Piloting Online Dispute Resolution Simulations for Law Students Studying Alternative Dispute Resolution: A Case Study Using Modria Software at Victoria University

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Alternative dispute resolution (ADR) is now commonly taught in Australian law schools, but primarily as an elective. While the notion of online dispute resolution (ODR) has existed for 20 years, using information technology to support the teaching of ADR is a rare occurrence in Australian law schools. This article traces the recent development of ODR and its significance for legal practitioners. In particular, it demonstrates how ODR can support the teaching of ADR, especially through the use of artificial intelligence and simulations. Victoria University ADR students were asked to conduct an ODR simulation, write a report on the simulation and also submit a letter of advice after the ADR process, with the production of either a mediation deed of settlement or an arbitration award. This article reports on the students' evaluation of the course and its benefits for ADR students.

I. Introduction

Until 2014, the Victoria University College of Law and Justice did not teach a stand-alone alternative dispute resolution (ADR) subject; it did, however, teach some material on legal negotiation in the civil dispute procedure subject. Following representations, in 2015, for the first time, "LLW3002 Alternative Dispute Resolution" was taught as an elective in the Bachelor of Law Degree.

This article discusses the teaching of this subject, and in particular the novel use of online dispute resolution (ODR) to support ADR students at Victoria University to engage in negotiation simulations. While ODR has been used to resolve e-commerce disputes for two decades, and is increasingly being used in civil justice courts, its use to support ADR teaching is, in the authors' belief, novel.

II. Why Teach ODR in a Law School? ODR as an Extension of ADR

Modern alternatives to litigation have been heavily influenced by the *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, which took place in Minneapolis, Minnesota from 7–9 April 1976. At this conference, then United States Chief Justice Warren Burger encouraged the exploration and use of informal dispute resolution processes. During this era Sander introduced the idea of the "multi-door courthouse".[1]

The 1970s can be seen as marking the commencement of the modern ADR movement. Galanter noted the decline in the portion of cases that were terminated by trial and the decline in the absolute number of

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[1] According to the US Department of Justice, the term "multi-door courthouse" describes courts that offer an array of dispute resolution options or screen cases and then channel them to particular ADR processes: F Sander, "Varieties of Dispute Processing" (1976) 70 *Federal Rules Decision* 111; see also C Menkel-Meadow, "Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR" (1997) 44(6) *UCLA Law Review* 1613.

trials in various American judicial fora. He found that the portion of federal civil cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002, continuing a long historic decline.[2]

The concept of ODR developed circa 1996. At that time the focus was upon the resolution of disputes that originated online, with the prevailing belief that these disputes would be easily resolved via the worldwide web.

As Ebner and Zeleznikow note:

> The ODR field, since its genesis in the mid-1990s, has developed in bursts and spurts. This is largely because of ODR's connections to the areas of Internet development and e-commerce (Katsh 2012) and also because of the more general evolution of ADR that has taken place in the last thirty years.
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> At first, ODR seemed like an oddity or anomaly. … But this is no longer the case … As the field has grown and gained traction, it has received increasing attention from professional associations and industry leaders in the dispute resolution world.
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> Even as ODR's status solidifies inside the ADR field, it has also increasingly received attention and recognition from sources outside this milieu. Signs of this are visible in both the private and public sectors.
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> In the private sector, we see signs of ODR's expanding role across a number of fields. In the area of e-commerce, online dispute resolution's early and resounding success in resolving disputes at eBay and PayPal has not been duplicated elsewhere, but the road is being paved for its utility for settling disputes originating in online reputation and feedback systems (such as customer reviews posted on Yelp.com or TripAdvisor.com) (Rule and Singh 2012).
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> Beyond e-commerce, private-sector implementation of ODR has advanced in a variety of other areas. Online dispute resolution service providers have been targeting conflict niches (such as ResolutionTable.com, specializing in landlord-tenant disputes), and authors have offered suggestions for operationalizing ODR to resolve workplace disputes (Parlamis, Ebner and Mitchell 2016). More generally, private-sector mediators have started to offer online services as an add-on to their traditional, face-to-face practice (Ebner 2012).[3]

As early as 2002, Zeleznikow[4] advocated the benefits that web-based decision support systems could provide for self-represented litigants (SRLs). However, for most of the past 20 years, ODR research has focused upon e-commerce disputes. As discussed below, only recently has ODR focused upon non-financial disputes and disputes that do not originate online.

The use of information technology can promote many of the benefits of ADR. Receiving advice online, in conjunction with the benefits provided by decision support systems, reduces costs by delivering a lower reliance on services from lawyers and mediators to reach settlement. Further, because this advice is available online it will be timely, and the backlog in seeing lawyers or mediators will be less critical. Evidence shows that time taken to hear a dispute is often a factor in the successful resolution of a dispute[5] – the sooner disputants are able to have their views heard, the more likely the prospect of success.

ODR systems provide for the effective use of e-government and e-commerce. According to Colin Rule,[6] then director of Dispute Resolution at eBay, 60 million disputes were filed with eBay in 2006. At the time, eBay had developed many resources for supporting ODR, not out of benevolence but because it believed that doing so was good commercial practice. Without secure and fair ODR processes, eBay reasoned that consumers would be reluctant to purchase products over the worldwide web. This rationale

[2] M Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1(3) *Journal of Empirical Legal Studies* 459, 459.

[3] N Ebner and J Zeleznikow, "No Sheriff in Town: Governance for the ODR Field" (2016) 32(4) *Negotiation Journal* 297, 298.

[4] J Zeleznikow, "Using Web-Based Legal Decision Support Systems to Improve Access to Justice" (2002) 11(1) *Information and Communication Technology Law* 15.

[5] RA Posner, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations" (1986) 53(2) *University of Chicago Law Review* 366.

[6] Colin Rule, "Address" (Paper delivered at the *International Conference on Online Dispute Resolution in conjunction with the International Conference on Artificial Intelligence and Law*, Palo Alto, 8 June 2007), cited in A Lodder and J Zeleznikow, *Enhanced Dispute Resolution through the Use of Information Technology* (Cambridge University Press, 2010) 14.

has held true not only in online marketplaces like eBay, but also for online merchants like Amazon and collaborative economy companies like Airbnb.

As an indication of how ODR is now focusing upon non-financial disputes and disputes that do not originate online, the *15th ODR Conference 2016* had as its focus "Can ODR Really Help Courts and Enhance Access to Justice?"[7] Issues that were considered included:

(1) the collection of information online;
(2) the provision of online advice; and
(3) the ability to request judicial intervention online – for example, obtaining domestic violence intervention orders online.

After two decades, the legal community is finally realising the potential for ODR to enhance "access to justice", and the Chicago-Kent College of Law now teaches an "Access to Justice and Technology" subject in its juris doctor program.[8]

Katsh and Rabinovitch-Einy[9] in their groundbreaking book on digital justice illustrate how ODR can operate for the bulk of disputes outside the e-commerce arena. The theme of their book is that ODR can promote access to justice, and discusses digital justice, the internet of on-demand health care, social media, ODR for work conflicts and ODR in courts, as well as disputes about e-commerce and the internet of money. In a preface to the book, the eminent legal scholar and consultant Professor Richard Susskind notes that "[l]awyers should surely be the pioneers in upgrading justice rather than standing in the way of processes that, as Ethan and Orna so compellingly show, are great improvements on what we have today".[10]

One important recent example of a court-based ODR system is the British Columbia Civil Resolution Tribunal (CRT), discussed by Salter and Thompson.[11] It is Canada's first online tribunal and as of 2017 was the only ODR system in the world that was fully integrated into the justice system. The CRT allows the public to resolve their condominium property and small claims disputes. The CRT provides the public with access to interactive information pathways, tools and a variety of dispute resolution methods including negotiation, facilitation and, if necessary, adjudication.[12] Participants use all of these ODR services. For those who are unable or unwilling to use technology to resolve their dispute, the CRT provides paper-based or telephone-based services.

At its 2017 national conference, the National Judicial College of Australia had as its theme "Brave New Worlds", with a special session on "Decision Making: Human vs Machine".[13] The Fair Work Commission of Australia, at its *2017 International Perspectives on Dispute Resolution Conference* conducted a session on "Online Workplace Dispute Resolution"[14] and the annual conference for the International Network of Financial Services Ombudsman Schemes included a discussion on ODR.[15]

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[7] *Can ODR Really Help Courts and Enhance Access to Justice? 15th ODR Conference* (The Hague, 23–24 May 2016) <https://20160dr.wordpress.com/>.

[8] Chicago-Kent College of Law, "Access to Law and Technology" (April 2004) <http://www.kentlaw.iit.edu/courses/jd-courses/jd-seminars/access-to-justice-and-technology>.

[9] E Katsh and O Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (OUP, 2017).

[10] Katsh and Rabinovich-Einy, n 9, xv.

[11] See Civil Resolution Tribunal <https://civilresolutionbc.ca/>; S Salter and D Thompson, "Public Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2016) 3 *McGill Journal of Dispute Resolution* 133.

[12] *Civil Resolution Tribunal Act*, SBC 2012, c 25.

[13] See Australian National University College of Law, *Brave New Worlds: Challenges for Evidence in the 21st Century* (Canberra, 4–5 March 2017) <http://www.anu.edu.au/events/brave-new-worlds-challenges-for-evidence-in-the-21st-century>.

[14] See Fair Work Commission, *International Perspectives on Dispute Resolution Conference* (Melbourne, 1 November 2017) <https://www.fwc.gov.au/about-us/events/international-perspectives-dispute-resolution-conference>.

[15] See Financial Ombudsman Service Australia, *Info Conference 2017* (Melbourne, 24–27 September 2017) <https://www.fos.org.au/events/2017/09/24/546/info-conference-2017/>.

III. The Future of ODR – Artificial Intelligence and Support for Self-represented Litigants

To indicate the growing significance of artificial intelligence and dispute resolution to the legal community, the then Australian Chief Justice, the Hon Robert French AC speaking at the Australian Disputes Centre ADR Awards night in 2017, said:

> ADR today continues to be a moving wave-front of new development. That is demonstrated by the existence of the Australian Disputes Centre and its activities and by the awards which are given tonight to recognise and encourage excellence in the practice of ADR in a variety of fields.
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> Nowhere is the potential for change more dramatic than in the use of technology and, in particular, artificial intelligence. An immediate application is online dispute resolution using what has been described as "a virtual space in which disputants have a variety of dispute resolution tools at their disposal." Two authors, Arno Lodder and John Zeleznikow have proposed a three-step model using what they called a "negotiation support tool" which can:
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> 1. provide feedback on likely outcomes if the negotiation fails – BATNA;
> 2. attempt to resolve existing conflicts using argumentation or dialogue techniques;
> 3. employ decision analysis techniques and compensation/trade-off strategies to facilitate resolution.
>
> If step three fails, the parties go back to step two and try again until resolution or stalemate. Even then blind bidding or arbitration can be used to narrow the issues. Systems available to support such negotiations include rule-based reasoning, case-based reasoning, machine learning and neural networks. There are challenges in connection with the use of artificial intelligence in this area, especially in relation to machine-based application of legal rules whether they be statutory or common law. Such rules are rarely unambiguous and generally offer constructional choices which don't readily translate into machine logic. An alternative approach is called a "Data-centric approach". The relevant computer is provided with data about the facts and outcomes of a large number of cases on the basis of which it is asked to estimate the probabilities of outcomes given a particular set of facts and relevant legal issues. Such a tool might be useful as a kind of surrogate early neutral evaluator.
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> I was interested to see some of the names given to the template-based software systems used to help lawyers negotiate – they include Deus, Inspire, Adjusted Winner and Smartsettle. In the field of family law there is a system called "Family-Winner" which includes techniques such as issue decomposition strategy, a compensation and trade-off strategy and an allocation strategy.
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> There are, of course, issues of justice which transcend the negotiating objectives of the parties, particularly in family law disputes where the law requires that the interests of affected children be treated as paramount. And in complex multi-party negotiations such as environmental or native title disputes, the question of the public interest is a very large aspect of the context in which negotiations must be undertaken.
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> There is a related question of the use of technology and artificial intelligence in making the judicial dispute resolution process quicker and cheaper and less burdensome on the litigants and witnesses. … Courts also should consider whether the physical presence of litigants, witnesses, lawyers, experts, and jurors is necessary for hearings, trials, and other proceedings or whether remote participation through technology is feasible without jeopardizing litigant rights or the ability of lawyers to represent their clients.
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> There is a kind of symbiosis between the court system and other means of dispute resolution. Those are the means which we still call "alternative" and in fact provide the vast bulk of dispute resolution processes actually used if we include negotiation.
>
> The courts deal with a very small proportion of disputes but their distinctive character and function is essential to the rule of law in our society – if we understand by that term that everybody, private citizen and public official is subject to the law.
>
> In the public interpretation and application of statutes and the common law in the determination of disputed rights, liabilities and obligations, the courts affirm the rule of law –every time a judgment is published. In doing so they provide part of the societal infrastructure which parties to a dispute can use as reference points to assist them in finding their way to a non-judicial resolution. The body of cases decided by the courts at all levels are part of any negotiating environment – they inform the assessment of the best alternative to a negotiated agreement. The legal rules and patterns of decision in various classes of case

> set standards or criteria against which the legitimacy and fairness of negotiated resolutions can be judged and without which they will be unstable.[16]

Zeleznikow[17] has examined the issue as to whether potential litigants can receive useful support from intelligent ODRs. He claimed that such systems can be particularly useful for SRLs, who benefit not only from obtaining useful advice but also by becoming better educated about the procedures and potential outcomes for issues in dispute.

He noted that most ODR systems provide exactly one of either: (1) BATNA advice;[18] (2) support for trade-offs; or (3) facilitated communication. A truly useful ODR system should be a hybrid of all three approaches. Further, ODR should not be fully automated. As well as providing opportunities for communication, such systems should advise users of the relevant law, potential solutions and relevant trade-offs. These tools might include videos, relevant papers and books, past cases and links to useful websites. They can also be very useful in triaging disputes (eg immediately sending a case of domestic violence to court rather than allowing the parties to prolong physically acrimonious disputes) and act as a source of information collection (there is no need to expend a court official's time recording demographic data).

Those ODR systems that have been successful have generally been transactional. A dispute that involves money and legal details is more likely to be resolvable online, whereas one that requires relationships to be improved before resolution adds a layer of complexity which is more difficult when using ODR. As such, when Zeleznikow provides support for family and parenting disputes, he provides advice about BATNAs and potential outcomes, rather than investigating emotions. Lodder and Zeleznikow[19] also had advanced communications as one of their three steps in constructing intelligent ODR systems.

Intelligent advice can be very useful in:

(1) having clients know their BATNA;
(2) reality testing;
(3) conducting simulations; and
(4) providing a roadmap.

IV. ADR IN THE CIVIL JUSTICE SYSTEM

Regulatory frameworks make ADR a core area of skill and knowledge that lawyers must have or at least be aware of when advising clients with their legal issues.[20] More specifically, ADR is now embedded in civil procedure.

A new framework was introduced in Victoria through the *Civil Procedure Act 2010* (Vic) with the objective to "facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute".[21] The framework includes overarching obligations for parties in dispute to engage with ADR to resolve the dispute.[22] These measures further institutionalise ADR in the civil justice system.

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[16] Hon Robert French, "Australian Disputes Centre ADR Awards" (Speech, Sydney, 10 August 2017) <https://disputescentre.com.au/wp-content/uploads/2017/09/Robert-French-Address-Australian-Disputes-Centre-ADR-Award-Evening-10-8-.pdf>.

[17] J Zeleznikow, "Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts" (2017) 8(2) *International Journal for Court Administration* 30.

[18] Zeleznikow, n 17, 43. In Roger Fisher and William Ury, *Getting to Yes: Reaching Agreement Without Giving In* (Houghton Mifflin, 1981), the authors introduced the idea of a BATNA (Best Alternative to a Negotiated Agreement). The reason you negotiate with someone is to produce better results than would otherwise occur. If you are unaware of what results you could obtain if the negotiations are unsuccessful, you run the risk of entering into an agreement that you would be better off rejecting or rejecting an agreement you would be better off entering into. BATNAs can be used to form a basis from which fair agreements can be obtained. Developing BATNAs is an important step for disputants to engage in when they are reality checking.

[19] A Lodder and J Zeleznikow, "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model" (2005) 10 *Harvard Negotiation Law Review* 287.

[20] *Civil Dispute Resolution Act 2011* (Cth); Law Council of Australia, *Australian Solicitors' Conduct Rules* (24 August 2015).

[21] *Civil Procedure Act 2010* (Vic) s 7.

[22] *Civil Procedure Act 2010* (Vic) s 22.

Similar measures exist at the Australian federal level. Under the *Civil Dispute Resolution Act 2011* (Cth) a party must take genuine steps to resolve a dispute, which includes ADR.[23] These measures are general and act as a baseline across the civil justice system. Increasingly, specific and more onerous frameworks are being introduced to specific areas of law. Examples of this can be seen on a federal level in the family law domain and on the State level in retail leases and domestic building.[24]

The technology revolution is making its way into the law and ADR is a particular area where there is real appetite for innovation. ADR is a key focus area for technology-based innovation.

A. Victorian Access to Justice Review (2016) Recommendation 5.2

The "Access to Justice Review" was commissioned by the Victorian government in October 2015.[25] The aim of the review was to improve access to justice for Victorians. The report was released in October 2016 and included 60 recommendations.[26]

Recommendation 5.2 was for the development of an online system for the resolution of small civil claims at the Victorian Civil and Administrative Tribunal. The government agreed to implement this recommendation in May 2017. The review recommended the following three-step process for introducing ODR into the Victorian civil justice system:

(1) establish an Online Dispute Resolution Advisory Panel with terms of reference to oversee the introduction and evaluation of an ODR system for small civil claims in Victoria and make recommendations about the possible future expansion of ODR to other jurisdictions;
(2) provide pilot funding, and, subject to evaluation, ongoing funding, for the development and the implementation of a new online system for the resolution of small civil claims in Victoria; and
(3) introduce legislation to facilitate the use of the new online system for the resolution of small civil claims.[27]

B. Teaching ADR in the Law Curriculum

The position of ADR in Australian law schools' curriculums has been a long and still continuing journey. In the 2009 "Access to Justice Report" recommendation 12.1 stated "[l]awyers being admitted to practice should be equipped with the skills to guide a client through dispute resolution process and understand the major ADR processes".[28] The now disbanded National Alternative Dispute Resolution Advisory Committee (NADRAC) noted in their 2009 report "… that better training at universities is required and that ADR must be elevated from a mere adjunct to civil procedure or litigation subjects to being taught as a full course. An ADR course should be compulsory core subject that is a prerequisite for admission".[29]

NADRAC found that the call for ADR in the law curriculum has largely been taken up by law schools in Australia.[30] Their findings were based on a survey of all 27 (at that time) Australian law schools, feedback received at the "ADR in Legal Education and Promoting Student Wellbeing Forum" (held at RMIT on 20–21 February 2012) and research conducted by NADRAC drawing on members and

[23] *Civil Dispute Resolution Act 2011* (Cth) s 4.

[24] *Family Law Act 1975* (Cth) s 60I; *Retail Leases Act 2003* (Vic) s 87; *Domestic Building Contracts 1995* (Vic) s 56.

[25] Department of Justice and Regulation, "Access to Justice" (Engage Victoria, Victorian Government) <https://engage.vic.gov.au/accesstojustice>.

[26] Department of Justice and Regulation, "Access to Justice Review: Report and Recommendations" (Victorian Government, 2016).

[27] Department of Justice and Regulation, n 26, 281.

[28] Attorney-General's Department, "A Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce" (Commonwealth Government, 2009) 149.

[29] National Alternative Dispute Resolution Advisory Council, "The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction" (2009) 62.

[30] National Alternative Dispute Resolution Advisory Council, "Teaching Alternative Dispute Resolution in Australia Law Schools" (2012).

experts.[31] Eighteen of the law schools taught ADR at an undergraduate level, seven taught it at both the undergraduate and in the juris doctor law degree, and one taught it only in the juris doctor degree. However, only eight law schools had a mandatory ADR unit and 25 had ADR as an elective.[32]

C. Teaching ADR at Victoria University

In 2017 the ADR unit at the Victoria University Law School partnered with ODR leaders from Tyler Technologies[33] to integrate ODR into the unit as a key form of assessment. The Modria platform utilised in the pilot is the one being used in the United States and other countries for court/government and/or commercial purposes.[34] It was not developed to be used for assisting in student assessment.

All 120 students were required to participate in an ODR simulation in groups of three and were tasked with providing legal advice regarding the content of the simulation together with a written report. The following sections discuss the process of developing an ODR simulation and integrating it into the law degree curriculum, and how it assessed student performance. Some of the opportunities and challenges for teaching ODR that were identified in conducting the pilot are also discussed, as well as ODR insights from law students undertaking the course.

D. The ADR Unit at Victoria University

The ADR unit (LLW3002) at the College of Law and Justice at Victoria University was first delivered in 2015.[35] The unit is a popular elective with approximately 120–140 students enrolled each year. Through a Technology Enhanced Learning Grant, a series of videos was developed that followed a case through mediation and arbitration.[36] The unit received a Blended Learning Grant in 2017, which was used to develop the ODR simulation component for the unit.

1. Unit Assessments

The unit has four assessments (assessments 2–4 are group based):

(1) Online multiple choice questions.
(2) ODR simulation and report.
(3) Letter of advice after the ADR process with the production of either a mediation deed of settlement or an arbitration award.
(4) Group presentation.

2. How ODR Has Added Benefits for ADR Students

ODR has primarily been seen as the provision of ADR via technology.[37] ODR integration into the ADR curriculum has the potential to offer many benefits for students; it requires students to develop their technological literacy and offers greater time and access flexibility. Some of the features of ODR, as shown below, are considered both benefits and limitations for the provision of ADR services.

It should be noted that students were only exposed to one form of ODR, and it was text based. The system used was developed by Tyler/Modria.[38] In the below discussion of student comments on the

[31] National Alternative Dispute Resolution Advisory Council, n 30, 3.

[32] National Alternative Dispute Resolution Advisory Council, n 30, 9.

[33] The ODR software developed by Tyler Technologies was formerly developed and owned by Modria.

[34] Tyler Technologies, "Deliver Fast and Fair Online Dispute Resolution" (2018) <https://www.tylertech.com/solutions-products/modria>.

[35] See Victoria University, "Alternative Dispute Resolution" (2018) <https://www.vu.edu.au/units/LLW3002>.

[36] The videos are posted on YouTube, see Victoria University and Dispute Settlement Centre of Victoria, "Appropriate/Alternative Dispute Resolution (ADR) Learning Resource Pts 1–6" (YouTube, 9 May 2017) <https://youtu.be/J2KLXAKfIL8>.

[37] RC Bordone, "Electronic Online Dispute Resolution: A Systems Approach – Potential, Problems and a Proposal" (1998) 3 *Harvard Negotiation Law Review* 175.

[38] See Tyler Technologies, n 34.

negatives of ODR, it should be noted that there are ODR systems that provide far more functionality than text-based systems. Such systems are more likely to meet the concerns of students.

3. The Modria Platform

Modria is the world-leading ODR platform that has experienced significant growth in the industry. The success of Modria is a clear demonstration of the growing acceptance and use of ODR[39] – in fact, "UNCITRAL, the UN working group on international law, has sought to make it industry standard for cross-border e-commerce and business to business disputes".[40] The company was founded by Colin Rule and Chittu Nagarajan, who created the ODR systems for eBay and PayPal; Modria was developed based on their experience of resolving over 400 million cases.

4. Student Insights from the Integration of ODR in the ADR Unit LLW3002

The following insights were adapted from observations, class discussion and student submissions in the ADR unit. It should be noted that the initial goal was merely to educate students about the use of ODR, hence detailed questionnaires about the use of ODR were not developed. This will occur in future offerings of the LLW3002 unit.

(a) The Benefits of ODR

There are a number of benefits offered by the use of ODR where the parties use a text-based platform with the ability to participate remotely, as compared to traditional mediation, including:

- Everything is typed so there is no need to repeat what was said or take notes.
- It can be more cost effective; there is no requirement for travel, room hire or paper.
- Parties participate remotely, which can address safety concerns and allow for a more comfortable environment.
- The conflict is less confrontational or emotional as the parties are not in the same room.
- A text-based discussion keeps the parties more focused on the issues in dispute.

(b) The Limitations of ODR

The text-based ODR process comes with a number of limitations as compared to the traditional mediation process, including:

- The process is impersonal. However, ODR systems are not only text based – the Australian Online Family Dispute Resolution[41] emulates traditional face-to-face mediation; parties and the mediator may be in different locations, but via video-conferencing can see and talk to each other.
- It can be hard for the parties to express empathy. Novais and his team at the University of Minho in Braga, Portugal, have developed sensors to measure emotions during online negotiations.[42]
- There is a greater likelihood of the parties becoming keyboard warriors.
- There is a lack of non-verbal communication. This is not the case when ADR occurs via tele or video-conferencing.
- The parties require competency in digital literacy (eg typing speed). This is only the case when using text-based systems.
- Asynchronous text communication can have delays between messages.
- There can be technical difficulties with both the hardware and software. This is always a problem when one uses information technology.
- Parties can easily type messages in the wrong room.

[39] SJ Shackelford and RH Anjanette, "Building the Virtual Courthouse: Ethical Considerations for Design, Implementation and Regulation in the World of ODR" [2014] *Wisconsin Law Review* 615, 627.

[40] BH Barton, "The Lawyers Monopoly: What Goes and What Stays" (2013) 82 *Fordham Law Review* 3067, 3076.

[41] M Thomson, "Alternative Modes of Delivery for Family Dispute Resolution: The Telephone Dispute Resolution Service and the Online FDR Project" (2011) 17(3) *Journal of Family Studies* 253.

[42] D Carneiro et al, "Online Dispute Resolution: An Artificial Intelligence Perspective" (2014) 41(2) *Artificial Intelligence Review* 211.

- The mediator has less control. *This statement is, however, not correct*. In tele or video-conferencing, the mediator can halt conversations whenever they like. It is also easier to conduct shuttle mediation when using ODR. As such, the mediator actually has more control.
- There needs to be confidentiality compliance with the typed record.
- The process creates added complexity for non-English speakers.

(c) How Can ODR Be Improved?

A number of the limitations and issues with ODR can be addressed through:

- An intake session with the mediator to build rapport. This is now standard practice in ODR systems.
- Introduction to the ODR video. There needs to be an ODR guide for parties that covers:
  - etiquette;
  - online communication; and
  - the process.
- Use of video chat in mediation.
- The ability to view joint and private rooms simultaneously.
- There should be alerts for new messages.
- A "typing…" icon should appear when the other party is typing.
- There should be indicators for when a message is sent, delivered and read.
- Mobile device compatibility.
- A mediator termination option should be available.

E. Opportunities and Challenges for ODR in Law School Curricula

This project was not originally recognised as having any research content. The focus was to allow students to engage in the valuable task of negotiation simulations and it was believed that an ODR tool would be very useful to have students conduct this task. Hence the Law School partnered with Modria to develop these simulations.

Following the introduction of the ODR simulation integration pilot in the Victoria University Law School ADR unit, it became clear that this is an exciting area with a number of opportunities and challenges to consider as it is further developed and delivered, including:

- Group work-based assessment has a number of challenges and this is no different in an ODR context.
- ODR is an innovative and new area to which students are being exposed. This requires expectations to be managed.
- For the pilot, a one fact scenario was used for all the groups. There is an opportunity for students to develop their own fact scenario for their group to use in the ODR simulation.
- The ODR simulation will be limited by the platform being used. The platform used in the pilot was not designed for student assessment. There was no ability to export the content of the simulation for assessment submission. For the pilot, students were required to copy the text from the platform and paste it into a word document, which was then submitted. This is a clunky and inefficient process.

In 2018, the subject "BMO5567 Workplace Dispute Resolution", taught in the Victoria University Business School, used the Guided Resolution ODR Software[43] to conduct workplace dispute resolution simulations. Students were given two two-hour lectures about ODR; in a third two-hour lecture they were given an introduction to the Guided Dispute Resolution Software by its developer Nitzan Karni.

The 13 students were asked to form groups of three and develop a workplace conflict of their choosing. One party was the mediator and the other two parties acted as disputants in a workplace conflict. They were to use the Guided Dispute Resolution Software to attempt a resolution of the dispute. They submitted a 5,000-word report, including a discussion of:

(1) the benefits of ODR for workplace conflicts;
(2) the simulation – roles played, techniques used, outcomes; and
(3) the suitability (or not) of the Guided Resolution Software for the simulation.

[43] See Guided Resolution, "Powerful and Decisive Dispute Resolution for…" <https://www.guidedresolution.com/>.

This small sample size makes it difficult to draw conclusions; however, some trends became apparent in the student feedback, as listed below.

Advantages of using guided resolution software for online workplace dispute resolution included:

- The ability to prioritise issues in a clear and consistent manner.
- The software takes some emotion out of a face-to-face meeting.
- The program forced ideas and alternatives to the issues identified via the questions asked. The ranking system was an additional benefit, which gave clear purpose to the dispute and what motivated each party. In addition to this, the ranking system identified what was specifically important to each party, which led to better negotiation and agreement.
- The software listed the dispute and responses in writing, allowing for clear record keeping from the start to conclusion.
- ODR software was also helpful in keeping track of the conversation held among the parties including the mediator. This allowed the parties to read the conversation recorded over and over again, if needed.

Disadvantages of using guided resolution software for online workplace dispute resolution included:

- There were confidentiality and trust issues as the participants became guarded in giving comprehensive detail because ultimately they did not trust that the information being provided online was confidential or could be kept confidential.
- The missing ingredients in the simulated mediation process – such as the lack of verbal and non-verbal communication, as well as the missing cues associated with tone of voice, eye contact and hand gestures – meant the process was unemotional and detached.
- Use of ODR software requires certain protocols to follow where it was only permissible to answer to the points raised by the party using the software for the first time.
- There is no reverting back once the conversation is submitted or locked. ODR software does not allow the parties to revert back to the comments that are made in the online portal and hence this software does not cater for the aspects of impulse responses. During verbal communication impulse responses can be judged by the mediators and then they can support the parties by rephrasing or revaluating their decisions on the spot.

A future article will examine, in detail, the use of Guided Dispute Resolution Software[44] for workplace dispute simulations, and will also compare this with the Modria software as teaching tools for conducting ADR simulations.

V. Conclusion

With the increasing use of technology in education, government, commerce and courts there is an urgent need for students to be aware of these new technological trends. While the use of ODR in legal practice is still very limited, there is wide acceptance that this will no longer be the case in the coming decade. Hence, as legal education leaders, we need to train our students in the potential and use of ODR.

Further, the use of ODR in law courses has benefits for teaching students about ADR. It allows students to watch and, most importantly, engage in ADR simulations. This opportunity is lost in the traditional teaching of ADR.

While ODR has been used in e-commerce for 20 years and courts are now starting to use ODR, the use of ODR in ADR teaching has been very limited, despite its obvious benefits.

[44] RDO, "Making Justice Effortless and Accessable" <https://resolvedisputes.online/>.