The Impact of ODR Technology on Dispute Resolution in the UK

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THOMSON REUTERS®

"Everyone says 'technology can't possibly change what I do' then BOOM technology disrupts you out of all existence"

– Private Mediator

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Introduction

In an increasingly networked world, online technologies have the power to transform dispute resolution in all walks of life - and they're already doing so.

- In the private sector, commercial organisations like eBay and PayPal have implemented peer-to-peer systems to resolve automatically disputes between their customers.
- In the public sector, courts are seeking efficiencies through technology, for example by introducing guided online systems to manage divorce settlements, or online portals to deal with large volumes of low-value money claims.

The ability to manage disputes and administer justice online has clear relevance for four professional groups in particular – the courts service, regulators and ombudsmen, private mediators and consumer businesses. Each is struggling with an increased volume of disputes and pressure to resolve them quickly, cheaply and proportionately, while delivering a better experience for all involved.

Digital-first services are not only an attractive prospect for cash-strapped courts and regulators, but also the medium of choice for a generation of digital natives that has grown to expect online interaction in all areas of life – including lodging a complaint.

ODR has huge potential to reduce fixed and operating costs for the four groups mentioned here, while improving access to justice and opportunity for redress as well as proportionality and timeliness of resolution.

Assessing the impact of ODR technologies

It will be apparent from the examples already mentioned that "ODR" can mean different things to different people. It covers a wide range of technologies deployed in many different ways; from a mediator using Skype to connect with geographically distant parties, to a regulator or court service using multiple technologies to transform the end-to-end experience of resolving a dispute.

In order to understand this spectrum of technologies better, and its application to dispute resolution in the UK, Thomson Reuters, with the involvement of Spinnaker Research, talked to 40 people, including lawyers, academics, ombudsmen, regulators, judges, mediators, and technology providers.

Our interviewees had only one thing in common: each was deeply affected by and experienced in the transformation of dispute resolution through technology.

We found technology making significant impacts in many areas of dispute resolution. During our interviews common themes repeatedly cut across industries and dispute types. However, the individual contexts of dispute types were a significant factor in the fragmented approach to solutions. It seems that adopters of ODR technologies in different sectors have to ask themselves the same questions, but that the answers are often different.

Though our discussions were focused on the UK, technology is no respecter of borders, and the experience of other countries inevitably featured in several conversations. We believe and hope that non-UK readers will find much of what we learned to be of interest for them.

We should like to thank all our interviewees for their generous participation.

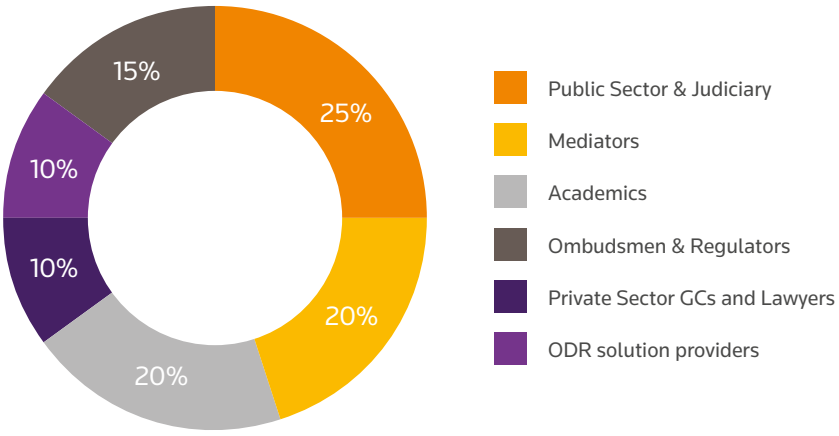
Responses have been anonymised. Representative quotations in the report are not attributed, though an indication of the person's sector has been given for context.

Methodology

Thomson Reuters conducted a structured interview programme with 40 subject matter experts and market participants from each of the relevant market areas (Figure 1). Interviewees were predominantly UK-based, though some provided some insights from Europe and US.

Interviews included conversations with most developed solution providers, dispute systems experts, senior courts representatives, ombudsmen and commercial businesses using or seeking to use ODR.

Figure 1: *Research participants*



"...Technology is not a barrier to development. Political support appears to be there... financial case appears strong but unproven... I believe the barriers are largely cultural but should not be underestimated..."

– Courts representative

The Spectrum of ODR Technologies

ODR is a broad term covering a range of different technologies. In this section we examine and categorise the technologies described by our interviewees.

> *"From a barely-computerised process – a paper system with online filing of docs – to sophisticated software that makes demands and comes up with answers around negotiation, bidding and plenty of things in between. It's a huge spectrum."*
>
> ***– Disputes systems expert***

ODR covers a huge spectrum of ideas and applications related to digital and online dispute processes. Those ideas tend to involve enabling judges, law firms or mediators to handle disputes by communicating electronically with parties and reviewing digital documents. In some cases, assessing the problem and negotiating between parties can be automated.

There are two discernable attitudes to technology in dispute resolution:

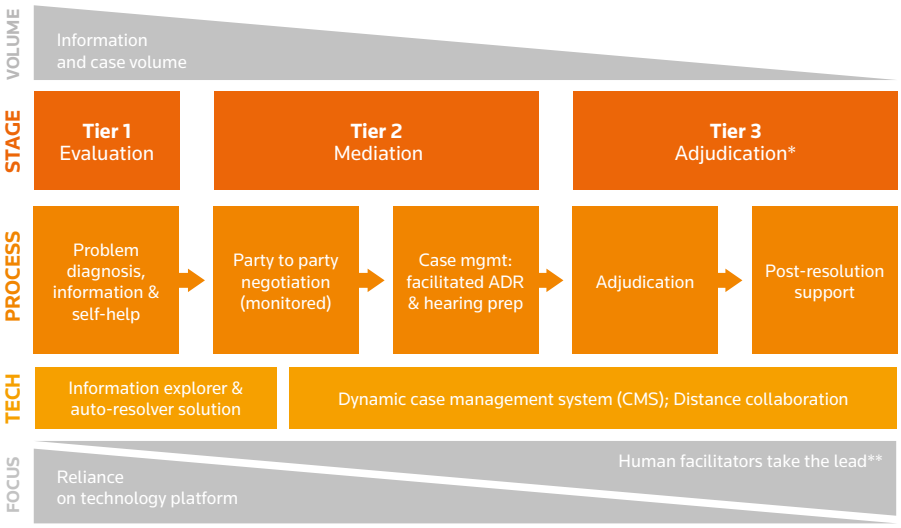
1. Using technology to support or enable existing manual processes of administering dispute resolution – incremental improvement, efficiency gain or value-add in existing legal or negotiating dynamics.
2. Using the technology to fundamentally re-engineer the dispute resolution process, delivering resolution in new ways.

Readers may find it helpful to visualise the spectrum of ODR technologies as per Figure 2. These are technology types deployed in various instances around the world today, in different spheres of dispute resolution.

Importantly, for a large, institutional or high-volume dispute resolver (such as an ombudsman or a court), this spectrum can also be viewed from left to right as an integrated pathway to resolution. In this model, simple disputes will find self-directed resolution early on in the process and without the need for human facilitation. Complex disputes will progress further in the process until a binding resolution is met.

A case may ultimately end up in the physical court-room if either party appeals, if no decision is reached, or the nature of the case requires it.

Figure 2: The ODR spectrum



ODR technology examples

Existing technologies support different aspects of the ODR spectrum. They are offered by a variety of technology providers, some relatively niche. Other examples in use today are self-build systems developed by public sector service providers, regulators or courts. The following list of examples is by no means exhaustive.

Figure 3: Examples of ODR technologies

ODR TECHNOLOGY	ODR TIER	EXAMPLES
Blind bidding These systems accept confidential settlement offers from parties and determine what is acceptable to both parties.	2	Smartsettle
Drafting collaboration Tools to enable parties to review draft documents and forms to resolve a dispute.	1	SettlementIQ MicroPact entellitrak ADR
Automated negotiation AI-type systems calculate outcomes that lead to the maximum satisfaction of parties.	2	Modria Smartsettle
Customised systems Built bespoke for an organisation's needs	1 & 2	eBay's Resolution Center Facebook's dispute system
Virtual mediation rooms & technologies Enables remote mediation in real time through video conferencing and IM.	2 & 3	ADR Group's ADRg Express Virtual Courthouse Skype; Zoom

"The way we have designed the ADR process is that it's proportional. As you progress through the DR phases, it escalates in terms of the work the parties need to do and resources the tribunal needs to provide."

– Tribunal representative

* Not relevant where ODR technology is used in a bilateral B2C context, for example as an extension of a CRM system.

** Although the level of human interaction is higher in this space, technology may continue to play a role in decision-making, for example by setting out possible outcomes.

"The new social media technologies are taking over. Dispute resolution will be the same."

– Academic

Figure 3: *Cont...*

ODR TECHNOLOGY	ODR TIER	EXAMPLES
Arbitration systems Allow arbitrators to conduct arbitrations online from anywhere, through video conferencing IM etc.	1 & 2	AAA / DecisionQuest's CaseXplorer Arbitration eQuibbly Traffic Penalty Tribunal, England and Wales
Online court case initiation Parties or their representatives file claims and related documents via an online tool.	2	Rolls Building CE-File
Online courts Judges or qualified resolvers rule on cases using an official online platform, without the need for face-to-face.	3	Civil Resolution Tribunal (British Columbia, Canada) Federal Court of Australia's eCourtroom
Agreement monitoring Compliance and monitoring tool – can include reporting and analysis that can be used as evidence if there is a breach of agreement.	2	Rechtwijzer Our Family Wizard

"Where ODR is most useful is where a dispute starts online e.g. buying or selling goods or services online. The most natural thing is to resolve the dispute online if there is an appropriate forum to do it."

– Barrister

Where ODR Technologies are Making an Impact

ODR means different things to different people. In this section our interviewees describe different attitudes to ODR technologies in businesses, mediation, ombudsmen and the courts.

Businesses
Avoids litigation and reputational damage

ADR providers and Lawyers
Drives efficiency and may ease painpoints arising from working in different timezones and languages

Ombudsmen and Regulators
Deals with large volumes of disputes, drives demonstrable efficiencies, may speed up resolution of disputes

Courts Services
Improves access to justice, creates better user experience, drives costs savings

Businesses

Depending on their core purpose and scale, businesses in the UK find themselves managing a wide range of dispute types. These include but are not limited to: disputes or complaints arising between the business and customers (B2B or B2C). disputes arising with partners in the business's supply chain; and disputes with competitors or other businesses (for example on IP). Cross-border disputes can add to complexity and cost.

Our interviews with general counsel of businesses highlighted core principal benefits of using ODR technologies:

- Resolving disputes quickly and privately before they get to court, helps avoid expensive litigation and potential reputation damage.
- ODR would also allow businesses to proactively manage and prevent disputes and spot weaknesses in services or supply chain through management information.

"We don't want to be in litigation with our customers. The cost is not proportionate to the cost of any of our products"

– General Counsel, Consumer business

The range of applications mirrors the vast spectrum of business models. Businesses who focus on internet/distance transactions or efficient markets are a natural adopter of ODR systems. eBay and PayPal process more than 60 million cases a year online using Squaretrade, a peer-to-peer ODR system built in 1999 by a group that

later launched off-the-shelf ODR system Modria, covering tier 1 and parts of tier 2 of the ODR process. Over 80% of eBay and PayPal disputes are resolved using this software.

> *"Where ODR is most useful is where a dispute starts online e.g. buying or selling goods or services online. The most natural thing is to resolve the dispute online if there is an appropriate forum to do it."*
>
> ***– Barrister***

However, deployment of ODR technologies (as opposed to CRM tech) is relatively sparse in the B2C space; many businesses do not have a consistent means of managing consumer disputes. Recently introduced national and EU legislation tends to promote the use of ODR platforms in B2C, but the onus is on businesses to fund and implement their own solutions. In one interviewee's view, the EU legislation "will promote ODR but it's not a game changer."

In some cases the sophistication of a business's B2C dispute resolution systems are dictated by membership of a particular trade body, industry sector or customer type. As another interviewee in financial services noted, when it comes to extracting management information from disputes, "in theory corporates should be doing that anyway … there is an expectation that regulated companies should have that level of information".

It is interesting to note that in some areas the nexus between a particular industry segment and the judicial system has developed in order to drive efficiency in a technology-enabled way. Examples highlighted by our interviewees include the UK road traffic portal, which drives swift resolution of insurance cases that would otherwise go to court. This mirrors the fact, highlighted by Lord Justice Briggs*, that the majority of claims processed by the UK civil courts' Northampton Bulk Centre relate to large utilities.

The newly launched ODR platform for B2C transactions in the EU has the potential to significantly affect the way online disputes are resolved within the union – at the time of writing it remains to be seen what the full impact will be.

"An [ODR] solution could support asynchronous comms, improve language misunderstanding and provide secure, confidential case management."

– Private Mediator

ADR providers and lawyers

As a focal point for global litigation, the UK represents fertile ground for the adoption of new technologies in dispute resolution. At the same time, the growth of private mediation and London's pre-eminence as a hub for international commercial arbitration is expected to drive adoption of ODR among UK legal and private arbitration and mediation bodies and practitioners.

For the purposes of this paper we talked to lawyers, mediators and other professionals involved in litigation and also in the spectrum of activities covered by ADR, including mediation, arbitration and Med-Arb. We interviewed people with experience both in relatively low-value cases and in large, complex, cross-border disputes, involving both businesses and governments.

In other areas (for example the courts), interviewees with an institutional view of efficiency gains were united in believing that new technology investment is best aimed at dealing with the high volumes of "low-level" cases, while "high-level",

* Lord Justice Briggs, Civil Courts Structure review: Interim Report, December 2015.

complex or long-running cases should percolate through to face-to-face, "low-tech" resolution.

Not so here. With their focus on case-by-case efficiency, and under increasing pressure from clients to reduce costs, most lawyers and mediators we talked to saw the deployment of technology as something to be assessed on a case-by-case basis: "The type of dispute should lead the type of technology that's used to resolve it".

Where smaller disputes are concerned, most saw the ubiquity and low cost of **video-conferencing tech** as an efficiency driver:

"There are so many free-to-use systems ... I don't mind what platform we use, I'm looking for value for money and effectiveness."

– Arbitrator

In contrast, at the high-value end of the litigation and dispute spectrum, greater values at stake and also larger fees justify the consideration of **specialised technologies**. A variety of tools are available and are selected for use based on the exigencies of the matter, the number and location of parties involved and so on.

"Once the amount of the dispute is over a certain level then the technology piece could be helpful even just for pieces of the process, if not the whole process."

– Arbitrator

"For large-scale IT and telco cases, the cost of litigation is not a deterrent. The volume of documentation tends to be a lot greater and you don't know at the start what the issues will really be and where the effort will need to be spent."

– Barrister

"For multi-million disputes, multi-jurisdiction and multi-party, we do that all online as well ... The global economy has impacted travel budgets hugely. Before, people would allocate millions to resolving disputes. Now that's axed."

– Barrister

"The issues around B2B networks are more complex than those surrounding consumer disputes, as they often involve numerous parties, with large data sets that require discovery."

ADR Professional / Barrister

Similarly, in cross-border disputes, ODR technologies were seen to ease a variety of pain points arising from working in different timezones and languages.

"An [ODR] solution could support asynchronous comms, improve language misunderstanding and provide secure, confidential case management."

– Private Mediator

"For each of the functions of the typical ombudsman office, there is an App for that. And there is a client base eager to use it."

– Rainey and Fowlie, Journal of the International Ombudsman Association, Vol 8, p.66

Ombudsmen and regulators

With significant pressure to divert disputes away from the courts, many of our interviewees suggested that non-judicial schemes for dispute resolution in the UK are likely to proliferate and continue to grow their caseload. Some interviewees pointed to high-volume, low-value transactional disputes in sectors such as retail and aviation.

Interviewees also suggested that ombudsmen, in addition to processing increasing volumes, were also highly focused on demonstrable service and performance measures.

As an example, The Financial Ombudsman Service, the largest of the nine current UK ombudsmen, receives around 1.7m enquiries and 300,000 complaints annually. It uses ODR systems to manage the dispute process between consumers and businesses with the minimum of face-to-face meetings.

Typical technologies referenced by professionals in this space included dispute initiation tools (for large-scale ingestion of incoming matters), as well as video-conferencing to support cases that required mediation:

> *"Sometimes you need to get parties in the same room at the same time. It's a small, small percentage of cases that need that ... The cost of setting up a video link is so small that ODR is more viable, it's a powerful tool. If you can see all parties, it could be so valuable."*
>
> ***– Ombudsman***

"Ombudsmen should embrace ODR technology because it offers the ability to make contact regardless of time zone or geography, to accommodate disabilities with remote contact and communication, and to engage in case tracking and management."

– Rainey and Fowlie, Journal of the International Ombudsman Association

One point raised by interviewees was that speed of resolution can in some cases be a significant advantage to the user – "the selling point isn't really the price, it's the timing of resolution" said one interviewee. It is interesting to speculate whether a faster pace of technology adoption in parts of the dispute landscape may speed up migration of matter volumes away from other parts slower to adopt.

Courts services

By virtue of its history, scale and visibility as the final guarantor of justice and an essential component of democracy, the UK court system is the focus of continual and vigorous debate, in respect of both its successes and its shortcomings.

Lord Justice Briggs' recent interim report into the civil justice system openly raises issues of cost and delay. Commentators note that historic underfunding has left much ground to be made up by the newly confirmed courts modernisation budget.

Interviewees pointed out that in spite of this, ODR technologies have already been adopted in pockets across the system where clear drivers exist – for example, the Money Claim Online system or (in the criminal system) videoconferencing for bail applications to reduce logistics costs. The open question remains how far an end-to-end online approach can be taken for a large class of disputes – as suggested by the Civil Justice Council's report *Online Dispute Resolution for Low Value Civil Claims* (February 2015) report and elaborated by Lord Justice Briggs' interim report.

We summarise interviewee comments on likely benefits of ODR technologies as applied to the courts in the two figures below.

Figure 4: *Civil court claims and the impact of ODR-type systems*

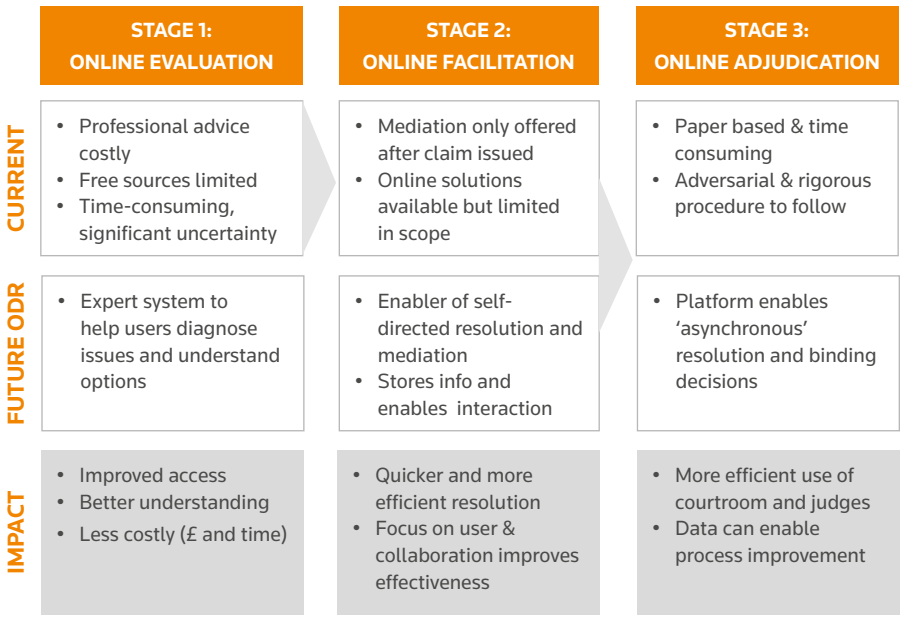


Figure 5: *Interviewees suggested cost reduction opportunities in the Courts as a result of ODR*

"The radical potential of this sort of system is clear. It offers a person one route within one system, from the seeking of information to the resolution of the dispute. If this can be satisfactorily done, it would be an enormous and exciting advance."

– Roger Smith, ODR, Ten lessons on access to justice

ODR Technologies: Impacts for the User

ODR technologies fundamentally change the experience of people in resolving disputes. In this section our interviewees talk about how systems need to be designed for maximum effectiveness.

User experience
For ODR to be effective, it requires investment in a well-designed and user-focused system.

Integrity of the system
Adequate safeguards are needed for online systems, including high standards of privacy and data security.

Face-to-face vs. virtual
Importance of achieving the right balance between face- to-face and virtual methods, depending on context.

Emotional experience
To increase user satisfaction and encourage greater adoption, an ODR system should be sensitive to emotional aspects of disputes.

Speed of the system
The application of ODR technologies in the right ways is speeding up the resolution of disputes.

User experience

Commentators across industries were united in seeing opportunities for ODR technologies to deal with volume traffic in an automated way (whether in dispute initiation, resolution suggestions, or end-to-end processing of simple disputes). However all agreed that for this to be effective requires investment in a well-designed and user-focused system.

> *"We're trying to embrace the notion of putting users at the centre, making it as user focused as we can. As part of that we're employing user-centred design methodology and testing it on real people with disputes."*
>
> ***– ODR Provider***

It was notable that the strongest requirement for quality user experience was voiced by interviewees in the corporate sphere, discussing their B2C dispute resolution activities. Since poor-quality systems leave customers feeling their experience has been "formulaic and shoddy", corporate interviewees recognise a need to select systems that reflect well on the business:

> *"Existing systems are lawyer friendly rather than human being friendly ... We need to ensure that it sets the right tone, delivers fair outcomes, and enhances our reputation."*
>
> ***– Corporate GC***

"Don't start from the IT end! Ask what people want, then base it on a sensible piece of technology"

– Corporate GC

"It can be used to balance the power between the parties more effectively; for example where you have the might of a company versus one single employee. ODR can be used to deliver more equality between parties."

– Mediator

Many interviewees noted that court users stand to benefit the most from the application of ODR technologies, since it can address the common drawbacks of the courts for parties to a dispute (delay, complexity and cost), improving accessibility, affordability and timeliness.

Access: challenges and opportunities

When compared to the current system, ODR may significantly improve access to justice for users, by driving down costs and delays and delivering a user-centric approach.

Some interviewees pointed out that ODR may also improve understanding of justice and consumer rights by providing clear public guidance during the 'evaluation' phase (Tier 1), meeting a need clearly indicated by recent Ministry of Justice research into pre-court decision-making.

Darin Thompson, Legal Counsel for Ministry of Justice in British Colombia suggests that an artificial intelligence based system could improve access to justice for non-expert users. It could do so by, for example, keeping information to a minimum and ensuring that information is non-legalistic and "practically oriented to the user's situation".

A well-designed ODR system may also redress perceived or real inequality among parties. For example, it may give confidence and reduce stress for citizens representing themselves, especially in cases where they can otherwise expect to face a represented party in the courtroom. This applies outside the courtroom as well.

Although a well-designed and executed and digital service may provide an easier path to resolution for self-represented users than the court system today, interviewees noted that in various settings (not just the courts), a move to online services may present challenges for specific classes of people: "There's a litany of issues around computer literacy, use of language for non-English speakers, and societal issues to take into account." Requirements for "assisted digital" therefore come into play, particularly in public court systems.

Integrity of the system

Many interviewees highlighted the importance of adequate safeguards for online systems. High standards of privacy and data security were seen as a basic requirement to ensure trust and take-up of ODR technologies.

"The main issue is keeping it secure, given data protection regulations. Security of personal and customer data is paramount."

– Corporate GC

"Data security is also a concern. As you get more complex ... where are the files stored, it's an issue in all cases."

– Mediator

Key issues highlighted included:

- **Identity:** Establishing the identity of users may prove a challenge; fraud and mistakes will be a concern.
- **Confidentiality**: Interactions as part of the ODR process may take the form of settlement discussions which would be afforded protection. Inability to control information outside of process is a concern, especially given digital evidence collection. Deterrent and punitive measures should be considered.
- **Privacy:** An ODR interface may need to display or conceal different parts of information depending on the stage of process and the type of user. This will need to be factored into the platform's architecture.
- Those adopting ODR can learn from a range of measures to mitigate risk and improve security, commonly used in other sectors including banking, online payment systems and healthcare sectors.
- **Closed or open:** ODR systems need to be secure, but need to be open enough to:
  - provide management insights at a granular level
  - interact with other systems in order to drive efficiencies
  - in public sector settings, comply with transparency policies

  To achieve this, an ODR solution must include open APIs allowing it to share data with other systems. This will require some upfront investment and will need to be considered in the system design.

Beyond the protection of personal data, interviewees commenting on the public or "institutional" space – courts, tribunals, ombudsmen and regulators – also noted the need for applied ODR technologies to deliver demonstrable transparency and fairness where they are deployed in support of, or as a substitute for traditional proceedings.

"How do you ensure that the technology delivers justice not just efficiently but with ethics and integrity?"

– Academic

"You need to make it [ODR] trustworthy, with integrity and ethics. Build in those ideas that people have about justice... harness that objectivity and idealism."

– Academic

"Non-verbal communication can be lost without the direct face to face contact. In so many mediations we are told to be aware of how we talk with our body language and of course if you are seeing a video screen of someone's head and shoulders you miss the subtleties."

– Mediator

Face-to-face versus virtual resolution

We encountered diverging opinions on the respective merits of virtual resolution and resolution in person. As might be expected, these differences of opinion were sometimes influenced by the interviewee's area of expertise (for example, courts versus corporate versus mediation). However, divergences between interviewees within the same area indicated that other factors are in play, including fundamental attitudes to the capability of technology itself.

Some interviewees felt that virtual interaction (via teleconferencing or videoconferencing) could never take the place of face-to-face. Others placed implicitly higher value on the efficiency of virtual meetings and also spoke enthusiastically about the potential for adapted technique to mitigate their disadvantages:

> *"Mediation is an analogue, old-fashioned thing, and it's difficult to see how this can adapt to being a screen-based thing. Cross-examination is workable, but so much of mediation is non-verbal and so much is visual and what you pick up from body language. On conference calls everyone interrupts as you can't see non-verbal cues."*
>
> ***– Mediator***

> *"It's costly and impractical to always have face to face resolution ... the necessary people will always have a mobile. The ability to pause negotiations at any time is valuable. The implications of phone meetings are that you need to keep people's attention; provide regular verbal summaries and email confirmations – this is what was confidential, this is what I can discuss with the other party; rapport building, active listening and use of questions; ... challenging and reality testing."*
>
> ***– Mediator***

Some mediation experts also pointed to the value of a blended approach in complex negotiations, using virtual meetings to acclimatise parties to the discussion before running a face-to-face meeting.

> *"I schedule calls so they get familiar with the voices, and I can explain the process and preparation. It's much more about social comfort so when they come into the room, there's less apprehension."*
>
> ***– Mediator/Barrister***

Others pointed out that a completely virtual experience may in fact lead to more effective resolution than the confrontational atmosphere of a face-to-face meeting; while some parties may simply find a virtual experience less uncomfortable (and therefore more conducive to rational decision-making and better outcomes).

> *"It may be better not to meet other half in person, just be on video link. Removing the emotional content can be valuable." (comment made in relation to divorce proceedings)*
>
> ***– Mediator***

"Getting a decision in writing, a quick resolution to the issue, compensates to a very large extent for the fact that you haven't actually met the judge."

Where courts are concerned, a number of interviewees pointed to an inherent institutional need for physical presence, stressing the value of the courts both as a democratic institution and a visible embodiment of justice:

"There are a number of different ways in which technology can make life easier. In the criminal courts, it is so much cheaper to video conference with the prisoner in a remand or parole hearing rather than organise a van and some guards ... On the one hand, that's great. On the other hand, what are you missing out on by not being face to face? What does the prisoner miss out on? What about the rule of law and the majesty of the courts? Technology is enabling people to 'be there' even if not in the same room ... Being in court with counsel and the judge counts for something. We talk about the importance of the democratic architecture of the courts; you miss out on that if the judge is at home in their pyjamas."

– Academic

A number of interviewees in the court area drew distinctions between the criminal and civil jurisdictions, believing that the former entails an irreducible need for face-to-face proceedings in the interests of visible justice.

However, interviewees across all the different areas (courts, mediators, corporations) expressed a belief that developments in technology and changing social attitudes (associated with the "digital natives" generation) will normalise online dispute resolution in the near future:

"A mediator can use technology to understand emotions on the screen ... It is still theoretical but there is a belief that non-verbal information [will] be captured or enhanced by computerisation."

– Mediator/Barrister

"In our training we explain to people how it feels to see yourself on the screen and how you pick up non-verbal stuff. People born after 1980 understand the emotional intelligence of the online world ... They see the non-verbal communication much better as they are always online."

– Mediator/Barrister

"It's often the most neglected bit, the human element. The court system is too process based and too formal... it just comes down to objectivity, when a dispute is normally emotional."

"It will become foreign to [digital natives] to go and sit in the court hallway for five hours to speak to someone for 20 mins about a small claim issue. They will simply pull out their smartphone and put in the information, receipts, photos and wait for a decision, or get one instantaneously. Digital natives will drive the uptake, the convenience of lower cost dispute resolution."

– Ombudsman

Emotional experience

"People sometimes want their day in court, the ability to be heard."

– Barrister / mediator

"Sometimes by being patient and listening you can get people to accept the decision and carry on with their lives and you are much more likely to do that at an oral hearing than on paper."

– Ombudsman

Interviewees expressed a variety of opinions on whether the application of ODR technologies makes the process itself more comfortable for parties to the dispute – whether it is easier to contemplate a dispute at arm's length via a software system rather than conduct the same dispute in person.

However our interviews also highlighted the core emotional needs that are expressed by the fact of initiating a civil dispute at all. Many people involved in a dispute are seeking not only the "rational benefits" of a favourable outcome (a sum of money, or a replacement for a faulty product, or a better contact pattern with their children), but also, consciously or subconsciously, justification of their position: an acknowledgement in open forum that they were "right".

For example, an interviewee recounted anecdotally that user satisfaction surveys of parties in financial disputes tend to show that satisfaction is higher after a court resolution than after online resolution via an ombudsman; regardless of whether the party is the winner or the loser.

It was also noted that for many citizens, particularly those unable to access either professional representation or free sources of support, the daunting prospect of embarking on a negotiated or adjudicated dispute can increase stress, heighten emotions, and impair decision-making and understanding.

To increase user satisfaction and encourage greater adoption, it's important that an ODR system is sensitive to the emotional aspects of disputes. In his article for the International Journal of Online Dispute Resolution, Darin Thompson, explores one way to 'humanise' ODR; by modelling emotional intelligence functionality into the system. For example, by asking users to rate their feelings of anger about a dispute on a slider bar, which then prompts the system to offer appropriate support and guidance.

To an extent, as our interviewees pointed out, this mirrors historical attitudes to resolution in court versus resolution via ADR. As one academic interviewee put it, "for example in boundary disputes, the parties would rather fight for it and get a judge on their side – some people will never think differently".

Speed of the system

Finally, when considering impacts for the user, it's important to note that the application of ODR technologies in the right ways is speeding up the resolution of disputes. This can be a benefit both to the actors involved in the dispute, and the institution or actor managing the dispute. We will discuss this aspect in more detail in the next section.

"The selling point isn't really the price, it's the timing of resolution."

– ADR practitioner

ODR Technologies: Impacts for the Adopter

Effective use of ODR technologies requires adopters to make informed decisions. In this section our interviewees talk about the benefits of ODR technologies, and also about the investment of time and resources required. Common themes emerge across the public/private spectrum.

Efficiency benefits

ODR improves efficiency for adopters – our interviewees highlighted efficiency benefits, around the following themes:

- Speed
- Timeliness
- Correct information
- Proportionate approach
- Management information

Workforce impacts

ODR adopters will need to consider the changing skillset required of people involved in the dispute resolution process – as well as the change in the types of people involved.

Selecting technology

ODR adopters will need to select from a variety of ODR technology applications, according to their needs.

Adoption and transformation

ODR adopters should consider external adoption factors such as whether ODR makes it easier to mandate ADR. They will also need an effective internal transformation plan.

Efficiency benefits

Speed – reduced elapsed time to resolution

Many interviewees were enthusiastic about the capacity of technology to improve the "speed" and "flexibility" of dispute resolution, through a variety of mechanisms: reduced delays in scheduling virtual meetings, faster and more effective information exchange, and the facilitation of asynchronous resolution models.

Many interviewees sought to contrast these capabilities with the delays inherent in (largely offline) courts systems:

"Delays have been successfully addressed over the last 15 years ... It is better than a lot of other jurisdictions. England and Wales actually has quite speedy justice. But if claimants have to wait 9-12 months, it's viewed as an inordinate length of time."

– Academic

Interviewees also noted that ODR technologies currently facilitate, in appropriate contexts, decisions by experts (for example legal practitioners or industry experts) acting remotely and judging solely on documentary evidence – for example as panel members of a body resolving commercial disputes. This provides for efficient use of the expert's time, as well as speedy communication of documents in one direction and decisions in the other. This was suggested as a useful model for court services, where, in appropriate cases, "a judge would decide on the papers online".

Timeliness – resolution earlier in the pathway

Interviewees also drew out a related measure of the speed of resolution: can online systems enable resolution early in the dispute pathway, saving time and resources at later stages?

Interviewees noted the importance of reaching resolution at the earliest possible stage in settings where the adopter has a particular stake in resolving issues quickly before they escalate; for example a business's complaint process, or a court pathway with the potential for multiple hearings.

"In our particular space, dealing with customer issues quickly at the first stage is key."

– Corporate GC

"Disputes come from tiny things and grow into elephants. When any public service can have a better mechanism for resolving them, that's gold."

– Ombudsman

Many interviewees believed that well-designed ODR technologies would enable the swifter resolution of disputes at a low level.

Correct information – reducing wasted effort

The spectrum of ODR technologies (see Figure 2) incorporates "Tier 1" online tools designed to facilitate problem diagnosis and information exploration. Several of our interviewees noted the capacity of these tools to improve the efficiency and effectiveness of dispute resolution by ensuring that people with disputes (particularly in situations where they do not have professional representation):

- have clearly stated their objectives and their understanding of the facts;
- have submitted the necessary supporting documents;
- and understand what rules apply to their situation (for example, if they are bringing a legal claim, on what basis).

"You increase your chances of settling, if everyone has submitted the right information to begin with"

– Corporate GC

"Anything that will soak up litigants who can't afford access to justice through the courts is a good thing."

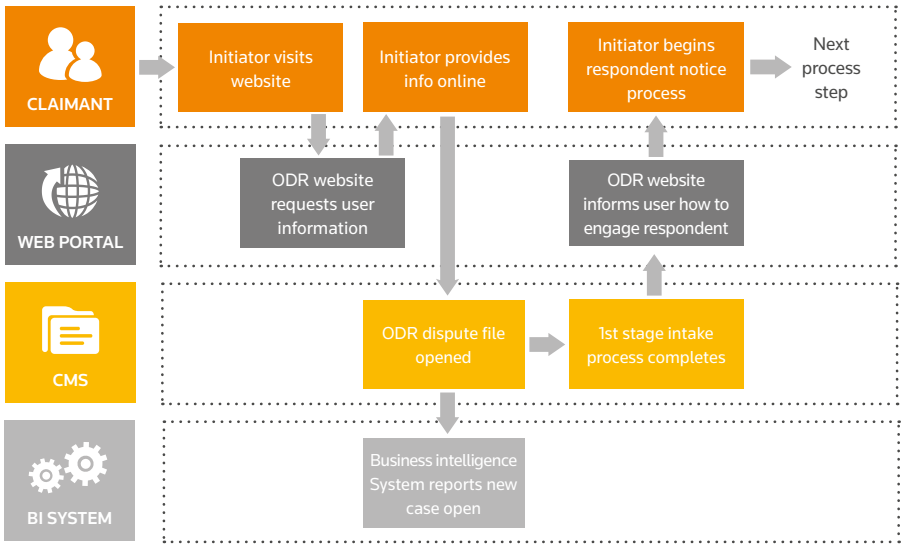
– Arbitrator

For example, one dispute resolution service, working in commercial online disputes, demonstrated to us their front-end software for people initiating a dispute, which guided users through the submission of their evidence and included automated warnings where not enough evidence had been submitted for the expert panel to be able to adjudicate in their favour.

The figure below, while originally focused on a public court setting, is representative of the typical information exchange flows in the ODR processes our interviewees discussed.

Figure 8: *Process map of person initiating ODR*

(Source: ***Darin Thompson****, Implementing Online Dispute Resolution in a Public Justice System, www.scl.org)*



Where would ODR technologies have most impact in the courts?

What conditions must be met for ODR to drive efficiencies for the government and value for the taxpayer? *Delivering Justice in Age of Austerity,* a report by JUSTICE, suggests the following conditions are necessary for ODR to be successful:

- High numbers of litigants in person
- Difficulties for the court in extracting the information necessary for a just decision before the final hearing, often indicated by a high rate of adjournments
- High numbers of successful appeals
- Litigants have difficulty in understanding the relevant law and complying with the required procedure.

Proportionate approach – focusing resources in the right places

Interviewees also noted the capability of ODR technology to assist in the more efficient deployment of **expert resource**. This was mentioned particularly in relation to the deployment of highly qualified resource such as judges, commercial mediators, and expert panels (in industry-specific resolution models). Both high-volume settings (like courts) and low-volume but geographically dispersed settings (like global mediations) were called out.

Specific examples included the conduct of assessments based on the documents, or other situations admitting asynchronous working:

"Early evaluation is conducive to being done online."

– Commercial mediator

More generally, in the courts setting, many interviewees agreed with the view of the Civil Justice Council, recently provisionally endorsed by Lord Justice Briggs, that a careful application of ODR technologies to the end-to-end process of low-value civil claims could manage significant numbers of claims to resolution early in an online process, with lower numbers therefore requiring the attention of a judge in a physical courtroom - thus saving not only skilled resource but also potentially real estate.

At the same time, as noted elsewhere, mediators indicated that virtual mediation was a feasible and useful approach to limit travel costs and the delays associated with scheduling physical meetings:

"For multi-million disputes, multi-jurisdiction and multi-party, we do that all online as well."

– Mediation Director

Focusing resource more efficiently, however, means also reviewing the type of person involved at each stage of the process. Our interviewees discuss the impact of technology on the managers of disputes in **People impacts** on the next page.

"It will be great to get information out of the system in terms of data, where disputes arise, to provide thought leadership to the industry and facts and figures to clients; for example typical timeframe to resolve this particular level of dispute, where do these disputes tend to settle"

– ADR Practitioner

Management information – creating efficiency within the pathway and elsewhere

Many interviewees highlighted the value of leveraging the data exhaust from certain types of ODR technology, such as Tier 1 self-serve systems or Tier 2 online case management and workflow systems. It was pointed out that this data can help directly improve the operational efficiency of high-volume operations (for example, regulators or ombudsmen) or be used to improve insight into the broader social or institutional context of the type of disputes involved.

Data extracted from an ODR system around the nature and volume of disputes would allow continual improvement of the justice system and drive value for the tax-paper by enabling administrators to:

- predict and prevent future disputes
- manage disputes that can't be prevented more quickly and effectively
- spot weaknesses in law which government can address through legislation or other means.

As one of our experts commented: "[ODR would allow for] resolving a case and preventing 10 more via lessons learned and positive feedback loops."

In the corporate space, it was acknowledged that the management information revealed by a powerful dispute management system aids in "making commercial benefits elsewhere in the organisation, e.g. more rapid product development, quick wins on accelerating product de-commissioning, dealing with suppliers more readily".

Workforce impacts

Our interviewees described a number of evolutions brought about by ODR technologies. These included both a sea change in the skillset required of people involved in the dispute resolution process, and, for high-volume operations, a change in the types of people and roles involved at each stage of the resolution pathway.

Mediators in particular noted the requirement to gain new **skills** to flourish in the new technology-enabled dispute resolution environment:

> *"In our training we explain to people how it feels to see yourself on the screen and how you pick up non-verbal stuff."*
>
> ***– Mediator***

For high-volume operations seeking efficiencies, there was a broad acknowledgement that ODR technologies both facilitate and require changes in the mix of roles for those who resolve disputes. The general principle, akin to resourcing to risk, is that the most highly qualified expertise is husbanded for the most complex or high-value disputes, while simpler or smaller disputes are resolved by less experienced colleagues, enabled or supported by ODR technologies. To some extent this echoes Lord Justice Briggs' interim report on the UK civil justice system in which he contemplates a broader role for non-judicial "Case Officers" in the management of disputes in their early stages. The following quotes, all from within the courts and ombudsman sphere, illustrate the principle:

> *"There are three parts to the system: stage 1 is triage ... stage 2 is adjudication, where we look at the case and try to create a resolution. This is recommended to parties ... Stage 3 is a binding decision ... In resourcing terms, [we] would apply 10% of resource at stage 1, 80% at stage 2 and 10% at stage 3. With ODR principles in mind, the model is changing the default so stage 1 is default and 60-70% of the work is done at that stage by people dealing with cases promptly and endeavouring to find a resolution."*

> *"[Our solution] is low touch and will gradually move to a facilitation process where someone who is not a judge will try to find a way to get the parties to resolve their issues. If that doesn't work they go through to adjudication that involves a judge-type role."*

> *"The resolving entity wouldn't have to be a judge or lawyer - you probably wouldn't bother for small claims."*

Interviewees often went on to discuss the types of non-legal role that are increasingly

becoming involved in high-volume mediation situations. It was noted by interviewees – both inside and outside the corporate sector – that core mediation skills of communication, empathy and consensus building are shared in an effective customer service function. Indeed, we noted at least one example of a successful high-volume dispute resolution service staffed by mediators exclusively drawn from customer service backgrounds.

Selecting technologies

As demonstrated earlier in this paper, the ODR technology space encompasses a range of applications, for different use cases, deployed in different parts of the resolution pathway. Our interviewees showed us that dispute resolvers investing in ODR select their technologies according to various contextual factors; including the type of dispute they are resolving, the volumes they process, the commercial or operational model that they use.

For example:

- A solo practitioner mediator may deploy one or two point solutions to meet specific ODR needs – for example, a mobile videoconferencing package.
- A larger-scale "institutional" resolver that processes high volumes of similar disputes (such as an ombudsman) may use a specialised workflow solution tailored to its needs – for example, a case management system incorporating multiple portals.
- Courts-type resolver systems dealing with high volumes of multiple case types at multiple levels (first instance, appeal and so on) start from an offline base and deploy a range of ODR-type technologies, whether in tactical pockets (for example the HMCTS personal injury portal) or in general alignment with broader strategy.

The availability of technologies across the ODR spectrum varies according to application type. The table below highlights some general points indicated by our interviewees:

ODR APPLICATION TYPE	STATE OF THE TECHNOLOGY
Virtual meetings	• Various generic commercial offerings available at low cost, readily deployable.
"Tier 1" self-guidance or automated resolution	• Various solutions ranging in complexity. • Heavily dependent on dispute and audience context. • Usually self-built, however a small but growing number procured from SMEs.

"The idea of ODR is fine, but someone somewhere has to fund it"

– Arbitrator

"Cost is an issue for the lower value disputes. You would need to prove effectiveness versus cost. If you can afford to pay why would you use online provision rather than going to court?"

– Academic

ODR APPLICATION TYPE	STATE OF THE TECHNOLOGY
Dispute workflow management	• Numerous examples deployed, with similar functionality (e.g. case review, permissioning, deadline management) recurring across different industries and dispute types. • Examples of both self-build and procured from SMEs. • Some evidence of organisations extending commercial CRM solutions to cover dispute resolution.
Outcome management	• Variety of nascent initiatives to automate or semi-automate settlements/decisions, for example to "provide a structured platform for communication that may yield a settlement before it goes in front of a neutral decision maker".

Interviewees agreed that the market for commercially available ODR solutions (excluding generic applications such as videoconferencing) was in its infancy, with activity seen both from technology companies and from resolving bodies themselves:

"The burden of investment and risk is usually on the tech start-up to create the platform and create a pilot that will secure funding. The initiative usually starts at the tech side."

– Arbitrator

"ADR providers also want to create their own proprietary systems."

– Arbitrator

While existing solution examples (especially at Tier 1) are heavily geared towards specific contexts, commercial providers were clearly seen to be attempting to discover common ground across dispute areas, for example "to create a neutral platform that can be customised to reflect the case load of a court or a municipality or a govt agency". As indicated above, workflow management seems to admit of this kind of approach, as do other broadly generic areas.

"A structured negotiation platform in the UK would work in New York."

– Arbitrator

"There was a base set of processes and the IT architecture could support a wide range of different tribunals."

– ODR provider

Our interviewees also had a lot to say about methods of funding ODR investment. At one extreme, ODR technologies were seen as naturally self-funding through efficiency gains. In the commercial mediation sector, technology costs were said to be either rolled up as an overhead or – where specific, expensive solutions were required for a particular case – rolled into party fees.

At the same time, there was a recognition that for large-scale change in large resolution systems (for example courts) initial injections of central funding were a probable requirement, or indeed "some sort of transition exercise where initial government funding transitions to more of a cost recovery system".

Adoption and transformation

External adoption challenges – mandating ADR

In various resolution settings (in the courts and out) ODR systems can be used to facilitate ADR prior to the adjudication stage, for example by providing a neutral platform for the exchange and comparison of information, objectives, claims and counter-claims. Interviewees in various settings (both public sector and commercial resolution services) discussed the relationship between these stages and how the development of ODR technologies affected this dynamic.

In the specific area of litigation, interviewees noted that the question of whether prior ADR should be mandatory involves broader principles than simply whether the technology exists to deliver it efficiently. Regardless of technology, mediation has long been seen as a cost-effective alternative to litigation, and in parts of the UK justice system parties are strongly encouraged to consider ADR before entering court. However, interviewees highlighted that not only would compulsory ADR raise issues related to access to justice, but also the experience of jurisdictions that have introduced compulsory ADR prior to litigation has not universally demonstrated a successful reduction in court volumes.

These questions are broader than the scope of this paper. Therefore we confine ourselves to three emerging themes from our interviews, specifically related to ODR technology and compulsory diversion to ADR:

1. ODR technologies make mediation easier in certain contexts, and therefore should be seriously considered when contemplating the introduction of a mediation stage prior to adjudication in high-volume settings.
2. Where a dispute resolution provider mandates early mediation and supports it via ODR technologies, fundamental standards of security, effectiveness and user-friendliness must be met.
3. Introducing ODR technology to support ADR and simultaneously making that ADR compulsory may be a risky strategy. ("We need phased implementation on a voluntary basis … Both parties need to consent and agree to use the new system … Most of the time people won't consent, which will help to keep volumes low.")
4. Some interviewees dealing with unique case types reported success in mandatory introduction of ODR-enabled mediation prior to adjudication: "All parties are auto-opted in to confidential, non-binding mediation. This improves our hit rate because no-one needs to feel as though they are losing face by proposing mediation."

Internal transformation

Successful adoption of ODR technologies requires user-focused design and responsive development of the system to new user needs. People with disputes must find the system easy to use. Furthermore, where a large-scale, established institutional dispute resolver is concerned, our interviewees pointed out that an effective internal transformation plan is needed in order to integrate new technology with existing workforces and established procedures.

Interviewees highlighted two areas in particular:

1. **Transforming expert working patterns** – planning for how dispute resolvers themselves (judges, arbitrators, expert mediators and so on) will engage with the new ODR technologies. Internal metrics of success will turn on more efficient use of expert time. New technologies must not only be accepted by people with disputes, they must be accepted by the experts and demonstrably improve their ability to work effectively and efficiently. As one interviewee told us, "The tricky bit is how to structure the information in a way that the expert can respond to". We encountered examples of trilateral online resolution systems where systems of permissioning, guidance and document exchange were configured for remote working by expert resolvers and dispute parties alike.
2. **Teaching the system** – if technology efficiencies are to be realised, an online resolution process must not be a virtual copy of the physical process that went before. However, experience is not lightly cast aside, and there is an inescapable need to transfer in the accumulated institutional wisdom, statutory objectives and procedures, and expert knowledge of the relevant dispute types: "The challenge is how to do the knowledge engineering, how to put the knowledge into the system." Resolvers and administrative staff must work closely with IT colleagues and technology providers to configure new systems appropriately. Our interviews raised some key procedural issues that will need to be considered before implementing ODR.

Changing the Landscape of Dispute Resolution

Taken as a whole, our interviews paint a picture of an ODR technology market in flux, making impacts to different extents in different spheres of dispute resolution.

At its root, the proliferation of ODR technologies has potential implications as an enabler of the transfer of disputes away from one sphere of resolution and towards another:

> *"Many disputes now go through ADR and mediation; there is less case law now and that has implications for our common law system and the development of it. Parties are turning to more confidential methods so there is less judge-made law and interpretation."*
>
> ***– Corporate Counsel***

If one sphere (or resolver within a sphere) proves more adaptable and better suited to the mobile, connected and global society than another, and can deliver outcomes more efficiently, then it presents a powerful motive for the migration of civil disputes. The absolute extent of migration depends on other factors as well – enforceability, attitudes to culture and tradition and the willingness of institutions and governments to foot the bill for modern, centrally-provided dispute resolution. But ODR technologies create environments that allow new resolvers – and entirely new models of resolution – to enter the lists.

More information

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