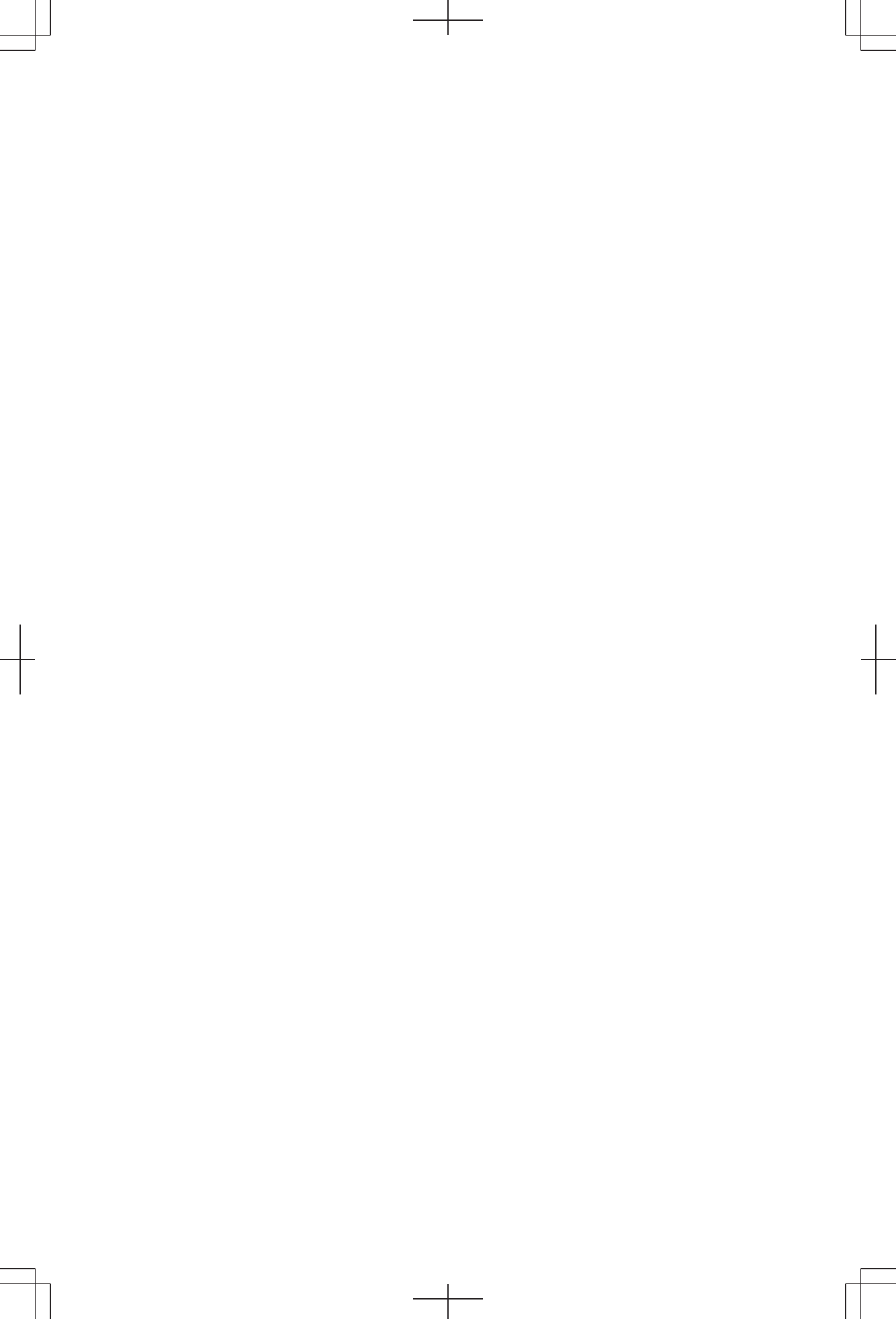


## Table of Contents

### Articles

World Peace Forum VI Insights and Takeaways <i>Jeffrey Aresty &amp; Larry Bridgesmith</i>	3
Digital Identity for Refugees and Disenfranchised Populations The 'Invisibles' and Standards for Sovereign Identity <i>Daniel Rainey, Scott Cooper, Donald Rawlins, Kristina Yasuda, Tey Al-Rjula &amp; Manreet Nijjar</i>	20
Managing Procedural Expectations in Small Claims ODR <i>Fabien Gélinas</i>	53
Mobile Online Dispute Resolution Tools' Potential Applications for Government Offices <i>Stephanie Gustin &amp; Norman Dolan</i>	65
e-Court – Dutch Alternative Online Resolution of Debt Collection Claims A Violation of the Law or Blessing in Disguise? <i>Willemien Netjes &amp; Arno R. Lodder</i>	94
The Pull of Unbiased AI Mediators <i>Chris Draper</i>	114



# World Peace Forum VI

## Insights and Takeaways

Jeffrey Aresty & Larry Bridgesmith\*

### Abstract

*In May 2019, the World Justice Project (WJP) convened its sixth annual conference to explore the state of access to justice (A2J) in the global context. World Justice Forum VI met in The Hague and published the most recent A2J report compiled after a year of analysis and based on more than a decade of public, government and citizen data. Measuring the Justice Gap revealed less than optimistic data reflecting the lack of significant progress toward achieving the United Nations Sustainable Development Goal 16: achieving just, peaceful and inclusive societies by 2030. The 2019 conference showcased many global initiatives seeking to narrow the justice gap. For the most part these initiatives rely on institutional action by governments, financial institutions and NGO's. As important as these projects are, transforming the access to justice status of the world can also be achieved through actions focused on Justice at the Layer of the Internet. A consensusbased governance model can build a legal framework which is not reliant on the enactment of laws, the promulgation of regulations or overcoming the inertia of institutional inaction. This article reviews the learning gleaned from the WJP and the 2019 Forum. It also seeks to augment the great work of the WJP by exploring the potential for justice as delivered by individuals joined in consensus and relying on emerging technologies.*

**Keywords:** World Justice Forum, World Justice Project, World Justice Report, online dispute resolution, technology, access to justice, Justice Layer of the Internet.

### 1 Introduction

From 29 April to 2 May 2019, a global gathering of Access to Justice advocates, activists, technologists and advisors convened in The Hague, Netherlands, to explore the state of access to justice worldwide. Hosted by the World Justice Project<sup>1</sup> (WJP) organization, the event featured the publication of the 2019 World

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1 World Justice Project: <https://worldjusticeproject.org/>.

Justice Project report, *Measuring the Justice Gap*<sup>2</sup>. On a nation-by-nation basis, the report reflected detailed data that reveals that at least 5 billion people globally have little or no access to justice. Many factors contribute to this dilemma. Those who gathered at The Hague were committed to not merely discussing, but taking action in order to remedy this enormous gap in access to justice. Importantly, it is not just the underdeveloped nations that suffer from unremedied injustice. The developed nations display as much inaccessibility as many economically disadvantaged nations and tyrannical dynasties. The United States ranks only 20th out of the world's 126 nations analysed in the 2019 WJP index. There is much work to be done on local, national and global fronts. The World Justice Forum VI (WJF VI)<sup>3</sup> was a place intended to initiate reform and remedial efforts. This article will address the programmes and technologies, including online dispute resolution (ODR), that were showcased at the Forum as being at the intersection of law, technology, policy, governance and the multidisciplinary approaches that are the means by which collaborative transformation of failing justice systems can be achieved. Specifically, the 'Justice Layer of the Internet'<sup>4</sup> provides a lever that can move the earth's systemic rock of injustice.

### 1.1 The Event

The WJF VI in 2019 was the sixth convening of this massive global initiative seeking to bring Access to Justice for All. The mission of the Forum was simply stated:

The World Justice Forum: *Realizing Justice for All* emphasizes a showcase of practical solutions to addressing and closing the justice gap. From interactive working sessions to plenaries highlighting solutions to increasing access to justice fast pitch presentations from World Justice Challenge finalists, participants gain knowledge and insight from multi-sector actors making an impact.

The emphasis was clearly focused on impact and action, not theories and principles. The intent of the participants was to demonstrate and learn from what is, in fact, working in practice to close the gap between access to justice and the legal injustices humans face daily.

The intended outcome of the event was equally action oriented:

In response, governments, organizations, and individuals joined in showcasing their justice initiatives and Commitments to Justice at the conclusion of the World Justice Forum. These declarations of further action to accelerate implementation of Sustainable Development Goal (SDG) 16 set the pace for

- 2 World Justice Project, 'Measuring the Justice Gap', *World Justice Project*, 2019, <https://worldjusticeproject.org/our-work/publications/special-reports/measuring-justice-gap>.
- 3 'World Justice Forum: Realizing Justice for All', *World Justice Project*, <https://worldjusticeproject.org/world-justice-forum-vi>.
- 4 J. Aresty, D. Rainey & R. West, 'Building the Justice Layer of the Internet', *Internetbar.orgInstitute*, Litigation, 2016 <https://www.internetbar.org/building-the-justice-layer-of-the-internet/>.

outcomes that will feed directly into the UN High Level Political Forum on SDG 16 in July and the UN Summit on the SDGs in September.

Passive observation and negative commentary was not the purpose or outcome participants expected to achieve.

## 1.2 *The Organization*

The World Justice Project states that it:

... is an independent, multidisciplinary organization working to advance the rule of law worldwide. Founded by William H. Neukom in 2006 as a presidential initiative of the American Bar Association (ABA), and with the initial support of 21 other strategic partners, the World Justice Project transitioned into an independent 501(c)(3) non-profit organization in 2009. Its offices are located in Washington DC, Seattle, Singapore, and Mexico City.

For thirteen years the condition of the world's rule of law in reality has been the primary work that WJP has done to analyse, collect data, publicize and support initiatives that expand access to justice on a global basis. Importantly, WJP recognizes that:

Traditionally, the rule of law has been viewed as the domain of lawyers and judges. But everyday issues of safety, rights, justice, and governance affect us all; everyone is a stakeholder in the rule of law.

Accordingly, the entire population of the world are all participants in the pursuit of access to justice. Everyone is welcome at the table of the transformative rule of law collaboration, not just those in positions of power.

Far more than the judicial administration of justice by the courts, the justice for which WJP strives is best stated in their vision statement:

Effective rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of justice, opportunity, and peace – underpinning development, accountable government, and respect for fundamental rights.

Despite this, all over the world, people are denied basic rights to safety, freedom and dignity because the rule of law is weak or non-existent.

When pollution laws are ignored and inspectors are bribed, the environment suffers. Women fall victim to abuse when their rights are ignored and when their access to justice is limited. Families suffer when parents are coerced into paying bribes to get their children into health clinics and even schools. Local and international businesses avoid investing in communities where there is a lack of stable rules and regulations, leading to excessive amounts of risk.

Additionally, the WJP posits the following objectives for its existence:

- 1 Increased understanding of the rule of law and its foundational importance.
- 2 Greater rule of law adherence by governments.
- 3 Multidisciplinary, home-grown cultures of the rule of law.

According to the WJP, the very sustainability of human existence is dependent on achieving this high level of societal functioning. Governments are but one cog in a complex interdependent global system. No nation, not even the United Nations, is solely responsible.

### 1.3 *The Project Report*

The WJF VI at The Hague began with the release of the massive report on the state of global justice in 2019. *Measuring the Justice Gap* is the outcome of a year-long effort to collect, analyse and categorize data that is intended to portray the access to justice in the world's nation-states and locales. Over 600 government and local data sources were reviewed. A decade's worth of justice data previously collected was corrected for double counting. The work resulted in the "first-ever effort to integrate survey data with other sources of people-centred data on the nature and scale of injustice". The summary 45-page report and its links to appendices and the interactive World Justice Index comprise the most comprehensive and data-driven analysis of access to justice ever produced.

Its findings can be summarized as follows:

- 1.5 billion people who cannot obtain justice for civil, administrative or criminal justice problems. These are victims of crime and people with civil and administrative justice needs who may live in contexts with functioning institutions and justice systems but who face obstacles to resolving their everyday justice issues.
- 4.5 billion people who are excluded from the opportunities the law provides. These are people who lack legal tools – including identity documents, land or housing tenure and formal work arrangements – that allow them to protect their assets and access economic opportunities or public services to which they have a right.
- 253 million people who live in extreme conditions of injustice. This includes people who are stateless, victims of modern slavery and people who live in fragile states with high levels of insecurity.

When viewed in the aggregate, these figures amount to 5.1 billion people – or approximately two-thirds of the world's population – who face at least one of these intractable justice issues. Many are confronted by multiple injustices. This aggregate estimate certainly demonstrates unacceptable levels of exclusion from justice. The justice gap assessment aims to go beyond this high-level figure and serve as the first step in an effort to better understand the multifaceted and overlapping forms of injustice that people face. For this reason, the justice gap assessment presents information about the underlying measurement questions and data sources that comprise the justice gap framework as a means of better under-

standing what the data can tell us about the state of justice and injustice in the world.

By design, the WJP exists to evaluate and provide support for the United Nations Sustainable Development Goal 16<sup>5</sup>, which calls for the promotion of just, peaceful and inclusive societies.

The WJP VI agenda was developed to address and provide evidence of successful remedial efforts that are reducing this unjustifiable gap. The global magnitude of this problem and the actual progress towards the achievement of UN SDG 16 by 2030 is not encouraging. The report reflects that justice has become more remote than it has been in the past.

## 2 World Justice Forum VI Agenda

### 2.1 WJP Approaches to the Report

One of the more important places to begin our inquiry into the WJP's approach to realizing Justice for All, and to see how technology and, specifically, ODR was utilized, if at all. We begin by taking a look at the projects which the WJP team selected as its Access to Justice winners.

Only two of the five winners of The Access to Justice competition focused on addressing the dispute resolution mechanisms to achieve the protection of rights. These were Monitoring Maternal Health Entitlements & Increasing Access to Grievance Redressal – Nazdeek<sup>6</sup>, India, and Riverine People and the Right to Full Reparation Instituto Socioambiental – ISA<sup>7</sup>, Brazil. Neither of the projects, however, anticipated the use of any form of technology, let alone ODR, to facilitate future resolutions. The other winners had developed legal advocacy projects, empowerment through education and reform of the criminal justice mechanisms to achieve their aims. Even projects that showcased Alternative Dispute Resolution (ADR) mechanisms, such as the Community Justice Team in Liberia, looked to use local mediators without any reference to ODR. ODR was not absent at the WJP, as will be mentioned later. But suffice it to say that Justice Innovators from around the world who chose to participate in the competition did not use ODR mechanisms.

Broadening our inquiry somewhat, we provide a link to all the thirty Access to Justice finalists (<https://worldjusticeproject.org/world-justice-forum-vi/world-justice-challenge-2019>). It is notable that the projects come from all over the world, and they address inequities faced by the most impoverished peoples in each community. They identify the pain points for each of these populations. So it is noteworthy that the individuals and teams who focused on the justice innovations were more comfortable innovating using fairly traditional approaches: education, empowerment, negotiations and with political groups.

5 'Goal 16: Promote Just, Peaceful and Inclusive Societies', *United Nations*, <https://www.un.org/sustainabledevelopment/peace-justice/>.

6 *Nazdeek: Bringing Justice Closer*, <https://nazdeek.org/>.

7 *ISA: Instituto Socioambiental*, <https://www.socioambiental.org/pt-br>.

With the exception of technology connected to courtrooms, or technology that connects people needing access to a lawyer or other legal resources, access to justice throughout the world was viewed in a very conventional fashion. This is not to say that the use of technology has created a meaningful increase in A2J. In fact, the opposite argument can be made. Technology such as e-filing, online case intake and evidence gathering tools, especially with chatbots, artificial intelligence (AI) and online support, have resulted in an increase in the number of self-represented litigants.

Although on the face of it this seems like progress, the problem is that courts are more overburdened than ever. The rules of civil procedure that govern the court processes have not changed, and the electronic march to the courts has resulted in longer lines, more wait and fewer resolutions. Connecting someone to a lawyer electronically, though helpful, still does not change the fact that the delays in processing cases through the legal system itself is the problem. The question we ask is, why do we always depend on the formal legal system to be the place where society's norms are to be enforced? There are many other alternatives, but when judges and lawyers are the innovators, their 'go to' mindset to solve a problem lies within the current legal framework.

Here is a sample of some of the winning projects featured at WJF VI that demonstrate our conclusions:

- by providing free legal aid and education to torture victims and through trainings for public officials;
- by using legal empowerment and education as a tool to improve the health and safety of tribal members and establishing culturally appropriate locally based networks of civil legal attorneys embedded in the tribal health care delivery system;
- by developing judicial capacity for adjudicating climate change and sustainable development issues. It also assists national judiciaries in enhancing access mechanisms through establishment of 'green courts,' development of rules of procedure for environmental cases and building a strong regional network for environmental governance;
- by partnering with communities, local security and justice actors to support the police in the investigation of crimes and assist the courts in arguing the cases;
- by using strategic litigation to address discriminatory social security laws in Sonora to improve women's labour rights and protect the notion of equal justice for all;
- by addressing issues with the formal justice systems in Liberia by supporting mediators who resolve disputes at the local level, ensuring that they do not escalate into violence;
- by improving fisheries governance where technical measures and better policies are beginning to show meaningful impact;
- by connecting a community of lawyers to disadvantaged children across India so that they may have access to quick and expert pro bono legal assistance; and



- by creating a project which assists tenants in gathering evidence, mediating with their landlord through templated communications, reporting violations to city agencies, connecting with organizers and attorneys, and presenting a ‘case history’ in housing court.

A singular exception that illustrates how technology can improve A2J is the project on *E-lawyering: Criminal Justice and Accountability through Mobile Technology* (The Asia Foundation, Philippines<sup>8</sup>). Following the implementation of the Philippines’ government’s war on drugs, a growing number of grievances over extrajudicial police violence have gone unaddressed owing to overburdened public defence institutions. E-lawyering connects Filipinos to free legal and psychological aid through a 24-hour hotline and legal missions to vulnerable communities.

In conclusion, the winners of the competition demonstrated powerful and legally based solutions to systemic problems in their countries. The legal framework to address the problems was accepted as unchangeable in most cases. Alternatives focused primarily on raising awareness of the population of legal rights and engaging legal resources, lawyers and others to support the newly empowered citizens to get legal redress.

The WJP did not stop here – it moved the agenda forward by presenting an innovative programme, ‘Learned Hands’ by Stanford Legal Design Lab<sup>9</sup>, in partnership with Suffolk LIT Lab (<https://learnedhands.law.stanford.edu/>) as a new way to think about justice innovation. We turn to that presentation.

## 2.2 *Technology and Justice Innovation*

In the programme entitled ‘Learned Hands’, presented by the Stanford Legal Design Lab, in partnership with the Suffolk LIT Lab, the WJP framed an approach that would then be supplemented by several tools and presentations in concurrent programmes. The only issue the authors had was that some of the programmes ran simultaneously, so we could not see them all. But the framework session started out with these guideposts:

Effective use of data and design can be a powerful driver of successful access to justice solutions. This session, inspired by the “School of Data” workshops for journalists, will educate and empower those working in the legal and social sector to use these tools effectively. Outcomes include increased data-literacy, the ability to spot data-project potential, and building a collaborative data and design ecosystem.

The handout for the programme can be accessed here<sup>10</sup>:

8 *The Asia Foundation, Philippines*, <http://libraryguides.vu.edu.au/oxford-referencing/internet-websites>.

9 ‘Learned Hands’, *Learned Hands*, <https://learnedhands.law.stanford.edu/>.

10 ‘Data & Design Justice Projects’, *World Justice Project*, <https://worldjusticeproject.org/sites/default/files/documents/Data%20Design%20workshop%20-%20case%20studies%20templates%20cards%20%283%29.pdf>.

The critical message is that there are starting points for access to justice problems that require a focus on the needs of the community you are serving. Identifying the 'pain points' requires both a subjective and an objective analysis of the fears and concerns of your community. The programme focused on what types of data-driven services, research, policies and tools have been developed in the justice + poverty space, though it could easily have been extended to climate justice, human rights and many other areas.

The authors have used legal hackathons as vehicles to gather the front-line service providers for A2J solutions, most of whom are not lawyers or judges. Legal hackers meet the clients where 'pain' is being experienced to obtain subjective viewpoints on access to justice issues. Hearing from and incorporating the lessons learned from the stakeholders experiencing the pain is essential.

The combination of both the subjective and objective data can then be used to inform the innovators' understanding when they gather to begin work on justice innovation. The Learned Hands approach suggests that with this data, solutions can only follow the gathering of multidisciplinary actors into groups to brainstorm about what might be possible – after they have completed initial needs-finding, agenda-setting and brainstorming work. It is well established that 'cognitive diversity' is the primary successful approach to achieving creative problem solving.

This new knowledge of how to approach justice innovation, using some new tools, generated interesting examples, as presented in the following sessions.

## 1. Opportunities and Challenges in Documentary Film-making for Change

- a Working Sessions 3
- b Coordinated by the World Justice Project Mexico
- c The audience learned of the work done by the World Justice Project in Mexico and the US Institute of Peace in Burkina Faso. These projects applied documentary film-making to create change. Documentary film-making is a creative form of communication that plays a "critical role in building public support and engaging key policy-makers" to further implement reforms to get access to justice.

Documentary filmmaking, in and of itself, is expensive and requires serious production expertise. Not only has the WJP Mexico project won awards, but when talking with the team that put it together, they combined the best of the folks digging into the justice problems in Mexico, putting their lives at risk and finding ways to document the story. But that is only the beginning.

Assembling the raw footage, making sure that you have the entire story of where the justice system has gone wrong and catching and exposing the system's failings is a story. Now it has to be assembled into the documentary, which requires the knowledge of Hollywood (or Bollywood!).

At this point, most non-profits are going to need access to studios, network TV or some other outlet to get the documentary the kind of visibility it deserves. Of course, if a non-profit is creative enough to have folks on board who can put

the content onto their own website, donors and others who visit the non-profit's website will be able to view the documentary.

Two non-profits at the show, [savethechildrenindia.org](http://savethechildrenindia.org) and [internetbar.org](http://internetbar.org) (in which the authors play leading roles) used the latest virtual reality technology to demonstrate a new way to present documentaries. It was very powerful. Because it simulates reality for each person, making the wearer of a headset feel as though they are experiencing and seeing refugee camps, climate disasters and anything the non-profit wants to demonstrate, stories become real.

## 2. Algorithms in Justice and Justice in Algorithms: Fairness to Whom?

- a Working Session 4
- b Coordinated by Alan Turing Institute
- c This session discussed the use of algorithmic tools in justice and open data. Owing to the little knowledge or transparency of what algorithms are, it is often further marginalized to the disadvantaged group.

The session on using algorithms in justice highlighted the very early stage of development of the idea that algorithms can be used to increase access to justice. A generational and cultural divide could be sensed in that older attorneys and judges and many victims of the justice system where technology had been used in profiling commented on the bias that is built into the algorithms themselves. Of course, algorithms, like all technology, are built and/or coded by people. And everyone has a built-in bias. But a justice system should have no bias whatsoever. As algorithms gain more currency in use to acquire and help to assess data and trends, especially when coupled with AI, it is certainly possible to build integrity through multidisciplinary teams from many cultures and generations as collaborators. This standard-setting approach can help ensure that the algorithms operate in as unbiased a manner as possible on the basis of established and proven best practices.

## 3. Court Digitalization and Online Dispute Resolution: How Courts are Using Technology to Deliver More Modern Justice

- a Working Session 4
- b Coordinated by The Legal Education Foundation
- c "This session will... describe the trends and successes in automation, as well as the challenges of sustainability and public access" and tackle whether or not ODR has an impact on justice or caseloads.

The rich experience of the authors in ODR and its deployment over the past decade helped them anticipate the findings presented at the programme on ODR. Primarily, the presentation focused on how a great deal of research is going to be funded by PEW and others to determine the best way to deploy ODR. But a field that was once dominated by start-ups, with innovative ways to prevent disputes or solve them using smart negotiating tools (such as [smartsettle.com](http://smartsettle.com)) or negoti-

ating frameworks to facilitate agreement (such as co-parenter.com) is slowly being taken over by large corporate groups with existing tie-ins to the courts. Tyler Technologies bought Modria, for example, to acquire its ODR platform as another tool to assist judges in moving huge caseloads off their dockets.

The message that came across is that ODR needs to abide by the rules of civil procedure, around which all types of justice actors have grown accustomed. David Larson, one of the leading thinkers in the ODR field, recently concluded a two-year stint working on a request for proposal (RFP) for the New York state courts' entry into the ODR field and ran into every obstacle possible. See [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3399778](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399778)<sup>11</sup> for an account of David's attempts to mediate between the needs of various justice actors to protect their clients' interests in the face of a court system moving to use ODR. Innovation is a massive challenge when one must abide by the rules of a system that is failing to serve 75% of the people with justice problems. Working an inadequate system harder only creates less access to justice, which the current system is unable to provide.

It would have been interesting had there been some representation from the courts in Hangzhou, China, where one of the authors visited last summer. The courts mandated ODR implementation on a pilot basis in the Hangzhou province two years earlier. Thousands of cases have been resolved, and new technologies, including virtual juries and data analysis, have given China a foundation for growth in the ODR field. With the upcoming focus on ODR at the National Center for State Courts, one can hope that this 'top-down' mandate to use ODR will remove some of the obstacles to adoption faced by Professor Larson.

#### 4. How to Achieve a Level Playing Field for Innovation: A Dialogue on Regulating Legal Services in the 21st Century

- a Working Session 4
- b Coordinated by the Hague Institute for Innovation of Law
- c In this session, the Innovation Working Group of the Task Force on Justice introduced the 'level playing field'.

Although technically not a session on technology, the regulation of legal services has everything to do with innovation. This session was a moderated dialogue by a former Supreme Court justice from Colorado, an innovator herself. It raised many of the issues innovators face – principally, whether a particular innovation can lead one to the unauthorized practice of law, whether technology is used properly so as to comply with the ethical rules governing legal practice, and whether or not rules can be harmonized across borders when technology essentially ushers in a global economic and social operating environment. No resolutions were reached. But the clear risk to lawyers and justices operating under the existing rules is that

11 D. Larson, 'Designing and Implementing a State Court ODR System: From Disappointment to Celebration', *Journal of Dispute Resolution*, 2019, SSRN, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3399778#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399778#).

a new system will develop without lawyers and justices to pick up and resolve the justice issues that are not being addressed today. Lawyers and justices have the time to 'think out of the box' and help invent the new system; otherwise, they risk being left out.

Although not mentioned in the session, while one of the authors was present, the Sustainable Development Goal 16 – which is founded on the principle that the rule of law is foundational in solving the global society's most pressing problems – was almost left out by the UN. Incredible lobbying had to take place to keep the rule of law SDG in the final draft. Obviously, others outside the legal and justice world are going to hold innovators in the justice system to account for how they are increasing access to justice.

#### 5. Digital Identity: Helping Redefine Access to Justice

- a Working Session 5
- b Coordinated by Internetbar.org (IBO)
- c The session focused on 'The Invisibles' and how technology plays a part as the first digital identity project.

The session on digital identity was the second time this topic was presented at the World Justice Forum. The first presentation had taken place three years earlier at the World Justice Forum V. In between these two events, the IBO put together the team to take the project to the next stage. At this forum, they presented innovative technology that can increase access to justice, digital identity built on the blockchain, supported by a collaborative rule of law developed globally as a set of self-governance standards.

The Invisibles project is building a world where individuals from the poorest areas can access opportunities offered by anyone from anywhere around the world while being protected by a justice layer of the Internet. This would be realized by a virtual marketplace called an 'Open World' marketplace that would unlock sleeping capital in marginalized communities, leading to eradication of poverty and accelerated financial inclusion.

Imagine a world where a Sri Lankan can become a research assistant for a US-based consultant looking for expertise at a cost she can afford. Thanks to the increasing penetration of mobile phones and the Internet network in the developing world, this is no longer a dream.

There are two main reasons why such a marketplace is still non-existent despite the needs. First, there is a lack of trust between the transacting parties. In order to make a successful digital transaction, parties need to be able to identify and keep each other accountable. The Internet has been built without an identity layer, but emerging technologies, including distributed ledger technology (DLT), enable the creation of trusted verifiable digital identities.

Second, the Internet lacks a justice layer that would guarantee fairness, freedom and ethics of digital behaviour. In many cases, individuals from marginalized

communities can be exploited because they are unable to prove ownership of their digital assets or their working rights.

The Invisibles project aims to create a solid foundation for an 'Open World' marketplace by restoring digital or self-sovereign identity for the marginalized populations within a legal framework for digital identity. The first pilot is already in place in Bangladesh, issuing trusted credentials for teachers and volunteers working for JAAGO Foundation, a non-government organization that provides free education to underprivileged children, and doctors in Gonoshasthaya Kendra, one of the four largest hospitals.

Teachers, volunteers and doctors will act as 'trusted agents of change', facilitating the issuance of digital identity to their students and patients. The ultimate target population is refugees, which is the group in most urgent need of identity to be recognized as individuals and gain access to opportunities.

The system is easily replicable in other marginalized communities, when adjusted to local context such as culture, tradition and norms of each community. Once we have a solid foundation of digital identity, we will start developing other components crucial to enabling financial transactions within the 'Open World', such as payment systems and mobile apps.

#### 6. Securing Communications Channels from Metadata Risks for Vulnerable Actors

- a Working Session 5
- b Coordinated by Leiden University Centre for Innovation
- c An overview of data responsibility and a focus on the risks through the use of metadata communication channels.

This session made it clear that when you work in the global online space, what you see is not the entire picture. Metadata, the information that gives context and authenticity and accountability to the underlying content, whether in a document or a video or some other format, tells a story. What the story tells can be misinterpreted by many, if the content creators give no thought to the metadata that surrounds their content. Ethical risks are created for the creators. More importantly, there are many times that the metadata can be accessed by bad actors and used to hurt others. This is an area of concern that requires multidisciplinary support to ensure that best practices include the proper training in the creation and use of metadata.

#### 7. Building Portals to Improve Access to Justice Solutions Online

- a Working Session 6
- b Coordinated by Legal Services Corporation
- c Introduces The Legal Navigator portal as a means to provide resources when legal issues are present.

The final session was put together by the Legal Services Corporation (LSC), whose Technology Innovation Grant programme has spurred innovation in the legal aid sector for the most vulnerable in society. They have created pathways to the existing justice system using innovations that bring the knowledge of what the justice system can do to assist its clients gain access to the courts and/or to the legal resources they need.

After many successful years of bringing the best innovations to the justice system, LSC joined forces with probono.net and Microsoft to run a pilot programme to develop online, statewide legal portals to direct individuals with civil legal needs to the most appropriate forms of assistance. The first two states to test the pilot were Alaska and Hawaii. Developing content that was specific to the state and the legal problems being addressed created some obstacles for the partners, but they have persisted and the programme will launch in the fall of 2019 in the pilot states.

### 3 Justice at the Layer of the Internet

As the WJP has led to what has been referred to as the globe's first effort to understand the nature of the 'justice gap' from the point of view of people who have unmet justice needs, an initial question that has to be answered is: What are the justice needs being measured?

In 'A Report on the Future of Legal Services in the United States', issued in 2016 by the American Bar Association's Commission on the Future of Legal Services, justice is generally explained in terms of access to institutions of law and government, which are generally made available to the public through legal processes that are supposed to ensure fairness and trust. In regard to basic legal assistance for most people, whether living in poverty or with moderate income, the WJP Justice Gap Report noted:

*Justice problems are ubiquitous.* Approximately half (49%) of the people surveyed experienced a legal problem within the preceding two years. While the prevalence and severity of problems vary by country, the most common problems relate to consumer issues, housing and money and debt.

When one looks at access to justice in terms of solving legal problems that arise from a misstep or failure, whether a society provides access to justice will necessarily focus the inquiry on the need to find solutions – and, generally, solving legal problems requires access to a legal institution of some sort. This leads to a system that favours the use of lawyers and judges as intermediaries to get fair and just resolutions. A recent report prepared by the Columbia Law School Human Rights Clinic put it this way:

Legal representation is fundamental to safeguarding fair, equal and meaningful access to the legal system. Yet, in the United States, millions of people who are poor or low-income are unable to obtain legal representation when facing a crisis such as eviction, foreclosure, domestic violence, workplace discrimination, termination of subsistence income or medical assistance and loss of child custody. Indeed, only a small fraction of the legal problems experienced by low-income and



poor people living in the United States – less than one in five – are addressed with the assistance of legal representation.

Middle-income people face the same lack of access to justice.

And yet, when the WJP frames the theme of its forum as ‘Realizing Justice for All’, they embrace the opportunity-oriented Sustainable Development Goal (SDG) 16, which commits countries to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels.” Not only is justice looked at in terms of resolving problems, but its focus on institutions of law completely ignores that most of the world is functioning online.

Accordingly, a global assessment of access to justice must take into account the radically different state of the world’s current population from that of 13 years ago at the founding of the WJP. A relatively small proportion of people had access to computers and the Internet in 2006. Now, the Internet has placed a sizeable majority of humans in touch with each other and a vast amount of products and services globally. Even where computers and Internet access is limited, smartphones and Web services have changed access to economic opportunity and risk to a radical degree. Access to Internet connectivity is expected to achieve almost universal reach in only a few years from now.

Therefore, to assess Access to Justice for All under the UN standards, it is essential to add to the WJR additional criteria such as multi-stakeholder commitments to justice and the promotion of effective, sustainable and replicable approaches to closing the justice gap at the community level, and provide meaningful measures of progress.

The WJP’s justice gap assessment and global study on access to justice illustrate that realizing justice for all is a large and complex challenge. This challenge is being met with a groundswell of advocacy efforts, calling for the policy commitments, financing and data required to ensure equal access to justice for all by 2030. These efforts must also be measured by the additional goals of the UN SDG 16.

### 3.1 *Multi-stakeholder Commitments to Justice*

The 2019 World Justice Forum<sup>12</sup> (<https://worldjusticeproject.org/world-justice-forum-vi>) stands as an important milestone for building a worldwide community dedicated to realizing justice for all. As a global meeting place for governmental and non-governmental actors, private sector leaders and the donor community, the Forum addressed principal challenges to delivering justice and provided space for advancing concrete solutions. In response, governments, organizations and individuals joined in showcasing their justice initiatives and commitments to justice at the conclusion of the World Justice Forum.

12 ‘World Justice Forum: Realizing Justice for All’, *World Justice Project*, <https://worldjusticeproject.org/world-justice-forum-vi>.



### 3.2 *Promoting Effective, Sustainable and Replicable Approaches to Closing the Justice Gap at the Community Level*

Since its founding, WJP has provided over \$1,000,000 to support initiatives on five continents, from improving food security in Haiti to access to healthcare in Cameroon to tackling petty bribery in India. On 2 May 2019 at the World Justice Forum in The Hague, Netherlands, the WJP announced five \$10,000 prizewinners in a worldwide competition to identify and highlight effective and promising work to increase access to justice.

The 2019 World Justice Challenge: Access to Justice Solutions<sup>13</sup>(<https://worldjusticeproject.org/world-justice-forum-vi/world-justice-challenge-2019>) competition sought to identify projects working to provide access to justice – in particular to excluded groups – and to contribute to the movement to close the justice gap and realize justice for all. More than 250 Challenge applications were judged on impact, sustainability, replicability, scalability and promise for the future.

### 3.3 *Meaningful Measures of Progress*

The World Justice Forum showcased cutting-edge efforts by governments, civil society and researchers to meaningfully measure access to civil justice. This excellent starting point must be reviewed, analysed and built upon over time. As in any standard-setting exercise, the work is never finished.

As new approaches, standards, examples and best practices arise, the task of measuring justice can continue to improve.

### 3.4 *How 'Bottom Up' Technology Collaboration Assists A2J*

The 2019 WJF modelled and illustrated several key themes of value to the ODR community:

- Multidisciplinary collaboration promotes innovation and problem solving
- Emerging technologies are enhancing connectivity globally
- The Internet of Things is a powerful tool for change
- Regulations/Rules/Laws are slow to form or change and difficult to enact
- Standard-setting and self-governing agreements promote best practices among stakeholders

Justice at the Layer of the Internet means that individuals and advocacy groups are able to join forces globally to generate solutions that can deliver 'self-sovereign justice' consensually rather than by enforcement. A2J by way of the Internet is faster, more satisfying and far less expensive than formal traditional legal system initiatives.

13 'World Justice Challenge 2019', *World Justice Project*, <https://worldjusticeproject.org/world-justice-forum-vi/world-justice-challenge-2019>.

### 3.5 *The New Social 'Operating System'*

The American Bar Association's *Litigation Magazine's* Spring, 2016 edition carried the article 'Building the Justice Layer of the Internet', by Jeffrey Aresty, Daniel Rainie and Robin Page West. They described the reasons for a 'Justice Layer of the Internet' as follows:

Despite the legal community's neglect, information and communications technology has transformed social and professional relationships. Lee Rainie and Barry Wellman have argued that a new social "operating system" that affects all parts of our lives, including work, has arisen from three "revolutions": the social network revolution, the Internet revolution, and the mobile revolution. (Lee Rainie & Barry Wellman, *Networked: The New Social Operating System*, MIT Press, 2012).

These revolutions began after the online network created by the early developers of the Internet offered a way to improve communication between and among researchers. Opening that network to the public created a layer of expanded communication and information sharing for societies at large. The National Science Foundation's move to open the Internet to online commerce in 1992 added yet another layer, exploding commercial possibilities, creating some of the largest corporations in the world and making the concept of venue and location all but irrelevant.

As each of these layers has developed – with artificial intelligence, expanding communication channels and ever more complex networked interaction – justice systems have remained largely frozen in place, locked into particular geographical places and paper. This has left a conspicuous empty layer – a layer that, if developed, would enable people anywhere and everywhere to access the justice system. Even poor people have access to information and services of all kinds through multiple channels accessed through traditional computing and, more important, through 'simple' mobile devices and smart-phones.

Yet access to justice remains illusory for them. This would not be the case if access did not depend on systems created in a barely post-Medieval world. Even though many of us became lawyers in order to do good and shape society, most in our profession were mere spectators at these revolutions, doing very little to protect, preserve and defend the rights of the vast majority of people, businesses and social structures we swore to protect. For the most part, we have been slow to adopt and have even resisted innovative technologies. The problem for the legal community is that these changes will happen whether we help shape them or not. All users of the Internet acting together will begin to define organic norms for online interaction as they continue to communicate, trade and sign agreements.

The justice layer will form on its own. If we want to do more than witness the process unfold, we must consciously and actively build the justice layer of the

Internet. Globally, this means we must not only reinvent the way we make law in cyberspace but also catalyse the creation of justice-related technologies.

#### 4 Conclusion

Readers of this journal are painfully aware of how long ODR has been a 'gleam' in our eyes. Courts, Bar Associations and governing institutions of every kind are 'wired' to maintain the status quo. In the digital and exponential age of change, relying on institutional change cannot keep up with the rate of innovation and the impact of disruptive technologies.

Borders are of no consequence to Internet exchange of ideas and economic value. Although nation-states can erect barriers, the flow of information is like water: it will not be siloed forever. Information is power, and access to justice derives from access to information.

The work of the World Justice Project is critically important and must continue. However, access to justice is too important to be left to those elected, appointed or born to power alone. A2J is contrary to their interests.

Just as the Internet and its limitless applications have transformed the global economy, so can it transform the justice model. Blockchain, AI, smart contracts, cryptocurrency and other emerging technologies are combining at the layer of the Internet to deliver economic value by eliminating intermediaries. Justice can be delivered in the same way.

Online Dispute Resolution is the combination of technology, those seeking justice and their advocates to 'do law' better, faster and cheaper than traditional forms and forums.

The World Justice Project has made great advances in bringing together the leaders of justice in the world to commit themselves to realizing justice for all. But if the WJP VI demonstrated one key point, it is that legal technology and innovation needs to make sure that a new way of thinking, a new way of innovating, breaks down the reliance on legal systems that have failed us and points to a new way of thinking.

As Professor Gillian Hadfield noted at World Justice Forum V, "Legal innovation needs to keep up with 21st century technology and globalization."

Those of us dedicated to ODR are in a perfect position to do so.

# Digital Identity for Refugees and Disenfranchised Populations

## The ‘Invisibles’ and Standards for Sovereign Identity

Daniel Rainey, Scott Cooper, Donald Rawlins, Kristina Yasuda, Tey Al-Rjula & Manreet Nijjar\*

### Abstract

*This white paper reviews the history of identity problems for refugees and disenfranchised persons, assesses the current state of digital identity programmes based in nation-states, offers examples of non-state digital ID programmes that can be models to create strong standards for digital ID programmes, and presents a call to action for organizations like International Organization for Standardization (ISO) and the United Nations High Commissioner for Refugees (UNHCR).*

**Keywords:** digital identity, sovereign identity, standards, online dispute resolution, refugees, access to justice.

### 1 Introduction

‘Brain Waste’ is a term of art among refugee populations that refers to an all-too-common phenomenon involving the loss of credentials among those who have been forced to move from homelands to ‘safe’ havens in host countries.

A glaring example is the brain waste involving health-care professionals who are forced into refugee status. Doctors with well-established credentials and years of practice find themselves without credentials recognized by the host country, unable to find work in the fields in which they were trained. As one health professional observed, “The brain waste is appalling. These are individuals who

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could be taking care of children with asthma and instead are working at a car wash.”<sup>1</sup>

But in one sense, these displaced doctors, nurses and health professionals are lucky. They have at least found a haven, they have new identities in their host countries that allow them to make a living doing *something*, and they are officially recognized by the host country as human beings.

For Syrian refugees in camps around the world, or for Rohingya refugees in Bangladesh, or for any number of other refugee populations living in tents or makeshift shelters, isolated from local populations and largely unwelcomed by host countries, merely having professional credentials stripped away would seem a luxury. Refugees who land in the camps have generally lost all of the documentation that allowed them to claim a place in society – they have become, for all practical purposes, invisible.

One of the authors has experienced the effects of invisibility first-hand. In 2012, Toufic ‘Tey’ Al-Rjula discovered that he is, in fact, an ‘invisible man’. On his Dutch driver’s licence, you will not find a city name such as ‘Beirut’, ‘Damascus’, or ‘The Hague.’ Instead, his place of birth is declared as ‘Unknown’. This is because Tey was born in Kuwait to Syrian parents during the Gulf War, when the birth registries were destroyed en masse. Therefore, he does not have a birth certificate, and even if copies were to exist, neither he nor the issuing authority could possibly verify the document.

Two years later, in 2014, Tey started his asylum application in a refugee camp in the Netherlands, where he was forced to move when his work permit expired after five years. Then, for two years, he felt the pain of thousands of Syrian refugees unable to verify the authenticity of their documents. In addition, many of those refugees had lost other important documents, such as land titles and academic certificates. By the end of his stay, Tey had met more than a thousand invisible men, women and children. This experience, unfortunately typical of millions of refugees today, has driven the development of an identity programme that will be described later in this article.

Much of the work that has been done for refugees can be grouped under the umbrella of ‘Access to Justice’ (A2J). But A2J has traditionally been defined as access to the courts or formal justice systems. This is an approach to access to justice that provides, at best, tangential benefits for refugees. The World Justice Project has published the 2019 review of 126 countries, ranking them on an access-to-justice scale determined by an array of factors related to the independence and fairness of their court systems.<sup>2</sup> But for even the most accessible justice systems in the world, one must exist – be a person recognized as having standing in that court’s area of control – in order to benefit.

1 Dr. Jose Ramon Fernandez-Pena, in M. Nederman, ‘Why Refugee Doctors Become Taxi Drivers’, *CNN Health*, 9 August 2017, <https://www.cnn.com/2017/08/09/health/refugee-doctors-medical-training/index.html> (last accessed 8 July 2019).

2 World Justice Project, ‘Rule of Law Index 2019’ (last accessed 8 July 2019).

A reconsideration of the basic elements of access to justice is needed. The authors would add at least three basic human rights to the list of things that should be elements of access to justice.

- The right to exist, to have an identity and to be recognized as a human being is a basic human right and an element of access to justice.
- The right to control one's identity, to decide who can access the elements of identity, under what conditions and for what uses is a basic human right and an element of access to justice.
- The right to access opportunity and to unlock value in one's knowledge and skills is a basic human right and an element of access to justice.

This white paper focuses on the need to develop an alternative approach to the concept of access to justice, and calls for a coordinated attempt to create standards for identity construction, reconstruction and control. A guiding fact is that, to an ever-increasing degree, identity around the world is being created, stored and used digitally.

This white paper does *not* seek to establish standards for creation or re-creation of identities. That is a complicated, iterative process that will stretch over time and benefit from contributions by many organizations. But there are some related questions that this white paper *does* aim to address.

First, what is the history and context of the 'refugee crisis,' and what has been done in the past to address the destruction of identities among refugees? There is no 'justice layer' of the Internet – that is, there is no legal environment that stretches across boundaries and furnishes rules and structures agreed on and followed by the myriad of state actors who deal with refugees. But there is some precedent for the creation of solid identities, voluntarily accepted across national borders, that may give some guidance to the creation of standards that would bring refugees out of invisibility. The opening section of this article deals with this history and the transnational nature of standards-driven approaches to identity.

Second, what is the current state of digital identity creation around the world? Many projects are underway that use various digital formats and archiving platforms to create online identities, but most of them are state-bound. That is, they are designed to operate within the boundaries of a political entity, and they are generally designed to establish citizenship and access to social benefits that are largely denied to refugees. The second section of this article reviews the current state of digital identity creation.

Third, what are some examples of current digital ID projects that do not rely on state authorization or national boundaries? Although there are no internationally recognized standards for creating or re-creating identities, there are examples of process-driven projects that can show the way towards larger, more generalizable, approaches to digital IDs. The third section of this article will offer some examples.

Finally, what is a generalizable framework for digital ID projects, and what issues must be considered when developing standards that can be formalized and

recognized internationally? Each refugee situation will be to some extent unique, but there are some process models that can be used as a framework for standards development. The fourth and final section of this article explores one such model.

It is hoped that the discussion surrounding these basic questions will prompt cooperative work among international organizations concerned with refugees, standards and technology, and that the cloak of invisibility over refugee populations can be lifted.

## 2 History and Context

There is a growing need to find practicable ways for refugees to help themselves. Overcoming the impasse of refugees stuck between a country they were forced to leave and a country that has unenthusiastically become their current refuge has been frustrating for all concerned.

Refugees are reluctant travellers. They have been forced out of their homes and seek temporary alternatives that will offer them shelter, food and safety. Sovereign states, in turn, are reluctant hosts. They did not ask for refugees to land on their shores, and they worry about how to shelter and feed refugees, preserve security and avoid confrontation. International non-governmental organizations find themselves caught between an obligation to fulfil the basic needs of refugees and the sovereign concerns of the nation-states. The United Nations High Commissioner for Refugees (UNHCR) defers to the wishes of host countries, yet the UN 1951 Refugee Convention, relating to the status of Refugees (1951 Convention), gives international standing to the plight of refugees.<sup>3</sup> The result has been a series of halfway measures that frustrate both camps.

It may be helpful to isolate particular issues – what are called ‘wicked problems’<sup>4</sup> – and look to third-party organizations such as the international standards community to help craft practicable solutions to issues that currently overwhelm refugees and host countries. In particular, addressing issues dealing with defining a constructive role for refugees to play while living inside a host country would mitigate much of the angst that refugee status currently entails. Standards organizations, such as ISO (the International Organization for Standardization), already play an important role in refugee camps by defining such things as design

3 UN Convention Relating to the Status of Refugees, Art. 1(A)(2), 28 July 1951 (189 UNTS 137). “Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

4 A ‘wicked problem’ is one that is highly difficult or impossible to solve because of incomplete, contradictory and changing requirements that are often difficult to recognize. Wicked problems are usually ones that do not have a ‘true-false’ axis, but fall upon a ‘better or worse’ continuum. Such problems are often economic, political or environmental issues, and involved stakeholders often have radically different world views. Often political ‘solutions’ to wicked problems can stress those who have standing in the issue, which induces policymakers to kick the can further down the road.



specifications for camp structures, community building resilience, record management, hospital and food safety standards, product designs of relief supplies, systems engineering standards and specially designed cookstoves.<sup>5</sup>

The world has always had refugees,<sup>6</sup> but issues involving refugees have gotten worse, not better, in the twenty-first century. There is a growing concern in developed Western nations that the current diaspora of refugees from the Middle East and Africa to Europe, and/or migration from Mexico and Central America to the United States, has become an insoluble public policy issue.<sup>7</sup> Are developed nations at risk by what seems an unprecedented movement of refugees from their countries of origin to countries of destination, where they are both unknown and uninvited?

As Emma Haddad points out,

As long as there are political borders constructing separate states and creating clear definitions of insiders and outsiders, there will be refugees. Such individuals do not fit into the state-citizen-territory hierarchy, but are forced instead into gaps *between* states.<sup>8</sup>

The United States serves as a case in point. The current debate over refugees from Mexico and Central America is couched by some as ‘an invasion’ that brings drugs, criminals and families desiring to go on welfare. Others accept the analysis of organizations such as the Cato Institute, which reports that refugees and migrants

... 1) increase the productive possibility of the US economy and currently account for 11 percent of all economic output; 2) are twice as likely to start a new business as native-born Americans; and 3) basic indicators of assimilation from naturalization to English ability, are if anything, stronger now than they were a century ago.<sup>9</sup>

5 M. Lazarte, ‘ISO Focus Magazine’, 19 September 2017, [www.iso.org/news/ref2222.html](http://www.iso.org/news/ref2222.html).

6 The plight of refugees is a classic concept in human lore; from Adam and Eve forced to leave Eden to Oedipus and Odysseus wandering the old world, refugees have long been strangers in strange lands.

7 This was not always the case. In the 1776 Declaration of Independence describing King George III’s “repeated injuries and usurpations on American rights and liberties,” the Founding Fathers complained that the King “has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither ....” (The Plantation Act of 1740 allowed any Protestant alien residing seven years in one of the American colonies to have the same rights as one of “his Majesty’s natural-born subjects”).

8 E. Haddad, *The Refugee in International Society*, Cambridge University Press, 2008, p. 7. “States can be differentiated from other forms of belonging by their attachment to sovereignty, borders and territory. Refugees therefore pose a problem for the international community quite different from other foreigners.”

9 A. Nowrasteh, ‘Myths and Facts of Immigration Policy’, *Cato Policy Report*, Jan/Feb 2019, Vol XLI, No. 1.



Prior to the expansion of violence in the twentieth century, being a refugee was a temporary position before a new home was found. Irish Catholics and Russian Jews (among others) looked across the Atlantic. Chinese sought new homes in the Indies, Singapore and San Francisco. In the Balkans, Greeks came home from Turkey and Bulgaria. Nineteenth century migrations were usually country-specific and of short duration. Refugees knew where they wanted to migrate to, and while many states welcomed refugees, other states countered migration desires by passing restrictive laws to limit the influx of refugees.

This situation was changed for the worse by World War I, the war that was expected to end all wars. The length and severity of the war was unexpected, and when the victors arrived at Versailles they were committed to breaking up the old empires of Germany, Austria-Hungary and Turkey – Russia fell apart on its own. The aspirational goal of the victors at Versailles for national sovereignty for the new nation-states quickly turned sour as lines drawn on maps captured unwilling minorities behind borders as well as ‘liberating’ supposed majority populations. In a chapter entitled “The Decline of the Nation-State and the End of the Rights of Man”, Hanna Arendt describes the clash of tribe versus tribe in the twilight following the war that was to end all wars.<sup>10</sup>

The creation of the many new nations in Central Europe and the Middle East caused a huge diaspora of refugees who were forced to leave homelands and find refuge elsewhere. Greeks and Turks by the millions exchanged places. A quarter of a million Bulgars returned to Bulgaria, two million Poles and a million Germans were forced to migrate. This was a slow-moving crisis, and by 1926 there were still 9.5 million refugees in camps and dispersed into urban environments. White Russians, Mensheviks, socialists and liberals all had to abandon Russia for bolt-holes in locations ranging from Paris to Tashkent to Shanghai. Poles and Russians waged a brutal border war. Greeks moved west, the Turks east and the few Armenians followed the Jews into fragile places of exile.<sup>11</sup>

Outside Athens, on the Piraeus, in Salonika, masses of humanity lay rotting in the cold of a Greek winter. Then the Fourth Assembly of the League of Nations, in session in Geneva, voted one hundred thousand gold francs to the Nansen relief organization for immediate use in Greece. The work of salvage began. Huge refugee settlements were organized. Food was brought and clothing and medical supplies. The epidemics were stopped. The survivors began to sort themselves into new communities. For the first time in history, large scale disaster had been halted by goodwill and reason. It seemed as if

10 H. Arendt, *The Origins of Totalitarianism*, New York, 1976, p. 267. “Civil wars that ushered in and spread over the twenty years of uneasy peace were not only bloodier and more cruel than all their predecessors; they were followed by migrations of groups who, unlike their happier predecessors in the religious wars, were welcomed nowhere and could be assimilated nowhere. Once they had left their homeland they remained homeless, once they had left their state they became stateless; once they became deprived of their human rights they were rightless, the scum of the earth.”

11 See T. Zahra, *The Great Departure – Mass Migration and the Making of the Free World*, New York, WW Norton, 2016.

the human animal were at last discovering a conscience, as if it were at last becoming aware of its humanity.<sup>12</sup>

The newly formed League of Nations felt obligated to act as the lead authority to deal with the problem, in large part because of the inability (and unwillingness) of the nation-states to deal with the unintended consequences of the Treaties of Versailles. The League's High Commissioner for Refugees, Fridtjof Nansen, found quickly that the League could promise but rarely deliver; and he was forced into dependence on private sector organizations such as the International Red Cross and the American Relief Organization, led by Herbert Hoover, to deal with immediate needs for shelter, food and security.<sup>13</sup> Nansen acknowledged his dependency on private sector organizations through the creation of an Intergovernmental Advisory Commission for Refugees, "a body that acted under the auspices of the League of Nations, but which included both state officials and representatives of private organizations".<sup>14</sup>

Nansen quickly realized that a key tool was missing to aid refugees: internationally recognized identification papers. This was a huge impediment to their request for safe asylum, and left them not only 'stateless' but invisible, as they lacked the ability to prove who they were. The resultant 'Nansen Passport' was created to give refugees what food and shelter could not: an instrument that gave a refugee a sense of belonging and stability in a world that had spun out of control, leaving refugees "suspended in a web of international legal technicalities".<sup>15</sup>

The Nansen Passport was a document that had no official standing, but it was accepted by most countries as a way to attest to the bona fides of the refugee and recognized the de facto acceptance of refugees carrying the document. Only sovereign states can decide who can legally cross their borders, and while some nation-states refused to recognize the Passport, the League of Nations mandate gave needed credibility to the understanding that refugees were citizens of the world, even if not citizens of an individual nation-state. Russian refugees made the observation, "Man consists of a body, a soul and a passport."<sup>16</sup>

12 E. Ambler, *A Coffin for Dimitrios*, London, Vintage Crime, 1939, pp. 51-52.

13 M. Marrus, *The Unwanted; European Refugees in the Twentieth Century*, New York, Oxford University Press, 1985, p. 88. "Establishing a pattern that would become familiar in the interwar period, Nansen drew upon the League of Nations only for its prestige and administrative assistance; the actual operation was supported by private agencies."

14 Haddad, 2008, p. 112.

15 Marrus, 1985, p. 111. "All this was achieved with a very small staff working closely with private and voluntary agencies... To help coordinate the work of these agencies, a Permanent International Conference of Private Organizations for the Protection of Migrants assembled in Geneva in 1924."

16 E. Fiddian-Qasmiyeh, G. Loescher, K. Long & N. Sigona (Eds.), *Oxford Handbook of Forced Migration Studies*, Oxford, Oxford University Press, 2014, and K. Jacobsen, *Livelihoods and Forced Migration*, p. 105: "Official documents are [often], poorly designed – often handwritten and illegible – or flimsy and easily destroyed – and they do not look legitimate. Documentation must be recognized by authorities, and authorities trained to act according to the rights conferred, in order to provide effective protection."

As with the post-World War I refugee crisis, the post-World War II era began with a concern by the sovereign states that the refugee crisis would wash up on their shores never to leave. This sense of alienation on the part of refugees and the commensurate sense of imposition on the part of the nation-states has defined the modern impasse of the refugee dilemma. Just as today we have refugees from Syria, minority Sunnis in Shiite territory, Kurds without a national base and Africans trying to leave chronic warfare, corruption and poverty behind, after World War II millions of displaced persons (DPs) moved from East to West, and to a lesser extent from West to East, because staying where they were at the end of the war was not a viable option.

For six years, the United Nations Relief and Rehabilitation Administration (UNRRA) worked closely with private organizations such as the Red Cross and the American Friends Society to bring order to these camps of DPs. In the beginning there was only chaos. In the words of one UNRRA administrator, "There was tremendous disorder. It was a shambles ... sullen inmates ... choked toilets ... and the threat of typhus."<sup>17</sup>

An early key decision made by the understaffed UNRRA officials was to devolve as many governance obligations as was possible on the refugees themselves. UNRRA stressed camp democracy on ideological grounds ... and because experience showed it was the best plan in such conditions. Soon the camps were being run largely by elected camp committees and in many cases UNRRA leaders were only nominally in charge.<sup>18</sup>

Because refugee camps were removed from the economic and cultural life of the host country, the refugees had to develop their own educational systems outside of the traditional schools of the host state. These schools were informal and depended entirely on the skills of the refugees themselves, with minimal funding from UNRRA. At the highest level, 'universities' were set up that required exams and academic records for acceptance. Getting such valuable documentation from students who had been on the move for many years was not always possible, so ad hoc exams were utilized to enable students to attest to the level and quality of their education.

Many refugees from eastern Europe soon realized that they were not going to be able to return home, where the Soviet Union now dominated the politics and culture of the entire region.

Gradually, [the UNRRA] operations slipped into a dull routine of care and maintenance, the spirit of which was reflected in the dreary, mournful appearance of the refugee camps and centers that dotted Central Europe a year and a half after the war was over.<sup>19</sup>

17 M. Wyman, *DP: Europe's Displaced Persons (1945-1951)*, Philadelphia, The Balch Institute Press, 1998, pp 38-39.

18 *Ibid.*, p. 117.

19 Marrus, 1985, p. 324.

In December 1946, UNRRA transferred all its obligations to a new UN agency, the International Refugee Organization (IRO), which was given more authority to work collaboratively with refugees to resolve concerns as to what was to be their ultimate fate.

Unlike UNRRA, which worked constantly at the end of a tight leash, IRO had its own resources and could negotiate agreements ... with the military occupational authorities and with governments.<sup>20</sup>

The IRO quickened the tempo of resettlement<sup>21</sup> and “attempted to link the economic needs of various countries with particular skills among the DP population”.<sup>22</sup>

The IRO, working collaboratively with the refugees themselves, found a path forward for those who had felt unwanted and invisible. Refugees created educational opportunities and developed or renewed occupational skills. They came to feel that their life would finally move forward again. It was going to be up to them to take what they thought they had irrevocably lost and integrate it into a new life.

If the authentic literature of the Croatian past, for example, was to be saved, it must be done by the DPs. If the Latvian language was to retain its purity and beauty before being Russified, it must be through the lips of the DPs.

In the refugee camps “were a people in exile who still yearned for the tales, songs and prayers of their native land”. Refugees were convinced that, while in exile, they still represented the heart and soul of their native country. “They were now the sovereign nation.”<sup>23</sup>

The refugee crisis of the twenty-first century has become global. The refugees themselves are from a wider scope: the Middle East and North Africa as well as south of the Sahara and from the Horn of Africa, East Asia and Central America. While refugee protection has become a global public responsibility under the 1951 Convention, nation-states have strong incentives to free-ride on the contributions of other nation-states who are either more responsible in meeting global obligations or luckier in being further away from the problem.<sup>24</sup>

In the Middle East, the destruction wrought by nation-states and their theocratic adversaries has shattered communities and traditional political loyalties. It has also badly wounded a nascent civil society that had been the hope for the future in the Middle East. The Arab Spring had released a longing by young people – and others – for a world not dominated by theocratic institutions or the off-

20 *Ibid.*, p. 343.

21 Between mid-1947 and the end of 1951, the IRO resettled just over one million refugees into new homes in new countries of destination. *Ibid.*, p. 344.

22 *Ibid.*, p. 344.

23 Wyman, 1998, p. 157. (Emphasis added).

24 A. Betts, ‘International Relations and Forced Migration’, in E. Fiddian-Qasmiyeh, G. Loescher, K. Long & N. Sigona (Eds.), *Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, Oxford University Press, 2014, p. 66.

again, on-again brutality of autocratic nation-states. In Tunisia – which called forth the Arab Spring – four members of Tunisian civil society were awarded the Nobel Peace Prize for their work in developing a countervailing governance approach that depended on the energy of the students, the pragmatism of shopkeepers, and the working poor to create a new demos. The nation-states of the Middle East have returned to bad, old habits, and it is the civil society leaders who currently carry the tenuous hopes of the region. As stated in the Peace Prize announcement, this civil society Quartet filled the governance void in Tunisia:

[W]hen the democratization process was in danger of collapsing as a result of political assassinations and widespread social unrest. It established an alternative, peaceful political process at a time when the country was on the brink of civil war. It was thus instrumental in enabling Tunisia, in the space of a few years, to establish a constitutional system of government, guaranteeing fundamental rights for the entire population, irrespective of gender, political conviction or religious belief.<sup>25</sup>

The inability (to date) of the Arab Spring to become a countervailing political force in the Middle East has in part led to the third mass migration of refugees of the past century. What lessons can we learn from the first two refugee crises that followed the World Wars? Unfortunately, the refugee issue most often turns into an us-against-them dichotomy that makes the search for consensus solutions difficult. In the middle, with few resources and few allies, are the functional international organizations (such as the League of Nations and UNHCR). The time has come to expand the discussion and open up the playing field to other groups who have issues involved but who have been to date ineffectual in stating their standing and pressing for their involvement. One step that needs to be taken is to recognize that ‘us and them’ does *not* just mean refugees and the host country nation-states. As a scholar of refugee studies points out:

Far from being a ‘statist’ mode of governance, as it is often portrayed, the governance of forced migration now involves a range of non-state actors, including armed actors, NGOs, transnational civil society, and increasingly the private sector .... However, this role has rarely been recognized or studied in relation to forced migration.<sup>26</sup>

In light of the changing, indeed worsening refugee situation, and in light of the shortcomings of state-based solutions to refugee invisibility, what identity approaches have worked in the past, and what can work in the future?

Running parallel to the top-down authority of the nation-states, over the past century there has been the development of a countervailing authority for global

25 The 2015 Nobel Peace Prize: “The National Dialogue Quartet” for their “decisive contribution to the building of a pluralistic democracy in Tunisia in the wake of the Jasmine Revolution of 2011.” Oslo, 10 October 2015.

26 Betts, 2014, p. 69.

governance utilizing the political and economic power, the expertise and the gravitas of civil society and business. In a global world, the nation-states have been unable in many cases to supply the public goods of global governance needed to effectively run the global marketplace and supply consensus solutions for the wicked problems that an integrated world requires.

For example, because of the rigour of the private sector, consensus-based standards process, the World Trade Organization (WTO) looks to internationally recognized standards bodies to verify the bona fides of products in global trade. The nation-states have been known to claim that imported products fail to meet domestic health and safety rules in order to keep out foreign competition. Such national rulings are considered 'technical barriers to trade'.<sup>27</sup> To help ensure that the nation-states cannot 'game' the world trade system through trumped up health and safety assertions, products that conform to the standards of internationally recognized standards bodies are considered to meet WTO requirements and cannot be denied entry. Thus, private sector standards have 'standing' at the WTO; standards created by legislatures or various government regulatory bodies in the nation-states are denied similar standing.<sup>28</sup> The European Community, the United States and the Organisation for Economic Co-operation and Development (OECD) have all urged that their regulatory bodies "refer to international voluntary standards, specifications and test methods rather than produce their own".<sup>29</sup>

Among the first such international management standards – and ultimately the global standard with the most extensive use – is ISO 9000 on quality assurance systems. ISO 9000 is a process (and an exacting one) of the management criteria required in the global marketplace to ensure that customer expectations of product quality, price and distribution are met. Most current uses of ISO 9000 are by manufacturers supplying products and services into global supply chains. This is in large part due to the interest of potential exporters in East Asia, Eastern Europe and elsewhere to overcome 'information asymmetries,' i.e. that buyers have no knowledge as to the bona fides of autonomous exporters and so are looking for ways to assess the product quality and reliability of an unknown supplier. An accredited third-party audit of the suppliers' management systems under an ISO 9000 certification process can act as a viable 'quality signal' to a potential global purchaser that an unknown supplier is incapable of offering directly.

The dramatically successful uptake of the ISO 9000 quality assurance process was largely due to a growing awareness by businesses and governments of the

27 WTO, TBT, 15.4: "The Technical Barriers to Trade (TBT) Agreement aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade."

28 World Trade Organization, Technical Barriers to Trade: Technical Explanation (Harmonization and the TBT Agreement), 16 December 2013. "For many years, technical experts have worked towards the international harmonization of standards. An important role in these efforts is played by the International Standardization Organization (ISO), the International Electrotechnical Commission (IEC) and the International Telecommunication Union (ITU). Their activities have had major impact on trade, especially in industrial products. For example, ISO has developed more than 9,600 international standards covering almost all technical fields."

29 C. Murphy & J. Yates, *The International Organization for Standards (ISO)*, New York, Routledge, 2009, p. 44.



benefits that a trusted (*i.e.* accredited) and widely accepted global standard could offer to participants in the global marketplace. Authoritative non-governmental organizations such as ISO are increasingly seen by public international organizations as appropriate venues for the resolution of global supply chain problems, the certification of trusted processes and the creation of needed global public goods.

As an example, in the early 1990s a number of national initiatives on environmental issues began to create mixed political signals with the proliferation of potentially conflicting national and regional environmental standards on such issues as environmental management, life cycle assessment, sustainability, green labelling and disclosure. Not only did the lack of global harmonization result in a waste of environmental resources and muddled mitigation efforts, but it also created perverse incentives. WTO rules target countries, not companies, allowing environmentally reputable companies to suffer the same fate as 'bad actors' when country-specific trade penalties were assessed. ISO standards are both global and company-specific; the existence of national boundaries are irrelevant to the success (or failure) of meeting ISO management standards requirements.

The final incentive for ISO to move forward on developing an environmental management standard was the run-up to the June 1992 United Nations Conference on Environment and Development, where the conference leadership specifically asked the ISO Central Secretariat to make a commitment to creating a global environmental standard. The resulting management system, ISO 14000, covers five separate environmental concerns: a baseline management system, auditing, green labelling, environmental performance evaluation and life cycle assessment. As with ISO 9000 management system requirements, meeting what is now the ISO 14000 suite of environmental standards has become a prerequisite for many manufacturers and other organizations that wish to participate in the global marketplace.

Certifying global standards such as ISO 9000 and ISO 14000 thus addresses difficult sovereign-state governance issues. When there are questions about

the overall reputation of the country in which the seller is located ... ISO certification can act as a stronger signal of performance in contexts with corrupt or otherwise weak regulatory institutions.<sup>30</sup>

The widespread global take-up and acceptance of these two global management standards is a clear sign that a) practicable global governance solutions can develop outside of the nation-state environment and b) consensus governance solutions that induce good behaviour can often be more viable than top-down attempts by the nation-states to prohibit bad behaviour.

30 D. Berliner & A. Prakash, 'Public Authority and Private Rules', *International Studies Quarterly*, Vol. 58, No. 4, 2014 (1-11), p. 3. "Thus, exporting firms located in countries with reputations for environmental problems or low product quality can face a 'market for lemons' problem and suffer a competitive disadvantage in the international market. In such a context, sellers can use quality or environmental certifications to rebrand themselves and signal their commitment to high product quality and environmental stewardship to their foreign buyers."

More recent efforts to create new global management standards, ISO 45000 on worker safety in global supply chains and ISO 37000 on anti-bribery and anti-corruption efforts, have both been developed and ratified by ISO in the past few years. These global management standards are good examples of creating practicable solutions to those ‘wicked problems’ that have confounded the best (and worst) efforts by the nation-states to respond.

ISO has actually begun to become an alternative to our ineffective UN system of intergovernmental organization, a development that some observers of voluntary consensus standard setting have championed for almost a century.<sup>31</sup>

Practicable global solutions require the work of many. Ensuring business and civil society are involved from the beginning of a solution-seeking process will almost certainly lead to better solutions and consensus support. Laws made by nation-states place all their political capital into the crafting of legislation. Once created, a ‘law’ is considered the final word, and lawmakers walk away. With standards creation, the consensus process requires that all affected parties participate. Unlike a law, a standard is expected to be dynamic and thus subject to continuous review.<sup>32</sup> Thus, the politics of law creation creates an artificial endpoint. Standards creation and implementation are never considered concluded.

Hundreds of new standards are needed each year (to reflect new products and new services), and each standard needs to be updated constantly. As a result, when legislatures *do* set industrial standards, they have a tendency to leave them in place for decades or even generations, and inflexible, unamendable standards really *can* stifle innovation.<sup>33</sup>

The ISO Committee on Developing Country Matters (DEVCO) held a meeting in late 2017 on Missing Persons and Refugees, ‘A new target for standardization?’, as part of the 2017 ISO General Assembly. The keynote speaker, Prof. Jurg Kesselring, Chair of the International Red Cross MoveAbility Board, stated: “When a product, activity or service meets ISO standards, there is a general expectation that it will be delivering what is expected of it.” At the same meeting, a spokesperson from the Ministry of Foreign Affairs in Lebanon pointed out that 84% of the world’s refugees are hosted in developing countries.

Standardization is a way of putting in place practical solutions that are reproducible and harmonized, which could help host countries in their response to many of the issues they face while helping refugees.<sup>34</sup>

31 Murphy & Yates, 2009, p. 68.

32 ISO standards must be reviewed at least every five years, and most sooner than that. Standards creation should be considered a process of continuous, significant, incremental improvements.

33 Murphy & Yates, 2009, p. 9.

34 “Missing Persons and Refugees – a new target for standardization?”, *FOCUS Magazine*, 19 September 2017.



### 3 The Current Status of State-Based Digital ID Projects

Later in this article some examples of non-state identity programmes using information and communication technology will be offered. But a survey of digital identity programmes from around the world reveals that many, if not most, attempts to use technology to establish identity are state-based. These state-based programmes exhibit many of the strengths and weaknesses of digital identity programmes generally, but they are, almost universally, not available to or of help to refugee populations.

Modern national identification is believed to have begun under Napoleon in the early 1800s, as the ruler was attempting to consolidate his governance of France.<sup>35</sup> Other countries tried other national identification schemes after that, most notably the Ottoman Empire in the late 1800s.<sup>36</sup> National identification became common during World War II, first with adoption in Europe and with the creation of national identification papers in England, Germany, France and other countries.<sup>37</sup>

A more recent surge in national identification schemes began, following the events of 9/11.<sup>38</sup> In 2005, the US Congress passed the Real ID Act<sup>39</sup> to assure the consistency and reliability of the US states' driver's licences as identification. Driver's licences are the principal form of identification in the United States and are widely used for airline travel, banking and other financial transactions and proof of age.

Shortly thereafter, the European Union took steps towards ensuring interoperability among digital identification beyond the borders of a singular nation. In 2011, the EU parliament adopted a regulation on digital identification and trust services for electronic transactions in the internal market,<sup>40</sup> which is commonly referred to as the eIDAS Regulation (Electronic Identification and Trust Services Regulation). The regulation requires that by 29 September 2018:

[w]hen an electronic identification using an electronic identification means and authentication is required under national law or by administrative practice to access a service provided by a public sector body online in one Member State, the electronic identification means issued in another Member State shall be recognised in the first Member State for the purposes of cross-border authentication for that service online ...<sup>41</sup>

35 C. Jerzak, 'A Brief History of National ID Cards', *Harvard Univ. FXB Center for Health & Human Rights*, 12 November 2015, <https://fxb.harvard.edu/2015/11/12/a-brief-history-of-national-id-cards/> (last accessed 4 April 2019).

36 *Ibid.*

37 *Ibid.*

38 'The History of Federal Requirements for State Issued Driver's Licenses and Identification Cards' (*National Conf. of State Legislatures*), [www.ncsl.org/research/transportation/history-behind-the-real-id-act.aspx](http://www.ncsl.org/research/transportation/history-behind-the-real-id-act.aspx) (last accessed 4 April 2019).

39 The Real ID Act of 2005, Pub. L. 109-13, 119 Stat. 131, Division B, Title II (11 May 2005), *codified at* 8 U.S.C. §§ 101, *et seq.*

40 EP Reg. of 23 July 2014, OJ 910/2014 L 257/73.

41 *Ibid.*, Art. II, Chapter 6.

European Union member countries that have developed and rolled out digital identification cards under eIDAS include Bulgaria, Croatia, Estonia, Finland, Germany, Ireland, Italy, Malta, Netherlands, Spain and Turkey.<sup>42</sup> Some of the identification cards are simply travel cards that can be used in the EU, such as the passport card issued by Ireland.<sup>43</sup> Other identification cards permit the holders to access a range of services from the government as well as from banks, including those issued by Croatia,<sup>44</sup> Estonia,<sup>45</sup> Finland,<sup>46</sup> Germany<sup>47</sup> and Italy.<sup>48</sup>

Estonia's national identification card has multiple uses in accessing government and private services, such as health services, medical and prescription records, banking services, voter identification and tax information. In addition, the Estonian identification can be loaded on an app on a mobile phone.<sup>49</sup>

Each EU country-issuer sets its own standards for what documentation is required for a holder to obtain a digital ID and what biometrics or other personally identifying information will be imprinted as a part of the ID. For example, some EU countries embed one or more fingerprints or facial recognition metrics into the chip on the card. Germany permits ID holders to include two fingerprints on the card chip at the holder's option,<sup>50</sup> Croatia includes two fingerprints on the card chip,<sup>51</sup> while Turkey includes all 10 fingerprints as well as palm prints.<sup>52</sup>

Electronic identification within the EU, however, is not universally accepted by its member states. Notably, the United Kingdom has not yet created a widely accepted digital identification, although it has passed laws and regulations from time to time, planning such rollouts. The Identity Cards Act 2006<sup>53</sup> was the first attempt to adopt a national digital identification card that would connect to a database containing the biometric information of the cardholders. The Identity Cards Act of 2006 was repealed in 2010 owing to concerns regarding the large

42 M. Eichholtzer, 'Overview of pre-notified and notified eID schemes under eIDAS' (2 January 2019), <https://ec.europa.eu/cefdigital/wiki/display/EIDCOMMUNITY/Overview+of+pre-notified+and+notified+eID+schemes+under+eIDAS> (last accessed 4 April 2019).

43 'Passport Card' (Dept. of Foreign Affairs and Trade), [www.dfa.ie/passportcard/](http://www.dfa.ie/passportcard/) (last accessed 12 April 2019).

44 'Overview of the Croatian eID Scheme' (Ministry of Public Administration, 27 June 2018), <https://ec.europa.eu/cefdigital/wiki/display/EIDCOMMUNITY/Croatia?preview=62885743/65972541/G1.v4.0%20%20Overview%20of%20the%20Croatian%20eID%20scheme.pdf> (last accessed 8 April 2019).

45 'ID-Card – e-Estonia', <https://e-estonia.com/solutions/e-identity/id-card/> (last accessed 8 April 2019).

46 'Use of the Identity Card', [www.polisi.fi/identity\\_card/use\\_of\\_the\\_identity\\_card](http://www.polisi.fi/identity_card/use_of_the_identity_card) (last accessed 8 April 2019).

47 'German National Identity Card – The Electronic Functions', [www.personalausweisportal.de/EN/Citizens/German\\_ID\\_Card/Functions/Functions\\_node.html](http://www.personalausweisportal.de/EN/Citizens/German_ID_Card/Functions/Functions_node.html) (last accessed 8 April 2019).

48 'The New Italian National EID Card Goes Live (2018 Update)', 7 March 2019, [www.gemalto.com/govt/customer-cases/new-national-identity-card-for-italy](http://www.gemalto.com/govt/customer-cases/new-national-identity-card-for-italy) (last accessed 8 April 2019).

49 *Supra*, n. 45.

50 *Supra*, n. 61.

51 *Supra*, n. 58, p. 9.

52 'Distribution of Biometric Turkish ID Cards Begins', *Hürriyet Daily News*, 23 March 2016, [www.hurriyetdailynews.com/distribution-of-biometric-turkish-id-cards-begins-96822](http://www.hurriyetdailynews.com/distribution-of-biometric-turkish-id-cards-begins-96822) (last accessed 15 April 2019).

53 O. Dowden, 'GOV.UK Verify programme', HC Deb 9 Oct 2018 978WS.

databases holding the biometric data, as well as the cost of rolling out the programme.<sup>54</sup> The databases were to be destroyed, and all cards issued under the programme were declared invalid.<sup>55</sup>

Following the lead of the European Union, several regional trade groups have enacted various regulations, agreements and treaties to enable relatively free travel between the member countries using a national digital ID card in lieu of a passport.<sup>56</sup>

The member countries of the South American trade consortium Mercado Común del Sur (MERCOSUR)<sup>57</sup> recognize digital identification of other countries in the group in lieu of a passport.<sup>58</sup>

Also in a manner similar to that of the European Union, the Economic Community of Western African States (ECOWAS)<sup>59</sup> has created a scheme whereby citizens within the ECOWAS can travel freely to other member countries using digital national ID.<sup>60</sup> The first country in the ECOWAS to issue a digital ID under the ECOWAS scheme was Senegal.<sup>61</sup>

The national identification card issued by Nigeria has practical day-to-day applications. In addition to being used as identification to access government services and for travel without a passport to several other member countries of the ECOWAS<sup>62</sup> the card can also be used as a payment device through MasterCard.<sup>63</sup> The Nigeria ID card stores all 10 fingerprints on a chip on the card.<sup>64</sup>

54 A. Travis, 'ID Cards Scheme to Be Scrapped within 100 Days', *The Guardian*, London, 27 May 2010, [www.theguardian.com/politics/2010/may/27/theresa-may-scrapping-id-cards](http://www.theguardian.com/politics/2010/may/27/theresa-may-scrapping-id-cards) (last accessed 16 April 2019).

55 'Identity Cards and New Identity and Passport Service Suppliers', 26 March 2013, [www.gov.uk/guidance/identity-cards-and-new-identity-and-passport-service-suppliers](http://www.gov.uk/guidance/identity-cards-and-new-identity-and-passport-service-suppliers) (last accessed 28 March 2019).

56 M. Czaika, H. de Haas & M. Villares-Varela, 'The Global Evolution of Travel Visa Regimes', *Population & Development Rev.*, Vol. 44, 2018, p. 589, doi:10.1111/padr.12166.

57 The member states of the MERCOSUR are Argentina, Brazil, Paraguay and Uruguay. Although formally a member, Venezuela's membership is currently suspended. Bolivia is in the process of becoming a member. Associate states of MERCOSUR are Chile, Columbia, Ecuador, Guyana, Peru and Surinam. 'MERCOSUR Countries' (MERCOSUR), [www.mercosur.int/en/about-mercotur/mercotur-countries/](http://www.mercosur.int/en/about-mercotur/mercotur-countries/) (last accessed 12 April 2019).

58 'XLVIII Summit of Heads of State of MERCOSUR and Associated States', 17 July 2015, [www.itamaraty.gov.br/images/documents/Documentos/Fact\\_Sheet\\_Mercotur\\_English.pdf](http://www.itamaraty.gov.br/images/documents/Documentos/Fact_Sheet_Mercotur_English.pdf) (last accessed 11 April 2019).

59 The countries in the ECOWAS are Benin, Burkina Faso, Capo Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo, [www.bidc-ebid.org/english/](http://www.bidc-ebid.org/english/) (last accessed 12 April 2019).

60 S. Atkins, 'Turning the ECOWAS ID Card from Vision to Reality', *The Silicon Trust*, 13 April 2018, <https://silicontrust.org/2018/04/13/turning-the-ecowas-id-card-from-vision-to-reality/> (last accessed 12 April 2019).

61 A. Peralá, 'Senegal First ECOWAS Member to Begin Issuance of Biometric IDs', *FindBiometrics*, 7 October 2016, <https://findbiometrics.com/senegal-biometric-id-310071/> (last accessed 12 April 2019).

62 *Ibid.*

63 'About the e-ID Card', *National Identity Management Commission*, [www.nimc.gov.ng/the-e-id-card/](http://www.nimc.gov.ng/the-e-id-card/) (last accessed 9 April 2019).

64 'Nigerian National ID Program: An Ambitious Initiative', *Gemalto*, 7 March 2019, [www.gemalto.com/govt/customer-cases/nigeria-eid](http://www.gemalto.com/govt/customer-cases/nigeria-eid) (last accessed 12 April 2019).

Ghana has also created a national identity card that can be used for travel in the ECOWAS.<sup>65</sup> The Ghana ID card has both a physically readable chip and a Radio Frequency Identification (RFID) chip and contains the user's fingerprints.

More recent developments in national identification systems are the usage of biometrics, exploiting the individuality of physical characteristics of fingerprints, iris, face, veins and other body parts.

India leads the field in biometric identification, with its national digital identification card known as the Aadhaar card.<sup>66</sup> The Aadhaar database is believed to be the largest biometric database in the world, with over one billion users.<sup>67</sup> The card is on paper, with a two-dimensional barcode known as a quick response (QR) code that contains some of the demographics of the cardholder and a digitized photo in addition to having a digital key giving the reading device access to more of the ID holder's demographics and biometric data contained on a central database.<sup>68</sup> Holders can download and print their own card from any computer and printer.<sup>69</sup> In addition, the Aadhaar card can be accessed using an Android smartphone.<sup>70</sup> The biometrics database for each cardholder contains 10 fingerprints, iris scans of both eyes and digital facial recognition, making it the most exacting of all government-issued digital identification schemes.<sup>71</sup>

The concentration of personal biographic, demographic and biometric data of the holders of the Aadhaar card is controversial within India.<sup>72</sup> The constitutionality of the Aadhaar programme as well as the question of whether the Indian Constitution contains a fundamental right to privacy was argued before the Supreme Court of India.<sup>73</sup> In a unanimous decision, a nine-judge panel held that the Indian Constitution does contain a fundamental right to privacy and that certain aspects of the Aadhaar scheme violated that right, particularly the ability of

65 'FAQs on the Ghana Card and Related Matters, *National Identification Authority*, [www.nia.gov.gh/faq.html](http://www.nia.gov.gh/faq.html) (last accessed 12 April 2019).

66 'What Is Aadhaar', *Unique Identification Authority of India*, <https://uidai.gov.in/what-is-aadhaar.html> (last accessed 8 April 2019).

67 'India', *Electronic Frontier Foundation*, 4 May 2018, <https://www.eff.org/issues/national-ids/india> (last accessed 28 March 2019).

68 'Updated QR Code to Shield Aadhaar Information', *The Times of India*, 19 April 2018, <https://timesofindia.indiatimes.com/india/updated-qr-code-to-shield-aadhaar-info/articleshow/63823001.cms> (last accessed 16 April 2019).

69 P. Motiani, 'How to Get Duplicate Aadhaar Online If You Have Lost Yours', *Economic Times*, 23 November 2018, <https://economictimes.indiatimes.com/wealth/personal-finance-news/lost-your-aadhaar-heres-how-to-get-a-duplicate-aadhaar-online/articleshow/59466455.cms> (last accessed 8 April 2019).

70 'mAadhaar FAQs', *Unique Identification Authority of India*, <https://uidai.gov.in/contact-support/have-any-question/285-faqs/your-aadhaar/maadhaar-faqs.html> (last accessed 9 April 2019).

71 'Aadhaar Features, Eligibility', *Unique Identification Authority of India*, <https://uidai.gov.in/contact-support/have-any-question/286-faqs/your-aadhaar/aadhaar-features-eligibility.html> (last accessed 9 April 2019).

72 S. Shukla, 'Aadhaar Verdict: Why Privacy Still Remains a Central Challenge', *The Economic Times*, Mumbai, 27 September 2018, <https://economictimes.indiatimes.com/news/politics-and-nation/aadhaar-verdict-why-privacy-still-remains-a-central-challenge/articleshow/65970934.cms?from=mdr> (last accessed 16 April 2019).

73 *Puttaswamy v. Union of India*, (2017) 10 Scale 1.

non-governmental, commercial entities to access the Aadhaar database in order to confirm the identity of an Aadhaar cardholder.<sup>74</sup>

Israeli law requires that all Israeli citizens carry the national identification card, the 'Tehudat Zehut'.<sup>75</sup> The card has a machine-readable chip that contains digital facial recognition and the prints of two fingers.<sup>76</sup>

Saudi Arabia's digital identification is required to be carried by all of its citizens and expatriates in the country.<sup>77</sup> The identification system connects to a central database that contains all 10 fingerprints of each registrant. In contrast to other similar national ID cards, Saudi Arabia, specifically, has made it illegal to remove the card from the Persian Gulf region.<sup>78</sup> Although all citizens are required by law to have a national ID, women in Saudi Arabia tend not to have the identification, but the government has a campaign to assure that women are able to receive the required ID.<sup>79</sup>

Australia has the most modern form of digital identification. To enrol in the identification service, a user downloads an app onto an Android or Apple phone, opens the app and completes the questionnaire, which is electronically verified with government databases.<sup>80</sup> The user then takes a 'selfie' photo on the phone, which is digitally compared with existing government records.<sup>81</sup> The user will then take the phone and a passport or driver's licence to the post office, Australia Post, which confirms the paper documents and activates the digital ID.<sup>82</sup> After activation, when identification is needed the app will generate a QR code that can be scanned by government agencies and used in financial and other private transactions.<sup>83</sup> Australia Post owns the URL 'digitalid.com', through which it promotes the ID app and offers instructions to users and merchants on how to apply for and use the ID app.

74 *Ibid.*

75 'Apply for an ID', *Population and Immigration Authority*, [www.gov.il/en/service/biometric\\_smart\\_id\\_request](http://www.gov.il/en/service/biometric_smart_id_request) (last accessed 9 April 2019).

76 *Ibid.*

77 'Deadline for Enrollment in Saudi Arabia Biometric Registry Looms', *FindBiometrics*, 19 January 2015, <https://findbiometrics.com/deadline-for-enrolment-in-saudi-arabia-biometric-registry-looms/> (last accessed 15 April 2019).

78 'National ID', *Ministry of Interior*, [www.moi.gov.sa/wps/portal/lut/p/z0/04\\_Sj9CPykssy0xPLMnMz0vMAflJo8zIDTxNTDwMTYy8\\_Y0dXQ0czdx8LIMsDQw9DQ30g1Pz9L30o\\_ArApqSmVVGOWoH5Wcn1eSWIGiH5Gbn6mQklmemKdqAGJm5OemKoAl80pUDUA8VYOi1PTSHLBlwGri86CuUshMiU9JTUsszSmJB1pfkO0eDgACsLK3/](http://www.moi.gov.sa/wps/portal/lut/p/z0/04_Sj9CPykssy0xPLMnMz0vMAflJo8zIDTxNTDwMTYy8_Y0dXQ0czdx8LIMsDQw9DQ30g1Pz9L30o_ArApqSmVVGOWoH5Wcn1eSWIGiH5Gbn6mQklmemKdqAGJm5OemKoAl80pUDUA8VYOi1PTSHLBlwGri86CuUshMiU9JTUsszSmJB1pfkO0eDgACsLK3/) (last accessed 15 April 2019).

79 H. Toumi, 'Campaign for Saudi Women to Apply for Individual ID Cards', *Gulf News*, 7 November 2018, <https://gulfnews.com/world/gulf/saudi/campaign-for-saudi-women-to-apply-for-individual-id-cards-1.2186407> (last accessed 15 April 2019).

80 'Digital ID Help & Support', *Australia Postal Corp.*, [www.digitalid.com/help-support?c=DigApp100#app](http://www.digitalid.com/help-support?c=DigApp100#app) (last accessed 9 April 2019).

81 *Ibid.*

82 *Ibid.*

83 *Ibid.*

The New Zealand tax authority has a unique experiment in biometric identification: voice ID.<sup>84</sup> A user calls a phone number and recites her or his tax identification number. The voice is digitized, creating a voice print, and saved so that the voice alone can identify the caller in the future. A New Zealand finance minister reported in 2015 that 1.4 million taxpayers,<sup>85</sup> of an estimated population of 4.6 million,<sup>86</sup> had registered for the voice ID service. A similar voice ID service is also being used by a New Zealand bank.<sup>87</sup>

An age-old question on what information is part of a person's 'identity' has caused problems for digital identification programmes in Egypt and Afghanistan. Egyptian law requires that all Egyptians have a national digital identification card, which is required to access government services. To apply for the card an applicant must declare his or her religion. However, Egypt allowed the applicant to choose only Islam, Judaism or Christianity as a religion. Applicants who did not choose one of the three recognized religions were refused ID cards. A lawsuit was filed by adherents to the Bahá'í faith claiming that their inability to obtain a national identification card without misstating their religion was a violation of their rights under Egyptian law. In 2008, the Egyptian Court of Administrative Justice ruled in two cases that Egyptian citizens who are not Christian, Muslim or Jewish may have the religion omitted from their identification card.<sup>88</sup>

Further complicating the rollout of the digital ID card in Egypt was the difficulty of getting identification cards for women. Identification cards are required in Egypt to obtain access to most government services. However, Egyptian women often do not have such identification.<sup>89</sup> Through a United Nations Development Programme called the Citizenship Initiative, over two million Egyptian women have been able to obtain national identification cards.<sup>90</sup>

In Afghanistan, the distribution of digital identification cards, known as e-Tazkiras, has been delayed several times over disputes over nationalist and ethnic

84 'Voice ID Video', *Inland Revenue*, 12 March 2019, [www.ird.govt.nz/help/demo/voice-id/voice-id-index.html](http://www.ird.govt.nz/help/demo/voice-id/voice-id-index.html) (last accessed 15 April 2019).

85 '1.4 Million Customers Sign up for IRD Voice ID', *The Beehive*, 11 June 2011, [www.beehive.govt.nz/release/14-million-customers-sign-ird-voice-id](http://www.beehive.govt.nz/release/14-million-customers-sign-ird-voice-id) (last accessed 15 April 2019).

86 Estimated population as of June 2015, 'Population | Stats NZ', [www.stats.govt.nz/topics/population](http://www.stats.govt.nz/topics/population) (last accessed 19 April 2019).

87 'ANZ Phone Banking' (ANZ), [www.anz.co.nz/banking-with-anz/ways-to-bank/phone-banking/](http://www.anz.co.nz/banking-with-anz/ways-to-bank/phone-banking/) (last accessed 15 April 2019).

88 Case Nos. 58/18354 and 61/12780, 29 January 2008, Court of Administrative Justice, cited in 'Freedom of Religion and Belief in Egypt', Quarterly Report (*Egyptian Initiative for Personal Rights*, January-March 2008), accessed 18 April 2019. See also "First Identification Cards Issued to Egyptian Baha'is Using a 'Dash' Instead of Religion" (*Bahá'í World News Service*, 14 August 2009), <https://news.bahai.org/story/726/> (last accessed 18 April 2019).

89 'Women's Political Participation in Egypt' (OECD, July 2018), p. 56, [www.oecd.org/mena/governance/womens-political-participation-in-egypt.pdf](http://www.oecd.org/mena/governance/womens-political-participation-in-egypt.pdf) (last accessed 18 April 2019).

90 'Egypt: ID Cards Help Women Proclaim Their Existence' (UNDP), [www.undp.org/content/undp/en/home/ourwork/ourstories/a-young-woman\\_s-pursuit-of-proclaiming-her-existence.html](http://www.undp.org/content/undp/en/home/ourwork/ourstories/a-young-woman_s-pursuit-of-proclaiming-her-existence.html) (last accessed 18 April 2019).



descriptions on the cards.<sup>91</sup> Ethnic minorities in Afghanistan believe that the word 'Afghan' historically describes members of the Pashtun tribe and that the identification should be related to the name of the country.<sup>92</sup> The current low adoption rate of the e-Tzkiras has raised concerns about the ability to hold fair elections.<sup>93</sup>

Some non-governmental organizations have also created digital identification to be used for purposes outside of the business needs of the organizations. For example, the financial services industries in Sweden<sup>94</sup> and Norway<sup>95</sup> have each created their own 'BankID', which, in addition to providing access to automatic teller machines, provides access to government services and also serves as general identification throughout the country. Both countries also make the digital identification available on an app for a mobile phone.

### 3.1 Problems with Nation-Issued Identity

As Aresty and Schmitz argue, "In the 21st century, individuals should have a digital identity not linked to citizenship, and be able to exercise the right to own and control it."<sup>96</sup> In a rapidly digitizing and globalizing environment, current national identification systems have a limitation in terms of solving the issues of privacy, portability and interoperability.

Centralized databases of national identities serve as a honeypot for hackers, whose repertory of tools available for breaking in increases faster than digital identity protection can keep them out. Most of the systems require unique login and passwords, which are then stored in a centralized 'location' (e.g. keyserver), thereby creating multiple vulnerabilities. There have been a host of data breaches in government systems, with a number of minor ones happening every day without being publicized. The US Postal Service had 60 million records stolen in 2018 owing to poor security,<sup>97</sup> hackers stole 9 million records from the Greek government in 2012,<sup>98</sup> and nearly 2.5 million Syrian government records have been lost or compromised.

91 H. Shalizi, 'Who Is an Afghan? Row over ID Cards Fuels Ethnic Tension', *Reuters*, 8 February 2018, [www.reuters.com/article/us-afghanistan-politics/who-is-an-afghan-row-over-id-cards-fuels-ethnic-tension-idUSKBN1FS1Y0](http://www.reuters.com/article/us-afghanistan-politics/who-is-an-afghan-row-over-id-cards-fuels-ethnic-tension-idUSKBN1FS1Y0) (last accessed 18 April 2019).

92 *Ibid.*

93 S. Salahuddin & P. Constable, 'Afghanistan's New National ID Card Has Finally Debuted, and It's Already Plagued by Problems', *The Washington Post*, 3 May 2018, [www.washingtonpost.com/world/asia\\_pacific/afghanistans-new-national-id-card-has-finally-debuted-and-its-already-plagued-by-problems/2018/05/03/b9449ba4-4ee8-11e8-85c1-9326c4511033\\_story.html?utm\\_term=.602b76b77017](http://www.washingtonpost.com/world/asia_pacific/afghanistans-new-national-id-card-has-finally-debuted-and-its-already-plagued-by-problems/2018/05/03/b9449ba4-4ee8-11e8-85c1-9326c4511033_story.html?utm_term=.602b76b77017) (last accessed 18 April 2019).

94 'BankID', [www.bankid.com/en/](http://www.bankid.com/en/) (last accessed 10 April 2019).

95 *Ibid.*

96 A.J. Schmitz & J.M. Aresty, 'Blockchain Can Empower Stateless Refugees', *Law360 Perspectives*, 2 December 2018, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3297182](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3297182).

97 J. Biggs, 'US Postal Service Exposed Data of 60 Million Users', (*TechCrunch*, 26 November 2018), <<https://techcrunch.com/2018/11/26/the-us-postal-service-exposed-data-of-60-million-users/>> (last accessed 12 April 2019).

98 I. Steadman, 'Hacker Arrested for Allegedly Stealing ID Info of Most of Greece', *Wired*, 22 November 2012, [www.wired.co.uk/article/greece-id-theft](http://www.wired.co.uk/article/greece-id-theft) (last accessed 11 April 2019).

In addition to protecting data in their own databases, national governments have been increasingly challenged by unwanted dissemination of personal information kept by corporations. In the most recent case, Cambridge Analytica gained unauthorized access to the personal identifiable information (PII) of 87 million Facebook users and used it for targeted political campaigns worldwide.<sup>99</sup> For refugee populations, the security of data is perhaps perceived as even more important than for 'regular citizens'. Most humanitarian workers would confirm that refugees care about privacy, perhaps because privacy is often related to security and personal safety.

## 4 Examples of Non-State-Based Digital Identity Projects

### 4.1 *Truu: The First Self-Sovereign Identity Solution for Health-Care Workers*<sup>100</sup>

Created by Dr Manreet (Manny) Nijjar, an infectious disease physician of Indian descent in Kenya who has worked for over a decade in the UK's National Health Service, Truu addresses the disparity in access to health-care services across the globe. Dr. Nijjar's work was prompted by observations about the danger of siloed identities for health-care workers in high-stress environments.

A common theme across cultures is the trusted relationships that individuals build up with doctors, nurses and allied health-care professionals.<sup>101</sup> This has led them to be the most respected and trustworthy professionals across the world.<sup>102</sup>

Built on morals and a code of professional ethics, health-care workers form this trust through their understanding of confidentiality (privacy), consent (control) and respect for an individual's wishes (autonomy). Nevertheless, this trust can be broken when individual actors, despite the systems in place, cause harm or risk to patients.

One major problem is that doctors interact with multiple organizations, so their identity data is usually siloed. Before Truu there was no easy process for these organizations to communicate with each other to share this information. The administrative burden for both doctors (some of whom can have up to 15 identity checks in a 10-year period) and organizations fuelled a commitment to finding a digital identity solution to solve the problem.

Dr. Nijjar researched centralized, federated and user-centric digital identity systems, all of which were useful for certain cases. However, they did not meet the requirements of portability, privacy, security and scalability required. The conclusion of the research was that a self-sovereign/multi-source identity would work. It would not only increase the level of trust in the current physical world

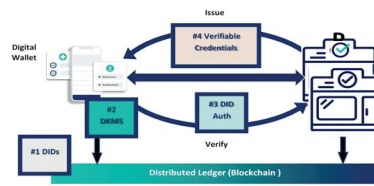
99 K. Granville, 'Facebook and Cambridge Analytica: What You Need to Know as the Fallout Widens', *NYT*, 19 March 2018, [www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html](http://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html).

100 <https://www.truu.id/>.

101 Global Teacher Status Index 2018, <https://www.varkeyfoundation.org/media/4790/gts-index-9-11-2018.pdf>.

102 Ipsos MORI Veracity Index 2018, [https://www.ipsos.com/sites/default/files/ct/news/documents/2018-11/veracity\\_index\\_2018\\_v1\\_161118\\_public.pdf](https://www.ipsos.com/sites/default/files/ct/news/documents/2018-11/veracity_index_2018_v1_161118_public.pdf).





process for doctors, but also bring this trust into the digital world along with the rapid emergence of health technology. Truu is the world's first self-sovereign identity solution for health-care workers.

Building these technologies offers a great public benefit. Two areas of need and benefit are:

- Working towards the Millennium Development Goal of universal health coverage, which highlighted the global challenges of an estimated deficit of 14 million global health-care workers by 2035.
- Helping doctors, as highly trusted professionals, to cascade this trust (trust waterfall) to people who need this care most, such as refugees in post-conflict areas or individuals in resource-poor countries. By providing health credentials to these people (adults or children) Truu can provide the basis and foundation of their own identities.

For Truu's approach to work it needed to be built on a global public utility underpinned by open standards and interoperability, with the fluidity and flexibility to cater to local and regional needs, while meeting international standards.

The following technologies and emerging international open standards have allowed Truu to build and develop a trusted digital identity solution for doctors in the UK that can be scaled for health-care workers across the globe.

#### 4.2 Distributed Ledger Technology (DLT)

Sovrin Network<sup>103</sup> is an open-source project creating a global public utility for self-sovereign identity. The Sovrin Network enables people, organizations or IT devices to prove things about themselves to anyone or anything, peer to peer, using data that the other party can verify. When anyone or anything is able to trust whom or what it is dealing with online, massive amounts of friction can be removed, user experience can improve and the transaction processes can be simplified. The Sovrin Network is built on top of Hyperledger Indy, part of the Hyperledger project.

Hyperledger is an open-source collaborative effort created to advance cross-industry blockchain technologies. It is a global collaboration, hosted by The Linux

103 The Sovrin Network, <https://sovrin.org/> (last accessed 8 July 2019).

Foundation, including leaders in finance, banking, Internet of Things, supply chains, manufacturing and technology

Hyperledger Indy<sup>104</sup> is a distributed ledger, purpose-built for decentralized identity. It provides tools, libraries and reusable components for creating and using independent digital identities rooted on blockchains or other distributed ledgers so that they are interoperable across administrative domains, applications and any other 'silo.'

Because distributed ledgers cannot be altered after the fact, it is essential that use cases for ledger-based identity carefully consider foundational components, including performance, scale, trust models and privacy. In particular, Privacy-by-Design and privacy-preserving technologies are critically important for a public identity ledger where correlation can take place on a global scale.

For all these reasons, Hyperledger Indy has developed specifications, terminology, and design patterns for decentralized identity along with an implementation of these concepts that can be leveraged and consumed both inside and outside the Hyperledger Consortium.

#### 4.3 *Decentralized Identifiers*<sup>105</sup>

A decentralized identifier (DID) is a new type of identifier that is globally unique, resolvable with high availability and cryptographically verifiable. DIDs are typically associated with cryptographic material, such as public keys and service endpoints, for establishing secure communication channels. DIDs are useful for any application that benefits from self-administered, cryptographically verifiable identifiers such as personal identifiers, organizational identifiers and identifiers for Internet of Things scenarios. For example, current commercial deployments of W3C Verifiable Credentials heavily utilize Decentralized Identifiers to identify people, organizations and things to achieve a number of security and privacy-protecting guarantees.

#### 4.4 *Decentralized Key Management Solution*<sup>106</sup>

Decentralized key management solution (DKMS) is a new approach to cryptographic key management intended for use with blockchain and distributed ledger technologies where there are no centralized authorities. DKMS inverts a core assumption of conventional PKI (public key infrastructure) architecture, namely that public key certificates will be issued by a relatively small number of centralized or federated certificate authorities (CAs). With DKMS, the initial 'root of trust' for all participants is a distributed ledger that supports a new form of root identity record called a DID.

104 Hyperledger Indy, <https://www.hyperledger.org/projects/hyperledger-indy> (last accessed 8 July 2019).

105 W3C A Primer for Decentralized Identifiers, <https://w3c-ccg.github.io/did-primer/> (last accessed 8 July 2019).

106 Decentralized Key Management System Rebooting Web of Trust #4 Drummond Reed Paris 2017, <https://github.com/WebOfTrustInfo/rwot4-paris/blob/master/topics-and-advance-readings/dkms-decentralized-key-mgmt-system.md> (last accessed 8 July 2019).

A DID is a globally unique identifier generated cryptographically, so it requires no central registration authority. Each DID points a DDO (DID descriptor object), a JSON-LD object containing the associated public verification key(s) and a pointer to off-ledger agent(s) supporting peer-to-peer interactions with the identity owner. From this baseline, trust between peers can be built up in two ways:

- 1 Challenge/response messages for real-time verification of public keys.
- 2 Exchange of identity attribute claims signed by other trusted peers ('verifiable claims') whose public keys can also be verified against the ledger.

This decentralized 'web of trust' model leverages the security, privacy and resiliency properties of distributed ledgers to provide highly scalable key distribution, verification and recovery, finally making PKI accessible to everyone.

#### 4.5 Verifiable Credentials<sup>107</sup>

In the physical world, a credential might consist of:

- Information related to the subject of the credential (for example, a photo, name and identification number);
- Information related to the issuing authority (for example, a city government, national agency or certification body);
- Information related to the specific attribute(s) or properties being asserted by the issuing authority about the subject;
- Evidence related to how the credential was derived;
- Information related to expiration dates.

A verifiable credential can represent all of the same information that a physical credential represents. The addition of technologies, such as digital signatures, makes verifiable credentials more tamper-evident and more trustworthy than their physical counterparts. Holders of verifiable credentials can generate presentations and then share these presentations with verifiers to prove they possess verifiable credentials with certain characteristics. Both verifiable credentials and verifiable presentations can be transmitted rapidly, making them more convenient than their physical counterparts when trying to establish trust at a distance.

While this specification attempts to improve the ease of expressing digital credentials, it also attempts to balance this goal with a number of privacy-preserving goals. The persistence of digital information, and the ease with which disparate sources of digital data can be collected and correlated, comprise a privacy concern that the use of verifiable and easily machine-readable credentials threatens to make worse.

107 W3C Verifiable Credentials Data Model 1.0, <https://www.w3.org/TR/verifiable-claims-data-model/#what-is-a-verifiable-credential> (last accessed 8 July 2019).

#### 4.6 *DID Auth*<sup>108</sup>

The term DID Auth has been used in different ways and is currently not well defined. Truu defines DID Auth as a ceremony where an identity owner, with the help of various components such as web browsers, mobile devices and other agents, proves to a relying party that they are in control of a DID. This means demonstrating control of the DID using the mechanism specified in the DID Document's 'authentication' object. This could take place using a variety of data formats, protocols and flows. DID Auth includes the ability to establish mutually authenticated communication channels and to authenticate websites and applications.

#### 4.7 *Tykn: The Future of Resilient Identity*<sup>109</sup>

A third of the refugees in Europe are children, and while some are lucky and get documented, hundreds of thousands in Syrian refugee camps do not have birth certificates, and newborns in camps are unable to complete the birth registration process owing to economic, geographical and complex administrative barriers.

Ultimately, the experiences the refugees shared with Tey in the Dutch refugee camp regarding the hardships they suffered as 'invisible people' gave him the inspiration and motivation to found Tykn with the ultimate goal of reinforcing identity infrastructures to make them more resilient, providing higher socio-economic inclusion.

Tykn is envisioned not just as a company, but as a movement attacking the multi-headed 'identity crisis' problem from multiple angles, focusing on a single goal: transforming the lives of millions impacted by lack of verifiable identity. Experience on the ground creates an inherent understanding that solving for basic identity is just an enabler – true value will be unlocked only once linked benefits can be realized. As such, Tykn's focus is not just on resolving challenges at the individual level, but also on optimizing the remedy engine and creating the infrastructure of humanitarian agencies and NGOs globally.

#### 4.8 *Two Types of Credentials*

Our identity consists of many different components called credentials (*e.g.* a name, date of birth or nationality). Tykn distinguishes two types of credentials:

**Dynamic credentials:** These points of information can change over time, such as one's place of legal residence or nationality. Dynamic credentials have a tendency to change, with some subject to shorter intervals of change than others. Nationality, for example, can, but will not necessarily, change.

**Static credentials:** These points of information do not change and are thus deemed static (*e.g.*, one's date of birth, blood type or family ties). Addi-

108 Introduction to DID auth. Rebooting Web of Trust #6 Markus Sabadello *et al.* July 2018, <https://github.com/WebOfTrustInfo/rwot6-santabarbara/blob/master/final-documents/did-auth.md> (last accessed 8 July 2019).

109 <https://tykn.tech/> (last accessed 8 July 2019).

tional static information can be added, but the basic information will not change.

The only identity document (on- or offline), which has a global standard in terms of format and verification procedure, is a passport, since these are attested to by one of the national governments. National governments are part of a global trust network in terms of identity verification, since the verifying government trusts the issuing government and thus subsequently trusts the identity owner. This concept illustrates the importance of identification rather than identity, which in itself is useless without this trust network that allows interoperability and multi-purpose usage. Within the digital realm, only siloed versions of identity exist, since there is no global network of identity attestors that can provide a single verified and interoperable identity. Issuers create a single-purpose usable identity in the form of an account for their respective use case. This means that identity owners hold an array of different accounts with a single use, instead of a single one with full interoperability. The real problem of identity lies in identification.

The Harvard Humanitarian Initiative (HHI)<sup>110</sup> has distinguished five fundamental rights in humanitarian information activities to protect information rights, but these also apply to all other identity owners.

- i **Right to protection** Every person should be protected from (in)direct harm in terms of life, liberty and personal security from the information and communication technology (ICT) services or data that is related to them, with respect to the potential misuse of this data that could cause harm.
- ii **Right to information** Access to information and methods of communication have become a basic human right. They should be able to generate, access, acquire, transmit and benefit from information, specifically in the context of crises.
- iii **Right to privacy and security** The basic human right that a person's data is treated with ethical, technical and legal standards for the protection of individual privacy, consistently.
- iv **Right to data agency** The collection, use and disclosure of PIIs should lie within the agency of the data owner. Also, the misuse of aggregated personally identifiable information (PIIs) into DIIs, could lead to information threat through breaches on a population level.
- v **Right to rectification and redress** When a person's collected information is false, inaccurate and/or incomplete they hold the right to rectification. A person should have the right of access to all personal information collected on themselves. When there is (in)direct harm as a result of this, relevant parties should be able to redress this.

110 <https://hhi.harvard.edu/> (last accessed 8 July 2019).

#### 4.9 *InternetBar.Org: Secure DIDs Enable Trusted Online Communities*

Across the globe, virtual communities are being self-organized into electronically linked networks of people coming together for some shared purpose. This organic growth of online communities is, perhaps, inevitable given the open structure of the Internet, but the fractured existence of these online communities echoes some of the same problems that are found in existing state-based identity programmes: one's identity in one place may not be recognized or seen as valid in another. And, importantly for refugees, many of these 'organic' online communities are essentially unavailable to refugees and other disenfranchised persons.

In order to flourish, these communities need to develop trusted internal networks, which the InternetBar.Org (IBO) calls 'Trusted Online Communities' (TOCs), but they also need to be part of a global 'justice layer' of the Internet. There are social and commercial layers in the 'real world,' most of which are defined by venue and proximity. Again, in the real world there is a patchwork of justice systems that operate to support the commercial and social layers and that are themselves defined by location, or, in legal terms, venue and standing. The aim of IBO is to facilitate the creation of a true justice layer for the Internet that supports the social and commercial layers without boundaries we have created in cyberspace. A large part of this effort depends on the creation of secure, manageable, sovereign digital identities.

#### 4.10 *PeaceTones: Access to Display/Commercialize Creative Works on the Internet*

IBO, a TOC itself, exists as a virtual legal community, helping to establish rules of conduct and guidelines for an online justice system to support civil society's norms and standards for conduct in cyberspace.

PeaceTones, and the digital identities for artists it creates, is a project rooted in the field of intellectual property (IP) law. If law is supposed to be a protector of creation, why does IP law put most artists and musicians in the poor house? They can only rely on highly complex IP law to protect their creations if they can afford to employ a host of intermediaries who exist between their creations and the marketplace. Without trusted digital identities, individuals or organizations operating as elements in the music supply chain cannot hold each other accountable. In traditional business relationships in music, most of the creators' revenues get tied up with the work performed by intermediaries who were engaged to protect their work and get their products to market. In many cases, musicians and artists must actually give up ownership, or partial ownership, of their creations to get them to the marketplace. This has especially been the case for artists who come from conflict, post-conflict and stressed environments where they are practically disenfranchised and invisible. Since its inception in 2008, PeaceTones has taken artists from countries where it was difficult or impossible to protect IP (*e.g.*, Haiti, Sierra Leone and Brazil) and given them the opportunity to build a profitable business selling and performing their music. Essentially, IBO has begun building a fair trade music model on the Internet, based in part on the creation of strong digital identities for artists and connecting creative work to those identities.

The most recent PeaceTones project, The World United in Song (WUIS), is the first step towards combining access to opportunity through digital IDs with a

wider ‘Invisibles’ project that aims to use health-care information as the first, trust-building step in the development of complete digital identities for refugees. WUIS is a compilation of “11 original songs and videos from musicians living in refugee camps, post-conflict countries, and some of the most marginalized regions of the world”.<sup>111</sup>

#### 4.11 *The Invisibles: Refugee Identity and Credentials on the Internet*

The Invisibles is an IBO legal project designed to work with technology partners to create legal digital identities for stateless refugees utilizing blockchain technology and a self-sovereign identity system. The project has begun with fieldwork in Bangladesh among Rohingya refugees. According to data collected by The UN Refugee Agency, there are approximately 10 million stateless people without personal identification, who have been denied a nationality and access to basic rights such as education, healthcare, employment and freedom of movement. These are 10 million refugees around the world who could benefit from the creation of a sound digital identity to gain access to basic services, education and employment. As the project develops, it will include finding/creating ID elements, storing/using ID elements and helping refugees use new IDs to get access to justice, find employment, get an education or receive healthcare.

## 5 Digital ID Process Model

The history of refugee identity problems, the clear shortcomings of state-based digital identity programmes and the array of digital identity projects underway through NGOs or aid organizations all point to the need for some set of standards in the gathering, storing and use of digital ID elements that can be accepted across organizational and national borders.

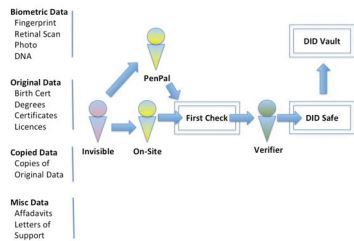
The creation of standards, or any form of control over the elements of a complex relationship, should start with the development of a general process model to describe, at a very high level, the process for which standards need to be created. For refugee digital IDs, circumstances may vary greatly on the ground from case to case, but it is possible to envision a general process model with relationships, steps and requirements that can at least inform the initial work on international standards.

Potential elements that may be added to an Invisible’s digital ID include biometric data, original paper or digital data, copies of original data or miscellaneous data that can be gathered to support the Invisible’s claim to identity.

Beginning the process is the Invisible’s interaction with an on-site actor (*e.g.* a medical professional in a camp engaged in basic intake and medical examination). At this point, whatever basic information can be gathered is moved into a database and undergoes a first check of authenticity. A reviewer embedded in the project works with the Invisible to add to the store of data in the first check data-

111 <https://peacetones.org/projects/world-united-song/>.





base, all of which is reviewed and approved by a Verifier, who moves the data into a DID Safe, where it is accessible to the Invisible. Once the information is moved into the Safe, it is also entered into the DID Vault, a blockchain ledger that cements the accuracy of the information.

In this relatively straightforward process there are many steps or elements that must be addressed in the development of meaningful standards. The need for standards to guide various aspects of the process and the development of standards to support the process of DID creation can be approached using five broad functions represented in the simple model: Gathering Information; Authenticating Information; Storing Information; Creating Permanent DIDs; and Creating an Online Dispute Resolution option.

## 6 Gathering and Authenticating Information

Even before the Invisible shows up at a camp or processing centre, there are questions about who will be involved in the gathering and recording of any information related to the refugee. Who will be the Reviewers, On-Site Actors and Verifiers? From where will they be drawn, how will they be approved, what training will they get and what are the actions for which they will be responsible?

With the project personnel in place, in many cases the only 'data' the Invisible will be able to present to the on-site representative will be herself or himself, in the flesh. First, DID creation must establish what data the Invisible possesses, other than him or herself, and assess the validity and usefulness of information the Invisible may have in his or her possession. If the only information available is biometric (retinal scans, fingerprints, etc.), there may be standards for the technology that gathers the information and how it is stored. If the information is paper copies of original documents or copies of original documents, some standards may address what is acceptable, the technology to digitally record the information and how it is stored. If affidavits or letters of support are included, some standards for establishing the identity of the suppliers of the letters must be generated, along with how the material is copied and stored.

## 7 Storing Information and Creating the Vault

Standards related to storing information encompass questions of how the data is handled after it is gathered and who has access before and after storing. Technical questions include the nature of the technology used to gather the information (scans, drives, etc.) and the nature of the technology used to house the interim databases and the final DID blockchain vault. A related issue is how data that is rejected or replaced is to be deleted and destroyed.

The DID blockchain vault should be considered a final, permanent, safe home for DID information. Standards and process issues include the nature of the blockchain repository and ongoing access and control of the data. For the Invisible, owning the data is one step in moving out of invisibility, but the ultimate utility of the DID is the ability of the Invisible to access the data and exercise control over it.

## 8 Online Dispute Resolution

In any ongoing human interaction there is the possibility for the creation of disputes and conflict. In order for the DID process to fully serve the Invisibles, the process should include an online dispute resolution (ODR) programme that allows for the resolution of issues that arise as a result of the gathering, recording, storing and controlling of personal data. The ODR programme should conform to international ODR standards and be accessible to the Invisible, the DID project staff and individuals or groups reviewing DID information at the request of the Invisible.

Potential disputes may arise from a variety of perspectives. The Invisible can contest the inclusion or exclusion of data by the DID staff. For whatever reason, an Invisible may want to provide access to data only by sharing a verifiable claim, without revealing the information itself (zero-knowledge proof), but the person or organization with whom the verification is shared may want to see the information itself. An Invisible may want to share information with one person or organization, and that person may want to share the information with another person or organization. The Invisible should be able to control the sharing of the information if the information truly belongs to the Invisible, so a grievance to prevent unapproved sharing could be taken through the ODR process.

## 9 Conclusion

How can international standards use consensus solutions to help refugees find their place in the world?

### 9.1 *Develop a Standardized, Universal ID for Refugees*

No one, officially, expects that refugee encampments will be more than 'temporary'. But past experience gives clues about the future: the refugee experience will be with us for some time. Some refugees will be repatriated, some will move on.

But others will arrive to spend a long time in the world's waiting rooms. Refugees are spending more time in refugee camps than in the past, and a large preponderance of refugees are now in semi-permanent exile.<sup>112</sup> The alternative approach for refugees is to avoid camps and to settle in urban areas, depend on their own fortune and thus "remain invisible to UNHCR and any protection it may offer".<sup>113</sup>

UNHCR works with host governments to develop a generic refugee ID card for all refugees over 18. However, the information collected can vary from country to country, depending on the wishes of the host government. And, as UNHCR states, "The issuance of identity documents for refugees is the primary responsibility of the government of the host state."<sup>114</sup> Among the data points that UNHCR wants to have captured are type and title of identity document, name and logo of the issuing authorities, a general statement of rights associated with the document, unique document number, given name and family name, sex, date of birth, a photo (if possible) and date of issuance and expiration.<sup>115</sup>

The UNHCR currently works with ISO on 'quality management' procedures "to provide essential information about quality processes (i.e. the ISO 9000 series), that support sourcing and procurement of goods to ensure the right quality of the procured goods".<sup>116</sup> An international consensus process to create a universal refugee ID card that was tied to, but independent from, a UN organization might convince host governments to agree to turn a 'wicked problem' over to a consensus solution using ISO standards.

For example, in 2006 it was discovered that numerous products were entering the global toy supply chain that contained toxic levels of lead paint. Most (but not all) of these toys had been sourced from China. For reasons of sovereignty, foreign government inspectors were not allowed access to Chinese factories. A 15 August 2007 recall of almost 20 million toys by Mattel created a critical mass of concern by US and European consumers, retailers and policymakers. The US toy industry agreed to work with the American National Standards Institute (ANSI), retailers and consumer groups to develop a regime of testing, inspection and auditing of factories in China based on ISO standards.

The Chinese – as committed users of ISO standards – agreed to allow such accredited private sector, third-party inspections of Chinese factories supplying products into the global toy supply chain, when they would not allow US govern-

112 J. Miller, 'Protracted Refugee Situations', in E. Fiddian-Qasmiyeh, G. Loescher, K. Long & N. Sigona (Eds.), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, Oxford University Press, 2014, p. 151. Further, UNHCR estimates that a "significant majority some 6.4 million refugees are now to be found in protracted refugee situations." *ibid.*, p. 151

113 O. Bakewell, 'Encampment and Self-Settlement', *ibid.*, p. 133.

114 UNHCR Guidance on Registration and Identity Management, 5.3 Documentation, [www.unhcr.org/registration-guidance/chapter5/documentation](http://www.unhcr.org/registration-guidance/chapter5/documentation) (last accessed 8 July 2019).

115 *Ibid.*, 5.3.2.

116 UNHCR 'Quality Manual' No. DESS/PMCS/2014/002 [cms.emergency.unhcr.org](http://cms.emergency.unhcr.org) Further, "PMCS' QMS is established in compliance with the Rules and Regulations of the United Nations UNHCR and the following international standards; a) UNHCR Supply Management Manual; b) UNICEF Supply Manual, and c) The Vanguard Standards: A systems thinker's guide to interpretation and use of ISO 9000."

ment officials the same privileges. As in many such cases, an international standard was accepted by the nation-states as the most effective solution.

A single document that captures the bona fides of a refugee could act as a 'passport' to attest to the rights of refugees under the 1951 UN Refugee Convention, as well as the obligations of refugees to respect the laws of the host country. Such a 'passport' could list and attest to demographic information about the refugee holder; could list the professional credentials, certifications and skills held by the refugee; and could list family members and colleagues of the holder of the passport among other pieces of germane information.

## 9.2 *Enable the Refugees' Right to Support Themselves*

In many of today's refugee camps in Italy, Lebanon, on the Greek islands and elsewhere, refugees are given enough to get by. In return, nothing is expected except apathy and acquiescence. After World War I, refugees were recognized as citizens of the world and were accorded the right to be treated with dignity and respect. After World War II, refugees were allowed to organize themselves to help run their own camps under rules they helped promulgate. In the anarchical conditions after World War II, both UNRRA and then the UN IRO concluded that refugees should be allowed a certain amount of latitude in the governance of refugee encampments in partnership with the host country.

What is missing today are consensus governance solutions that include refugees themselves in the dialogue. Such governance solutions should include opportunities for recognition as world citizens, educational certification and advancement and small business entrepreneurship. Some small business opportunities do exist, on a de facto basis, in today's camps. Refugees have discovered that used cargo containers (called ISO boxes after the standard size of the containers set by ISO), serve very effectively as open-air restaurants, barber shops, fix-it shops, etc., as well as living spaces.<sup>117</sup>

A consensus process that includes civil society, local business as well as government officials and refugees could be created to develop a standards-based governance process (rules of the road) that can take over much of the responsibility for running the camps. Basic rules of civil behaviour, keeping the encampment clean and encouraging small business could be a first step in lowering current tensions between refugees and the citizens of the host country. In exchange, the current de facto privileges to run small businesses could be formalized – depending on the ability of refugees to successfully govern the encampment.

In the United States, many businesses and farms are dependent on migrant labour and/or H1B visas for workers. In Europe there is a strong antipathy to having refugees enter into the domestic workforce. And yet, businesses have difficulties finding the expertise they need for the jobs that need filling. Refugees want to earn money to support their families and find a constructive role in their new environment. Acknowledging the basic human need to be productive and

117 'Entrepreneurship Thrives in ISO box Containers', <https://medium.com/athenslivegr/in-a-refugee-camp-entrepreneurship-thrives-in-isobox-containers-115d6e9833e9> (last accessed 8 July 2019).

enabling this with trusted digital IDs and credentials would help mitigate a current 'wicked problem' of refugee governance.

### 9.3 *Restore or Replace Lost Credentials and Identification*

Using generic credentialing or certification programmes to prove the bona fides of refugees could help in discovering job opportunities outside of refugee camps that could help both the local economy and the family of the new worker. The Migration Policy Institute found that "nearly 2 million US college-educated immigrants were either working in low-skilled jobs or unemployed". This waste of resources comes at a cost of \$40 billion in unrealized earnings and the loss of \$10 billion in federal, state and local taxes.<sup>118</sup>

The post-World War II refugee communities developed rigorous generic tests that could be used in camp educational academies to teach refugees the skills needed to get on with their lives. The standards world has programmes that test the ability of potential workforce applicants as to what skills they hold.

Standards organizations such as ANSI have developed programmes on credentialing and certification that will test the skills and bona fides of potential employees. Many businesses have worked with ANSI to develop credentialing and certification procedures to screen potential employees. US government agencies also use such standard ANSI tests with military officers and non-commissioned officers to prepare them for jobs in the private sector.

### 9.4 *Take the Development of Refugee ID from Nation-States*

The quality of due diligence efforts by national officials varies widely, and what is accepted at one border may be unacceptable at another. A single standardized system accepted by all would remove much uncertainty from the system and allow refugees greater freedom to find opportunities for themselves and their families. Such a digital ID programme could be combined with blockchain technologies to create an asset-capturing and skills credentialing programme that would allow the refugee and family a path beyond the physical, mental and cultural barriers of the refugee encampment.

The creation of the Nansen Passport was perhaps the League of Nations' finest hour. Refugees were given standing by the document and were expected to be so treated by officials from the nation-states. The ability to create a digital identity (that they controlled) would be of tremendous benefit in giving refugees a sense of worth and belonging in a world not of their making.

### 9.5 *Coordinate Serious Standards-Setting Work*

All of the history and all of the current activity in the creation of IDs, particularly our contemporary experience with digital IDs, point to the need for serious standards-setting work. The work needs to be organized and endorsed by international non-state organizations with the ability to create standards that, like the Nansen Passport, can be voluntarily recognized across the world.

118 'The New Brain Gain: Raising Human Capital among Recent Immigrants to the United States', MPI, May 2017, Washington, DC.

# Managing Procedural Expectations in Small Claims ODR

Fabien Gélinas\*

## Abstract

*In this article, the author reflects on the appropriate place of traditional procedural guarantees in the resolution of consumer and small claims disputes using online tools. After examining the key aspects of procedural justice that constitute the right to a fair trial and analysing its effects on procedures designed for low-value disputes, the article argues for a flexible approach that takes procedural proportionality seriously.*

**Keywords:** fair trial, procedural justice, natural justice, waiver, small claims, consumer disputes, proportionality.

It would be difficult to overstate the importance of procedure in the governance of human affairs in general, and the administration of justice in particular. In the following pages, I aim to reflect on the appropriate place of traditional procedural guarantees in the resolution of consumer and small claims disputes using online tools.

## 1 The Importance of Procedure

From a high-level public policy and institutional design perspective, procedure is crucially important because it allows us to establish legitimacy and to stabilize expectations where disagreement persists over the substantive values underpinning society and the right construction of the norms through which those values are made legally operational. In the context of dispute resolution, it is broadly acknowledged that the quality of the process leading to an outcome is just as important as the substantive quality – often designated as accuracy, or truth – of that outcome. It is no wonder, then, that in the area of dispute resolution writ large – *i.e.* going beyond criminal matters into civil procedure, and beyond state courts into private arbitration – procedural expectations have found expression

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in the form of a fundamental right to a fair trial.<sup>1</sup> Often entrenched in human rights instruments, this right has now been placed, to some extent, beyond the reach of ordinary legislation and therefore depends largely on how the right is interpreted by courts of law.

Given the cross-border nature of a significant portion of e-commerce, it is helpful to take a global perspective on the right to a fair trial. In spite of significant differences in procedural traditions, a remarkable convergence of the requirements of a fair trial (or due process, or natural justice) can be observed across legal traditions. The *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* has provided an opportunity to observe this convergence by imposing broadly worded procedural requirements for the enforcement of awards in 157 jurisdictions.<sup>2</sup> More specifically, according to art V(1)(b) of the *New York Convention*, recognition and enforcement of a foreign arbitral award may be refused, at the request of the party against whom it is invoked, if the said party “was not given proper notice of the appointment of the arbitrator or of the

- 1 See the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Art. 14(1), (entered into force 23 March 1976) [ICCPR]: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.” For a commentary, see S. Joseph & M. Castan, *The International Covenant on Civil and Political Rights*, 3rd ed., Oxford, Oxford University Press, 2013, at 418 ff. See also *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5, Art. 6(1): “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” [ECHR]. For a commentary, see D. Harris et al., *Law of the European Convention on Human Rights*, 3rd ed., Oxford, Oxford University Press, 2014, 370 ff. See also *UNCITRAL Model Law on International Commercial Arbitration*, 11 December 1985, UN doc A/40/17, Art. 12 (independence and impartiality of the arbitral tribunal), Art. 18 (equal treatment of the parties and due process) and Art. 34(2)(ii) (annulment of the award for violation of due process) [Model Law]. For a commentary, see P. Binder, *International Commercial Arbitration and Conciliation in Uncitral Model Law Jurisdictions*, 3rd ed., London, Sweet & Maxwell, 2010, at 276 ff. (“This provision [art 18] was described ... as being the Magna Carta of arbitral procedure”).
- 2 *Convention on the Recognition and the Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38, 21 UST 2517 [New York Convention]. For the status of the Convention, see [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).



arbitration proceedings or was otherwise unable to present his case”.<sup>3</sup> Moreover, it is widely accepted that similar factual circumstances will allow a state court seized of an application for enforcement the power to refuse of its own motion the application on grounds of violation of public policy.<sup>4</sup> This includes cases of lack of independence and impartiality of the arbitrators.<sup>5</sup>

Scholarly works on these procedural requirements show that the core understanding of the right to a fair trial (or procedural due process) is universal.<sup>6</sup> The details of how far the right extends to various aspects of the trial and in different circumstances, however, remain unsettled. Thus, while the ‘impartiality and independence’ aspect of a fair trial is clear in its broad outlines, the determination of its precise scope in various domestic and international, public and private contexts remains elusive.<sup>7</sup> Similarly, while the equal right of the parties to be heard is easy to formulate as an abstract and universal principle, the answers to countless process issues thrown up by circumstances and innovation do not flow from the principle without the mediation of interpretation and normative construction. I will mention two areas relevant to consumer ODR where opinion is divided or the position unsettled.

There is an important divide between the common and civil law traditions that should be mentioned here. The divide focuses on the right of a party to hear and to answer all communications between the other party and the adjudicator (a judge or an arbitrator). The issue surfaces in cases where mediation is attempted by the person who will act as adjudicator in the course of a procedure leading to adjudication. Lawyers trained in the common law tend to insist that no adjudication can be consistent with procedural public policy if the adjudicator has held caucuses, that is, if separate communications or meetings between the adjudicator and the parties on either side have taken place as part of the mediation effort. To be sure, there is universal agreement that *ex parte* communications with an

- 3 For an overview, see H. Verbist, ‘Challenges on Grounds of Due Process Pursuant to Article V(1) (b) of the New York Convention’, in E. Gaillard & D. Di Pietro (Eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards*, London, Cameron, May 2008, p. 679.
- 4 Art. V(2)(b): “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: ... (b) the recognition and enforcement of the award would be contrary to the public policy of that country.” See B. Hanotiau & O. Caprasse, ‘Public Policy in International Commercial Arbitration’, in E. Gaillard & D. Di Pietro (Eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards*, London, Cameron, May 2008, atp. 819 ff.
- 5 *Ibid.* at p. 824. See also D. Otto & O. Elwan, ‘Article V(2)’, in H. Kronke, P. Nacimiento *et al.* (Eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Alphen aan den Rijn, Kluwer Law International, 2010, p. 345 at p. 370.
- 6 For an overview see N. Kuckes, ‘Civil Due Process, Criminal Due Process’, *Yale Law & Policy Review*, Vol. 25, No.1, 2006, p. 1 at 10 (“Within [the] civil model of procedural due process lie at least four distinct elements ... : participatory procedures (the affected party is present); an unbiased adjudicator (the decision-maker is a neutral nonparty); prior process (the hearing precedes the adverse action); and continuity (hearing rights attach at all stages)”).
- 7 See, generally, F. Gélinas, ‘The Dual Rationale of Judicial Independence’, in A. Marciano (Ed.), *Constitutional Mythologies*, New York, Springer, 2011, p. 146; F. Gélinas, ‘The Independence of International Arbitrators and Judges: Tampered with or Well-Tempered?’, *New York International Law Review*, Vol. 24, No. 1, 2011, pp. 1-48.

adjudicator are not to take place as a matter of general principle.<sup>8</sup> The difference lies in whether it is appropriate – and consistent with public policy – that such communications should take place with the knowledge and consent of the parties. Mounting pressures in favour of efficiency, as well as the growing influence of the Chinese med-arb practices, have combined to push in the direction of allowing combined processes involving caucuses as long as all parties have clearly consented.<sup>9</sup> In this respect, one sign of the growing international consensus is in the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. General Standard 4(d) states that<sup>10</sup>:

An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.

The standard makes clear that arbitrators can assist the parties in reaching a settlement in addition to the arbitrator's main function as adjudicator.<sup>11</sup> The reference to both conciliation and mediation suggests that caucuses are acceptable as long as they do not raise doubts in the adjudicator's mind about her own impartiality and the parties have given their agreement in writing.

Another respect in which the position remains somewhat unsettled is the right to a hearing. Most procedural instruments used internationally allow documents-only procedures but require that a hearing take place if one of the parties requests it. The difficult question here is the contractual limits that can be placed on the right to a hearing and the time from which such limits can validly operate. The question presents itself with respect to both oral pleadings and the hearing of

8 See, e.g. *Goldtron Ltd. v. Media Most B.V.*, No. 02.398 KG (Amsterdam District Court), *YB Comm Arb* XXVIII (2003) 814.

9 See K. Fan, 'The Risks of Apparent Bias When an Arbitrator Acts as a Mediator', *YB Private International Law*, Vol. 13, 2011, p. 535 at p. 540.

10 For a detailed analysis of the 2014 version of the *IBA Guidelines*, see N. Voser & A. Petti, 'The Revised IBA Guidelines on Conflict of Interest in International Arbitration', *ASA Bull.*, Vol. 33, No. 1, 2015, pp. 6-36.

11 For an overview on the existing understandings of the adjudicative functions of arbitrators, see G. Marchisio, *The Notion of Award in International Commercial Arbitration*, Alphen aan den Rijn: Kluwer Law International, 2017, pp. 13-24.

fact and expert witnesses. Again here, the tendency among lawyers trained in the common law procedural tradition is to insist on an absolute right to put questions orally to any fact or expert witness who has submitted a witness statement or expert report. This position has been embraced to an extent in international arbitration, where it is commonly held that the failure of witnesses to appear at a hearing without a valid reason can lead to their written evidence being discarded by the arbitrators.<sup>12</sup> The extent to which the right to cross-examine fact and expert witnesses can be waived and if so when, however, remains unclear. The recently adopted expedited procedure of the 2017 ICC Arbitration Rules – a set of rules which is normally considered as incorporated into the agreement of the parties to the arbitration<sup>13</sup> – appears to empower the arbitral tribunal to refuse a request for a hearing. Article 3(5) of the Expedited Procedure states that “The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts.”<sup>14</sup> The willingness to invoke such a provision in order to refuse the cross-examination of fact witnesses or experts who have filed written evidence that the tribunal intends to consider, however, remains to be seen and appears uncertain. In other words, having an eye on the reviewing courts – at the seat of arbitration and at the likely places of enforcement – and their possible approach to this procedural point, arbitrators are likely to err on the side of caution, and some of them may well consider that Article 3(5), or similar provisions, cannot operate as an effective advance waiver of the right to cross-examine a witness whose written statement or report will be considered. This is an example of the kind of situation where favouring procedural caution can work against the effectiveness of an expedited procedure designed, in the interest of or with the agreement of the parties, with proportionality in mind.

Some years ago, I had occasion to raise some doubts about the cautious approach to waiver in the context of the right to an impartial and independent tribunal.<sup>15</sup> The point was exploratory but bears repeating here in respect of other aspects of the umbrella right to a fair trial. The point is that waiver and consent cannot be analysed in the same way in relation to procedural rights as they can be in relation to substantive rights. That is because civil adjudication relies entirely on the litigants to bring forth and to define the issues to be decided. Because of the *‘principe dispositif’*, or principle of ‘party initiative’, adjudication remains fun-

12 See Art. 4(7) of the 2010 IBA Rules on the Taking of Evidence: “If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.”

13 For an overview, see J. Ricardo Feris, ‘The 2017 ICC Rules of Arbitration and the New ICC Expedited Procedure Provisions: A View from Inside the Institution’, *ICC Bull.*, Vol. 1, 2017, p. 63; G. Marchisio, ‘Recent Solutions to Old Problems: A Look at the Expedited Procedure under the Newly Revised ICC Rules of Arbitration’, *ICC Bull.*, Vol. 1, 2017, p. 176.

14 See 2017 ICC Rules, Appendix VI, Art. 3(5).

15 Gélinas, 2011, at 44-47.

damentally tied to party autonomy.<sup>16</sup> No matter how fundamental or mandatory a substantive right may be, there is never any question of forcing the creditor of that right to pursue it in the adjudicative mode. If creditors of substantive rights have the agency to decide not to pursue them at all in the adjudicative mode, should their right to pursue them under procedural terms of their choosing not be recognized? The full logical implications of this principle of party initiative do not seem to have been fully worked out in respect of how we treat waivers in matters of procedure. Working these out may well open up some of the conceptual space we need to adapt dispute resolution processes to small claims and consumer disputes.

From the foregoing, one can see that key procedural guarantees in contemporary legal thinking have acquired such a heightened status that, in many settings, they are placed beyond the reach of legislative power and the exercise of party autonomy. In my view, this status may be too elevated, at least in settings where parties are in a comparable bargaining position. If traditional procedural rights are sometimes considered sufficiently important to trump party autonomy even in those settings, how can one hope to manage, in the consumer context, the high expectations they create?

## 2 Procedural Expectations in the Consumer Context

Considerable efforts have been invested in finding ways to resolve the cross-border consumer dispute conundrum. Private-sector innovations have gone to great lengths to introduce non-binding conflict management processes using charge-back protocols, insurance-model schemes implementing no-questions-asked return policies, and online structured negotiation and mediation tools including blind bidding.<sup>17</sup> However, in many cases, large retailers have set up their online retail operations in national silos to avoid the regulatory difficulties raised by cross-border commerce with consumers, thus depriving consumers and the world economy of the competition benefits of global e-commerce.

Among the most significant efforts deployed in the public realm have been those of UNCITRAL, which for many years supported a large working group with

16 See 2004 ALI/UNIDROIT *Principles of Transnational Civil Procedure*, Principle n. 10(5) (codifying the right of a party to modify or voluntarily terminate the procedural proceeding): “**The parties should have a right to voluntary termination or modification of the proceeding or any part of it, by withdrawal, admission, or settlement. A party should not be permitted unilaterally to terminate or modify the action when prejudice to another party would result.**” See also H.P. Glenn, ‘The ALI/UNIDROIT Principles of Transnational Civil Procedure as Global Standards for Adjudication?’, *Uniform Law Review*, Vol. 9, 2004, p. 829 at p. 830 (“[P]arty control or disposition (the “dispositive” principle) of the nature and object of the dispute are common to [the romano-canonical and common law procedural traditions], indicating their fundamentally western and liberal character”).

17 See, e.g. J. Hörnle, *Cross-Border Internet Dispute Resolution*, Cambridge, Cambridge University Press, 2009, p. 75 ff; A.J. Schmitz & C. Rule, ‘The New Handshake: Where We Are Now’, *International Journal of Online Dispute Resolution*, 2016, p. 84.

broad-ranging informal stakeholder representation.<sup>18</sup> For many reasons that cannot be explored here, these efforts have come to very little. Central among the reasons for this disappointing outcome is a seemingly irreconcilable difference in views about the role of consent and party autonomy in the design of the relevant dispute resolution model.<sup>19</sup> Is a consumer's consent sufficiently informed to effect a valid waiver of important procedural rights? If so, when? And, can out-of-court procedures ever be binding on the consumer? National laws provide different answers to these questions, making international consensus extremely difficult.

To observers from countries outside the European Union and the United States of America, it may appear as though a middle ground position would be ideal. Treating consumer transactions, for the purpose of arbitration, as though they were freely negotiated contracts between parties of comparable bargaining power seems unreasonable to most people outside the USA. Treating consumers as though they have no agency whatsoever when it comes to procedural rights also seems unreasonable to most people. There is now significant movement at the state level in the USA towards a heightened degree of protection for consum-

18 I am referring to UNCITRAL's Working Group n. III (Online Dispute Resolution). See *Report of the United Nations Commission on International Trade Law*, Forty-third Session, 21 June-9 July 2010, A/65/17 at para. 257 ("After discussion, the Commission agreed that a working group should be established to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions, including business-to-business and business-to-consumer transactions"). See also United Nations Commission on International Trade Law, Forty-third session New York, 21 June-9 July 2010, *Possible future work on online dispute resolution in cross-border electronic commerce transactions* (Note by the Secretariat), A/CN.9/706 (detailing the reasons behind the creation of a separate Working Group).

19 See UNCITRAL, Working Group n. III, *Draft Outcome Document Reflecting Elements and Principles of an ODR Process* (22 December 2015, A /CN.9/WG.III/WP.140). The instrument highlights these difficulties. In this respect, section III ("Stages of an ODR Process") introduces the idea of an escalation process, although avoiding any reference to a precise dispute resolution mechanism for each stage, particularly when preliminary negotiation/mediation has failed:

"18. The process of an online dispute resolution proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.

19. The ODR process may commence when a claimant submits a notice of claim through the ODR platform to the ODR administrator. The ODR administrator informs the respondent of the existence of the claim and the claimant of the response. The first stage of proceedings – a technology-enabled negotiation – commences, in which the claimant and respondent negotiate directly with one another through the ODR platform.

20. If that negotiation process fails (i.e. does not result in a settlement of the claim), the process may move to a second, 'facilitated settlement' stage ... In that stage of proceedings, the ODR administrator appoints a *neutral* ... who communicates with the parties in an attempt to reach a settlement.

21. If facilitated settlement fails, a third and final stage of proceedings might commence. In that stage of proceeding, the ODR administrator may remind the parties, or set out for the parties, possible process options to choose." [references omitted]

ers and other groups who transact in a weak bargaining position.<sup>20</sup> Although the movement at the state level looks strong and in some respects promising, the various initiatives pushing in the same direction at the federal level are not likely to

- 20 Most recently, the Supreme Court of California, in *McGill v. Citibank*, 393 P3d 85 (Cal Sup Ct 2017), held that a provision of a pre-dispute arbitration agreement waiving a consumer's statutory right to seek public injunctive relief under California's Consumers Legal Remedies Act, Unfair Competition Law or False Advertising Law violates California public policy and, as such, is unenforceable, and that the California rule is not pre-empted by the Federal Arbitration Act (FAA). Another example concerns the approach adopted by state Attorneys General to the rule that was introduced by the Consumer Financial Protection Bureau (CFBP; the US federal agency in charge of enforcing federal consumer financial laws and protecting consumers in the financial marketplace). The CFPB rule (82 Fed. Reg. 33428, § 1040.4.(a)(1) (10 July 2017)) would have imposed significant limitations on arbitration had it not been nullified by Congress in October 2017. However, prior to its nullification, the rule was well received by state Attorneys General. Nineteen state Attorneys General, including the Attorneys General of New York, California, Massachusetts, Illinois and Delaware, jointly sent a letter to the CFPB, supporting the rule and even taking it a step further by encouraging the CFPB to consider regulations as to "total prohibition of mandatory, predispute arbitration clauses in consumer financial contracts" ([www.mass.gov/ago/docs/consumer/cfbp-multistate-letter.pdf](http://www.mass.gov/ago/docs/consumer/cfbp-multistate-letter.pdf)). In addition, there are several cases where federal Courts of Appeals applying state laws distinguished the matters before them from the US Supreme Court's decision in *AT&T Mobility v. Concepcion*, 131 S Ct 1740 (2011), which held that the arbitration agreement waiving the possibility of any class arbitration is enforceable as the FAA pre-empts states' judicial rule regarding the unconscionability of such waivers in consumer contracts – so as to avoid the pre-emption of the state law by the FAA. See, e.g. *Richmond Health Facilities v. Nichols*, 811 F3d 192 (6th Cir 2016) (distinguishing the case from *Concepcion* and holding that under Kentucky law the executrix of a decedent's estate is not a party to the arbitration agreement between the nursing facility and the decedent and, as such, the executrix may not be compelled to arbitrate a wrongful death claim against the facility operators) and *Noohi v. Toll Bros*, 708 F3d 599 (4th Cir 2013) (distinguishing the case from *Concepcion* and holding that under Maryland law the arbitration clause lacked mutuality of consideration and was thus unenforceable).



prosper under the current administration.<sup>21</sup> The European Union has also been working hard to find ways of making cross-border consumer dispute resolution a

- 21 It should be noted that the US Supreme Court over the past years has favoured strict enforcement of arbitration agreements. In this regard, three of its decisions particularly stand out: *Allied-Bruce Terminex v. Dobson*, 513 US 265 (1995), *AT&T Mobility v. Concepcion*, 131 S Ct 1740 (2011), and *American Exp Co v. Italian Colors Rest*, 133 S Ct 2304 (2013). The three decisions, when read together, provide that generally the Federal Arbitration Act (FAA) pre-empts state laws prohibiting arbitration of consumer disputes even if the arbitration clause has waived the consumers' right to launch/join any class action or class arbitration and also even if the costs of customers' individually arbitrating a federal statutory claim exceed the potential recovery. However, during the presidency of Mr. Obama, there was a considerable momentum in federal agencies to adopt pro-consumer regulations, which under the new administration were either nullified, revised or not finalized. There are three notable examples in this regard. The first example concerns the Consumer Financial Protection Bureau (CFPB). The CFPB was tasked by the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), § 1028, with submitting a report to Congress on "the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services", and was also authorized to adopt necessary regulations. The CFPB submitted the report to Congress in March 2015 ([http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf)) and issued its final rule in July 2017 prohibiting providers of consumer financial products/services from relying on pre-dispute arbitration agreements to stop consumers from launching/joining class actions in courts (Arbitration Agreements, 82 Fed. Reg. 33428, § 1040.4.(a)(1) (July 10, 2017), [www.gpo.gov/fdsys/pkg/FR-2017-07-19/pdf/2017-14225.pdf](http://www.gpo.gov/fdsys/pkg/FR-2017-07-19/pdf/2017-14225.pdf)). The rules were believed to result in removing arbitration clauses altogether from the targeted financial agreements because, as put by a commentator, "without the 'carrot' of a class arbitration waiver, a company has no incentive to offer, much less to cover the costs of, individual consumer arbitration." (R.L. Lampley, 'The CFPB Proposed Arbitration Ban, the Rule, the Data, and Some Considerations for Change', *BLT*, May 2017, [www.americanbar.org/publications/blt/2017/05/07\\_lampley.html](http://www.americanbar.org/publications/blt/2017/05/07_lampley.html)). However, the CFPB rule was nullified by Congress. Soon after the CFPB issued its rule in July 2017, the Republican-controlled House of Representatives in Congress exercised its authority under the Congressional Review Act to pass a resolution nullifying the CFPB rule, which passed Senate in October 2017 (HRJ Res. 111, 115th Cong (2017), [www.congress.gov/115/bills/hjres/111/BILLS-115hjres111rds.pdf](http://www.congress.gov/115/bills/hjres/111/BILLS-115hjres111rds.pdf); and website of Congress [www.congress.gov/bill/115th-congress/house-joint-resolution/111/actions](http://www.congress.gov/bill/115th-congress/house-joint-resolution/111/actions)). The second rule that suffered the same fate concerns the Federal Communication Commission (FCC), which in November 2016 published its rule imposing significant restrictions on the use of consumers' information by Internet service providers (Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. 87274 (2016), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db1103/FCC-16-148A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1103/FCC-16-148A1.pdf)). In the rule, the FCC had asserted its 'serious concerns' about pre-dispute arbitration agreements and its plan to address the matter in 2017. However, in January 2017, Congress nullified the rule altogether (SJ Res. 34, 115th Cong (2017), [www.congress.gov/115/bills/sjres/34/BILLS-115sjres34enr.pdf](http://www.congress.gov/115/bills/sjres/34/BILLS-115sjres34enr.pdf)). The third example concerns the Centers for Medicare & Medicaid Services, which is part of the US Department of Health and Human Services. It published its final rule in October 2016 prohibiting the use of pre-dispute arbitration clauses in long-term care facilities agreements (Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, § 483.70, 81 Fed. Reg. 68688 (2016), [www.gpo.gov/fdsys/pkg/FR-2016-10-04/pdf/2016-23503.pdf](http://www.gpo.gov/fdsys/pkg/FR-2016-10-04/pdf/2016-23503.pdf)). The rule was challenged in court by the American Health Care Association and a group of nursing homes, following which the rule was revised and the prohibition against pre-dispute arbitration clauses was lifted in June 2017 (CMS press release, *CMS Issues Proposed Revision Requirements for Long-Term Care Facilities' Arbitration Agreements*, 5 June 2017, [www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-06-05.html#](http://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-06-05.html#)).



practicable avenue, at least within the EU.<sup>22</sup> In this area, legislative initiatives have to contend with the evolving case law under Article 6 of the European Convention on Human Rights. Here, traditional conceptions of the trial are set against innovative and practical ways of dealing with a new problem.

I will mention only one initiative demonstrating both the tension between the traditional conception of the right to a fair trial and the alternative models put forth to make cross-border commerce, including e-commerce, viable for small transactions. This initiative is the European Small Claims procedure.<sup>23</sup> The procedure establishes that the parties are by default to be heard in writing.<sup>24</sup> An oral hearing is to be held only if it is considered, by the adjudicator, “to be necessary or if a party so requests”.<sup>25</sup> This is not inconsistent with a standard position seen in many instruments, including some international arbitration instruments. The position recognizes that by default there will be a hearing, but the adjudicator is given discretion and will not hold a hearing if it is not useful or necessary, unless a party requests it.<sup>26</sup> However, the relevant regulation goes further, and this is where I see progress made from a rigid traditional position. The regulation provides that the party’s request for an oral hearing can be refused if it is “obviously not necessary for the fair conduct of the proceedings”. This is a small step. But it is indicative, in my view, of the willingness at the European level to advance “practicable” interpretations of the provisions guaranteeing the right to a fair trial. It is this kind of value-balancing exercise that is at the core of the work that is needed to make cross-border consumer e-commerce work smoothly.

Looking at the cross-border consumer dispute conundrum holistically, one must accept the reality that the bulk of consumer disputes will continue to be

22 See, e.g. Reg. (EU) No. 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Reg. (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). Among other things, this regulation has introduced the European ODR Platform: <https://ec.europa.eu/consumers/odr/main/> (last accessed 22 June 2017).

23 **Reg. (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure**, OJ L 199, 31 July 2007, pp. 1-22. See Art. 1: “This Regulation establishes a European procedure for small claims ... intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs. The European Small Claims Procedure shall be available to litigants as an alternative to the procedures existing under the laws of the Member States ... [the regulation] also eliminates the intermediate proceedings necessary to enable recognition and enforcement, in other Member States, of judgments given in one Member State in the European Small Claims Procedure.” For an overview, see X.E. Kramer, ‘A Major Step in the Harmonization of Procedural Law in Europe: The European Small Claims Procedure’, in A.W. Jongbloed (Ed.), *The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports*, Antwerpen, Intersentia, 2008, pp. 253-283.

24 Art. 5(1) (Conduct of the Procedure), **Reg. (EC) No. 861/2007**: “The European Small Claims Procedure shall be a written procedure. The court or tribunal shall hold an oral hearing if it considers this to be necessary or if a party so requests. The court or tribunal may refuse such a request if it considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the proceedings. The reasons for refusal shall be given in writing. The refusal may not be contested separately.”

25 *Ibid.*

26 See, e.g. Art. 3(5), Appendix VI, 2017 *ICC Arbitration Rules*. Cf. Art. 28 of the 2010 *UNCITRAL Arbitration Rules* (the provision indirectly confirms that the tribunal has discretion as to whether hearings should be held), and Sec. 34(2)(h) of the 1996 *English Arbitration Act*.

resolved under a ‘consensus’ model of dispute resolution, that is, through negotiation efforts or mediation processes that steer clear of the adjudicative mode of engagement and do not rely directly on the authority model of adjudication and the procedural requirements that come with it. There is certainly good reason to foster the development of such processes, particularly where one is able to leverage the power of technology to help structure the engagement between disputing parties and to guide them to a resolution without requiring their physical presence. The point I would like to make here very briefly is that, although avenues based on consensus can usefully complement the adjudicative mode of dispute resolution, they cannot replace it entirely.

The consensus model of dispute resolution cannot entirely replace the authority model, because the latter is partly parasitic on the former. While negotiation and mediation processes have considerable flexibility and potential because they are not limited to the vindication of legal rights, the very existence of those rights and their possible vindication in the adjudicative mode are the starting point of, and provide the necessary backdrop to, any consensus processes that lead to acceptable outcomes. It is too often forgotten that consensus without law and its authoritative enforcement is nothing but power. Consumer disputes have as their predicate a power imbalance that is ultimately for the law and its vindication through adjudication to redress. In other words, consensus-based approaches can work properly only if the law and its vindication is effective. “To the extent that the power relations between the parties or stakeholders depend on the legal norms that will govern the resolution of the conflict in respect of both venue and merits, consensus-based approaches can be said to operate under these norms, that is, in the shadow of law.”<sup>27</sup> That is the reason why those approaches, even if they can admittedly do wonders in some sectors (e.g. blind bidding for insurance claims), should not be touted as a policy alternative to the adjudicative mode of resolution and the vindication of legally-based expectations it can provide, or as a way to avoid facing the policy choices that are needed to manage procedural expectations.

### 3 Conclusion

In addition to the crucial role they play in framing the parties’ substantive expectations in consensus-based processes, adjudicative processes naturally constitute the default position for the resolution of all disputes. Those cases in which an acceptable resolution through negotiation or mediation cannot be found will always need a practicable fallback mechanism, and that mechanism must leave consumers with the sense that justice can speak the truth to economic power. That sense depends not necessarily, in my view, on the religious observance of

27 F. Gélinas, ‘Conflict Resolution in Sustainability Disputes: Authority and Consensus in the Shadow of Law’, in S.-L. Hsu & P. Molinari (Eds.), *Sustainable Development and the Law: People, Environment, Culture*, Montreal, Canadian Institute for the Administration of Justice, 2008, p. 21 at p. 26.

Fabien Gélinas

the most exacting procedural standards, but rather, as with so many things, on a proper regard for proportionality.

# Mobile Online Dispute Resolution Tools' Potential Applications for Government Offices

Stephanie Gustin & Norman Dolan\*

## Abstract

*Online communication practices have become intrinsic to government work environments. Understanding the impact of these practices, whether they be general computer mediated communication (CMC) or specifically online dispute resolution (ODR) processes, is an essential step in supporting respectful and healthy work environments. ODR literature focuses almost exclusively on e-commerce, leaving large gaps in the body of knowledge as ODR applications diversify. Available ODR tools, which simply transpose traditional alternative dispute resolution (ADR) processes online through the use of office videoconferencing systems, are not mobile and do not utilize the full capabilities of the existing technology. This article explores the potential impacts mobile ODR (MODR) tools could have on the dispute interventions and prevention initiatives in government office settings. The study used an exploratory model to establish an understanding of the experiences and needs of Canadian and Australian government employees. Findings demonstrate an interest in the introduction of education-oriented MODR tools as supplementary support with the purposes of knowledge retention and further skill development following dispute prevention training. Findings suggest that workplace attitudes towards online communication and ODR have a significant impact on the extent to which individuals successfully develop and maintain relationships either fully or partially through the use of CMC.*

**Keywords:** mobile online dispute resolution, MODR, ODR, computer mediated communication, dispute prevention, workplace conflict.

## 1 Introduction

Nearly all jobs now involve some form of digital technology use, and it is normal for work-related relationships to be developed and maintained using digital tools.<sup>1</sup> Digital technology use can simply mean that individuals communicate with each other using email, smartphones, social media platforms or other platforms designed for and within a specific organization. The field of dispute resolution has evolved alongside this use of digital technology. Online Dispute Resolu-

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1 D. Lupton, *Digital Sociology*, New York, Routledge, 2015, p. 1-2.

tion (ODR) is a relatively new and quickly evolving subcategory of dispute resolution. Research conducted to date is largely limited to ODR applications within e-commerce settings; however, a rapidly growing variety of scenarios now use ODR tools.

The data for this article was collected in the process of evaluating the potential impact of mobile ODR (MODR) tools on the dispute resolutions interventions provided to government clients. In order to determine how MODR tools could enhance the dispute intervention services currently provided to government clients, the research first explored several secondary questions:

- How receptive are government workers to the use of MODR tools?
- How might ODR tools impact the relationship building aspects of dispute resolution?
- What ODR tools currently on the market might address the needs of government workers?

Participants in this study had taken part in training provided by a private company whose services targeted conflict prevention and repairing damaged relationships to promote healthy and safe working environments. Interviews were conducted with clients from municipal and federal government offices in Canada and municipal and state government offices in Australia. This selection reflected the primary clientele of the company, but the findings of the study are potentially applicable to other recipients of dispute prevention and resolution training.

ODR is becoming increasingly relevant to workplace dispute and conflict prevention services as technological abilities rapidly advance and are applied in increasingly varied ways; however, academic research has struggled to keep pace with the realities of the field. Dispute resolution providers need to understand how ODR tools might impact the services they provide and how ODR could be applied to better meet the needs of their clients. This knowledge is necessary in order to provide their clients with the best services possible and to maintain a competitive edge in the delivery of dispute prevention and resolution services.

The development of ODR has generally been broken down into four phases.<sup>2</sup> ODR is intrinsically connected to the Internet, and these phases have been heavily influenced by its evolving capabilities and applications.<sup>3</sup> Mania described four phases in the development of ODR practice. The first phase, from 1990 to 1996, was a test period in which amateur applications of technology were applied to traditional dispute resolution practices. ODR application was limited to disputes generated in online interactions. Commercial ODR services were introduced in the second phase, from 1997 to 1998. During the third phase, from 1999 to 2000, companies began introducing electronic DR tools, and ODR became a viable business. The fourth and ongoing phase has seen the introduction of ODR to courts,

2 K. Mania, 'Online Dispute Resolution: The Future of Justice', *International Comparative Jurisprudence*, Vol. 1, No. 1, 2015, pp. 76-86; E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass, 2001.

3 N. Ebner & J. Zeleznikow, 'No Sheriff in Town: Governance for Online Dispute Resolution', *Negotiation Journal*, Vol. 32, No. 4, 2016, p. 298.

administrative authorities and governments, as well as its continued use within the online community.<sup>4</sup> This final phase recognizes the potential benefits of applying ODR to both offline and online-generated disputes.

There are two generations of ODR systems that are distinguished by their application of technology to the dispute resolution process. First generation ODR systems use technology to support a process in which human disputants remain the central generators of solutions. The second generation uses technological tools for idea generation, planning and decision-making.<sup>5</sup> Essentially, first generation ODR systems treat technology as a supportive tool, while in second generation systems it has been integrated into the analysis and resolution process.

ODR products are rapidly becoming commonplace tools in the resolution of disputes and conflicts, regardless of whether they were generated online or offline. ODR tools have recently been introduced by the provincial governments of British Columbia and Ontario to aid in the resolution of select civil disputes.<sup>6</sup> Governments around the world, including the European Union, have created legislation promoting the use of ODR tools, where ODR is applied to jurisdictional issues that have arisen out of cross-border uses of Internet technologies.<sup>7</sup>

As the use of online communication tools increases, it is understandable that there is concern about how they might affect human interactions. Trust-building exchanges that used to occur in person are now occurring entirely in cyberspace. In order to assess what kinds of MODR tools would be most useful to support the work done by those who provide dispute prevention and resolution services, it is necessary to understand the antecedents to trust that are inherent in online communication methods.

The application of ODR tools to disputes generated in online interactions has become well established through online vendors, such as eBay's platform, which, as of 2016, handles approximately 60 million cases a year.<sup>8</sup> Although research on the relationship between human interactions and online communication methods is limited, that which explores the development and maintenance of trust between parties who communicate, either entirely or partially, through online tools can be applied to the development of trust in MODR. Some research in this

4 Mania, 2015, p. 77.

5 D. Carneiro *et al.*, 'Online Dispute Resolution: An Artificial Intelligence Perspective', *Artificial Intelligence Review*, Vol. 41, No. 2, 2014, pp. 214-215.

6 A. Jun, 'Free Webinar Training: Strata Property Disputes & The Civil Resolution Tribunal', [web blog], August 2016, <http://blog.clicklaw.bc.ca/201/08/25/free-webinar-training-strata-property-disputes-the-civil-resolution-tribunal/> (last accessed 14 April 2017); I. Harvey, *Inching Towards the Digital Age – Legal Report: ADR*, [website], 2016, [www.canadianlawyermag.com/6104/Inching-towards-the-digital-age.html](http://www.canadianlawyermag.com/6104/Inching-towards-the-digital-age.html) (last accessed 26 February 2017); M. Erdle, *Ontario Joins Wider Move Toward Online Dispute Resolution to Ease Court Burdens*, [website], 2015, [www.slaw.ca/2015/03/25/ontario-joins-wider-move-toward-online-dispute-resolution-to-ease-court-burdens/](http://www.slaw.ca/2015/03/25/ontario-joins-wider-move-toward-online-dispute-resolution-to-ease-court-burdens/) (last accessed 19 February 2017).

7 D. Clifford & Y. Van Der Syde, 'Online Dispute Resolution: Settling Data Protection Disputes in a Digital World of Customers', *Computer Law & Security Review*, vol. 32, no. 2., 2016, <https://doi.org/10.1016/j.clsr.2015.12.014> (last accessed 28 May 2017).

8 Ebner & Zeleznikow, 2016, p. 319.

field is limited to the development of brand loyalty.<sup>9</sup> Other studies have examined the broader relationship between ODR and trust, dialogue generation and relationship maintenance.<sup>10</sup>

In order to understand how ODR tools might influence social factors of conflict and disputes, this article used an exploratory research design to generate qualitative data through interviews with individuals who participated in training provided by a single dispute resolution service provider. Data collected through interviews was analysed using a comparative thematic analysis model that supported the comparison of different interview responses to specific topics, while also allowing a holistic overview of the data set.<sup>11</sup> Each interview was coded immediately following transcription and before subsequent interviews. Codes were constantly compared with other codes or categories.

The results of this study will be most pertinent to government offices. However, some of the findings of the study have potential applications for non-government offices and to individuals who have not received dispute resolution or prevention interventions. There were a variety of office environments present within the participant pool, and interviews largely addressed issues and experiences likely to occur in most office workplaces.

## 2 Background

The field of ODR was first recognized as a practice area by the International Institute for Conflict Prevention and Resolution in 2012. While still in its infancy, disagreements about topics such as what should be included within the scope of ODR in general and what counts as computer mediated communication (CMC) persist.<sup>12</sup> Owing to the ongoing evolution of computer technologies and the continuously changing ways in which we conceptualize and apply these tools to dispute resolution, disagreement about these and other topics is unlikely to dissipate entirely.

An online dispute resolution process will not be something that appears fully grown on a single date but rather something that evolves; not only in the

- 9 A. Baranov & A. Baranov, 'Building Online Customer Relationships', *Bulletin of the Transylvania University of Brasov. Series V: Economic Sciences*, Vol. 5, No. 1, 2012, p. 15.
- 10 C. Rule & L. Friedberg, 'The Appropriate Role of Dispute Resolution in Building Trust Online', *Artificial Intelligence and Law*, Vol. 13, No. 2, 2005, p. 184; W. Shin, A. Pang & H. Kim, 'Building Relationships through Integrated Online Media: Global Organizations' Use of Brand Web Sites, Facebook, and Twitter', *Journal of Business and Technical Communication*, Vol. 29, No. 2, 2015, p. 184, <http://doi.org/10.1177/1050651914560569> (last accessed 31 May 2017).
- 11 U. Flick, *Introducing Research Methodology*, Los Angeles, Sage, 2015, pp. 184-185.
- 12 B. Davis & P. Mason, 'Locating Presence and Positions in Online Focus Group Text with Stance-Shift Analysis', in S. Kelsey & K. St. Amant (Eds.), *Handbook of Research on Computer Mediated Communication*, Hershey, PA, IGA Global, 2008, p. 365; Z. Cemalcilar, 'Communicating Electronically When Too Far Away to Visit', in S. Kelsey & K. St. Amant (Eds.), *Handbook of Research on Computer Mediated Communication*, Hershey, PA, IGA Global, p. 375; Ebner & Zeleznikow, 2016, p. 298.



capabilities that are built into it, not only in our use of it, but in how we think about it.<sup>13</sup>

In their book *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (2001), Katsh and Rifken outline three fundamental building blocks, namely convenience, trust and expertise that are required in any successful ODR system. They argue that there is no objective way to measure these factors that typically influence one another. This means that strengthening one building block may weaken another.<sup>14</sup> For example, if relying on an extensive amount of expert knowledge is required, the system may become more difficult for the average user to navigate. Such a tool would trade convenience for expertise. The authors contend that trust is often underestimated, but, owing to inherent difficulties with online identity verification, they consider it to be an uncontrollable factor.<sup>15</sup>

Following the publication of the book, readily available video tools and pervasive practices of online discussion and communication have greatly mitigated this last concern. As a result, attitudes towards CMC have evolved to the point where trust is no longer uncontrollable. The role of trust and methods of influencing it are discussed later in this article.

Excluding the sources described earlier, most of the limited ODR literature is written from the perspective of organization-customer relations, with a strong focus on the establishment of customer loyalty.<sup>16</sup> No literature was found that explicitly addressed the topic of relationship building between individuals in ODR scenarios. However, considering the relationship cultivation strategies present in the literature, many of the insights into online organization-customer relationships should be transferable to interpersonal relationship building.

Cemalcilar, who strongly supports CMC, notes that there are mixed attitudes towards its potential impact on social interactions.<sup>17</sup> From one perspective, online communication blocks the reception of social and contextual cues, meaning that it is harder to establish and maintain relationships. From another perspective it is supplemental to social interactions, providing new options for communicating over great distances.

CMC is now a ubiquitous method of maintaining relationships, as demonstrated by the fact that interpersonal communication is a principal reason for the use of home computers. However, types of computer usage are linked primarily to generational factors, with younger users being much more likely to communicate extensively online than older generations.<sup>18</sup> This information indicates two things. First, CMC can be a powerful tool for relationship building through ODR/MODR. Second, differences in attitudes and comfort of use must be considered, especially if two parties' approaches to online communication differ. Attitudes and comfort levels are different from computer illiteracy. They do not inhibit

13 Katsh & Rifkin, 2001, p. 11.

14 *Ibid.*, pp. 75-76.

15 *Ibid.*, p. 85.

16 Baranov & Baranov, 2012, p. 15; Shin *et al.*, 2015, p. 188.

17 Cemalcilar, 2016, p. 366.

18 *Ibid.*, pp. 365-366.

communication itself but may impact the information individuals are willing to share. These factors can also impact the way parties view relationships developed online as opposed to in person.

The literature indicates that despite high levels of online communication, ODR is underutilizing many forms of CMC. Online media provide great opportunities for two-way communication and relationship building, but organizations tend to underutilize them. It is more common to establish websites as a tool for information dissemination than for generating discussion.<sup>19</sup> However, there has been a shift towards more interactive websites such as those used by Facebook and Twitter that have been designed specifically for two-way communication.

Web 2.0 or the 'social web' refers to the prevalent social media sites and social uses of the Internet.<sup>20</sup> Although research on this topic is minimal, there appears to be a correlation between levels of use and the importance of social media as a communication tool. The potential impacts of using or ignoring social media opportunities intensify as more people engage through social media platforms.<sup>21</sup> Despite the adoption of social media, organizations tend to use it in much the same way they use websites, as a means of one-way communication.<sup>22</sup> These sites are not applying interactive components to aid in relationship development.

The types of tools used for online communication impact how messages are received. Video, text and images all have their own strengths.<sup>23</sup> Video can simulate face-to-face interactions and allow body language to play a role in discussions. Text is useful for explaining complex ideas and can be used synchronously or asynchronously. Synchronous text communication enables real-time conversations, while asynchronous allows time for parties to think carefully about their responses. Images can help show patterns and changes in the discussions over the course of time.<sup>24</sup>

The most effective combination of tools for an ODR system will depend on factors such as the context in which the system is used, the knowledge base of the users and the ideal desired outcome. Consider the three building blocks of convenience, trust and expertise outlined earlier. Systems with a focus on convenience could rely on images, while video and text could be more beneficial to transmit complex ideas (expertise). Videos of an expert or other significant individual could also be used to aid in the development of trust.

Increasingly widespread access to the Internet provides individuals with access to CMC tools from nearly anywhere and at any time. An International Telecommunication Union Report (2013) stated that nearly 100% of the global population now has access to a mobile phone signal and that the quality of accessible

19 Shin *et al.*, 2015, p. 190.

20 Lupton, 2015, p. 9.

21 Shin *et al.*, 2015, p. 191.

22 *Ibid.*, pp. 184-185; K. Koehler, 'Dialogue and Relationship Building in Online Financial Communications', *International Journal of Strategic Communications*, Vol. 8, No. 3, 2014, p. 191, <http://dx.doi.org/10.1080/1552118X.2014.905477> (last accessed 10 June 2017).

23 Katsh & Rifkin, 2001, p. 42.

24 *Ibid.*, p. 42.

signals continues to rise.<sup>25</sup> Advances in affordable high-speed Internet has allowed for quality video connections for a number of years.<sup>26</sup> It is conceivable that video quality will continue to improve as future technological development increases both the signal speed and the number of available devices. Despite these developments, most online mediation relies on real-time text-based communication.<sup>27</sup> This reflects the general consensus that ODR is not fully utilizing the available CMC.

### 2.1 *Establishing and Maintaining Trust Online*

CMC tools have the potential to provide innumerable combinations of audio, visual and textual methods of communication. Combined with the range of attitudes and comfort levels experienced by users, this creates a highly complex environment with almost unlimited outcomes. Trust in online interactions can be defined as feeling confident that others will act fairly, respectfully, honestly and transparently.<sup>28</sup> Trust exists only where the user perceives it to be present. In these complex environments it is necessary to monitor factors that can support or diminish trust in the experience of the user. The style of CMC tools must be able to convey messages between individuals in a way that is clear.

Rule and Friedberg, in their examination of the relationship between ODR and trust, argue that ODR is typically thought of as only a segment of an overarching trust-building strategy.<sup>29</sup> They support the widely accepted idea that it takes time to build trust.<sup>30</sup> Katsh and Rifkin also support this understanding of trust development, arguing that ODR itself should be applied as a trust-building tool for websites. Trust building begins with the user interface and requires the anticipation of questions.<sup>31</sup> Together, ease of use and readily accessible information for common questions make the system useful to users and create a sense of reliability on the part of the system provider. The authors maintain that trust improves when a website demonstrates a willingness to resolve issues through easily accessible ODR methods. The existence of an ODR tool does not imply to users that the system is problematic but rather that it signals a willingness to work with users to resolve any issues that may arise. This form of trust building assumes that disputes occurring online, typically related to e-commerce, are being resolved using ODR. While this project is not examining ODR for e-commerce applications, it would be remiss to dismiss the insights gleaned from this type of application.

25 Lupton, 2015, p. 118; International Telecommunications Union, 'Measuring the Information Society', 2013, p. 3, [www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2013/MIS2013\\_without\\_Annex\\_4.pdf](http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2013/MIS2013_without_Annex_4.pdf) (last accessed 6 June 2017).

26 International Telecommunications Union, 2013, p. 91.

27 Mania, 2015, p. 79.

28 Rule & Friedberg, 2005, p. 195.

29 *Ibid.*, p. 193.

30 *Ibid.*, p. 195.

31 Katsh & Rifkin, 2001, p. 88; R. Ott, 'Building Trust Online', *Computer Fraud & Security*, 2000, p. 10, [https://doi.org/10.1016/S1361-3723\(00\)02017-0](https://doi.org/10.1016/S1361-3723(00)02017-0) (last accessed 21 April 2017).

Although studies relying on empirical evidence are scarce, examples of trust development can be found in numerous online communities. A study conducted using American statistics for online health communities found that developing trust online relied on the users' ability to see the other's point of view, display empathic concern and a belief in their own ability to reach a solution.<sup>32</sup> This same study emphasized the importance of cognitive and affective trust in online relationship building, which confirmed past research.<sup>33</sup>

Empirical research on interpersonal trust and its antecedents in the fields of psychology and sociology describe interpersonal trust as a combination of cognitive and affective trust.<sup>34</sup> The two types of trust are intrinsically linked but distinct from each other.<sup>35</sup> Cognitive trust is the confidence or willingness to rely on the other party. It requires a belief in their competence and reliability.<sup>36</sup> This type of trust typically relies on reputation or past personal interactions with the other party. Affective trust, on the other hand, relies on emotional connections. Feelings of security, a perceived strength of relationship and demonstrations of care by the other party are antecedents to affective trust.<sup>37</sup>

Within interpersonal relationships, cognitive trust typically emerges first, while affective trust develops over time.<sup>38</sup> The development and maintenance of both cognitive and affective trust best support ongoing relationships. Antecedents of trust necessary to support ongoing relationships can be identified and nurtured (see Figure 1).

It is important to think about the process of trust development when building relationships through online tools, particularly when these relationships are part of an ODR process. In order to create opportunities for trust to develop among users, its antecedents must be identified and built into the ODR system. Identifying these factors can assist in developing and determining the most successful ODR tools for differing scenarios.

## 2.2 Online Dispute Resolution Tools on the Market

Tyler's 2004 assessment of the state of ODR found that of the 115 providers identified, 82 were still operating at the time of publication.<sup>39</sup> Tyler argued that,

32 J. Zhao, S. Ha & R. Widdows, 'Building Trusting Relationships in Online Health Communities', *Cyberpsychology, Behavior, and Social Networking*, Vol. 16, No. 9, p. 652, <http://doi.org/10.1089/cyber.2012.0348> (last accessed 14 April 2017).

33 *Ibid.*, p. 654.

34 S. Webber, 'Development of Cognitive and Affective Trust in Teams: A Longitudinal Study', *Small Group Research*, Vol. 39, No. 6, 2008, p. 746.

35 D. Johnson & K. Grayson, 'Cognitive and Affective Trust in Service Relationships', *Journal of Business Research*, Vol. 58, No. 4, 2005, p. 505, [https://doi.org/10.1016/S0148-2963\(03\)00140-1](https://doi.org/10.1016/S0148-2963(03)00140-1) (last accessed 16 June 2018).

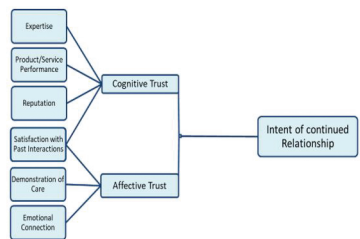
36 *Ibid.*, p. 501.

37 *Ibid.*.

38 Webber, 2008, p. 749.

39 M. Tyler, *115 and Counting: The State of ODR 2004*, Melbourne, International Conflict Resolution Centre, 2004, p. 3, [www.mediate.com/odrresources/docs/ODR%202004.doc](http://www.mediate.com/odrresources/docs/ODR%202004.doc) (last accessed 19 January 2017)

Figure 1 Antecedents of Trust in Ongoing Relationships



considering the ‘experimental nature’ of ODR as a field, this demonstrated the durability of these services. A survey conducted by Suquet et al., in 2010, revisited the providers listed in Tyler’s study as part of their own assessment. They found a total of only 34 ODR providers on the global market, a pool only 29.5% of the size of the one published by Tyler six years earlier.<sup>40</sup> While the low costs of ODR have been touted by most of its advocates as a major benefit, it has also been argued that the decrease in ODR entities post 2000 is related to the high costs of system design, creation and security maintenance.<sup>41</sup> The majority of providers currently active operate with a generic scope (over 65%), and their primary dispute resolution mechanisms are mediation (74%) and arbitration (>40%).<sup>42</sup> It is common practice for businesses to adapt technology created externally in order to fulfil their specific needs.<sup>43</sup> While this is often sufficient for basic communication needs, dispute resolution-specific systems could provide specialized processes to aid in the generation of solutions and the nurturing of relationships. Information gathering and added security to protect data could also develop. These benefits that the literature hints at are not yet present.

A minority of the providers discussed by Suquet et al. allowed users to select their preferred resolution mechanism. Some of these mechanisms used multistep processes in which the level of system intervention increased if parties were unable to reach resolution.<sup>44</sup> Expert systems such as these, created in consultation with experts in a field, provide non-expert users with specialized information. They enable large numbers of people to affordably access knowledge that would otherwise be expensive or difficult to reach.

It is important to emphasize that – as of 2014 – the design of most technology used for dispute resolution has been for general communications and information-handling purposes.<sup>45</sup> One example of this is the Virtual Mediation

40 J. Suquet et al., ‘Online Dispute Resolution in 2010: a Cyberspace Odyssey?’, 2010, p. 3, <http://ceur-ws.org/Vol-684/paper1.pdf> (last accessed 26 May 2017).

41 Mania, 2015, p. 78.

42 Suquet et al., 2010, p. 4.

43 U. Dolata, *The Transformative Capacity of New Technologies: A Theory of Sociotechnical Change*, 2014, London, Routledge, p. 11.

44 Suquet et al., 2010, p. 4.

45 D. Rainey, ‘Third Party Ethics in the Age of the Fourth Party’, *International Journal of Online Dispute Resolution*, Vol. 1, No. 1, 2014, p. 42; A. Stuehr, *8 Top Mobile Apps for Mediators*, [website], 2013, [www.mediate.com/articles/StuehrA1.cfm](http://www.mediate.com/articles/StuehrA1.cfm) (last accessed 26 February 2017).

Lab – Online Mediation Made Simple project. It is a resource for commercial, family and workplace mediators that hosts classes on how to conduct mediations through videoconferencing. The project also offers free webinars exploring online mediation and related topics.<sup>46</sup> This project is merely transposing traditional ADR into Internet-based communication platforms. While this can save costs by eliminating the need for space rentals and travel, it does not provide any further technology-related benefits.

As technology develops that is designed specifically for the delivery of ODR and MODR, new possibilities will emerge. These may range from the mere provision of access to the most relevant information and referrals to applicable services to the development of algorithms and the use of artificial intelligence to actively aid in reaching resolutions. Dispute resolution-specific platforms are on the market but have faced two significant challenges to widespread success. They are either proprietary in nature or have not gained sufficient users to remain commercially viable.<sup>47</sup> Proprietary systems include organizations' internal dispute resolution systems. Daniel Rainey, Chief of Staff for the National Mediation Board (United States of America), claimed in the first issue of the *International Journal of Online Dispute Resolution* that these issues are slowly disappearing as computer illiteracy rapidly diminishes. Extrapolating from Rainey's comment and Katsh and Rifkin's earlier predictions, it would appear that individuals will become increasingly willing to participate in ODR/MODR processes as they become accustomed to engaging in interpersonal interactions through digital portals, both socially and at work. Adopting ODR tools as part of an organization's formal or informal dispute resolution system is not unusual in today's world.

The move away from proprietary systems to external ODR/MODR providers is important because of the issue of neutrality. Dispute resolution systems created, funded and operated by an organization may develop biases in favour of the organization in their processes and decisions.<sup>48</sup> In an article for the Centre for Electronic Dispute Resolution (Amsterdam), Benjamin Davis argues that not enough has been done to ensure ODR processes remain independent.<sup>49</sup> Ensuring independence and freedom from bias is especially important if the use of the ODR system is encouraged or even enforced by the organization. The creation and use of independent ODR/MODR tools can help prevent risks associated with biases and conflict of interest.

The number of ODR services available to the public has fluctuated significantly since the late 1990s. Many of the services available in the early 2000s were merely digitized ADR. Services marketed as ODR-specific tended to target mediators and were primarily technologies for document sharing or videoconferencing. Within the last five years, tools designed specifically for ODR and MODR have

46 G. Leone, *Home*, [website], 2008, [www.virtualmediationlab.com/](http://www.virtualmediationlab.com/) (last accessed 26 February 2017).

47 Rainey, 2014, p. 42.

48 B. Davis, 'Disciplining ODR Prototypes: True Trust through True Independence', in A. Lodder *et al.* (eds.), *Essays on Legal and Technical Aspects of Online Dispute Resolution*, Amsterdam, Centre for Electronic Dispute Resolution, 2004, p. 83.

49 *Ibid.*, p. 75.



begun to emerge, most notably the self-help guides found in the BC Property Assessment Appeal Board and the CRT's Solution Explorer.<sup>50</sup> These systems also demonstrate a shift beyond ODR to MODR.

Inhibiting attitudes towards CMC-supported relationships are becoming increasingly rare, although differences in technological comfort levels warrant consideration in multiparty interactions. Despite this, ODR is underutilizing the available technology. If a CMC technology is generic, its ODR applications may not be recognized. If it is proprietary, then its usership is obviously limited.

The literature supports the idea that ODR systems can be useful trust-building tools. Attitudes towards the use of CMC in relationship building are overwhelmingly positive, with the exception of recurring concerns regarding privacy. A lesser mentioned but equally important concern is the issue of neutrality, specifically for proprietary systems. External providers would be an excellent solution to this issue if they could become fiscally sustainable – something services have struggled with in the past.

### 3 Findings

When invited to discuss their own experiences in the workplace, participants presented a wide range of exposure to and comfort with CMC. While online communication was used across the board, it was often being narrowly applied. Many descriptions provided by participants in the study mirrored the statements made in the literature regarding the widespread underutilization and unrealized potential in ODR-capable technologies. At the same time, many participants, perhaps because of their interest in dispute resolution, provided keen insights into how their own offices as well as other dispute resolution services providers could integrate modern technology into their dispute resolution and prevention practices to more fully realize the potential of ODR.

Although the primary medium of online communication listed by participants was email, they also reported using other platforms such as instant messaging, videoconferencing and Skype, Slack, WebEx, official department websites and the social media platforms Facebook (both official and unofficial group pages), Instagram, LinkedIn and Twitter. The participants' experiences and opinions about conducting their work, developing and maintaining trust and building relationships with these tools were explored during interviews. By examining what features of these platforms they have found useful or harmful to the dispute resolution process or ways in which they have triggered or exacerbated disputes, the researcher was able to determine what aspects of a potential MODR platform would be most beneficial to their clients.

50 D. Thompson, 'The Growth of Online Dispute Resolution and Its Use in British Columbia', 2014, Victoria, Continuing Legal Education Society of British Columbia, [www.cle.bc.ca/PracticePoints/LIT/14-GrowthODR.pdf](http://www.cle.bc.ca/PracticePoints/LIT/14-GrowthODR.pdf) (last accessed 12 August 2017); Civil Resolution Tribunal, 'How the CRT Works', *Civil Resolutions BC*, [website], 2017, <https://civilresolutionsbc.ca/how-the-crt-works/> (last accessed 16 April 2017).



When designing this project, the researcher expected most conversation about communication to centre on experiences participants had had with their colleagues – internal communication. Owing to the diverse roles held by participants within a broad variety of departments, many participants spoke of instances in which they were communicating with individuals outside the employ of their offices – external communication. These individuals were either members of the public or employees of other government or private sector offices with whom the participant interacted in their work role. Most, but not all, participants spoke to varying extents on both internal and external communication. Eight participants discussed internal communication practices and experiences, and seven participants discussed external communication practices and experiences.

The data coding process resulted in six topics, which will be discussed in this section. Clients' receptivity and opposition to MODR and ODR tools will be presented and their experience with ODR addressed. All participants made a point of discussing their concerns regarding weaknesses of CMC. The impact that online communication has had on relationship building and trust development will be highlighted. Finally, features that participants would like to see in a potential MODR tool and what they would like to get out of an education-oriented tool will be presented.

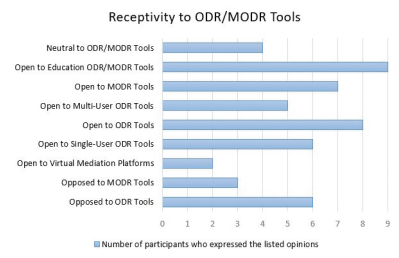
### 3.1 *Receptivity to ODR/MODR Tools*

The numbers represented in Figure 2 demonstrate that some participants expressed conflicting opinions about their receptivity and opposition to ODR and MODR tools. If an individual noted multiple opinions, for example being receptive to ODR/MODR tools and being opposed to ODR tools, both opinions were coded and graphed. Participants' willingness to use an ODR/MODR tool for some purposes but not for others accounts for these conflicting opinions. These opinions will be reflected throughout the findings. For example, some participants who welcomed the possibility of an education-oriented tool were reluctant to apply any form of ODR tool to relationship building and trust development.

All nine participants responded that they would be interested in introducing some form of ODR or MODR tool to the services they receive from their dispute intervention provider. Two participants stated that they viewed online communication, primarily between their office and the public, to be the source of the problems they were looking to address through an ODR tool. Eight participants expressed a general interest in knowing what types of ODR tools were available and cited this as a driving factor in their participation in the study.

Four participants expressed interest in multiple styles of tools (specific descriptions of tool features can be found later in this article). Four participants stated that they would use a multi-user synchronous tool to bring individuals together in real time to resolve disputes. These individuals engaged in long-distance dispute resolution processes using various combinations of videoconferencing/Skype, teleconferences and emails; frequency of long-distance processes ranged from weekly to monthly to only occasionally.

Figure 2     *Receptivity to ODR/MODR Tools*



Five participants clearly described tools that would be accessible to individuals as needed and that would provide them with advice for communicating and working through disputes they encountered in the workplace. These were coded as individuals who were open to single-user tools. A second group of individuals, which overlapped somewhat with the first, were open to ODR/MODR tools focused on education. Individuals in both groups related to the in-person training offered by the dispute intervention service provider. Finally, two participants expressed interest in a tool that could host virtual mediations; one wanted to address disputes involving parties in different geographic locations, and the other wanted to bring in mediators and other specialists not employed by their offices.

While every participant was open to using some form of ODR/MODR tool, six individuals expressed a reluctance to use tools in certain situations. These opinions register in Figure 2 as those who are opposed to ODR tools. It is important to register the significant level of opposition to ODR tools because it speaks to the concerns clients have with their use. However, it is equally important to note that one hundred percent of the participants who voiced opposition to the use of ODR and MODR tools also discussed scenarios and applications in which they were actively interested in pursuing the use of ODR/MODR tools.

There were repeated assertions that participants did not want online tools to replace any in-person training currently provided to their offices. Online tools were welcome only if they were supplemental to these services. Four individuals made a point of stating that they were opposed to ODR tools specifically in the context of mediating disputes; two of these participants cited past experience with inadequate devices, set-up and Internet connections as the chief cause of their reluctance to use virtual mediation set-ups in the future. In these instances, the use of online communication tools hindered the dispute resolution process by interrupting the flow of conversations due to lags or glitches. Audio-visual distortions and delays in entering or leaving caucuses were cited as having a dramatic impact on the effectiveness of the mediations.

Two individuals who worked in the same office were emphatic that they viewed online communication between government office workers and the public as being the cause of their problems, stating: “The online stuff isn’t the solution but the problem and what are our solutions to help our staff deal with that?” Although these participants were clear that they viewed online interactions to have a high potential for antagonistic interactions, they were nevertheless curi-

ous to explore what ODR or MODR options might have the potential to help address the issue. A total of four participants reported instances where they viewed CMC as problematic, either because of technological deficiencies or because anything less than face-to-face was considered insufficient (*see* Figure 3).

### 3.2 *ODR Experience*

Data gathered from the literature review suggested that it was not uncommon for individuals to fail to recognize ODR experiences they have had. Six out of the nine participants in this study reported that they had no experience in using any form of ODR. Of those six participants, only three discussed activities that this study considers to be online dispute resolution practices, while self-reporting that they had no ODR experience. The majority of participants in this study both worked in roles that involved elements of dispute resolution and had an interest in the field of ODR. Participants in this study were therefore perhaps more likely to be able to accurately self-report their level of experience in using ODR than were the individuals reported on in the literature review.

Three participants responded that they had used ODR tools as part of their current job, although one individual revealed that owing to budget cuts their office was no longer able to sustain any ODR structures. Their experience with ODR was varied and included interpersonal communication training videos, virtual mediation chat rooms, videoconferences to conduct long-distance mediations, and pre- and post-mediation online document sharing. Another two individuals – who work at the same office – shared that their department has developed an app that will enable the public to express concerns and track the progress of their complaints. This app is expected to be in operation in the near future and will be the only example of an MODR tool in use by the participants of this study. Two participants reported that they did not use ODR in their current roles but that they had had very positive experiences using such tools in previous, non-government jobs. Six participants described instances where they had used ODR in relation to their current role; however, not all of them realized that the way they were using technology could be considered ODR. Of the three participants who did not use any form of ODR, two had past experience, and only one individual had no reported experience with ODR.

One participant who had extensive ODR experience in their current role no longer used ODR at the time of the interview. This participant described a pilot project their department had run that provided a text-based virtual mediation system that was accessible from any location and that was controlled by a mediator in their office.

It was an experiment that worked but because I didn't have the full support of the management we just let it go and went to the old traditional teleconference or face-to-face.

### 3.3 *Weaknesses of Online Communication*

While all participants described scenarios in which the benefits of online communication outweighed any potential weaknesses, every participant discussed their

concerns with technical deficiencies of online communication. Deficiencies in the abilities of online communication methods impacted the experiences of every participant but did not typically dissuade them from continuing to use some form of CMC for the purposes of dispute prevention and resolution. Participants introduced weaknesses in a number of ways. They were discussed as triggers for disputes, as causations of dispute escalation and as hindrances to dispute resolution processes. Although ODR tools that included video-based communication appeared to reduce the drawbacks of CMC, for some participants nothing could replicate the gravity present within in-person exchanges. Improvements in online communication practices and set-ups were still desired even when ODR methods were the de facto approach to resolution.

Obviously, the experiences and opinions presented here are subjective to the individual. For instance, one participant noted that parties in a dispute resolution process tended to be less pleased using a videoconference to host mediations than they were when physically present in the same space. Another participant reported an entirely different opinion, stating that in their experience hosting a text-based virtual mediation could be a very good forum for dispute resolution. Despite being without visual communication tools, they were happy to see the language and were able to participate fully. Weaknesses appeared to be subjective to the needs of the situation, and what was insufficient for the purposes of one participant could be considered successful by another.

Differing standards of devices and Internet connections have also been an issue for those who attempted to deal with disputes using online communication. Even in instances that were considered generally successful, the strain of operating the technology could sometimes be considered too great an effort to maintain long term. In the case of the participant who had successfully operated a virtual mediation pilot programme, they still claimed that:

It was hard to get running because of the different types of equipment and it faded away. I didn't pursue it because our workload went up and we had to get cases done. So we don't do that now.

This demonstrates that the weaknesses and challenges of online communication can easily outweigh the benefits. The equipment used to access the virtual mediation platform was not uniform. Such inconsistency is unsurprising as users of the platform had different working locations and employers. At the same time, in instances where disputants are at a significant geographic distance, some method of long-distance mediation is highly desirable owing to the time and cost saving potential.

The use of email was expectedly ubiquitous to the work of all study participants and was typically the first answer provided after they were asked how they used online tools to communicate with their colleagues. Email was used for starting the dispute resolution process, setting up meetings and documenting agreements made in person. As a text-only form of communication that does not allow for facial expressions or tone to influence the perceptions of the receiver, email held a high risk of creating or nurturing misunderstandings. Blocking the recep-

tion of social and contextual cues was one of the drawbacks of CMC noted in the literature review. Participants also noted that when using email “it is easy to get misconstrued. You might mean it in a different way than how the person took it”.

Regardless of these drawbacks, email was necessary to the work of the participants. One participant reported a practice they had successfully introduced to their department:

One of the things that I’ve adopted is emojis because that gives you some of the tone. So you can say something but put a smiley face at the end of it and they’re not going to take it serious.

This participant reported that the practice of including emojis in email communication had a large and positive impact in the office workplace and aided in the avoidance of misinterpretations and that some colleagues working in leadership roles have adopted the practice.

Although the downsides of online communication were discussed in each interview, it was recognized that such methods of communicating are an intrinsic part of the working environment.

And if there was a quick, effective way of circumventing or mitigating risk around misunderstandings, inevitable conflict when a contentious issue arises, I would be keen to explore that. Because it is labour intensive.

The ‘it’ this participant was referring to was the process of dealing with issues using online communication, particularly in situations where a miscommunication had exacerbated the problem.

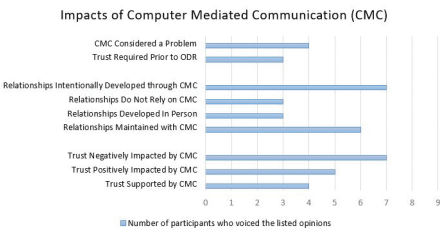
Concern about the weaknesses of online communication practices was the most frequently raised topic across all participant interviews. However, in most instances these concerns manifested as a desire for higher quality, easier to use tools. The quotes provided in this section demonstrate that despite concerns about misunderstandings, technological glitches or the effort of maintaining a system, online communication tools continued to be used in all offices.

### 3.4 *Relationships and Trust*

The study participants discussed topics of relationships and trust together, and this section will address them jointly. Unsurprisingly, trust was considered a necessary antecedent to relationship building. The antecedents to trust being developed and maintained online differed slightly among the participants, yet generally conformed to the findings of the literature review in that the development of interpersonal trust typically occurred gradually over a period. Some, but not all, participants reported that when they communicated with people using CMC over long periods they developed similar trusting relationships to individuals with whom they shared workplaces.

Attitudes among the participants in regard to the impacts of CMC on relationships and trust were mixed, in alignment with what was found in the literature review. Perceptions of CMC’s impact across the spectrum from positive to

Figure 3     *Impacts of Computer Mediated Communication (CMC)*



negative were linked to participants’ personal experience as well as to the culture of their work environment. In some instances, participants provided multiple answers to a question owing to the varied types of relationships they have with those they interact with at work. These multiple answers are reflected in the data of Figure 3. For example, a participant may have had relationships intentionally developed through the use of CMC and relationships that did not rely on CMC. When reflecting on a collection of different experiences, a participant may refer to times when trust was negatively impacted and other times when CMC usage had a positive impact on the experience. Both of the experiences were worthy of discussion and consideration, as it was likely that participants and other clients of the dispute intervention and prevention service provider would encounter similarly varied experiences in the future of their work.

Seven of the nine study participants presented examples of intentional relationship development. Internally, these included relationship development between a conflict resolution practitioner and colleagues, where individuals were introduced during training sessions and relationships were built and maintained through email, videoconference and phone. Fostering a sense of camaraderie in the workplace was also supported by public recognition of good work in group emails. External relationship development examples included communicating with the public on social media, correcting misinformation and providing a face for the department/office to establish a trusting relationship.

It was in the development of these relationships that participants reported positive impacts of CMC on trust. For instance, two participants reported that creating trusting relationships with the public meant that “they tend to cut us a bit of slack – they wouldn’t necessarily jump to the worst conclusion immediately”. Quick, accurate response to public requests for information enabled offices to build credibility. This allowed the dialogue to remain open, furthering the development of stronger trust and preventing disputes from escalating into conflicts. Positive impacts of CMC on trust were reported for both external and internal communication.

When reporting a negative impact on trust, participants spoke of specific instances of conflict where they had experienced an escalation of an already present dispute. Participants referenced misrepresentation in emails that occurred



either innocuously or as a result of individuals in conflict who are “looking for a reason for it to be wrong”.

Participants who had worked in a coaching or mediating role reported negative impacts of videoconferencing such as a lessened ability to influence discourse through eye contact and general body language due to the set-up of office videoconferencing equipment. Large boardrooms where individuals were at a distance from the camera and screen were reported as being less easily guided through the mediation and more likely to be distracted by passer-by.

In one example, a dispute resolution practitioner was brought in by videoconference to mediate a dispute between two employees. However, owing to limited resources both disputants were initially placed in the same conference room. A power imbalance existed between the disputants that began to manifest and interfere with the mediation, which subsequently had to be rescheduled so another conference room could be borrowed and the disputants separated. One participant suggested that mediations be conducted via a system like Skype, which provided visuals that allowed for a focus on eye contact and facial expressions.

Participants presented a variety of opinions to explain how the impact of CMC on relationships was neutral. They argued that factors influencing the success or failure of an online interaction originated in, among other things, the attitudes of individuals or the state of pre-existing relationships between parties. The medium of communication was deemed irrelevant. Participants provided examples that demonstrated this neutrality. “The online works if you have very professional, respectful people”. Those who reported a neutral view of the impact of CMC tended to report experiences in which individuals had established a trusting relationship prior to ODR interventions.

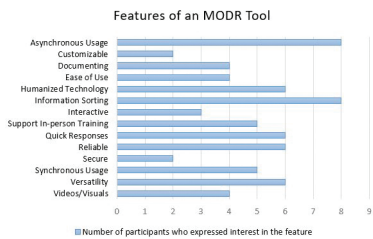
Describing dispute resolution processes conducted online, one participant shared that they considered one-on-one interactions using CMC to be fine but that when working with multiple groups it became increasingly difficult. They did not have a visual connection with the individuals or parties. For this participant, CMC-hosted mediations were a frequent part of their job. Another participant claimed that in developing trust between individuals, video is the most important aspect of an ODR tool. Video-capable CMC tools allow individuals to create an approximation of face-to-face conversations. The communication tool brings people together as if they were in the same room. It does not add any value to the interaction, and when it works correctly, it does not diminish the exchange.

Three participants shared the view that ODR tools were informal and consequently depended on a previously established trust relationship. In this view, CMC does not negatively impact trust, but the sense of informality during CMC-hosted discussions makes it difficult to establish that kind of relationship. Those who reported that their working relationships existed prior to CMC usage had a hundred percent overlap with those who did not use CMC to maintain relationships.

Many of the nuances in relationship maintenance and development practices were attributed to the culture of the workplace that differed between interviews. All participants reported using some form of CMC during some stage of the



Figure 4     *Feature of an MODR Tool*



dispute resolution process, and five participants reported having used online tools to communicate during a mediation situation. The work environment more heavily influenced the extent to which CMC is applied to active disputes than the employee’s personal preferences. For example, one participant who had substantial experience resolving disputes through CMC tools in a past job was asked by colleagues to always conduct in-person conversations as that was the practice of the office. There was no office policy against using CMC for dispute resolution, but the culture of the office rejected its use in delicate or tense situations.

3.5     *Desirable Features for MODR Tools*

Study participants described a variety of hypothetical uses for an MODR tool or system they could use in their work. The traits described in this report are desired features that were described by multiple participants. Multiple participants independently introduced some features, while the researcher introduced others to gauge the level of interest in features that emerged in earlier interviews.

Certain concepts that arose in the interviews conformed to the commonly described factors of ODR systems as described by the reviewed literature. For example, four participants were attracted to ODR/MODR for its ability to document expectations and agreements leading up to and following mediation. The ability to provide quick responses to queries or conversations was attractive to six participants. These features, in particular, matched the features of ODR considered most desirable by the published literature.

In addition to these two features, participants listed numerous features that they would like to see specifically in an MODR tool that the dispute prevention and intervention organization might provide as part of their future services. Features that only one participant expressed interest in were not included in this report as they were not considered representative of the client base. The full list of significant features that emerged from the interviews is displayed in Figure 4.

Asynchronous usage referred to an MODR tool that clients could access at any time. There was substantial overlap of this feature with the features labelled information sorting, interactive and support in-person training. Information sorting refers to a tool that could provide easy access to information; the information hypothesized by participants ranged from office dispute resolution

procedures to communication tips to where to go or whom to contact for various issues. Participants were interested in having a tool that could help bridge training. The level of interest in this capability was extremely high and will be explored in the next section.

Humanized technology was a feature of ODR that was not explicitly stated anywhere in the academic or non-academic literature reviewed for this project. Humanized technology refers to the attempt to foster a sense of interpersonal communication when that communication is occurring online. Participants who described successful attempts at online relationship development spoke of ways in which they personalized interactions. This included providing their name and/or their face to the person who had reached out to their office online or to those to whom they were attempting to reach. It meant setting up online mediations in such a way that disputants were within arm's length of the camera to create a sense of collaboration and to improve engagement. When participants discussed what they would like to see in an MODR tool, humanized technology meant demonstrating who they were, what can be expected of them, as well as fostering a sense of community among the users. By humanizing the technology, a sense of trust can begin to be established. In synchronous tools, it would aid relationship development by promoting users to engage as if they were entering into a discourse in person.

Synchronous usage features were discussed in relation to active virtual mediations or to training seminars in which clients could access the tool as part of the training. While five participants discussed this feature, most did not place as much emphasis on it as they did on asynchronous usage. Another feature that was described in general terms was versatility. Versatility had multiple meanings to different participants. They appreciated that technology could provide them with 'agile ways of working' that could 'catch essential information quickly and reliably'. Three participants' offices were already using devices such as laptops and tablets to allow for flexible work and communication practices. Participants wanted a tool that was multidimensional; particularly when speaking of education-oriented tools, they described something with a mixed media approach, using visuals and interactive elements to support multiple learning styles.

The issue of security features inherent in a potential MODR tool was not raised often in interviews. This is worth noting as it was not in line with evidence from the literature that suggests security features would be a crucial point for many users of ODR. Questions did not directly ask about participants' thoughts on security, but when describing what was important to them in an MODR tool, only two participants discussed the subject.

### 3.6 *Education Tools*

What I find is that everybody goes to the training, they think it's really good and then you go back to your regular day-to-day lives and you don't necessarily transfer the knowledge. So, I think that when you develop a program that keeps the information fresh, I think that's beneficial.

The sentiment of this quote was repeated throughout all interviews. Multiple participants, beginning in the first interview, introduced the idea of using an MODR tool for the purposes of dispute prevention and resolution training. All participants either introduced the topic themselves or were prompted by the researcher to explore their views on using an MODR tool for education. Unlike the previous topics being addressed, the participants had a fairly unified approach to an education-oriented MODR tool. Many aspects of an MODR education tool were addressed earlier, particularly in the discussion of desired MODR tool features.

Primarily, an education MODR tool was viewed as something to be introduced alongside live dispute resolution and prevention training. Most participants were attracted to the idea of using the tool to create a bridge between the knowledge and skills taught during the seminars and the everyday workplace applications. Three participants were open to the idea of making an MODR tool available to their employees prior to training sessions as a means of orienting them to the subject matter, in addition to receiving a post-training support tool.

Participants identified two potential uses for an MODR education tool. First it would keep information fresh in the minds of the clients who could asynchronously access the tool when they needed a reminder of what was taught. One participant described their ideal tool as an 'app to remind me, to help [clients] navigate something that they might not want to bring to HR, to build their skills and to provide them with some supports.' Second, participants described a desire for clients to be able to use the tool to build upon their skills, either by working through hypothetical scenarios or researching communication or dispute resolution techniques. Ease of use and versatility were key points in the discussions of an education tool.

Another participant described a hypothetical tool that could be accessed as needed by a client:

It has to be short, modular and practical...You have to be able to bounce around. You don't do module one, module two, module three. If I'm interested in "how do I bring up a sensitive topic", I'm going to skip module one to six and go right to number seven.

When asked to describe what they would like to get out of an online tool, most participants spoke of prevention and interactive learning techniques. There was interest in tools that would help change behaviours, promote respectful interactions and prevent individuals from inadvertently causing an issue to escalate. Participants also complained that the online training currently provided to them was insufficiently interactive, amounting to no more than clicking through presentation slides. Interest was expressed in a tool that was interactive and engaging to its users.

All nine participants expressed a level of interest in tools for the purposes of education and stated that they could see themselves or their offices using such a tool. One participant's interest in an education-oriented tool focused largely on the possibility of simulated mediations for training and hiring purposes. Two others reported that they were curious about the potential of an education MODR

tool but did not discuss it at significant length. The remaining six participants actively engaged in discussion, generating ideas about what would be useful in their offices. The findings presented in this section reflect all responses.

## 4 Discussion and Analysis

### 4.1 *Receptivity to MODR Tools*

Participant receptivity to MODR tools was perhaps the most crucial question of this study. Understanding participant receptivity to MODR tools requires knowing whether they are open to ODR options or not. What aspects of an MODR tool would participants welcome? To which would they be opposed? In what circumstances would an MODR tool be welcomed? In general terms, all participants were receptive to introducing an MODR tool to the dispute intervention services they currently receive or have received.

During the interviews, discussions between participants and the researcher generated an assortment of different ideas about what a useful MODR tool might look like. Participants were asked if and how they could see themselves and their offices using ODR or MODR tools. Differences among participant responses were the result of the varying tasks, job expectations, office environments or cultures in which the participants worked and their own individual perspectives.

Every participant was also strongly protective of the current services they received from their current service provider and were receptive of MODR tools only insofar as they would not replace or limit any in-person interventions and training seminars. Even when participants had received the majority of their services in the form of telephone conversations, they did not wish to see those services reduced. Any tool welcomed by clients would therefore have to be supplementary or additional to the established services.

Participant encounters with ODR systems were mixed, with some individuals reporting highly successful experiences, while others shared stories where ODR or CMC was a major contributing factor to disputes. None of the negative experiences with ODR resulted in reluctance among the participants to work with some form of ODR/MODR tool, but for some it did result in an unwillingness to use ODR for active disputes. Challenges with Internet technologies, particularly related to hardware and connection standards, made the weaknesses of CMC outweigh the benefits of ODR.

Participants held mixed attitudes towards online communication, which is in line with the findings of the literature review, as presented earlier. The literature review found that online communication is considered deficient in terms of conveying the social and contextual cues of conversation. All participants addressed weaknesses inherent to online communication, including missing cues or misconstrued phrasings. Online communication of some form was necessary to the work of all participants, and they were therefore very interested in any type of tool that could aid in limiting misunderstandings. Participants primarily used online platforms to disseminate information when communicating with the public. Two participants reported that their office monitored online discussions to understand

the concerns and interests of the groups with whom they engaged with in the course of their work. However, there was minimal evidence of active interactions between users of online platforms, such as social media, official websites and the participants' offices. This limited use of online communication capabilities reflects the academic literature in that ODR processes are underutilizing many forms of CMC.

Considering the experiences and needs of the participants, the most practical application of an MODR tool would be as a preventative measure. Misunderstandings in online communication and disruptions to dispute resolution processes caused by technological glitches were significant concerns among the participants. The multitude of features a tool would require in order to address the needs of all or most participants in active disputes or conflicts in differing work circumstances would be unsustainable. However, all participants were receptive to education-oriented and preventative tools, whose design could incorporate versatility and generality more easily than could tools for active disputes.

#### 4.2 *Trust and Relationships*

Data collected during the interviews demonstrates differing perspectives on how online communication impacts the development of relationships. These dissimilarities are largely attributable to differences in workplace culture. In smaller, single-location offices, relationships between colleagues were developed and maintained in person. This makes sense as communicating online without in-person communications alongside would generally be unnecessary. Alternatively, in offices where employees were dispatched to various rotating locations or in which work often required communicating with other, geographically distant offices, CMC was a standard medium through which trust and relationships were developed. Participants were asked to share their perspective and experience on the matter regardless of which of these two categories their office fit, as one of the purposes of this project was to examine the impact of CMC on relationship aspects of dispute resolution.

Trust seemed to be highly dependent on three factors. First, the quality of any pre-existing relationship between the individuals influenced trust in online interactions. If there was a pre-existing relationship that had deteriorated to the point that resolving a dispute required intervention, then the participants reported trust as something that was difficult to effectively establish, or re-establish, online. Of course, in the described scenario, trust would also have been difficult to establish between the individuals in in-person interactions. Any technological difficulties that would impede the ODR process would limit its effectiveness and risk further erosion of trust.

Second, participants who reported that they had established trust through CMC had more experience in communicating online. When the work environment placed expectations on employees to conduct business through CMC and the people with whom they were communicating were similarly accustomed to using CMC, then trust was more easily established.

This speaks to an expectation bias – when individuals on both ends of communications are expected to establish trust online, it is easier. When online com-

munications are outside of the normal process for employees, it is harder. This difficulty is understandable particularly in the cases provided by participants, in which Internet technologies were introduced to instances of dispute. When participants reported successful trust-building processes they were often, but not always, using CMC for dispute- and non-dispute-related communications. Those reporting difficulties were less likely to discuss extensive CMC use in non-dispute scenarios.

The attitude disputants displayed was the third commonly reported factor influencing trust building and was related specifically to building trust during online dispute resolution processes. Participants who had experience in hosting virtual mediations recounted that in their experience, cases of CMC-assisted mediations with difficult personalities or attitudes were significantly less successful than in-person mediations. They found it harder, as the person working in a conflict resolution role, to control the conversation when the parties and/or they themselves were present only on a screen.

In most discussions of relationship development through online communication, participants stated that they had a previously established relationship with the other individual. Relationships were established in person and used CMC to maintain the relationship afterwards. Impacts of online communication fell into three categories: neutral, negative and positive. As noted in the findings, participants who claimed CMC usage had no influence on trust and relationships discussed relationships that were well established prior to CMC use. This neutrality was something new to the research, as the academic literature reviewed focused primarily on online customers and communities that could not include in-person relationships. The impacts of CMC on relationships that routinely exist both in person and online is something that requires further study.

Negative impacts manifested most prevalently in active disputes. In situations where a dispute had already reached the level of a third-party intervention, CMC negatively impacted both relationship and trust development. There was a significant overlap between participants who had experienced these negative impacts and those who cited specific instances in which an ODR process had become challenging because of technological difficulties with the system. Negative impacts due to technological difficulties are simple in theory to counteract. Simplified systems that can operate on a variety of different devices would be necessary. Negative impacts also presented in instances where the meaning of messages sent online was misconstrued. Owing to the lack of social, facial or tonal cues, written messages of any sort will always carry added risks of misunderstandings. Some participants reported methods they used to offset this risk, such as indicating tone through careful wording or emojis, and taking at least a day between reading an emotional email and sending their response.

Positive impacts were reported in situations where online communication was intentionally applied to develop relationships. Actively embracing CMC was a major factor in creating positive impacts for the participants. When miscommunications occurred online, participants reported responding in the same format to provide corrected information. Multiple participants shared practices of reaching out to their colleagues, either entirely online or in person and subsequently



online to further solidify a relationship. Just as attitudinal factors influenced trust building, the attitudes and office practices towards online communication significantly influenced how it impacted relationship development. It is fair to assume that all users of online communication will have good and bad experiences. By noting what worked and what did not work, some participants were able to nurture relationships through the use of CMC. When communicating with someone over longer periods, participants reported developing similar trusting relationships to those developed in person.

The importance of trust in the development and maintenance of ongoing relationships was discussed in the literature review. It is possible to develop both cognitive and affective trust online. Two study participants spoke of online activity that their office had undertaken to improve the relationship between themselves and the public. By embracing CMC usage and intentionally humanizing the online communication process, they were able to establish a more trusting relationship with vocal and often argumentative online communities that represented segments of the public they dealt with in their work. Through ongoing engagement with these groups, a history of communication was developed and cognitive trust was established. As a result of personalizing interactions as much as was reasonable, the online community recognized that they were interacting with an individual rather than an abstract government office. This established a more emotional connection and supported the development of affective trust.

#### 4.3 *Supplementing Services with MODR Tools*

The primary research question addressed by this article looked at how MODR tools could enhance the dispute intervention services currently provided by dispute resolution and prevention trainers. As stated previously, participants were receptive to MODR tools that would supplement or expand on in-person training. Participants talked about virtual mediation technology, tools to guide public conversations on social media, videoconferencing tools to bring subject experts into mediations, education and dispute prevention. Out of all of these, education and dispute prevention applications were the only uses of an MODR tool that all participants stated they and their offices would find beneficial.

Participants who spoke directly about the training they had received from the dispute resolution and prevention service provider were positive about their experiences. While the knowledge and skills taught by the company were well received, interviews highlighted a space in the current services for an MODR education tool. The issue reported by participants was the limited extent that the information provided in seminars was being retained and applied in the daily working environment in the weeks and months following training. This demonstrates that participants see the interventions currently provided as highly beneficial but would appreciate a way for seminar attendees to improve their ability to retain knowledge and apply skills long term. Participant descriptions of a potential education tool indicate it would be most useful as a resource available to their offices after, not before, other training provided in person.

Data collected during interviews showed that misunderstandings that occurred through the course of online communications were both a major concern for



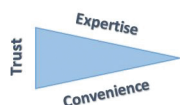
participants and a cause of dispute escalation. The examples provided by participants demonstrate insufficient levels of trust between individuals in communication. Without sufficient interpersonal trust, disputants can more easily interpret text-based messages with tones or inflections that, as the reader, they assume the sender intended to convey. Promoting awareness of this issue and making advice about good and bad online communication techniques readily available to clients would help prevent disputes and dispute escalation. Dispute prevention in this area can also be linked to trust development. Strengthening cognitive and affective trust – and consequently strengthening the relationship between individuals – has the potential to limit misunderstandings. When disputants can trust each other, they will be less likely to negatively interpret written statements.

Evidence from the literature review suggested that data security would be a primary concern for any user of an online dispute resolution tool. Among the nine participants of this study, only two individuals mentioned security as a concern or necessity for a potential ODR/MODR tool. This notable difference between findings from this study and from past research could be attributable to a number of factors. Participants primarily hypothesized an MODR tool to be generic in nature, designed to supplement education services. As such a tool would require little, if any, personal data, security of information would not necessarily concern participants. Another possibility is that participants had already established a trusting relationship with the dispute resolution and prevention service provider through their previous interactions and that that trust created an assumption among participants that any tool provided – and accepted for use by their government employers – will have sufficient security measures. As the researcher did not specifically ask participants about potential security concerns, this subject remains largely conjectural. However, when asked to describe what they would need a potential MODR tool to provide, only the two aforementioned participants discussed security.

#### 4.4 *Summary*

The analysis of CMC usage on trust and relationships found that the impact of CMC on these two features of the dispute resolution process was highly dependent on previously established personal relationships and on workplace cultures. If participants' offices routinely engaged in some form of ODR, then the use of online communication platforms had minimal impact on the dispute resolution process. However, if a personal relationship had been significantly damaged, any technical issues with connections or devices often lessened the effectiveness of the resolution process.

Finally, participants were found to be interested in introducing some form of MODR tool to the services they received. Although there was some variety in the style and purpose of tool most desired by participants depending on their workplace cultures and individual roles within their offices, all participants were interested in the concept of an education and dispute prevention tool. Ideally, this tool would be able to provide support in bridging the training provided by the company, as well as help limit miscommunications online.

**Figure 5** *Proposed Balance of ODR Building Blocks*

## 5 Applications

### 5.1 *Providing In-Person Services*

Study participants spoke positively about their experience of participating in in-person training, coaching and interventions and were protective of these services. They welcomed the possibility of expanding current services to include MODR or ODR elements but independently conditioned that acceptance on the continuance of existing services. A small number of participants who had only interacted directly with the company via telephone were also happy with their service experiences but were less passionate about protecting the existing delivery method.

In-person service delivery creates a different experience for clients compared with online delivery. Face-to-face communications eliminate any of the technology-related glitches that participants struggled with when using synchronous ODR technology. In the experiences of the participants, it also gave the interventions a greater measure of gravity. Breaking individuals out of everyday routines to focus on dispute prevention and resolution training demonstrates the importance placed on the process by their office. However, not everyone has the time to dedicate a half- or full day to such interventions. Ultimately, it is about finding the right delivery model for the needs of the clients.

### 5.2 *MODR Tools for Skills Maintenance and Growth*

Participants in dispute resolution and prevention training would benefit from the use of an online education tool, accessible through personal work devices. The tool should be concentrated on dispute prevention through skills training as opposed to aiding in active dispute resolution. As evidenced by the findings, participants value versatile and interactive systems that allow individuals to focus their time and effort on refreshing the elements of the training that are most relevant to their unique circumstances. Exercises and activities contained within the tool should reflect the training individuals had already received through participating in dispute resolution and prevention training. It would be beneficial to organize these into sections accessible to the client in any order, without completion requirements. Options to advance the training clients had already received could be included for further skills development.

People need MODR tools that provide convenient ways of accessing knowledge about how to prevent and de-escalate disputes and conflicts. According to Katsh and Rifkin's building blocks for developing successful ODR tools, a tool that focu-

ses on convenience and knowledge risks weakening its ability to create trust among its users. Figure 5 represents the combination of the three factors of an ODR system that should be emphasized in the development of an MODR tool. According to the existing research, focusing on providing a user interface that is easy to navigate and successfully transfers skills to the client could limit the ability of the tool to develop trust with the users. However, when being marketed to pre-established clients who have already developed a level of trust with the company, this concern is negated. A post-intervention MODR resource would not need to establish a new trust relationship and can focus instead on delivering convenience and knowledge.

Online education platforms that currently offer dispute and conflict training provide users with the opportunity to earn certificates on the completion of multiple module courses. The findings of this study also showed positive impacts of publicly recognizing success among peers. The MODR tool could offer acknowledgements for successfully completing sections and/or for revisiting sections to keep the knowledge fresh for the user. It could also adopt the practice of existing online skills training programmes and provide digital certificates for completing combinations of skills sections. While these recognitions would not be substantive certifications, they could provide users with measurable goals and promote ongoing usage.

Organizations should focus on the minimum viable product for any tool they wish to provide to their clients. The minimum viable product is the simplest product that will provide value to the client (Rule, 2018). This allows for issues in the tool to be identified and resolved while the product is relatively simple and for client feedback to be incorporated into later additions to or versions of the tool (Rule, 2018). Choosing to embrace the continuous evolution of an MODR tool will allow dispute resolution and prevention providers to keep pace with the rapidly changing field of ODR.

## 6 Conclusion

This article set out to establish an understanding of whether or not MODR tools could enhance the dispute resolution and prevention services received by government clients. It found that clients perceive significant potential benefits from the introduction of MODR tools designed to help with skills development and knowledge retention. The continued delivery of in-person interventions by the company combined with the introduction of an MODR tool will add value to services that are provided to clients.

It has been established that participant receptivity towards MODR tools is high but attitudes towards the use of ODR vary significantly. The literature suggests that approaches to CMC vary most significantly according to the age of the user. In the modern-day working world, all government office workers can be expected to make use of computers at least for basic communication. This study built on the understanding of individual attitudes by expanding the parameters of conversation in the interviews to take group attitudes within the workplace

into consideration. Considering group attitudes towards generic online communication has helped develop a deeper understanding of the potential for success or failure of ODR processes. Differences in receptivity to various ODR applications are attributable to diverse workplace cultures and expectations, and therefore knowledge of these factors can help determine where and how to apply ODR/MODR tools to provide ideal support.

This article explores a small segment of an increasingly diverse field in which the fast-paced evolution of ODR can quickly surpass research. If an MODR tool is introduced to support intervention services, client feedback should be collected and integrated into the tool on an ongoing basis. This will help service providers remain up to date with client needs and stay current in the continuously changing field of ODR.

# e-Court – Dutch Alternative Online Resolution of Debt Collection Claims

## A Violation of the Law or Blessing in Disguise?

Willemien Netjes & Arno R. Lodder\*

### Abstract

*In 2017, the Dutch alternative dispute resolution (ADR) initiative e-Court handled 20,000 debt collection claims via an online arbitration procedure, and this number was expected to double in 2018. In September of that same year, the Chairman for the Council of the Judiciary, Frits Bakker, argued on the Day for the Judiciary that in the future most lawsuits can be handled automatically and that a robot judge could work fast, efficiently and cheaply. However, in January 2018, Frits Bakker seemed to have changed his mind and criticized e-Court for its lack of impartiality, lack of transparency, unlawfully denying people the right to a state Court, and for being a 'robot judge'. Ultimately, all criticism boiled down to one issue: that the defendant's right to a fair trial was not sufficiently protected in e-Court's procedure. This accusation led to a huge media outcry, and as a result Courts were no longer willing to grant an exequatur to e-Court's arbitral awards until the Supreme Court had given its approval. This forced e-Court to temporarily halt its services. Questions such as 'is arbitration desirable in the case of bulk debt collection procedures?' and 'are arbitration agreements in standard terms of consumer contracts desirable?' are relevant and important, but inherently political. In this article, we argue that the conclusion of the judiciary and media that e-Court's procedure is in breach of the right to a fair trial is not substantiated by convincing legal arguments. Our aim is not to evaluate whether online arbitration is the best solution to the debt collection claim congestion of Courts in the Netherlands, but instead to assess e-Court's procedure in the light of Article 6 of the European Convention of Human Rights. The conclusion is that e-Court's procedure sufficiently guarantees the right to a fair trial and thus that the criticism expressed was of a political rather than legal nature.*

**Keywords:** fair trial, money claims, judiciary, echr, arbitration.

### 1 Introduction

In May 2000, scholars and policymakers from Italy, France, UK, Belgium, Norway and the Netherlands gathered in Leiden to discuss the current state as well as the

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future of *IT support of the Judiciary in Europe*.<sup>1</sup> As the discussions progressed, the future appeared to turn out less bright. For in April 2018 a Dutch project to facilitate electronic communication and exchange of Court documents was terminated, without success and after having spent 220 million euro (original budget: 7 million). Around the same time the successful online dispute resolution (ODR) project e-Court was, at least temporarily, pushed out of the market. e-Court was highly criticized for violating the law. This paper seeks to analyse whether e-Court's procedure sufficiently guarantees the right to a fair trial, as enshrined in Article 6 of the ECHR (European Convention on Human Rights).

A legal analysis of the ODR initiative e-Court in the light of recent Dutch developments is interesting in its own right. In addition, in the context of e-commerce, recital 4 of the 2013 EU ODR Regulation<sup>2</sup> considers the lack of successful ODR "a barrier within the internal market which undermines consumers' and traders' confidence in shopping and selling across borders." More generally, scholars have for years wondered why the taking up of ODR in practice is so slow in relation to the expectations we had years ago. This article analyses whether the legal arguments used justify the termination of an ODR provider that was successful. The short answer is no: invoked arguments are of a political rather than legal nature. Perhaps society, in general, and the judiciary, in particular, are still not ready for ODR.<sup>3</sup> Even a proponent of ODR like Lord Briggs stated during an ODR conference in July 2018 in Liverpool that he believed ODR would become a success but hoped it would be after he and his wife retired. He obviously stated it with a wink, but the threat some see in ODR should not be underestimated.

In 2009, the online arbitration institution 'e-Court' started in the Netherlands as a professional, cheaper and quicker alternative to state Courts<sup>4</sup> and was backed by government support.<sup>5</sup> While e-Court initially handled simple cases varying from debt collection to labour cases as well as small claims procedures up to a maximum of 100,000 euros, since 2014, it has exclusively taken on debt collection cases. In early 2018 a media frenzy was unleashed, and articles titled 'verdict for sale'<sup>6</sup> and 'commercial judiciary should be halted immediately'<sup>7</sup> were pub-

- 1 A.R. Lodder, A. Oskamp & A.H.J. Schmidt (Eds.), *IT support of the Judiciary in Europe*, Den Haag, SDU, 2001.
- 2 Reg. (EU) No. 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes, see A.R. Lodder, 'Commentary on the Regulation', in S. Gijrath *et al.* (Eds.), *Concise European Data Protection, E-Commerce and IT Law*, 3rd ed., London/Boston, Kluwer Law International.
- 3 J.C. Betancourt & E. Zlatanska, 'Online Dispute Resolution (ODR): What is it, and is it the Way Forward?', *International Journal of Arbitration, Mediation and Dispute Management*, Vol. 79, No. 3, 2013.
- 4 H.W.R. Nakad-Weststrate, H.J. van den Herik, A.W. Jongbloed & A.B. Salem, 'Digitally Produced Judgements in Modern Court Proceedings', *International Journal of Digital Society (IJDS)*, Vol. 6, No. 4, 2015, p. 1102.
- 5 [Dispute Resolution by E-Court from a consumer protection angle] M.B.M. Loos, 'Geschillenbeslechting door e-Court vanuit consumentenrechtelijk perspectief bezien', *WPNR*, Vol. 145, No. 7003, 2014, pp. 92-98.
- 6 [Verdict for Sale] K. Kuijpers, T. Muntz & T. Staal, 'Vonnis te Koop', *De Groene Amsterdammer*, 18 January 2018, p. 3.
- 7 A.J. Moerman & B. Houkes, 'Rechtspraak op bestelling?! Stop commerciële rechtspraak', *Sociaal Werk Nederland*, January 2018.

lished, arguing that e-Court's procedure constituted a severe breach of the fundamental right to a fair trial. Points of criticism were the lack of transparency, e-Court being a 'robot judge', that e-Court denied consumers unlawfully the right of access to a state Court and that e-Court was not independent and impartial.<sup>8</sup> Ultimately, all criticism boiled down to one issue: the defendant's right to a fair trial was not sufficiently protected in e-Court's procedure.

In her 2008 PhD thesis *Electronic Alternative Dispute Resolution - Increasing Access To Justice Via Procedural Protections*, Susan Schiavetta analysed ODR in the light of the ECHR and stated that ODR inherently does not fully satisfy Article 6 ECHR but that this does not necessarily mean that the process is not fair. Certain procedural safeguards might be weakened, as long as

this is compensated for by other benefits accruing from the use of e-ADR, such as a cheap and fast resolution process. The extent to which disputants accept this corrosion of their rights will vary from disputant to disputant.<sup>9</sup>

In this article we therefore do not analyse whether e-Court's procedure guarantees all rights enshrined in Article 6, as the right to a public trial, for example, will not be protected, but whether defendants' right to a fair trial is sufficiently safeguarded.

Article 6 of the Convention enshrines the right to a fair trial. The Convention itself does not make any references to arbitration, nor do its *travaux préparatoires*.<sup>10</sup> However, the EC

HR has held that the article is partially applicable to arbitral procedures. When parties sign an arbitration agreement and thereby submit their dispute to an arbitral tribunal, they partially 'waive' the right to a fair trial. Strasbourg case law teaches us that a "waiver may be permissible with regard to certain rights but not with certain others."<sup>11</sup> The rights to a fair hearing and to an independent and impartial tribunal are absolute and may not be waived. Moreover, the arbitral agreement itself, or 'the waiver', must have been established in a free and unequivocal manner<sup>12</sup> and should not "run counter to any important public interest."<sup>13</sup> This article will first introduce e-Court's history and online procedure. Subsequently, we shall analyse Art. 6's three core issues: the legitimacy of e-Court's arbitral agreement, its independence and impartiality and whether it provides the right to a fair hearing. We will end with a conclusion on whether e-Court's procedure sufficiently guarantees the right to a fair trial.

8 *Ibid.*

9 S. Schiavetta, *Electronic Alternative Dispute Resolution – Increasing Access to Justice via Procedural Protections*, PhD thesis, University of Oslo, 2008.

10 G. Dal et al., *L arbitrage et la Convention européenne des droits de l homme*, Droit et Justice No. 31, Nemesis, 2001, pp. 57-68, at 59

11 *Suovaniemi c.s. v. Finland*, No. 31737/96, ECHR 1999, §53.

12 *Deweert v. Belgium*, No. 6903/75, EHRM 1980.

13 *Håkansson and Stureson v. Sweden*, No. 11855/85, ECHR 1990, §66; *Dorozhko and Pozharskiy v. Estland*, No. 14659/04 and 16855/04, ECHR 2010.



## 2 e-Court

### 2.1 History

e-Court started to offer its services in 2009, as a general online arbitration platform. There was discussion about whether the use of the terms ‘Court’ and ‘judge’ would confuse users. In the early 2000s, Colin Rule explained that ODR does not have the term ‘alternative’ in its name because Courts do not work online and ODR therefore automatically concerns alternative dispute resolution. However, in 2009 citizens would not be surprised to find Courts offering online processes or at least offering the option to electronically upload and access case-related documents and information. For instance, the judiciary in India uses an ‘e-Court’ website for that purpose.<sup>14</sup> Nonetheless, e-Court did stop using the term judges, but its name remained the same. At least in the Netherlands the use of an English term, e-Court, should not be confusing.

e-Court received government support in its early days and ended up as a finalist in the 2011 HiiL innovating justice awards<sup>15</sup> competition. Around the same time, the Ministry of Justice decided that the process of e-Court in which notary documents were used to enforce outcomes of the online process was invalid and notaries and bailiffs were no longer allowed to support e-Court’s procedure. In 2014, e-Court decided to switch exclusively to handling debt collection cases. Their number grew fast. In January 2018, 94% of all health insurance providers in the Netherlands as well as Internet giant Bol.com had an arbitration clause in their standard terms that referred their debt collection disputes to e-Court. The prediction was that e-Court would handle over 40,000 cases in 2018, more than double its caseload in 2017.

For an arbitral award to be enforceable, an ‘exequatur’ is required. This exequatur is granted by a Court after a marginal review of the arbitral award. In January 2018, a critical report on e-Court was published<sup>16</sup> by social counsellors, followed by tendentious media coverage and a fierce critique by the judiciary. As a consequence of all this negative publicity, Courts were no longer willing to grant e-Court awards an exequatur and wanted a decision about the validity of those awards by referring preliminary questions to the Supreme Court. However, as the judiciary had voiced its concerns regarding the effects of competition, the use of digitalization, possible loss of employment within the judiciary, and the fear that public law would be marginalized by e-Court, a Dutch Court is arguably not impartial and hence not competent to rule on this issue. The accusation that the Supreme Court is not independent is a bold statement, but the Dutch attorney Matthijs Kaaks has analysed the judiciary’s financial interest in handling debt collection cases. Annually, there are approximately 400,000 undisputed debt collection cases. While the production costs of such judgments are €12, the Court fee

14 [www.ecourts.gov.in/eCourts\\_home/](http://www.ecourts.gov.in/eCourts_home/).

15 <https://innovatingjustice.com/>.

16 [Verdicts on request?! Stop commercial jurisdiction] Moerman & Houkes, 2018.

ranges between €119 and €476. He therefore estimates that the judiciary's annual profits for debt collection proceedings are 200 million.<sup>17</sup>

## 2.2 *e-Court's Procedure*

The e-Court arbitral agreement is usually included in the standard terms of a consumer contract. e-Court's model clause reads:

The parties have the possibility to have their disputes with regard to this agreement settled by arbitration via Stichting e-Court, hereinafter "e-Court" ([www.e-Court.nl](http://www.e-Court.nl)). If [the company] invokes this provision, [the consumer] has the opportunity during one month to still opt for the government Court. The procedure at e-Court will take place in accordance with the procedural rules published on [www.e-Court.nl/juridisch](http://www.e-Court.nl/juridisch).<sup>18</sup>

When a party wants to bring an action before e-Court, it must inform the other party in writing<sup>19</sup> and should in its letter include information about the proceeding and the starting date.<sup>20</sup> From the moment the defendant receives the letter, he has one month to opt for a state Court.<sup>21</sup> Under Dutch law, this one-month period is required before the proceedings start when an arbitral agreement is included in the standard terms of a consumer contract.<sup>22</sup> During this month, log-in details for the online procedure are sent to the defendant's email address that is mentioned in the letter. After the month has expired and the defendant has not indicated he wants to start proceedings before a Court, he has renounced his right to submit the conflict to a state Court. e-Court is now competent to decide on the issue.

One month after the letter has been received by the defendant, the first round of the procedure starts on Monday morning at 09:00 and lasts till Friday at 17:00.<sup>23</sup> During this week, the defendant can defend himself by uploading documents. If a party wants to have a hearing, he must inform the arbitrator before Wednesday 17:00. e-Court appoints the arbitrator,<sup>24</sup> but parties may challenge the arbitrator within three days after the procedure has started,<sup>25</sup> in which case e-Court's supervisory board decides on the challenge within 24 hours.<sup>26</sup> If a party has not responded to the claim before Friday 17:00, the claim is awarded unless it seems clearly unlawful or unfounded to the arbitrator.<sup>27</sup> This award is called a robot verdict, but there is not much technology involved since what has been

17 M. Kaaks, 'Kiloknallers van de rechtspraak', *Advocatenblad*, No. 3, 2018, p. 7.

18 Procesreglement e-Court [e-Court's procedural rules], annex: model clause standard terms.

19 Art. 4 (1) e-Court's procedural rules; Art. 3:37 DCC.

20 Art. 4 (2) e-Court's procedural rules.

21 Art. 5 (1) e-Court's procedural rules.

22 Art. 6:236n of the Dutch Civil Code ('DCC').

23 Art. 9 (1) e-Court's procedural rules.

24 Art. 6 (1) e-Court's procedural rules.

25 Art. 7 (4) e-Court's procedural rules.

26 Art. 8 (1) e-Court's procedural rules.

27 Art. 12 (2) e-Court's procedural rules.

claimed is awarded. When the defendant does respond to the claim, a second round takes place in the following week from Monday 09:00 till Friday 17:00, during which parties can respond to each other's statements.<sup>28</sup> Parties can do this by uploading documents as well as writing messages directly on the platform. As a rule, these two rounds are not extended, and an arbitrator usually decides on a case after the second round. Only when parties are discussing an amicable solution outside of e-Court's procedure, the arbitrator may grant extension by 'parking' the procedure.<sup>29</sup>

After rendering an award, the arbiter submits on behalf of the applicant a petition requesting an exequatur with the competent District Court,<sup>30</sup> which was usually the District Court in Almelo. The competent Court 'summarily' investigates the award and usually grants the exequatur. Only in exceptional cases cf. Article 1065 Rv is the award set aside, e.g. owing to the non-existence of a valid arbitration agreement, when an award is not signed or lacks a motivation; and when the award or the manner in which it was made violates public policy (*i.e.* violation of the right to hear and be heard, partiality of arbitrators, etc.).<sup>31</sup> Once an exequatur has been granted, e-Court's judgment has a so-called executorial title,<sup>32</sup> and the applicant can enforce the decision.

### 3 Legitimacy Arbitral Agreement

In this section, we discuss whether e-Court's arbitral agreement as a partial 'waiver' of the right to a fair trial is valid under the Convention. Criticism has been voiced regarding the validity of the 'secretly hidden' arbitration agreement in the standard terms. Specifically, it was argued that consumers usually do not read standard terms and have therefore not consciously consented to give up their right to a state Court.<sup>33</sup> We show that e-Court's arbitral agreement is valid and that its summoning letter informs adequately about the option to opt for litigation. Even when consumers have missed the term about arbitration, they still have sufficient opportunity to have their case decided by a state Court.

#### 3.1 *Are All Requirements for a Valid 'Waiver' Fulfilled?*

According to the European Court of Human Rights (ECtHR) an arbitral agreement is a partial 'waiver' of the fundamental right to a fair trial and is subject to certain requirements. First, an arbitral agreement must have been made in an unequivocal manner. e-Court's arbitral agreement is included in the standard terms, in a clear manner.

Second, the arbitral agreement must be concluded in the absence of constraint. There are no specific criteria to determine what constitutes constraint,

28 Art. 9 (3) e-Court's procedural rules.

29 Art. 10 e-Court's procedural rules.

30 Art. 1063 Rv (Civil Procedural law).

31 Art. 1065 Rv.

32 Art. 430 Rv.

33 Kuijpers *et al.*, 2018, p. 3.

but economic pressure does not necessarily mean that the agreement was involuntary, e.g. an arbitral clause in an employment contract is considered to have been accepted voluntarily.<sup>34</sup> The argument in the case of the employment contract is that the applicant was 'free' to refuse the work. However, what if that person really needed this particular job and 94% of all employment contracts contained an arbitral clause? That is essentially what is happening with e-Court.<sup>35</sup> Would that still qualify as voluntarily? Probably not. Also, under European consumer law, arbitral clauses in standard terms of consumer contracts are regarded as unfair.<sup>36</sup> Especially when consumers have almost no choice but to accept, such an arbitral agreement can therefore not be said to have been concluded voluntarily.

However, e-Court's arbitral clause is fundamentally different from standard arbitration agreements: e-Court's model clause contains a one-month 'opt-out' period that, after a dispute has arisen, allows the defendant to go to a state Court. Only after the month has passed and the defendant has not made use of this opportunity is e-Court competent to decide on a case. Whereas a normal arbitral clause irreversibly removes the competence from a state Court, e-Court's arbitral clause is not final in the sense that the defendant still has one month to change his mind and choose litigation. Under these circumstances, there is no form of duress or constraint to submit a dispute to an arbitral tribunal. Under Dutch law, an arbitral clause included in a consumer contract is considered fair as long as an 'opt-out' period of one month is given.<sup>37</sup> However, it is considered valid only when parties have expressly or impliedly accepted the arbitration clause.<sup>38</sup> Below, we show what case law considers 'implied acceptance.' One relevant point is that the waiver should be made explicitly, a 'silence implies consent' basis is too weak for waiving such an important right. We are not sure about the policy by e-Court on this point, but if e-Court would resume its services, they should integrate explicit consent not to go to court into their process.

In 2011, a party was invited to resolve the dispute through e-Court's arbitration procedure. The letter stated that unless the defendant took up action and made it known he wanted to go to a state Court, the dispute would be handled by e-Court. However, previously *no* reference had been made to arbitration in the contract between the parties, or in the standard terms. This therefore did not qualify as a valid arbitration agreement, as the defendant had not wilfully accepted the arbitral agreement: "inaction is simply not equal to implied acceptance."<sup>39</sup> One year later, e-Court's arbitral clause was inserted into the standard terms after

34 *X. v. Federal Republic of Germany*, No. 4618/70, Commission Decision of 21 March 1972.

35 94% of all health insurance providers refer to e-Court, and taking out health insurance is mandatory under Dutch law, according to Parliamentary Inquiries, ah-tk-20172018-1802, 18 April 2018.

36 Art. 3(3) jo. Annex list 1 (q) of the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

37 6:236n DCC.

38 Art. 1021 Rv, 6:227a (1) DCC.

39 r.o. 2.7, ECLI:NL:RBALM:2011:BT7088; Translation from: "Stilzitten is nu eenmaal niet gelijk te stellen aan stilzwijgende aanvaarding."

the contract had already been signed. This was held to have been concluded voluntarily as the consumer had been informed of the new standard terms and had not opposed their implementation. This qualified as implied acceptance; the Court granted the *exequatur*.<sup>40</sup> When e-Court's arbitral clause was included in the standard terms of the health insurance companies, consumers were informed of the changing terms. Thus, both express or implied acceptance as well as a one month 'opt-out' period are required for e-Court's arbitral clause to be valid under Dutch consumer law. These requirements meet the threshold for 'absence of constraint' under the Convention.

Third, the waiver should be accompanied with minimum procedural guarantees commensurate with the importance of the rights waived. This means that there should be 'compensatory factors' (fair trial guarantees) in the subsequent procedure. The consumer is given the opportunity to be heard, challenge the arbitrator if there is a sense of partiality and comment on the other party's arguments. We shall analyse these procedural guarantees in depth in the following sections.

Finally, on the basis of European fundamental rights, we must establish whether the arbitral clause does not run counter to any important public interest. There seems to be no important public interest present opposing online arbitration as long as the procedure is fair. One argument could be that bulk debt collection cases *must* be handled by a District Court because indebted people deserve additional protection. There is, however, no reason to assume that a defendant's rights are better protected in normal litigation than in e-Court's procedure. In a District Court, debt collection cases where the defendant does not appear are checked only marginally, so basically rubber-stamped by the Court's registry. According to e-Court, in their procedure the chance that an invalid claim is awarded is probably smaller because algorithms are used to identify unusual patterns rather than being subjected to random checks in District Courts.

Whether or not one agrees with the Dutch law that allows for arbitral clauses in standard terms of consumer contracts is a political opinion. Legally, e-Court's arbitral clause meets all criteria of a valid 'waiver' under the ECHR and of a valid arbitration agreement under European and Dutch consumer law; that is, assuming that e-Court has indeed properly informed the consumer of his opportunity to still go to a state Court. We will examine this next.

### 3.2 *Summoning Letter*

e-Court's model clause is a fair standard term because of the one-month opportunity to 'opt-out', but this does not mean that the defendant is necessarily aware of this right. If not, the opportunity is rendered essentially meaningless. Critics argue that e-Court's summoning letter is not doing this properly and therefore "deliberately deceives the defendant and unlawfully denies the defendant access to a state Court."<sup>41</sup> We will analyse e-Court's summoning letter.

40 r.o. 2.8, ECLI:NL:RBALM:2012:BV8413.

41 Moerman & Houkes, 2018.

Some argue that the name ‘e-Court’ and the legal and intimidating tone of voice make it insufficiently clear that e-Court is an arbitration tribunal and not a state Court. In his article, Hartendorp correctly states that “for individuals, there should be no ambiguities about the nature of the procedure in which they participate nor about the status of the dispute resolution body.”<sup>42</sup> However, the first thing the letter says is ‘call for arbitration’ and the option to choose a state Court is explicitly given under point five. The text is unambiguous and clearly informs the defendant of his right:

the defendant has the right to, within one month from today, choose for a procedure at the District Court instead of e-Court Foundation. If the defendant wishes to make use of this opportunity, he must make this known within the stated term of one month to the Dutch organisation for bailiffs GGN<sup>43</sup> by sending a letter.

In practice, GGN also accepted it when defendants sent emails stating their choice of forum. One might argue that it would have been better to have a box stating this right to abstain from arbitration directly after the ‘call for arbitration’, in particular because people tend to be overwhelmed by such letters and maybe never fully consciously arrive at point five where the right to go to Court is formulated. This could thus be improved, but as it is, it is at least not clearly wrong or misleading.

The letter also includes a reference to e-Court’s website and regulation, explains e-Court’s standardized procedure, mentions that the Court fee can be prevented if the money is transferred within two weeks and that the costs of state litigation are higher than e-Court’s procedure. In addition, the letter contains a roadmap that illustrates the choice graphically. Legally, e-Court is under a mere obligation to give a one-month ‘opt-out’ period in which a defendant can exercise his right to Court, and it follows logically that such an opportunity must be a real one.<sup>44</sup> The letter informs the defendant clearly of this opportunity to choose a state Court and is not in any way misleading: the defendant has been sufficiently enabled to exercise his right. It should be noted, however, that for many consumers e-Court is a more attractive option than litigation. To conclude, it follows from our legal analysis that e-Court’s arbitration agreement is valid under Article 6 of the Convention.

42 R.C. Hartendorp, ‘e-Court een goed initiatief dat zich op de verkeerde punten onderscheidt’, *Rechtsgeleerd Magazijn Themis*, Vol. 2014, No. 3, 2014, pp. 117-122, at 117.

43 GGN specializes (see ggn.nl) in: a. the collection of claims; b. invoicing and accounts receivable management; c. credit management; d. execution of official acts; e. legal proceedings; all this in the broadest sense of the word.

44 *Golder v. the United Kingdom*, No. 4451/70, ECHR 1975

## 4 Independence and Impartiality

An arbitral tribunal must, similarly to a Court, be independent and impartial. The Chairman for the Council of the Judiciary, Frits Bakker, has criticized e-Court for its lack of transparency and called it an ‘intransparent black box’.<sup>45</sup> In addition, some argue that e-Court is financially dependent on the companies, because they have included e-Court’s arbitral clause in their standard terms. We examine these two allegations in order to determine whether the defendant’s right to an independent and impartial tribunal is sufficiently guaranteed.

### 4.1 Transparency

e-Court has been criticized because it does not publish its verdicts or a list of its arbitrators. However, when e-Court awards a claim, its judgment is sent to both parties. This is common practice in the case of arbitration, where confidentiality is one of the core principles.<sup>46</sup> Regarding the arbitrators, e-Court indicates on its website that its arbiters were legal professionals with more than fifteen years of experience. In addition, the parties to the arbitration proceedings knew the identity of their arbitrator and had the opportunity to challenge the arbitrator and have him replaced. e-Court as an arbitral institute is not required to publish verdicts or a list of its arbitrators. Nonetheless, to meet criticism and increase transparency, some decisions as well as a list of e-Court’s arbitrators have been published since early 2018.

Although the European Directive on Consumer ADR<sup>47</sup> is not applicable to e-Court, it is relevant as it sets out requirements for ODR platforms. When we look at the information that ADR platforms are required to publish online according to the Directive, it appears that e-Court publishes all required information, excluding annual activity reports.<sup>48</sup> They intended, however, to start publishing annual accounts as of 2018, since in previous years e-Court was still in the start-up phase.<sup>49</sup>

### 4.2 Independence

There are numerous criteria for assessing independence, including the manner of appointment of a body’s members, the duration of appointment and guarantees against outside pressure.<sup>50</sup> First, the parties do not appoint the arbitrators, nor exert any influence over the duration of the arbitrators’ term. Fellow arbitrators or e-Court’s president do not influence an arbitrator when he makes a decision, as

45 F. Bakker, ‘voorzitter van de Raad voor de Rechtspraak’, as quoted in Kuijpers *et al.*, 2018, p. 3.

46 A. Redfern, *Redfern and Hunter: Law and Practice of International Commercial Arbitration*. Oxford, Oxford University Press, 2015.

47 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 Reg. (EC) No. 2006/2004 And Directive 2009/22/EC (Directive on Consumer ADR).

48 *Ibid.*, Art. 7.

49 Interview e-Court, May 29 2018, Amsterdam.

50 Council of Europe/European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb)*, 17 December 2017, p. 38



the arbitrators work independently from their own office and the president executes a managerial and organizational function, which is strictly separated from the judicial functions. Similarly, e-Court does not employ arbitrators who are in a subordinate position vis-à-vis a company, as that too would be considered seriously to affect its independence.<sup>51</sup> By incorporating these procedural safeguards, e-Court complies with the impartiality requirements as set forth in the new ADR Directive.<sup>52</sup> However, a tribunal should not only factually be independent, but also demonstrate an *appearance* of independence.

Critics argue that the mere inclusion of e-Court's arbitral clause by companies in their standard terms implies a relationship of dependency. However, this would imply that companies would never be allowed to have an arbitral clause in their standard terms that refers to an arbitral institution and would effectively mean only ad hoc arbitration would be allowed. Merely because a company has chosen the forum, it does not mean that that forum is not independent. Besides, the Court has held in *Oleksandr Volkov v Ukraine* that any defects regarding independence might be remedied in the subsequent stages of the proceedings.<sup>53</sup> The one-month 'opt-out' period is a good example of a subsequent procedural guarantee: if e-Court had not instilled an appearance of independence in the defendant, the defendant could opt for Court litigation. If the defendant makes no use of this opportunity, the principle of *collateral estoppel*<sup>54</sup> prevents the defendant from complaining about a lack of independence later on.

Yet, whereas the opinion of the defendant is important,<sup>55</sup> decisive is whether an 'objective observer' sees any cause for concern regarding independence in the specific circumstances.<sup>56</sup> The American Bar Association (ABA) has recommended best practices for ODR service providers,<sup>57</sup> which are based mainly on the use of disclosures. The ABA, similarly to the European Union, thus also sees a link between increased transparency and (appearance of) independence. They suggest that ODR providers should disclose *inter alia* organizational information, the terms and conditions, an explanation of the service that is provided and a confirmation that the proceeding will meet basic standards of due process. e-Court's website includes all disclosures mentioned in the ABA Guidelines. More specifically, with regard to independence, the guidelines recommend ODR platforms to disclose whether ODR services are provided under a contractual relationship with other organizations, such as merchants or trade associations, and whether the ODR provider provides any referral compensation (referral fees, rebates, commissions, etc.).<sup>58</sup> e-Court explains that none of the preceding examples are applicable

51 *Sramek v. Austria*, No. 8790/79, ECHR 1984, §42.

52 Directive 2013/11/EU, Art. 6.

53 *Oleksandr Volkov v. Ukraine*, No. 21722/11, ECHR 2013, §§103, 118, 123, 131.

54 R. Gordon, 'Only One Kick at the Cat: A Contextual Rubric for Evaluating Res Judicata and Collateral Estoppel in International Commercial Arbitration', *Fla. J. Int'l. L.*, Vol. 18, 2006, p. 549.

55 *Sacilor Lormines v. France*, No. 65411/01, ECHR 2006, §63.

56 *Clarke v. the United Kingdom* (dec. 2017; unpublished).

57 American Bar Association Task Force on E-Commerce and ADR – Recommended Best Practices for Online Dispute Resolution Service Providers.

58 *Ibid.*, p. 6, under V1. Impartiality.

since they do not have any contractual relations with the companies, nor receive any referral compensation.<sup>59</sup> It does not follow from the ABA's guidelines or from the ADR Directive that there is an obligation to disclose relationships and arrangements that do *not* exist.

What follows from the ABA Guidelines as well as from the ADR Directive is that disclosures, and hence transparency, are also important for the sake of appearing independent and installing trust in users. However, this does not mean that every detail requires disclosure. As already mentioned, an arbitral award requires an exequatur before it can be executed, and for every exequatur a Court fee of €124 must be paid.<sup>60</sup> e-Court has repeatedly tried to combine all cases of the same applicant into one debt proceeding case, to avoid paying individual Court fees for every exequatur.<sup>61</sup> However, in 2013, the District Court confirmed that even though the creditor was the same in all cases, these were still considered separate judgments and therefore required separate exequaturs.<sup>62</sup> There has been controversy in the media because it is unclear how e-Court can cover these costs of €124 if their Court fee is only €85. e-Court explains that this aspect of the procedure is classified information. This is a bit odd, also because there is no other explanation than that the contactors they offer their services to (like insurance companies) will cover the differences, and probably even more than that. That being said, the ABA Guidelines mention that disclosures should be made regarding costs and funding, but an ODR platform is not required to publicize its business model. Mentioning all costs of the process, what portion of the cost each party will bear and the terms of payment is sufficient.<sup>63</sup> Similarly, the ADR Directive does not require a platform to disclose such information, only “the costs, if any, to be borne by the parties, including any rules on awarding costs at the end of the procedure.”<sup>64</sup> As e-Court meets all these criteria, we can conclude that e-Court has appropriate institutional safeguards in place and discloses sufficient information. In the eye of an objective observer, e-Court thus also appears sufficiently independent.

#### 4.3 Impartiality

Regarding impartiality, the ECtHR has adopted a double impartiality test: arbitrators should be both personally, or *subjectively*, and *objectively* impartial. As we have seen, default verdicts are the sole result of an automated procedure. In such cases, the computer is the arbitrator, and because of the simplicity of the ruling (awarding or not awarding the claim) partiality is not very likely. Moreover, e-Court's algorithm detects disproportionately high claims and other deviations, and thereby aims to ensure absence of bias. When a defendant does respond to a claim, an arbitrator looks at a case and shall “execute the assignment independ-

<sup>59</sup> Interview e-Court, 29 May 2018, Amsterdam.

<sup>60</sup> Art. 1072a Rv jo. Art. 261 Rv jo. Art 3(2) and (4) Wgbz jo. Art. 22 (1) Wgbz.

<sup>61</sup> ECLI:NL:RBALM:2011:BT7623.

<sup>62</sup> r.o. 2.10, ECLI:NL:RBOVE:2013:2138.

<sup>63</sup> American Bar Association Task Force on E-Commerce and ADR – Recommended Best Practices for Online Dispute Resolution Service Providers, p. 5, under V. Costs and Funding.

<sup>64</sup> Directive 2013/11/EU, Art. 7 (1) l.

ently, impartially and to his best abilities. In doing so, he is bound by the (i) Code of behavior, (ii) e-Court's regulation, and (iii) the law."<sup>65</sup> Subjectively, an arbitrator should not have any conflict of interest regarding a certain case. There has not been any evidence pointing in that direction, and, moreover, the cases are relatively straightforward: debt collection proceedings do not require extensive interpretation and do not lend themselves well for biased arbitrators. The ECtHR consistently holds that "the personal impartiality of a judge must be presumed until there is proof to the contrary".<sup>66</sup>

The objective impartiality test concerns whether the tribunal offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. Firstly, e-Court only employs legal professionals with a university degree in law, 15 years of relevant, preferably litigation, experience and sufficient knowledge of Dutch civil procedural law. Second, if doubts remain as to the impartiality of e-Court, there is a one-month 'opt-out' period during which a defendant can choose another forum. Lastly, if any doubts regarding the arbitrator's independence or impartiality arise during the procedure, there is an opportunity to challenge and replace the arbitrator.<sup>67</sup> By implementing all of these safeguards, e-Court fulfils all the recommended best practices by ABA.<sup>68</sup> e-Court meets both the objective and the subjective impartiality criteria.

## 5 Fair Hearing

The right to a fair hearing is arguably the most important right under Article 6 and hence deserves protection. We will examine whether e-Court sufficiently guarantees the right to a fair hearing, by looking at all aspects of the procedure. First, does the 'robot' procedure undermine in any way the right to a fair hearing? And, second, is e-Court's online procedure sufficiently accessible, adversarial and providing a fair balance between the parties?

### 5.1 Robot Judge

As e-Court's default verdicts are entirely rendered by a computer, it is criticized for being a 'robot judge'. It is important to note that only e-Court's *default* verdicts are rendered automatically; when a defendant responds to the claim, a human arbitrator looks at the case. E-Court's procedure is thus fully automated only when a defendant does not respond, and this process consists of seven steps:

- 1 Identification of parties;
- 2 Establishing competence of e-Court;
- 3 Establishing the correct application of the e-Court's procedural laws;

65 Art. 6 (4) e-Court's procedural rules.

66 *Le Compte, Van Leuven and De Meyere v. Belgium*, no. 6878/75, Court Judgment, §58; *Micallef v. Malta*, no. 17056/06, [GC], ECHR 2009, §94.

67 Art. 7 (1) e-Court's procedural rules.

68 American Bar Association Task Force on E-Commerce and ADR - Recommended Best Practices for Online Dispute Resolution Service Providers, p.6 under V1. Impartiality

- 4 Selection of the correct template;
- 5 Deciding on the correct verdict;
- 6 Producing the original verdict (with the correct digital signature) and
- 7 Determining that the claim is not unjust or unlawful.<sup>69</sup>

These are all relatively straightforward tasks, and indeed e-Court makes very limited use of the available artificial intelligence (AI) techniques in legal decision-making, as, for example, stages one to three are performed by simple administrative software. When a defendant does not respond to a claim and all requirements have been positively fulfilled, the award is rendered through this seven-step procedure, or, in other words, by an algorithm. With understandable scepticism, it is argued that without an actual human judge looking at the claim, the quality of justice cannot be guaranteed and, moreover, that there is no legal basis for such ‘robot judgment’.<sup>70</sup>

Does this automated procedure undermine the defendant’s right to a fair hearing? First, e-Court assesses its competence like any other arbitral tribunal and *ex officio* checks whether the consumer contract complies with European consumer law, just like Dutch Courts are required to do.<sup>71</sup> This review of the standard terms and the arbitral clause is done by a human arbitrator “to establish a level of trust and (...) be convinced of the integrity and the good faith of the Plaintiff”.<sup>72</sup> So once a human arbitrator has checked whether there is indeed a valid arbitral clause that refers to e-Court in the standard terms and whether the claim is formulated clearly enough, the computer can analyse the ensuing claims. Assessing its competence and compliance with European consumer law is thus not decided automatically, but by human arbitrators.

Second, it is important to distinguish default cases from cases in which the defendant responds to the claim. Currently, AI is not advanced enough to decide on complicated cases and really balance and weigh arguments.<sup>73</sup> Therefore, when a defendant contests the claim, a human arbitrator looks at the case, decides whether new evidence is allowed and decides.<sup>74</sup> Thus, where there is a matter of legal or factual complexity and actual adjudicating is required, a human arbitrator decides.

In addition, the risk that a company files an unjust claim is smaller in e-Court’s procedure than in traditional litigation. The bailiff has the legal task<sup>75</sup> to summon a defendant and check whether the claim is real and correct. Similar to how a District Court works, a claim is held to be correct until proven otherwise. However, while a District Court does this by randomly checking claims, in which

69 Nakad-Weststrate *et al.*, 2015, p. 1107.

70 One could argue that Art. 22(1) GDPR prevents e-Court from ruling automatically. The exceptions of Art. 22(2) of explicit consent and performance of contract may apply, but also may not. This is an interesting issue that deserves further attention.

71 ECLI:NL:HR:2013:691. Supreme Court, 13 September 2013.

72 Nakad-Weststrate *et al.*, 2015, p.1107.

73 *Ibid.*

74 Art. 9 (3) e-Court’s procedural rules.

75 Art. 2 Gerechtsdeurwaarderswet.

there is an element of chance and arbitrariness, the computer algorithm used by e-Court detects any abnormal deviation. For example, old claims, very high claims as well as many very low claims that suggest improper filing costs, etc. are discovered. Bart Houkes, social councillor and co-author of the critical report 'Rechtspraak op Bestelling?!',<sup>76</sup> argues that there should be a more thorough review of the default verdicts: "now it is only done by a computer, this does not guarantee sufficient quality of justice."<sup>77</sup> However, up to now there has not been a single case in which e-Court's calculations were proven wrong, while there have been examples of human error as a result of the manual process of copying all data.<sup>78</sup> e-Court's digital procedure is not only faster than traditional litigation, but it is also objective and works without miscalculations.<sup>79</sup> It then does not undermine but rather *improves* the defendant's right to a fair hearing.

However, an arbitral procedure cannot guarantee the right to a fair hearing if it does not have any legal basis. The Minister of Justice has stated with regard to e-Court's automated judgment that "digitization is an increasingly important tool in modern dispute resolution. However, fully automated decision-making without any intervention from a judge are a concern."<sup>80</sup> e-Court's founder Nakad addresses this complication: "Dutch legislation does not provide for the possibility of a digital judge (...) and its incorporation in the laws and regulations is not to be expected soon."<sup>81</sup> Indeed, Dutch law states that an arbitrator is any natural person with legal capacity.<sup>82</sup>

To solve this requirement of having a human arbitrator, e-Court therefore renders the automated verdict in the name of the arbitrator, who does nothing more than random checks. This seems an appropriate solution, as a similar practice takes place at District Courts. A judge does not calculate any claims; all that is done by the registry's computer; the judge merely signs the claim. Similarly, orders from the Central Judicial Collection Agency (CJIB) are created by a fully digitalized process, without any human intervention.<sup>83</sup> While the use of AI in judicial proceedings is a very interesting topic that undoubtedly requires further investigation, it seems strange to contest e-Court's legal basis when there is no fundamental difference when compared with Court proceedings and its procedure is even more accurate.

## 5.2 Accessibility

The large majority of debt collection procedures at a District Court are judged by default, and defendants consequently do not participate in that litigation process at all. Similarly, in e-Court's procedure only 12% of all defendants respond to the

76 Moerman & Houkes, 2018.

77 Interview Bart Houkes, Wednesday 25 April 2018.

78 Nakad-Weststrate *et al.*, 2015, p. 1108.

79 *Ibid.*

80 Parliamentary Papers ah-tk-20172018-1802.

81 Nakad-Weststrate *et al.*, 2015, p. 1108.

82 Art. 1023 Rv.

83 M. Hildebrandt, 'Data-gestuurde intelligentie in het strafrecht', *Preadvies NJV*, 2016.

claim.<sup>84</sup> However, while only a few defendants want to respond to a claim, responding should not be difficult to do. In other words, the procedure should be accessible. Since e-Court's procedure takes place in an entirely online environment, access to the Internet and some digital skills are required.

André Moerman, social councillor and author of the critical report 'Rechtspraak op Bestelling?!',<sup>85</sup> stated in an interview that "especially the clients who look for help from social councilors, are not capable of proceeding digitally."<sup>86</sup> Does e-Court's procedure require an advanced set of digital skills? Its website uses easy language and pictures to guide a defendant through the process, e-Court sends emails to remind the defendant when terms for response are almost over,<sup>87</sup> and defendants can respond to a claim in Dutch or English. For an average Internet user, this process should not cause any difficulties. This then leads us to an important question: when is a law or procedure considered to be sufficiently accessible? When *everyone* understands it? There will always be illiterate or otherwise helpless people for whom any form of proceeding is incomprehensible. These are the people that Moerman is talking about, and they obviously deserve protection, but it is very doubtful that these same people understand court proceedings. Very likely, more people will encounter difficulties understanding court proceedings than the e-Court procedure.

For the majority of people, e-Court's procedure is easily accessible. First, most people have signed their health insurance contract online, and it makes sense to resolve any dispute arising from that contract online as well. Second, out of the 33,000 procedures, only five people have complained that they did not understand the process.<sup>88</sup> Third, GGN has shown that defendants communicate sooner with them in e-Court procedures than in traditional litigation procedures and that three times more payment arrangements have been made. Moreover, under the new ADR Directive, e-Court's responsibility regarding accessibility of the procedure means that e-Court should

maintain an up-to-date website which provides the parties with easy access to information concerning the ADR procedure, and which enables consumers to submit a complaint and the requisite supporting documents online.<sup>89</sup>

e-Court easily complies with these requirements; hence e-Court's procedure is sufficiently accessible and even seems to foster communication. Besides, in case a defendant has in no way access to the Internet, it is possible to proceed offline. In such a case, requests, responses and other statements can be sent by ordinary

84 R. van Etten, 'Droom of werkelijkheid: digitale rechtspraak leidt tot meer betalingen en minder zaken voor rechter', 27 March 2018, [www.ggn.nl/actueel/2018/~/.link.aspx?id=248979438BAD43049933CEFD06195281&z=z](http://www.ggn.nl/actueel/2018/~/.link.aspx?id=248979438BAD43049933CEFD06195281&z=z).

85 Moerman & Houkes, 2018.

86 André Moerman as quoted in an episode of *Nieuwsuur*: 'Robotrechter e-Court is een groot en niet transparant zwart gat', 17 January 2018.

87 Art. 3 (4) e-Court's procedural rules.

88 Van Etten, 2018.

89 Directive 2013/11/EU, Art. 5(2) a



mail.<sup>90</sup> To conclude, going to Court is, also for the digital non-literates, likely more cumbersome than, maybe with some help, going through the process online via e-Court.

### 5.3 Adversariality

Once the procedure has started, defendants have five days to respond to a claim. Is this period sufficient to give effect to such a fundamental principle as the right to adversarial proceedings? The Court held in *Nideröst-Huber v. Switzerland* that the desire to save time and expedite the proceedings never justifies disregard of the adversarial principle.<sup>91</sup> We must keep in mind that the cases concern money claims and hence does not require extensive fact-finding or legal debate. However, even in such simple cases it is important to give the parties the right to put statements forward as well as to be heard. This also implies that the tribunal should 'duly consider' the defendant's arguments.<sup>92</sup> While the defendant indeed has five days to respond, starting from Monday 09:00 until Friday 17:00, the defendant is informed by letter about the procedure one month before it starts. This is crucial, because during this period the defendant can already contact GGN and, if a payment arrangement is made, even *prevent* the e-Court fee. So in effect the defendant has a month and five days to respond to a claim.

Compare this with a District Court's letter in which a defendant is informed one week before the hearing takes place and in which a claim is usually awarded by default. Health insurance company CZ states that compared with traditional litigation, e-Court's method was very customer-friendly.<sup>93</sup> Practice thus reveals that the defendants readily find their way to communicate and that the principle of adversariality is sufficiently present in e-Court's procedure.

### 5.4 Equality of Arms

e-Court must also ensure 'equality of arms' in order to safeguard the right to a fair hearing. This principle is closely interlinked to the principle of adversariality and serves to maintain a 'fair balance' between the parties. This is important, because the applicant will have more experience with the online system since it resolves all its debt collection disputes through e-Court. At the outset, the parties to the proceeding are thus unequal. However, this does not necessarily mean that there is no longer a fair balance between the parties. An assessment of the proceedings is determined by examining them in their entirety,<sup>94</sup> and shortcomings in the fairness of the proceeding may be remedied at a later stage.<sup>95</sup> According to e-Court's regulation, an arbitrator must treat the parties on an equal footing.<sup>96</sup> In

90 Art. 3(7) e-Court's procedural rules.

91 *Nideröst-Huber v. Switzerland*, No. 18990/91, Court Judgment 1997, §30.

92 *Donadze v. Georgia*, No. 74644/01, ECHR 2006, §35.

93 Press release CZ February 16, 2018: "CZ zoekt voor verzekerden naar alternatief voor laagdrempelige en betaalbare arbitrage na wegvallen e-Court."

94 *Ankerl v. Switzerland*, No. 17748/91, Court Judgment 1996, §38; *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, No. 38433/09, [GC], ECHR 2012, §197.

95 See, e.g. *Helle v. Finland*, No. 20772/92, Court Judgment 1997, §54.

96 Art. 6 (5) e-Court's procedural rules.



more concrete terms, this means that a defendant should have the possibility to put statements forward and get a real chance to comment on replies, under conditions that do not place the defendant at a substantial disadvantage vis-à-vis the plaintiff.<sup>97</sup>

Moreover, in e-Court's procedure, the plaintiff must ensure that the defendant has sufficient opportunity to respond to any new statements. To that end, the arbitrator may issue further instructions with regard to the period of delivery of the reply or dismiss statements for being too late. In practice, an arbitrator considers a plaintiff's statement too late when it is written on Thursday or Friday.<sup>98</sup> Thus, the plaintiff, and otherwise the arbitrator, aims to realize that the defendant has sufficient time to comment on a statement. While the parties are at the outset not 'equal', e-Court offers extra protection to the defendant so as to compensate and thereby effectively treats the parties as equal.

## 6 Is e-Court's Process Fair?

Allegations regarding lack of transparency, lack of independence, unlawfully denying access to a state Court and e-Court being a 'robot judge' were widespread in the media. Ultimately, criticism boiled down to the fact that the defendant's right to a fair trial was not guaranteed in e-Court's procedure.

On the basis of our foregoing analysis, we argue that e-Court's procedure sufficiently guarantees the right to a fair trial under Article 6 of the Convention. e-Court's arbitral agreement is concluded in the manner required by the Convention and is therefore a valid 'waiver'. Moreover, e-Court offers sufficient safeguards and has published necessary information on its website. Through these disclosures, it thereby meets the best practices for ODR platforms as outlined by the ABA as well as the requirements for ODR platforms as enshrined in the ADR Directive. Sufficient transparency also aids e-Court in guaranteeing the right to an independent and impartial tribunal.

e-Court's procedure offers the opportunity for the defendant to comment and be heard and offers additional protection in order to treat the inherently unequal parties equally. Its online process is straightforward, clear and sufficiently accessible for an average digital user. By ensuring an adversarial process, equality of arms and an accessible process, e-Court thus also guarantees the right to a fair hearing. The improved communication and increased number of payment arrangements reveal that these principles do not exist only on paper: defendants respond well to e-Court claims and are thereby often able to avoid the *Court fee*. Insofar as the Convention is applicable to an arbitral tribunal, e-Court thus guarantees the defendant the right to a fair trial.

One point where e-Court needs to change its policy is that the defendant is informed by writ and subsequently charged for it. While the first is allowed, there

<sup>97</sup> *Regner v. the Czech Republic* [GC], § 146; *Dombo Beheer B.V. v. the Netherlands*, § 33.

<sup>98</sup> Interview e-Court, 29 May 2018, Amsterdam.

is no legal basis for ascribing these costs to the defendant.<sup>99</sup> The Minister of Justice, Sander Dekker, has informed the Royal Professional Organization of Judicial Officers in The Netherlands (KBvG)<sup>100</sup> that there is no legal basis for such conduct.<sup>101</sup>

## 7 Conclusion

When we read the 2018 report on e-Court by Moerman & Houkes we largely agreed with their findings and considered e-Court an initiative with serious shortcomings. After the legal analysis reported on in this article, however, we conclude that most criticism is not legal but seems either to be political or to originate from a protectionist viewpoint. For example, an arbitral clause included in the standard terms is simply something people do not *like*; a letter that is sufficiently informative but does not include positive news is bound to receive criticism; and arbitration tribunals that do not publish a list of their arbitrators and their verdicts are considered untrustworthy. Yet these critiques are all *political*: legally, there is no convincing ground for any of these arguments. Similarly, the fundamental belief that dispute resolution is inherently a state responsibility is political. Stating that “arbitration is an undesirable solution to bulk debt collection proceedings”<sup>102</sup> is potentially an interesting claim but is not linked to a legal discussion. Arbitration is explicitly allowed for under the Convention, and e-Court complies with all requirements.

Other criticisms, such as that the defendant’s rights are not protected, that an automated judgment is not valid and doubts concerning the depth of review of arbitral award, originated from the Council of the Judiciary. These arguments are similarly legally unfounded and seem to have their origin in protectionism.

While e-Court was supposed to handle 40,000 cases in 2018, the media frenzy led the LOVCK<sup>103</sup> to refrain from granting exequaturs to e-Court’s procedure until the Supreme Court had answered several prejudicial questions. These will most likely include the legality of an automated default process, the validity of an arbitral clause in the general terms of a consumer contract, the motivation of verdicts, and the manner of review of arbitral awards. Pending a decision, e-Court is not operational. However, as the judiciary in the Netherlands has voiced its concerns regarding the effects of competition, possible loss of employment and use of digitalization, e-Court correctly argues that a Dutch Court is not impartial and therefore not competent to rule on this matter. Preliminary judicial questions should therefore instead be referred to the Court of Justice of the Euro-

99 Response from the Minister of Legal Protection to Parliamentary Inquiries about e-Court (18 April 2018): ah-tk-20172018-1802.

100 Koninklijke Beroepsorganisatie van Gerechtsdeurwaarders.

101 Letter from the Minister of Legal Protection to the Chair of the Dutch Parliament (16 April 2018): kst-29279-423.

102 Moerman & Houkes, 2018.

103 In Dutch: Landelijk Overleg Vakinhoud Civiel en Kanton [National Coordination on legal issues lower Courts].

pean Union (CJEU), or the case could be taken to the Supreme Court and afterwards to the ECtHR.

When we look at the criticisms outed in the media frenzy, it seems that people are not used to an online platform deciding on ‘judicial’ disputes and believe dispute resolution inherently is a state task. While bulk debt collection cases lend themselves perfectly for online arbitration and automated judgments because of its high volume and simplicity, perhaps some more time is needed before people trust the dispute resolution ability of ‘a robot’. However, e-Court was actually quite successful and decided on thousands of cases in 2017. To be more accurate, then, it seems that the real issue is that some more time is needed before it is accepted that the Dutch *judiciary* shares its dispute resolution task.

# The Pull of Unbiased AI Mediators

Chris Draper\*

## Abstract

*There is significant concern in the access to justice community that expanding current court-based online dispute resolution (ODR) efforts will further exacerbate the systemic inequities present in the American justice system. This well-founded fear stems from the fact that current ODR tools typically calibrate artificial intelligence (AI) algorithms with past outcomes so that any future cases are consistently analysed and filtered in a manner that produces similar results. As courts consider ODR tools for more complicated cases that often require mediation, there is significant disagreement on whether it is possible to create an AI mediator and how that could be achieved. This article argues that an effective AI mediator could be created if its design focuses not on the outcomes achieved by the mediation but on the manner of the communication prompts used by the AI mediator.*

**Keywords:** automation, artificial intelligence, algorithm development, mediation, pull style communication.

## 1 Introduction

The response to automation in traditionally white-collar industries ranges from excitement to fear.<sup>1</sup> Online Dispute Resolution (ODR) is one of these primarily white-collar applications where the onslaught of automation is causing a wide range of visceral reactions. To some, implementing ODR solutions that “turn every cellphone into a point of access to justice” is the only way we can meaningfully serve Americans who cannot afford a lawyer when they need one.<sup>2</sup> For others, ODR tools are accelerating efforts to remove all remaining shreds of humanity from our inequitable society.

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1 See, ‘Automation and Anxiety’, *The Economist*, 23 June 2016, [www.economist.com/special-report/2016/06/23/automation-and-anxiety](http://www.economist.com/special-report/2016/06/23/automation-and-anxiety) (last accessed 7 July 2019).

2 A. Morris, ‘Could 80 Percent of Cases Be Resolved through Online Dispute Resolution?’ *Legal Rebels Podcast*, 17 October 2018, [www.abajournal.com/legalrebels/article/rebels\\_podcast\\_episode\\_033](http://www.abajournal.com/legalrebels/article/rebels_podcast_episode_033) (last accessed 7 July 2019).

Alternative dispute resolution (ADR) covers a wide range of dispute resolution techniques designed to streamline justice by avoiding traditional courts. ODR takes efficiency a step farther by streamlining traditionally human-dependent processes. For example, traditional ADR expects mediation to bring all parties to one location where information can be physically shuttled between different physical locations. ODR mediation can be carried out asynchronously with electronic communication between parties from all over the world securely facilitated through a platform like Trokt. While there is limited controversy when ODR automates the physical message delivery happening in traditional ADR, artificial intelligence (AI) is being looked to for automating procedural and facilitative processes that could significantly impact ODR outcomes.

The most controversial conceptual application of automation is an *AI mediator*. There is a body of evidence that indicates AI is fundamentally unable to be truly creative<sup>3</sup> or to make decisions that will be acceptable to humans without continually optimizing human input.<sup>4</sup> These fundamental issues with AI are often cited as reasons why an AI mediator is not viable. Yet these arguments implicitly assume that mediation requires creative skill.

## 2 What If It Does Not?

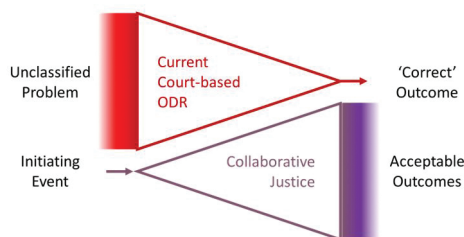
There are disputes where the presence of a specific individual can fundamentally alter the outcome of the dispute or any agreement that could be reached. Yet there does appear to be a science to mediation that could be repeatably designed. If true, then a thoughtful development and application of ODR technologies, contextualized by the actual risks and biases observed in unautomated ADR workflows, could provide a future that is squarely in the middle of these two extreme visions – even when it comes to an AI mediator.

## 3 What Is ODR?

ODR is fundamentally an ADR process that is at least partially completed online. Dispute resolution processes include fact-finding, negotiation or settlement during mediation, arbitration or med-arb using video, voice or written collaboration software, to name just a few. At its most basic, ODR includes asynchronous contract negotiation over email, or real-time collaboration using text-based messaging programmes. At its more refined, ODR includes case management software that is integrated into court processes, or collaboration spaces that allow brainstorming to feed into document drafting until an agreed contract is signed.

3 S. Belsky, 'How to Thwart the Robots: Unabashed Creativity', *Fast Company*, 23 January 2019, [www.fastcompany.com/90294821/how-to-thwart-the-robots-unabashed-creativity](http://www.fastcompany.com/90294821/how-to-thwart-the-robots-unabashed-creativity) (last accessed 7 July 2019)

4 N. Scheiber, 'High-Skilled White-Collar Work? Machines Can Do That, Too', *New York Times*, 7 July 2018, [www.nytimes.com/2018/07/07/business/economy/algorithm-fashion-jobs.html](http://www.nytimes.com/2018/07/07/business/economy/algorithm-fashion-jobs.html). (last accessed 7 July 2019).

**Figure 1** *Filtering versus Facilitating ODR Systems*

Regardless of the ODR platform's sophistication, it will typically take one of two operational forms: filtering or facilitating.

Most discussion around ODR often focuses on court-based systems integrating tools from companies like Tyler Technologies or Matterhorn to solve simple, low-value disputes.<sup>5</sup> If an individual receives a parking ticket, these tools allow someone to log in, complete the necessary documents and pay all relevant fines online. On the more complex end, these tools may allow for the solving of small claims by facilitating real-time or asynchronous text-based communication between the parties, allow the claimant to accept a lesser value in exchange for a quick resolution, and all agreements and payments will be competed online. In all these types of cases, the number of potential outcomes is limited. Whether it be a traffic ticket or a small-claim dispute, the claimant will get all its money, some of its money, none of its money or go to court. These 'filtering' ODR systems are designed to filter the parties into one of these outcomes as quickly as possible. Filtering ODR systems are represented by the top part of Figure 1, where an unclassified problem is filtered down to the 'correct' outcome.

The less visible branch of ODR is 'facilitating' tools that fall into the realm of collaborative justice. These tools are designed to ensure that any outcome that is acceptable to all involved parties can be simply, safely and securely codified. The most widely recognized ODR tool in this space is Trokt, which is designed to remove the human errors that occur between the time a dispute arises until a settlement agreement is filed. Yet Trokt is not the market leader. The US district courts terminated 98,786 tort trial cases between 2002 and 2003, with only 1,647 of these cases resulting in either a jury or bench trial.<sup>6</sup> The remaining 98.3% of tort cases that did not go to trial were resolved with some mixture of the most widely used facilitating ODR tools: tracked-changed Word documents going

5 J.J. Prescott, 'Improving Access to Justice in State Courts with Platform Technology', *Vanderbilt Law Review*, Vol. 70, No. 6, 1993, <https://s3.amazonaws.com/vu-wp0/wp-content/uploads/sites/89/2017/11/28175541/Improving-Access-to-Justice-in-State-Courts-with-Platform-Technology.pdf> (last accessed 7 July 2019).

6 See, 'Tort, Contract and Real Property Trials', *Bureau of Justice Statistics*, [www.bjs.gov/index.cfm?ty=tp&tid=451](http://www.bjs.gov/index.cfm?ty=tp&tid=451) (last accessed 7 July 2019).

back and forth via email that are discussed over the phone or in a videoconference. Despite the widespread understanding that these types of tools are not secure and are inappropriate for relaying sensitive digital data,<sup>7</sup> tens of thousands of complex settlements are negotiated online every year using these rudimentary ODR tools.

The case management and negotiation tools developed by Tyler and Matterhorn have recently defined what many consider court-based ODR. Yet the fundamental definition of ODR means our justice system has adopted and accepted the use of ODR tools for decades. The emerging concerns about ODR regard how these tools are becoming automated.

#### 4 Acceleration through Automation

Current court-based ODR tools such as those provided by Tyler and Matterhorn that rely on ‘filtering’ a dispute into its appropriate resolution bin achieve efficiency by increasing the speed at which a case is filtered. Increasing filtering speed means users must:

- agree to use the system more quickly,
- acknowledge they understand the process more quickly,
- be appropriately filtered into an agreeable bin more quickly,
- agree to the terms of the resolution accessible in the bin where they are filtered more quickly, and
- complete the actions required by the agreement more quickly.

These steps can be achieved more quickly by:

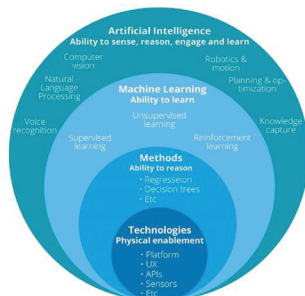
- Simplifying descriptive or instructional language,
- Classifying the dispute with AI, and
- Reducing the effort of agreeing to and paying for the resolution.

These same filtering concepts are routinely applied to the commonly used ‘facilitating’ tools of Word, email and text-based messaging during eDiscovery. Most common eDiscovery tools are using Natural Language Processing (NLP) AI methods to find words, phrases or concepts within documents being searched and select what documents or data points the eDiscovery tool ‘believes’ are appropriate for human review as part of the discovery effort. These same types of AI tools are already appearing in email and word processing tools to help users select words that adjust how the reader will interpret things like repetitive content or intended tone.

Not only is the use of these types of AI techniques for both ‘filtering’ and ‘facilitating’ ODR tools common, but it enables users to rapidly find consistency

7 C.H. Draper & A.H. Raymond, ‘Building a Risk Model for Data Incidents: A Guide to Assist Businesses in Making Ethical Data Decisions’, *Business Horizons*, 2019, ISSN: 0007-6813, <https://doi.org/10.1016/j.bushor.2019.04.005> (last accessed 7 July 2019).



**Figure 2** *Artificial Intelligence, Dependent Tools and Technologies*

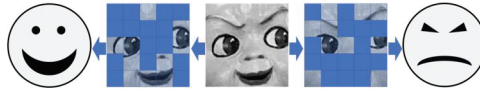
within large or often unstructured datasets. This consistency is found by using Machine Learning (ML) algorithms that compare large amounts of Big Data (BD) against Business Intelligence (BI) metrics that set the priorities for comparison. If these priorities for comparison are met, whether the AI process is relevant to NLP, Vision, Autonomous Vehicles, Robotics or other common applications, the system takes the action that it is instructed to take when faced with this consistency.<sup>8</sup>

For example, an autonomous vehicle application of AI is often seeking unobstructed road and guiding the vehicle to maximize its allowed speed along that unobstructed road. Alternatively, a Vision application of AI may be operating at a retail store to identify how many items are on a shelf before and after a customer enters a store and to alert security if the number of items remaining is not consistent with the number of items bought. Or a Robotics application of AI may be testing the ripeness of grapes by tracking the response to compression forces and picking those that conform to customer interpretations of preferred taste. All these applications depend on ML to process the data the software is gathering against the data with which the ML routines are calibrated, with AI considered to have the ability to make the 'correct' decision with this processed data.

The fundamental limitations of AI are no different from those we experience as humans. First, the quality of any AI application is directly dependent on its ability to access large amounts of relevant data. When data is limited, we must make assumptions about what we cannot see. Second, the quality of any AI decision is directly dependent on its ability to accurately equate what it sees with reality. When environments change, there is an inertia to our expectation of human reactions. This is easy to see in the facial recognition challenges like those presented in Figure 3.

8 S. van Duin & N. Bakhshi, 'Artificial Intelligence Defined', *Deloitte*, March 2017, [www2.deloitte.com/se/sv/pages/technology/articles/part1-artificial-intelligence-defined.html](http://www2.deloitte.com/se/sv/pages/technology/articles/part1-artificial-intelligence-defined.html) (last accessed 7 July 2019).

**Figure 3**     *Example of the Interpretation Challenges Given Limited Data*



In Figure 3, we see that different limited data views result in wildly different interpretations of the underlying reality. Yet even with the full picture, the underlying emotional reality may remain unclear. This lack of clarity and the method of reducing it is not unique to facial recognition, where the interpretation of meaning in facial expressions is continually studied using large human surveys.<sup>9</sup> These large surveys often calibrate a ‘Weak’ or ‘Narrow’ AI system that will use this data as the basis for making its decisions. These Weak or Narrow AI systems differ from ‘Strong’ AI systems that independently refine their analysis of the data, the most important difference being that *Strong AI systems do not currently exist*.

It is extremely important to understand two things when interpreting AI systems:

- 1 AI does not uncover truth; it more rapidly refines what it sees, and
- 2 The weaknesses of AI systems are equivalent to those in an expert witness.

These truths about AI systems are important to understand when interpreting, assessing and mitigating the risks around their use in access to justice applications.

## 5 What Aspects of ODR Worry the Access to Justice Community?

In the dispute resolution and access to justice communities, court-based ODR processes raise a number of concerns and fears. These concerns and fears about court-based ODR technology in general and AI-assisted technology more generally included eight major concerns that were expressed at the National Legal Aid & Defender Association (NLADA) Tech Section meeting held during the 2019 Equal Justice Conference in Louisville, Kentucky.<sup>10</sup> These eight issues that participants at the Tech Section believe must be accounted for in court-based ODR tools can be summarized and grouped as follows:

### Group A: Uniform Intent

1. Stakeholder participation. Automating significant portions of the court system using ODR tools could produce wide-ranging and potentially unintended consequences, including the dominance of systemic biases. For this reason, it is

<sup>9</sup> S. Fecht, ‘How to Smile without Looking Like a Creep, According to Scientists’, *Popular Science*, 28 June 2017, [www.popsoci.com/how-to-smile](http://www.popsoci.com/how-to-smile) (last accessed 7 July 2019).

<sup>10</sup> C.H. Draper, ‘Personal Notes from the NLADA Tech Section Meeting’, *2019 Equal Justice Conference* in Louisville, KY, 9 May 2019.

important that the broadest collection of impacted stakeholders be involved in the planning and implementation of any changes.

Group B: Safely Accessible

2. Equitable Accessibility. Internet access is neither of consistent quality nor equitably distributed throughout the United States. For this reason, the bandwidth and autosaving qualities of any cloud-based system should be understood and appropriate for the communities intended to access any ODR tool.

3. Physical Security. The ability to provide access to the courts from nearly any location using ODR tools means an individual could be completing a legally binding action in physical proximity to someone causing him or her duress. For this reason, scenarios that involve actions taken under duress that may not be possible without the presence of an ODR tool should be accounted for when determining the enforceability of any ODR-enabled agreement.

Group C: Meaningful Clarity

4. Accurate Translations. The American judicial system must be accessible to individuals who are unable to fully understand the English language. For this reason, the implementation of any ODR system should not deny equitable access to individuals based on the languages they can understand.

5. Oversimplification of plain language. Many concepts, procedures or choices in the American justice system are complex enough that their implications cannot be condensed into simple summaries or binary choices. For this reason, informational or expert systems that accompany ODR systems, or the choices users are forced to make as part of an ODR system, should be careful to avoid oversimplifications that allow individuals to be adversely impacted by negative consequences that they did not expect or understand.

6. Meaningful Allocation. There is now a societal comfort with accepting terms and conditions couched in long, intellectually impenetrable language when using software platforms that results in the average user being completely unaware of their rights or responsibilities with respect to their use of those platforms. For this reason, any ODR tool should ensure that any meaningful, legal obligations associated with a process that is agreed to using the ODR tool are not bundled or buried in a manner that produces uninformed acceptance.

Group D: Information Security

7. Operational Privacy. Societal comfort with facilitative ODR tools makes most practitioners unaware that the operational risks associated with an approved user mismanaging data are conservatively estimated as eight times more likely to cause a release of confidential data than any malicious system intrusion.<sup>11</sup> For this reason, any court-based ODR tool should assess the operational risks associated with using the platform against the value of any data that a user could accidentally release.

8. Anonymous Calibration. The source and quality of the data required to calibrate an AI tool will fundamentally impact both the decisions made by the tool

11 C.H. Draper & A.H. Raymond, 'Building a Risk Model for Data Incidents: A Guide to Assist Businesses in Making Ethical Data Decisions', *Business Horizons*, 2019, ISSN: 0007-6813, <https://doi.org/10.1016/j.bushor.2019.04.005> (last accessed 7 July 2019).

and the ability to rebuild private qualities defining the user whose data was anonymized for inclusion in the calibrating dataset. For this reason, the data selection, storage and calibration processes associated with an ODR tool should account for worst-case, real world impacts when assessing appropriateness.

Examining these concerns may bring many to one rather surprising conclusion: very few are related specifically to the ODR technology itself. For example, operational changes in court systems that are perceived as minor, like altering the reporting structure of administrative staff, can often result in significant impacts because not all stakeholders are included in the planning process. In the case of equitable access, the location, hours of operation and available transportation to a traditional courthouse may not provide an appropriate level of access or safety for many who need to participate in programmes located at the courthouse. In the case of meaningful clarity, ineffective or oversimplified written communication may even produce more significantly negative impacts when delivered in paper form because searchability and comparability are more limited relative to electronic documents that can be immediately linked to a wider array of more extensive resources. Or in the case of information security, the release risks that are often feared with digital data have no meaningful ability to even be tracked when a well-intentioned individual inappropriately shares paper-based materials where the transmission of digital data does have a reasonable ability to be meaningfully controlled.

For those items that are related to the technologies behind the ODR tools, “reliance on algorithms and data, present new challenges to fairness and open the door to new sources of danger for disputants and the judicial system”.<sup>12</sup> For court-based ODR systems that rely on filtering towards predefined options, the technological risks are both clear and nearly unavoidable: the biases and inequities present in the data of past actions that are used to calibrate the future decisions of AI-based ODR tools will more perfectly replicate past biases and inequities more quickly.

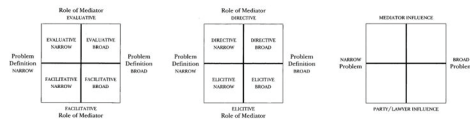
ODR processes that rely upon facilitation, however, can either be equivalently harmed or uniquely enabled by AI. When disputes are resolved by allowing the parties to voluntarily arrive at a legally acceptable outcome that is agreeable to all parties, even if the final terms of the agreement were not initially contemplated as a potential outcome, there is greater access to more efficient, enforceable justice. ODR systems could achieve these types of outcomes when they are built to mimic effective mediation, with AI enabling an idealized mediator.

## 6 What Is Mediation?

Mediation can be generally defined as a process where an impartial facilitator assists disputing parties to develop a mutually agreeable resolution. It is broadly

12 O. Rabinovch-Einy & E. Katsh, ‘The New Courts’, *American University Law Review*, Vol. 67, p. 165, [www.aulawreview.org/au\\_law\\_review/wp-content/uploads/2017/12/03-RabinovchEinyKatsh.to\\_Printer.pdf](http://www.aulawreview.org/au_law_review/wp-content/uploads/2017/12/03-RabinovchEinyKatsh.to_Printer.pdf) (last accessed 7 July 2019).

Figure 4      *Various Versions of Riskin Grids*



accepted that the disputing parties are the only ones who can start or end a mediation, and a facilitating mediator must not have any interest in either side reaching any specific outcome. How the mediator assists the parties is a bit murkier.

Every mediation is a multiparty negotiation where the mediator is actively involved in the crafting of each party’s proposals. The nature of this involvement will typically vary over the course of a mediation, with many of the recent methods for classifying a mediator’s role influenced by the work by Leonard Riskin. Figure 4 shows three versions of Riskin Grids discussed in his evaluation of their intended use and effectiveness, with each defining the mediator’s role as a combination of its facilitative scope and influence.<sup>13</sup> This definition of mediator actions as represented by Riskin Grids has often resulted in conversations about automation that focus on the procedural or evaluative aspects of a mediation. In this regard, AI has already proved to be more effective than a human mediator.

For example, if the parties wish to constrain the mediator’s focus to a narrow aspect of a complex topic, an AI system could perfectly exclude all data deemed out of scope by the parties without any residual bias. Alternatively, if the parties are seeking an evaluation of how a particular aspect of the negotiation would likely be resolved on the basis of its similarity to all other known disputes, AI can make a more accurate assessment more efficiently than any human. These uses of AI are already proven tools for filtering a dispute and are exactly the kind of AI applications that run the risk of more quickly replicating past biased resolutions if used to define the choices available to the parties during a mediation.

In terms of the Old Riskin Grid, an idealized mediator is typically considered one who operates in the Facilitative-Broad quadrant.<sup>14</sup> These mediators allow the parties to arrive at their own solutions, no matter how unconventional the outcome. In this quadrant, the mediator facilitates an environment that reduces emotion and expands creativity. In these mediations, the mediator can read the room, feel where things are going and enable breakthroughs. Many mediators who succeed in this quadrant are known for their empathy, charisma and likability, which are observable personality traits that empower some to assess mediator

13 L. Riskin, ‘Decisionmaking in Mediation: The New Old Grid and the New New Grid System’, *Notre Dame Law Review*, Vol. 79, No. 1, Article 1, 1 December 2003, <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1416&context=ndlr> (last accessed 7 July 2019).

14 L. Riskin, ‘Understanding Mediators’ Orientation, Strategies, and Techniques: A Grid for the Perplexed’, *Harvard Negotiation Law Review*, Vol. 1, No. 7, Spring 1996, <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1684&context=facultypub> (last accessed 7 July 2019).

quality by “looking at the person’s background, formal mediation training, and biases”.<sup>15</sup> This focus on interpretable human qualities allows many to see mediation as more art than science.

Yet modern research indicates that most effective mediators are successful because of their consistent use of Pull Style communication.<sup>16</sup> Using metrics that define the presence of Pull Style communication, feedback accessible through ODR platforms and NLP AI tools, an automated mediator that conforms to ethical norms is no longer science fiction.

## 7 Automating Mediation

Accepting the latest research on effective negotiation strategy indicates that an unbiased AI mediator that enables the parties to more rapidly arrive at any outcome that is agreeable to all parties maximizes Pull Style communication.<sup>17</sup> Maximizing Pull Style communication can be distilled into the following three major components:

- Building upon areas of agreement,
- Seeking information, and
- Facilitating inclusion.

When impasses occur, research indicates that consistently successful mediators routinely employ Pull Style communication strategies of:

- Clarifying aspects of the conflict that could be interpreted in a different manner,
- Asking questions that seek out whether the needs of one party could be built on the needs of another, or
- Engaging each party so they are equitably contributing.

Each of these actions can be achieved with NLP AI tools. For example, the following displays an example negotiation in Trokt where an NLP processor finds three related items (A, B and C) that conflict both with each other (B conflicts with C) and with an agreed element (B and C conflict with A).

When the NLP processor identifies these disagreements within related elements, it could be trained to propose discussion questions such as the following:

- [Clarifying] ‘Can you more fully explain what comment C means?’

15 C. Currie, ‘Mediating Off the Grid’, *Mediate.Com*, November 2004, [www.mediate.com/articles/currieC4.cfm?nl=64](http://www.mediate.com/articles/currieC4.cfm?nl=64) (last accessed 7 July 2019).

16 A. Abramowitz, ‘How Cooperative Negotiators Settle without Upending the Table’, *Design Intelligence*, 20 October 2006, [www.di.net/articles/how\\_cooperative\\_negotiators\\_settle/](http://www.di.net/articles/how_cooperative_negotiators_settle/) (last accessed 7 July 2019).

17 A. Abramowitz, *Architects Essentials of Negotiation*, 2nd ed., London, Wiley, 16 March 2009, ISBN-10: 9780470426883.

**Figure 5** *Example of Negotiation in Trokt Where an NLP Processor Finds Disagreement*



- [Clarifying] ‘Do you see a relationship between B and C?’
- [Building] ‘Is there a way that B could be incorporated into A?’
- [Building] ‘If C were added into B, could it be incorporated into A?’
- [Engaging] ‘Team 1, could you clarify...’
- [Engaging] ‘Team 2, could you propose...’

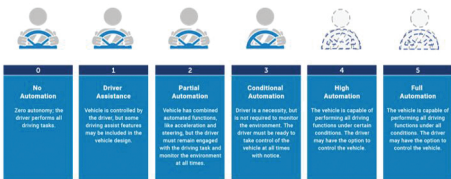
Using an NLP processor trained to look for related items that contain enough uncertainty or inconsistencies to indicate conflicting positions would produce an AI mediator that is able to continually question the parties without bias. Unlike systems that may observe A, B or C in the above example and offer alternative suggestions given the context of similar negotiations, focusing on Pull Style questions confined to the facts in the negotiation will avoid the AI mediator from perpetuating the systemic bias inherent in filtering-based tools. Further, while the NLP processor could be built to prioritize questions around related items with the most significant uncertainty or inconsistencies first, it is more likely that the NLP processor would find minor inconsistencies that could be overlooked by a human mediator that is developing patterns of interpretation within the negotiation that are unconsciously biased by past experience.

This design approach will enable true facilitative mediation, which can be augmented by checks to ensure neither party agrees to anything that is counter to law, yet directly avoid the systemic bias inherent in historically calibrated filtering ODR platforms.

Current NLP tools and negotiation communication research indicate that there is a clear, objective path for creating a fully autonomous NLP AI mediator built on Pull Style communication algorithms. However, it is also clear that hesitation within the access to justice and dispute resolution communities will likely require the first AI mediator to gain iterative acceptance. Assuming the need for iterative acceptance, designers may find value mimicking successful autonomous vehicle development pathways when developing a rollout strategy that avoids access to catastrophic failures. Like autonomous vehicles, the role of an AI mediator is to set the boundaries within which users will operate. Like autonomous vehicles, human participants must be effectively engaged to ensure success. And like autonomous vehicles, an unplanned diversion outside of safe operating con-



Figure 6 Society of Automotive Engineers (SAE) Automation Levels



ditions could result in a catastrophic consequence for the designer or the wider community.

The National Highway Traffic Safety Administration (NHTSA) has identified its roadmap to fully autonomous vehicles based on the Society of Automotive Engineers (SAE) automation levels 0-5.<sup>18</sup> These levels can be translated into ADR practices as follows:

- Zero (0). No automation, which equates to technology-free ADR in the dispute resolution space.
- One (1). Driver assistance, which equates to using AI tools for email or document drafting that suggest more appropriate language.
- Three (3). Conditional automation, which equates to an autonomous NLP AI tool that requires human verification before any output is approved.
- Five (5). Full automation, where an NLP AI will likely employ some form of Strong AI that can operate without oversight.

Mediators who are managing remote communication by sending documents back and forth via email or collaborating internally on an AI-assisted, cloud-based collaboration platform would therefore be currently operating somewhere between a Level 1 or a Level 2. Assuming all steps are equal, this indicates that the ODR world is likely already 30-50% of the way towards full automation. Yet with all technological innovations, it is more likely that the final three steps will come upon us like a dam breaking, meaning fully autonomous NLP AI tools will be ready to be operated sooner than many in the ADR, ODR and access to justice industries may be ready to expect. To ensure facilitative ODR does more than accelerate the adoption of inequitable precedents; now is the time to implement a set of mediation standards that reach past the current filtering problems that typically define court-based ODR.

18 NHTSA, 'Automated Vehicle Safety', [www.nhtsa.gov/technology-innovation/automated-vehicles-safety](http://www.nhtsa.gov/technology-innovation/automated-vehicles-safety) (last accessed 7 July 2019).

## 8 Conclusions

The courtroom automation efforts that are implementing ODR tools that depend on efficient filtering have woken up the access to justice and dispute resolution communities to the opportunities and dangers of AI. Systems that use past outcomes to calibrate an AI system's future decision processes will accelerate the adoption of the systemic inequities that are rife within the current judicial system. Yet a design focus on Pull Style communication strategies and techniques offers a pathway for developing efficient, effective and unbiased AI mediator tools that can be used to assist, share or eliminate human mediator workload. Given how quickly the industry is expected to move from its current level of automation to full mediator automation, now is the time for transparent discussions on how we expect these tools to behave. If our communities are committed to understanding the modern ghost in the machine, we can remake tools that are currently on a path towards accelerating inequity so they can help rewrite the old concepts of law and order into solutions that meet the needs of our communities.