The Digitalisation of the Judicial System: Online Tribunals and Courts

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The option of an online tribunal or court is not a completely novel idea and it is one that is gaining traction in a number of jurisdictions, such as the e-Courts in China,[2] the Civil Resolution Tribunal in Canada and the (very similar) proposal to establish an Online Court in England and Wales.[3] The latter two initiatives follow the idea of the multi-door courthouse, which was first posed by Professor Sander in the 1970s at the Pound Conference in the US.[4] The rationale behind the multi-door system is to assist litigants to find the most appropriate dispute resolution method for their disputes. Interestingly, these updated initiatives are based on lessons and techniques from modern online dispute resolution (ODR) and alternative dispute resolution (ADR) which are resolving 'huge numbers of relatively low value or low stakes cases … simply, quickly and cheaply by avoiding hearings all together'.[5] This article examines how technology and ODR/ADR techniques are being imbedded into the judicial system, and it does so discussing in particular two notable initiatives: the Civil Resolution Tribunal in British Columbia, Canada and the proposal for an Online Court for England and Wales.

The Online Tribunal

Readers from civil law jurisdictions may wonder about the difference between a tribunal and a court. This distinction applies to common law jurisdictions and it is not always clear-cut. Typically, a tribunal is a specialist dispute resolution body established by statute whose role is to adjudicate disputes between individual citizens and (normally) a governmental or public body. A common feature of tribunals is the presence of two lay-members alongside a legally qualified judge, with the role of providing specialist expertise. Decisions from tribunals are legally binding and are subject to a limited right to appeal in an ordinary court.[6] Importantly, one of its defining features is that the procedure is designed *in theory* to be used by citizens acting as claimants without legal representation.[7] Consequently, tribunal judges adopt an inquisitorial or enabling role to facilitate the dispute resolution process of parties that operate on an unequal footing (where typically only the respondent is a government agency that participates in the process with legal representation). In the UK there are over 70 tribunals

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[2] See China.org.cn 'E-courts promise online justice for Chinese shoppers' (11 December 2015). Available at <http://tinyurl.com/j9yxwkz>.

[3] Parts of this version appeared in P. Cortés (ed.) *The New Regulatory Framework for Consumer Alternative Dispute Resolution* (OUP, 2016) in press.

[4] F. Sander 'Varieties of Dispute Resolution' National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice 7-9 April 1976 Pound Conference (1976) 79 FRD 111.

[5] N. Ceeney, 'Modernising Courts and Tribunals' HM Courts and Tribunals Service (23 September 2015). Available at <https://www.gov.uk/government/speeches/modernising-the-courts-and-tribunals>.

[6] F. Cownie, A. Bradey and M. Burton, *English Legal System in Context* (5th ed, OUP, 2010) chapter 4.

[7] See Sir Leggatt, *Tribunals for Users: One System, One Service* Report of the Review of Tribunals by Andrew Leggatt (2011) para. 1.9.

dealing with matters as varied as social security, employment, health, education, tax, immigration and parking. It must be noted that in practice tribunals may not be as user-friendly as one might expect. Indeed, tribunal judges cannot provide legal advice, so many obtain this before going to court, or get legal representation (or, non-legal representation from a member of the trade union which is common in employment tribunals).

In this day and age there is no reason why a tribunal or a court should not require all users to submit claims online (perhaps initially for cases up to a certain value), save for where there is a reason why the claimant cannot do so – but this should be a question of access of the user, not necessarily the nature of the case that determines this. It is a question of time before the online submission of documents becomes 'digital by default'[8], requiring documents to be issued and uploaded via an online portal, and then filtered out to the right place, which, for cases that are not suitable for online determination, could end up in a face-to-face hearing.

The Civil Resolution Tribunal has been recently launched in British Columbia, Canada. This is an online tribunal which started its operations at the beginning of 2016 and it is regulated by statute.[9] It has been designed to offer an alternative and a more convenient forum than the small claims court, but it is expected to become mandatory as soon as 2017. It deals with claims of under 10,000 Canadian dollars related to debts, damages, recovery of personal property and certain types of condominium disputes. The online tribunal follows a procedure not dissimilar to that offered by many CADR entities, encouraging amicable settlements at the earliest possible stage.

Its procedure has been influenced by the multi-stage procedure drafted by the UN for online dispute resolution and by the eBay Resolution Center.[10] The procedure requires the parties to engage first in its online negotiation platform, which is subject to short timelines and templates that support the negotiation (stage one). If a settlement is not reached within a certain period of time, then a tribunal case manager will be appointed to assist the parties to settle their dispute through a mediation process which takes place online and over the telephone (stage two). If the parties do not settle in mediation, then they are invited to agree to go to a third and final stage: adjudication (stage three). The adjudicator will contact the parties via the online platform, over the telephone, and when necessary, through video conferencing, in order to make a decision that will be final and binding.

Similarly, in the UK there are a number of tribunals that are incorporating ODR technology in their processes, allowing parties to submit and decide claims online. Such an example in England and Wales is the Traffic Penalty Tribunal, which is a statutory body that considers appeals against parking fines.[11] Also, the Tribunal of the Social Entitlement Chamber has recently announced the launch of an ODR platform.[12]

The Online Court

An analogous initiative is being discussed for the court system of England and Wales. Indeed, this initiative is not very different from the online tribunal in Canada as in essence seeks to deliver a much improved small claims court that is user-friendly and accessible online. The system design of this model, as with the tribunal, incorporates an online procedure with ADR

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[8] This is the target for the English courts for 2020. Ibid.

[9] Bill 44 – 2012 Civil Resolution Tribunal Act. See <http://www.civilresolutionbc.ca>.

[10] UNCITRAL Working Group III (Online Dispute Resolution) twenty-seventh session (New York, 20-24 May 2013). The work which has taken place in the various different sessions may be found at <http://tinyurl.com/lccxarz>.

[11] See <https://www.parking-appeals.gov.uk/olappeals>.

[12] N. Rose, 'Tribunals Set to Pilot Online Dispute Resolution as a Priority' Legal Futures (25 February 2016).

techniques and it is being designed for litigants in person (i.e. self-represented parties). This option is now being considered for England and Wales following a landmark report from the Judiciary published in January 2016 (*Civil Courts Structure Review* by Lord Justice Briggs), whose main recommendation (to overcome the disproportionate costs of paying for legal representation when litigating low and medium value civil disputes) was the introduction of Online Courts (OC) by 2017.[13] This report follows the proposals made by the Civil Justice Council (a public advisory body)[14] and by JUSTICE (a human rights NGO).[15] Both reports note the need to invest in technology and in court-annexed ADR schemes, especially in order to assist litigants in person with civil and commercial disputes of low and medium value. Inevitably, many consumer disputes could fit within this category. The proposal for the OC became doable when the Lord Chancellor's Autumn Statement in November 2015 committed £700 million to digitalise the court system making the launch of the OC unquestionable. The proposed procedure for the OC follows closely the Canadian online Civil Resolution Tribunal. It is envisaged to resolve the majority of civil disputes of low and medium value (which ceiling has been initially proposed at £25,000 where full legal representation is normally disproportionate) through a new multi-tier dispute resolution procedure designed for litigants in person.[16]

Lord Justice Briggs notes that 'the true distinguishing feature [of the OC]… is that it would be the first court ever to be designed in this country, from start to finish, for use by litigants without lawyers'.[17] However, this is not entirely accurate, as tribunals as well as the small claims procedure were also originally designed to operate without lawyers in response to consumer demand in the early 1970s.[18] The main risk of the new OC would be similar to the shortcomings of the existing tribunals and small claims procedures. That it is a court procedure after all, which may remain only accessible to highly educated consumers with medium- or high-value disputes.

Yet, an important novelty of the OC will be its departure from the traditional adversarial process, operating instead an online tiered procedure with three main stages, which are almost identical to those already discussed for the Civil Resolution Tribunal in Canada: (stage one) it will consist of a fully automated triage process, where parties fill in the claim and are offered simple commoditised online advice; (stage two) the unresolved claims will pass to a case officer who will offer a mix of mediation or facilitation techniques (such as conciliation or early neutral evaluation) and case management – this stage hopes to settle the majority of claims; and (stage three) the remainder of the claims will be sent to a judge for final determination on the documents (and when necessary via telephone, video or face-to-face hearings). Susskind has suggested the implementation of stages three and two first, as the design of stage one would be the most difficult since it would require the building of 'diagnostic rule-based expert systems'.[19]

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[13] Lord Justice Briggs, Interim Report, *Civil Courts Structure Review* (December 2015). Hereinafter, Briggs Interim Report.

[14] Civil Justice Council Online Dispute Resolution Advisory Group, 'Online Dispute Resolution for Low Value Claims' (February 2015).

[15] JUSTICE, 'Delivering Justice in an Age of Austerity' (April 2015).

[16] Briggs Interim Report.

[17] Ibid, para 6.5.

[18] R. Smith, Response for The Legal Education Foundation to the Interim Report on the Civil Courts Structure Review (2016) para. 8.

[19] R. Susskind, ODR Group Response, Civil Justice Council (31 March 2016) para. 5-6.

Lord Justice Briggs proposes a final fourth stage to streamline the enforcement of judgments. This ambitious reform seeks to deliver a court system which is accessible, transparent and operates at a proportionate cost.

At the time of writing in 2016, Lord Justice Briggs was still consulting on how to design the OC and it appears that the OC would start operating on a pilot basis with the types of claims particularly suited for online procedures, such as cases that rely on standard forms and written procedures. Thus the European Small Claims Procedure (whose financial limit has recently been increased to €5,000) would be an obvious fit for the OC, especially when there are no language barriers (e.g. disputes with Irish claimants). It will however exclude cases that are complex or follow a separate procedure or digital platform, such as repossession cases and personal injury matters. The OC will be able to transfer cases to the county court, which although they will digitalise in the next few years all the documents, they will continue using the procedure following the Civil Procedure Rules and they will maintain the face to face hearings.

Thus, the aim will be to achieve greater proportionality in the judicial process, processing entirely online all low-value claims insofar it is possible to do so. Yet, the proposed £25,000 ceiling should be reached on a progressive and escalating basis, starting at a lower value of £10,000 (or even lower) for full-blown online processes.[20] Hence, the OC should initially operate for specific cases only (opt-in basis) during the pilot stage, and progressively extend its scope until it covers all types of civil cases, except those excluded (opt-out basis).

There are a number of design options that need to be taken into account. First, it will be necessary to provide adequate tools for court users without IT skills. The online portal for the OC should provide links to supporting networks, such as Citizens Advice centres. These centres will need additional resources to train their staff and provide clinics where one-to-one support can be obtained in order to avoid the exclusion of these citizens from the OC.

Costs shifting rules can have an important impact on the parties' behaviour towards settlement, also encouraging pre-action ADR and the online mediation stage. Accordingly, there should be cost consequences when a judge considers that one litigant has behaved unreasonably in refusing to participate in settlement discussions or in accepting a reasonable offer to settle.[21] Cost consequences and cost sanctions should, however, be proportionate, affecting mostly the shifting court fees, and imposed only in exceptional cases on consumers acting as litigants in person when facing businesses with legal representation. Overall, it should follow the small claims track regime[22] but being stricter for not complying with pre-action protocols on ADR (especially when provided for free or at a low cost by certified ADR entities) and for unreasonable behaviour during stages one and two of the OC. In order to encourage early settlements the fee structure should be a 'pay as you go' system, subject to court fees for each of the court stages.

Conclusion

[20] Ibid, para. 9.

[21] Part 36 Civil Procedure Rules 1998. See P. Cortés, 'A Comparative Review of Offers to Settle – Would an Emerging Settlement Culture Pave the Way for their Adoption in Continental Europe?' (2013) 32(1) *Civil Justice Quarterly* 42-67.

[22] Rule 27.14 Civil Procedure Rules.

The OC should draw lessons from ADR/ODR bodies, such as successful ombudsman schemes like the Financial Ombudsman Service and the eBay Resolution Centre.[23] Nonetheless, it must be noted that the dispute system design of these systems is very important for its success. For instance, as already noted, eBay famously claims to resolve around 60 million disputes a year, most of which without the intervention of humans – this is possible because all disputes in eBay (and in other marketplaces such as Amazon) can be categorised into a few groups (i.e. non-delivery, delays, non-payment, or goods not matching description), so the solutions are also limited (e.g. refund, partial refund, return of goods, etc.), and, importantly, parties have strong incentives to settle because the buyer wants compensation and the seller needs positive feedback to keep selling goods in the competitive market. Similarly, small claims systems incorporate incentives that may not be easily replicated in the OC. When parties opt into the telephone mediation offered in the small claims track, they know that if they do not settle over the telephone they will have to attend an oral hearing (and take time off work to do so).

As currently envisaged, the OC does not incorporate the existing out-of-court ODR/ADR infrastructure. This is partly because the OC and ADR are emerging in an organic way from different governmental departments to meet specific sectorial needs. For instance, while the Financial Ombudsman was created to address lack of redress in the UK banking system, the rationale behind the launch of the OC is inter alia to tackle the collapse of legal aid and an expensive court system. Thus, there is a need for pathways to align these schemes that often operate in parallel. Accordingly, the OC should have pathways to lead users to the most appropriate redress option. The goal should be to avoid duplication and to find synergies between court and existing ODR/ADR schemes, helping to close the gap in the English civil justice system.

[23] These websites are available at <http://www.financial-ombudsman.org.uk> and <http://resolutioncentre.ebay.co.uk>.