprehensive example of ODR in the Australian legal system is found in the Federal Court of Australia’s eCourtroom.<sup>55</sup> The eCourtroom is a virtual courtroom used by judges and judicial registrars to assist with the management and hearing of some disputes in the federal jurisdiction. The types of matters heard in the eCourtroom include ex parte applications for substituted service in bankruptcy proceedings, applications for examination summonses, and the giving of directions and other orders in general federal law matters. It is linked with eLodgment to facilitate the electronic filing of documents.

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Outside of the courts, in the realm of ADR, ODR has also become an increasingly prevalent feature in conferences, mediations and, to a lesser extent, arbitrations. In 2013, the Australian Mediation Association (AMA) launched a virtual conferencing mediation service to facilitate mediation regardless of where the parties to a dispute are located.<sup>56</sup> However, the use of this service has been limited in the mainstream legal community, and it appears the online platform on which the AMA intended to provide this service is no longer accessible.

Nevertheless, ODR continues to be integrated into ADR processes, largely in the form of teleconferencing and video link, allowing parties to access and participate in the ADR processes synchronously, with the assistance of technology. There is, however, significant room for growth in this area particularly given Australia's isolated geographical location and vast continental size.

### **Benefits and burdens of ODR**

There are clear benefits to implementing ODR, as part of both ADR and court litigation. Most notably, it can result in costs saving when compared to traditional ADR methods and litigation. In particular, for minor economic disputes and small claims, fully automated cyber negotiation platforms may provide an avenue for clients to avoid incurring significant, or indeed any, legal costs involved in retaining a lawyer in circumstances where the ODR platform may enable a resolution through the exchanging of offers without the need for legal representation, particularly where liability is not in issue.

Costs are also likely to be avoided or minimised if synchronous ODR methods are integrated into traditional methods of mediation and arbitration to allow parties located internationally or in rural areas to

participate in the ADR process without incurring the costs of travel. This also increases the accessibility of ADR which can also make the process more efficient, thereby decreasing the costs involved. This is particularly beneficial in smaller disputes or in matters involving impecunious disputants for whom the cost of travel is not a feasible option.

However, while there are some evident advantages to engaging ODR platforms, mostly relating to the saving of time and costs, there are several potential risks that practitioners ought to bear in mind when considering engaging ODR platforms.

Along with the efficiency of using technology in ADR comes the risk to confidentiality of using third-party software and applications, particularly when discussing privileged information.<sup>57</sup> The Australian Dispute Resolution Advisory Council (ADRAC) reported that the sophistication of internet hacking increases with, if not exceeds the evolution of, ODR platforms.<sup>58</sup> Nevertheless, it is reasonable to expect that the incentive for, and therefore likelihood of, hacking in relation to the majority of legal disputes is negligible.

Further, it is usually more difficult for advocates, mediators and arbiters to build rapport with, and the confidence of, the parties. This can be exacerbated if stable internet connection and sufficient internet speed cannot be guaranteed, thereby interrupting the fluidity of negotiations. Similarly, conducting ADR purely online or via communication technology can present difficulties when private discussions are required between parties and their legal advisors. In that regard, communication facilities and online resources must be available not only for the joint negotiation sessions but also for the individual break-out sessions in order to be of real value.

Moreover, where parties are not required to appear or participate in person, there may be a perception that those parties are not invested in the process of resolving the dispute resulting in a less enthusiastic approach by all parties in the ADR process. In such circumstances, the costs saved by parties avoiding the need to travel to a mutual mediation or arbitration location are of little overall benefit, particularly when the costs of travel are compared with the legal costs of protracted litigation. Indeed, in large commercial disputes, the saving of costs associated with attending an ADR process in person is of minimal significance, if any.

The absence of parties appearing in person also presents a strategic issue for legal practitioners who lose the opportunity to assess how potential witnesses might present in court should the matter proceed to trial. This assessment can often be influential in convincing parties to resolve the matter to avoid the potential detriment to a case by reason of a poor-performing witness.

Further, the absence of human insight, empathy, and guidance provided to users of ODR platforms in relation to emotionally complex legal matters, such as those proposed to be dealt with by Rechtwijzer, is susceptible to creating, rather than abating, confusion among disputants thereby detracting from the intended benefits of ODR in those circumstances. Indeed, the lack of tailored legal advice provided to users of Rechtwijzer proved problematic to the success of that particular ODR platform.

An additional difficulty with the increased use of, or reliance upon, ODR is the disadvantage to clients who are not technologically savvy or who do not have access to computers or a reliable internet connection. Thus, while ODR platforms may assist those in regional or international locations to access ADR more conveniently, this access is of little benefit if those seeking to use the ODR services are unable to use the requisite technology in order to meaningfully participate in the process.

These burdens have the potential to result in less, rather than more, effective results arising from the ADR process.

A further issue with the increasing prevalence of, and reliance upon, ODR platforms was described by Ms Penelope Gibbs, director of Transform Justice and a former magistrate in the UK, who observed that the transition to online and virtual justice, particularly in the context of criminal law proceedings:

**...threatens to significantly increase the number of unrepresented defendants, to further discriminate against vulnerable defendants, to inhibit the relationship between defence lawyers and their clients, and to make justice less open.<sup>59</sup>**

Indeed, an increased reliance on fully automated cyber law platforms would likely result in an increased number of self-represented litigants which would in turn have the effect of placing a substantial and undue burden on the judicial system in circumstances where matters have failed to resolve and therefore come before the courts without prior, or with minimal, legal guidance, advice or representation.

Finally, there are also significant issues presented by ODR platforms intended for use in the legal field which are developed and managed by non-lawyers. In most, if not all, jurisdictions in the world, persons who are not qualified to practise law are prohibited from providing legal advice to members of the public. As such, if ODR platforms intend to provide legal advice, rather than simply provide resources and information, they must engage with legal practitioners to ensure any advice is provided by a person qualified to do so. This is crucial to not only ensure ODR platforms abide by the governing laws of a given jurisdiction, but also to ensure these processes accord with the community expectation of the standards and integrity of the legal profession.

## The future of ODR

**The benefits provided by ODR are similar to those offered by other forms of ADR – time and cost efficiency, autonomy, and user empowerment. It is therefore likely that ODR platforms will continue to evolve and integrate with more traditional legal processes. The ADRAC reported that, provided there is a reliable technological capacity, including adequate internet service provision and widespread service accessibility, the future developments in ODR are effectively boundless.<sup>60</sup>**

**Modria has proposed the concept of ODR to be replaced by the notion of cloud-based dispute resolution** whereby information and communication technologies facilitate secure case management and the implementation of other cloud-based technologies. The ADRAC has suggested whether the term “ODR” ought to be replaced with Dispute Resolution in the Cloud (DRIC).<sup>61</sup>

Nevertheless, as more entities move to implement or integrate ODR, security and confidentiality must remain a paramount priority for laypersons and legal practitioners alike. However, while there is presently a lack of

accountability, regulation and guidelines to monitor and govern ODR in the legal sector, the nature of ODR is that it can “incorporate internationally cooperative accountability and regulatory mechanisms”.<sup>62</sup>

This provides some degree of security to those engaging in ODR, although there remains room for improvement in this area.

With the implementation of adequate armament around ODR platforms and their users, ODR has the potential

to be an effective and efficient process choice for resolving disputes, which, when conducted appropriately, is likely to increase justice accessibility. However, regardless of how advanced ODR platforms become, they will nevertheless be unable to sufficiently replicate or replace the capacity for empathy and emotional intelligence which is of crucial importance in ADR processes. Instead, ODR is likely to increasingly assist the traditional models by facilitating more efficient and cost-effective methods of resolving matters through ADR.

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## Conclusion

ODR is best placed to enhance, rather than replace, traditional ADR processes. While there is significant scope for ADR to be supplemented by ODR platforms, there remain concerns regarding security, confidentiality and indiscriminate accessibility in using ODR. Further, in the absence of legal advice and guidance, there is potential for the courts to be inundated by a large number of unrepresented litigants when disputes fail to resolve via the ODR platforms.

As such, while there are advantages to integrating ODR into traditional models of ADR, it is unlikely to replace the role of mediators and arbiters given the irreplaceable value of human insight and judgment in legal matters.

As information and communication technology continues to evolve, a shift towards ODR in the law is inevitable. Legal practitioners should therefore recognise the increasing prevalence and utility of ODR processes and communication technology, and incorporate these methods which can complement their practice and benefit their clients. Incorporating ODR into traditional ADR methods strikes a balance between advancing the efficiency and modernity of the profession and increasing access to justice, without forsaking the integrity of the judicial process.

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## Footnotes

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