



## *Beyond Court Digitalization With Online Dispute Resolution*

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### Abstract:

"I felt so sorry for you; such a lovely tool and then you have no users!" I heard this comment during a lunch break at ODR 2016. I presented the eKantonrechter there, a digital procedure for small value disputes; a nice tool, but unfortunately with few users. ODR2016 was the 15th ODR conference in the Peace Palace in The Hague, organized by The Hague Institute for internationalization of Law (HIIL).

The conference, in May 2016, was a platform for people involved with all kinds of online dispute resolution (ODR). I also presented the eKantonrechter at the 'Law and Courts' in an online world conference by the Sir Zelman Cowen Center in Melbourne, Australia in November 2016. This article is both a summary of the presentations and discussions at both those conferences, and a reworked version of an article for the Netherlands Society for Sociolegal Research periodical. Its theme is ODR and its users.

**Keywords:** ODR, courts, court users, dispute resolution, digital court

### 1. ODR: A Panacea or a Tool in Search of a User?

ODR: a panacea against all court weaknesses? A reader of the 4th Trend report by HIIL on ODR<sup>2</sup> can hardly believe her eyes: ODR will end all administrative frustrations of courts as well as the disappointment of their citizens. It can help to standardize, simplify and humanize judicial procedures and it can help people who need access to courts to negotiate, settle and put unresolved matters before the court. Moreover, it can reduce the cost of dispute resolution.

ODR: technology looking for a user? The reader of Arno Lodder's weblog for SOLV Lawyers in Amsterdam<sup>3</sup> in which he writes about the 15th ODR conference is less confident. In 2002, ODR enthusiasts believed ODR had a future full of promise. However, that did not happen. Why? Was the technology not user-friendly enough and geared too much to small e-commerce disputes where users just want to complain but they do not want to resolve the dispute? ODR and its users are an interesting and useful subject for research. Below, I will explain why. But first: what are we talking about when we talk about ODR?

#### 1.1 What is ODR?

Online dispute resolution (ODR), according to Wikipedia, utilises the use of information and communication technologies to help resolve disputes between parties. The technology particularly supports negotiation, mediation and arbitration, or a combination of all three. It can be regarded as a form of alternative dispute resolution. ODR can also improve traditional dispute resolution methods with innovative techniques and online technology. In the past, ODR was used mainly for disputes in e-commerce. That is only natural, since the disputes also arose online. Now communication increasingly takes place online, as a consequence it is generally more obvious that disputes are resolved using online communication. A few

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<sup>2</sup> ODR and the Courts: [100% Access to Justice?](#)

<sup>3</sup> 2 ODR is Dead! Long live ODR! 15th ODR Conference: [Targeting the courts.](#)

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examples.

*CyberSettle* is a tool that has been around since 1998. It supports negotiation processes through double blind offers by the parties. It helps parties therefore to agree on an amount of money. It also has facilitators who can help the parties to achieve a solution. According to information on the site, 250.000 disputes have been settled since 1998.

*Rechtwijzer uit elkaar* (legal guidance on separation) helps couples wanting to separate or divorce make a plan for the separation, and with the separation itself. At the end of June 2016, according to information on the site, more than 1,000 couples had started making a separation plan. The tool includes online forms, chat functionality, calculation tools, and the ability to get help from an expert.

*DemandeJustice* (DemandingJustice, DJ) is a French site where people can try, for approximately €40, to resolve a dispute online. If they are not successful, the DJ tool can also help them to bring the case to court by sending the introductory document to court in an email. This costs an additional €70. DJ can only deal with disputes under € 10,000, the limit for submitting a case to court without a lawyer in France. DJ says it handled more than 250,000 cases in the course of this year. About half were resolved; the plaintiff won more than 80% of the cases that went to court.

*Magontslag* (Dismissal allowed) is a site where the user - usually the employee - who considers resigning from a job, can get an estimate of the chances and consequences for dismissal by answering a list of questions. The tool produces a summary of the reasons, and these reasons form the basis for a resignation letter to be sent to the employer. It can also produce a defense in court and a letter to the social security agency.

*Civil Resolution Tribunal* (CRT) is a digital tribunal set up to decide disputes about strata, subsidized housing in British Columbia, Canada. It provides assistance with exploring solutions to a problem, with producing documents, and if necessary, access to a tribunal hearing.

These ODR tools, therefore, do many different things. Cyber Settle supports two parties, but only to negotiate a monetary amount. DJ helps two parties negotiate and bring the case to court.

Rechtwijzer helps two parties with information, tools and a guided process to achieve a final result. Magontslag helps one party with information, tools and a final product. CRT helps with exploring solutions and with a procedure to decide the dispute.

## 2. Digitization in Courts: The eKantonrechter

In courts, opportunities to digitally resolve a dispute also emerge. The eKantonrechter, the example from the introduction above, is a case in point. The Netherlands judiciary completed this digital procedure for everyday disputes in 2014. This section explains how eKantonrechter was developed and implemented with a focus on a user-friendly interface.

**The legal procedure** is based on an existing provision, article 96 of the Code of Civil Procedure, giving court access to parties who together want to put a dispute before a judge. The procedure is consensual in the sense that parties together agree to put the dispute before the judge. They can do this themselves, no legal representation is required. A judgment is guaranteed within eight weeks of filing. The disputes can be small claims of up to €25.000, or labor, consumer or housing problems.

There is usually an oral hearing, but the fixed, limited disposition time does not allow for hearing witnesses or otherwise thorough examination of the facts.

**Digital access.** In part four of *Technology for Justice*, my book on improving justice with information technology, I have set out some guidelines for web access to justice and the courts<sup>4</sup> Communication should be:

- based on understanding the information needs people have, given that they have a problem that needs to be resolved;
- understandable to people with an average level of education, and
- making people confident that if they follow the instructions, they will achieve results.

**Earlier experiment.** There was an earlier experiment, at least twenty years ago, to give citizens direct access to court. It involved a paper form that could be bought in a stationery shop, filled out, and sent to the court to file a claim. The court

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<sup>4</sup> Reiling, Dory. [Technology for Justice](#), how information technology can improve judicial reform. Leiden 2010.

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then summoned the other party, which was the beginning of a civil procedure. Judges struggled with the information people put in the form. Parties struggled with the complex procedural rules of an adversarial civil procedure, that were hard to explain and even harder to understand.

**The new procedure.** This time, the procedure was designed to start with a digital form. The parties, after agreeing to put their dispute before the court, each fill out a part of the form. Because the procedure is consensual and not adversarial, the rules are less complex. The procedure itself is conducted entirely over the internet, except for the hearing which is face to face in court. For authentication, parties log into the judiciary's kiosk with DigiD, the Dutch government digital ID. For extra security, they get a text message with an access code. For firms, authentication works with eHerkenning, the government ID for legal entities. Lawyers log in with their Bar ID, a smart card provided by the Dutch Bar Association. One party takes the initiative, logs in to the judiciary's digital kiosk, and fills out the first part of the application form. The system then provides a code with which the other party can log in to this particular case. The other party then fills out the other half of the form, and submits the entire form to court. The court then reviews the information for admissibility. As there is only one court hearing and the disposition time is limited, only simple cases can be admitted. After the dispute is admitted, parties can provide additional information and upload documents they want to present as evidence. The court fee is paid electronically as part of the submission process. Parties are also presented with optional time slots for the oral hearing. They can indicate those slots for which they are not available. The information from the forms is fed into the court's case registration system and into the digital case file. The oral hearing is then set by the court. After the hearing, the judgment is uploaded into the digital case file.

**Building digital access.** My team, charged with designing and then building the new digital procedure, was determined to do better than the paper form. It was particularly important to get the digital forms right. We started with a workshop for the judges to indicate what information they need to determine the merits of the case: what is the problem, what happened, did they attempt to resolve the dispute amicably, what is the claim, what evidence is available. We then designed different ways of asking questions people without legal training can answer. Web technology offers ways of asking structured questions: yes/no, drop down lists, radio buttons. This information is unequivocal, and can be stored and handled easily. However, it is rather poor in content. Asking for the story: what happened, what makes you think so, what is the background, provides much richer information, but this information is not quite so manageable. We tested the different methods, on paper, with a test panel provided by the Dutch Consumers Union. We had devised fictional disputes, cases our panelists could use to fill out our forms: a contract case about a fading couch, another one about a labor dispute, and a tort case involving physical injury. This enabled us to check whether users can describe different types of problems adequately. With lots of feedback from the panel, we designed a digital form combining structured and unstructured questions. The panel came back, tested this form, and told us they needed more context and help in answering the questions. We then added explanations and help information. For those who feel they cannot fill out the forms themselves, we added a link to the legal aid kiosk, the Juridisch Loket. The panel then came back to test the final product. They told us they could use the form easily. The eKanton procedure for citizens went live at the end of May 2014.

**What comes next?** Devising a procedure is one thing, whether it meets the needs of those who seek justice is a different matter. Whether or how digital access to court is an improvement that will enhance access to justice is one of the major themes in the access to justice debate. It remained to be seen if the eKanton procedure will be used by citizens. For the Dutch judiciary's digitalization program, it was an opportunity to take a simple, existing procedure, digitalize it and learn about the process. This experience now feeds into the digitalization program for all other court procedures. It turned out that creating and implementing a digital process is quite viable. During the development, there was much enthusiasm for the idea that professionals and ordinary citizens themselves could also take a case to court digitally. The procedure, however, is not used much. In fact, in 2016 it was not used at all. We held a small evaluation interviewing the legal aid insurers and applicants whose initiative for the procedure was not taken up by the defending party. From this evaluation, we found that a number of conditions make the eKantonrechter unattractive, such as high court fees, no investigation as to the facts (witness hearings, for instance) and no possibility for appeal. The condition of consensuality of art. 96, that the parties submit their dispute together<sup>5</sup>, was also identified as problematic. It is important to keep in mind that parties do not submit a document. They submit information collected in a form. I will discuss the issue of consensuality in more detail below.

### 3. Quality and Innovation in the Law

Digitizing existing procedures, however, is only the beginning. Information and communication technologies not only make access to justice easier, they also open the door to other ways of resolving disputes. We know there are still many people for whom obtaining justice is difficult. But what will that look like in practice? The participants of the ODR conference in

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<sup>5</sup> How we designed this condition into the digital procedure is described in the section on the new procedure above.

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The Hague in late May 2016 were asked what they preferred: ODR and court procedures separately so that competition will raise quality, ODR only in the preliminary phase, or integration of ODR and court procedures. The vast majority opted for integration. What I am particularly interested in is, how the possibilities of ODR can be integrated into the court procedures. Can the courts reduce deficiencies in access to justice, and resolve disputes better with it? Better, that is: fair, fast, accessible and sustainable. That is only possible if the users needs get enough attention.

## **4. Sociolegal Research**

### **4.1 Technology, or: What Do The Users Want?**

The subject of this article is not a tool searching for a user. I want to inspire researchers who are looking for a research topic to investigate ODR and its users. ODR harbors enough interesting, relevant problems that demand solutions. From the small survey into the use of the eKantonrechter we can understand that parties to a dispute often do not want to take their case to court together. And again, Arno Lodder's question, whether the types of ODR we now know are equipped to meet the needs of the user. There are many more questions, but that user perspective seems an attractive subject. I will explain why.

Ten years ago, our main concern was what information technology can do. Today, the technology can provide almost anything: access to information, interactive tools to negotiate, documents, experience sharing models. The focus is shifting to the domain of the user. What does the user want to do, and what technology does she need to achieve it? In my experience, in building new digital procedures, this has proved to be by far the most important question. So how can the courts offer, what the user wants to do?

The pitfall is that we tend to think we already know what the user wants. In practice, users want something quite different. The eKantonrechter presents a striking example. All stakeholders in the development, such as legal aid insurers and the Consumers Union found the idea that people want to submit their dispute to court together an attractive idea. However, when asked, users tell us they do not want to submit a dispute to court together at all. The applicant believes that he is right, and the court should make that clear to the other party. I once had an inspiring conversation with Law and Society professor Leny de Groot-van Leeuwen. She recalled how she and her students had interviewed people about their "justice moment". That was a time when they had come into contact with the law or the legal system, and how they had experienced it. Such moments can be important for designing procedures.

All kinds of issues came up in this article that could be of interest to sociolegal scholars: the experience of the eKantonrechter, people's justice moment, the opportunities ODR offers to courts. Thus, the scholars can make a substantial contribution to the development of online dispute resolution to support effective legal protection. Here are some examples of issues that may be of interest in this regard.

### **4.2 Problem Solving: a Line, Network or Cloud?**

We tend to think of problem solving as a linear process. Someone with a problem goes through a process in steps coming one after the other, always in the same order. Reality may be very different, though. Maybe problem solving looks more like a cloud or a network. The problem solver in search of a resolution may take very different turns, depending on a variety of changing circumstances. What routes do people follow when they try to solve their problems?

#### **4.2.1 How Can We Give the Parties Ownership of their Problem?**

In ODR2016, the CEO of a legal assistance insurer said his customers want to be more actively involved in their procedures. They are knowledgeable, they get all the information from the Internet and want to control what happens in their case. In the online world, it is important that users have a clear understanding of what they can do, and that they are confident that their actions will have the intended result. We know maximum ownership in resolving conflicts is key to the success of an ADR procedure. How can this principle be operationalized for court procedures?

#### **4.2.2 How can we Involve the Defendant in the Proceedings?**

Voluntary, consensual dispute resolution was never very popular, as emerges from the investigation into the use of eKantonrechter. The applicant believes that he is right, and that the court had better make that quite clear to the other party. Has this phenomenon ever been researched? Is voluntary dispute resolution actually a romantic idea? That brings up the question how the defendant may or must be involved in a procedure. Resolving a dispute amicably, together, does not always work; the plaintiff then has no choice but to go to court. Sometimes, but not often, the defendant will participate voluntarily. How can the defending part be involved in the procedure? How can the defendant be induced to participate constructively in the resolution of the conflict? What is needed?

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#### 4.2.3 Problems are Different; How About the Solutions?

How can courts, with ODR, adapt themselves better to the fact that there are many different kinds of conflicts? The examples of ODR, above all, offer various solutions for different problems. Which solutions are most suitable, and for which problems? In most court procedures, legal representation is not mandatory. Legal aid is greatly reduced. People will often need to take their case to court themselves. From the research into people's legal needs<sup>6</sup>, we already know a lot about what people do when they have a problem. We know the type of problem determines the kind of solution. Short term problems are quite different from problems in a long-term relationship, like a family relationship, a neighborly relationship or employment. Courts are organized along the lines of legal categories: labor law is judged by the small claims judge, divorce by the family court and disputes with the government by the administrative court. Disputes with the government prove especially hard to resolve. They are, each in their own way, all part of the cloud or the network. Is it possible to set up courts so they are better suited for the problems they have to solve? What is needed?

#### 5. Conclusion

From the eKantonrechter example, we can learn that designing a user friendly, effective dispute resolution procedure requires more than just a user-friendly interface. Even a well-designed mechanism will not be used if it does not meet the users' needs. Those needs are determined by the type of problem, by the way people attempt to resolve their problem and probably many other factors we do not yet know. I imagine many socio-legal scholars would like to explore such topical issues. People and the law, theory and reality, they are all there. Going digital means experimentation, which involves research in itself. Trying out ODR methodologies to better help people to resolve their disputes and go to court if necessary, in the light of the issues outlined here, may help people get the justice they are entitled to.



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<sup>6</sup> Genn, Hazel, Paths to Justice. Oxford and Portland Oregon 1999. M.J. ter Voert, C.M. Klein Haarhuis, Geschildbeslechtingdelta 2014, WODC, The Hague, summary in English.