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Executive Summary

This submission is restricted to comment on the digitalisation of the Small Claims Track and the Money Claim process, which is commonly referred to as the Online Court (OC) and HMCTS has called the Civil Money Claims Online. This note observes that the OC process, once completed, will in essence allow parties to communicate with the court through online submissions. This process, which is hoped to be designed with the needs of self-represented litigants in mind, encourages parties to seek early settlements. This submission argues that the lack of empirical research on comparable Online Dispute Resolution (ODR) processes and on the impact that ODR technology has on these self-represented litigants would limit its potential. Furthermore, simply bringing online the existing Small Claims Track will not release the full potential that the OC has to increase access to justice for self-represented litigants. This note concludes by making a number of recommendations.

Background

1. The Civil Courts Structure Review led by Lord Justice Briggs, as it was then called, found that “the single, most pervasive and indeed shocking weakness of our civil courts is that they fail to provide reasonable access to justice for the ordinary individual” (Briggs, 2016). This is because the cost of representation is often disproportionate to the value of most claims, especially those under £25,000. Furthermore, lay-litigants often find the courts unintelligible, slow and detached from a growing digital society. There is also a growing recognition that judicial adjudication is not the best process to resolve most civil disputes. This view is not entirely new, and in the past few years we have seen an expansion of specialised dispute resolution schemes, from tribunals to Alternative Dispute Resolution (ADR) processes, that are increasingly imbedding a conciliation stage as part of the process.

2. The Government has decided to invest in Online Dispute Resolution (ODR) technology with the aim of making civil courts more accessible through technology and ADR while benefitting from significant cost savings. The Government has committed £1 billion to modernise its courts and tribunals, which are expected to
become more efficient and to operate “digital by default” (Ministry of Justice, 2016). The tension between the goals of cost saving and increasing access to justice are going to be present in the launch of a new Online Court (OC) procedure. The OC is expected to resolve eventually most civil claims under £25,000, which account for the majority of the 2 million civil disputes lodged annually in English and Welsh courts. At the moment is unclear what will be the residual jurisdiction of the Small Claims Track and the Fast Track once the OC becomes fully operational. The OC is based on a proposal that originated in the Civil Justice Council (the ODR Advisory Group, 2015) that recommended the creation of an OC that incorporated ODR features and promoted early settlement, and on a report by JUSTICE that called for court-officers to assist lay-litigants (JUSTICE, 2015). The OC was subsequently the central recommendation of the made by Lord Briggs, which called for the establishment of an OC with new procedural rules suitable for lay-litigants (Briggs, 2016).

The Online Court Procedure

3. The initial stages of the OC procedure are currently being tested in a Public Beta website at https://www.gov.uk/make-money-claim The National Audit Office reported the data from the Ministry of Justice which shows that good satisfaction levels amongst those litigants that tested the new online procedure (National Audit Office, 2018).

4. The OC process, akin to many ADR/ODR processes, tribunals and small claim schemes, once it is completed it will employ a less adversarial approach that will seek to enable a simpler pathway to justice online for litigants in person. This radical change is intended to be achieved by transferring most of the case management role from lawyers and judges to ODR self-help software (though very little of this has been done so far beyond ensuring that claims fall within the purview of the OC) and legally-trained court officers. The OC process, once finalised, will be structured with the following three main procedural stages:

I. The OC website will assist litigants in filling in their claims and responses (e.g. using pop-up windows that alert them to missing information), and it will allow parties to exchange settlement offers (in effect replacing the pre-action protocols). This stage (I) is currently operational with the important exception of its most promising features incorporating triage and self-advice tools. Unresolved claims will move to stage (II).

II. A court officer is appointed to assist litigants (via telephone and online communications) with case management and, when possible, to settle their claims –this is expected to happen through the expansion of the existing HMCTS telephone mediation and other ADR techniques, such as judicial Early Neutral Evaluation (i.e. where a specialised judge provides a preliminary non-binding recommendation). The expectation is that the majority of cases will be settled at this stage. This stage is currently being rolled out, but, for what I understand, it only offers the telephone mediation which is being used in the Small Claims Track. From April 2019 it will commence an “opt-out” model whereby all claims under £300 will be automatically allocated to a telephone mediation slot, unless one party actively requests to opt-out this mediation.
III. The remaining unresolved cases will be decided online by a district judge based on the e-documents submitted by the parties. Judges may also require parties to engage in a hearing that will normally take place via telephone or video-conference. This stage has not been implemented yet, and I have seen very little information on how this will be carried out. Below I offer some suggestions, such as the deployment of specialised judges to ensure they are more efficient and deliver more consistent judgments than the current set up of “generalist” county court judges.

Lack of research on comparable dispute resolution processes, the journey of civil claims and the impact of technology on lay litigants

5. While the US has begun to examine the impact of ODR in courts (Joint Technology Committee, 2017), in the UK there is no in-depth study of any of the ODR systems that inspired the design of the OC, such as the ones identified by the Civil Justice Council: e.g. the Financial Ombudsman Service, the Traffic Penalty Tribunal, and the Civil Resolution Tribunal (Civil Justice Council, 2015). The assessment of best practices and benchmarks from comparable leading ODR processes would therefore help to inform the design of the OC.

6. The main predecessor to Stage (I) of the OC process is the Money Claim Online as the latter allows for the online submissions of specified money claims. When a defence is submitted for claims under £10,000, these are currently allocated to the Small Claims Track of the relevant county court. These litigants are offered telephone mediation (i.e. where the mediator speaks to the parties separately) provided by HMCTS staff. Although, this telephone mediation is the predecessor of Stage (II) of the OC, it is unclear whether in the OC litigants will have the same incentives to participate in the mediation –this is because while currently a successful mediation obviates the need to attend an often-stressful court hearing, the OC will do away with most hearings, deciding most of these cases on the documents. Moreover, only around half of the cases where parties request mediation are allocated to a telephone mediation slot. The reasons behind this low percentage are the two limited time-slots offered to the parties, its availability during working hours Monday to Friday (i.e. as some litigants may not be able to take the time off work for the allocated hour to participate in the telephone mediation) and the limited capacity of the existing 17 HMCTS mediators.

7. There is also very little available information on the journey of these claims. All that is known is that the vast majority of the 2 million civil claims (97.5% of them) do not reach the trial stage. While most claims are undefended (i.e. around 88%) and culminate in a default judgment (often in favour of a debt recovery business), many others are settled or withdrawn (e.g. because it is cheaper to restart a claim than to amend one where the details of the defendants are incorrect). However, there is no reliable data on what percentage of cases fall within the last two categories and when that occurs; let alone about the lay-litigants’ socio-economic and demographic background. Also, it must be noted that the percentage of trials is significantly higher in Small Claims (i.e. around 1 in 3 defended claims instead of 1 in 5 for other defended claims) as the trial fees and costs are much lower and parties often do not have legal representation.
8. There is no information on the impact of the online processes on lay-litigants. Thus, it will be important to address this critical gap by providing an in-depth analysis of ODR best practices as well as an independent analysis of the OC pilot, which is currently limited to small claims under £10,000, before its official launch in January 2020. In particular, it will be important to compare the journey of small claims when at least one of the parties is a lay-litigant who opted in the OC pilot and contrast the data against those lay-litigants who used the offline Small Claims Track.

9. Although it is hoped that the accessibility and user-friendliness of the new OC will increase access to justice without denting the quality of justice, the limited empirical research does not unambiguously support this hypothesis. Whereas there is an assumption that ODR processes increase access to justice, they can also represent barriers for lay-litigants, even when the process is user-friendly. A recent study about the digitalisation of courts in Michigan found that while ODR increased efficiency and case numbers, the number of cases brought by lay-litigants dropped overall.

10. Furthermore, the research on the Small Claims Procedure in Ireland (and the limited experience of the OC pilot) have found that allowing for the online submission of claims can reduce their admissibility when an unrepresented claimant did not identify the correct legal name of a business defendant; this also creates problems in the enforcement stage. Conversely, the recent pilot allowing individuals to file for a divorce online using plain-language forms reduced the high dismissal rate from 40% of the more legalistic paper-based applications to 0.5% for the new online system which alerts the applicant if the information provided is insufficient.

Recommendations

11. Lord Briggs recommended in his Final Report that in addition to procedural stages (I), (II) and (III), there should be stages 0 and 0.5 where the claimant should seek legal advice (for which he recommended that some of this cost could recouped in a subsequent OC case) and where parties should explore ADR/ODR options before starting the OC process. There is however no evidence that HMCTS is looking at implementing these preliminary stages. However, it would be preferable if prospective litigants are required to seek the resolution of their disputes before starting the OC process.

12. One of the main advantages of using ODR processes, as well as certain ADR schemes, such as consumer ombudsman bodies, is that they can incorporate a triage or diagnosis tool which inform parties about the validity of claims and what would be necessary to succeed in a claim. Lord Briggs, following recommendation from the Civil Justice Council, proposed that this function should be part of Stage (I) of the OC process. Although HMCTS has started to develop dispute resolution trees (e.g. for flight delays and cancellations) there is no public information about this or any indications whether or when this function will be plugged into the OC process. Therefore, it would be helpful to know whether these functions will be implemented, and if so, when and how will this be done.
13. Stage (II), also known as the conciliation stage, is currently relying exclusively on the telephone mediation service used in the Small Claims. There are however not other ADR processes that are being tested despite the fact that Lord Briggs and others, recommended to use a variety of ADR processes, including but not limited to, judicial early neutral evaluation. Furthermore, there is a wealth of nationally certified ADR entities that resolve consumers disputes. But these ADR schemes, many of which are optional for traders to participate in, are operating in parallel to the OC. I submit that it would be beneficial to interconnect these ADR schemes, which by in large now operate online, with Stage (II) of the OC process.

14. To a large degree the success of the OC will depend on its ability to dispose claims quickly and efficiently in the first two stages. However, for these stages to be effective, parties must have incentives (and penalties) so that they are encouraged to engage in settlement discussions. There are several factors that would contribute to achieve this goal. For example:

   a. As noted above, HMCTS is due to roll out in April an opt-out telephone mediation scheme for claims under £300, which currently represents around 20% of all claims going to the OC. The expectation is to increase this threshold once an evaluation has taken place. If an opt out model is adopted, then policy makers will need to consider when litigants will be able to rely on opt-outs, whereas if an opt-in model is chosen, then it will be crucial to imbed incentives into the process to ensure an adequate level of participation. Importantly, the online medium may change existing incentives. For example, presently the small claims telephone mediation model has a powerful built-in incentive for opting-in as it is free and parties opting to use it could save themselves from having to take a day off work to attend a likely intimidating court hearing. Yet, this incentive may disappear once Stage (III) is fully operational. This is and since parties will not be required to attend physically a court room as most cases will be adjudicated based on the parties’ online submissions. Thus, while adjudication must be accessible to litigants, if it is too accessible, it would discourage parties to consider settlement options.

   b. Open justice will be an important factor to ensure transparency and it could also operate as a powerful incentive to encourage settlements as these will remain confidential, whereas judicially adjudicated decisions should not. In a similar vein, when oral hearings are taking place, these will need to remain open to the public, and technology can make this possible with little disruption by allowing outsiders to connect live.

   c. Court fees and cost penalties will not only impact in the number of settlements but also in the level of access to justice. The Civil Procedure Rules and case law have already developed economic strategies to promote settlements, such as Part 36 offers to settle and cost penalties for unreasonably refusing to accept or ignoring an invitation to ADR/mediation (Halsey v Milton [2004] EWCA (Civ) 576 and PGF II SA v OMFS [2013] EWCA Civ 1288). But these penalties do not normally apply to small claims or lay-litigants (LIPs). Over the next few years policy makers will need to consider whether these incentives and penalties should be extended to LIPs, and if so, whether to build-in safeguards (such as capping penalties to court fees) to
ensure that the most vulnerable court users will not be left out or pushed towards a second-class justice of under settlements.

15. Moving from face to face to online judges opens up the opportunity to re-imagine justice. In the OC context this means that by moving from having district judges in county courts to having a centralised system whereby judges will be contacted through an online platform, it allows for the specialisation of judges. There is therefore no longer the need to have generalist judges to serve their local communities, instead there is the opportunity to have specialised judges which can decide cases more efficiently and consistently. Indeed, High Court judges, which are largely centralised in London are fairly specialised –yet, the case volume and the number of district judges in the OC will be much higher than that of the High Court. In a similar vein, currently large ADR entities, such as the Financial Ombudsman Service in the UK which processes over 400,000 complaints per year have case handlers and ombudsman which are specialised in different types of financial disputes (e.g. personal protection insurance, mortgages, current and credit accounts, etc). The same approach should be adopted for the OC.

16. Last, but not least, we need to improve of our understanding of the transformative impact that digital communications and ADR processes have for lay-litigants; hence, informing the system design of the OC process so that it is fair in terms of procedural (i.e. access) and substantive justice (i.e. fairness). The following three actions would enable us to get closer to those goals:

- To review best practices of the leading ODR schemes to inform the ongoing design of the OC. In particular, it would be important to examine those ODR schemes that are the closest to the OC process, such as the Traffic Penalty Tribunal and the Civil Resolution Tribunal in British Columbia.

- To provide an independent evaluation of the experience of lay-litigants in the OC pilot and in the Small Claims paper-based counterpart.

- To increase the collection of data of cases reaching the OC in order to improve the statistical data that HMCTS currently offers on civil cases.

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