

ONLINE DISPUTE RESOLUTION AS AN INSPIRATION FOR CONTEMPORARY JUSTICE

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Keywords: *ODR, e-justice, ODR platform, Online Court, negotiation, mediation, court proceedings*

Abstract: *The traditional judicial mechanisms have not previously offered an appropriate solution for settling disputes in online environment. Online dispute resolution (ODR) has emerged as a pragmatic response to this unsatisfactory situation. It cannot however be seen only as an out-of-court dispute settlement tool (as it is often wrongly understood), as the instruments of ODR are fully usable also in the court decision-making process and should be understood as part of it. In our article we would like to focus on the direction in which ODR should be further developed. The main suggestion currently considered promising is linking the non-binding forms of ODR with judicial proceedings in one functional unit. This should reveal further potential of ODR and adequately combat the lack of efficiency of judicial decision-making. The main aim of the article is to discuss further the interconnection of ODR and its non-binding phases (online negotiation and online mediation) with binding court proceedings and to show the only partly verified potential of such an approach. The gradual use of online tools in decision-making processes should eliminate at least some simple cases; the court would then deal during the binding phase only with the more complex cases. Moreover, we will provide some results of the tests of such multi-tier dispute settlement.*

1. Introduction¹

Online dispute resolution (further referred to as «ODR») consists of three main elements. These include (i) the dispute resolution, (ii) communication between participants using modern technologies, (iii) the use of online software tools.² However, the third aspect is crucial for ODR and software is often used as the assistance tool. Software can ideally assist the participants by displaying the information within a user-friendly interface within online file management systems (shielded by the ODR platform). It may also include deeper schematization of decision-making processes or at least partial automation.³

¹ This article is partly based on the results of the research contained in: LOUČKÝ, Vymahatelnost práva pomocí online mimosoudního řešení sporů [Enforceability of Law through out-of-court Online Dispute Resolution]. Dissertation. <https://is.muni.cz/auth/th/hoxkg/> (accessed on 6 January 2019), 2018, p. 162–171.

² These three elements were introduced in: LOUČKÝ, Vymahatelnost práva pomocí online mimosoudního řešení sporů [Enforceability of Law through out-of-court Online Dispute Resolution]. Dissertation. <https://is.muni.cz/auth/th/hoxkg/> (accessed on 6 January 2019), 2018, p. 27-28. General definitions of ODR can be found e.g. here: KATSH/RABINOVICH-EINY, Digital Justice: Technology and the Internet of Disputes, Oxford University Press, New York, 2017, p. 47 et seq., or KAUFMANN-KOHLER/SCHULTZ, Online Dispute Resolution: Challenges for Contemporary Justice, Kluwer Law International, The Hague, 2004, p. 6.

³ LOUČKÝ, Visualization in Out-of-Court Decision-Making Process: Synergy or Discord? In: KLUSOŇOVÁ/MALANÍK/STACHOŇOVÁ/ŠKOP. Argumentation 2015. Brno, 2015, p. 121–136.

ODR is however still understood more as out-of-court dispute settlement, but such limitation is not fully revealing the potential of it.⁴ The future trend of ODR development should be, in our opinion, a greater interdependence of out-of-court ODR with the judicial system. We however do not mean only the closer interconnection of these two so far quite intensely isolated worlds; the exploitation of the possibilities provided by modern technologies in decision-making processes should be another positive effect of such interconnection (private providers of ODR already satisfactorily implemented and tested such tools).⁵ This article is thus aiming to explore further usability of ODR. Linking ODR with court proceedings should, in our opinion, contribute to resolve such disputes within the state power that were not solved or solved with great difficulty in the past.⁶ By such interconnection, higher efficiency of judicial decision-making can be achieved; we consider this to be one of the future objectives of ODR.⁷

2. Lack of efficiency of court decision-making mechanisms when using modern technologies

The resistance of state decision-making mechanisms to the use of modern technologies is generally evident, and although adequate technical tools have been available for a long time, it is often hard to properly implement them into an e-justice environment.⁸ Although there are some rare examples of states that implemented total electronization of justice,⁹ most countries are struggling not only with the actual problems of introducing and implementing modern technologies to justice, but often with a completely non-conceptual approach to the issue.¹⁰

The use of technologies in justice should not be seen as «adapting to» modern trends of communication but as improving access to justice. ODR can provide a good example in some cases (especially in the area of handling and further processing of information).¹¹ However, the inspirational role of ODR has been unfortunately rather marginal so far. RABINOVICH-EINY and KATSH emphasize that the goal of applying electronic tools to the court proceedings in the last twenty years was primarily to reduce the cost of decision-making and, if possible, rising its effectiveness.¹² What has, however, been largely neglected, is the need to provide new tools and means for resolving disputes, or to link the existing isolated options together to resolve the dispute. The fact that physical, geographical, and even psychological boundaries in dispute resolution have been overcome

⁴ Such a narrow scope of ODR is understood e.g. by RULE, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, Jossey-Bass, San Francisco, 2002, p. 326, or HÖRNLE, *Online Dispute Resolution: The Emperor's New Clothes?*, *International Review of Law, Computers & Technology*, 2003, Issue 17, No. 1, p. 28.

⁵ To see more at: RULE/SINGH, *ODR and Online Reputation Systems*. In: WAHAB/KATSH/RAINEY, *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution*. The Hague 2012, p. 174 et seq., or KATSH/RULE, *What We Know and Need to Know about Online Dispute Resolution*, *South Carolina Law Review*, 2016, Issue 67, No. 2, p. 330 et seq.

⁶ Dutch developers are expanding the possibilities of how to assist justice using modern technologies (and linking it with the non-binding phases of ODR). They state that by 2030 technology shall be able to settle 130 million disputes in non-binding stages before judicial decision-making. HAGUE INSTITUTE FOR THE INTERNATIONALISATION OF LAW, *User Friendly Justice*. <http://www.hiil.org/> (accessed on 6 January 2019), 2018.

⁷ KOULU, *Dispute Resolution and Technology: Revisiting the Justification of Conflict Management*, University of Helsinki, Helsinki, 2016, p. 17 et seq.

⁸ KATSH/RABINOVICH-EINY, *Digital Justice: Technology and the Internet of Disputes*, Oxford University Press, New York, 2017, p. 154.

⁹ To see the rise of e-justice and the first attempts of broad electronization: KAUFMANN-KOHLER/SCHULTZ, *Online Dispute Resolution: Challenges for Contemporary Justice*, Kluwer Law International, The Hague, 2004, p. 40–41.

¹⁰ The concept of the approach is crucial. Technical barriers can sometimes be easily overcome, but when the overall concept is missing, a comprehensive and functional system cannot be reliably built. POLČÁK, *Internet a proměny práva [Internet and metamorphosis of law]*, Auditorium, Prague, 2012, p. 254.

¹¹ KOULU, *Dispute Resolution and Technology: Revisiting the Justification of Conflict Management*, University of Helsinki, Helsinki, 2016, p. 18–19.

¹² KATSH/RABINOVICH-EINY, *Digital Justice: Technology and the Internet of Disputes*, Oxford University Press, New York, 2017, p. 155.

especially by private ODR providers is an example of how to implement some of the lessons learned from already available ODR systems into court decision-making processes. This should increase overall access to justice.¹³ The fact is that modern technologies change and should change the basic characteristics of the decision-making process and its form.¹⁴ Private and public ways of settling disputes are thus starting to get closer to each other thanks to the online environment.

3. The search for the ideal interconnection of ODR and judicial decision-making scheme

The convergence of out-of-court ODR and judicial proceedings should therefore be one of the current objectives not only for ODR and its further use, but also for judicial decision-making in general. This could reduce the current rate of discrepancy in the speed of binding dispute resolution,¹⁵ which is even more evident when the dispute arises in the online environment. Out-of-court ODR effectively addresses online disputes (but not just those), provides the parties with an effective tool, and the parties do not have many reasons to look for anything other than «private justice» in the vast majority.¹⁶ It is clear that the judicial system cannot successfully deal with a large number of disputes especially when they are of low value. The reasons for that are, among other, the financial demands of conducting such a dispute, its often cross-border nature or the low motivation of the parties to reach the settlement.¹⁷ However, in our opinion, this does not mean that the courts should resign on resolving such (especially simpler and low value) disputes and leave them entirely in the hands of the private sector. This would not fulfil one of the fundamental roles of a functioning role of the state (which is, among other things, the effective control of society through dispute resolution and enforcement). Furthermore, it is necessary to underline that private and public decision-making are gradually approaching each other. It seems a necessity to use this state and to link each type of the decision-making processes together effectively. This, in our opinion, will at least partially fill in the existing gap in decision-making, as well as help with the appropriate implementation of modern technology tools into justice.

We therefore see it as necessary to link out-of-court ODR with judicial decision-making to deal with selected disputes (especially private online disputes). Ideally, the decision-making process typical for non-binding ODR phases – negotiation and mediation (using already existing interconnections with modern technology tools) – should be offered in the framework of the dispute resolution. This should then be directly followed by a binding (judicial) decision-making process. The courts would manage the whole process, transfer available information to the next stages, and ultimately process the court's decision when linking non-binding decision-

¹³ Private ODR providers have been to some extent those who were pioneers in the use of modern technologies to resolve disputes. Their knowledge is gradually transferred and should be transferred to the disputes settled by courts. The courts are starting to recognize the need to use the rapid processing of information for a more appropriate resolution of disputes. KATSH/RABINOVICH-EINY, *Digital Justice: Technology and the Internet of Disputes*, Oxford University Press, New York, 2017, p. 155, 166.

¹⁴ Virtualization however does not change the core of the problems or approach in general – there is still the need to settle the disputes irrelevant to the environment where they are appearing. To see more on the phenomenon of the virtualization: LÉVY, *Cyberculture*, Karolinum, Prague, 2000, p. 44 et seq.

¹⁵ To see some statistics on the length of judicial processes: COUNCIL OF EUROPE, *European judicial systems, Efficiency and quality of justice*, Edition 2016 (2014 data). <https://rm.coe.int/european-judicial-systems-efficiency-and-quality-of-justice-cepej-stud/1680788228> (accessed on 6 January 2019), 2016, or EUROPEAN UNION, *The 2018 EU Justice Scoreboard*. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2018) 364 final. https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf (accessed on 6 January 2019), 2018.

¹⁶ BENYEKHELF/GÉLINAS, *Online Dispute Resolution*, Lex electronica, 2005, Issue. 10, No. 2, p. 10 and 15 et seq.

¹⁷ «Traditional judicial mechanisms [...] did not offer an adequate solution for cross-border electronic commerce disputes, and that the solution (providing a quick resolution and enforcement of disputes across borders) might reside in a global ODR system for small value, high volume [...] disputes». Paragraph 25. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, *Online dispute resolution for cross-border electronic commerce transactions*. Working Group III (Online Dispute Resolution), Twenty-second session, Vienna, 13-17 December 2010, A/CN.9/WG.III/WP.105. <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V10/574/10/PDF/V1057410.pdf?OpenElement> (accessed on 6 January 2019), 2010.

making to the judicial system.¹⁸ This would, in our opinion, gradually lead to comprehensive decision-making, taking advantages from the non-binding ODR stages. Non-binding ODR phases will also act as prevention or rather filter¹⁹ for eliminating (and resolving) simpler disputes (possibly easy cases as DWORKIN is describing them).²⁰ Only complicated disputes (hard cases) should be brought to court and resolved in binding judicial proceedings. It is precisely such a distribution of dispute resolution that is capable of relieving overloaded judicial decision-making, which in that case would only deal with complex disputes. At the same time, participants of the decision-making process would gradually utilize such tools that are adequate to resolve their disputes; they would thus gradually verify whether it is easier and cheaper to settle the dispute in the negotiation and not in the final binding stage.

4. Actual attempts to reform justice using non-binding ODR phases

The idea of creating the link between non-binding stages of ODR and binding judicial decision-making has been followed by an initiative in the form of creating the Online Court in England and Wales.²¹ It has been prepared as the response to the technological deficiency of judicial decision-making processes. It should focus on most civil cases (without being limited to the online environment) with a maximum value of up to £ 25,000 and it should be voluntary. The Online Court is intended as a way of resolving the disputes, in which the physical presence of the parties is minimized and the contact between the parties is primarily mediated if necessary by a Case Officer not the judges themselves.²² The Online Court also aims to use modern technologies to streamline the entire decision-making process.²³

The Online Court should offer a comprehensive tool that will link particular dispute resolution phases to allow different ways of resolving the dispute gradually according to its suitability and taking into account its nature. The process should consist of three phases: (i) in the first phase after filling in the information about the dispute to the online platform, the parties will be able to negotiate between each other within a closed system and possibly reach mutual agreement; if this stage is unsuccessful, it is possible to use (ii) the designated officer of the court via an online platform that would act as a mediator; at this phase it is assumed that most of the disputes will be resolved;²⁴ (iii) the remaining unresolved disputes will be decided by the District Judge (the negotiation and mediation phase will be linked to court proceedings and all the information already contained within the online platform will be used also in this stage of decision-making). The judge may continue to

¹⁸ Such decision-making should be shielded by a closed platform that would further contribute to the clarity of the solution and its effectiveness.

¹⁹ The use of non-binding forms of ODR has to be seen not only as a possibility to settle the disputes but also in means of preventing to resolve the disputes in more formal phases. RABINOVICH-EINY/KATSH, A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution, *Ohio State Journal on Dispute Resolution*, 2017, Issue 32, No. 4, p. 719.

²⁰ DWORKIN, *Hard Cases*, *Harvard Law Review*, 1975, Issue 88, No. 6, p. 1060 et seq.

²¹ In 2014, a working group led by professor Richard Susskind was formed. Its mission is to explore the potential of ODR use in justice which partially led to the initiatives around the Online Court. ROZENBERG, *Origins of the online court. The Online Court: will IT work?*, *The Legal Education Foundation*. <https://long-reads.thelegaleducationfoundation.org/> (accessed on 6 January 2019), 2018.

²² BRIGGS, *Civil Courts Structure Review: Final Report by Lord Justice Briggs, Judiciary of England and Wales*. <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (accessed on 6 January), 2016, p. 37–38.

²³ CORRÉS notes that the Online Court is similar in non-binding phases to many ADR schemes or out-of-court tribunals. CORRÉS, *Regulatory Developments in Mediation and in Technology Supported Mediation Schemes in the UK*, *Computer and Telecommunications Law Review*, 2017, Issue 23, No. 8, p. 210.

²⁴ BRIGGS, *Civil Courts Structure Review: Final Report by Lord Justice Briggs, Judiciary of England and Wales*. <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (accessed on 6 January), 2016, p. 59.

communicate with the parties primarily by using an online environment.²⁵ The Online Court is about to start operating around 2022.²⁶

Although such an initiative of linking out-of-court mechanisms with court proceedings using modern technologies is highly welcomed, there is also emerging criticism. The main subject of criticism (apart from the traditional argument regarding the restricted access of users to the Internet)²⁷ is the concern that a «second-class justice» will be provided through this scheme. However, such concerns are not justifiable, as it is envisaged within this system that disputes that would not be resolved will be decided as well and moreover there will always be the possibility of deciding the dispute within court proceedings.²⁸ Likewise, criticism cannot be accepted in terms of online litigation concerns²⁹ and the transparency of the whole process.³⁰ The fact is, however, that the proposal has not yet clarified the question, whether the Online Court will also deal with cross-border disputes.³¹ Also, the costs associated with the submission of evidence and statements are problematic – the rules are currently stating that, from the beginning, the evidence must comply with legal requirements (thus also during the negotiation and mediation stages), which can lead to increased costs without any certainty that the dispute will be further discussed in online proceedings. At the moment, however, the implementation of the Online Court proposal is delayed due to some political bickering and scepticism towards online tools, although the benefits are clearly explained in the proposal itself.³²

The potential of modern technologies (and the use of ODR) for the transformation of justice has also been demonstrated in Canada by introducing the Civil Resolution Tribunal. This scheme is more successful than the Online Court so far and it is already operational; it was launched in 2016. It focuses on disputes with a

²⁵ CORTÉS, Regulatory Developments in Mediation and in Technology Supported Mediation Schemes in the UK, Computer and Telecommunications Law Review, 2017, Issue 23, No. 8, p. 210.

²⁶ ROZENBERG, Origins of the online court. The Online Court: will IT work?, The Legal Education Foundation. <https://long-reads.thelegaleducationfoundation.org/> (accessed on 6 January 2019), 2018.

²⁷ Such restrictions are linked to the access to justice by potential participants. Briggs, however, quite unambiguously and convincingly argues that the number of such participants, particularly in online disputes, will be minimal. He also stresses that this procedure is voluntary, only an extension of classical judicial decision-making and opens a wider area of dispute settlement. BRIGGS, Civil Courts Structure Review: Final Report by Lord Justice Briggs, Judiciary of England and Wales. <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (accessed on 6 January), 2016, p. 39.

²⁸ One of the primary purposes of ODR shall be emphasized – to provide dispute resolution where it was not available or was rather difficult to access the court dispute resolution. «I suspect that the essence of the «second class» criticism arises from a comparison between the Online Court and traditional litigation with lawyers engaged on both sides under a full retainer. But this ignores the harsh reality that such litigation is so expensive that it is either unaffordable or imprudent [...]» BRIGGS, Civil Courts Structure Review: Final Report by Lord Justice Briggs, Judiciary of England and Wales. <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (accessed on 6 January), 2016, p. 38.

²⁹ BRIGGS notes that it is not possible to maintain the full parallels of traditional dispute settlement and copy its structure. It is necessary to use modern technologies and adapt the decision-making process to the online environment. BRIGGS, Civil Courts Structure Review: Final Report by Lord Justice Briggs, Judiciary of England and Wales. <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (accessed on 6 January), 2016, p. 39.

³⁰ Modern technologies should contribute to the transparency and openness of justice, they should not reduce or maintain the standard. In this context, BRIGGS stresses out the need to ensure that online decisions are made available (on-line accessibility), being able to be found, the documents are in electronic form, they should be archived adequately, and the proceedings should be publicly accessible online if possible. BRIGGS, Civil Courts Structure Review: Final Report by Lord Justice Briggs, Judiciary of England and Wales. <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (accessed on 6 January), 2016, p. 44–45.

³¹ Cf. BRIGGS, Civil Courts Structure Review: Final Report by Lord Justice Briggs, Judiciary of England and Wales. <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (accessed on 6 January), 2016, p. 102, 123.

³² To see other steps how to support the Online Court: SMITHS, Online Courts in England and Wales: six proposals to see off a gathering storm, Law, Technology and Access to Justice. <https://law-tech-a2j.org/odr/online-courts-in-england-and-wales-six-proposals-to-see-of-a-gathering-storm/> (accessed on 7 January 2019), 2018.

value lower than CAD 5,000 (real estate disputes are excluded) and it is voluntary.³³ The process consists of four phases: (i) firstly, the parties insert relevant information into the system on the basis of which the software tries to recommend solutions to the parties (solution explorer phase); (ii) if the dispute is not settled, the parties are left to the next stage and negotiating between each other using a software solution which clearly presents the parties with substantial arguments and seeks to assist the parties to reach the settlement using recommendations based on the automated analysis of previous cases; (iii) the parties are provided with the possibility of mediation with the participation of a third party (mediator); (iv) a binding court decision-making process.³⁴ In the final phase, the parties can also use online file management, phone, videoconferencing, etc. The final decision could then be appealed. The process lasts from sixty to ninety days on average.³⁵ By the end of 2017, proceedings have been initiated in almost 24,000 cases; the court receives some 400 new disputes a month. The success of such an approach to dispute resolution is highlighted by the fact that approximately 85% of the disputes were settled at the negotiation or mediation stage, only 15% of disputes have reached the binding decision-making phase.³⁶ This example demonstrates the effectiveness of linking non-binding ODR with judicial decision-making, as well as the basic idea of this interconnected process – streamlining judicial procedures by involving specific tools of modern technologies and thus relieving an overloaded justice system. In addition to the public initiatives described above, there are also private providers offering systems linking justice and non-binding ODR. It is the Dutch *Rechtwijzer* platform, which provides non-binding dispute resolution mechanisms in family law, and has been extended, for example, to disputes related to debts.³⁷ Similar services are offered by the American provider *Modria*, which provides modular ODR and, depending on the needs of a particular court, is connected with the judicial proceedings.³⁸ This also demonstrates that private-sector decision-making processes and public binding judicial systems are progressively approaching each other. This should further improve decision-making in general.³⁹

5. Conclusion

The presented approaches have shown, in our opinion, the appropriate interconnection of non-binding forms of ODR and binding judicial decision-making. We find a voluntary scheme, where negotiation is offered as the first possibility to settle the disputes, as ideal. If the first stage of negotiation fails, mediation with the assistance of a third party should be offered; the mediator then seeks to recommend proper agreement to the parties to reach the settlement. The last phase of a binding court decision using all the information from previous stages of the process should then shield the whole process. It is not, however, convenient to use arbitration, as that would mean avoiding court proceedings and could also cause problems in consumer disputes. Besides, linking with the judicial decision-making process is trying to (and should) respond to the deficiency in the use of modern technologies in the judiciary.

It is thus necessary to point out that one of the important roles of ODR should be seen in the assistance to the judiciary. This article is trying to address future areas where ODR should expand. We see further potential

³³ THE CIVIL RESOLUTION TRIBUNAL, Welcome to the Civil Resolution Tribunal. <https://civilresolutionbc.ca/> (accessed on 7 January 2019), 2019.

³⁴ KATSH/RABINOVICH-EINY, *Digital Justice: Technology and the Internet of Disputes*, Oxford University Press, New York, 2017, p. 161 et seq.

³⁵ KATSH/RABINOVICH-EINY, *Digital Justice: Technology and the Internet of Disputes*, Oxford University Press, New York, 2017, p. 161.

³⁶ ROZENBERG, Origins of the online court. The Online Court: will IT work?, The Legal Education Foundation. <https://long-reads.thelegaleducationfoundation.org/> (accessed on 6 January 2019), 2018.

³⁷ RECHTWIJZER, *Vind uw route door het recht*. <http://rechtwijzer.nl/> (accessed on 6 January 2019), 2014.

³⁸ TYLER TECHNOLOGIES, *Expanding Access to Justice with Online Dispute Resolution*. <https://www.tylertech.com/solutions-products/modria> (accessed on 6 January 2019), 2019.

³⁹ KATSH/RABINOVICH-EINY, *Digital Justice: Technology and the Internet of Disputes*, Oxford University Press, New York, 2017, p. 161.

of ODR exactly in the interconnection of non-binding stages of ODR with binding decision-making. Gradual offering of online negotiation and mediation could result in the elimination of some simple cases (soft cases in the terminology of DWORKIN), the more complicated cases (hard cases by DWORKIN) would be dealt by the courts themselves in binding proceedings. The initial successful experiments in Canada and planned launch of the Online Court in England and Wales suggest that this pathway could not only unleash the potential of ODR but, above all, adequately fight the crisis of court decision-making processes and improve the meaning of e-justice.

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