

14 ODR AND THE COURTS

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1 INTRODUCTION

Ever since *online dispute resolution* (ODR) processes first arose in the mid-1990s,¹ their impact on the state's already eroded monopoly on resolving conflicts has been the subject of much debate.² This is not to say that the rise of ODR signified the first instance in which individuals chose to settle matters outside of the courtroom – alternative means of settling disputes have been around for ages³ – but ODR offers a technological shift to dispute resolution, not merely a procedural one. Online environments have created new and unique ways (notably through the use of the so-called fourth party)⁴ of settling disputes in a swift, asynchronous (although synchronous solutions are also available), and cost effective manner. Accordingly, ODR can be seen as both a competing and complementary tool to traditional in-court schemes and state-run judicial systems.

But the true essence and scope of the relationship between ODR processes and the courts hinge on a series of criteria, the most prevalent of these being the definition one chooses to adopt to circumscribe the very notion of *online dispute resolution*.

If ODR is interpreted broadly as being the use of online environments to facilitate communications and dispute resolution,⁵ then it could be argued that ODR has seeped into the Court process through the use of electronic filing⁶ and electronic court management systems.⁷ However, if we accept the more conventional definition of ODR as being a process that “utilizes the Internet as a more efficient medium for parties to resolve their disputes

1 See K. Benyekhlef & F. Gélinas, “Online dispute resolution”, *Lex Electronica*, Vol. 10, No. 2, 2005, <www.lex-electronica.org/articles/v10-2/Benyekhlef_Gelinas.pdf>.

2 *Id.*

3 See K. Benyekhlef, *Une possible histoire de la norme*, Thémis, Montreal 2008.

4 See J. Rifkin, “Online Dispute Resolution: Theory and Practice of the Fourth Party”, *Conflict Resolution Quarterly* (2001) Vol. 19, No. 1, p. 117 *et seq.*

5 J. Hörlné, “Online Dispute resolution”, in R. Bernstein, J.A. Tackaberry & A.L. Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, Volume 1 (4th edn.), London, Sweet & Maxwell 2003, p. 782, paragraph 12-004.

6 “Electronic filing or e-filing is a method of filing court documents that uses an electronic format rather than a traditional paper format. Parties convert their documents into the file format designated by the court and file their documents via email or over the Internet.” See <www.abanet.org/tech/ltrc/research/efiling/>.

7 A list of such systems can be found here: <www.ncsconline.org/d_tech/vendorlist/vendbyproduct.asp?id=12>.

through a variety of ADR methods”,⁸ and that “brings disputing parties together ‘online’ to participate in a dialogue about resolving their dispute”,⁹ then ODR has yet to make its way into the court system in any significant manner.¹⁰

Of course, it could be argued that this goes without saying since, according to some, ODR is merely an online transposition of *alternative dispute resolution* (ADR) systems and processes, which, as their name clearly states, serve as an alternative to the Court system.¹¹ Therefore, to talk about Court sanctioned ODR would be akin to stating that the courts could serve as an alternative to themselves, which is somewhat nonsensical. That is not to say that the state cannot incorporate ODR processes and practices into its arsenal of judicial services,¹² but rather that, according to this approach, the notion of “court-run ODR” seems incongruous.

Other authors, however, prefer to oppose ODR to offline dispute resolution without referring to ADR, in which case the concept of “court-run ODR” becomes completely legitimate:

Cybercourts are simply court proceedings that use exclusively (or almost exclusively) electronic communication means. They should be, and often are, considered to be part of the ODR movement, for two reasons. First, because the ODR movement emerged because of the clash between the ubiquity of the Internet and the territoriality of traditional, offline dispute resolution mechanisms. The term ODR is thus opposed to offline dispute resolution mechanisms, not to courts. Online ADR is only one part of ODR. Second, courts do not only provide litigation. As I said before, there also is court-based mediation and non-binding arbitration.¹³

8 See <<http://cyber.law.harvard.edu/olds/ecommerce/disputetext.html>>.

9 *Id.*

10 For more on this distinction, see R. Susskind, *The End of Lawyers*, Oxford, Oxford University Press 2009, p. 218.

11 “ODR draws its main themes and concepts from alternative dispute resolution (ADR) processes such as negotiation, mediation, and arbitration. ODR uses the opportunities provided by the Internet not only to employ these processes in the online environment but also to enhance these processes when they are used to resolve conflicts in offline environments. [...] Like ADR [...] at its core is the idea of providing dispute resolution in a more flexible and efficient manner than is typical with courts and litigation.” E. Katsh & J. Rifkin, *Online Dispute Resolution*, San Francisco, Jossey-Bass 2001, p. 2. See also: Hörline (2003), p. 779, para. 12-004.

12 For an overview of such practices, see D. Reiling, *Technology for Justice*, Leiden, Leiden University Press 2009.

13 T. Schultz, *An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR*, Proceedings of the UNECE Forum on ODR 2003, p. 5: <www.odr.info/unece2003>.

Nevertheless, as stated by Thomas Schultz, “if we accept that courts can be part of the ODR movement if they provide dispute resolution online, we can think about the advantages that are specific to courts”.¹⁴ The legal system can clearly benefit from the incorporation of ODR, and in a way, state-run ODR can serve to eliminate the hurdles private ODR initiatives still face, such as those of confidence and enforcement.¹⁵

Whilst acknowledging that ODR assumes two roles as a competing and complementing system to state courts, our focus in the following pages shall be exclusively directed to the complementary role of ODR, and to the development of court annexed ODR schemes. Accordingly, we shall commence by providing an overview of how states have started to incorporate ODR into the legal process (2), and then proceed to shed light on possible future paths for state-run ODR systems(3).

2 COURT ANNEXED ODR SCHEMES: AN OVERVIEW OF PAST AND CURRENT PRACTICES

George Santayana argued that “Those who cannot remember the past are condemned to repeat it”.¹⁶ We would add that those who do not have knowledge of the present could be wasting their time and efforts. In other words, before embarking on the task of establishing principles and developing software to help in the adoption of ODR solutions by the courts, we should take notice of certain ODR initiatives that have emerged in different jurisdictions around the World. These initiatives, which have registered various degrees of success, can teach us what to do and, more importantly, what not to do when trying to establish how ODR could help to alleviate the courts’ burden and backlogs.

The following is a survey of four such initiatives: the Michigan Cyber Court (section 2.1), the Federal Court of Australia’s eCourt (section 2.2), Her Majesty’s Courts Service’s Money Claim Online and Possession Claim Online (section 2.3), and the Subordinate Courts of Singapore’s eAlternative Dispute Resolution initiative (section 2.4).¹⁷

¹⁴ *Id.*

¹⁵ *Id.*, p. 6.

¹⁶ G. Santayana, *The Life of Reason*, New York, Dover Publications 2005: <www.gutenberg.org/catalog/world/readfile?fk_files=1498120>.

¹⁷ For descriptions of other similar initiatives, see Susskind (2009), p. 221 *et seq.* See also S. Schiavetta, “Online Dispute Resolution, E-Government and Overcoming the Digital Divide”, 2005: <www.bileta.ac.uk/Document%20Library/1/Online%20Dispute%20Resolution,%20E-Government%20and%20Overcoming%20the%20Digital%20Divide.pdf>.

2.1 *Michiga's Defunct Cyber Court*¹⁸

Perhaps the most ambitious Court annexed ODR project was created by the Michigan legislature when, in 2002, it enacted its "Cyber Court" act¹⁹ which allowed for the creation of "the first courtroom in the nation to fully operate over the Internet using electronic document filing, web-based conferencing, and virtual courtrooms".²⁰ The Cyber Court was meant to hear cases regarding "business or commercial disputes"²¹ in which the amount in controversy exceeds USD 2.5 million".²²

In a paper presenting the Act when it was still in bill form, Marc Shulman, the bill's sponsor, stated that:

The cyber court will be a model for the future delivery of legal services and will include E-filings, web-based conferencing, virtual courtrooms, the establishment of the feasibility of online dispute resolution, and the use of mediators and judges that have the skills and knowledge to render prompt and competent decisions, all with the intent to provide businesses with an alternative venue to resolve disputes.²³

The Act, which is incorporated in section 80 of the Revised Judicature Act of 1961,²⁴ states that:

Sec. 8001. [...] (2) The purpose of the cyber court is to do all of the following:
a. Establish judicial structures that will help to strengthen and revitalize the economy of this state.

18 For a detailed explanation of the project, see L.M. Ponte, "The Michigan Cyber Court", *N.C. J. L. & Tech.*, (2002) Vol. 4, pp. 51 *et seq.*

19 2001 PA 262.

20 K. Koscielniak & B. Wassom, "Cyber Court", *Michigan Bar Journal* 2008, p. 48.

21 Paragraph 8005 of the Act describes "business or commercial disputes" as the following types of actions:
a) Those involving information technology, software, or website development, maintenance, or hosting.
b) Those involving the internal organization of business entities and the rights or obligations of shareholders, partners, members, owners, officers, directors, or managers.
c) Those arising out of contractual agreements or other business dealings, including licensing, trade secret, noncompete, nonsolicitation, and confidentiality agreements.
d) Those arising out of commercial transactions, including commercial bank transactions.
e) Those arising out of business or commercial insurance policies.
f) Those involving commercial real property.

22 Paragraph 8005 of the Act.

23 M. Shulman, "Cyber Court in Michigan", *Mich. B.J.* (2001) Vol. 80, November, p. 45.

24 P.A.1961, No. 236, paragraph 8001.

- b. Allow business or commercial disputes to be resolved with the expertise, technology, and efficiency required by the information age economy.
- c. Assist the judiciary in responding to the rapid expansion of information technology in this state.
- d. Establish a technology-rich system to serve the needs of a judicial system operating in a global economy.
- e. Maintain the integrity of the judicial system while applying new technologies to judicial proceedings.
- f. Supplement other state programs designed to make the state attractive to technology-driven companies.
- g. *Permit alternative dispute resolution mechanisms to benefit from the technology changes.*
- h. Establish virtual courtroom facilities, and allow the conducting of court proceedings electronically and the electronic filing of documents. (emphasis added)

Therefore, although the Act mostly focuses on e-filing and courtroom technologies, it also allows for the incorporation of ODR practices within the legal process,²⁵ most notably, as was stated by Representative Shulman, through the use of Internet teleconferencing chat rooms.²⁶

That being said, although the legal framework is in place to allow for the incorporation of ODR practices in this Cyber Court, the state of Michigan has yet to fund the actual infrastructure. As explained by one observer: “a loss of funding and irreconcilable differences over the court’s nature and location (e.g., partially physical versus purely electronic) led to an abandonment of the project.”²⁷

According to others,²⁸ those were but some of the reasons for the project’s ultimate demise:

Concerns ranged from the reluctance of parties and their lawyers to gamble on an untested system, to uncertainty about the costs and use of new technologies in their case preparation and presentation, to a general distrust of technology. Other concerns included the worry by parties and witnesses that their

²⁵ See paragraph 8023 of the Act. See also Ponte (2002), p. 84.

²⁶ Shulman (2001), p. 47. See also paragraph 8015 of the Act.

²⁷ A. Garofano, “Avoiding Virtual Justice”, *Cath. U. L. Rev.* (2007) Vol. 56, p. 688.

²⁸ B.A. Pappas, “Online Court”, *UCLA J. L. & Tech.*, 2008, p. 10.

privacy could be threatened due to the potential broadcast of their personal information online.²⁹

It seems that, as with many other failed Court IT projects,³⁰ the Cyber Court's proponents tried to do too much at once, therefore neglecting to take into account key components such as user acceptance,³¹ while underestimating the complexity and costs of the endeavour.³²

If the Cyber Court experiment could lead us to believe that the use of ODR by the courts is not a worthwhile endeavour, other state-run ODR projects have had much more positive outcomes.

2.2 *The Federal Court of Australia's eCourt*

As explained on the Federal Court of Australia's website:

The Federal Court's eCourtroom is a virtual courtroom that enables submissions to be exchanged and directions and other orders to be made on-line. The eCourtroom may be used to receive submissions and affidavit evidence and to make orders in a way that emulates actual courtroom proceedings. It may also be used to facilitate mediation [...]³³

The eCourt "is in effect an email service within a secure environment"³⁴ combined with a message board system similar to that of social media websites such as Facebook. A party

29 *Id.*

30 See for example C. Baar, "Integrated Justice: Privatizing the Fundamentals", *Canadian Public Administration*, (1999) Vol. 42, p. 42 *et seq.*; K. Makin, "Computer lawsuit costs Ontario \$63 million", *The Globe and Mail*, 1 June 2005, A1; and S. Lysecki, "Integrated Justice Project 'Too Large, Too Complex, Too Ambitious': AG's office", (2005), available at: <www.allbusiness.com/technology/896690-1.html>, all of whom discuss the failed Ontario Integrated Justice Project. For a more general view of failed Court IT experiments, see Reiling (2010), p. 60 *et seq.*

31 N.W. Vermeys & K. Benyekhlef, "Premiers éléments d'une reformation des processus judiciaires par la technologie", in D. Le Métayer (ed.), *Les technologies de l'information au service des droits: Opportunités, défis, limites*, Brussels, Bruylant 2010, p. 207 *et seq.*

32 Reiling (2009), p. 69.

33 <<https://ecourt.fedcourt.gov.au/>>. See also B. Tamberlin, "Online Dispute Resolution and the Courts", 2004: <www.odr.info/unforum2004/tamberlin.htm>: "The eCourt is a virtual courtroom that assists in interlocutory matters and allows for directions and other orders to be made online. It may also be used in mediations, where these are directed by the Court and conducted by one of the registrars."

34 "eCourtroom User Guide": <https://ecourt.fedcourt.gov.au/UserManuals/eCourtroom_User_Manual.doc>.

(or judge) simply has to log onto the system with his user name and password³⁵ to post messages and attach documents on a webpage reserved for the matter in which he is taking part. Once that is done, an email alert is automatically sent to all other participants in the matter. A user then simply has to click on a link included within the email's body to be taken directly "to the related matter and message on the eCourtroom".³⁶ However, as explained by Justice Brian Tamberlin of the Federal Court of Australia:

Protocol dictates that only the Judge (or the associate or registrar on the Judge's behalf) may commence the "discussion threads" with orders or directions, and it is in response to these that the parties may submit submissions and affidavit evidence. Discrete interlocutory matters may be conducted this way, or this can be the means for the provision of extra information, submissions and evidence prior to a hearing in court.³⁷

Like any "brick and mortar" courtroom, the eCourtroom has a user Protocol, which refers to series of requirements that must be strictly adhered to in order to be allowed to use the system. This Protocol³⁸ underlines the necessity for parties to abide by general rules of courtroom decorum as if they were in an actual courtroom.³⁹ Therefore, rules regarding language, contempt of court, and the publicity of hearings⁴⁰ are all enforced, as they would be in a "real" offline courtroom.⁴¹

It is interesting to note that, in test cases, the eCourt has proven to significantly reduce the delays and costs normally associated with a court case⁴² by eliminating the need for travel and synchronous communications.

35 See Tamberlin (2004): "Where a matter has been referred to the eCourt, the parties or their legal representatives, the Judge, associate and registrars may access the forum through the Court's webpage by using a password, which is allocated to the parties once the Judge has directed (and the parties have agreed) that the matter is an appropriate one for the eCourt forum."

36 *Id.*

37 *Id.*

38 See <<https://ecourt.fedcourt.gov.au/pagecontent/officalcontent.aspx?contentType=Protocol>>.

39 On the importance of staying true to rules of decorum even when using an online environment, see Benyekhlef & Gélinas (2005).

40 It must be noted that proceedings are only made public post facto through the online publication of court transcripts. See <<https://ecourt.fedcourt.gov.au/pagecontent/officalcontent.aspx?contentType=Protocol>>.

41 See *id.*

42 Tamberlin (2004).

Finally, although the service is available for any type of dispute (as long as the presiding judge deems it useful),⁴³ it seems to be particularly suitable for bankruptcy cases.⁴⁴ In fact, a survey of the five hundred and thirty-two (532) public transcripts currently available for consultation on the eCourtroom website⁴⁵ reveals that almost 80% of files relate to bankruptcy matters.⁴⁶

2.3 *The United Kingdom's Money Claim Online and Possession Claim Online*

Money Claim Online⁴⁷ (MCOL) and Possession Claim Online⁴⁸ (PCOL) are both Internet based services “for claimants and defendants” offered by Her Majesty’s Courts Service.⁴⁹ As their names suggest, MCOL is a way of “making or responding to a money claim on the internet”,⁵⁰ while PCOL aims at settling “certain types of possession claims”.⁵¹

2.3.1 **Money Claim Online**

Money Claim Online allows claimants and defendants to use online forms to settle a money claim rather than incurring the costs associated with a court case.⁵² As explained in Practice direction 7E,⁵³ claimants may use the system “to start certain types of county court claims

43 “Whether a matter, or part of a matter, is to be dealt with on the eCourtroom will be determined by the Court or a Judge having regard to such things as the nature and complexity of the issues to be resolved, the number of parties, the access of each party to email and the Internet, the views of the parties, the nature and extent of any evidence that may be required, and the urgency of the matter or part of a matter.” See <<https://ecourt.fedcourt.gov.au/pagecontent/officalcontent.aspx?contentType=Protocol>>.

44 In 2009-2010, “registrars undertaking general federal law work in the Sydney and Melbourne registries of the Federal Magistrates Court used eCourtroom to finalise in excess of 180 ex parte applications for substituted service in bankruptcy matters, as well as hear applications for the issue of summonses for examination pursuant to s81 of the *Bankruptcy Act 1966*.” See Federal Magistrates Court of Australia “Annual Report 2009-2010”, p. 41.

45 <<https://ecourt.fedcourt.gov.au/PublicTranscript/PublicForumHome.aspx>>.

46 According to our research, of the 532 files currently available for consultation, 419 pertain to bankruptcy matters, while 44 deal with appeals and related actions, 25 deal with corporations actions, 12 deal with consumer protection actions, 10 deal with intellectual property actions, 6 deal with administrative law actions, 6 deal with taxation actions 5 deal with miscellaneous actions, 3 deal with industrial actions, and 2 deal with admiralty actions.

47 <<https://www.moneyclaim.gov.uk/web/mcol/welcome>>.

48 <<https://www.possessionclaim.gov.uk/pcol/HomePage.do>>.

49 See <<https://www.moneyclaim.gov.uk/web/mcol/welcome>> and <<https://www.possessionclaim.gov.uk/pcol/HomePage.do>>.

50 <<https://www.moneyclaim.gov.uk/web/mcol/welcome>>.

51 <<https://www.possessionclaim.gov.uk/pcol/HomePage.do>>.

52 This being said, the service is not free. Claimants need to pay a fee ranging from GBP 25 to GBP 595 (depending on the value of the claim) to be able to use MCOL. See: <www.hmcourts-service.gov.uk/courtfinder/forms/ex50_web_0610.pdf>.

53 Available at <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part07e.htm>.

by requesting the issue of a claim form electronically via Her Majesty's Courts Service website". They may also use it to electronically file a request for judgment in default, judgment on acceptance of an admission of the whole of the amount claimed, or the issue of a warrant of execution. Defendants, on the other hand, can use the system to electronically file an acknowledgment of service, a partial admission, a defence or a counterclaim. Both parties may use the system to view an electronic record of the progress of the claim.

It must be noted that the system only allows "claims up to GBP 100,000 (including court fees and solicitor's costs)" against a maximum of two defendants residing in either England or Wales.⁵⁴ Also, in order for the claim to be contained exclusively online, the particulars (*i.e.* the details of the case) "must be set out in no more than 1,080 characters (including spaces)". Otherwise, a document containing more detailed information or particulars will have to be sent using more conventional methods of service.

The process is relatively simple. A claimant accesses an online form, which he fills out and files on the MCOL website. Once a claim is filed, the court issues a claim form, a printed copy of which is served to the defendant. The claim form "will have printed on it a unique customer identification number or a password by which the defendant may access details of the claim on Her Majesty's Courts Service website".⁵⁵ If the defendant does not answer in the allotted time, the claimant may ask for a default judgement through the platform. If the defendant files a counter claim or a partial admission that is unacceptable to the claimant, "[t]he claim will then be transferred to a local court and no further action can be taken online".⁵⁶ In all other scenarios, the case will be considered as being settled. On a final note, it should be underlined that MCOL has proven to be a very successful program. The service is now "dealing with more claims than local courts".⁵⁷

2.3.2 Possession Claim Online

Possession Claim Online allows individuals, solicitors, the government and businesses to file a claim, a warrant or certain other processes related to possession claims⁵⁸ electronically through the PCOL website.⁵⁹ As with MCOL, a claimant accesses an online form, which he fills out and files on the PCOL website. However, the PCOL process is different in that

54 See <www.hmcourts-service.gov.uk/onlineservices2/important_info/claim_criteria.htm>.

55 See <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part07e.htm>.

56 See <www.hmcourts-service.gov.uk/onlineservices2/progress_claim/judgment.htm>.

57 Schiavetta (2005). See also Susskind (2009), p. 221.

58 See: <<https://www.possessionclaim.gov.uk/pcol/help/hlp.do;jsessionid=0a3f6d0130d5d8a654f9997b48f3b270fce07f5c60d3.e34PaxqLb3iObi0Pbh0Na3uKaNz0n6jAmljGr5XDqQLv-pAe#userguide>>.

59 See Practice Direction 55B – Possession Claim Online, available at: <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part55b.htm>.

“the particulars of the claim must be included in the online claim form and may not be filed separately”.⁶⁰ Once a claim is filed, the court issues a claim form, a printed copy of which is served to the defendant. The defendant may then file a defence or a counterclaim by filling out his own online form. In certain cases, the parties will be able to communicate with the court “using the messaging service facility, available on the PCOL website”.⁶¹ They will also be able to file certain applications online.⁶² Although less of a success than MCOL,⁶³ PCOL remains a good example of effective state-run ODR.

2.4 *The Subordinate Courts of Singapore’s eAlternative Dispute Resolution (e@dr)*

As stated on the service’s website, “eAlternative Dispute Resolution is a Singapore Subordinate Courts’ initiative, for parties in an e-commerce transaction to resolve their disputes on the internet”.⁶⁴ Rather than commencing an action before the courts, a complainant simply has to fill out an online form describing his grievance and the remedy he seeks. A moderator⁶⁵ will then email the respondent and invite her or him to fill out a response form. If the respondent party accepts to take part in this process, a court-appointed mediator⁶⁶ will be assigned to the case.⁶⁷

60 *Id.*

61 *Id.*

62 *Id.*

63 See Susskind (2009), p. 222.

64 See <<http://app.subcourts.gov.sg/e-adr/index.aspx>>.

65 It must be noted that “[t]he moderator’s role is essentially administrative. He will collate the forms [...] and bring the parties together for the use of e@dr”.

66 As explained on the service’s website: “Where the dispute involves a claim of a small amount (up to S\$10,000, or up to S\$20,000 by consent of parties), the moderator will channel the dispute to the Small Claims Tribunals to be mediated by a Referee”. However, “[w]here the dispute does not fall within the Small Claims Tribunal’s jurisdiction, it will be referred to a court mediator”. See <<http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3882>>.

67 See <<http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3891>>. A more detailed explanation of the process is available at <<http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3883>>:

1. The complainant (the Requesting Party) files his complaint by submitting a Request for Mediation form, stating his particulars, the complaint and the brief facts relating to it, and propose a solution.
2. Within 3 days of receiving the completed form for Request for Mediation, the moderator will forward to the respondent (the Responding Party) a notice, together with the Requesting Party’s complaint. If the Responding Party does not wish to resolve the dispute by e@dr, or does not respond within a certain time set by the moderator, the Requesting Party will be notified, and the matter is terminated.
3. If the Responding Party agrees to e@dr, he will submit a Response form, stating his particulars, his version of events and his proposed solution. The Responding Party may also make a counterclaim against the Requesting Party, where it arises out of the same dispute or transaction. The Responding Party will be required to submit the Response form within 1 to 4 weeks, depending on the nature and complexity of the matter.
4. Within one week of receiving the Response Form, the moderator will notify the parties of the forum for resolution. Based on the nature and complexity of the dispute, the moderator will, at first instance,

From that point on, as a rule, “[a]ll communications and correspondences will be done through e-mail for mediation”.⁶⁸ However, where necessary, “the mediator may ask parties to meet face to face, or to produce and exchange documents and exhibits”.⁶⁹ If the parties come to an agreement, they will be invited to draft a settlement agreement. However, if they cannot come to an agreement within the allotted time (as set by the mediator),⁷⁰ the complainant will either have to file a case or simply abandon the claim.

This service is free, and available to all complainants (even foreign companies or consumers when the complaint relates to a Singaporean)⁷¹ if:

- They have yet to commence any court proceedings;⁷²
- They speak English;⁷³ and
- The dispute relates to “e-Commerce transactions and matters”,⁷⁴ including “disputes on contracts, intellectual property, [and] domain names”.⁷⁵

Finally, since the service is email-based, it goes without saying that it is only available when both parties have an active email account.⁷⁶

3 THE FUTURE OF STATE SPONSORED AND COURT ANNEXED ODR

We have seen that there are already some examples of state sanctioned ODR, but it goes without saying that there is still much that can be done, using online solutions, to make the judicial system more accessible and efficient. This is not to say that we should blindly

determine the appropriate channel for resolution. The mediator may channel it to the court mediator, the Small Claims Tribunal (SCT), the judge-mediator at CDRI and e.CDRI, SMC or SIAC. This is subject to the consent of the parties as to the mode of determining the dispute, and does not preclude a subsequent change of the forum of settlement.

5. The mediator will set the time-frame for the actual settlement of the dispute. Alternatively, the time-frame will be governed by the rules and regulations of SCT, SMC or SIAC where appropriate. Parties can also suggest a timeframe in agreement, with the approval of the mediator, SCT, SMC or SIAC (as appropriate).

68 See <<http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3883>>.

69 *Id.*

70 *Id.*

71 “E@dr [Electronic Alternative Dispute Resolution]”: <<http://app.subcourts.gov.sg/Data/Files/File/e-adr/ElectronicAlternativeDisputeResolution.pdf>>.

72 *Id.*

73 See <<http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3888>>.

74 *Id.*

75 *Id.*

76 “E@dr [Electronic Alternative Dispute Resolution]”: <<http://app.subcourts.gov.sg/Data/Files/File/e-adr/ElectronicAlternativeDisputeResolution.pdf>>. See also: <<http://app.subcourts.gov.sg/e-adr/page.aspx?pageid=3888>>.

implement an ODR-based judicial process. As we have stated in other arenas,⁷⁷ there are intrinsic dangers to the thoughtless digitalization of the judicial system. This being said, implementing certain ODR practices, when appropriate, could be beneficial for all participants.

What is appropriate, however, is obviously up for debate. Nevertheless, it does seem, as some authors have pointed out,⁷⁸ that:

Some types of dispute are less likely to be solved by online proceedings than others. E-commerce, for instance, seems better adapted to ODR than family law disputes⁷⁹ or criminal cases. Small claims benefit more from the low costs of ODR than large claims.⁸⁰

Indeed, it seems that the use of ODR to settle small claims and therefore free up judges and courtrooms for more complex cases is a given: “[s]mall claims courts, with smaller dollar amounts and less complex issues, are ideally situated to transition their operations online”.⁸¹ The e@dr service in Singapore is an example of how ODR practices can be applied to small claims, but the model, although efficient, is relatively rudimentary as it mainly focuses on the use of email when more effective, secure and accessible online dispute resolution technologies are available.

Indeed, numerous advanced ODR platforms aimed at resolving small claims are already being used and could easily be adapted to suit the needs of a state-run small claims court. For example, in 1999, eResolution, a company founded by one of the authors of this paper,⁸² signed an agreement with the European Commission to design a web application for resolving online consumer disputes. This application, which would bear the name ECODIR (for *Electronic Consumer Dispute Resolution*), was launched in 2001.

The ECODIR application has two parts: first, a negotiation stage only involving the consumer and the other party (an online merchant, for example). In this stage, consumers are

77 Vermeys & Benyekhlef (2010).

78 T. Schultz *et al.*, “Online Dispute Resolution: The State of the Art and the Issues”, E-Com Research Project of the University of Geneva, Geneva, 2001: <<http://www.onlineadr.org/reports/TheBlueBook-2001.pdf>>.

79 That being said, it must be pointed out that Australia did incorporate ODR into certain divorce proceedings. See Susskind (2009), p. 221.

80 *Id.*

81 Pappas (2008), p. 2.

82 Karim Benyekhlef and others founded eResolution in 1999. For more on the issue, see K. Benyekhlef, “La résolution en ligne des différends de consommation: un récit autour (et un exemple) du droit postmoderne”, in P.-C. Lafond (ed.), *L’après des consommateurs à la justice*. Cowansville, Yvon Blais 2010, p 89 *et seq.*

guided by user-friendly questionnaires that invite them to specify the nature of the problem: the consumer is simply asked to check certain boxes corresponding to the situation. The purpose of this approach is to guide consumers, while not allowing them the opportunity to vent too much. The online merchant is also invited to describe its versions of the facts through a guiding table. Upon providing an adequate description of the problem, the parties are invited to suggest ways of resolving it. The solutions appear in a table of proposal summaries that can be changed as counter-proposals are made. If negotiations have not led to a settlement upon a lapse of eighteen days, the parties can refer the dispute to a mediator. This is when the second stage of the ECODIR procedure begins, in which a third party is introduced. The third party takes cognizance of the exchanges between the parties during the negotiation stage, and tries to mediate a settlement. Naturally, the mediation takes place online using tools made available to the parties: secure email exchanges, chat-rooms, secure filing and exchange of documents, etc.⁸³

Although the technical aspects and user-friendliness of the application were praised by most (consumer associations, professional associations, industrial groups, the public sector, the European Commission, etc.),⁸⁴ the ECODIR Project never really took off for a number of reasons, most notably lack of funding for the platform's deployment phase, and lack of enforcement mechanisms. Were ECODIR or a similar platform to be used by a state-run small claims tribunal, both these issues would become moot.

ODR services, like any other private enterprise, need to foster consumer confidence to be able to perform.⁸⁵ This can be done through advertising campaigns or through backing from someone in a position of authority. A fine example of the latter is that of the SquareTrade platform,⁸⁶ which was set up specifically to resolve conflicts among users of the eBay auction site. SquareTrade registered impressive results: between 1999 and 2008, its platform was used to handle and resolve two million disputes involving 120 countries and five languages.⁸⁷ In other words, the system helped resolve an average of more than 220,000 cases a year. But eBay users did not turn to the SquareTrade platform because of its unique concept. In fact, the SquareTrade platform was quite similar to ECODIR's and to a plethora of other online dispute resolution services which appeared in the early 2000s.

83 For a more detailed description of ECODIR's rules of operation, see <www.ecodir.org>.

84 *ECODIR Project, Final Report*, September 2008, p. 40 *et seq.*

85 Pappas (2008), p. 21.

86 <www.squaretrade.com>. Concerning SquareTrade, read the article by SquareTrade's President and CEO: S. Abernethy, "Building Large-Scale Online Dispute Resolution & Trustmark Systems", in E. Katsh *et al.* (eds.), *Online Dispute Resolution (ODR): Technology as the "Fourth Party" Papers and Proceedings of the 2003 United Nations Forum on ODR*: <www.odr.info/unece2003/pdf/Abernethy.pdf>.

87 These statistics were taken from the SquareTrade website (<www.squaretrade.com>) in 2007, but are no longer available online.

SquareTrade succeeded because it was able to take advantage of a captive market in the form of the millions of buyers and sellers on eBay, and because eBay endorsed the platform and offered a way of enforcing agreements through its policies.⁸⁸ This therefore gave eBay users confidence in SquareTrade's capacity to resolve their disputes.

As many others have pointed out, state approval (through legislative or other means) would do the same for any state-run ODR small-claim service:

[T]he courts can play an instrumental role in providing legitimacy through control. There are actually many advantages to utilizing an online court process (more traditional adjudication facilitated with technology) over a more informal ODR process. First, online courts have more predictable remedies in that the decisions are appealable and enforceable. Judicially mediated settlements are much easier to enforce as they can qualify as "consent judgments" or as another form of enforceable instruments. Also, courts can benefit from the democratic accountability of judges. As an institution, judges have great symbolic capital in the field of dispute resolution. Additionally, online courts, as an arm of the state, have much greater authority to demand the accountability parties often desire from businesses than do private dispute resolution providers.⁸⁹

For these and other reasons, the time finally seems right for the emergence of state-run ODR platforms aimed at resolving small claims disputes. In fact, it is interesting to note that the ECODIR prototype has been presented to various departments of justice (in Québec, Belgium and Luxemburg), and all recognized the usefulness and pertinence of such a system for processing small claims. We therefore predict that these systems should start to emerge in the next few years.

This prediction is somewhat obvious, however, since the CRDP has recently received funding from the Quebec *ministère des Services gouvernementaux* (Department of Government Services) to adapt the ECODIR model to suit the needs of Quebec's small claims court (*i.e.* claims under CAN\$ 7,000). Motivation for this test project stems from the government's rumoured will to bow to mounting pressures to raise the maximum value of small claims from CAN\$ 7,000 to CAN\$ 10,000 or even CAN\$ 15,000.⁹⁰ If the change does

⁸⁸ It is interesting to point out that, ever since eBay created its own ODR service, SquareTrade shifted its services from ODR to warranty services. See <www.squaretrade.com/pages/about-us-overview>.

⁸⁹ Pappas (2008), p. 17.

⁹⁰ This change has been requested by certain stakeholders for many years now (See Louise Rozon, "L'accès à la justice et à la réforme de la Cour des petites créances", *Les Cahiers de droit*, (1999) Vol. 40, No 1, p. 243), and is rumoured to be part of a bill to modify the *Code of civil procedure* (RSQ, c C-25) that should be made available later this year.

happen, the number of cases filed in small claims court will most probably rise, and demand that more judges be assigned to these cases. Since judges presiding over small claims are Court of Quebec judges, this means that they will not be available to hear more complex legal cases (the Court of Quebec also hears cases relating to criminal matters, appeals from the housing board, adoption cases, most cases where the value of the matter is less than CAN\$ 70,000, etc.). Therefore, ODR is seen as a possible way to weed out small claim cases that do not necessitate a judge's intervention so that Court of Quebec justices can concentrate on those cases that do require their involvement. In this context, ODR processes are therefore not perceived as competitors to traditional in-court schemes, but rather as a value added asset to the small claims process.

Also in Canada, British Columbia's Ministry of the Attorney General is also working at developing an ODR platform to settle its province's small claims. The BC program "would largely focus on quantifiable disputes, such as debt claims, perhaps valued up to \$10,000".⁹¹ It is interesting to note, however, that said program is not only driven by efficiency and cost-cutting measures. Rather, "[t]he ministry's motivation to move online stems partially from a problem familiar to many employers: the impending mass retirement of baby boomers is expected to leave a big hole in its workforce".⁹²

These two examples only help to further emphasize the complementary role that ODR can serve if properly incorporated into the conventional legal process.

But small-claims, although currently the best suited to be settled through the use of ODR platforms because of their low value and relative simplicity (as opposed to more complex cases involving injunctive and other interlocutory measures), should only be the beginning of the court annexed ODR adventure, not its end. As the Australian eCourtroom and countless other ODR experiments⁹³ have demonstrated, ODR platforms can and should be used for much more complex matters. First, it is important to point out that past

91 R. Todd, "The New Frontier", *Canadian Lawyer*, 2010: <www.canadianlawyermag.com/The-new-frontier.html>.

92 *Id.*

93 For example, the eResolution system settled complex domain name disputes completely online: "eResolution was founded in the autumn of 1999 and launched its first online dispute settlement service when it received accreditation from ICANN to administer the settlement of disputes concerning domain names, in accordance with ICANN's policy of 1 January 2000. Several hundred cases from all over the world have since been settled through eResolution's technological platform. [...] From the start, eResolution set about transforming the document-based ICANN procedure into an online procedure. The technology eResolution has put in place enables the parties, decision-makers and administrators of cases to do everything online. All the exchanges take place within a secure environment accessible by password and user name." See K. Benyekhlef & F. Gélinas, "International Experience in Regard to Procedures for Settling Conflicts Relating to Copyright in the Digital Environment", *Copyright Bulletin*, (2001) Vol. 35, No. 4, p. 13.

experiments⁹⁴ have taught us that online dispute resolution can be equally and efficiently used for off-line and online disputes. Indeed, there is no obstacle to using this technology to facilitate the processing and resolution of conflicts arising in the physical world. Furthermore, although “there are several [...] logistical issues that present a challenge to the launch of an online court, including ensuring valid court appearances, issues with due process, and a digital divide between different segments of society”,⁹⁵ these issues should not stop us from exploring all that ODR has to offer to the courts, nor should “the lack of personal connection inherent in conducting a court or ODR proceeding electronically”.⁹⁶ In fact, in certain cases, the lack of physical presence can prove to be a blessing rather than a curse.⁹⁷ Informal surveys conducted with parties who took part in proceedings arbitrated through the Cybertribunal project⁹⁸ showed that parties did not feel the need to meet since it would incur more costs and delays, without generating any true benefits. On the other hand, meeting might fuel animosity when parties are already hostile towards one-another, diverting the topic from trying to resolve a problem to trying to defeat an enemy.⁹⁹

4 CONCLUSION

ODR practices can and should be adopted by the courts to help settle those cases that are adapted to the online environment. Such measures could go a long way in making the courts more efficient by freeing up judges from hearing cases which could easily have been settled through negotiation or mediation. However, these measures come at a cost. As past and current state-run ODR services have demonstrated, the state needs to invest both financially and politically in these programs for them to work.¹⁰⁰ Lack of funding is ultimately what killed the Michigan Cyber Court before it could take off and, according to some,¹⁰¹ this lack of funding was the direct result of a lack of political will to support the project.

94 These experiments include the afore-mentioned ECODIR as well as the Cybertribunal and eResolution projects. See Benyekhlef, (2010), p. 89 *et seq.*

95 Pappas (2008), p. 11.

96 *Id.*, p. 15.

97 See Vermeys & Benyekhlef (2010), p. 232 *et seq.*

98 The Cybertribunal was the first online platform integrating both mediation and arbitration. It was launched by the CRDP in 1998 thanks to funding from the *Fonds québécois des autoroutes de l'information*. For more information on the project, see V. Gautrais, K. Benyekhlef & P. Trudel, “Cybermédiation et cyberarbitrage: l'exemple du Cybertribunal”, in *Droit de l'informatique et des télécoms*, (1998) Vol. 4, p. 46. See also Benyekhlef (2010), p. 89.

99 *Id.*

100 Pappas (2008), p. 21.

101 For example, see Garofano (2007), p. 688.

But one should not throw good money after bad in the sense that we should not invest in ODR programs without first establishing what ODR solutions are compatible with the practices, customs, and principles underpinning our court systems. There is a good reason why ODR mainly developed outside of the courts: because it was not hindered by the normative order associated with legal systems. However, this order serves a purpose, and simply discarding it because it is incompatible with new technological advances is a mistake.¹⁰² The key to incorporating ODR practices into the courts is to first identify how the technology will impact our practices beyond the simple statement that ODR will make the legal system more efficient and less costly, because a system that is not in line with our values will never work, no matter how inexpensive and expedient it is.

This is one of the basic premises which the Cyberjustice Laboratory upholds amidst undertaking the development of future ODR-based technologies for the courts. The Cyberjustice Laboratory¹⁰³ is a research infrastructure housed at the University of Montreal and operated in collaboration with McGill University. It aims to develop different software solutions to the many problems now plaguing the justice system such as costs, delays and lack of confidence, just to name the most obvious. As explained in the Laboratory's promotional documents:

Thanks to a virtual hearing room, the Laboratory will be used for, among other things, developing a basic software structure for elaborating and testing computer models for facilitating online processing of disputes, digitalization of files, more efficient case management and establishment of decision-assistance systems. The purpose is thus to create software tools that will make it easier to network the court system and offer concrete, functional solutions to the various problems now facing the justice system (long delays, cost of procedures, etc.). These tools will not be limited to simply reproducing court procedures; they may also suggest new ways of doing things and thus revolutionize procedure thanks to innovative software design.¹⁰⁴

These “new ways of doing things” necessarily include the development of court-run ODR, one of the many tools available to reinvigorate a somewhat withered judicial system.

However, software development is only one of the Laboratory's two primary research areas: *i.e.* the “techno-legal area”. The other area reflects the need to modernize procedural

¹⁰² Benyekhlef & Gélinas (2005), p. 8.

¹⁰³ See <www.cyberjusticelaboratory.org>.

¹⁰⁴ *Cyberjustice Laboratory, Presentation Document*, Montreal, Centre de recherche en droit public, Faculté de droit, Université de Montréal, 2009.

law and to damper the obstacles that plague online dispute resolution systems. This “socio-legal area” includes two main objectives:

1. To identify psychological, social and cultural factors that are obstacles to or that curb the networking and computerization of the legal system;
2. To provide avenues for restructuring our procedural law in light of findings discovered through work on new models for networking court procedures.

These objectives are admittedly very ambitious and the scope of work promises to be somewhat complex; there are numerous obstacles to the modernization of our legal system but, as demonstrated by the few advances in state-run ODR described herein, the social and societal benefits seem to justify the costs and efforts associated with the implementation of such systems.