

## **Online dispute resolution: ten lessons on access to justice**

### **Roger Smith**

A concrete way of approaching the question of access to justice and ODR may be to build some practical issues from a current study (for the Legal Education Foundation) of what seems one of the most interesting ODR projects at the present time: that developed by the Dutch Legal Aid Board at [rechtwijzer.nl](http://rechtwijzer.nl). The rechtwijzer is sufficiently complex to raise a number of different questions about different aspects of ODR provision. The most interesting part of the rechtwijzer is its coverage of divorce and matrimonial disputes - a much more emotionally charged area of dispute than most commercial or consumer disagreements.

### **Rechtwijzer 2.0: an example**

The Dutch Legal Aid Board came forward in 2006 with the project which became the Rechtwijzer (law signpost). This has undergone a number of transformations in its short life, notably what might be identified as versions 0.0, 1.0 and 2.0. In the course of this development, the ambition of the project has been transformed. It began in version 0.0 as a 'choice facilitator', a referral tool in a number of specific areas including divorce. Version 1.0 remained on the near side of the legal information-advice line: it scrupulously avoided giving advice; lawyers were invited to incorporate it within their websites and to use its interactive capacities to prepare their clients for their consultation. Use of version 1.0 is being researched by a researcher at the University of Twente but version 2.0 is being developed before that research has been completed. So we do not know much about how well 1.0 has been used.

Version 2, still under development and likely to be launched later in August, takes a step further and moves into what will potentially be a melding of online information, advice and (ultimately) dispute resolution. Peter van den Biggelaar, executive director of the Dutch Legal Aid Board, describes this as moving to a hybrid model in which 'self help is combined with self help and assistance by lawyers, other experts and mediators'. Version 2 is still under construction and can only be

described in its current state of development: this may yet change. A key difference from version 1.0 is that the American firm Modria has been drafted in to advise on some of the underlying architecture. As conceived, version 2.0 will incorporate different elements through which an individual may progress. Some of these will require the payment of fees, offering the opportunity to pay for the future maintenance and development of the system through a three way agreement between Modria, the Legal Aid Board and the Hague Institute for Internationalising Law which developed the initial rechtwijzer project.

The sections, as seen as present, will be

1. Diagnosis and Information (intended to be free);
2. Intake (intended as fee-based);
3. Dialogue between the parties (free);
4. 'Triologue' - an opportunity for online mediation (fee-based);
5. External online review (fee based).
6. Online adjudication if required (fee based also);

This seems to me the key because it potentially involves Online Dispute Determination rather than Resolution i.e. a judge may presumably make a determination through an online process and without an oral hearing which is not, at least in its entirety, agreed by both parties.

- 7 'After care'

The programme takes a person through a series of questions on a 'justice journey' in which the system interacts with the answers provided. Advice, information, options and tools (such as a maintenance calculator) are supplied as required. It is, thus, inherently dynamic and oriented

towards settlement. Where decisions are to be made, the intention is to highlight to the parties to the 'best alternative to negotiated agreement' (in the jargon, BATNA) which sets the parameters for a settlement. Available to the parties will be supplementary online or in person consultation with advisers in Dutch networks of advice provision of legal 'counters'.

The new version will be not without controversy. Seen at its most extreme, it threatens traditional paradigms of service delivery. It seeks to combine the provision of information; individually orientated advice akin that given by lawyer to a client; a form of what is effectively early neutral evaluation; mediation; emotional support and even adjudication. The devil will lie in the detail of how this is precisely worked out so that different roles are transparent and within acceptable parameters. However, the radical potential is this sort of system is clear. It offers a person one route within one system through from the seeking of information to the resolution of the dispute. If this can be satisfactorily done, it would be an enormous and exciting advance. Its model of provision incorporates individual assistance with a general system - the ultimate holy grail of mechanised delivery. On the issue of digital exclusion, the Dutch Legal Board takes a bullish version, noting that 95 per cent of Dutch citizens have access to the internet and 83 per cent use online banking. This would not be dissimilar to UK figures.<sup>1</sup> It also has a shopping list of requirements on others for success of the programme: 'simpler [government] rules and legislation'; a 'changing attitude by government on its interaction with citizens and consumers; 'transparent services and pricing with reasonable schedules for client's contribution, stimulating co-operation and self-help'; and sufficient 'incentives and support' through, for example, coaching or help lines.

### **Access to justice and ODR: ten lessons suggested by [rechtwijzer.nl](http://rechtwijzer.nl)**

**1 Online dispute resolution - like any dispute resolution - involves a number of linked phases, only one of which is online dispute determination. There must be transparency**

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<sup>1</sup> <http://www.thelegaleducationfoundation.org/wp-content/uploads/2014/12/Digital-Delivery-Paper-2.pdf>

about which is applicable and the role of any actors e.g. advisers, judges, mediators etc in terms of independence etc.

2 Online information and advice (between which the distinction must be clear) needs to be integrated with online determination - as in the rechtwijzer model - though different agencies could be responsible for different phases.

3. Online dispute resolution is at a very early stage where experimentation is important but where research on outcomes is required before any major decisions are taken. There should be a specific commitment to researching international developments and encouraging interaction between bodies experimenting with online provision e.g. the Dutch Legal Aid Board, the Californian courts etc.

4. In countries like the UK or The Netherlands, high degrees of access to online dispute resolution can reasonably be assumed but it is too early to make assumptions on how this translates into a practical willingness to use ODR.

5. The effectiveness of ODR is likely to be increased by the availability of individualised assistance - which might itself be on or off line. At the present time, the need for this will be overwhelming because of inexperience with the process. The role of any intermediary must be clear.

6. A key element in the success of ODR is likely to be a shift in paradigm to a more 'collaborative' approach between the parties - very evident in matrimonial disputes where 'collaborative law' has taken off as a distinct approach. The parties will need to be transparent about their demands and some way needs to be found to provide a way of parties testing their demands against likely outcomes.

7. An ODR system has to be able to 'red flag' out those cases:

**(a) by their nature inappropriate for online resolution e.g. in a family context those involving domestic violence;**

**(b) where one or both of the parties is not seeking an honest settlement e.g. through non disclosure of assets;**

**(c) where there is a third party interest in the resolution of the dispute e.g. where decisions are being made about the interests of unrepresented children.**

**(d) where there is a public interest in the resolution of the dispute.**

**8. An ODR system must be able to compensate for imbalances of power and resources or, at least, identify these for the weaker party. A 'triage' or 'early neutral evaluation' phase may be ways of doing this.**

**9. ODR must not develop as 'second best' to conventional determination i.e. it must not be possible to 'buy yourself out of' ODR by paying increased fees.**

**10. No ODR system is likely to arrive fully formed. Just like the rechtwijzer, it will progress through different stages. This should be allowed for in the initial planning.**