



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

**Government
Centre for
Dispute
Resolution**

Online dispute resolution

**An introduction to online dispute resolution (ODR),
and its benefits and drawbacks**

Charlotte Austin

Summer Research Scholarship Programme 2016/17

Victoria University of Wellington

February 2017



This report was completed by Charlotte Austin, for the Government Centre for Dispute Resolution, as part of the 2016/17 Summer Research Scholarship Programme, Victoria University of Wellington, New Zealand.

Disclaimer: The analysis, views and information included in this report are strictly those of the author. They do not represent policy advice nor do they necessarily reflect the views of the Government Centre for Dispute Resolution, the Ministry of Business, Innovation and Employment or the Government.

Correspondence details:

Government Centre for Dispute Resolution:

gcdr@mbie.govt.nz, 15 Stout Street, PO Box 1473, Wellington 6140, Phone +64 4 917 0199

Contents

1	Introduction	2
2	Defining Online Dispute Resolution	3
	Early Conceptualisations of ODR.....	3
	Development of ODR	5
	Summary of ODR definitions.....	8
3	The benefits of ODR	10
	Cost savings	10
	Time savings and convenience.....	11
	Increased access to justice	11
	Environmentally friendly.....	12
	Knowledge development and mediator training.....	12
	Expression of emotions.....	13
	Reduces the influence of unconscious bias	14
	Benefits of ODR in specific contexts	15
4	The drawbacks of ODR	17
	Cost and time savings?.....	17
	Requires technological literacy	18
	Privacy and confidentiality concerns	19
	Expression of emotions.....	20
	The “rudeness of cyberspace”	21
	Lack of governance.....	21
	Lack of quality data to assess claims about advantages and disadvantages	23
	Ethical concerns	24
	Drawbacks of ODR in specific contexts	27
5	The Future of ODR	29
	Government and ODR in New Zealand	29
	Artificial intelligence and ODR	30
6	Conclusion	32
7	Bibliography	33

1 Introduction

This report provides an introduction to online dispute resolution (ODR), and its benefits and drawbacks. It first provides an overview of the range of concepts which fall within a broad definition of ODR, and uses examples of ODR in practice to demonstrate the development of ODR, from early beginnings on eBay, through to Government-funded online courts for resolving low value civil claims.

The benefits and drawbacks of ODR are then discussed, both generally and in some specific contexts. Finally, the report looks at two major probable future developments, one specific to New Zealand, and the other, more generally, in relation to Artificial Intelligence (AI).

Where this report does not go into great detail on a specific point, reference has been made to sources which can be used by the reader to gain further information if required.

2 Defining Online Dispute Resolution

"Online dispute resolution" is a term that is now widely used; however there is no singular definition that applies to all formulations of ODR. Broadly speaking, ODR describes the use of the internet as a tool to help resolve conflicts, drawing on Alternative Dispute Resolution (ADR) concepts such as negotiation, mediation and arbitration.¹ However, there are several distinct conceptualisations of ODR in relation to the type of dispute. For example, ODR may refer to disputes that arose in the online sphere (ie resolution of online disputes), or alternatively to disputes that arose offline, but for various reasons use the internet to assist in resolving the dispute (ie resolution of offline disputes, online). There is also a distinction between "hybrid" ODR systems that utilise both humans and technology, and standalone ODR systems which are entirely reliant on software.² A 2004 review of ODR literature concluded that there was an incredibly wide range of procedures that were claimed to be "ODR":³

blind bidding, automated negotiation, automated settlement systems, assisted negotiation, mediation, online consumer advocacy and complaint, complaint assistance, software-based or automated mediation, facilitative mediation, conciliation, consumer schemes, consumer complaint boards, ombudsmen, med-arb for consumers, jury proceedings, arbitration, non-binding evaluation, non-binding arbitration, automated arbitration, mock trials, and credit-card charge backs.

By 2017, the range of ODR procedures has expanded even further. This section explores the different ways ODR can be defined and provide examples of how each definition is seen in practice.

Early Conceptualisations of ODR

The use of the term ODR can be seen as early as 1996, when the first articles about ODR were published and the first conference dedicated to ODR was held.⁴ At the time, ODR was mainly thought to be in relation to resolving disputes that had arisen online, largely as a result of the growing popularity of e-commerce.⁵ A definition of ODR put forward in 2004 largely represents the way in which ODR was initially viewed:⁶

[ODR is] a dispute resolution process that operates mainly online. This encompasses both online versions of alternative dispute resolution and cybercourts, the former being dominant. In other words, ODR relates to negotiation, mediation, arbitration, and court proceedings, whose proceedings are conducted online.

¹ Kori Clanton "We are not who we pretend to be: ODR alternatives to online impersonation statutes" (2014) 16(1) *Cardozo Journal of Conflict Resolution* 323 at 349.

² Robert J Condlin "Online Dispute Resolution: Stinky, Repugnant, or Drab" (Francis King Carey School of Law Legal Studies Research Paper No 2016–40, University of Maryland, 2016) at 15.

³ Thomas Schultz "Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust" (2004) 6 *NC JOLT* 71 at 73, n 4.

⁴ Ethan Katsh "ODR: A Look at History – A Few Thoughts About the Present and Some Speculation About the Future" in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (Eds) *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution* (Eleven International Publishers, The Hague, 2011) 21 at 23.

⁵ As above.

⁶ Schultz, above n 3, at 74.

Initially, the 'online' part of ODR was mainly using the internet as a tool through which to conduct already-established ADR processes, rather than using the cybersphere to resolve disputes in a completely new manner. At least initially, online mediation for example, "strongly resembles" offline mediation.⁷

Two early examples of ODR in practice can be seen in eBay's online mediation service, initially developed in 1999 to mediate disputes between buyers and sellers, and in the "Uniform Domain-Name Dispute-Resolution Policy (UDRP)" adopted by the Internet Corporation for Assigned Names and Numbers (ICANN), also in 1999.

eBay and SquareTrade

eBay was founded in 1995 as an online marketplace. In response to the growing number of disputes between vendors and purchasers, eBay developed a dispute resolution program in 1999, initially contracted out to the internet startup company SquareTrade.⁸ The ODR platform offered by Square Trade was still relatively simplistic. It was an early form of online mediation which involved one party filling in text boxes, selecting choices from drop-down menus, and ranking options generated by SquareTrade, which was then emailed to the other party by SquareTrade for that party to do the same.⁹ If the dispute was not resolved automatically through the choices selected and the ranking of the options, the dispute was referred to a human mediator who would use typical mediation techniques via asynchronous email to attempt to resolve the conflict.¹⁰ Thus, the initial form of ODR adopted by eBay was a hybrid ODR system which used a mixture of text-based mediation and blind bidding designed to resolve online disputes.

'Blind bidding' refers to the process of the parties selecting and ranking options, and was also used by companies such as Smartsettle and Cybersettle – early start up companies which still exist.¹¹ Although an early ODR technique, blind bidding is still used to resolve disputes of a similar nature to eBay vendor/purchaser disputes. For example, in 2010 the American Arbitration Association's international division, the International Centre for Dispute Resolution, adopted an ODR program created by Cyber Settle which is heavily reliant on blind bidding.¹² The program is used to resolve disputes arising between a manufacturer and a supplier, similar to eBay disputes. However, unlike eBay disputes, the disputes in question arise offline rather than online. The blind bidding process involves each party submitting three "bids" - for the claimant from the lowest they are willing to accept up to their ideal, and for the respondent from the highest they are willing to pay downwards.¹³ Each bid is matched with each other and the dispute is automatically resolved if the claimant's bid is equal or less than the respondent's bid. If an agreement is not reached, the case is referred to online arbitration.¹⁴

⁷ As above, at 74.

⁸ Katsh, above n 4, at 27.

⁹ Condlin, above n 2, at 8.

¹⁰ As above.

¹¹ Katsh, above n 4, at 27

¹² Markus Altenkirch "A Fast Online Dispute Resolution Program to Resolve Small Manufacturer-Supplier Disputes: Using the ODR M-S Program" (2012) 67(3) Dispute Resolution Journal 48 at 49.

¹³ As above, at 51.

¹⁴ As above.

While eBay's ODR system has evolved since their early hybrid mediation and blind bidding system, the same techniques continue to be used by other companies and organisations to resolve similar disputes, showing that some initial forms of ODR have persisted despite development in other areas. The development of eBay's ODR process will be expanded on further below.

Uniform Domain Name Dispute Resolution Policy

Another early example of ODR can be seen in the *Uniform Domain Name Dispute Resolution Policy* (UDRP) adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) in 1999. The policy was adopted to respond to the issue of "cybersquatting", that is, "the registration of a domain name identical to or resembling a well-known trademark with the purpose of reselling it afterwards to its owner."¹⁵ UDRP uses a form of online arbitration with either a single arbitrator or a panel of three people appointed to make a decision about the registration of a domain name.¹⁶ Decisions made by UDRP arbitrators are enforced by "cancellation, transfer or other changes to domain name registrations".¹⁷ This is another early example of ODR, designed to resolve disputes that arose online, using human arbitrators rather than an arbitration software.

Early definitions of ODR: First Generation ODR

Generally speaking, early forms of ODR were relatively simplistic, largely constrained by the limited abilities of Artificial Intelligence (AI), technological capability, and human familiarity with the internet. Thus, definitions of ODR that focus on resolving disputes that arose online, primarily using the internet and software as a communication tool to assist humans in resolving disputes, reflect the early usage of ODR. The early ODR systems can be said to be "first generation" systems, with technology merely used as equipment, without having autonomy or a major role in the dispute resolution process.¹⁸ However, as will be explained below, ODR has since developed beyond the early systems, and an accurate definition now needs to encompass more than the use of technology as a tool to resolve disputes that arose online.

Development of ODR

Fourth and fifth parties: Second generation ODR

As technological capabilities increased, ODR also expanded in ability and reach. ODR in its more recent conceptualisation involves a "fourth party" to dispute resolution – the technology itself.¹⁹ The fourth party may assist either a third party mediator, for example, or the parties to the dispute themselves. Some authors suggest it is necessary to think also of a "fifth party", the service providers who deliver and produce the fourth party technology.²⁰ These can be described

¹⁵ Clanton, above n 1, at 349.

¹⁶ As above.

¹⁷ Jaap Van den Herik and Daniel Dimov "Towards Crowdsourced Online Dispute Resolution" (2012) 7(2) JICLT 99 at 101.

¹⁸ Davide Carneiro and others "Online dispute resolution: an artificial intelligence perspective" (2014) 41(2) Artificial Intelligence Review 211 at 215.

¹⁹ Katsh, above n 4, at 32.

²⁰ Carneiro and others, above n 15, at 214.

as "second generation" ODR systems.²¹ Second generation ODR systems have moved beyond primarily using the internet as a communication tool, and towards using ODR as a method of dispute resolution that uses a virtual location, and proactively assists parties to resolve disputes in ways that goes beyond facilitating the exchange of information.²² Second generation ODR can go beyond solving disputes that arose online and can also address disputes that originated offline. As well as "pure" ODR systems, "legal decision support systems" also have a place within ODR. Examples of second generation ODR in practice will be discussed below.

Development of eBay's ODR

eBay's ODR service now settles approximately 60 million disputes per year.²³ Disputes between a vendor and purchaser regarding delivery times or dissatisfaction with the product are resolved via a two stage process involving both online negotiation and e-adjudication. Parties to a dispute are first encouraged to self-resolve the dispute through guided negotiation. If unsuccessful, the dispute is referred to eBay's own resolution service where an adjudicator will make a binding decision on the dispute, once each party has presented their argument.²⁴ The ODR service enables quick resolution of disputes as well as incentivises parties to reach an agreement themselves as the e-adjudication is not available earlier than eight days after the dispute was raised.²⁵

Alternatively, if the dispute is in relation to feedback placed by one party about another, then the dispute is handled by an external company, Net Neutrals, which provides trained online adjudicators who, after reviewing evidence from each party, makes a recommendation to eBay as to whether or not the feedback should be removed.²⁶

The development of eBay's ODR has moved it towards a second generation ODR service using internet and technology which is fully integrated with the ODR service to provide a virtual location and facilitate meaningful dispute resolution.

Legal Decision Support Systems: Split Up

Legal Decision Support Systems (LDSS) are designed to assist a decision maker (commonly a judge) by managing relevant knowledge and presenting that knowledge to the decision maker in an accessible format.²⁷ While different from most ODR systems in that LDSS focus on assisting the person resolving a dispute rather than the parties to a dispute, LDSS could be considered as an aid to existing ODR systems.

An example of a LDSS in practice is "SplitUp", an Australian LDSS designed to assist judges making decisions about relationship property distribution following the breakup of a relationship.²⁸

²¹ As above.

²² As above.

²³ Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims: Report by the UK Civil Justice Council* (February 2015) at 11.

²⁴ As above.

²⁵ As above.

²⁶ As above.

²⁷ John Zelenznikow, "Using Web-based Legal Decision Support Systems to Improve Access to Justice" (2002) 11 *Information & Communication Technology Law* 15 at 17.

²⁸ As above.

LDSS may be incorporated within ODR systems or operate as standalone services. This report will not focus on LDSS in any great detail, however it is worth acknowledging the existence of the technology and its potential to support and enable ODR systems.

Online Courts and Virtual Juries

A major development of second generation ODR is the relatively recent adoption of government-owned online courts as a form of ODR. As with most other ODR terms, "online" or "virtual" courts can be used to refer to a wide variety of concepts. For the purposes of this section, the use of the term "online courts" does not refer to traditional courts which integrate technology (such as video witness reports or e-discovery) into their usual court processes, but rather courts which operate fully online, without a physical presence.

Non-state virtual or online courts are not particularly new; virtual juries in a commercial context have existed for at least five years. For example, in the Netherlands, one of eBay's subsidiaries Marktplaats uses virtual jurors to resolve feedback disputes.²⁹ Marktplaats' online juries are a form of crowd-sourced online dispute resolution, enforced by a private entity, that:³⁰

transform[s] into reality the futuristic idea that a dispute can be effectively solved at no cost by a large group of people located in many different countries in 30 minutes after submitting the claim.

On the other hand, government-owned online courts or tribunals are still quite novel and new. In Canada, a fully online tribunal for low value civil claims was launched in 2015, regulated under the Civil Resolution Tribunal Act 2012.³¹ The tribunal has jurisdiction over claims under 25,000 Canadian dollars related to debt, damages, and recovery of personal property, and uses a three-tier ODR service from negotiation, through to mediation and finally adjudication.³² This tribunal represents "the first full integration of ODR into a formal court system".³³

Since the implementation of the Canadian Civil Resolution Tribunal, a report by the Online Dispute Resolution Advisory Group in the UK has been released recommending the establishment of a fully online court, HMOC, which would also have jurisdiction over civil claims of £25,000 and under. As with the Canadian Civil Resolution Tribunal, the proposed HMOC would also utilise a three tier service, incorporating online evaluation, online facilitation and online judges.³⁴

To date, the recommendations in the UK report have not been implemented. However, it is likely that online courts in overseas jurisdictions will continue to develop, and with such development, there may begin to be a call for New Zealand to also develop such a service.

²⁹ *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 12.

³⁰ Van den Herik and Dimov, above n 17, at 101.

³¹ *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 12.

³² As above, at 13.

³³ Noam Ebner and John Zeleznikow "No Sheriff in Town: Governance for Online Dispute Resolution" (2016) 32(4) *Negotiation Journal* 297 at 300.

³⁴ *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 6-7.

Artificial Intelligence and ODR

The final element to be discussed in relation to defining ODR is the role of Artificial Intelligence (AI) in ODR systems. ODR systems that utilise AI primarily (although not exclusively) fall within second generation ODR systems. However, as the technological capabilities develop, AI ODR systems may form a new, third generation of ODR.

ODR systems may be partially or completely reliant on AI to automate their functionality. The use of AI to assist in dispute resolution isn't a new concept – negotiation support systems using AI were developed in the 1980s.³⁵ Since then, the ability of AI to support and run ODR systems has extended.

A modern example of AI's implementation is in the AssetDivider Negotiation Support System used in Australian family law. Similar to SplitUp, AssetDivider is used in the context of a relationship break up, and uses AI to automate suggested negotiation outcomes and assist the parties in coming to a solution. The AI is designed to incorporate fairness and interest-based negotiation (IBN) in order to present parties with a suggested asset division that meets the underlying interests of the parties, and is financially fair.³⁶ Parties enter a list of items to be distributed, and assign numbers to each item to represent how much that item is worth to them. AssetDivider then allocates assets to a party based on who values it more, and the "losing" party is financially compensated by the "winning" party for that item.³⁷

AssetDivider is presently only used for the specific purpose of aiding parties to determine a settlement following the break up of their relationship. That said, in a hypothetical context, it has also been (somewhat surprisingly) used to provide a proposed settlement of the Israel-Palestine conflict.³⁸ Although a surprising application of the system, it does demonstrate the potential for ODR systems to have usage beyond their initial intended context.

At present most ODR systems remain hybrid systems, incorporating some AI, but still not entirely reliant on AI to make decisions. It is anticipated, however, that the presence and capabilities of AI in ODR systems will continue to develop, and ODR systems which are entirely reliant on AI to make decisions are possible in the short or medium term.³⁹

Summary of ODR definitions

As discussed, there are a wide range of systems and programs that can be described as falling within the definition of "Online Dispute Resolution". ODR can solely refer to resolving disputes that originated online, or alternatively to also resolving offline disputes (sometimes in combination with online disputes). ODR may be used to refer to hybrid systems, incorporating both humans and AI, or to systems which are entirely automated and reliant on AI. ODR may refer to first, second, or even third generation ODR systems.

³⁵ Arno R Lodder and John Zeleznikow "Artificial Intelligence in Online Dispute Resolution" in Wahab, Katsh and Rainey, above n 4, at 81.

³⁶ As above, at 79-80.

³⁷ As above.

³⁸ As above, at 90.

³⁹ *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 24-25.

ODR can be distinguished by the type of dispute to be resolved, (ie online or offline, small value civil claim versus asset distribution following a relationship break up, cross-border versus domestic, etcetera). It can also be distinguished by the type of technology and the method of dispute resolution.

For the purposes of this report, a wide definition of ODR is preferred, incorporating the resolution of both online and offline disputes, leaning towards second generation (and later) ODR systems. This reflects the present status of ODR technological capabilities and the growing understanding of ODR conceived broadly, rather than construed narrowly.

While some writers and organisations still consider first generation ODR systems as valid forms of ODR, these are becoming less common, and as such, this report will primarily focus on second generation ODR systems and beyond. Within second generation ODR, this report will consider all methods of ODR, from blind bidding through to automated negotiation, mediation and arbitration.

3 The benefits of ODR

This section will discuss the positive aspects of ODR systems, both generally and in certain contexts such as family law or small civil claims. Examples of ODR in practice will be used to demonstrate the benefits of ODR as appropriate.

It is important to note that both the benefits and drawbacks of ODR differ according to the specific type of ODR used. Where possible, this report will try to distinguish between benefits for one type of ODR versus another. The different positives and negatives of each form of ODR should be taken into consideration when a new ODR program is designed, in order to ensure that the program is fit for the specific purpose.

Cost savings

One of the most widely discussed benefits of ODR is cost savings. ODR is said to be more cost-effective than traditional forms of dispute resolution, both for parties to a dispute and to the dispute resolver, be that a lawyer, a mediator, or a member of the judiciary.

For parties to a dispute, ODR can be cheaper than pursuing a remedy through the court system, as well as cheaper than seeking offline mediation.⁴⁰ These savings are due to fees to use an ODR service generally being lower than to use a traditional dispute resolution service, and because there may be no need to hire a lawyer to use an ODR service. For claims of small value, or where parties are geographically disperse, some claim that ODR is "the only financially feasible settlement option".⁴¹

For the dispute resolver, ODR services can also provide cost savings. In the report by the Civil Justice Council recommending a UK online court, the authors anticipated significant cost savings for the judiciary because of the reduction in fixed and operating costs. Moving cases into the online environment would mean that "the unit costs of civil claims (that is, the cost per individual claim) conducted by judges sitting online (from their homes, for instance) will be significantly lower than the costs of judges sitting in courts."⁴² Furthermore, if enough disputes were to be resolved online, then there would be a reduction in need for court buildings, further reducing the operating costs of the judiciary. Finally, introducing a tiered dispute resolution service with online facilitation at the entry point would:⁴³

reduce the number of cases that actually reach judges – and the cost of disposing of cases through facilitation should be considerably lower than that of judges deciding the cases, whether or not online, because the individuals involved will be less senior.

As well as for the judicial system, ODR is said to offer cost savings for lawyers involved in dispute resolution, especially to lawyers involved in mediation. Conducting mediations

⁴⁰ See for example, Altenkirch, above n 12, at 50, Condlin, above n 2, at 3, and Eugene Clark, George Cho and Arthur Hoyle "Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects" (2003) 17 *International Review of Law, Computers & Technology* 7 at 9.

⁴¹ Melissa H Conley Tyler and Mark W McPherson "Online Dispute Resolution and Family Disputes" (2006) 12(2) *Journal of Family Studies* 165 at 169.

⁴² *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 9.

⁴³ As above, at 10.

online reduces travel costs for all parties, and, as with savings for the courts, the more mediations a lawyer or mediator can conduct online, the less need they have for physical premises and the costs associated with physical premises.⁴⁴

Time savings and convenience

In addition to cost savings, ODR is said to be more a more efficient form of dispute resolution, able to resolve disputes faster and more conveniently for the parties involved.

The slowness of the court system in New Zealand and overseas is often referred to.⁴⁵ In contrast, the vast majority of ODR providers aim at quick settlements of disputes. For example, in the case of low value manufacturer-supplier disputes, the ODR program "ODR M-S", created for the American Arbitration Association, is able to resolve disputes between a manufacturer and a supplier in an average of 54 days.⁴⁶ In another ODR system utilising blind-bidding, the US-based company CyberSettle was used by New York City to help clear a backlog of 40,000 personal injury claims – resulting in an 85 percent reduction in the average time to settlement when compared with the previous court process.⁴⁷

ODR systems in conjunction with decision support systems that assist lawyers with information and knowledge management can also provide significant time savings by automating smaller tasks and decisions, and storing and presenting information effectively, thus allowing the lawyer to work more efficiently.⁴⁸

In addition to the time savings for lawyers and consumers of dispute resolution, ODR is viewed by some as a more convenient form of dispute resolution due to its more flexible nature. ODR systems can either be synchronous or asynchronous – asynchronous ODR systems in particular offer increased flexibility for users of the service. Synchronous ODR services operate in real time, whereas asynchronous ODR services allow users to access the service when the time is convenient for them. This means that parties to a dispute are able to access dispute resolution services without needing to take time off work, nor are they required to complete all aspects of the dispute resolution process in one sitting.

The ability to access fast and efficient dispute resolution services from anywhere, at any time, is one of the main benefits of ODR.

Increased access to justice

ODR is also said to improve the accessibility of dispute resolution by removing barriers to access due to financial status, disability, geographical location, shyness in face-to-face contexts, and other such potential hindrances to accessing justice.⁴⁹

⁴⁴ Noam Ebner and Colleen Getz "ODR: The Next Green Giant" (2012) 29(3) Conflict Resolution Quarterly 283 at 285-286.

⁴⁵ In the New Zealand context, see, for example, this Law Talk article discussing how the adoption of 'e-Duty', to allow judges to assess cases electronically, "cuts the time it takes for a decision to be made on these to less than an hour, instead of up to half a day." "eDuty will speed up Family Court", Law Talk, 16 July 2013, available at <https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-821/eduty-will-speed-up-family-court>.

⁴⁶ Altenkirch, above n 12, at 50.

⁴⁷ *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 15.

⁴⁸ Carneiro and others, above n 18, at 220.

⁴⁹ Conley Tyler and McPherson, above n 41, at 169.

The lower cost of accessing ODR services enables people with low value disputes that would be not worth pursuing using traditional dispute resolution services the opportunity to pursue their claim and potentially reach a settlement. Where the cost of traditional dispute resolution might be prohibitive, ODR has the potential to enable a larger group of people to exercise their rights by lowering the cost of accessing dispute resolution.⁵⁰

Furthermore, it is argued that traditional dispute resolution methods "... advantage people who are physically attractive, articulate, well-educated, or members of a dominant ethnic, racial, or gender group."⁵¹ In contrast, by utilising an online environment that has less barriers to access, ODR may be able to remove such an advantage presented to the privileged members of society when accessing dispute resolution. For users of dispute resolution services who find face-to-face communication difficult, such as people with Autism Spectrum Disorder, text-based communication 'levels the playing field', enabling more accessible and equitable dispute resolution.⁵² Online environments may also be less intimidating for parties requiring dispute resolution who are unfamiliar with legal services. Thus, the online environment could appear to be more neutral and accessible for users of dispute resolution services.

The flexible nature of ODR services allows programmes to be tailored towards the particular needs of a group of clients more easily than traditional courts can tailor procedure according to needs. For those with disabilities or language barriers, the more informal and flexible nature of ODR services can provide a better, more accessible way to engage with courts and other forms of dispute resolution.⁵³

Environmentally friendly

A less well publicised benefit of ODR is the environmental benefit that ODR services offer compared with traditional dispute resolution services.

ODR offers a more environmentally conscious dispute resolution service.⁵⁴ By using a virtual mediation room, for example, or an online court, carbon emissions can be reduced. There is less need for travel, less power needs to be consumed, and less printing will need to be done. While the environmental impact of just one mediation or one court case may be quite small, the cumulative impact is large.

For many people, the environmental impact of a particular form of dispute resolution is unlikely to be a major consideration. However, it is still worth noting the environmental benefit that ODR can offer, both for governments and for environmentally-conscious corporations and consumers.

Knowledge development and mediator training

ODR programmes offer increased benefits for the development and skills training for mediators and other dispute resolution providers. In the majority of ODR proceedings, the dispute resolution proceeding is able to be recorded and stored for the neutral party (in the case of

⁵⁰ Condlin, above n 2, at 2.

⁵¹ Conley Tyler and McPherson, above n 41, at 169.

⁵² Roland Troke-Barriault "Online Dispute Resolution and Autism Spectrum Disorder: Levelling the Playing Field in Disputes Involving Autistic Parties" (2015) 6(2) Western Journal of Legal Studies.

⁵³ As above.

⁵⁴ Ebner and Getz, above n 44, at 286.

online mediation) to learn from later. This enables reflective practice to occur and effective language to be remembered and reused in future mediations.⁵⁵ It also enables a mentor to supervise and provide feedback to a mediator without intruding on the mediation itself.⁵⁶

Recording and reflecting on mediations (or other forms of dispute resolution) assists dispute resolution providers in developing their skills, training new dispute resolution professionals, and tailoring the service provided to each individual user. Asynchronous online mediation systems also provide advantages for mediators, by providing more time for mediators to effectively reframe an issue, and by providing additional flexibility for elements of the mediation process such as private sessions with each party, as the mediator does not "need to concern themselves with party reactions to the amount of time they spend separately with each party".⁵⁷

Storing data about previous dispute resolutions also allows lawyers or other dispute resolution providers to quickly and inexpensively gain insight into the potential outcome of a case (although this does raise issues with privacy and confidentiality concerns, to be discussed later in the report). Lawyers can also utilise ODR as a "trial run" of a real case, for example, by using virtual juries to provide feedback and serve as a diagnostic tool.⁵⁸

The benefits offered by recording ODR sessions and using ODR sessions for developing practitioner knowledge and skills needs to be balanced with privacy and confidentiality concerns, however, it does offer a unique advantage to practitioners in the dispute resolution field.

Expression of emotions

The literature on the expression of emotions in ODR is not entirely conclusive. The arguments presented in favour of ODR supporting expression of emotions will be presented in this section, and the arguments against will be presented in the section on the drawbacks of ODR.

A 2001 empirical study on the expression of emotion in online mediation found that 80 percent of participants in both the pilot and comprehensive study reported that they could adequately express their emotions using text-based, asynchronous online mediation.⁵⁹ The participants' self-reporting of their ability to express emotions was also confirmed by the mediators' impressions of the ability of the participants to adequately express emotions.⁶⁰ By 2017, it is possible that the percentage of people who feel comfortable expressing their emotions online will have grown due to the increasing prevalence of online communication in everyday life.

The expression of negative emotions may be better received online than offline for some users, as "... for some, negative messages from machines are less emotionally charged and less threatening than negative messages from humans."⁶¹ Furthermore, online mediation allows the mediator to take advantage of 'pre-communication reframing' to coach a party through

⁵⁵ Clark, Cho and Hoyle, above n 40, at 9.

⁵⁶ As above.

⁵⁷ Marta Poblet and Pompeu Casanovas "Emotions in ODR" (2007) 21(2) International Review of Law, Computers and Technology 145 at 150.

⁵⁸ Nancy Marder "Cyberjuries: A new role as online mock juries." (2006) 38 U Tol L Rev 239 at 251.

⁵⁹ Anne-Marie Hammond "The effectiveness of online dispute resolution" (MA Thesis, Royal Roads University, 2001) at 52.

⁶⁰ As above.

⁶¹ Condlin, above n 2, at 20.

communicating a difficult or emotionally charged point, so that potentially destructive comments can be first seen and ameliorated by the mediator, before being received by the other party.⁶² In this way, ODR provides a way for negative emotions to be better managed than in offline dispute resolution.

Although not accepted by all writers on ODR, some argue that text-based asynchronous ODR, in particular, offers key benefits over traditional in-person dispute resolution, and even over video-based and/or synchronous ODR. Text-based asynchronous ODR allows a party to a dispute more time to develop a response to the other side. This enables the party sufficient time to reflect upon what it is they wish to say, and as a result, they can more clearly express their emotions and wishes.⁶³ In the 2001 Hammond study, a full 100 percent of the mediators and 80 percent of the parties to the dispute reported that they felt the asynchronous nature of the mediation helped them focus on the "broader picture" of the conflict, instead of being caught arguing over the minutiae.⁶⁴ Interestingly, 72 percent of mediators noted the lack of body language and non-verbal cues as an issue for text-based asynchronous ODR. However, 70 percent of the participants said that the lack of verbal cues was not an issue for them, some even stating that they could express themselves better in writing.⁶⁵ It is possible that the lack of verbal communication is not such a disadvantage as the mediators perceived, and may even be an advantage.

On the other hand, some proponents of synchronous ODR argue that synchronous ODR systems offer better outcomes than asynchronous communication. A study of 98 mediators engaged in different kinds of online mediation found that "... synchronous on-line communication (on-line chat) had a much higher rate of win-win solutions compared to delayed communication".⁶⁶

With regard to asynchronous versus synchronous ODR, as with text-based versus audio-visual ODR, in the words of a participating mediator in the Hammond study:⁶⁷

For each negative difference there appears to be a positive one... No positive body language is offset by no negative body language. No immediacy is set off by time to think. No face-to-face impression is set off by no initial prejudices.

While both forms of ODR have advantages and disadvantages, ODR on the whole arguably allows for adequate expression of emotion, and in certain contexts may offer more positives for emotional expression and management than traditional forms of dispute resolution.

Reduces the influence of unconscious bias

Another general benefit of text-based ODR systems is that it removes or lessens the likelihood of unconscious bias playing a part in determining the outcome of a dispute. Without visual or audio cues, factors like gender, ethnicity, appearance, disability or socio-economic status are more difficult to know. This "... can increase the chances that disputes will be resolved on the basis of

⁶² Poblet and Casanovas, above n 57, at 150.

⁶³ As above, at 151.

⁶⁴ Hammond, above n 59, at 54-55.

⁶⁵ As above, at 55.

⁶⁶ Poblet and Casanovas, above n 57, at 151.

⁶⁷ Hammond, above n 59, at 55.

what is said, rather than how it is said, or who says it."⁶⁸ The removal of audio-visual cues can help parties feel more protected than in a face-to-face or video setting. Reducing the influence of unconscious bias is important both for the interaction between the parties and for the neutrality of any third party mediator or arbitrator, and can help keep the dispute resolution process focused on the substantive issues.

Benefits of ODR in specific contexts

Low value civil claims

In the context of resolving low value civil claims, particularly when such claims are cross-border disputes, ODR has significant advantages over traditional forms of dispute resolution.

The lower cost associated with ODR enables parties to engage with dispute resolution providers where otherwise the low value of their claim would render it unsuitable or unworthwhile to pursue through traditional dispute resolution due to the cost of pursuing the claim being higher than the value of the claim. For many such low value disputes, ODR may be the only financially feasible form of dispute resolution, and thus, "... [ODR] brings a possibility for redress to those who would not otherwise seek it."⁶⁹

In addition, for cross-border e-commerce disputes where there are jurisdictional issues, ODR provides a way to resolve the dispute, (so long as both parties agree to the jurisdiction of the ODR provider).⁷⁰ Practically, ODR also enables parties who live in different time zones the opportunity to resolve the dispute at a time that is convenient for them.

Overall, low value civil claims are argued to be the most appropriate form of dispute for ODR programmes due to the time and cost savings which both enables disputes to be resolved which otherwise wouldn't be pursued, and increases the efficiency of resolving such disputes. ODR in this context is well established for e-commerce disputes (eg eBay), however, it remains to be seen whether it is successful in the context of domestic tribunals such as Canada's Civil Resolution Tribunal.

Family law and domestic violence

Increasingly, ODR programmes are being developed to deal with non-commercial disputes. In the family law context, some argue that ODR has significant promise.

Research has shown that "unresolved, chronic conflict" is the most damaging to children involved in a family breakdown.⁷¹ In this respect, ODR programmes can provide support for families and protect the best interests of any children involved by promoting quick resolution of conflict and by taking the conflict resolution into an online environment.⁷² ODR software has been reported to be helpful in improving communication and collaboration between divorced parents by:⁷³

⁶⁸ Condlin, above n 2, at 19.

⁶⁹ Andrea M Braeutigam "Fusses that fit online: online mediation in non-commercial contexts" (2006) 5(2) *Appalachian Journal of Law* 275 at 286.

⁷⁰ As above.

⁷¹ Conley Tyler and McPherson, above n 41, at 170.

⁷² As above.

⁷³ As above, at 170.

- Providing a neutral environment to reduce the hostility between the parents;
- Helping the parents be more organized, which can lead to more consistency and stability in their children's lives; and
- Providing an alternative to using the children as a means of communication between parents.

Furthermore, by moving the conflict resolution online, parties to a family dispute are forced to develop new forms of communication, rather than relying on their existing, (and often problematic), methods of communicating with one another.⁷⁴ In turn, this can lead to better outcomes for the conflicting parties.

In addition, it has been suggested that ODR provides a safer way to resolve conflicts in situations where domestic violence has been present in a relationship, but the parties nonetheless wish to enter into negotiation or mediation together. The parties can negotiate or enter mediation without needing to be physically in the same space, providing a degree of protection for the vulnerable party that is not possible when parties are going through traditional dispute resolution.⁷⁵

Thus, ODR can provide a way to resolve family conflict that better protects the children involved from the impacts of familial conflict, and encourages parents to develop new and more beneficial ways of communicating and collaborating with each other.

Online disputes

Increasingly, parties to a dispute which originated online will expect to be able to resolve the dispute online as well. Traditional forms of dispute resolution are unlikely to be preferred by parties to an online dispute because of jurisdictional, cost and time concerns.⁷⁶ The need to "fit the forum to the fuss" promotes ODR as the most logical form of dispute resolution for conflicts which originated online.⁷⁷ As a result, it is likely that ODR is moving towards being seen as a necessity for certain kinds of conflict, rather than a novel or specialised form of dispute resolution.

Power imbalances

Finally, ODR has value in conflicts where there is a significant power imbalance between the parties. The party with less power can feel "empowered" in an online context and act more assertively than they would in traditional face-to-face dispute resolution.⁷⁸ The online environment can provide a neutral, less intimidating space in which dispute resolution can proceed.⁷⁹ Power imbalances can occur in any type of conflict, meaning that the flexibility of ODR is a strength as the type of ODR can be adapted to best suit the kind of dispute and power imbalance in question.

⁷⁴ Braeutigam, above n 69, at 298.

⁷⁵ Conley Tyler and McPherson, above n 41, at 170.

⁷⁶ Schultz, above n 3, at 85.

⁷⁷ Braeutigam, above n 69, at 266.

⁷⁸ As above, at 294.

⁷⁹ Clark, Cho and Hoyle, above n 40, at 21.

4 The drawbacks of ODR

This section will discuss the negative aspects of ODR and provide counter arguments to the suggested benefits outlined in the previous section. As with the benefits section, the drawbacks of ODR will be discussed generally, as well as outlining the drawbacks for some specific contexts (eg cross-border disputes, online mediation, crowd-sourcing ODR).

Cost and time savings?

Cost and time savings are the most widely discussed benefits of ODR systems. However, the majority of reports and papers which advocate for ODR on the basis of cost and time savings do so without having data to verify whether the cost and time savings are genuine or merely perceived. In addition, there are several reasons why ODR programmes may not actually provide significant cost or time savings, either to dispute resolution providers or to parties to a dispute.

Firstly, any cost savings to dispute resolution providers, especially courts, will be modest if the majority of cases resolved through ODR are cases which would have been unlikely to proceed through the traditional court system.⁸⁰ Additionally, although ODR may be available at a lower cost for consumers of ODR services, there is concern that this will lead to an 'economy class' justice service, with traditional dispute resolution becoming a 'business class' justice service.⁸¹ Thus, while access to lower cost dispute resolution through ODR services may *prima facie* appear to be a benefit of ODR, there is the possibility that it will exacerbate existing inequality in access to justice for users of dispute resolution services. ODR also has costs associated with it which are not present for offline dispute resolution, namely the cost of the hardware and software needed to access the service. While these costs could be covered for the *developers* of online courts, for example, through fees, these costs could be prohibitive for some *users* of the service.⁸² Therefore, while there may be some cost savings available by using ODR, not everyone will benefit from such savings.

Secondly, while many promote ODR as a more time efficient form of dispute resolution, ODR also has the potential to extend the time taken to reach a settlement. Asynchronous ODR, in particular, has the potential to take a long time for parties to reach an agreement, either because one or more party is actively trying to obstruct the dispute resolution process by not engaging and not replying to messages, or through non-malicious procrastination or forgetfulness.⁸³ As a result, the conflict can continue over a longer period of time, even though parties are not actively engaged with the dispute resolution service throughout the entire process. Just as chronic conflict can be traumatic for children involved in a family conflict,⁸⁴ extending the conflict over a longer period of time likely also takes a psychological toll on adult parties to a dispute.

⁸⁰ Condlin, above n 2, at 6.

⁸¹ *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 26.

⁸² *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 9.

⁸³ Hammond, above n 59, at 14.

⁸⁴ Conley Tyler and McPherson, above n 41, at 170.

Finally, even if ODR services are generally more cost and time-efficient, some argue that this represents "... a capitulation to the conditions of modern society more than a superior system for administering justice".⁸⁵ Accessing faster and cheaper dispute resolution through ODR services may mean parties have to sacrifice the opportunity to fully explore the relevant issues or exercise their legal rights, all in the interest of achieving faster and cheaper settlement. This is particularly concerning if the ODR service results in a binding outcome for the parties. Shackelford and Raymond note that:⁸⁶

As with most arbitral mechanisms, typically the decisions in ODR—depending on the specific context in which it is used—are binding. This means that the parties give up substantial due process rights to appeal adverse judgments or enjoy other procedural protections during the "trial" process. Thus, as policy makers seek to regulate and businesses develop ODR systems, important questions must be asked and answered about under what circumstances societies are most comfortable with promoting the use of ODR, even in low-value disputes.

Therefore, consideration must be given to whether it is desirable to promote ODR as a cost and time efficient form of dispute resolution, given this potential efficiency could come at the cost of having a meaningful, just and comprehensive settlement.

Requires technological literacy

While ODR is often promoted as a way of increasing access to justice, ODR is not universally accessible. The use of technology is inherent in ODR services, however, for some this can cause difficulty due to inability to access or confidently use the required technology. The 'digital divide' can be caused by a range of factors, including age, education level, socio-economic status, physical disability, and cultural differences.⁸⁷

In New Zealand, just over 90 percent of the population has access to the internet.⁸⁸ However, there is a difference between groups according to age, financial status and cultural background. For example, respondents in the World Internet Project survey in 2015 who were aged under 40 were 1.4x more likely to use the internet than those over 65, and there was a 31 percent difference in internet users between those earning less than \$35,000 per year and those earning over \$100,000.⁸⁹ Asian New Zealanders had the highest rates of internet usage, with 99 percent of respondents using the internet, followed by New Zealand Europeans, Māori, and finally Pasifika at 80 percent.⁹⁰ Thus, while overall New Zealand has good internet usage, the digital divides across age, financial status and cultural groups should be considered when determining whether or not ODR will provide increased access to justice for society generally, or only for groups of people who already occupy a relatively privileged place in society.

⁸⁵ Condlin, above n 2, at 4.

⁸⁶ Scott J Shackelford and Anjanette H Raymond "Building the virtual courthouse: ethical considerations for design, implementation, and regulation in the world of ODR" (2014) 2014(3) Wisconsin Law Review 615 at 644.

⁸⁷ Clark, Cho and Hoyle, above n 40, at 21.

⁸⁸ Philippa Smith and others "Internet Trends in New Zealand 2007-2015" (Auckland University of Technology as part of the World Internet Project, 2016) at 9.

⁸⁹ As above, at 27-28.

⁹⁰ As above, at 30.

By way of contrast, the United Kingdom report recommending the establishment of an online court service noted that, while 22 percent of adults in the UK were not internet users, only 5 percent of people surveyed reported that they “definitely” would not have anyone who could help them use an ODR service.⁹¹ Anticipating that this percentage of people is likely to slowly decrease over time, the recommendation of the authors of the report was that it would be better to put resources into providing people with assistance should they require it, rather than delay implementing an online court because of concern about some members of society being unable to use it.⁹² The same mentality could be adopted in New Zealand.

Privacy and confidentiality concerns

A further potential drawback of ODR is in regards to privacy and confidentiality concerns. Firstly, ODR systems which do not incorporate audio-visual components in the dispute resolution process raises issues with verifying identities online. This has significant flow on effects, as if the authenticity of a party is unable to be verified, or is able to be verified but nevertheless is not verified, then sharing information with an unverified party could breach privacy regulations and ethical standards.⁹³ The potential difficulty in verifying the identity of a party to a dispute is compounded by the fact that in text-based ODR, parties may not act the same online as they would in a face-to-face context.⁹⁴ On the other hand, ODR has also been promoted as a promising method for resolving the growing number of disputes related to online impersonation itself.⁹⁵ In this sense, online impersonation seems to be both a threat and opportunity for ODR providers.

A second concern related to privacy and confidentiality is that, even if the identities of all parties are verified, the use of ODR, (particularly asynchronous ODR), also carries the risk that any documents sent between the disputing parties may be then shared with another third party without the knowledge or consent of the party who provided the document.⁹⁶ A document shared in-person during a mediation session is easier to control than an electronic document that can be forwarded on without the owner of the document being aware of the fact that other people have gained access to the document. If parties have concerns related to the confidentiality, privacy and security of ODR, then this may prevent parties from trusting each other and the ODR process, which would in turn reduce the likelihood of a positive outcome.⁹⁷

Thirdly, even a well-designed ODR system will have vulnerabilities that could be exploited by a sufficiently motivated and technologically-capable party.⁹⁸ This presents a risk that confidential information could be maliciously obtained and used for ulterior purposes. Moreover, many ODR systems that incorporate Artificial Intelligence utilise case-based reasoning and so use facts and outcomes from previous disputes to assist in resolving future disputes. This results in an accumulation of potentially sensitive data that is vulnerable to manipulation and exploitation.

⁹¹ *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 26.

⁹² As above, at 26-27.

⁹³ Vincent Bonnet and others, “Online Dispute Resolution Systems as Web Services” (2004) 3 ICFAI Journal of Alternative Dispute Resolution.

⁹⁴ Clark, Cho and Hoyle, above n 40, at 20.

⁹⁵ Clanton, above n 1.

⁹⁶ Clark, Cho and Hoyle, above n 40, at 10.

⁹⁷ Poblet and Casanovas, above n 57, at 149.

⁹⁸ Condlin, above n 2, at 28.

This report will not go into detail about the technical side of data security, however, it is worth being aware of the risk to privacy and confidentiality arising from the use of ODR services.

Expression of emotions

As mentioned in the section on the expression of emotions in the benefits part of this report, the literature on the expression of ODR is inconclusive. This section will outline the arguments against ODR supporting emotional expression in dispute resolution.

Some people may struggle to adequately express their emotions when using ODR programmes, especially if the programme is reliant on text-based communication. Without social cues such as body language or tone of voice, nuances of communication can be lost. Parties may misinterpret written messages from a mediator or other party, or feel that their own emotions have not been adequately conveyed.⁹⁹ Many people default to a more formal, 'business-like' tone in online written communication, meaning that rapport between parties is not able to be built in the same way and making parties seem less empathetic or friendly.¹⁰⁰ In fact, it has been observed that:¹⁰¹

the great paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct inter-personal contact.

The inability to express emotions fully in ODR, especially in online mediation, may therefore completely undermine the whole theoretical basis for the ADR movement.

There is some research to suggest that ODR results in parties attempting to filter out emotions from the dispute resolution process.¹⁰² For some people, expressing complicated or difficult emotions through typing can be more tiresome, annoying or lengthy than expressing the same emotions orally.¹⁰³ Having emotions recorded in a potentially permanent, visual and text-based format can also act to dissuade parties from wanting to engage in an emotional discussion.¹⁰⁴

Even if the ODR programme utilises audio-visual aspects such as video conferencing, this does not necessarily mean that difficulties with emotional expression are overcome. Video systems do not build rapport and cooperation between parties in the same way as face-to-face communication does.¹⁰⁵ While they may be better than asynchronous text-based communication, video systems do not yet offer the social cues and nuances of communication present during in-person dispute resolution, and it is these nuances which can make the difference between agreeing to a settlement or reaching an impasse.¹⁰⁶

Ultimately, the literature on emotional expression in ODR is inconclusive. It is likely that there is no absolute answer, and whether ODR is better or worse than traditional dispute resolution

⁹⁹ Braeutigam, above n 69, at 287.

¹⁰⁰ As above.

¹⁰¹ Joel B Eisen "Are We Ready for Mediation in Cyberspace" (1998) Brigham Young University Law Review 1305 at 1310.

¹⁰² Poblet and Casanovas, above n 57, at 147.

¹⁰³ Condlin, above n 2, at 20.

¹⁰⁴ Hammond, above n 59, at 15.

¹⁰⁵ Condlin, above n 2, at 30.

¹⁰⁶ Clark, Cho and Hoyle, above n 40, at 10.

from an emotional expression perspective is likely person and context-dependent. When deciding whether ODR is appropriate in a certain case, consideration should be given to whether or not expression of emotion is advantageous for the resolution of that particular conflict, and to the personalities and preferences of the parties involved.

The “rudeness of cyberspace”

Related to the issue of emotional expression in ODR is the concern about the so-called “rudeness of cyberspace”.¹⁰⁷ There is the potential for a “downward spiral” of mistrust and suspicion in ODR communications, especially in asynchronous text-based ODR, which can severely reduce the likelihood of reaching a settlement.¹⁰⁸

The same social rules do not apply in cyberspace as in face-to-face contact. Various academics and researchers have found that online, parties act differently, assume different personalities and are ruder than in offline contact. For example, an early study of online negotiation found that parties engaged in online negotiation were more likely to hide, exaggerate or alter information, or even lie about information.¹⁰⁹ Furthermore, parties were less flexible and less cooperative in online negotiation than in telephone negotiation or face-to-face negotiation, and more likely to escalate conflict rather than try to mitigate conflict.¹¹⁰ This creates an online environment which is not conducive to achieving positive outcomes.

A further example is how parties involved in asynchronous text-based ODR tend to attach malicious motives to delays in receiving a response to messages, and then often respond in a combative or defensive manner.¹¹¹ This can exacerbate existing tension and distrust between the parties and reduce the likelihood that an agreement will be made.

Overall, an online environment provided by an ODR programme has the potential to become a very negative space, and thus work against the aims of the service. When a conflict is already very emotively charged, consideration should be given to whether the efficiency offered by using an ODR programme sufficiently outweighs the possible risks and disadvantages for the parties.

Lack of governance

At present, there is very little governance or oversight in the ODR sphere. As an issue, this has been written about since at least the early 2000s, however, progress is still yet to be made.¹¹²

This lack of governance gives rise to two main concerns: firstly, that consumers will consequently lack faith in ODR systems, and secondly, that without adequate governance in the ODR field, there are insufficient protections in place to ensure that ODR providers are acting ethically, competently and responsibly. This section will deal with each of these two issues in turn.

¹⁰⁷ Condlin, above n 2, at 28-29.

¹⁰⁸ As above, at 21.

¹⁰⁹ Kathleen Valley “The Electronic Negotiator” (2000) Harvard Business Review at 16-17.

¹¹⁰ As above.

¹¹¹ Condlin, above n 2, at 21.

¹¹² See for example, Schultz “Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust”, above n 3, written in 2004, and Ebner and Zeleznikow “No Sheriff in Town: Governance for Online Dispute Resolution”, above n 33, written in 2016.

In order for ODR to be successful, all parties to the dispute need to have sufficient faith in the system for the system to have legitimacy. There are many factors which will influence whether or not someone will trust an ODR provider enough to use their services. One such factor is the degree to which the provider can present themselves as legitimate and respected. However, the normal ways of guaranteeing "integrity and minimum standards of performance" in the physical world are not necessarily directly translatable to an online context.¹¹³ With no independent body to certify or assess ODR providers or provide a 'trustmark', businesses and consumers may lack confidence in ODR providers, and thus erode faith in ODR generally.¹¹⁴

Arguably, more immediately concerning than the potential for user faith in ODR to be gradually eroded is the fact that, without adequate governance, ODR is vulnerable to exploitation and poor conduct. ODR remains "a big unregulated business".¹¹⁵ This is problematic because it could allow unethical or otherwise biased ODR services to operate unchecked, and furthermore, if and when a user of an ODR service has a complaint, there is no governance body to take the complaint to.

If ODR remains unregulated, there is a risk that ODR providers could not only be unhelpful for users, but actively cause harm, either intentionally or incidentally. For example, an ODR service provider could design a system that is designed to provide favourable outcomes to one party or one type of party, at the expense of another party or type of party, in order to placate a repeat customer or generate more profit.¹¹⁶ This could be done without the party who is to be negatively affected ever being aware of the fact that they were disadvantaged from the start.¹¹⁷ With ODR programmes "inefficiency, errors, or bias can be hidden under nicely crafted computer interfaces based on the way the program was constructed."¹¹⁸ In this way, vulnerable consumers, in particular, could be harmed by ODR programmes which do not have any governance or oversight to hold them to an ethical standard.

If a user of an ODR service was harmed by ODR or had a complaint, the other issue with the lack of governance is that there would be no obvious body which to take that complaint to. The irony of ODR being promoted as a solution to disputes with jurisdictional issues, for example, is that if a dispute about the ODR service itself were to arise, the online nature of ODR would mean that consumer protection would be weak and trying to resolve the dispute about ODR would potentially have its own jurisdictional issues.¹¹⁹ Ebner and Zeleznikow observed that, "... ODR is subject to the same consumer protection laws as any other profession, but overall it inhabits an area of weak external governance, voluntarily welcomes little monitoring, and has created no internal structures."¹²⁰

¹¹³ Louise E Teitz, "Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution" (2001) 70 Fordham L Rev. 985 at 1014.

¹¹⁴ As above.

¹¹⁵ Dusty Bates Farned "A new automated class of online dispute resolution: changing the meaning of computer-mediated communication" (2011) 2(2) Faulkner Law Review 335 at 343.

¹¹⁶ Ebner and Zeleznikow, above n 33, at 313.

¹¹⁷ As above.

¹¹⁸ Rafel Morek "Regulation of Online Dispute Resolution: Between Law and Technology" (Working Paper, August 2005) at 68.

¹¹⁹ Ebner and Zeleznikow, above n 33, at 314.

¹²⁰ As above at 305.

There are several ways in which ODR could become more regulated. Some authors advocate for governmental intervention to regulate ODR,¹²¹ although the private sector could, (and perhaps should), also play a role in the governance and oversight of ODR providers. At present, however, the unregulated status of ODR remains a risk and should be taken into consideration when evaluating the relative merits of ODR.

Lack of quality data to assess claims about advantages and disadvantages

There is a relative dearth of evidence-based research on ODR.¹²² This makes assessing the validity of claims about ODR difficult. While there are some studies on the effectiveness of ODR, the research remains incomplete. That said, some observations can be made.

For example, Valley compared email negotiation with face-to-face negotiation and telephone negotiation. That study found that:¹²³

- Face-to-face, the most frequent outcome is a mutually beneficial agreement;
- Over the phone, one party usually takes a greater share of the profits; and,
- With e-mail, the most frequent outcome is impasse.

Over 50 percent of e-mail negotiations in the study ended in impasse, whereas only 19 percent ended so in face-to-face negotiations.¹²⁴ As Valley pointed out, this does not mean that asynchronous, text-based ODR is “necessarily bad”, but rather that it has disadvantages and risks that need to be carefully weighed up against the advantages that can be gained.¹²⁵

In another early ODR study, Hammond found that five of the 12 mediations reached settlement using text-based, asynchronous ODR.¹²⁶ Although this is only a 40 percent settlement rate, (and a small sample size), 82 percent of the mediators and 75 percent of the disputants reported that they felt the online mediation was successful.¹²⁷

A further study involving 98 participants, comparing synchronous text-based ODR with asynchronous text-based ODR for negotiations, found that synchronous ODR had a much higher rate of mutually positive outcomes than asynchronous ODR.¹²⁸

Overall, there is a concerning lack of empirical evidence to support claims about the advantages, (and disadvantages), of ODR. It is hoped that the growing number of ODR providers in both the public and private sector will be able to contribute evidence to support the current hypotheses related to ODR. Until a greater body of evidence is developed, consumers and government should remain critical of unsubstantiated marketing claims made about a particular ODR system.

¹²¹ Schultz, above n 3.

¹²² Tania Sourdin and Chinthaka Liyanage “The Promise and Reality of Online Dispute Resolution in Australia” in Wahab, Katsh and Rainey, above n 4, 483 at 486

¹²³ Valley, above n 109, at 16-17.

¹²⁴ As above.

¹²⁵ As above.

¹²⁶ Hammond, above n 59, at 40.

¹²⁷ As above.

¹²⁸ Jaime Tan, Diane Bretherton and Gregor Kennedy, “Negotiating Online” (2004, The University of Melbourne) at 10-12.

Ethical concerns

The final general drawback of ODR to be discussed is in relation to the ethical concerns which have been raised in the ODR literature. This section is broken down into three key questions. Many of these issues are too complicated to cover in detail in this report, so responses to each question will instead be briefly outlined.

Should machines be enabled to make decisions that affect people?

It has been commented that “there is an inherent risk in letting machines take binding decisions that influence our lives.”¹²⁹ While ODR systems may offer a more efficient way to resolve disputes, that efficiency has several other costs associated with it. Artificial intelligence and algorithms in ODR programmes can reduce disputes down to numerical values in order to assist a human in resolving a dispute, or even resolve the dispute through the AI itself, however, this may not be a positive thing in all circumstances. After all, “software is logical, not reasonable, and legal judgments often require both qualities in equal measure”.¹³⁰ Furthermore, the more complicated the dispute, and the more emotions involved in the dispute, the less likely it is that the software will be able to appropriately deal with the dispute – but this does not necessarily mean that it will not attempt to anyway.

Another issue is that, as discussed in the section on privacy and confidentiality concerns, ODR systems can have security flaws. This creates a concern that, if the system is not made “robust against manipulation”, that businesses or consumers will be motivated to attempt to alter outcomes and/or alter the decision-making technology used by the system.¹³¹ Even if no attempt to ‘hack’ the system is made, repeat customers, especially technologically competent ones, may be able to learn how the system works and could then game the system to their advantage.

Ultimately, AI is not perfect, and can be manipulated relatively easily. Take the example of Microsoft’s AI chatbot “Tay”, which, after just 16 hours of being on Twitter and learning from the content of other Twitter users, started using racist language.¹³² The present state of AI technology leaves systems which incorporate AI vulnerable to exploitation, and a cautious approach may, therefore, be wise.

Does ODR meet basic principles of natural justice?

In the report recommending the establishment of a UK online court, the authors wrote:¹³³

... we see no reason why traditional principles of natural justice (requiring that parties are given an opportunity to plead their cases and that judges are independent) cannot be achieved in using a transparent ODR process that is governed by a clear set of rules.

¹²⁹ Carneiro and others, above n 18, at 214.

¹³⁰ Condlin, above n 2, at 6.

¹³¹ Shackelford and Raymond, above n 86, at 635.

¹³² Elle Hunt “Tay, Microsoft’s AI chatbot, gets a crash course in racism from Twitter” (The Guardian, online ed, London, 24 March 2016).

¹³³ *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 26.

It is clear that, in their view, ODR is, in theory, able to meet principles of natural justice. However, the implication is that it requires both a transparent process, and for that process to be governed by a clear set of rules. However, the ethical issue at hand is that these two criteria are not always met with ODR programmes at present. Rather, the principle of *caveat emptor*, “let the buyer beware,” applies due to the lack of transparency and rules governing ODR.¹³⁴

The issue of transparency and ODR is comprehensively covered in the chapter “ODR and Justice: An Evaluation of Online Dispute Resolution’s Interplay with Traditional Theories of Justice” in *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution* and contains valuable analysis of what an ODR system needs in order to meet traditional theories of justice.¹³⁵ For the purposes of this report, a few key points should be made.

In order for an ODR system to meet the basic principles of natural justice, both the process and the outcome need to be fair. In respect of the process, this means it needs to be sufficiently transparent so as to provide the user with a way of assessing and trusting that the process is treating them fairly.¹³⁶

... [disputants] may not want to know what kinds of algorithms work to produce recommended outcomes, but, in order to trust that an outcome is fair to them, disputants desire some knowledge on who is deciding the outcome of their dispute, what and how much information this mediator is evaluating (whether it be a person reviewing the case electronically or a computer program), and whether the decision process is uniform and predictable.

At present, this standard is seldom met, and information about the process of ODR is often difficult for users of the service to gain.¹³⁷ This makes ODR “more opaque” than traditional forms of dispute resolution, and parties can feel that due process has been compromised.¹³⁸

This issue of transparency is also relevant to the doctrine of precedent in the context of online courts and ODR for low value civil claims. Shackelford and Raymond warn that the lack of transparency in ODR will mean that the doctrine of precedent is unlikely to function in virtual courts as it does in physical courts.¹³⁹ They note that although this may not initially seem to be an issue for low value civil claims, if ODR’s use continues to spread, there is a risk of fragmentation in this area of commercial law generally, beyond just low value civil claims.¹⁴⁰

The other point raised in the UK report, that ODR would meet theories of justice if it were governed by a clear set of rules has been discussed in the above section on governance in ODR. As discussed, the present lack of governance in ODR means that there is no such clear set of rules. While a government-funded online court could establish their own rules for their own

¹³⁴ Ebner and Zeleznikow, above n 33, at 303.

¹³⁵ Ruha Devanesan and Jeffrey Aresty “ODR and Justice: An Evaluation of Online Dispute Resolution’s Interplay with Traditional Theories of Justice” in *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution*, above n 4, 263.

¹³⁶ Devanesan and Aresty, above n 135 at 279.

¹³⁷ As above.

¹³⁸ As above.

¹³⁹ Shackelford and Raymond, above n 86, at 644.

¹⁴⁰ As above.

purposes, the issue remains that ODR as a whole is unregulated and not based on clear guidelines.

Finally, a further issue related to ODR meeting the basic principles of justice surrounds software patents and intellectual property rights. If an ODR provider develops a new ODR process or software, then this could foreseeably be protected by a patent.¹⁴¹ This concerns the accessibility of ODR; if some forms of ODR are patented and prevented from being accessible to all, this could lead to the aforementioned ‘economy class’ dispute resolution developing separately from the ‘business class’ dispute resolution.¹⁴²

This raises ethical issues in terms of promoting equal access to justice, especially given that ODR is promoted as a way of increasing access to justice and removing barriers, even though it may also create barriers. Moreover, it must be considered whether the profit motive of private sector ODR providers reduces the ability of ODR to meet the principles of natural justice.

How should we determine whether a dispute is appropriate for ODR?

The last issue to be discussed in relation to ethical concerns is that of how to determine whether or not a dispute is appropriate for ODR.

There are different suggestions in the literature for the types of disputes which are appropriate for ODR. For example, with family law, some argue that ODR is appropriate for when one party has experienced domestic violence, or when there is a significant power imbalance between the parties, because of the physical distance imposed via ODR providing an empowering level of safety.¹⁴³ On the other hand, others argue that it is “wholly inappropriate” in such cases.¹⁴⁴ Some see ODR as having great flexibility, allowing it to adapt to a wide range of disputes, while others argue that it is only appropriate for straightforward commercial disputes.¹⁴⁵ Overall, the only type of dispute that seems to be generally agreed upon as appropriate for ODR is low value, business-to-consumer disputes. It is likely that until there is more empirical evidence to support or counter the various suggested advantages and disadvantages of ODR, that there will continue to be no clear way to determine whether a dispute is appropriate for ODR.

Other issues regarding whether a dispute is appropriate for ODR need significant further research. For example, there is some suggestion that cyberspace is a “male domain”, with more confrontational and masculine communication styles dominating.¹⁴⁶ It remains to be seen how this impacts on ODR, and whether, (assuming cyberspace *is* a male-biased domain), this could negatively affect the way females experience ODR and therefore make certain disputes inappropriate for ODR on the basis of the gender of the parties.

Additionally, although the lower cost of ODR could result in fewer low-value claims being ignored, this could also lead to society becoming more litigious. A balance needs to be struck between discouraging litigiousness while still remaining accessible to those with limited means, and this could influence the kinds of disputes which are suitable for ODR.

¹⁴¹ Clark, Cho and Hoyle, above n 40, at 20.

¹⁴² *Online Dispute Resolution for Low Value Civil Claims*, above n 23, at 26.

¹⁴³ See, for example, Sourdin and Liyanage, above n 122, at 494; Conley Tyler and McPherson, above n 41, at 170.

¹⁴⁴ See, for example, Clark, Cho and Hoyle, above n 40, at 21.

¹⁴⁵ Poblet and Casanovas, above n 57, at 149.

¹⁴⁶ Clark, Cho and Hoyle, above n 40, at 21.

Drawbacks of ODR in specific contexts

Virtual juries and crowd-sourced ODR

Virtual juries are used in ODR for virtual courts, as well as a component of “crowd-sourced online dispute resolution” (CODR). ODR programmes which use CODR can either be mixed systems, with some people appointed to resolve the dispute, and some people crowd-sourced, or else be pure CODR with all people crowd-sourced.¹⁴⁷ However, the disadvantage of CODR, and particularly virtual juries as a form of ODR, is the tendency for an informational or reputational cybercascades to occur.¹⁴⁸ An informational cybercascade is when people decide on the basis of the signals conveyed by others, rather than on their personal opinions. As a result, “the behaviour of the first few people produces similar behaviour from a large number of followers”. Similarly, a reputational cybercascade occurs when people “neglect their personal opinions and go along with the crowd in order to maintain the good opinion of others”.¹⁴⁹ Thus, CODR generally, as well as virtual juries specifically, has limited utility within ODR.

Cross-border disputes

Although ODR is promoted as a way of ameliorating difficulties that arise in resolving cross-border disputes, ODR is nonetheless not a perfect solution. Disputants residing in different countries, with different cultural backgrounds, can have very different expectations of the dispute resolution process.¹⁵⁰ A computer programme is not necessarily best placed to reconcile these different expectations; a human mediator, for example, with knowledge of different cultural perspectives on ODR, may well be more suitable for resolving such a dispute.

With regard to resolving cross-border disputes with parties who may have differing cultural expectations, it will be interesting to monitor the progress of the ODR platform created by the European Commission to resolve cross-border disputes in the European Union (EU). That platform, available since early 2016, enables consumers and traders in the EU to access ODR in any of the EU’s official languages, in order to quickly and cheaply settle consumer disputes.¹⁵¹ This initiative will hopefully provide some updated, sound evidence on the efficacy of ODR in cross-border disputes.

Online mediation

A further drawback of ODR is in the context of online mediation, specifically related to the control the mediator can exercise over the parties and the mediation. Online mediation can lead to the mediator having insufficient control over the parties due to difficulties in reading emotions, because of their inability to prevent offline caucusing, and due to increased difficulty in regulating communication and keeping it focused.

Just as some parties may struggle to express and recognise emotions online, so too can mediators struggle to correctly perceive the emotions and opinions of the disputing parties. If a

¹⁴⁷ Van den Herik and Dimov, above n 17.

¹⁴⁸ Marder, above n 55, at 245-247.

¹⁴⁹ Van den Herik and Dimov, above n 17.

¹⁵⁰ Schultz, above n 3, at 82.

¹⁵¹ See Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); the ODR portal is available at <http://ec.europa.eu/odr> (Last accessed February 2017).

mediator is unable to correctly recognise the emotions of the parties, then core aspects of the mediation, such as reframing the issue and practicing reflective listening will be more difficult. Mediation impasse and an escalation of negative emotion can result from a mediator's "imprecise evaluation of the flexibility, strength, feelings or confidence of the other party".¹⁵²

Asynchronous forms of mediation can also pose additional challenges for mediators. Mediators may struggle to prevent, or be completely unaware of parties engaging in offline discussions that can derail the whole mediation.¹⁵³ They may also have difficulties with parties merely "lurking", and not responding to messages, especially if one party is more reluctant to engage with the dispute.¹⁵⁴ Synchronous text-based forms of mediation also have downsides. Just as preventing parties from interrupting each other can present as an issue in face-to-face mediation, in online mediation a mediator may struggle to prevent one party "interrupting" the other by sending additional messages before the other party has had an opportunity to reply.¹⁵⁵ Ultimately, whether asynchronous or synchronous, mediation requires some form of structured dialogue model in order to regulate communication between the parties.¹⁵⁶ However, this can be more difficult to achieve online than offline.

¹⁵² Poblet and Casanovas, above n 57, at 149.

¹⁵³ Hammond, above n 59, at 14.

¹⁵⁴ As above.

¹⁵⁵ Douglas Walton and David M Godden "Persuasion dialogue in online dispute resolution" (2005) 13 Artificial Intelligence and Law 273 at 287.

¹⁵⁶ As above.

5 The Future of ODR

ODR has undergone significant development during the first part of the twenty first century. Now looking to the future development of ODR, this section will attempt to outline two key areas in which it is thought that ODR is likely to continue to develop over the next decade: Government ODR programmes, and the use of Artificial Intelligence in ODR.

Government and ODR in New Zealand

Since its inception in 1996, ODR has gone through several stages:¹⁵⁷

... a “hobbyist” phase where individual enthusiasts started work on ODR; an “experimental” phase where foundations and international bodies funded academics and non-profit organisations to run pilot programs; and an “entrepreneurial” phase where a number of for-profit organisations launched private ODR sites. [ODR is now] entering a fourth “institutional” phase where it is piloted and adopted by a range of official bodies, including courts and other dispute resolution providers.

This fourth, institutional phase of ODR was being observed in 2006, however, globally, government involvement in ODR has been slow to accelerate. It has not been until more recently that several government initiatives have begun. These include the Canadian Civil Tribunal, the proposed UK Online Court, and the EU ADR and ODR Directive which have all been previously discussed in this report. The United Nations Commission on International Trade Law (UNCITRAL) is also in the process of establishing a global framework for ODR, related to cross-border, business-to-consumer and business-to-business disputes.¹⁵⁸

In this respect, New Zealand is currently lagging behind other common law jurisdictions in the government response to, and uptake of, ODR. As ODR gains popularity and technological capability overseas, it is inevitable that ODR will also become increasingly important in New Zealand, especially in the field of consumer disputes. O’Sullivan provides a thorough overview of how an ODR platform for consumer disputes could be established in New Zealand. Her recommendations include that New Zealand should:¹⁵⁹

... incorporate a two-stage [ODR] process that includes an opportunity for negotiation between the parties before referral of the dispute to an independent third party, as suggested by the UNCITRAL proposal. If the parties are unable to resolve the dispute themselves, using assisted negotiation, the second stage would require the dispute to be referred to an independent third party who would work to resolve the dispute using ADR techniques, preferably online, and make a final determination if consensual settlement is not achieved.

¹⁵⁷ Conley Tyler and McPherson, above n 41, at 167.

¹⁵⁸ Trish O’Sullivan “Developing an Online Dispute Resolution scheme for New Zealand consumers who shop online— are automated negotiation tools the key to improving access to justice?” (2016) 24 International Journal of Law and Information Technology 22 at 35.

¹⁵⁹ As above, at 39.

This ODR service would need government funding and oversight by the Ministry of Justice, the expense being justifiable “on the grounds that the purpose of the ODR scheme is to improve consumer access to justice and make it more cost effective.”¹⁶⁰

The above proposal is just one way through which ODR could develop in New Zealand, and there are several other ways, not all necessarily requiring government involvement. ODR is likely to develop with or without government support, however, the extent to which it is successful and takes hold remains to be seen.

Artificial intelligence and ODR

A second major development likely to occur within ODR over the next decade is in relation to Artificial Intelligence. It is anticipated that the technological capability of AI within ODR will continue to improve, resulting in the third generation of ODR systems alluded to in the section on defining ODR.

These ODR systems will have computer mediators which use AI to can propose settlements to parties and provide justifications for those suggestions.¹⁶¹ If the party rejects the proposal, the AI will either try to persuade the party or amend the proposal to be more palatable.¹⁶² Then, using Case Based Reasoning, the AI will retain a memory of the interactions with that party to improve future mediations – remembering the parties, the industries, the type of disputes, and options generated and rejected.¹⁶³ The same technology could even be used in the context of online courts to create “cyber judges”.¹⁶⁴

One articulation of the goal of AI research in the field of ODR is as follows:¹⁶⁵

The goal ... is to attain a technological threshold, resulting in computational systems that are indeed the 3rd party. In this sweeping approach, there is no human intervention on the outcome or in guiding the parties to a specific situation. There is, on the other hand, a system that performs that major role. This is usually known as an electronic mediator or arbitrator. It should have skills for communicating with the parties and understanding their desires and fears and have the ability to decide on the best strategy to be followed in each possible scenario. This is evidently the most challenging approach to follow since it is not easy to implement in a computer system the cognitive abilities of a human expert, as well as the ability to perceive the emotions and desires of the parties involved.

As is evident, this speaks of an incredibly high level of sophistication, with a computer programme that is able to autonomously make decisions that would significantly affect the disputing parties, without any outside human intervention.

¹⁶⁰ As above, at 40.

¹⁶¹ Farned, above n 115, at 350.

¹⁶² As above.

¹⁶³ As above.

¹⁶⁴ Clark, Cho and Hoyle, above n 40, at 8.

¹⁶⁵ Carneiro and others, above n 18, at 214.

It is unknown when the technological capabilities to reach that goal will exist, or whether they will be actioned once they do exist. However, it is crucial to be aware of the future possibility of ODR technology, especially to ensure that any governance mechanisms that are developed will be able to adapt to deal with this new form of ODR.

6 Conclusion

Since the first online dispute resolution systems in the 1990s, ODR has experienced significant growth. Developing from early, relatively simple forms of dispute resolution via email and blind-bidding, 'ODR' as a concept is now far more complex, and can refer to a wide range of programmes which use the internet to create a virtual environment in which to resolve disputes. ODR has become particularly widely used in low value civil disputes, although its prevalence now extends to other areas of law such as family law.

ODR is often promoted as a means of resolving disputes that is faster and more cost-effective than traditional forms of dispute resolution. It is also said to assist parties who prefer written communication and to reduce the influence of unconscious bias. On the other hand, there is a lack of empirical evidence to support many of the claims that are made about ODR's benefits. Furthermore, the lack of governance and regulation in ODR makes it vulnerable to exploitation and manipulation. Consequently, the present state of ODR raises several ethical concerns.

However, despite the drawbacks of ODR, its presence seems certain to stay, with growing international recognition of ODR, and the development of several government initiatives in overseas jurisdictions. At present, New Zealand is behind many other common law jurisdictions in relation to ODR, however, New Zealand could, (and arguably should), use the lessons learned by others to develop a strong ODR programme.

More empirical research is needed on the topic of ODR, both in a New Zealand context and overseas.

7 Bibliography

Markus Altenkirch "A Fast Online Dispute Resolution Program to Resolve Small Manufacturer-Supplier Disputes: Using the ODR M-S Program" (2012) 67(3) *Dispute Resolution Journal* 48.

Jeff Aresty, Daniel Rainey, and James Cormie "State Courts and the Transformation to Virtual Courts" (2013) 39(2) *Litigation* 50.

Vincent Bonnet and others, "Online Dispute Resolution Systems as Web Services" (2004) 3 *ICFAI Journal of Alternative Dispute Resolution*.

Andrea M Braeutigam "Fusses that fit online: online mediation in non-commercial contexts" (2006) 5(2) *Appalachian Journal of Law* 275.

Davide Carneiro and others "Online dispute resolution: an artificial intelligence perspective" (2014) 41(2) *Artificial Intelligence Review* 211.

Davide Carneiro and others "Using Case-Based Reasoning and Principled Negotiation to provide decision support for dispute resolution" (2013) 36(3) *Knowledge and Information Systems* 789.

Kori Clanton "We are not who we pretend to be: ODR alternatives to online impersonation statutes" (2014) 16(1) *Cardozo Journal of Conflict Resolution* 323.

Eugene Clark, George Cho and Arthur Hoyle "Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects" (2003) 17 *International Review of Law, Computers & Technology* 7.

Robert J Condlin "Online Dispute Resolution: Stinky, Repugnant, or Drab" (Francis King Carey School of Law Legal Studies Research Paper No 2016-40, University of Maryland, 2016).

Melissa H Conley Tyler and Mark W McPherson "Online Dispute Resolution and Family Disputes" (2006) 12(2) *Journal of Family Studies* 165.

Pablo Cortés "Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers" (2011) 19(1) *International Journal of Law and Information Technology* 1.

Bruno Deffains and Yannick Gabuthy "Efficiency of online dispute resolution: a case study" (2005) 60 *Communications & Strategies* 201.

Jo DeMars, Susan Naus Exon, Kimberlee K. Kovach and Colin Rule "Virtual virtues: ethical considerations for an online dispute resolution practice" (2010) 17(1) *Dispute Resolution Magazine* 6.

Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

Noam Ebner and Colleen Getz "ODR: The Next Green Giant" (2012) 29(3) *Conflict Resolution Quarterly*

Noam Ebner and John Zeleznikow "No Sheriff in Town: Governance for Online Dispute Resolution" (2016) 32(4) *Negotiation Journal* 297.

Joel B Eisen "Are We Ready for Mediation in Cyberspace" (1998) *Brigham Young University Law Review* 1305.

Dusty Bates Farned "A new automated class of online dispute resolution: changing the meaning of computer-mediated communication" (2011) 2(2) *Faulkner Law Review* 335.

Anne-Marie Hammond "The effectiveness of online dispute resolution" (MA Thesis, Royal Roads University, 2001).

Elle Hunt "Tay, Microsoft's AI chatbot, gets a crash course in racism from Twitter" (The Guardian, online ed, London, 24 March 2016).

Ian Macduff "Flames on the Wires: Mediating from an Electronic Cottage" (2007) 10 *Negotiation Journal* 5.

Nancy Marder "Cyberjuries: A new role as online mock juries." (2006) 38 *U Tol L Rev* 239.

Rafel Morek "Regulation of Online Dispute Resolution: Between Law and Technology" (Working Paper, August 2005).

Trish O'Sullivan "Developing an Online Dispute Resolution scheme for New Zealand consumers who shop online—are automated negotiation tools the key to improving access to justice?" (2016) 24 *International Journal of Law and Information Technology* 22.

Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims: Report by the UK Civil Justice Council* (February 2015).

Pietro Ortolani "Self-enforcing Online Dispute Resolution: Lessons from Bitcoin" (2016) 36(3) *Oxford Journal of Legal Studies* 595.

Marta Poblet and Pompeu Casanovas "Emotions in ODR" (2007) 21(2) *International Review of Law, Computers and Technology* 145.

Colin Rule "Technology and the future of dispute resolution" (2015) 21(2) *Dispute Resolution Magazine* 4.

Philippa Smith and others "Internet Trends in New Zealand 2007-2015" (Auckland University of Technology as part of the World Internet Project, 2016).

Thomas Schultz "Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust" (2004) 6 *NC JOLT* 71 at 73.

Scott J Shackelford and Anjanette H Raymond "Building the virtual courthouse: ethical considerations for design, implementation, and regulation in the world of ODR" (2014) 2014(3) *Wisconsin Law Review* 615

Jaime Tan, Diane Bretherton and Gregor Kennedy, "Negotiating Online" (2004, The University of Melbourne).

Louise E Teitz, "Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution" (2001) 70 Fordham L Rev 985.

Roland Troke-Barriault "Online Dispute Resolution and Autism Spectrum Disorder: Levelling the Playing Field in Disputes Involving Autistic Parties" (2015) 6(2) Western Journal of Legal Studies.

Kathleen Valley "The Electronic Negotiator" (2000) Harvard Business Review.

Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (Eds) *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution* (Eleven International Publishers, The Hague, 2011).

Douglas Walton and David M Godden "Persuasion dialogue in online dispute resolution" (2005) 13 Artificial Intelligence and Law 273.

Jaap Van den Herik and Daniel Dimov "Towards Crowdsourced Online Dispute Resolution" (2012) 7(2) JICLT 99.

John Zelenznikow, "Using Web-based Legal Decision Support Systems to Improve Access to Justice" (2002) 11 Information & Communication Technology Law 15.

J Zeleznikow and A Stranieri "Split up: an intelligent decision support system which provides advice upon property division following divorce" (1998) 6 (2) Int J Law Info Tech 190.