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The convergence of ADR and ODR within the courts: The impact on access to justice

Dorcas Quek Anderson*

The complexion of justice within many judiciaries has changed dramatically through the influence of two global movements – the modern alternative dispute resolution (ADR) movement and the more recent development of online dispute resolution (ODR). The former wave led to the creation of multi-door courthouses, court-annexed mediation programmes and innovations such as judicial settlement conferences. In the last decade, the rapid growth of ODR has precipitated more changes in the administration of justice. Online courts have been designed in England and Wales (the Online Solutions Court suggested by Lord Briggs) and British Columbia (the Civil Resolution Tribunal).

This paper discusses the impact of the ADR and ODR waves on access to justice within the courts. It examines how substantive justice, procedural justice and accessibility to the judiciary have undergone transformation as the courts have incorporated these two waves into the justice system. The paper also considers the implications of the increasing convergence of both waves within the justice system. It argues that greater clarity is needed concerning the changes to access to justice amidst the courts' embracing of innovation.

I. Introduction

The complexion of justice within many judiciaries has changed dramatically in the last few decades through the influence of two global movements – the alternative dispute resolution (ADR) movement and the more recent development of online dispute resolution (ODR). The former wave led to the creation of multi-door courthouses and innovations such as judicial settlement conferences. In the last decade, the rapid growth of ODR has precipitated even greater changes within the justice system. ODR systems such as the Online Solutions Court in England and Wales and the Civil Resolution Tribunal in British Columbia have captured the imagination of the judiciary as ways to resolve the perennial challenge of access to justice.

This article discusses the collective impact of the ADR and ODR waves on access to justice within the courts. It examines the key trends arising from the increasing convergence of ADR and ODR in common law jurisdictions. It also explores how procedural justice and accessibility to the courts have undergone transformation as the courts incorporated these two waves into the justice system. It is argued that greater clarity concerning the impact of these developments is needed in order to safeguard the essential elements of procedural justice.

II. On Access to Justice

The primary concept that will be used to evaluate the trends in ADR and ODR is access to justice. This concept has been commonly discussed in relation to overcoming the barriers in accessing the civil justice system, particularly the potentially disproportionate costs and time involved in litigation, and the lack of knowledge. Ever since Lord Woolf's Report on Access to Justice underscored the urgent need to address the problems of excessive delay and disproportionate costs,[1] the Civil Procedural Rules (CPR) have underscored the importance of exercising firm judicial control over proceedings to "deal

* Assistant Professor, Singapore Management University School of Law. I would like to thank Professor Nancy Welsh (Texas A&M University School of Law) for her very helpful comments and suggestions.

[1] Lord Woolf, *Access to Justice: Final Report* (Lord Chancellor's Department, 1996).

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with cases justly and at proportionate cost”.[2] Lord Justice Jackson reiterated the importance of redressing the damage to the civil justice system caused by delays while Lord Dyson stressed that no one piece of litigation should be permitted to “utilise more of the court’s resources than is proportionate, taking account the needs of other litigants”.[3] Lord Reed also recently emphasised that access to the courts is inherent to the rule of law, and will naturally involve the knowledge of one’s legal rights and the ability to enforce them.[4]

It has been increasingly acknowledged that civil justice is a public good instead of a consumer service. In this connection, Lord Neuberger pointed out that an all-embracing commitment to substantive justice in the individual case reduces the justice system’s ability to achieve justice for other cases; a balance therefore has to be struck to ensure that the system can properly act in the public interest.[5] The changing roles of the court, coupled with the modified dispute resolution landscape, invariably exert a significant impact on the extent to which civil justice can be a public good accessible to all. This article will thus discuss the issue of access to justice from the perspective of ensuring proportionality of resources in litigation, which is a primary obstacle in access to civil justice.

Many of the issues in access to justice ultimately stem from a greater focus on the individual litigant. In this regard, the term “procedural justice” has taken on a different meaning in legal-psychological research as the focus has shifted to understanding individual perceptions of fairness. A growing body of studies has established that individuals tend to view an outcome as fair and legitimate when there are certain aspects within the process, such as even-handedness, opportunity to voice concerns, a sense of being heard and understood and the perception of dignified treatment. This research has been done in relation to perceptions of fairness of governmental authorities, the courts and the opposing negotiator.[6] Apart from discussing barriers to access to justice, this article will also examine procedural justice in terms of individual perceptions of fairness. The analysis of ADR and ODR innovations will generally be limited to common law jurisdictions including England and Wales, the United States, Canada and Singapore.

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[2] Civil Procedure Rules (CPR) r. 1.1(1).

[3] Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report,* p. 397; Lord Dyson MR, "The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme", speech delivered at the District Judges’ Annual Seminar, Judicial College, March 22, 2013. See also Andrew Higgins & Adrian Zuckerman, “Lord Justice Briggs’ ‘SWOT’ Analysis Underlines English Law’s Troubled Relationship with Proportionate Costs”, (2017) 35(1) C.J.Q. 1, 10 (arguing that the system should define proportionate cost by reference to the value of the rights in issue, and then reduce the amount of process and costs needed to resolve them).

[4] *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 W.L.R. 409 at [66]ff.

[5] Lord Neuberger, "Equity, ADR, Arbitration and the Law: Different Dimensions of Justice”, speech delivered at the Fourth Keating Lecture, Lincoln’s Inn, May 19, 2010, paras 23-25; see also Sir Ernest Ryder, “Assisting Access to Justice”, speech delivered at Keele University (15 March 2018).

[6] See generally Nancy Welsh, “Perceptions of Fairness in Negotiation”, (2003-2004) 87 Marq. L. Rev. 753; Nancy Welsh, “Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?”, (2001) 79 Wash. U. L. Q. 787, 817-838; Tom R. Tyler, “Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform”, (1997) 45 J. Am. J. Comp. L. 871; Steven J. Schulhofer, Tom R. Tyler and Aziz Z. Huq, “American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative”, (2011) 101 J. Crim. L. & Criminology 335; Rebecca Hollander-Blumoff & Tom R. Tyler, “Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential”, (2008) 33 Law & Soc. Inquiry 473; Allan Lind, Tom R. Tyler & Yuen J. Huo, “*Procedural Context & Culture: Variation in the Antecedents of Procedural Justice Judgments”,*(1997) 73 J. Personality & Soc. Psychol. 767.

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III. The ADR Movement

(a) The winds of change

The first wind of change to access to justice was precipitated by the ADR movement. The increasing popularity of ADR coincided with the growing criticism of the adversarial civil justice system. It is apposite that the Roscoe Pound Conference in the USA, which led to discussions about the multi-door courthouse, was convened to deal with causes of dissatisfaction with conventional litigation.[7] Likewise, the Woolf Report was written with the goal of addressing obstacles to access to justice, resulting in similar suggestions concerning promoting the use of ADR. Cappelleti and Garth have therefore characterised this phase of the access to justice movement as a search for alternatives to the traditional litigation model in order to reduce the cost of access to justice.[8] While ADR processes were already being used, the widespread discontent with litigation provided the impetus to the courts to promote more conciliatory forms of dispute resolution.

With the advent of the ADR movement, the complexion of civil justice in the courts evolved in several ways. First, Frank Sander's proposal of a multi-door courthouse gained traction in many courts. This notion essentially conceptualised the court's role as actively screening cases to direct litigants to the most appropriate form of dispute resolution. Litigation was not necessarily suitable for all types of disputes and hence the forum had to be fitted to the fuss.[9] While this concept was not implemented in its entirety in England, it became common for judges to take on pre-trial case management responsibilities to facilitate discussions about conducting litigation in a cost-effective way and the possible use of ADR.[10] In the same vein, the Singapore courts have institutionalised the practice of discussing ADR options at pre-trial conferences.[11] Pre-trial judicial case management has also become an integral practice in the US Federal Courts, leading to the growth of what has been termed "managerial judging".[12] The ADR movement has therefore contributed to the steady transformation of the judge's role to a case manager who performs triage of cases and actively manages litigation conduct.

Secondly, many civil procedural mechanisms have been created to facilitate the judge's exercise of case management powers and encouragement of the use of ADR. Both England and Singapore have empowered their courts to award adverse costs orders to take into account any party's unreasonable refusal to attempt ADR.[13] A substantial body of jurisprudence has emerged with guidelines on when a

[7] Frank Sander, "Varieties of Dispute Resolution", 70 FRD III (1976) and A. Levin & R. Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future* (St Paul, Minnesota: West Group, 1979).
[8] Mauro Cappelletti & Bryant Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective", (1977-1978) 27 Buff. Law. Rev. 181, 223-224; Mauro Cappelletti, "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement", (1993) 56(3) M.L.R. 282, 283.
[9] John Sorabji, "The Online Solutions Court – a Multi-Door Courthouse for the 21st Century", (2017) 36(1) C.J.Q. 86, 88-89.
[10] CPR, Practice Direction – Pre-Action Conduct and Protocols, paras 8-11.
[11] Rules of Court (Cap. 322, s 80, Singapore) Order 34A.
[12] Judith Resnik, "Managerial Judges", (1982-1983) 96 Harv. L. Rev. 374, 445; Nancy Welsh, Donna Stienstra & Bobbi McAdoo, "The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions", in Sourdin & Zariski eds, *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters, 2013), pp. 59-62.
[13] CPR 44.4(3); Rules of Court (Cap. 322, s 80, Singapore) Order 59 rule 5(c).

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case is appropriate for ADR and consequently, when a refusal to use ADR is deemed reasonable.[14] Additionally, both jurisdictions heavily rely on pre-action protocols to encourage the early exchange of information and the use of ADR. The Singapore courts have gone further to mandate the use of ADR for certain categories of civil claims, including personal injury and motor accident claims. Furthermore, the Singapore courts may order the parties to use ADR for civil claims below S$60,000 in value.[15]

Finally, the courts in the USA, Canada and Singapore have gone beyond encouraging the use of ADR to establishing ADR programmes *within the courts*. Court-connected mediation programmes have emerged in various forms, involving the assistance of volunteers, staff mediators (in the US federal appellate courts)[16] or panels of external mediators. In some jurisdictions, the judges are actively involved in facilitating settlement. For instance, the judge in a USA federal court would usually convene a judicial settlement conference to assist the parties in settling the dispute.[17] Some states in Canada have institutionalised this practice by establishing judicial mediation programmes. More than two decades ago, the Singapore lower courts also established a Centre for Dispute Resolution managed by judges who conduct mediation and early neutral evaluation.[18]

The changes associated with the ADR movement have led to a steady re-conceptualisation of the justice system to include both adjudicative and consensual processes. This new paradigm has been aptly termed "co-existential justice", because private dispute resolution processes are given an expanded role alongside formal public models.[19] Notably, the role of the court has been expanding from that of detached adjudicator to a more pro-active problem-solver customising its processes to fit the unique features of each dispute.[20]

(b) The ADR movement's impact on access to justice

Barriers to access to the courts

The ADR movement was principally embraced by the courts to decrease the time and cost of litigation. It is therefore evident that the growth of court-connected ADR had a considerable impact on reducing barriers to access to justice. However, there have been dissenting voices arguing that the promotion of consensual processes such as mediation has inadvertently exacerbated existing power disparities amongst the disputants, penalising vulnerable parties of lower status or who have no access to legal

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[14] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576; *Colin Wright v Michael Wright Supplies Ltd & Anor* [2013] EWCA Civ 234; *Rolf v De Guerin* [2011] EWCA Civ 78.

[15] Rules of Court (Singapore) Order 108 rule 3(3).

[16] All USA Federal appellate courts and some of the district courts use staff mediators; Judge Sandra Beckwith, "District Court Mediation Programs: A View From the Bench", (2011) 26 Ohio State J. Disp. Resol. 357.

[17] Nancy Welsh, Donna Stienstra & Bobbi McAdoo, "The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions", in Sourdin & Zariski eds, *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters, 2013), pp. 59-62; Nancy Welsh, "Magistrate Judges, Settlement, and Procedural Justice" (2015-2016) 16 Nev. L.J. 983, 1004-1010.

[18] Joyce Low & Dorcas Quek, "An Overview of Court Mediation in the State Courts of Singapore", in Danny McFadden and George Lim eds, *Mediation in Singapore: A Practical Guide* (Singapore: Sweet & Maxwell 2nd ed. 2017), p. 230.

[19] Mauro Cappelletti, "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement", (1993) 56(3) M.L.R. 282, 287, 289.

[20] Jean-Francois Roberge & Dorcas Quek Anderson, "Judicial Mediation: From Debates to Renewal" (2018) Cardozo Journal of Conflict Resolution (forthcoming).

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advice.[21] Dame Hazel Genn pointedly stated that ADR and other civil justice reforms have been neither about access nor justice, but about diversion of cases from the courts and an overall downgrading of civil justice.[22] It has been increasingly recognised that the use of ADR alone is not a panacea to access to justice challenges, without being accompanied by supporting infrastructure such as adequate legal aid, public education about ADR and a change in legal culture.[23]

Procedural justice

A consideration of the concept of procedural justice would shed some light on the above criticism. As discussed above, litigants' perceptions of fairness are strongly impacted by their sense of the courts' even-handed and inter-personal treatment. Mediation provides great potential for litigants to be heard because of the opportunity to express their views and actively participate in reaching a consensual settlement. However, mediation has not been fully embedded within the civil justice process in some courts because it is common to refer cases to external mediators who do not represent the courts. The litigant may well voice his or her concerns with the external mediator, but is unlikely to attribute the mediator's dignified or even-handed treatment of him or her to the courts. Instead, mediation may be perceived as a convenient diversion of the courts' heavy caseload to external agencies rather than as a key element of co-existential justice within the courts. The legitimacy of the court system suffers as a result.

In this connection, former USA Magistrate Wayne Brazil highlighted two decades ago that "the closer and the more visible the connection between the Court and its ADR programme, the clearer the Court's signal that it identifies with that programme – and endorses its value and quality". Conversely, a mediation programme model involving sending parties to the private ADR sector risks giving the impression that ADR has no real value and is a poor substitution for litigation.[24] A USA study corroborated this view, showing that lawyers had the greatest preference for court staff mediators and magistrate judge mediators who were not presiding over the trial in a federal court. By contrast, they had the least preference for volunteer mediators.[25] As Lord Neuberger observed, ADR should not be perceived as playing a crucial role to downsize the civil justice system, but as "express[ing] [the] commitment to civil justice as a public good".[26] Hence, to the extent that ADR is perceived as external to the court system and a convenient diversion measure, to that extent will procedural justice be undermined.

In addition, *how* the court-connected ADR process is conducted impinges on procedural justice. It has been noted in both England and USA that ADR is in danger of being co-opted into the litigation framework.[27] Lord Neuberger warned against the transformation of ADR into the likeness of litigation

[21] Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubert, "Fairness and Formality: Minimizing the Risk of Prejudice in ADR", (2007) Wisconsin L.R. 1359, 1402; Trina Grillo, "The Mediation Alternative: Process Dangers for Women", (1991) 100 Yale L.J. 1545.

[22] Hazel Genn, *Judging Civil Justice* (USA: Cambridge University Press, 2010).

[23] Lord Neuberger, "Equity, ADR, Arbitration and the Law: Different Dimensions of Justice", speech delivered at the Fourth Keating Lecture, Lincoln's Inn, May 19, 2010, paras 45.

[24] Wayne D. Brazil, "Comparing Structures for the Delivery of ADR Services: Critical Values and Concerns", (1998-1999) 14 Ohio St. J. Disp. Resol. 715, 750, 753.

[25] Roselle Wissler, "Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences" (2011) 26 Ohio St. J. on Disp. Resol. 271, 298-299.

[26] Lord Neuberger, "Equity, ADR, Arbitration and the Law: Different Dimensions of Justice", speech delivered at the Fourth Keating Lecture, Lincoln's Inn, May 19, 2010, para 44.

[27] Carrie Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR'", (1991) 19 Fla. St. U. L. Rev. 1.

by being more formal and less flexible, thus losing its original advantages.[28] US commentators have similarly raised concerns about mediation being conducted more like adjudication, involving the mediator making evaluations about the legal merits instead of facilitating communication to help the disputants arrive at their own agreement.[29] The involvement of lawyers who may retain a traditional adversarial style further contributes to court-connected mediation resembling adjudication or arbitration. As mediation takes place in the court setting, it could easily be conducted in a directive way, leading to the disputants feeling coerced into settlement and failing to truly exercise self-determination.[30] Furthermore, the use of mandatory mediation potentially taints the consensual nature of mediation. While compulsory mediation could be a very beneficial temporary expedient to increase the awareness and usage of mediation, there are risks of abuse of the power to mandate, resulting in reluctant participation or indiscriminate referral of cases – particularly the inappropriate ones – to mediation.[31] Cumulatively, excessive formalisation of ADR severely curtails the potential for expression of voice, dignified treatment and trustworthy consideration of the litigants' concerns.

In summary, the ADR movement has created opportunities for a diverse dispute resolution landscape to be created within and beyond the courts, resulting in greater access to justice in terms of more affordable options and more speedy resolution of disputes. There are, however, lingering questions on how the system of court-connected ADR and the way ADR is conducted affects the experience of procedural justice. As will be evident below, some of these unresolved issues are likely to contribute to greater challenges to the converging ODR and ADR landscape.

IV. ODR Converges with ADR

(a) ODR enters the ADR landscape

Katsch and Rabinovich-Einy have observed that earlier forms of ODR were predominantly utilised for small-value e-commerce disputes, with eBay being the most well-known example. In addition, ODR used to involve translating ADR processes to the online context. Over time, ODR developments reflected a discernible change from the principles underlying traditional ADR processes. The distinctive qualities of ODR include the shift to online instead of face-to-face communication; the change from a human "third party" to technology being the "fourth party"; and the shift to a mentality of no collection of data to processes that revolve around data.[32] The metaphor of "fourth party" has been foundational

[28] Lord Neuberger, "Equity, ADR, Arbitration and the Law: Different Dimensions of Justice", speech delivered at the Fourth Keating Lecture, Lincoln's Inn, May 19, 2010, para 41, referring to Main, "ADR: The New Equity", (2005-2006) 74 U. Cin. L. Rev. 329.

[29] Carrie Menkel-Meadow, "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 UCLA L. Rev. 485, 510-511; Nancy Welsh, "The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?" (2001) 6 Harv. Negot. L. Rev. 1.

[30] Nancy Welsh, "The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?" (2001) 6 Harv. Negot. L. Rev. 1, 67.

[31] Carrie Menkel-Meadow, "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 UCLA L. Rev. 485; Dorcas Quek, "*Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program"* (2010) 11 Cardozo Journal of Conflict Resolution, 479.

[32] Ethan Katsch & Orna Rabinovich-Einy, *Digital Justice* (USA: Oxford University Press, 2017), p. 34; Orna Rabinovich-Einy & Ethan Katsch, "A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution" (2017) 32 Ohio St. J. on Disp. Resol. 695, 716-718; Orna Rabinovich-Einy &

to the academic discussion on ODR. It has drawn attention to the unique role that technology and software can play to support or even replace the third party, the dispute resolution practitioner.[33] These three characteristics have cumulatively pushed the focus of dispute resolution to the pre-resolution stage of software design for the purpose of dispute containment, as well as the post-resolution stage of data analysis for the purpose of dispute prevention.[34]

It has been noted that the ODR field has recently diverted its focus from where the disputes originated to finding tools that can be effective for various types of disputes regardless of their origin. More significantly, as ODR has concentrated more on creating systems rather than online tools, it has become increasingly associated with the great potential to enhance access to justice for both online and offline disputes. [35] In this regard, the English Civil Justice Council stated that it understood ODR as the use of technology and the internet to help resolve disputes, going beyond the notion of conducting dispute resolution across video links, or online tracking of disputes.[36] It surveyed several well-known ODR systems, such as eBay and Rechtwijzer 2.0. The first system offers users a tiered method to resolve their disputes through online negotiation, and if it fails, online mediation then e-adjudication. The second system used by the Dutch Legal Aid Board, which has most recently been replaced by Justice42, similarly takes the parties through problem diagnosis via facilitated question-and-answer framing of their dispute, then problem solving and assisted negotiation, and finally to various forms of online ADR that are conducted asynchronously.[37]

(b) ADR and ODR converge within the justice system

Tiered and modular ODR systems have now emerged not only outside the courts, but within the court's civil justice process. This article focuses on the latter trend, examining how the convergence of ODR and ADR within the courts is transforming the nature of access to justice. Much of the discussion is clearly dependent on the exact design of the ODR system, which varies across different courts and is constantly being refined. Accordingly, the analysis in the sections below will be premised on the broad trends distilled from two ODR systems in England and Wales and in British Columbia.

The Online Solutions Court

The Online Solutions Court (OC) has its genesis in the Civil Justice Council's recommendations on using ODR for low value civil claims, that were subsequently endorsed in Lord Briggs' Interim and Final Reports on the Civil Courts Structure Review for the Judiciary of England and Wales. Based on the final report and latest updates, what is envisaged by 2020 is the following three-stage system for claims not exceeding £25,000:

Ethan Katsch, "Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment" (2014) International Journal of Online Dispute Resolution 5, 7-19.

[33] Ethan Katsch & Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (USA: Wiley Publishing, 2001)

[34] Ethan Katsch & Orna Rabinovich-Einy, *Digital Justice* (USA: Oxford University Press, 2017), p. 47; Civil Justice Council, Online Dispute Resolution for Low Value Claims (2015) ("CJC Report"), paras 5.2-6.1.

[35] Ethan Katsch & Orna Rabinovich-Einy, *Digital Justice* (USA: Oxford University Press, 2017), p. 33-34; Ethan Katsch, "ODR: A Look at History" in Mohamed S. Abdel Wahab, Ethan Karsh & Daniel Rainey, *Online Dispute Resolution: A Treatise of Technology and Dispute Resolution* (Hague: Eleven International Publishing, 2012), p. 12.

[36] CJC Report, para 1.5.

[37] CJC Report, para 4.2-4.3; Amy Schmitz & Colin Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection* (USA: American Bar Association Publishing, 2017).

(i) Stage 1, which Lord Briggs considered to be most significant, provides interactive triage. This is an automated process assisting litigants to identify their case in terms that can be understood, and to submit relevant documents. Triage software will be used, based on detailed questionnaires arising from customised decision trees, to help the litigant particularise their claims. Lord Briggs added that there should also be stage 0 providing guidance about treating litigation as a last resort and commoditised summaries of legal principles, and stage 0.5 providing for a short exchange between parties to ascertain whether a dispute really exists.[38] This first stage provides essential information at an early stage to help parties identify the nature of their dispute and explore early settlement, thus securing access to preventive justice.[39]

(ii) Stage 2 seeks to embed ADR into the court process by having case officers assist the parties to manage their claim and facilitate settlement. These officers are meant to promote the best dispute resolution method for each type of case, including mediation, early neutral evaluation or online ADR. Notably, Lord Briggs highlighted that the main form of conciliation at this stage is done through human intervention, though ODR may well be another process that utilised.

(iii) If stage 2 does not lead to the settlement, the case will move on to stage 3 involving adjudication by a judge. The trial may take place in a traditional courtroom or in an online setting. The judge will adopt a less adversarial and more investigative approach.[40]

The Civil Resolution Tribunal

The OC drew much inspiration from British Columbia's Civil Resolution Tribunal (CRT). The CRT is an independent tribunal handling condominium property claims and small claims disputes under $5000. The CRT system is meant to be an end-to-end process combining dispute resolution phases, and focusing on early participation by parties in dispute resolution. It involves the following four phases that are usually gone through sequentially:[41]

(i) Phase 1: Initial problem-diagnosis and self-help
The CRT has created an online tool, the "Solution Explorer", that can be accessed before a formal claim is filed. It uses guided pathways to help a person learn more about disputes, and then diagnoses the problem in terms of relevant legal rights, and provides self-help tools such as letter templates that can manage the problem. The tool harnesses an "expert system", a technology-based platform that emulates the guidance of a human expert and relies on a knowledge base filled with specialised knowledge from a given domain. If the user is unable to resolve the problem with the suggested tools, a case can be started using CRT's online intake process.

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[38] Lord Justice Briggs, Civil Court Structure Review: Final Report (July 2016) ("Final Report"), paras 6.108 – 6.111.

[39] Lord Justice Briggs, Civil Court Structure Review: Interim Report (December 2015) ("Interim Report"), paras 6.07-6.12; Final report paras 6.61-6.66; Sir Terence Etherton, "The Civil Court of the Future", speech delivered at the Lord Slynn Memorial Lecture, 14 June 2017, para 23.

[40] Final report, paras 6.14-6.15.

[41] See generally Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunals" (2016-2017) 3 McGill Journal of Dispute Resolution 113, 116, 129, 133; Shannon Salter, "Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal" (2017) 34 Windsor Y.B. Access. Just. 112, 120, 129.

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(ii) Phase 2: Negotiation

After the claimant gives notice of the claim to the opponent, they are given a brief window to negotiate directly. There is minimal intervention by the CRT at this point.

(iii) Phase 3: Facilitation

CRT uses the term "facilitation" to encompass a wide range of ADR processes, including case management, mediation and non-binding neutral evaluation. With the parties' consent, the facilitator may also issue a binding decision. While the facilitators need not be lawyers, they would have strong mediation experience. The facilitator will help the parties reach an agreement, using a variety of communication channels and tools. Most of the facilitation takes place remotely and asynchronously. If a settlement is reached, the facilitator helps draft the agreement and refers it to the tribunal member to have it converted into a binding tribunal order. Otherwise, the facilitator will take on a case management function and prepare the parties for adjudication by helping them narrow their issues and organise their claims.

(iv) Phase 4: Adjudication

This final phase is usually conducted remotely through asynchronous communication channels such as the online platform and e-mail. Any oral hearing will be conducted via telephone or video-conferencing.

(c) The key changes arising from the convergence

It is noteworthy that the above ODR systems are driven not only by technological developments, but thoughtful use of dispute systems design to strategically harness technological tools and human intervention. The facilitation stages in the CRT and the planned OC are largely run by humans who use technological tools, although the Civil Justice Council envisaged the future use of automated negotiation.[42] The adjudication stage for both systems adopts a similar approach. Only the first phase of problem diagnosis or counselling is heavily reliant on interactive software. Notwithstanding the largely online nature of this initial phase, Lord Briggs anticipated that face-to-face assistance will have to be provided by existing support agencies.[43] Likewise, the CRT currently provides telephone-based or paper-based services to parties who face barriers to using the online system.[44]

The changing face of ADR

As ODR and ADR incrementally converge within the court system, the nature of court-connected ADR is evolving in fascinating ways. ADR used to be external to certain courts that did not use staff mediators or judge mediators. However, as Sir Etherton observed, the OC will embed ADR process into the pre-trial process for the first time and require the court to actively facilitate it.[45] In this respect, the CRT has been described as an end-to-end system in which each process is meant to work in symbiosis with the one preceding or following it, so that there is gradual escalation of effort for each dispute resolution

[42] CJC Report, paras 6.3, 8.5.
[43] Final Report, para 6.19 and Interim Report, para 6.58.
[44] Shannon Salter, "Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal" (2017) 34 Windsor Y.B. Access. Just. 112, 123.
[45] Final report, para 6.8; Sir Terence Etherton, "The Civil Court of the Future", speech delivered at the Lord Slynn Memorial Lecture, 14 June 2017, para 26.

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phase.[46] English commentator Sorabji also observed that the future OSC is a "sequential multi-door courthouse", as the court is not matching a dispute to a process but arranging for disputes to move through different processes in stages.[47] Significantly, the sequence is deliberately arranged to emphasise dispute avoidance at the outset, then move to dispute containment through ADR and finally to the more drastic and costly step of dispute resolution.[48] By contrast, most existing court systems use an "add-on approach" by grafting mediation into the adversarial process. Consequently, the mediation process only augments, but does not permeate or transform, the adversarial mindset underpinning the civil justice process. Because the litigants start their legal claim in a positional and rights-based manner, the use of mediation in the middle of the court process is usually approached in an adversarial manner as well.[49] Hence the ODR system signifies a substantial systemic change, bringing about a radical shift of the function of ADR from being merely peripheral to the core of the civil justice process. ADR is used not only in the middle of the ODR system, but its underlying philosophy of dispute prevention through early settlement is infused into the very start of the process.

While ADR may potentially play an enlarged role within the court system, the distinctions between discrete ADR processes such as mediation and early neutral evaluation appear to be collapsing. The OC has a phase dedicated broadly to facilitation. The facilitator is empowered to use a range of facilitative and adjudicative dispute resolution methods to assist the disputants in arriving at an agreement. Whereas the courts used to screen disputes in order to direct them to the suitable "door" out of many options, this system simply directs all disputants to the same facilitation door and grants the facilitator the discretion to use the most appropriate methods. Although the human agent is currently performing the facilitation function, it is easily foreseeable to have well-designed software fulfil the same role with limited human intervention. Technology also brings the capability to mix and combine different ADR processes that used to exist separately in the physical realm. While this may appear to be a change of form more than substance, it arguably leads to less well-defined hybrid ADR processes that may not be aligned to the litigant's expectations concerning the process. On this point, this author has argued that the diversity of judicial settlement practices – ranging from facilitative to more evaluative techniques – has clouded the entire concept of judicial dispute resolution, risking the discrediting of both ADR and the court system.[50] By the same token, a blurring of the lines between different ADR processes within the ODR system could result in considerable disorientation within the court user. There is therefore a heavy onus on the facilitator to obtain the disputants' informed consent when utilising a variety of dispute resolution methods.

The multi-tasking fourth party

The metaphor of technology as "fourth party" was a prominent one in the early development of ODR. Now that ODR is infused with ADR within the courts, it is timely to consider what modified role the fourth party plays in the justice system. One indisputable trend is how it has taken on many of the courts' existing functions, including case management and triage of cases. If technology and artificial

[46] Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunals" (2016-2017) 3 McGill Journal of Dispute Resolution 113, 116.
[47] John Sorabji, "The Online Solutions Court – a Multi-Door Courthouse for the 21st Century", (2017) 36(1) C.J.Q. 86, 100.
[48] CJC Report, paras 5.1-5.8.
[49] Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunals" (2016-2017) 3 McGill Journal of Dispute Resolution 113, 116-117.
[50] Jean-Francois Roberge & Dorcas Quek Anderson, "Judicial Mediation: From Debates to Renewal" (2018) Cardozo Journal of Conflict Resolution (forthcoming).

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intelligence were to be further harnessed, the fourth party could also play a more central role in facilitating negotiations and settlement. It remains to be seen what other human functions it could replace in the future court ODR systems. While some may depict this trend as heralding an apocalyptic future for the legal profession, such a development potentially bodes very well for the courts. Some commentators have earlier observed that the managerial or multi-tasking judge could compromise the quality of adjudication for litigants as judicial resources are diverted to a myriad of other duties.[51] However, the fourth party now takes over the multi-tasking and the third party, the court, has more time to focus on its core functions. A report by the Hague Institute for Global Justice aptly noted that a well-designed ODR system creates time and budget for high quality human interaction with the parties.[52] Consequently, the multi-tasking fourth party, by fulfilling the courts' previous responsibilities, plays a strategic function in facilitating targeted intervention by the courts. Additionally, the fourth party in a well-designed and sophisticated system has great potential to perform these tasks with accuracy and consistency, free from cognitive biases.

Apart from taking over some of the courts' responsibilities, the fourth party also appears to have added more functions to the courts. The preliminary phase of the current ODR systems guides the potential litigant in understanding his or her case better so that self-help and negotiation can be explored at the earliest moment. The Solution Explorer in CRT offers resources for the person to understand the details of his dispute and different ways to proceed for resolution. Stage 0 of the OC similarly envisages giving guidance about dispute resolution and commoditised summaries of legal principles. The fourth party is effectively an enabler of self-help and problem-diagnosis, as well as a facilitator of early negotiation. Furthermore, the fourth party takes on the added responsibility of triage, helping the party articulate the claim systematically and succinctly, and guiding him or her in supplying the relevant information. This is a vast difference from the usual situation of a litigant requiring legal assistance to sieve through a sea of information and draft pleadings in a legally acceptable way. As such, the fourth party is taking on additional roles on the courts' behalf, functions that substantially widen the scope of the courts' intervention in disputes.

Regardless of whether the fourth party displaces or adds to the courts' existing functions, it is argued that the fourth party is steadily converging with the third party, the courts. The fourth party metaphor was probably construed because the early development of ODR involved technology primarily as a tool to assist the decision-maker or other neutral. With technology increasingly playing discrete functions, the fourth party has been substituting some functions of the third party. Furthermore, since the ODR system is clothed with the courts' authority, the litigant readily attributes the system's actions to the courts. As argued above, the growth of ADR has led to mediation being closely associated with the courts in some jurisdictions that utilise staff mediators and judge mediators. Similarly, when a certain function such as problem diagnosis is fully performed by the ODR system, the litigant could effectively perceive it as done by the courts. In other words, *the fourth party and third party are becoming indistinguishable in the litigant's perception. Both collectively represent the courts.* This reality has significant ramifications for access to justice, which will be further examined in the next section.

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[51] Judith Resnik, "Managerial Judges*",* (1982-1983) 96 Harv. L. Rev. 374, 445; Judith Resnik, "Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement", (2002) J. Disp. Resol. 166, 168.

[52] Hague Institute for Global Justice, "ODR and the Courts: The Promise of 100% Access to Justice?" (2016), *http://www.hiil.org/publication/trend-report-odr-courts* [Accessed 28 February 2018], pp. 50-51.

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V. The convergence of ODR and ADR: The impact on access to justice

(a) Barriers to the justice system

The principal barrier to accessing the courts is probably the cost of litigation. It is no surprise that ODR systems are gaining traction because of the huge costs savings and convenience they may bring to the average litigant. As Lord Briggs stressed, the OC envisages reduced reliance on lawyers, and makes the court system available to individuals who would otherwise be unable to litigate claims below £25,000 at proportionate costs.[53] The CRT designers also emphasised that the ODR "democratised the provision of dispute resolution services to those who have barriers accessing the traditional civil justice system" given the rapid growth of internet usage.[54] Moreover, the ODR systems help instil proportionality in costs by being designed to gradually escalate costs according to the duration and effort needed to resolve the dispute. It has, of course, been acknowledged that these potential benefits in access to justice have to be balanced against the need to provide assistance to individuals who lack technology literacy. Nonetheless, the unique features of ODR systems, including their wide reach and the ability to surmount physical boundaries, offer great promise in mitigating the most troubling barriers to access to the justice.

The current ODR systems also address another common obstacle to access to justice, informational deficits. The pre-claim stage (or stage 0 of OC) is specifically designed to offer customised legal information and useful tools that empower the disputants to resort to self-help.[55] While the internet is already a source of legal information, the ODR system uses interactive software premised on decision trees to provide only the relevant information that is unique to the dispute. Furthermore, informational deficits also include a lack of understanding of the opponent's circumstances. By providing mechanisms and making it mandatory to exchange information at the earliest instance, the ODR systems address a major obstacle to early settlement.

(b) Procedural Justice

The more controversial effects of the convergence of ODR and ADR relate to procedural justice. As explained above, this concept broadly refers to perceptions of fairness based on procedural elements such as an opportunity to voice one's concerns, and being treated in a dignified and even-handed way. The exact impact on procedural justice is contingent on the design of each ODR system. The discussion below will thus paint broad strokes on how procedural justice is evolving in the new ODR-ADR landscape.

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[53] Final Report, para 6.7.

[54] Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunals" (2016-2017) 3 McGill Journal of Dispute Resolution 113, 135.

[55] It has been pointed out that stage 0 must sufficiently detail information concerning ADR in order for them to appreciate the need to treat litigation as the last resort, and stage 0.5 may need to provide parties with guidance on their correspondence exchange exploring settlement; Masood Ahmed, "A Critical View of Stage 1 of the Online Court" (2017) 36(1) C.J.Q 12, 20.

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Voice and trustworthy consideration

The ADR movement was meant to bring about greater opportunities for litigants to actively participate in dispute resolution. In particular, the mediation process was meant to allow disputants to voice their concerns and be given the sense that the mediator heard and understood them. Nevertheless, it has been pointed out that the promise of maximising party autonomy and control was not fulfilled due to mediation being assimilated into the formal adjudicative court process. Court-connected mediation in the USA has been described as favouring efficiency over fairness, and as providing greater access to the courts system at the expense of justice. It has therefore been suggested that ODR represents the "new new courts" by offering the prospect of reaching a fresh equilibrium in enhancing access to justice.[56] This begs the crucial question of whether ODR indeed provides greater participation compared to the face-to-face mediation.

Compared to traditional mediation, the current ODR systems have the potential to transform the degree of individual participation. Notably, sophisticated and well-designed software gives greater opportunity to customise the questions asked and information supplied to the particular dispute, thus empowering the disputant to understand the dispute holistically and resolve it without necessarily involving the courts. In other words, the additional triage offered by the ODR systems potentially enlarges party autonomy by giving guided questions and very targeted responses that demonstrate the courts' understanding of what was shared.

However, whether this potential is realised ultimately hinges on how well the system is designed to cater for a wide spectrum of disputes. It is thus not surprising that Lord Briggs acknowledged the huge challenge in designing stage 1 of the OC. This stage requires very advanced knowledge engineering and design thinking apart from software sophistication.[57] Additionally, it has been pointed out that an ODR design could limit the opportunity to express what matters to disputants if their responses are limited to a pre-determined list of choices. Open text boxes have to be made available to complement pre-fixed options.[58] As such, the potential for ODR to enhance party autonomy and trustworthy consideration is heavily dependent on thoughtful design thinking and application of disputes systems design.

On a related note, the ODR-ADR environment is not immune from the same challenges faced by the courts in implementing ADR programmes. The very same errors that could have limited the success of court-connected mediation programmes may recur. After all, it is the same courts implementing these systems, facing the same tensions between efficiency and maximising procedural justice. In fact, it is argued that any error in implementing and designing the ODR systems could have graver consequences for the courts because the fourth party is steadily converging with the courts. Because ODR is now embedded seamlessly into the justice system instead of being an "add-on" feature, the litigant readily attributes the entire system with the courts. Hence, the very features of the ODR system that contributed to its attraction could also amplify any errors in implementation and readily associate them with the courts.

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[56] Orna Rabinovich-Einy & Ethan Katsch, "The New New Courts" (2017) 67 Am. U. L. Rev. 165, 182-184, 207.

[57] Final Report, para 6.62.

[58] Nancy Welsh, "ODR: A Time for Celebration *AND* the Embrace of Procedural Safeguards", presentation at ODR Conference 2016, *https://20160dr.wordpress.com/#post-8* [accessed 28 February 2018], p. 3; Orna Rabinovich-Einy & Ethan Katsch, "The New New Courts" (2017) 67 Am. U. L. Rev. 165, 208.

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For instance, the danger of litigants perceiving ADR to be a convenient diversion measure could also be present in the ODR system. Disputants who are unfamiliar with using an online platform will not necessarily feel understood when navigating the system. They may, on the contrary, feel alienated and disoriented. If the court ODR system fails to provide alternative channels to access the courts, such litigants may readily perceive ODR as being the courts' diversion measure. Similarly, many court-connected mediation programmes have been criticised as being co-opted into the adversarial system by incorporating mandatory mediation and utilizing evaluative forms of mediation. These same issues have to be carefully resolved in the ODR context. The courts have to consider how much flexibility is to be given to the disputants to opt out of various stages of the ODR system, so as to ensure that autonomy is not excessively constrained. Likewise, much thought has to be given to the facilitation stage of the ODR system. Would the disputants be given informed choice as to what ADR process is being used? If a hybrid ADR process is utilised, there is also the question of whether the exact process has been adequately explained to the parties. These issues substantially impinge on the exercise of party autonomy. Evidently, the very same danger of ADR losing its distinctive advantage in maximising self-determination and trustworthy consideration also confronts ODR systems.

Dignified treatment

The next procedural element of dignified treatment is also strongly related with the above aspects of procedural justice. They are collectively linked to the concept of interpersonal treatment. Some aspects of the court's functions, such as case management or triage, ADR and even adjudication, are now being undertaken by the ODR system or being conducted by humans in the online setting. There has been disagreement about whether the dispute resolution in the online setting vis-à-vis face-to-face interactions reduces the disputants' sense of dignity in their interpersonal interaction with one another and the court. Some scholars have highlighted the loss of non-verbal communication that could result in reduced trust and rapport.[59] Others have taken the view that online communication, with more intense use of strategies such as direct questions and self-disclosure, could reduce inhibitions and encourage more intimate conversations.[60] In the same vein, it has been suggested that the concept of procedural justice may need to be reconceptualised given its development in the context of a face-to-face setting.[61] A recent study has indicated that higher levels of procedural justice with a software mediator using a lean text-based interface than with a human mediator managing the same system. In particular, the participants reported around 30% more sense of participation when their text input was considered by a software mediator rather than a human mediator. By contrast, there were more favourable procedural justice levels when the respondents believed that a human arbitrator instead of a software arbitrator determined the case.[62]

[59] Teitz, "Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution" (2001-2002) 70 Fordham L. Rev. 985, 1002; Ebner and Thomson, "@ Face Value? Nonverbal Communication and Trust Development in Online Video Mediation" (2014) 2 International Journal of Online Dispute Resolution 1, 14-15.

[60] Larson, "Online Dispute Resolution: Do you know where your children are?" (2003) 19(3) Negotiation Journal 199, 201.

[61] Ethan Katsch & Orna Rabinovich-Einy, *Digital Justice* (USA: Oxford University Press, 2017), p. 164.

[62] Ayelet Sela, "Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration" (forthcoming, Ohio State Journal on Dispute Resolution 2017), available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3074311; Ayelet Sela, "Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation" (2016) 26 Cornell J. L. & Pub. Pol'y 331, 375-377 (study showing more positive procedural justice experiences when litigants-in-person received video communications from the judge and sent textual message to the judge, compared to the common two-way text messaging design).

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The above academic discourse reflects the growing awareness that communication in the online context has taken on a different complexion. Whether this change leads to a perception of diminished dignity or respect remains to be seen. Nevertheless, it is well-recognised that there is a greater need to foster trust in the online environment, taking into account how different communication mediums may affect the level of contextual clues, the probability of misinterpretation, the sense of anonymity and distance (and thus encourage trust-breaking behaviour), or the ability to display empathy.[63] The fourth party's close association with the courts means that all the disputants' interaction with the ODR system will be readily perceived as communication with the courts. Moreover, any ADR process conducted via the ODR system will be readily attributable to the courts. The disputants' sense of dignified treatment will hence be shaped from their collective experiences in both offline and online settings. It is therefore crucial for the courts to incorporate trust-building principles into the design of the ODR system and in how ADR processes are conducted using various online communication channels.

Even-handedness and neutrality
Finally, a central aspect of procedural justice is the perception that the courts have demonstrated even-handed treatment of all the litigants. In the face-to-face context, such neutrality is usually shown through giving parties equal opportunity to be heard, spending equal time with each disputant, demonstrating equal consideration of each person's arguments or delivering a judgment in the presence of all parties. It has been observed that there is a greater need for the litigants to "see" the ODR process dealing with both of them at the same time, particularly when many ODR activities take place asynchronously with a more acute sense of anonymity.[64] The design and conduct of the online ADR or hearing would have to take this concern into account. Furthermore, the pre-claim triage stage potentially casts doubt on the court's neutrality. It is germane that this phase has been carefully conveyed as a pre-claim stage, for individualised problem-diagnosis or provision of commoditised legal principles is often done by the lawyer, not the courts. Nevertheless, the disputants are likely to question whether the advice given to their opponents has been rendered on the same basis, and whether each party has been given an equal amount of assistance. These doubts would have to be adequately addressed by the courts.

More significantly, it is vital for the courts to assure court users that the ODR system does not favour repeat players or show bias to any particular group of litigants, particularly where algorithms have been used to automate any substantive outcomes within the ODR system.[65] The current ODR systems have yet to utilise such algorithms for online hearings or to assist in early settlement. However, it will probably be only a matter of time before such features are eventually part of the courts' ODR system. There will then be a more compelling need for the courts to be transparent about the principles underlying any algorithms used to determine outcomes.

In sum, the complex ODR-ADR environment raises wide-ranging concerns on how procedural justice is experienced very differently, and measures that should be taken to ensure that procedural justice is not diminished. The same pitfalls that confronted the courts during the ADR movement need to be

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[63] Noam Ebner, "ODR and Interpersonal trust" in Mohamed S. Abdel Wahab, Ethan Karsh & Daniel Rainey, *Online Dispute Resolution: A Treatise of Technology and Dispute Resolution* (Hague: Eleven International Publishing, 2012), p. 217; Ebner and Thomson, "@ Face Value? Nonverbal Communication and Trust Development in Online Video Mediation" (2014) 2 International Journal of Online Dispute Resolution 1.
[64] Nancy Welsh, "ODR: A Time for Celebration *AND* the Embrace of Procedural Safeguards", presentation at ODR Conference 2016, *https://20160dr.wordpress.com/#post-8* [accessed 28 February 2018], p. 4.
[65] Leah Wing, "Ethical Principles for Online Dispute Resolution: A GPS Device for the Field", (2016) International Journal on Online Dispute Resolution 12, 26.

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averted through careful design of the relevant ODR system, and new challenges have arisen because of the unique characteristics of the ODR-ADR milieu.

VI. Conclusion

The convergence of ODR and ADR in the courts has brought about growing complexity. ADR processes are now embedded within the ODR system, being conducted interchangeably in the online and offline environments. The nature of each ADR process is also evolving as it blends with other ADR and ODR processes. The fourth party, technology, has both replaced and added on to the courts' functions. More importantly, it has converged with the third party, the courts, and consequently expanded the functions that are readily attributable by litigants to the courts. The new ODR-ADR milieu also raises questions about whether procedural justice has diminished or is merely experienced differently. Many of the previous challenges faced by the courts in introducing ADR apply with even greater acuity in this complex environment. The convergence of ODR and ADR within the courts presents an opportune moment to reconceptualise and enhance access to justice, but also an apt juncture to reflect on ways to resolve the potential challenges.