

Using online dispute resolution to tackle the SME late payment crisis

LawtechUK feasibility study and proof of concept



Summary

There is now a technological solution to a longstanding problem facing SMEs. The problem is late payments and it affects most small businesses. The solution is known as online dispute resolution - an inexpensive and quick way of sorting out legal disagreements. Resolving late payment disputes in traditional courts takes too long, is disproportionately expensive, and can jeopardise ongoing business relationships. In June 2020, at LawtechUK, we recognised the potential for this new, technological approach to the late payment challenges facing British business. Specifically, we envisaged the development of an online platform that could provide an affordable, easy to use environment for SMEs to recover unpaid debts - as an optional alternative to the courts. This publication is the feasibility study and proof of concept for such a platform. It shows how the platform could be established and become financially self-sustaining within a short period. The study provides detailed analysis and practical insight on the development of the platform, taking account of the user and jurisdictional context and available technologies. It also lays out a business case for aspiring providers. In publishing this report, we hope to go further than solving a pressing business problem. Our purpose is to demonstrate an innovative, empowering and less adversarial approach to dispute resolution generally.

This report does not represent government policy.

Purpose

At LawtechUK, our purpose is to support the transformation of legal and court services through technology. We are keenly aware of the transformative opportunity of technology in the area of dispute resolution, which is known to be hard to navigate, slow, expensive and adversarial. This is a problem for all experiencing legal grievances, but is particularly an issue for smaller businesses (SMEs) under financial and resource constraints. We wanted to evaluate and demonstrate how online dispute resolution technology can be harnessed now to address this at a sustainable cost.

As Covid-19 took hold and we started to see the impending economic impact of lockdown, we focused our attention on the pressing and existential challenge for SMEs of late payments, and whether a platform could be developed to provide a fast, affordable and easy to use alternative to the court service for resolving debt disputes, mindful also of growing court backlogs.

Representing 99.9% of UK businesses and ~60% of jobs and private sector turnover, small to medium size businesses are essential to the UK economy. SMEs suffer £40bn in annual losses due to legal problems, resulting in over one million business owners suffering anxiety and ill health. One of the biggest issues for these businesses is late payments and the lack of an efficient way of recovering debts, which costs the UK economy £2.5bn each year.¹ SME late payment debt has risen to £23.4bn, with a cost to SMEs of £4.4bn each year to collect money owed.² Each SME deals with an average of five overdue invoices amounting to sums owed of on average £25,000 at any one time, and spends an hour and a half every day³ and £500 every month chasing payment.⁴ This has been made worse by Covid-19.⁵

¹ Federation of Small Businesses, '[Stop late payments, save 50,000 small businesses](#)' (November 2016)

² Pay.UK, 'UK SMEs face debt burden of £23.4 billion' (November 2019); Financial Times, 'UK businesses face fines for late payment of suppliers' (September 2020).

³ Tide, '[New research: UK SMEs chasing £50bn in late payments](#)' (January 2020).

⁴ Pay.UK, 'UK SMEs face debt burden of £23.4 billion' (November 2019).

⁵ Federation of Small Businesses, '[Late Again: How the coronavirus pandemic is impacting payment terms for small firms](#)' (June 2020).

Vision

LawtechUK set out the vision to address this issue in June 2020 and invited tenders to undertake a feasibility study and proof of concept for a dedicated online debt recovery platform:

- ➔ ... many businesses would be attracted by the availability of an elective ADR service, complementary to the Courts, which can support users through a significantly streamlined/simplified framework (both from a procedural and technical standpoint). This elective service could be designed and led by industry, and may incorporate a combination of proven ADR techniques, with the objective of resolving late payments without Court adjudication. However, it should be able to have the immediate benefit of Court execution and enforcement recourse should that ultimately become necessary.
- ➔ The impact of COVID-19 on the SME sector is not yet known, but it seems likely that late payments will be an even greater issue, and so this seems to be an opportune time to provide a tool to support the SME sector.
- ➔ To meet this need, we are seeking tenders to undertake a feasibility study and proof of concept for a transformative, industry-led Lawtech enabled, online disputes platform to be developed and made available for SMEs to provide a user-friendly, efficient and effective platform to recover unpaid debts.
- ➔ If the feasibility study leads to the creation of such a platform... it should enable and empower the UK's SME market in order to accelerate the economy, enhance productivity and create opportunity, as well as to make the sector representing 99.9% of the UK's business community more competitive at home and abroad. It is hoped that, for a relatively modest economic investment, combined with some out of the box and outcome led thinking, modelled on working examples from around the world, we can create a collaborative and elective platform which uses technology to support the fast, fair and effective resolution of SME related debt issues.
- ➔ ... to be able to enforce the outcome of the resolution process against debtors... The study would need to establish the user demand and needs and the legal mechanisms for resolution and enforcement, and include a timeline and business case for development of a full system.

At the heart of the vision for the online platform was the idea of a service that would sit alongside existing court infrastructure, providing user choice for dealing with disputes, and that would approach the process in a very different way to traditional court claims:

- Focusing on resolution and settlement, mindful of the importance of sustaining business relationships
- Empowering users through simplicity and self service
- Maximising speed and affordability
- Using technology to maximise positive outcomes for all parties

Together with this was the importance of the service providing confidence and certainty for businesses dealing with payment disputes, so that outcomes would be binding and easily enforced, through the court system if necessary.

This approach is an embodiment of the vision for civil justice reform now laid out by the new Master of the Rolls, Sir Geoffrey Vos, that embraces the best of public and private offerings to achieve optimal user outcomes in dispute resolution.⁶ This includes ‘front end portals’ for ‘integrated ADR interventions designed to bring about consensual resolution’, that achieve ‘blue tick’ accreditation to interface with the court system, for example by seamless transfer of a data file and, as necessary, allocation of a matter through to the right court, judge or process, at the correct moment. This means dedicated applications such as the online dispute resolution platform detailed in this report would ‘plug in’ to the court system, making it easy for users to move through the process and have their grievances dealt with quickly and effectively.

The SME payment dispute resolution platform is an optimal pilot to pioneer and realise this vision and build the process for blue tick accreditation, testing and developing infrastructure, technology, procedures and behaviour that inform and evolve how grievances can be handled at scale.

The dispute resolution and technology communities play a fundamental role in bringing forward and collaborating on new ideas and applications that will best serve user need, and testing and executing those ideas to reinvent how we think about and approach disputes in the modern world. Government support and collaboration can be instrumental in enabling new models and engendering trust as they develop, particularly in relation to dispute resolution, where people are ultimately reliant on the authority of the state.

Results

The Platform

The SME platform feasibility study and proof of concept have now been delivered to an exceptional standard by the consortium of legal, technology and alternative dispute resolution experts we appointed to undertake this work,⁷ and we have subsequently consulted on its findings.

The study confirms the importance and urgency for SMEs of addressing the issue of payment disputes, and the applicability of a dedicated platform for their resolution, sitting alongside other tools in the market that serve different categories of dispute.

⁶ Master of the Rolls, ‘[London International Disputes Week 2021: Keynote Speech](#)’ (May 2021).

⁷ LawtechUK, ‘[LawtechUK chooses delivery partners for Lawtech Sandbox and SME Dispute Resolution Platform](#)’ (August 2020).

The proof of concept and business case demonstrate the mechanism through which this can be achieved both operationally and financially, within a short timeline, modelling a co-funding structure with government. The proof of concept shows a compelling user journey with a self-service ethos that enables optimal cooperation between the parties, facilitating effective settlement, whether purely tech-enabled, and/or supported by an independent expert, and including data capture at all stages, for automated document production and case facilitation, onward use and portability, and wider system analysis.

On conservative projections, the platform can empower UK businesses to resolve +200,000 disputes over a five year onramp period, accounting for £3.4bn in debt value. The study anticipates a six to eight week resolution period, in contrast to the current average for court claims of more than a year, and a 'pay for success' cost of ~£50 for basic settlement after a free advisory and triage stage, or ~1-5% of the claim value for adjudicated settlement, compared to +10% of value for court claims.

Optimal cases for the platform are those of a pure payment dispute in nature, without complex issues of fact, and where the parties are engaging on an elective basis, either because they have agreed so through engagement terms up front, or they come to the platform ad hoc as issues arise. Agreed terms up front are of course preferable for cases where a debtor might otherwise wish to delay or avoid payment. The platform provides standard terms that parties can incorporate into their business relationships and these could become best practice in the market, for example adopted through trade bodies, complementary to the Prompt Payment Code and the wider work of the Small Business Commissioner.

Without sacrificing efficacy, the user experience is conciliatory and the platform can be integrated into other systems such as invoicing and accounting tools, enabling push button dispute creation. This prompts and smooths engagement, and can be presented as an extension of accounting administration. The use cases are potentially wider than for SMEs, in that the platform can be used by organisations of any size, whether public or private, dealing with payment disputes, including intra-group. The anticipated range of case value is at the lower end - hundreds of pounds up to low tens of thousands, but the platform can support all levels of quantum. The system is designed to be open, capable of interface with a range of stakeholders, including trade associations, ADR providers, technology pioneers and others. The facilitated settlement element anticipates a marketplace of ADR providers who receive a fixed fee for disputes resolved within the platform and contribute a proportion of that fee to fund the platform. Blockchain and smart contract functionality was not incorporated, but could be used and useful in relation to authentication of documents and automation of payments on agreed terms.

The study anticipates a first release of the platform could be brought to market within nine months and provides the baseline design to enable this. Features and functionality can be extended thereafter, including an interface for larger corporates, multi-party disputes, smart contract settlement, and debtor initiated claims e.g. about the quality of goods and services impacting payment.

Consultation

Our consultation on the study has met with widespread support in terms of the capability and approach of the platform and the importance of supporting SMEs on this issue, particularly in the current economic climate with an emphasis on building back better.

Some questioned the need for a dedicated system and whether such a platform would reduce work for legal practitioners. Others saw an opportunity to address a significantly under-served market, deliver business and justice outcomes through technological means, and seize the moment in terms of the policy imperative, strategic government focus on innovation and UK-wide investment, and what is now possible through technology.

The market opportunity was considered exciting for the mediation and arbitration community who would be integral to the success of the platform, and for legal practitioners, products and services that increase engagement with legal issues grows the market overall.

Many raised the criticality of maximising adoption and the platform having ‘teeth’, to avoid misuse by debtors wishing to delay court action or payment.

Enforcement

The study anticipates the vast majority of disputes being resolved through the AI enabled settlement builder and/or through the mediation or conciliation phase, leaving only a very few cases unresolved and requiring platform adjudication. Outcomes through the platform would be contractually binding on the parties.

To minimise and deal with default, decisions could be contractually structured as arbitral awards, such that onward enforcement is as expeditious as possible, for example through a part 8 claim under the English and Welsh regime, with cases injected directly into the HMCTS system through transfer of the data file. The ability to deliver this functionality will depend on alignment and cooperation with HMCTS, and on there being the required technical capabilities in HMCTS systems. Whilst this would affect the minority and be adequate, the transfer to start a further process with an analogue court system would be suboptimal for businesses looking for seamless and rapid resolution. Outcomes would be significantly improved by introducing a specific procedural or statutory regime to enable fast-track enforcement of platform cases. For example, committed timetables, document-only bulk processing of platform claims, or an expedited summary judgment style approach along the lines of the construction court adjudication scheme. Procedural and system improvements developed for SME platform claims could be evaluated for the wider ‘blue tick’ and court modernisation programmes, focused on timely delivery of justice outcomes for all.

Next steps

Our goal at LawtechUK is to accelerate innovation and support the market to bring forward the practical change in legal and court services that will best serve business and society. We therefore publish the SME dispute resolution platform study, business case and, solution design now in full, for the benefit of the market and its stakeholders, and we encourage those with expertise in this area to consider how they might take it or the principles within it forward.

LawtechUK will not be building or funding the development of the platform itself. Funding for the platform is not currently planned, but government backing would be a critical enabler in its initial stages, lending all important support, credibility and profile with the business community.

We welcome discussing the initiative and its potential, and exploring feedback, ideas and development opportunities with dispute resolution and technology experts, policy-makers and other interested parties. There is also an opportunity to consider the facets of ‘blue tick’ accreditation from the perspective of the market.

Appreciation

We are grateful to a host of people who have contributed to this project and we thank them for their insights, commitment and collaboration:

- The consortium who undertook the study, made up of Dr Mimi Zou and Professor Thomas Melham from the University of Oxford, Oxford Computer Consultants and the team at Resolve Disputes Online and Jur.
- Helen Dodds and Mark Beer who co-steered the project alongside us, together with other members of the original LawtechUK taskforce who helped initiate and enrich the project, including Richard Bamforth, Jeremy Barnett, Chris Dale, Elizabeth Gloster and Nick Pryor.
- Richard Susskind who chaired the original taskforce that helped establish the project.
- Sir Geoffrey Vos and Mr Justice Mann who tested and extended our thinking.
- The team at the Ministry of Justice and HMCTS, together with all those who gave their time and insights as part of the consultation, as listed in the Annex.

About LawtechUK

LawtechUK is a government-backed initiative to support the digital transformation of the legal sector through technology, for the benefit of society and the economy. Find out more at www.lawtechuk.io.

Contributors

Bar Council
Bar Standards Board
Centre for Effective Dispute Resolution (CEDR)
Chartered Institute of Arbitrators (CI Arb)
City of London Corporation
Confederation of British Industry (CBI)
Crown Representative for Small Business
Department for Business, Energy and Industrial Strategy (BEIS)
Federation of Small Businesses (FSB)
In Place of Strife (IPOS)
Jur
Law Society of England and Wales
Law Society of Northern Ireland
Law Society of Scotland
Mr Justice Mann
Prof Thomas Melham (University of Oxford)
Oxford Computer Consultants
Resolve Disputes Online
Small Business Commissioner
Traffic Penalty Tribunal
Xero
Dr Mimi Zou (University of Oxford)

LAWTECH UK

SME Online Dispute Resolution Platform **UK Feasibility Study**

Commissioned by LawtechUK

March 2021



Executive Summary

LawtechUK identified an opportunity for a technology enabled, industry-led/government backed platform to provide an affordable, easy to use environment for SMEs to recover unpaid debts, as an elective (and complementary) alternative to the courts. To establish the feasibility of such a platform, following a competitive tender process, LawtechUK appointed a consortium of legal, technology and alternative dispute resolution experts from the University of Oxford, Oxford Computer Consultants, Resolve Disputes Online and Jur, to undertake a feasibility study and proof of concept.

A range of stakeholders contributed to the study, including the MoJ, BEIS, HMCTS, members of the judiciary, the Traffic Penalty Tribunal, Small Business Commissioner, Federation of Small Businesses, CBI, City of London, the Law Societies of England and Wales, Scotland and Northern Ireland, the Bar Council, the mediation and arbitration community, legal firms and technology companies, including those providing accounting software into which the platform could be integrated. The study also included international benchmarking in relation to leading ODR systems.

The feasibility study has confirmed:

- The extent of the problem and the SME demand and market for a solution.
- The opportunity to address it in a straightforward, timely way, using innovative technology
- Broad stakeholder support for solving the problem, using online dispute resolution.
- Best practice from around the world, that can be harnessed.
- Such a platform could operate in alignment with the existing court system and the Online Court Money Claims pilot.
- Currently this would have limitations in respect of enforcement, although the platform would provide innovative enforcement support. The constraints could be addressed by legislation/a change to court rules on enforcement.
- On a conservative estimate, the platform could be self sustaining within 4 years, with a total investment of ~£3.5m.
- A minimum viable product could be established in ~9 months.

The feasibility study is in three parts:

(i) a report on the user need and legal and policy feasibility, which includes a jurisdictional review, (ii) a solution design for the platform proof of concept, (iii) a business case for that design.

The report does not represent government policy.

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D2: Report on User Needs, Legal & Policy Feasibility



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Executive Summary

Late and non-payments have been a pervasive problem for SMEs in the UK. In recent years, the UK Government has undertaken a number of initiatives to tackle this problem. While there has been a strong policy emphasis on changing the ‘unfair and poor payments culture’, there has been relatively less attention paid to the legal aspects and processes of resolving debt related disputes. SMEs often encounter a range of legal disputes related to late and non-payment that they find difficult or are reluctant to resolve. These reasons range from the need to maintain a good business relationship with the debtor who is an important client to the perceived or actual costs and/or time involved with pursuing a legal claim.

In this context, the assessment of a tech-enabled alternative platform to resolve debt disputes for UK SMEs and (if needed) to enable enforcement is very timely. The timing is even more pertinent due to the disruptions brought by COVID-19 to the justice system as well as the adverse economic impact of the pandemic that is hitting SMEs the hardest. If it can be successfully developed and rolled out in the near future, such a platform has the potential to provide SMEs (particularly small businesses) greater access to justice and support their critical role as the engine of the UK economy. This report is one part of a wider feasibility study of the proposed platform. The main objectives of this report are to:

- (i) Analyse the advantages and limitations in the processes and services presently available to SMEs for resolving debt disputes in the UK;
- (ii) Assess the policy and legal factors that are likely to influence the feasibility of the proposed platform in the UK;
- (iii) Identify SMEs’ needs and preferences regarding how they seek to resolve debt disputes relating to late or non-payments; and
- (iv) Consider the experiences of other jurisdictions that can provide useful insights for determining the feasibility of the proposed platform.

As part of this report, we conducted a survey of 73 SMEs. Despite the availability of a wide range of services and processes for SMEs in the UK to resolve debt disputes,

our survey identified several pain points for SMEs relating to the speed, cost, clarity, transparency, and enforceability of existing processes and services.

In assessing the feasibility of such a platform, any solution would crucially need to enable small businesses to quickly and cost-effectively resolve such disputes with finality as well as to preserve important business relationships. There is considerable potential for the effective use of online dispute resolution (ODR) on the platform to achieve such goals. Moreover, such a platform must have legitimacy. Its users must have trust and confidence in the system from the onset. Accordingly, strategic integration with the courts system should be part of the proposed platform. Examples from Canada, Netherlands, Singapore, Hong Kong, India, and the US show the possibilities and limitations of alternative ODR initiatives operating in parallel and in conjunction with the courts system.

The key findings in this report are as follow:

- The need for maintaining business relationships is crucial for SMEs in the context of debt recovery and debt disputes. If formal legal routes are pursued to resolve debt disputes, SMEs generally need to be convinced of a high probability of success and a simple, fast, and affordable process.
- There is currently a large but fragmented market of services (including online) for resolving debt disputes, including ADR providers, industry schemes, Money Claims Online and Online Civil Money Claims. The proposed platform should not reinvent the wheel but provide a superior solution in terms of time, cost, clarity, and enforcement of outcomes. This solution should include a single data record on the platform that tracks the entirety of the dispute process. It could also establish a marketplace that brings together the many ADR providers out there, thus offering SMEs a 'one-stop-shop' for debt dispute resolution services.
- The proposed platform should advance and extend the goals of post-Briggs civil justice reforms and complement the HMCTS reform programme. The proposed platform should operate separately from the courts system, with an objective of reducing the judicial caseload for such disputes.
- The platform should have a multi-tiered ADR process that relies primarily on negotiation and mediation. Within the platform, adjudication should be used for disputes in which parties fail to settle. The outcomes of the platform must be binding on the parties and linked to court enforcement processes in a streamlined and efficient manner. A statutory regime is suggested to support a fast-track enforcement route in the civil courts for adjudication decisions resulting from the platform.

1. Introduction

1.1. Background and objectives of report

Representing 99.9% of the UK's 5.9 million businesses, SMEs employ 16.6 million people (60% of the total) and account for 52% of private sector turnover. Among SMEs, there are 5.7 million small businesses (0-49 employees) that employ 13.2 million people (48% of the total).¹ A notable challenge for SMEs, especially with the economic impact of the COVID-19 pandemic, has been maintaining a healthy cash flow. Part of this challenge is the persistent problem of late payments for SMEs, which has been estimated to cost the UK economy £2.5 billion a year.² A survey of 1,000 small businesses conducted by the FSB in 2016 found that around 60 per cent of late payments were greater than £1,000 in value, with an average value of £6,142.³

Moreover, the estimated cost that small businesses in England and Wales face per year by having a dispute is £11.6 billion, which include legal representation, lost alternative business opportunities, and time spent on resolving the dispute instead of undertaking their core business activity. Around 72% of the reported disputes were in relation to late or non-payment.⁴ This problem of late or non-payment for SMEs has given rise to initiatives such as the Prompt Payment Code (PPC), a voluntary scheme created by the UK Government in 2008 to set standards in payment terms that signatories agree to implement. Additionally, the Office of the Small Business Commissioner (SBC) was established as an independent public body under the Enterprise Act 2016 and launched in 2017 with the objective of tackling late and unfair payment practices in the private sector. Under the regulations of the Enterprise Act, large businesses must publicly report the average time they take to pay their suppliers. The SBC offers support to small businesses (0-49 employees) relating to

¹ Department for Business, Energy and Industrial Strategy (BEIS), *National Statistics Business population estimates for the UK and regions: 2019 statistical release*, updated 14 January 2020.

² FSB, *Time to Act: The Economic Impact of Poor Payment Practice*, November 2016, <https://www.fsb.org.uk/static/517120db-2555-473f-a6ceb5c661d569fb/Time-to-Act.pdf> p 7.

³ FSB, *Time to Act: The Economic Impact of Poor Payment Practice*, November 2016 p 6.

⁴ FSB, *Tied Up – Unravelling the Dispute Resolution Process for Small Firm*, November 2016, <https://www.fsb.org.uk/resources-page/tied-up--unravelling-the-dispute-resolution-process-for-small-firms.html> p 6.

payment disputes with larger businesses (those with 50 employees or more), as well as considers complaints from small businesses relating to payment matters involving larger businesses. To date, the SBC does not have the authority to deal with small business to small business disputes, although this is under review at the time of writing. Since March 2020, the PPC has been administered by the SBC.

Importantly, the UK Government launched a consultation on *Creating a Responsible Payment Culture: Call for Evidence* in 2018 that sought the views of different sized businesses and other stakeholders on the impact of unfair payment practices and proposals for improving the culture. In June 2019, the UK Government published its response to the consultation. A key proposal from its response was to further consult the public on the merits of strengthening the SBC's ability to assist and advocate for small businesses in the area of late payment. Measures under consideration include granting the SBC the power to compel disclosure of information by large businesses⁵ and to impose sanctions on large businesses that have poor or unfair payment practices.⁶ In October 2020, the Government commenced this public consultation on extending the SBC's scope and strengthening its authority and powers.⁷ The Government also announced a review of the PPC, which is taking place at the time of writing.⁸

Late payments represent a significant and pervasive cultural problem, and indeed, initiatives like the PPC and the SBC attempt to address the 'poor payment culture'⁹ in the UK. Nevertheless, some argue that simply promoting cultural change has not tackled the problem, which seems to have worsened. In January 2020, Lord Mendelsohn proposed a Private Member's bill into the House of Lords, with provisions to introduce a statutory limit of 30 days for payment of invoices, a statutory limit of 30

⁵ Reporting on Payment Practices and Performance Regulations 2017 requires large businesses to publish a report every 2 years on their payments practices, which are made available to the public.

⁶ BEIS, *Creating a Responsible Payment Culture Call for Evidence: Government Response*, June 2019, <https://www.cicm.com/wp-content/uploads/2019/06/prompt-payment-cfe-govt-response.pdf>

⁷ BEIS, *Increasing the Scope and Powers of the Small Business Commissioner Government Consultation*, October 2020,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923110/consultation-increasing-scope-of-small-business-commissioner.pdf

⁸ BEIS, *Survey on the potential reforms of Prompt Payment Code*, September 2020,

<https://beis.gov.uk/citizenspace.com/business-growth/11bf35af/>

⁹ Interview with Mike Cherry, Chairman of the FSB, September 2020; FSB, *Tied Up – Unravelling the Dispute Resolution Process for Small Firm*, November 2016.

days for resolving payment disputes upon notification and referral of disputes to the SBC, prohibitions on specific payment practices, penalties for persistent late payments and non-compliance, and amendments to the SBC's remit, role and powers in relation to late payments, among other measures.¹⁰ At the time of writing, there have not been any further updates on this Private Member's bill since January 2020.

Late and non-payments entail contractual breaches that are the basis of legal disputes. A report by the FSB on dispute resolution for small businesses found that among 70% of FSB members that have encountered at least one commercial dispute between 2010 and 2015, 72% of those reported disputes were related to late or non-payment.¹¹ According to this report, small businesses were generally not well-equipped to deal with disputes. Part of the challenge was not only the resource constraints that they face, but also the 'powerful economic pressure from the other party' that produced unsatisfactory outcomes notwithstanding the merits of the case.¹² Notwithstanding the importance of dispute resolution, this issue has not been addressed in detail in the Government's consultation and response to *Creating a Responsible Payment Culture* other than suggesting that the SBC could handle disputes relating to late and non-payments (albeit without direct enforcement powers).

It is in this context that LawtechUK has suggested a potential solution of an alternative, online dispute resolution platform to support the fast, fair and effective resolution of debt issues for SMEs. The proposal is premised on a hypothesis that:

[M]any businesses would be attracted by the availability of an elective ADR service, complementary to the Courts, which can support users through a significantly streamlined/simplified framework (both from a procedural and technical standpoint). This elective service could be designed and led by industry, and may

¹⁰ Small Business Commissioner and Late Payments etc Bill, HL Bill 44, <https://publications.parliament.uk/pa/bills/lbill/58-01/044/5801044.pdf>

¹¹ FSB, *Tied Up – Unravelling the Dispute Resolution Process for Small Firm*, November 2016, p 6.

¹² FSB, *Tied Up – Unravelling the Dispute Resolution Process for Small Firm*, November 2016, p 6.

incorporate a combination of proven ADR techniques, with the objective of resolving late payments without Court adjudication. However, it should be able to have the immediate benefit of Court execution and enforcement recourse should that ultimately become necessary.¹³

The timing for investigating the feasibility of such a proposal is apt. Two movements have made a substantial impact within many civil justice systems around the world in recent decades: the significant expansion of alternative dispute resolution (ADR) and online dispute resolution (ODR). Innovations in the use of technology to resolve disputes through alternative methods can generate significant benefits for SMEs by promoting expediency, cutting legal costs, and avoiding and ameliorating adversarial processes that damage the parties' relationship. For over two decades, e-commerce companies like eBay, PayPal, and Alibaba have established and deployed their own ADR-ODR systems that handle hundreds of millions of disputes every year.

Within courts and tribunals, such developments have occurred at a much slower pace than private initiatives. However, in recent years, courts around the world including the UK have embarked on a range of digitalisation reforms that increasingly embrace the use of ODR processes and tools, notably in the development of 'online courts'.¹⁴ Moreover, in response to the challenges of COVID-19 for the civil justice system, virtual court hearings have quickly expanded in the UK and other jurisdictions.¹⁵ Recently, Sir Geoffrey Vos (Head of Civil Justice) has noted the need for a holistic look at civil justice that includes 'an online process with integrated mediated solutions'.¹⁶

The timing for considering such a proposal is even more critical due to COVID-19 and related prevention and control measures that have brought unprecedented disruptions to many aspects of economic and social life. In these times, late or

¹³ Tech Nation, *Invitation to Tender: Feasibility study and proof of concept for an online payment dispute resolution tool for SMEs*, 8 June 2020, para 4.

¹⁴ See further: Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2020).

¹⁵ Mimi Zou, 'Virtual Justice in the Time of COVID-19' in H Eidenmüller, L Enriques, J Payne & K van Zwieten (eds) *COVID-19 and Business Law* (CH Beck/Hart, 2020) ch 16.

¹⁶ https://www.judiciary.uk/wp-content/uploads/2020/11/BarConference.19thNovember2020.nf_.pdf

non-payments are likely to be an even greater issue and exacerbate the financial hardship that many SMEs are already or will be facing, potentially driving some to the brink of bankruptcy. Interim government support such as rescue loans, business rate relief, and job support schemes can only go so far.¹⁷

With courts operating at a reduced capacity and faced with a substantial backlog of cases, there have been serious concerns raised about the extreme pressures on the UK civil justice system brought about by the COVID-19 crisis.¹⁸ An insightful report commissioned by the Civil Justice Council in May 2020 highlighted the disparities in practices among different courts in this context. The report indicated that senior and commercial courts, which are better resourced and have higher levels of legal representation, experienced a 'swifter and easier' move to remote hearings. In comparison, the experience of County Courts, which deal with the bulk of money claims, has been 'more problematic'.¹⁹ Ministry of Justice statistics revealed that from July to September 2020, the mean time for small claims to go from issuance to trial was 48.8 weeks, which was 10.7 weeks longer than the same period in 2019.²⁰

This report represents Deliverable 2 of the wider feasibility study for the proposed platform. The objectives of the report are to:

- (i) Analyse the advantages and limitations in the processes and services presently available to SMEs in resolving debt disputes in the UK;
- (ii) Assess the policy and legal factors that are likely to influence the feasibility of the proposed platform in the UK;
- (iii) Identify SMEs' needs and preferences regarding how they seek to resolve debt disputes relating to late or non-payments; and
- (iv) Consider the experiences of other jurisdictions that can provide useful insights for determining the feasibility of the proposed platform.

¹⁷ Daniel Thomas, *Calm before the storm: UK small businesses fear for their future*, Financial Times, 30 July 2020 <https://www.ft.com/content/2bef51e5-f581-4ef5-af95-3c344ed7a238>.

¹⁸ Natalie Byrom, Sarah Beardon & Abby Kendrick, *Report and Recommendations: The impact of COVID-19 measures on the civil justice system*, May 2020.

¹⁹ Byrom, Beardon & Kendrick, p 5.

²⁰

<https://www.gov.uk/government/publications/civil-justice-statistics-quarterly-july-to-september-2020/civil-justice-statistics-quarterly-july-to-september-2020>.

1.2. Methodology

This report combines qualitative and quantitative research that has been conducted over a two-month period from September to October 2020. The relevant analysis has been developed through a combination of desk research and empirical research. The empirical research consisted of two components: a survey of SMEs and semi-structured interviews with key stakeholders.

Our research team conducted a detailed survey of SMEs based in England and Wales, Scotland, and Northern Ireland. The survey questions were designed to obtain information on the characteristics of SMEs' debt disputes (e.g. value of the claim, whether the claim was disputed, the time and resources expended to recover a debt and/or resolve a dispute, etc), the types of dispute resolution processes and services used by parties to a debt dispute, the use of dispute resolution clauses in the parties' contracts, the outcome of the disputes, as well as SMEs' needs and priorities in resolving such disputes.

The survey was conducted on Survey Monkey over five weeks in September and October 2020. As of 25 October 2020, 73 SMEs across different sectors participated in the survey. As the survey design featured 'skip logic' to ensure that the respondents only answered questions that were relevant to them, not all questions received a response. In addition to quantitative data, the survey collected a rich set of qualitative data from respondents' free-text responses.

In addition to the survey, our research team conducted 20 in-depth, semi-structured interviews with a range of stakeholders, including:

- Small Business Commissioner
- Federation of Small Businesses
- HMCTS
- Civil Courts Users Association
- Law Society of England & Wales
- Law Society of Scotland

- Mediators
- Arbitrators
- Law firms
- ODR providers
- Traffic Penalty Tribunal
- Business Banking Resolution Service
- International experts involved in ODR

The main purpose of these interviews was to collect insights from a variety of potential users of the proposed platform that could help us ascertain possible user demand as well as understand the opportunities and challenges in introducing such a platform within the wider ecosystem.

1.3. Scope and structure of report

The scope of this report is limited to the four objectives set out above in Section 1.2. In contributing to the overall feasibility study of the proposed platform, the report provides important insights into the needs and preferences of SMEs, their advocacy bodies, trade associations, dispute resolution service providers (including HMCTS), legal practitioners, policymakers, and other relevant bodies and organisations. Although the survey and interview findings cannot be generalised to reflect broader trends, the insights generated from this research can help us to assess some of the main advantages and drawbacks of existing processes and services in helping SMEs resolve debt disputes.

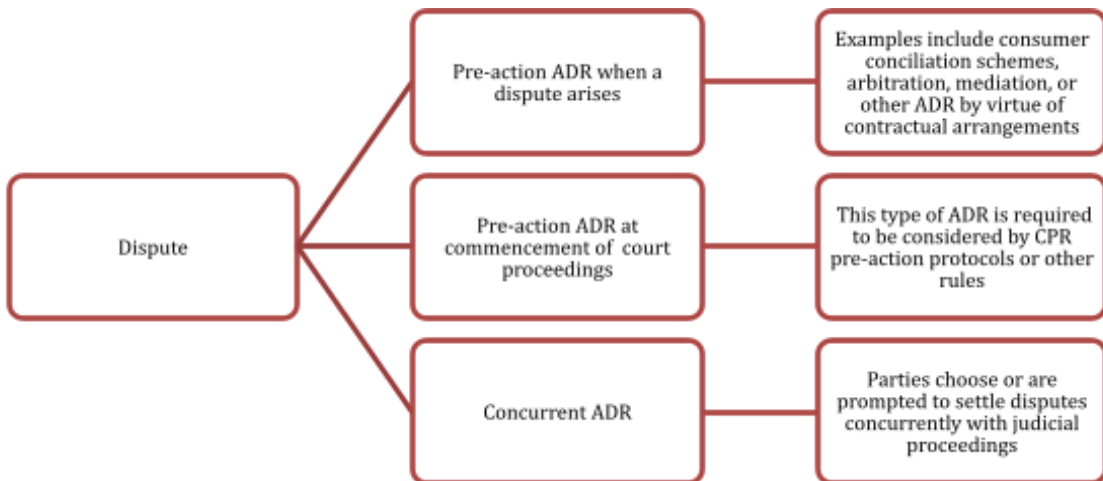
This report puts forward some high-level recommendations to guide the development of a feasible tech-enabled ADR platform to resolve such disputes, which are based on the findings and analysis from our desk research, survey, and stakeholder interviews. More detailed recommendations relating to the functional requirements and 'solution vision' of the proposed platform can be found in the Solution Design document (Deliverable 3). Other feasibility issues, such as economic/financial, technical, and operational, will be addressed in other parts of the feasibility study (Deliverables 3-4).

This report is structured as follows. Section 2 assesses the landscape or ecosystem in the UK for resolving debt disputes through alternative means (other than the courts). Section 3 examines the handling of debt disputes within the civil courts and examines salient developments such as Online Civil Money Claims in the policy context of civil justice reforms in recent years. In Section 4, the main findings from the survey and interviews with stakeholders are presented, which shed some valuable insight on user needs and demand. Section 5 looks at a selection of international case studies of ADR-ODR tools and systems to resolve debt and other civil disputes, which offer some lessons for developing the proposed platform. Section 6 concludes with some high-level recommendations based on the findings of this report, which will help guide the development of a feasible proposal for the platform.

2. Current ADR landscape for resolving debt disputes

In assessing the user demand for the proposed platform, it is important to consider what is already out there for SMEs to resolve debt and related disputes. This section analyses current alternative disputes resolution (ADR) processes and services, focusing on their provision *outside the courts*. We also examine specialised services such as the Office of the Small Business Commissioner and sector-based schemes such as mandatory adjudication in the construction industry and ombudsmen services. The analysis in this section presents some of the main benefits and limitations of these existing mechanisms in providing effective redress for SMEs, which will help us to map out the pain points that the proposed platform could potentially address.

At the time of writing, a creditor with a debt dispute can engage with ADR processes at the following points:



2.1. Mediation

Mediation, sometimes referred to as ‘facilitated or assisted negotiation’, is typically a cheaper and quicker dispute resolution process than arbitration and litigation. A key

advantage of mediation is the scope for parties to maintain a business relationship, because a good mediator will generally encourage the parties to find solutions to the dispute that suit both parties' interests. The process and outcome of mediation are also confidential. It has been observed that 'disputants are twice as likely to comply voluntarily with mediated agreements than with court-imposed judgements'²¹ because a consensus between parties produces a sense of fairness that is not always as apparent in an adversarial process.

In the UK, mediation has been incorporated into the civil dispute resolution procedure, most notably the pre-action protocols of the Civil Procedure Rules which strongly urge (but do not mandate) parties to settle a dispute with the assistance of a form of ADR.²² Some schemes such as the Court of Appeal Mediation Scheme are connected to court processes, where parties in qualifying cases (involving claims below £100,000) are notified by the Court that the case papers have been referred to the Centre for Effective Dispute Resolution (CEDR) for mediation. Parties are asked if they would like to follow the Court's recommendation for mediation. Although mediation is not mandatory, a party's unreasonable refusal to mediate may have consequences for costs sanctions if it loses the case.²³

Based on estimates by the CEDR in 2018, the mediation market in England and Wales sees around 12,000 cases per year with a total value of £11.5 billion.²⁴ The cost of mediation can vary considerably, though there is a relatively competitive market for fixed fee mediation services. These services are usually earmarked for relatively straightforward, two-party disputes over low-medium value monetary claims. For example, for disputes with a claim value of under £250,000, CEDR provides up to 7 hours of mediation services at a fixed fee (split equally between the parties) of £1,200 (for claim value under £75,000), £2,400 (for claim value between £75,000 and £125,000), and £3,000 (for claim value between £125,000 to £250,000).²⁵ Overall, mediation may still be seen as costly for many micro and small businesses. If one considers the SBC's case studies of late and non-payments

²¹ H. Glick. *Courts, politics & justice* (1983) pp 119-22.

²² https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.

²³ *Halsey v Milton Keynes General NHS Trust*. [2004] EWCA Civ 576.

²⁴ https://www.cedr.com/wp-content/uploads/2019/10/The_Eighth_Mediation_Audit_2018.

²⁵ <https://www.cedr.com/commercial/fixefee/>.

experienced by small businesses, a number of cases involved claim values of a few hundred pounds.²⁶

A traditional drawback of mediation is that it generally does not have the enforcement strength of litigation or arbitration. Settlement agreements have the binding force of a contract between the parties. Presently, there is no other way of enforcing a settlement agreement in the UK except through fresh legal proceedings. The only exception is if the parties have already commenced proceedings and reached an agreement through mediation, the court can issue a Tomlin Order that stays the proceedings on the parties' agreed terms.²⁷ The Tomlin Order comprises a consent order as well as a confidential schedule setting out the agreed terms or a separate settlement agreement that is referred to in the consent order. Such an order allows a party to enforce the agreement through application to the court without needing to start fresh proceedings. A Tomlin Order also avoids a County Court Judgment being entered against the debtor.

Recently, the Singapore Mediation Convention²⁸ has bolstered the enforceability of cross-border settlement agreements. Such agreements are enforceable in the courts of signatory states without requiring the parties to commence new proceedings. The Convention sets out a few grounds based on which a competent authority such as a court may refuse enforcement of the settlement agreement. These grounds include: the parties' incapacity, the invalidity or incomprehensibility of the settlement agreement, a breach of standards applicable to the mediator, issues relating to mediator's lack of independence and impartiality, public policy, and the inability of a dispute to be subject to mediation.²⁹

The Singapore Mediation Convention is likely to promote the wider use of mediation globally. How the Convention will operate in practice will ultimately depend on its domestic implementation by the signatory states. The Convention itself leaves considerable room to signatory states in determining the conduct of mediation and

²⁶ https://www.smallbusinesscommissioner.gov.uk/case_studies/.

²⁷ CPR 40.6.

²⁸ https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.

²⁹ United Nations Convention on International Settlement Agreements Resulting from Mediation, Article 5.

the enforcement of settlements reached in accordance with their own rules of procedure. At the time of writing, it remains to be seen whether and when the UK is planning to sign up to the Singapore Mediation Convention. A recent report by the UK All-Party Parliamentary Group for Alternative Dispute Resolution and the Chartered Institute of Arbitrators recommended the UK Government to sign the Singapore Mediation Convention ‘as an integral part of its efforts to encourage the use of mediation for resolving commercial disputes’.³⁰ If the UK signs the Convention, there is still the question of whether the enforceability of cross-border settlement agreements would also be extended (through legislation) to domestic settlement agreements.

2.2. Arbitration

Arbitration in England is governed by the English Arbitration Act 1996.³¹ In Scotland, it is governed by the Arbitration (Scotland) Act 2010.³² The UK is also party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).³³ Arbitration is popular for large commercial disputes, and particularly international commercial disputes. To quantify, between 2018 and 2019, the total number of arbitration cases increased by 443 (12.5%)³⁴ and matters relating to arbitration formed around 30% of the total claims issued in the English commercial courts.³⁵

Arbitration’s relevance to claims of small or medium value has been limited to date.³⁶ This is because arbitration tends to be expensive, time consuming, and requires extensive legal advice and representation. It has been argued that owing to these limitations, ‘small claims arbitration has not received much attention from dispute

³⁰ APPG and CI Arb, *Securing the UK’s position as a global disputes hub: Best practice lessons between Singapore and the UK* https://ciarb.org/media/12067/appg-report_digital.pdf p 1.

³¹ <https://www.legislation.gov.uk/ukpga/1996/23/contents>.

³² <https://www.legislation.gov.uk/asp/2010/1/contents>.

³³ <http://www.newyorkconvention.org/english>.

³⁴

<https://www.lexisnexis.co.uk/blog/dispute-resolution/arbitration-statistics-2019-rise-of-the-sole-arbitratof>.

³⁵

https://www.judiciary.uk/wp-content/uploads/2020/02/6.6318_Commercial-Courts-Annual-Report_WE B1.pdf.

³⁶ Cartoni, Bernardo, *Small Claims and Institutional Arbitration: An Overview* (August 8, 2015). Available at <http://dx.doi.org/10.2139/ssrn.2641318>.

system designers and scholars'.³⁷ In fact, the 17th Annual Review of the English Arbitration Act 1996 explicitly noted that arbitrators can often be more expensive than judges.³⁸ Arbitration is, therefore, *unlikely* to be an accessible option for less resourced parties like small businesses.

The ease of enforcement of arbitral awards is commonly viewed as a key advantage of arbitration at a domestic and international level.³⁹ Section 103 of the Arbitration Act sets forth the regime for recognition and enforcement of awards under the New York Convention.⁴⁰ The Convention provides for the reciprocal enforcement of arbitral awards in over 160 countries. Awards falling under the New York Convention may only be challenged in limited circumstances or grounds, namely the contracting parties' incapacity, invalidity of the arbitration agreement, procedural failures, scope of the arbitration agreement, arbitrability of the matter, and public policy.⁴¹ Challenges on the basis of merits of arbitral awards are rarely, if ever, admitted. For instance, in *RBRG Trading (UK) Limited v Sinocore International Co Ltd* [2018] EWCA Civ 838, the Court of Appeal considered seriously the 'the interest of finality' of an arbitral award against any challenges on merits.

Many arbitration institutions have introduced expedited arbitration processes, where arbitration is carried out in a shortened time frame and at a reduced cost. Other measures include limiting the number of submissions or documents-only arbitration. To reduce the cost of proceedings, expedited processes often appoint only one arbitrator. Some institutions offer expedited arbitration for resolving low- to medium-value disputes. For example, the London Chamber of Arbitration and Mediation (LCAM) offers a fixed-fee Expedited Arbitration Service that is a documents-only process, which provides 'businesses the option to resolve disputes

³⁷ Jill I. Gross, "AT&T Mobility and the Future of Small Claims Arbitration", in *Southwestern University Law Review*, 2012, p. 49.

³⁸ https://www.biicl.org/documents/2105_event_report_17th_annual_review_of_the_arbitration_act_260319.pdf

³⁹ Enforcement of domestic awards is governed by Part I of the Arbitration Act 1996 and foreign awards are governed by Part III (sections 99 to 104) of the Arbitration Act, which mirrors the New York Convention in ss 100 - 103

⁴⁰ UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

⁴¹ *Ibid*, Article 5; English Arbitration Act, Section 130.

without representation'.⁴² The claimant pays £2,500 upfront for a claim value of under £100,000, or £4,000 for a claim value of £100,000 or above. The respondent pays £1,500 for a counterclaim up to £100,000, or £3,000 for £100,000 or above. The recovery of legal costs are capped at £4,000 and £6,000 for claims and counterclaims under £100,000 and above £100,000 respectively. However, this 'expedited' process still takes *six* months for the issuance of an arbitral award, which may be considered a relatively lengthy process for an SME (especially if the time spent on negotiations and/or mediation is also included).

More recently, there seems to be greater market potential for more affordable and faster arbitration services. The CEDR and Chartered Institute of Arbitrators (CI Arb) launched the Pandemic Business Dispute Resolution Service aimed at supporting businesses facing disputes or potential disputes arising from COVID-19. The service offers a 'low-cost, constructive path to resolution that prioritises speed, affordability and effectiveness'.⁴³ The service provides guidance on ADR processes (negotiations, mediation, and fast-track arbitration) for users and there is no fee for such guidance. For mediation of up to 10 hours, the cost is £1,000 + VAT per party. For mediation of up to 5 hours, the cost is £500 + VAT per party. Importantly, arbitration under this scheme (conducted entirely online) is a fixed fee service of £1,250 + VAT per party, which covers administrative costs and arbitrator fees. The recovery of legal costs is capped at £1,000, which can deter parties from incurring significant legal costs. The simplified arbitration procedure should allow most businesses to present their case without legal representation. This Business Arbitration Service is aimed at low to medium value disputes (£5,000-£250,000) and provides a final, binding arbitral award in less than 90 days from appointment of the arbitrator.

2.3. Expert determination

Expert determination involves the appointment of one or more impartial experts to provide an opinion or determination on a specific matter referred to them by the

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<https://cam.org.uk/expedited-arbitration/#:~:text=The%20Rules%20contain%20a%20complete,simple%2C%20expedited%20and%20cost%20effective.>

⁴³ [https://www.ciarb.org/disputes/pandemic-business-dispute-resolution/.](https://www.ciarb.org/disputes/pandemic-business-dispute-resolution/)

parties. Expert determination can be particularly useful where the issue in dispute is relatively narrow and specific, e.g. a valuation dispute where the answer can be determined by an appropriate technical expert. It is conceivable that some debt disputes for SMEs fall within this category.

Depending on the parties' agreement, the outcome of expert determination may be binding or non-binding. Like other ADR processes, expert determination can only take place if the parties have agreed to it. The parties may include an expert determination clause in their principal contract as a mechanism to deal with future issues or disputes arising under the contract. If a dispute has already occurred but there is no such clause in the relevant contract, it may be referred to expert determination upon agreement between the parties. Expert determination can be used on its own as a stand-alone process or as a part of or in connection with mediation, arbitration or litigation.

The line between arbitration and a binding expert determination is not always clear. However, there are important differences. As described earlier, arbitration entails a more structured adjudicative process in which parties put their case forward. This process normally results in a hearing with a final, enforceable arbitral award issued by the tribunal. Compared to arbitration, an expert determination tends to be a less formal and often speedier process. Moreover, there is no general obligation on an expert to apply the rules of natural justice, which have an important role in arbitration (and constitute a ground for appealing the arbitral award).⁴⁴ For example, in arbitration, the arbitrator must act on the evidence and submissions of the parties, not his or her own opinion (even if the arbitrator is an expert in the relevant area of dispute). In expert determinations, unless the parties agree on certain procedural rules, the expert can make decisions based on her or his own opinion.

The grounds for setting aside a binding expert determination in UK courts have tended to be rather limited. In *Owen Pell Limited v Bindi (London) Limited* 2008 EHC 1420 (TCC), the Technology and Construction Court (TCC) found that even if an expert had answered the wrong question, their determination was binding on the

⁴⁴ Filip De Ly, Paul-A G elinas (eds) *Dispute Prevention and Settlement Through Expert Determination and Dispute Boards* (ICC 2017).

parties, unless it can be shown that the expert was actually biased.⁴⁵ Unlike arbitral awards, enforcing a decision from an expert determination is based on a contractual claim between the parties, which requires fresh legal proceedings.

2.4. Early Neutral Evaluation

Early Neutral Evaluation (ENE) is where an independent and impartial evaluator assesses a case at an early stage of the dispute and may be used as a stand-alone ADR mechanism or as part of a wider dispute resolution framework.⁴⁶ The evaluator normally provides an opinion on the parties' relative positions and the likely outcome of court proceedings. Such an opinion is generally non-binding on the parties but can help parties with further negotiations.

ENE is generally a voluntary process and the parties are free to determine the process and appointment of the evaluator. The parties may include the use of ENE in their contract to resolve all or specific disputes arising under the contract or agree *ex-post* to use ENE to resolve a contractual dispute. Within the private ADR market, ENE is not as well-known as mediation and arbitration. ENE services are generally more expensive than mediation. Some institutions such as the CEDR provide ENE services, which charge a fee £3,000 + VAT plus the fees and expenses of the evaluator (with typical rates of £250-£600 per hour).⁴⁷

Judicial ENE is used in the specific context of case management by a court. Rule 3.1(2)(m) of the Civil Procedural Rules provides that the court may 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an early neutral evaluation with the aim of helping the parties settle the case'. ENE can be used in the Technology and Construction Court (TCC), the Commercial Court, and the Chancery Division of the High Court. It has increasingly been encouraged by English courts in recent years. For instance, in *Lomax v Lomax* [2019] EWCA Civ 1467, despite opposition from one of the parties, the court ordered that a judicial ENE take place. The Civil Justice Council and the Briggs Report both considered that ENE may be reinvigorated

⁴⁵ Palles-Clark, R. (2008). Expert determination. *Contract Journal*, 444(6684), 22.

⁴⁶ CPR rule 3.1(2)(m).

⁴⁷ <https://www.cedr.com/commercial/otherdisputeresolution/earlyneutraevaluation/>.

through ODR systems by promoting them during the conciliation stages of disputes where parties are encouraged to settle disputes instead of moving to full trial.⁴⁸

2.5. Mandatory Adjudication

SMEs in the construction industry may resort to a statutory scheme of mandatory adjudication as a fast and cost-efficient way of resolving debt disputes, which allows parties to quickly resume or continue the contracted work. The Housing Grants, Construction and Regeneration Act 1996 ('1996 Construction Act') enables parties to a construction contract to refer their disputes to an independent adjudicator.⁴⁹ The parties' contracts may also make express provision for adjudication, but the terms must comply with the Act or else the statutory scheme will automatically apply. Under the Act, the adjudicator must reach a final decision within 28 days of the referral, but this period may be extended by a maximum of 14 days with the consent of the referring party or indefinitely if both parties agree. This flexibility has allowed more complex disputes to be dealt with by adjudication which, otherwise, would have been referred to arbitration or litigation.

A successful party to adjudication can apply to the TCC to enforce an adjudicator's decision. The decision of the adjudicator is binding, unless or until it is revised in arbitration or litigation. In most cases, the decision of the adjudicator ultimately decides the dispute and it is rare to see successful challenges of the decision in court. If a party fails to make payment in contravention of an adjudicator's decision, the party entitled to the payment can seek summary judgment (CPR 24) in the TCC, usually through Part 7 proceedings for monetary judgments. The TCC has developed a fast-track procedure for summary judgment in such cases.⁵⁰ A judge will usually give directions within 3 working days of the application and the directions will include an abridgement of time for acknowledgement of service of the proceedings. The enforcement hearing typically takes place within 28 days of the directions being made.

⁴⁸ <https://www.judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf>.

⁴⁹ See Section 108 of the Act.

⁵⁰ TCC Guide, Section 9.

The above statutory regime reflects a principle of ‘pay first, argue later’ for resolving disputes within the construction sector, which can help to protect a party’s cash flow and ensure prompt payments. In a recent case, the TCC stayed a Claimant’s (fresh) legal proceedings until it paid the outstanding sums under an Order enforcing an adjudicator’s award with summary judgment.⁵¹

Amendments in 2011 to the 1996 Construction Act have further sought to increase clarity and certainty as to the issuance of payment notices. The UK’s framework for statutory adjudication and security of payment in the construction sector has influenced similar legislative regimes in many other countries including Australia,⁵² Singapore,⁵³ New Zealand,⁵⁴ Malaysia,⁵⁵ and Ireland.⁵⁶

There is a significant emphasis in the construction sector on the use of ADR overall. Besides statutory adjudication, the Pre-Action Protocol for Construction and Engineering Disputes requires parties in dispute to meet, at least once before litigation commences, to discuss whether and how the dispute can be resolved without recourse to litigation. The meeting itself could take the form of an ADR process such as mediation.⁵⁷

2.6. Office of the Small Business Commissioner

The SBC, as mentioned earlier, was set up under the Enterprise Act 2016 to tackle late or non-payment problems experienced by small businesses (with fewer than 50 employees) in relation to their larger business customers (with over 50 employees). The SBC is a non-departmental public body, with BEIS being the responsible department for the SBC.⁵⁸

⁵¹ *Kew Holdings Limited v Donald Insall Associates Limited* [2020] EWHC 1862 (TCC)

⁵² See, for example, Building and Construction Industry Security of Payment Act 1999 (New South Wales, Australia). Numerous Australia states and territories also adopted similar legislation.

⁵³ Building and Construction Industry Security of Payment Act 2004, Singapore.

⁵⁴ Construction Contracts Act 2002, New Zealand.

⁵⁵ Construction Industry Payment and Adjudication Act 2012, Malaysia.

⁵⁶ Construction Contracts Act 2013, Ireland.

⁵⁷ https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_ced para 9.3.

⁵⁸ BEIS, Small Business Commissioner – Framework Document, December 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766161/sbc-framework-document.pdf.

As set out in the Enterprise Act, the principal functions of the SBC are:

- To provide general advice and information to small businesses in connection with their supply relationships with larger businesses, including signposting small businesses to existing services and;
- To consider complaints from small businesses relating to payment matters in connection with the supply of goods and services to larger businesses and make (non-binding) decisions and recommendations.⁵⁹

The services provided by SBC to small businesses are free and impartial. Small businesses raise their complaints by contacting the SBC directly. Following investigation and consideration of the complaint, the SBC can make non-binding recommendations regarding the resolution of the dispute between the parties. It also has the power to publish a report of the investigation, consideration, and determination of a complaint. There is the possibility of ‘naming and shaming’ the larger respondent business to highlight poor or unfavourable payment practices, which is aimed at disincentivising such practices. It may equally commend larger businesses with responsible payment practices.⁶⁰

The SBC has provided 11 case studies on its website, which demonstrate the steps it takes to address late or non-payment complaints from small businesses.⁶¹ First, upon receiving a complaint, a caseworker from the SBC contacts the larger business to try and resolve the dispute informally. This could involve holding a meeting between the parties and/or negotiations by the SBC on behalf of the small business. If the dispute remains unresolved and there is no engagement from the debtor, the Commissioner can issue to the debtor a formal determination letter and a formal request for representations. The Commissioner can further send a final determination letter if the debtor does not respond. This letter can include a decision upholding the small business complaint along with a potential ‘sanction’ of publishing a report into the complaint, including the parties’ identities.

⁵⁹ Enterprise Act 2016, Section 1. See further: Small Business Commissioner (Scope and Scheme) Regulations 2017.

⁶⁰ BEIS, *Increasing the Scope and Powers of the Small Business Commissioner Government Consultation*, October 2020, p 11.

⁶¹ https://www.smallbusinesscommissioner.gov.uk/case_studies/.

According to its website, the SBC has helped small businesses recover £7.43 million in unpaid invoices so far.⁶² This is likely to only represent a very small fraction of the debts that small businesses in the UK are owed, though it is important to remember that the SBC has only been in operation since 2018. As mentioned earlier, there is a Government consultation on the merits of strengthening the SBC's ability and powers to assist small businesses with payment issues at the time of writing. Nevertheless, even if the SBC's powers were strengthened in this regard, the parties will still have to resort to legal proceedings for the purpose of enforcement

2.7. Ombudsmen

An ombudsman is an independent ADR service, often established by the government or industry bodies, to investigate complaints by stakeholders (such as consumers) against organisations within the ombudsman's scope. Ombudsmen services are usually industry or sector-specific. Different ombudsmen have their own procedures of receiving and handling complaints. There are often time limits on bringing a complaint and caps on compensation that may be awarded. Typically, before raising a complaint, the complainant must demonstrate that he or she has attempted to resolve the dispute with the organisation in question.

Perhaps the most prominent ombudsman services in the UK is the Financial Ombudsman Service (FOS), which was established by the Parliament in 2000 to resolve business to consumer (B2C) disputes in the financial sector. In the year 2018-19, the FOS handled over 388,392 complaints on banking and credit, insurance, investment and pensions, and payment protection insurance issues.⁶³ The FOS provides a multi-staged process of resolving complaints brought by consumers. First, the complaints handler will attempt mediation between the parties. If an agreement cannot be reached, the complaints handler will make a recommendation. A dissatisfied party may lodge an appeal of the recommendation to the Ombudsman. The decision of the Ombudsman is final and legally binding on the parties. The decision is final and cannot be reviewed by another ombudsman. As the

⁶² <https://www.smallbusinesscommissioner.gov.uk/>.

⁶³ <https://www.financial-ombudsman.org.uk>

Ombudsman is a public body, the decision can be subject to judicial review.⁶⁴ The parties also retain the right to take a case to court.

Although the focus of the FOS is on B2C disputes, it is worth considering its function in addressing structural disparities in bargaining power and resources between the parties to a dispute. According to the Bingham Centre, the FOS is able to provide a remedy 'where financial inequality of arms would otherwise be stark, and where, in certain matters, individuals would face exorbitant court fees. Moreover, ombudsman schemes provide a viable alternative when legal claims cannot be filed unless they attain a certain financial level.'⁶⁵ This observation could also apply to debt disputes between small businesses and large businesses. There are also similar ombudsman services in specific sectors like insurance, health, legal, property, and housing.

2.8. Online Dispute Resolution (ODR)

Some dispute resolution services deploy a range of technological tools and processes to enhance the delivery and user experience of their services. The emergence of online dispute resolution (ODR) is closely associated with ADR and there has been ongoing debate about their relationship.⁶⁶ For the purpose of this report, our working definition of ODR takes on the United Nations Commission on International Trade Law ODR Working Group's definition of ODR as 'a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology'.⁶⁷ The approaches to ODR systems design can therefore range from fully computerised systems to hybrid solutions.

At the heart of ODR lies the possibility of making dispute resolution more accessible through the use of technology and increasing economic and time efficiencies through the use of streamlined preliminary processes. In addition to efficiency outcomes,

⁶⁴ <https://www.financial-ombudsman.org.uk/faqs/all/can-appeal-ombudsmans-decision>

⁶⁵ https://binghamcentre.biicl.org/documents/25_2021_access_to_justice_ombudsman_report_2018_full.pdf

⁶⁶ See Colin Rule, 'Is ODR ADR? A Response to Carrie Menkel-Meadow' *International Journal on Online Dispute Resolution* 2016 (3).

⁶⁷ United Nations Commission on International Trade Law, 'UNCITRAL Technical Notes on Online Dispute Resolution' (2017) vii.

some advocates argue that ODR mechanisms have significant potential to improve the quality of dispute resolution outcomes, especially the integration of ODR into the courts to expand access to justice.⁶⁸ In light of COVID-19, initiatives such as Remote Courts Worldwide, a collaborative initiative with LawtechUK, the Society of Computers and Law and HMCTS, have sought to accelerate the development of online courts to promote digitised access to legal solutions.⁶⁹ In the UK, practice Direction 51Y was issued in March 2020 in relation to video and remote hearings⁷⁰ along with a detailed protocol on the conduct of remote hearings.⁷¹ The Justice Committee of the Parliament observed that 90% of the 3,200 hearings that took place on 24 April 2020 were through audio or video.⁷²

In its final report on ADR and Civil Justice, the Civil Justice Committee considered that ‘it seems inescapable that given the wide acceptance of online processes and services in our social and business lives dispute resolution is bound to develop in this direction’.⁷³ An ODR expert interviewed for this study has further observed that if ODR techniques were incorporated into the design of the UK court system, the debate on mandatory ADR may simply become obsolete.⁷⁴ The next section examines in more detail the reforms in the UK’s civil justice system that include important ODR developments in courts and tribunals.

⁶⁸ Colin Rule, ‘Online Dispute Resolution and the Future of Justice’ (2020) 16 Annual Review of Law and Social Science 277.

⁶⁹ <https://remotecourts.org>.

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<https://www.judiciary.uk/wp-content/uploads/2020/08/CPR-116th-PD-Update-video-or-audio-hearings-f-or-coronavirus-period.pdf>.

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https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1-1-1.pdf.

⁷² Justice Committee of UK Parliament, Coronavirus (COVID-19): The impact on courts, 30 July 2020, <https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/519/51907.htm>.

⁷³ <https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf>.

⁷⁴ Interview with Graham Ross (Resolver), September 2020. See further: <http://odr.info/cjc/>.

3. Policy demands in civil justice reform relevant to the proposed platform

3.1. Modernising the courts

In 1996, Lord Harry Woolf published his report on access to justice, which led to sweeping reforms to the Civil Procedure Rules that aimed to make the civil litigation processes in England and Wales more affordable and efficient ('the Woolf reforms').⁷⁵ This was done primarily by increasing the courts' case management powers, and in subsequent years, by increasing the emphasis on incorporating alternate dispute resolution mechanisms in pre-trial stages. These mechanisms include negotiation, mediation, arbitration, early neutral evaluation, expert evaluation, and other hybrid dispute resolution processes.

Following on the Woolf reforms, in 2010, Lord Justice Jackson published the Civil Justice Cost Report which formed the basis of the 2013 reforms ('the Jackson Reforms') on litigation costs and funding, and significantly expanded the courts' case management powers.⁷⁶ In theory, the CPR regime and the Jackson Reforms should have substantially increased access to justice by making litigation affordable and efficient for both litigants and the civil justice system. However, a number of developments, including successive cutbacks in legal aid and parties' increasing weaponisation of the CPR pre-trial protocols still made the pursuit of litigation an expensive and time-consuming enterprise. To tackle this issue and to cater to the demand for effective and efficient dispute resolution mechanisms, in 2016, the Ministry of Justice began its biggest ever project to modernise the justice system through the Courts and Tribunals Reform Programme ("the Reform Programme") on Transforming our Justice System.



⁷⁵ Lord Harry Woolf, Access to Justice: Final Report (1996); Civil Procedure Rules 1998/3132, (CPR 1998), and related Practice Directions.

⁷⁶ Lord Justice Rupert Jackson, Civil Litigation Costs Review: Final Report (2010)

<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

In September 2016, the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals launched the Reform Programme aimed to provide a just, proportionate and accessible justice system through greater use of technology rather than paper-based processes, moving some cases online and introducing some virtual hearings.⁷⁷ The Government initially committed up to £700 million (and now over £1 billion) to the modernisation reforms to UK courts and tribunals, a programme which has six core objectives:

- Ensure access to justice
- Maintain judicial independence
- Eliminate delays
- Design user friendly systems
- Establish financially viable and cost-effective court infrastructure
- Remain a global leader in providing legal services and in delivery of justice

3.2. The Online Court

In 2016, Lord Justice Briggs published his final report on Civil Courts Structure in England and Wales (the Briggs Report)⁷⁸ and provided recommendations ‘for structural change’ that would integrate the ‘fruits of the Reform Programme’ into the structure of the Civil Courts.⁷⁹ Essentially, the report examined how and if at all an Online Court (OC) could be implemented to make litigation accessible to underrepresented litigants with claims of modest values, and justly resolve disputes without accumulating disproportionate costs.

Briggs’s OC proposal entails three stages:

- (i) Triage: decision tree system guides litigants with documents and evidence collection, and with claim and defence
- (ii) Conciliation: case officer oversees and promotes early case management and encourages parties to explore

⁷⁷ https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/19004.htm#_idTextAnchor002.

⁷⁸ Lord Justice Briggs, Civil Courts Structure Review: Final Report (2016).

⁷⁹ Ibid 3-11.

- (iii) Determination: judge decides to hear the dispute in person or by using other technologies

While the Briggs Report generated considerable debate, the idea of an OC has been broadly supported.⁸⁰ Briggs' OC proposal has yet to be fully implemented. The Briggs Report referred to some examples of 'successful IT developments within the UK', including the 'completely online' Road Traffic Accidents Portal ("RTA Portal").⁸¹ Set up on 31 July 2013, the RTA Portal is a pre-action protocol that facilitates secure information exchange for Road Traffic Accident (RTA), Employers' Liability and Public Liability claims.⁸² It is designed to achieve swift resolution in straightforward claims where liability is not in issue. Unlike other ADR mechanisms, RTA does not require the intervention of a human third-party neutral, and there are no charges for using the portal. The Traffic Penalty Tribunal is also worth a mention, as the first online tribunal in England and Wales where appeals are submitted and processed entirely online. There is real-time interaction between the appellants, authorities, adjudicators, and administrators. Evidence is submitted and reviewed online by the appellant and authority and there is a bespoke case management dashboard for authorities. The system is accessible on all devices with access to the web.⁸³

In May 2019, the Courts and Tribunal (Online Procedure) Bill was introduced by the Ministry of Justice to the House of Lords. The Bill would introduce an Online Procedure Rules (OPR) framework in civil and family courts and tribunals in England and Wales. It would also create an Online Procedure Rules Committee (OPRC) to 'provide new, simple online rules which are intelligible to, and easily navigable by, all people who rely on the courts system'.⁸⁴ The Bill did not complete its passage by the time Parliament dissolved in November 2019. The government may decide to

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<https://www.judiciary.uk/wp-content/uploads/2016/04/cjc-odr-advisory-group-response-to-lj-briggs-report.pdf>

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<https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013>

⁸² <https://www.claimsportal.org.uk/about/about-claims-portal-ltd/>

⁸³ Interview with Caroline Shephard, October 2020.

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<https://www.parliament.uk/business/news/2019/july/courts-and-tribunals-online-procedure-bill-commons-stages/>

reintroduce the bill, although the legislative process would need to be started all over again.

Since its Reform Update in mid-2019, HMCTS stated that over 100,000 people had used their online services over the past year.⁸⁵ The number reflects a combined figure for digital services on divorce, probate, civil money claims, and social security appeals. The Justice Committee has observed an acute lack of data on the qualitative aspects of digitised justice, which may have important implications for procedural justice and the perceived fairness and success of reform projects. It particularly noted the palpable ‘absence of data on how [digital technology in civil courts] has affected lay users who are using the system or their satisfaction with the process and outcome of the hearings’.⁸⁶

The gap in data on user experience and their uptake of the new online services under the Reforms Programme also includes an absence of data on vulnerable court users, which is important from the perspective of access to justice. A report by the Legal Education Foundation on HMCTS data strategy and access to justice recommended an approach to data collection for service design, iteration, and evaluation that included collection of 13 data points of vulnerability relating to individuals using the system for each service that is being reformed.⁸⁷ HMCTS has accepted this recommendation and indicated that it has built protected characteristics into digital services for Online Civil Money Claims (OCMC), with appropriate measures to be taken to reassure the public that the collection of such data is unrelated to case outcomes and personal data will be protected as required by the law.⁸⁸

⁸⁵ <https://www.gov.uk/guidance/hmcts-reform-programme-reform-update>.

⁸⁶ <https://committees.parliament.uk/publications/2188/documents/20351/default/>.

⁸⁷ Natalie Byrom, *Digital Justice: HMCTS data strategy and delivering access to justice: Report and recommendations*, October 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF.

⁸⁸ *Ibid*, Annex.

3.3. Online Civil Money Claims

The Online Civil Money Claims (OCMC) pilot, introduced in 2018, aims to introduce the Conciliation stage of Justice Briggs's Online Court (OC) framework and move Trial stage aspects of dispute resolution online.⁸⁹ HMCTS has stated that within the first 18 months of launch, around 100,000 claims (of value less than £10,000 including interest) by claimants (who must be litigants-in-person) had been issued against defendants in England and Wales. Around 90% of its users reported that OCMC was 'good and very easy to use'.⁹⁰ At the time of writing, around 158,000 claims have been made on OCMC.⁹¹ Colleagues at HMCTS whom we interviewed for this report also indicated a positive user experience of OCMC to date, based on extensive user testing that have been conducted at each phase of development.⁹²

Guidance on Practice Direction 51R,⁹³ which provides for the OCMC pilot, sets out that claims that could otherwise be made through the 'heritage' system of Money Claims Online (MCOL) may be commenced using OCMC if they met the eligibility criteria. Where MCOL can be used for disputes with claim value of between £10,000 and £100,000, the claim value for the OCMC pilot is currently capped at 1p under £10,000. The intention is to increase the claim value to £25,000 in the future (so that OCMC will ultimately replace MCOL). The OCMC pilot is only currently available to unrepresented parties or litigants in person. A notable limitation of the current pilot is that it does not allow for multiple parties. There must be only one claimant making the claim and only one defendant.⁹⁴ Nevertheless, a County Court Online pilot (Practice Direction 51S) is being piloted with professional users to issue unspecified claims, with the intention that legally represented claimants will be able to issue damages claims online in the future.

The current OCMC Pilot is online, with the view that a claim can be issued digitally 24 hours a day 7 days a week. There is a settlement tool within the service that enables the parties to settle a claim without the need to attend court.

⁸⁹ <https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf>.

⁹⁰ <https://www.gov.uk/government/news/more-than-10000-civil-money-claims-issued-online>.

⁹¹ Interview with Kerry Greenidge, September 2020.

⁹² Interview with Kerry Greenidge, September 2020.

⁹³ See PD 51R CPR 1998;

<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51r-online-court-pilot>.

⁹⁴ An issue which the Civil Courts User Association brought up in our interview with the association's former chair, September 2020.

Claimants and defendants can complete directions questionnaires online and legal advisers and judges can view the case documents digitally and give case management directions for hearing. Claims have been issued and defended, and directions questionnaires completed within 30 days on average. In comparison, such a process can take around 8-10 weeks on paper.⁹⁵ Where there is a defence, the case reverts back to the paper route and is transferred to the local County Court to be progressed. A recent practice direction update enables a defendant paper response to continue to the case management stage as opposed to dropping out of the pilot immediately. Once the claimant has reviewed the response and said that they would like to proceed the case will be transferred to the local court to continue on paper. Once the OCMC service is end-to-end the entire claim will be dealt with digitally and could result in a determination on the digital papers or by video or physical hearing.

Under the pilot, HMCTS has also introduced an 'opt out' mediation for defended claims of up to £500. Unless the parties in these claims decide to 'opt out' of mediation, the claim will be referred to the Small Claims Mediation Service. The inclusion of effective ADR mechanisms in the process is important, especially if there is likely to be a potential increase of disputed claims. The Civil Justice Committee (CJC) has observed:

"It appears that the one concrete consequence of the money claims online system being introduced is that more defences are being lodged. This was not, we think, an intended consequence. Plainly it is intuitively possible that the increased ease of being able to serve a Defence under these systems is going to increase the number of Defences served. Clearly if the number of disputed cases is going to increase then the importance of ensuring a successful and effective system of ADR is available becomes all the more acute if the Court system is not to be burdened even more excessively than it is at the moment."⁹⁶ (emphasis added)

⁹⁵ Interview with Kerry Greenidge, HMCTS Senior Service Manager, September 2020; Kerry Greenidge, 'Implementing change and modernisation in the civil courts', Presentation to the Law Society Civil Litigation Conference, October 2019

<https://events.lawsociety.org.uk/uploads/files/b79305ff-0945-4241-b1a4-6769f1d59df4.pdf>.

⁹⁶ <https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf>.

It is understood that while claims remain served on paper, providing an email address for service of the claim and the ability to reply digitally are leading to more cases being defended.

Moreover, HMCTS is piloting a phased approach to online case management at 19 County Courts. The pilot involves enabling HMCTS legal advisors to review a claim and response (including directions questionnaires) online and issue directions in claims valued £300 or less, under the supervision of the judiciary. This pilot also applies to judges (at the same 19 County Courts) for claims valued up to £10,000.⁹⁷

It is expected that once the OCMC is fully operational, it would be an end-to-end process which may even allow some determination of substantive issues on the merits online (the third stage of Briggs' OC). At the time of writing, it is anticipated that the OCMC pilot will be completed in 2022.

3.4. Scotland and Northern Ireland

In Scotland, with the exception of non-devolved tribunals (which follow the HMCTS reforms), there have been some developments with regards to increasing the accessibility of the civil justice system. In 2018, the Scottish Government and Scottish Mediation set up an Expert Group which sought to encourage the use of mediation in civil cases during the pre-action stages by establishing an early dispute resolution office and by introducing a presumption to mediate.⁹⁸ Further to the review, the Government committed to issuing a public consultation in 2020 to understand views of the stakeholders on the proposals.⁹⁹

⁹⁷ <https://www.justice.gov.uk/courts/procedure-rules/civil>.

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<https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civil-Justice-In-Scotland.pdf>.

⁹⁹

<https://www.gov.scot/publications/scottish-government-response-independent-review-mediation-scotland/>.

At the time of writing, this report is yet to be commissioned.¹⁰⁰ Furthermore, in its *Justice in Scotland: vision and priorities* policy document, the Scottish Government placed an emphasis on enabling digital access to justice.¹⁰¹

In Northern Ireland, Lord Mansfield conducted a Review of the Civil and Family Justice system and published his report in September 2017. This review considered, at length, how to make better use of new technologies and opportunities for digital working. In particular, Lord Mansfield recommended ‘a pilot scheme of voluntary ODR to be set up throughout Northern Ireland for money damages cases of under £5,000, excluding personal injuries over the value of £1,000’.¹⁰² The pilot scheme was proposed to achieve aims similar to the HMCTS Reforms. Notably, Lord Mansfield argued that ‘with ODR, the marginal costs of serving an extra pair of clients can drop to levels that make it feasible that court interventions are primarily paid for by the users’.¹⁰³

At the time of writing, the Northern Ireland Department of Justice provides access to online services for civil matters, which include an online small claims portal for creating, tracking, and following small claims under the value of £3,000 brought by litigants in person, and an ICOS Case Tracking Online portal which allows legal representatives and relevant organisations to follow cases online.¹⁰⁴ It should be noted that while most courts and tribunals are devolved matters in Northern Ireland, any proposed reforms have been broadly similar to those in England and Wales. The Northern Ireland Courts and Tribunals Service (NICTS) have also developed a Digital Justice Strategy for 2020-25 (mainly for the Criminal Justice System).¹⁰⁵ It remains to be seen whether the extensive ODR reforms proposed in Lord Mansfield's 2017 report will be fully implemented.

¹⁰⁰ Also see Margered Mitchell MSP's Mediation (Scotland) Bill at https://www.parliament.scot/S5MembersBills/Mediation_consultation_document.pdf.

¹⁰¹ <http://www.gov.scot/publications/justice-scotland-vision-priorities/pages/6/>.

¹⁰²

<https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/mediafiles/Civil%20Justice%20Report%20September%202017.pdf>.

¹⁰³ *ibid.*

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<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/icos-case-tracking-online-user-guide.pdf> and <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/Small%20Claims%20Online%20User%20Guide.pdf>.

¹⁰⁵ *see*

<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/digital-justice-strategy-2020-2025.PDF>.

4. Needs and preferences of users and stakeholders

4.1. Key findings from SME survey

Over 56% of the 73 survey respondents were limited companies and 30% were sole traders. A majority (57.5%) of the SMEs surveyed can be described as micro-businesses, with 26% of respondents having no employees and 31.5% having less than 10 employees. The respondents were based in diverse geographical localities across England, Wales, Scotland, and Northern Ireland. Around 28% of respondents were based in London and 24.6% in the South East region.

The respondents came from 12 business industries or sectors, including construction, creative industries, education, health and social work, electricity, gas, and water supply, financial and business services, legal services, manufacturing, mining, quarrying and hydrocarbons, technology, tourism, wholesale and retail trade, and other sectors. As the survey was promoted primarily through the research team's professional networks, a majority of respondents were from the legal services sector (28.7%) and technology sector (26%).

In our survey, over two-thirds (67.1%) of all respondents had tried to recover late or non-payment of debt lawfully owed to them over the past 3 years. In terms of the average size of the unpaid or late debt, nearly a third (32%) of respondents that have tried to recover debt indicated an average claim value of between £1,000 and £5,000. Around 20% indicated an average claim value of £500 and £1,000. Altogether, 72% of these respondents had an average claim value of under £10,000. For undisputed claims, 35.1% of relevant respondents spent an average of 1-3 months between invoicing a client and receiving the agreed payment. Another 16.2% spent 3-6 months, and 25.3% spent 6-12 months chasing up the unpaid debt. Around 47.5% of relevant respondents indicated that they had spent at least 11 hours of management hours on recovering unpaid debt. Around 22.5% of these respondents had spent an average of £100-£500 to recover a debt, 12.5% indicated £500-£1,000, and 17.5% stated £1,000 to £5,000.

Around 58.3% of relevant respondents indicated that their debt claims had been disputed by the debtor. Among those respondents that had debt claims, 62.2% sought to recover their debts through the courts. When asked about the utility of different mechanisms and processes for resolving their debt disputes, 71.7% of relevant respondents felt that direct negotiation between parties was useful. Responses on the utility of court litigation were spread between useful (34.8%), sometimes useful (26.1%), and no opinion/experience (34.8%). For mediation or conciliation, 27.3% of relevant respondents found it useful and 27.3% found it somewhat useful. Around 40.9% had no opinion or no experience of settling their debt disputes through mediation or conciliation. A significant proportion also responded 'no opinion or no experience' with other ADR processes such as arbitration, expert determination, adjudication, and specialised industry schemes or the use of a debt collection or debt factoring agency.

These findings from our survey are similar to the findings from the FSB's study on dispute resolution processes for small firms in England and Wales. The FSB's 2016 study found that informal and semi-formal negotiation between the parties was the primary method for resolving commercial disputes (among 43% of FSB respondents). The second most common mechanism was legal proceedings in the civil courts (among 19% of FSB respondents). Only 8% of respondents in that study indicated that they had used ADR services to resolve disputes.¹⁰⁶

Among the respondents in our survey that answered questions relating to dispute resolution clauses, 45.7% said that they had in place such clauses in their contracts. Around 34.8% stated that their contracts did not have such clauses and 19.6% did not know if their contracts had such clauses. Among those who indicated the presence of dispute resolution clauses in their contracts, 45.5% stated that court litigation in the UK was included in these clauses. Around 36.4% of these respondents indicated the inclusion of mediation or conciliation, 22.7% direct negotiations, and 18.2% arbitration.

¹⁰⁶ FSB, *Time to Act: The Economic Impact of Poor Payment Practice*, November 2016, p 7.

It is also interesting to note that 88.5% of relevant respondents indicated that they have not used an online system for debt recovery or disputes. Nevertheless, 70% indicated that they would consider using an online system for this purpose. Among the 11.5% of relevant respondents that have used online systems, they indicated the use of MCOL, County Court Business Centre, and remote hearings.

When asked about the top five factors that they considered important in a dispute resolution system, most SMEs chose the following 5 factors: cost (80.5%), speed (71.7%), finality of outcome (63.0%), enforceability (60.9%), and need to preserve parties' business relationship (34.8%). These findings were also reflected in the free-text comments by the respondents, who said they needed 'quicker, more easily enforceable' dispute resolution mechanisms, 'faster court proceedings', 'clarity', and 'automation'. Indeed, the need for 'reduce[ed] bureaucracy/cost & speed [of] enforcement' seems to capture the main criteria through which the survey respondents assessed offline and online dispute resolution systems.

Appendix 1: Visualisations of a selection of survey results

4.2. Views of other stakeholders

We summarise below some of the rich insights from key stakeholders whom we interviewed for the feasibility study. Some findings from these interviews can be found in other parts of this report where they add value to the relevant analysis. For example, our interview with HCMTS colleagues regarding the civil courts reform have been incorporated into Section 3 above.

A key stakeholder we interviewed was the SBC. The interim Commissioner indicated the challenge of getting SMEs to raise a dispute with large businesses that are significant clients. SMEs often prioritise the importance of keeping the client and thus, disputes may be perceived as harming the business relationship. If they do pursue a dispute, small businesses generally need to be convinced that there is a high probability of success and the process needs to be 'simple' and 'cheap'. The SBC also noted the challenges of SME to SME disputes, which can often involve

high levels of emotions because of the closeness of relevant individuals in those business relationships. Nevertheless, the SBC's remit does not cover SME to SME disputes, though this is currently under review in the Government's consultation on Increasing the Scope and Powers of the SBC.

The interim Commissioner also discussed with us the importance of government-led initiatives such as the Prompt Payment Code (PPC), a voluntary code of practice for businesses that is administered by his Office. Under the PPC, signatories voluntarily undertake to pay their suppliers on time (with a requirement to pay 95% of their invoices in a maximum of 60 days), and to give clear guidance on their dispute resolution processes.¹⁰⁷ If a signatory fails to engage with and contravenes the PPC system, they may be subject to investigations or even expulsion from participation in the system. As mentioned earlier, the PPC is undergoing a review at the time of writing as part of the Government's Response to the Consultation on Creating a Responsible Payment Culture.

The FSB has been an advocate for small businesses in tackling the problem of late payments for many years. In our interview with its Chairman, he highlighted the significance of the cultural aspects of late payments. In his view, changing this culture required a strong policy push by senior government officials and fundamental changes by big businesses at the board level. The FSB provides its own comprehensive debt recovery services, known as *FSB Debt Recovery*, to its members. Although the Chairman of the FSB did not discuss with us in detail how *FSB Debt Recovery* worked, the relevant webpage on the FSB site indicated that it includes 'a bespoke range of guidance, template documents and letters with support from qualified and experienced lawyers if required'.¹⁰⁸ If the member seeks to take legal action in relation to the debt, the service 'provides an easy online process, fixed fee services and certainty of costs' as well as experts 'on hand to support you at every stage of the process... from credit control letters and compliant letters before action, through to court proceedings and enforcement'. A benefit of FSB membership seems to be the ability to use this service at 'clear, discounted fixed costs'.

¹⁰⁷ <https://www.smallbusinesscommissioner.gov.uk/ppc/about-us/>.

¹⁰⁸ <https://www.fsb.org.uk/join-us/membership/debt-recovery.html>.

A useful reference from the FSB is a study it conducted in 2016 on small businesses and dispute resolution, which proposed a three-tier dispute resolution process to help small businesses avoid or resolve commercial disputes.¹⁰⁹ The first tier of ‘prevention, informal and semi-formal resolution’ aims to help small businesses prevent disputes or resolve disputes early on. It was recommended that the SBC should play a key role in guiding and supporting small businesses to improve awareness of commercial relationship management and dispute resolution strategies. The second tier is ADR. According to the FSB’s study, a reason for the minimal uptake of ADR services by small businesses to date has been the fragmented nature of the ADR market. The FSB recommended the creation of an ADR hub by the SBC, which includes a platform for small businesses to better navigate the commercial ADR market. An additional recommendation is a review of the ADR sector with the aim of identifying how it can better meet the needs of the small business community. Finally, the third tier is the civil courts, so there is a ‘reliable and accessible justice system underpinning commercial activity which can efficiently resolve disputes’.¹¹⁰ The FSB recommended reforming the civil court system to make it cheaper and quicker for small businesses.

We also interviewed the Law Societies of England and Wales and Scotland. The Law Society of England and Wales stated that as a general policy, it supported the use of ODR and ADR. There have been past concerns about digital exclusion, literacy, and connectivity related to ODR, however, there is only a very small proportion of the population without an online presence today. A representative of the Law Society of England and Wales also suggested education and awareness-raising initiatives that help SMEs understand the benefits of ODR. This is a helpful suggestion, as the lack of awareness may explain why there were so few SME respondents in our survey that have actually used an online system to tackle their debt disputes. Lawyers can still play a role ‘behind the scenes’ when it comes to the proposed platform, such as helping SMEs with pre-claim consultation and mediation. It was further suggested that there should be different resolution pathways that provide choice for parties within such a platform.

¹⁰⁹ FSB, *Tied Up – Unravelling the Dispute Resolution Process for Small Firm*, November 2016, p 8.

¹¹⁰ *Ibid.*

The Law Society of Scotland pointed out the little awareness of ADR among SMEs in Scotland. ADR services are usually perceived as expensive and high-street practitioners often do not offer advice on using ADR services to their clients, which include many SMEs. It is interesting to note that there are less litigants-in-person using the civil courts in Scotland compared to England and Wales. The Law Society of Scotland has been attempting to educate its members on ADR, including emphasising the financial benefits to lawyers in providing ADR to clients. There have been a number of private ODR initiatives for ADR in Scotland, such as a recently established 'Squaring Circles' platform that handles low value claims. The representative from the Law Society of Scotland indicated that the proposed platform could help to boost the private ADR market in Scotland. He further noted that the Scottish Civil Courts System launched an online system last year that focused on debt recovery and personal injury claims. However, there remain significant technical limitations in the system, such as a lack of APIs and electronic case management system (e.g. it does not automatically update the user when their claim has progressed). In his view, significant investment in the Scottish civil courts system is required to 'catch up' to HMCTS. Overall, the proposed platform for resolving SME debt disputes would be quite valuable to the Scottish civil justice system.

We also interviewed a number of mediators and arbitrators as part of our stakeholder consultations. In general, the proposed platform received broad support among these ADR practitioners. Depending on the design of the platform, a leading mediator suggested that it could generate work for some parts of the mediation community (especially those who are looking for flexible work). While mediation may not seem affordable for some SMEs, if the proposed platform could be designed in a way that reduces the administrative work that many mediators currently have to undertake, then the costs of using a mediator under the system could be minimised while the uptake of work by mediators from the system could be quite significant. In her view, the current mediation work in the civil courts system has not been particularly attractive for mediators, not only because of the low rates but also the rather impersonal 'horse-trading' nature of the exercise. Parties want to have the feeling of 'being heard' in the dispute resolution process and good mediators can

achieve such an outcome (but it is not possible to do so with current court mediation practices).

Meanwhile, a leading international arbitrator whom we interviewed highlighted some of the challenges of arbitration. Arbitration tends to involve much higher-value cases. The procedures of arbitration are heavily focused on the demands of natural fairness (and arbitral awards can be challenged on this ground), which is why arbitration can involve significant time and costs. It should be kept in mind that this arbitrator is usually engaged in high-value international arbitration cases. As mentioned earlier in Section 2.2, there is a growing market in the provision of expedited and more affordable fixed-fee arbitration services, which may be suitable for medium sized debt claims for SMEs. The obvious benefit of arbitration is the enforceability of the awards.

In general, there was broad support for the proposed platform among the stakeholders interviewed.

5. International case studies

5.1. Civil Resolution Tribunal (CRT)

The Civil Resolution Tribunal (CRT) of British Columbia is Canada's first online, administrative tribunal with the jurisdiction to hear strata disputes, monetary claims of up to CAD 25,000, and motor vehicle accident claims up to CAD 50,000. The CRT is one of the world's first ODR systems that has been incorporated as an integral component of courts and tribunals framework, with a view to resolve disputes in a timely and cost-effective manner.¹¹¹ It evolved from two early ODR projects of British Columbia's Ministry of Justice relating to consumer disputes and property tax disputes.¹¹² In 2012, the legislature of British Columbia passed the Civil Resolution Tribunal Act which authorised the establishment of the tribunal. Initially, the CRT sought to encourage litigants to undertake a range of ADR options before resorting to adjudication as a fallback process. However, in 2015, it became mandatory to use the platform for issues that fell within its jurisdiction, as it was felt that the earlier voluntary model did not adequately promote its uptake among disputing parties.¹¹³ The CRT seems to have been well-received by users, who have responded positively to its speed, flexible scheduling, and diverse hearing features.

In designing the CRT system, the adversarial style of court procedures was avoided as much as possible.¹¹⁴ While the system does not exclude legal representation, the CRT's permission is required to engage legal counsel.¹¹⁵ The CRT aims to support litigants in person, and towards that, the platform provides self-help tools and legal information, which are accessible through online as well as traditional mail and telephone formats.¹¹⁶ Despite the availability of mail and telephone in the process, users are still encouraged to use online channels due to the benefits of speed and

¹¹¹

<https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal>.

¹¹² Interview with Darin Thompson, September 2020.

¹¹³ Civil Resolution Tribunal Amendment Act, 2015.

¹¹⁴ Interview with Darin Thompson, September 2020.

¹¹⁵ <https://civilresolutionbc.ca/wp-content/uploads/2020/04/CRT-Rules-in-force-May-1-2020.pdf>.

¹¹⁶

<https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal>.

convenience as well as discounts on tribunal fees.¹¹⁷ Furthermore, because adjudication is considered a measure of last resort, the CRT encourages collaborative dispute settlement approaches (namely negotiation and mediation) that lead to solutions through mutual agreement and provides evaluative outcomes that have the same enforceability as that of a judgement.¹¹⁸

With regards to the structure of the CRT's dispute resolution process, the first stage is for users to complete a 'Solution Explorer' form, which is part of an automated 'expert system' that helps users diagnose their problem and provides them with specific legal information and guidance on dispute resolution. If a user is unable to solve their problem using the Solution Explorer, they may make an application to the CRT with details of the dispute. Upon making a formal application, the relevant diagnosis by the expert system via the Solution Explorer is automatically transferred to the CRT application process and forms the basis for the applicant's claim. Each claim is assigned a facilitator, who reviews the application, prepares and serves the relevant documentation. The parties are initially encouraged to negotiate on their own. If negotiations fail, the CRT facilitator then seeks to help the parties reach a settlement. If no agreement is reached, the facilitator works with the parties to prepare the dispute for an efficient adjudication decision process. The process is asynchronous in nature. The CRT allows the 'hearing' to take place by email, by electronic or paper submissions, through tele or video conferencing, or very rarely, in person.¹¹⁹ The decision of the independent tribunal member determines the outcome of the dispute and orders can be made by the tribunal member that are enforced as court orders.

The use of the system is not free, and fees are payable at each stage though they are generally kept at a modest level. At the time of writing, an application fee for a small claims dispute of CAD 3,000¹²⁰ or less (excluding court order interest, fees,

¹¹⁷ Darin Thompson, 'The Online Justice Experience in British Columbia', <https://www.scl.org/articles/3784-the-online-justice-experience-in-britishcolumbia>.

¹¹⁸

<https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal>.

¹¹⁹

https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2020/ja2020/ja20bilinsky/.

¹²⁰ The CAD-GBP exchange rate at the time of writing was 0.58 (so 1,000 CAD = 580 GBP).

and expenses) is CAD 75 if applying online or CAD 100 if applying by mail, email or fax. The application fee to add a counterclaim or third party claim to the dispute is the same. Responding to a dispute is free if it is online or CAD 25 if responding by mail, email or fax. If the dispute requires a tribunal decision, a fee of CAD 50 is charged for the decision. If a party seeks to file a notice of objection to a tribunal decision, it must pay CAD 200 to do so.¹²¹

The CRT was developed as a hybrid public private model. Salesforce provided the technological platform, and local software companies were contracted by the Ministry of Justice to develop the Solution Explorer, the intake system, and the communications portal as ‘relatively lightweight applications’ built to integrate into the Salesforce platform.¹²² There was a phased implementation based on an agile project approach, with the CRT accepting disputes even before its technology platform and supporting processes were fully completed. The intention was to avoid ‘significant and unforeseen technical or operational problems’.¹²³ At each phase of development, the technology and related processes were tested with members of the public. Areas of improvement were identified and incorporated into the development process.

Unlike the UK’s Online Court proposal mentioned above, the CRT is an administrative tribunal with some processes that integrate with the courts. It is interesting to note that the judiciary did not play a role in the CRT’s development.¹²⁴ According to an expert who was heavily involved in its development, ‘the team who developed the CRT placed a high priority on the needs, interests and preferences of the public and tribunal users rather than on more traditional justice stakeholders. This approach is considered vital to the broader goal of increasing access to justice’.¹²⁵

¹²¹ <https://civilresolutionbc.ca/resources/crt-fees/>.

¹²² Shannon Salter, ‘Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal’ (2017) 34 Windsor YB Access Justice 112, 122

¹²³ Darin Thompson, ‘The Online Justice Experience in British Columbia’, <https://www.scl.org/articles/3784-the-online-justice-experience-in-britishcolumbia>.

¹²⁴ Ibid.

¹²⁵ Ibid.

While the BC Ministry of Justice has taken an active approach to integrating ODR into its traditional justice system, this has not been without challenges. For example, cases have arisen in the context of permissions to seek legal representation and about the CRT process itself.¹²⁶ The Court of Appeal judgement in *The Owners, Strata Plan NW 2575 v. Booth* 2020 BCCA 153 raised concerns about the CRT's characterisation of disputes and its implications on procedural fairness. The BC Court of Appeal described the CRT's refusal of a party's request to be represented by counsel as an 'unreasonable and flawed' decision. This case also revealed some underlying uneasiness of the 'traditional' judiciary towards the CRT and related reforms, despite the CRT system significantly reducing caseload pressure on the courts. This uneasiness was confirmed by our interview with an expert involved in the CRT's development.¹²⁷ Moreover, since CRT is a tribunal and its adjudicators are government appointed, questions about judicial independence have arisen, which are currently kept in check by restricting the CRT's jurisdiction. However, these restrictions add to the complexity of jurisdictional questions. There is also no explicit requirement for CRT members to have legal training and queries have been raised regarding whether they may be the best placed to make decisions in certain cases.¹²⁸

5.2. Singapore

In Singapore, the uptake of technology in its entire dispute resolution ecosystem is generally very high compared to other jurisdictions. Singapore courts use a wide range of technology, including an e-document (e-Litigation) system, videoconferencing, touchscreen displays for witnesses to make annotations virtually on a document, and digital and real-time transcription services.¹²⁹ More recently, the COVID-19 (Temporary Measures) Act 2020 made further provisions for remote hearings to minimise and dispense with in-person hearings as far as possible.

¹²⁶

<https://bc-injury-law.com/bc-court-of-appeal-harshly-criticizes-civil-resolution-tribunal-for-flawed-and-unreasonable-decision-refusing-right-to-counsel/>.

¹²⁷ Interview with Darin Thompson, September 2020.

¹²⁸ http://www.internationallegalaidgroup.org/images/miscdocs/CPBP_Report_-_FINAL.pdf.

¹²⁹ <https://www.sicc.gov.sg/forms-and-services/use-of-technology-at-the-sicc>.

Singapore has two e-negotiation and e-mediation services provided through their Community Justice and Tribunals Systems (CJTS), which is a mandatory online case filing and management system that has jurisdiction over small claims and claims against neighbours and employers.¹³⁰ Under e-Mediation, parties can opt-in at a pre-filing stage to understand if their claim is eligible for the use of the online mediation system, and thereafter follow through the process online. The Community Disputes Resolution Tribunal (CDRT), which handles disputes between neighbours, is also able to take advantage of e-Mediation and ODR services. The CDRT is now also equipped to provide information about pre-existing claims against businesses and individuals to allow parties to assess the prospects of their claims and to make informed decisions when contracting with those parties in the future. Any agreements that arise as a result of the CDRT process are enforceable contractually as well as through court orders. The same is true for e-Mediation agreements on the CJTS. The CJTS also provides e-Negotiation services,¹³¹ which may be initiated by either disputing party. To streamline the dispute resolution process, the e-Negotiation system limits the number of offers to three rounds. If a settlement is reached, the parties may record it through a consent order by way of application to the court.¹³²

In 2002, the Ministry of Law and the Singapore Academy of Law supported the Singapore Mediation Centre to establish DisputeManager.com (a system which is now defunct). This system offered e-settlement, mediation, neutral evaluation, and a Singapore Domain Name Dispute Resolution Service, an ADR process for resolving ".sg" domain name disputes. More than 130 organisations had declared their support for DisputeManager.com at its launch. However, DisputeManager's caseload was relatively small and it became defunct as parallel services in the market emerged.¹³³

¹³⁰ <https://www.statecourts.gov.sg/CJTS#!/index1>;

<https://www.statecourts.gov.sg/cws/SmallClaims/Pages/Using-CJTS.aspx>.

¹³¹ <https://www.statecourts.gov.sg/cws/SmallClaims/Pages/e-Negotiation.aspx>.

¹³² <https://www.statecourts.gov.sg/cws/SmallClaims/Pages/e-Negotiation.aspx>.

¹³³ <https://www.mediate.com/Integrating/docs/34worldviews.pdf>.

5.3. Netherlands

The now obsolete Dutch ODR platform Rechtwijzer started as a proposal from the Dutch Legal Aid Board in 2006 to develop an ODR platform. The Rechtwijzer (translated into English as ‘conflict resolution guide’ or ‘signpost to justice’) evolved from version 1.0 to 2.0 during its short life. The system was initially launched in 2007 with an initial cost of €2.3m provided by the Netherlands Ministry of Security and Justice and supported by the Hague Institute for the Internationalisation of Law (Hiil) and US firm Modria.¹³⁴

The Rechtwijzer provided legal assistance to the parties by adopting an integrative approach. Version 1.0 performed a diagnostic stage and tailored the dispute resolution process which could be through the site or referral to another service. The basic idea was to promote a constructive dialogue between the parties: ‘rather than offering a fully informed solution, the website worked as a source of support and information for the parties, improving communication, and encouraging the formation of an agreement’.¹³⁵

Each iteration of the Rechtwijzer was accompanied by new technical innovations. While version 1.0 made possible seamless user interactions, version 2.0 in 2012 integrated mediation and arbitration into the system’s ambit. The system was meant to cover an entire array of civil disputes, including matters in consumer, tenancy, employment, and divorce related cases. The platform was ultimately disbanded due to commercial reasons, and it was understood that its ‘unsuccessful drive to move into other jurisdictions led to a drastic scaling back of the project’.¹³⁶

According to Sir Terence Etherton, the Dutch platform failed because it was not mandatory and because it aimed to set up a system parallel to the courts instead of one that would be integrated into the regular civil justice system.¹³⁷ Another

¹³⁴ www.hiil.org/project/rechtwijzer.

¹³⁵

<https://law-tech-a2j.org/odr/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/>.

¹³⁶

<https://law-tech-a2j.org/odr/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/>.

¹³⁷

<https://www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf>.

hypothesis for the failure, however, identified the root of the issue in the three-way collaboration between the Dutch government, HiiL, and Modria. The latter two parties were bound by financial and time constraints, while the Dutch Legal Aid Board was undergoing structural changes. This led a situation where the system could not break even. As Professor Maurits Barendrecht of HiiL noted:

‘the government organisations responsible for access to justice and the regulated private providers are...not there as buyers. At this moment, they cannot implement innovative dispute resolution systems that integrate legal information, legal review/advice, mediation and adjudication. They watch the developments, but until now, they mainly continue to do their own thing, restricted by a system of rules that is not designed to allow for innovation’.¹³⁸

Regardless of the reason for its failure, lessons may be learnt from the Dutch Rechtwijzer experience. Significant user demand, support from the civil justice system and the legal community, as well as effective integration of the private providers market are needed in order to successfully scale up and sustain an ODR platform or system.¹³⁹

5.4. Utah (USA)

In September 2018, the Utah State Courts launched their first ODR platform pilot, making Utah the second state in the USA (Ohio being the first) to offer ODR for small-claims cases. The platform was designed with the primary view of improving access to justice for litigants in small-claim lawsuits (except for cases dealing with landlord and tenant, property and possession cases, as well as those matters that involve the government).¹⁴⁰ This category of cases is generally procedurally simple, and litigants are usually self-represented. The ODR system is still in the pilot stage with only a handful of courts within the State going live with the system. The system

¹³⁸ www.internationallegalaidgroup.org and Smith, Roger. "Make Haste Slowly: On Haste, Waste & the Rechtwijzer." *New Law Journal* 167.7758 (2017): 6. Web.

¹³⁹

<https://law-tech-a2j.org/odr/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/>

¹⁴⁰ Hon. Deno G. Himonas & Tyler J. Hubbard, *Democratizing the Rule of Law*, 16 STAN. J. C.R. & C.L. 261 (2020)

has been developed in-house from the ground up within the Utah judiciary. Prior to its launch in 2018, there had been a two-year consultation process with judges, mediators and relevant stakeholders,¹⁴¹ including the appointment of representatives from plaintiff and defendant communities to a task force.¹⁴²

A plaintiff's filing of small claims affidavit and summons starts the ODR process. In the design phase of the pilot, there was considerable emphasis on the defendant's needs. Once the defendant is served the summons and directions on logging into the Small Claims ODR site, the defendant is asked a series of questions on a simple web form in plain language. The form provides the defendant with different options ranging from 'I don't owe this' to offering to enter into a payment plan as part of a settlement.¹⁴³ Once both parties have logged in, a facilitator is assigned to the case who works with the parties to discuss the issues and develop solutions to try to reach an agreement. The facilitator can further assist the parties prepare documentation for settlement or trial (if the parties cannot reach agreement). Case registration, documents exchange, and communications between the parties are all online and are visible to the parties.

If the parties reach agreement, the parties and/or the facilitator can draft the settlement agreement. Relevant information is entered into a form that allows the system to automatically generate the settlement agreement. Once the parties sign the agreement, it is submitted by the facilitator to the court where it is entered in the record. The parties may decide whether the settlement should be entered as a judgment of the court. If parties fail to reach agreement within two weeks, the facilitator prepares a trial preparation document that summarises the parties' positions, which is submitted to the court and the case is heard through a traditional court hearing (the normal small claims docket). However, the documents submitted to the ODR system do not automatically become part of the court record and need to be submitted at trial.

¹⁴¹ Felicia Martinez, 'Pilot Program Brings Small Claims Court To Your Computer' (*KSLTV*, 25 October 2018) <https://ksltv.com/402449/online-dispute-resolution/>.

¹⁴² Joint Technology Committee, Case Studies in ODR for Courts, Version 2.0, 28 January 2020, https://www.ncsc.org/data/assets/pdf_file/0020/16517/2020-01-28-odr-case-studies-v2-final.pdf p 2.

¹⁴³ *Ibid.*

The main advantage of the system has been its ability to prevent vexatious litigation by promoting collaborative settlement and convenience access to legal services.¹⁴⁴ There are also no additional fees for users to use the system. Nevertheless, a recent study by the University of Arizona on the system's user-experience raised certain concerns.¹⁴⁵ The study found that only 12.5% of participants were able to successfully register, log in, and use the document sharing feature on the platform. Furthermore, 71.4% of the participants were not able to review and sign documents. Similarly, 81.5% of participants generated critical error rates and spent disproportionate amounts of time with tasks like registration and document sharing. These figures indicate that the platform may not be entirely accessible and timesaving.

Finally, the Utah system functions on an 'opt-out' basis. If the defendant fails to log in within 14 days of being served the summons, a default judgment may be entered. This means that there is the danger that defendants with no access to the internet, or those without adequate digital literacy or other vulnerabilities, fail to comply with the ODR process's requirements and risk facing a default judgement.¹⁴⁶ A defendant wishing to use a paper-based or in-person process must have a compelling reason, such as requiring ADA assistance, language barrier, or lack of Internet access.

5.5. Hong Kong

Hong Kong recently launched a Covid-19 Online Dispute Resolution Scheme to provide cost effective and speedy services to micro, small and medium-sized enterprises.¹⁴⁷ The scheme covers disputes of value up to HKD 500,000 where at least one party is a Hong Kong resident or company, arising out of or in relation to COVID-19 directly or indirectly. The Hong Kong Government has appointed eBRAM, a not-for-profit private ODR provider, to roll out this ODR scheme.

¹⁴⁴ *ibid.*

¹⁴⁵ https://law.arizona.edu/sites/default/files/i4J_Utah_ODR_Report.pdf.

¹⁴⁶ http://www.internationallegalaidgroup.org/images/miscdocs/CPBP_Report_-_FINAL.pdf.

¹⁴⁷ <https://www.info.gov.hk/gia/general/202006/29/P2020062900651.htm>.

eBRAM employs blockchain and artificial intelligence technology and is designed to address concerns among practitioners about the feasibility of replicating entire dispute resolution proceedings online. Eventually, the idea is for eBRAM to act as a ‘one-stop-shop platform for commercial parties from all around the world’.¹⁴⁸ Towards this goal, the platform offers both online deal-making tools as well as ODR services including e-Mediation, e-Arbitration, e-Negotiation, and other hybrid procedures. The main anticipated advantages are the easy share of documents, ensured authenticity, real-time language translation, enhanced cybersecurity, and time and cost efficiency. Since this scheme is very recent and there is no available data on the user experience of these ODR platforms, it remains to be seen if these services for Hong Kong SMEs are able to achieve their stated goals.

5.6. India

There have been wide scale discussions about introducing and integrating ODR mechanisms within the Indian court system. More recently, the Chief Justice of India, Justice Bobde noted the need for virtual courts in light of COVID-19¹⁴⁹ and the NITI Aayog (the central government’s policymaking body) conducted a meeting on Catalyzing Online Dispute Resolution in India.¹⁵⁰ In that meeting, Justice DY Chandrachud considered the distinction between pre-litigation ODR and court-annexed mediation, and recommended that a system should be developed to encourage the former. A short-term goal was set to ‘create incentives for recourse to ODR by recognizing the role of private, voluntary ODR by encouraging businesses to seek recourse to ODR technology’.¹⁵¹

In terms of the feasibility of developing an ODR system, it has been observed that India has the technical capacity and the judicial and legislative intent to build such a platform.¹⁵² For example, the Supreme Court of India uses SUVAS (Supreme Court

¹⁴⁸ <https://www.ebram.org/services.html>.

¹⁴⁹

<https://timesofindia.indiatimes.com/india/combination-of-virtual-physical-courts-will-be-way-forward-cji/articleshow/75796059.cms>.

¹⁵⁰ <https://niti.gov.in/catalyzing-online-dispute-resolution-india>.

¹⁵¹ <https://niti.gov.in/catalyzing-online-dispute-resolution-india>.

¹⁵² <https://niti.gov.in/index.php/catalyzing-online-dispute-resolution-india>.

Vidhik Anuvaad Software), which is an AI-based open-source judicial domain language translation engine. It has also recently developed a SCI-Interact software aimed at making ‘all its 17 benches paperless’.¹⁵³ Similarly, Lok Adalats (local courts that provide ADR services) have also gained an online presence through e-Lok Adalats.¹⁵⁴ The courts have also accepted the validity and enforceability of results generated by ADR mechanisms that integrate new technologies. However, it appears that India still needs ‘an explicit recognition that there is no problem with online redressal processes, on enforceability, and clarify options relating to pre-litigation ODR’¹⁵⁵ in order to encourage both public and private service provider ODR.

¹⁵³

<https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-develops-software-to-make-all-its-17-benches-paperless/articleshow/75989143.cms?from=mdr>.

¹⁵⁴

<https://www.thehindu.com/news/national/karnataka/concept-of-e-lok-adalat-has-potential-to-transform-legal-landscape-sc-judge/article32650701.ece>.

¹⁵⁵ <https://niti.gov.in/index.php/catalyzing-online-dispute-resolution-india>.

6. Conclusions and Recommendations

Late and non-payments have remained a persistent problem for SMEs in the UK. In recent years, the Government has undertaken various measures that attempt to change the culture, including the potential enlargement of the SBC's powers in relation to late and non-payments. HMCTS is in the process of a major digitalisation reform programme that includes new online services for small claims, which may make it easier for SMEs to issue debt claims online. Nevertheless, our study has found that there remains a gap in relation to a simple and streamlined platform which offers parties to resolve debt disputes out of court while having the 'teeth' to minimise the real risks of debtors evading payment and enforcement of judgments.

Based on our assessment of user and stakeholder needs and preferences, as well as a detailed legal and policy analysis of the current ecosystem for dispute resolution in the UK and relevant international experiences, this final section of the report concludes with some high-level recommendations for the development of the proposed platform, should it be progressed to implementation. It should be noted that Deliverables 3-4 contain more detailed recommendations relating to the functional requirements, 'solution vision', technical prototype, and business case of the proposed platform.

First, the nature of the proposed platform should recognise SMEs' need for maintaining business relationships in the context of debt recovery and debt disputes. While late and non-payment of debt can create significant cash flow problems for SMEs, many SMEs may prioritise the need to keep an important client in the medium-long term over recovering the debt. Direct negotiations between the parties is the most common form of resolving disputes for SMEs in debt disputes. Dispute avoidance and management should be considered as part of a wider strategy to tackle these disputes.

Second, if formal routes are pursued to resolve debt disputes, SMEs generally need to be convinced of a high probability of success and a simple, fast, affordable, and just process. The effective use of technology on this platform can help to achieve such a goal but needs to ensure a user-centred and accessible system that caters

for the specific needs of SMEs. At the initial phase of the process, helpful advice, orientation, and signposting for SME users can provide an attractive entry point into the platform. Moreover, the direct and active involvement of SME users must be a key part of the platform's entire development process. Effective data collection of different users' experiences will help to identify problems as well as opportunities for improvement, which is particularly important in the early stages of the platform's development.

Third, there is already a plethora of dispute resolution processes and services in the UK available to SMEs to resolve debt disputes. The different processes and services have their own advantages and limitations. The proposed platform should not reinvent the wheel but needs to provide a superior solution in terms of time, cost, clarity of process, and enforceability of outcomes. A potentially unique characteristic of the proposed platform is the offering of a 'one-stop shop' for the various ADR and ODR providers in the UK and trade associations to offer their debt recovery and dispute resolution services to SMEs, while parties may track the end-to-end progress of the entire dispute resolution process on the platform (if possible, from invoice issuance to enforcement) based on a single, streamlined record of data.

Fourth, HMCTS reforms, including the OCMC pilot and other current pilots, reaffirm the move to integrate ODR into the substantive civil justice processes. As much as possible, the proposed platform should operate separately from the courts. Meanwhile, it should also support wider civil justice reform programme in the UK and complement current and prospective reforms undertaken by HMCTS. The platform would ideally resolve the bulk of SME debt disputes outside the civil courts, with the aim of reducing the caseload burden of the courts. At the same time, given the importance of gaining credibility and trust among users, the strategic integration of the platform with the courts is an important consideration. In particular, the outcomes of the platform should be linked to court enforcement processes in a streamlined and efficient manner.

Fifth, the platform should have a multi-tiered ADR process that relies primarily on negotiation and mediation to settle a vast majority of debt claims. For disputes that

fail to settle, independent adjudication should be used within the platform. Decisions from adjudication are binding on the parties, with a fast-track enforcement route in the civil courts. This enforcement process may be achieved through changes to civil procedure rules. An alternative (and recommended) option is to introduce a statutory adjudication scheme similar to that of the construction industry, which could enable the platform to achieve the goals of speed, cost, clarity, transparency, and enforceability, as well as reflect the policy significance of tackling this pervasive problem for SMEs.

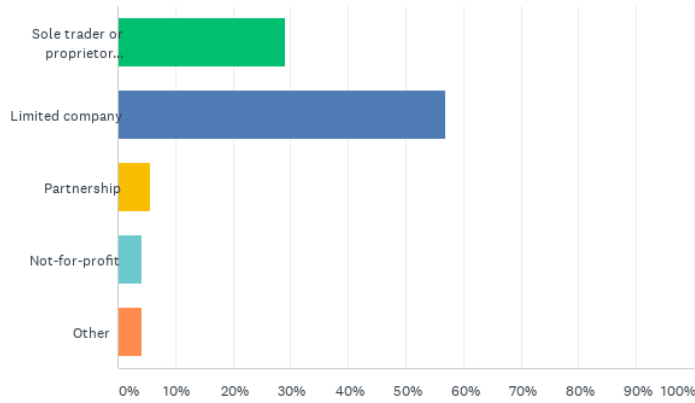
With the assistance of the SBC, industry bodies, and other stakeholders, a model dispute resolution clause regarding the use of the platform in B2B contracts involving SME creditors should be widely promoted. This could be done through an extension of the PPC framework and other SBC activities to include new initiatives such as a kitemark scheme for big businesses that demonstrate they take prompt payment seriously (for example, by including this model clause in their contracts with small businesses). In the absence of this contractual clause, if a SME creditor elects to use this platform to resolve a debt dispute, the statutory scheme should be triggered and require the debtor to engage with the platform.

Both parties must attempt to settle through negotiation and mediation on the platform. If the parties fail to settle, the dispute moves to adjudication. All stages of dispute resolution on the platform, from negotiation to adjudication, should be subject to a tight timeframe (for example, 14-21 days at each stage). Adjudication on the platform should ultimately result in a decision that is binding on the parties, unless/until revised by arbitration, litigation or parties' agreement. If a party contravenes the adjudicator's decision, the aggrieved party can resort to a fast-track route in the County Court for a summary judgment and enforcement order. Like the construction industry scheme, the principle of 'pay first, argue later' should apply.

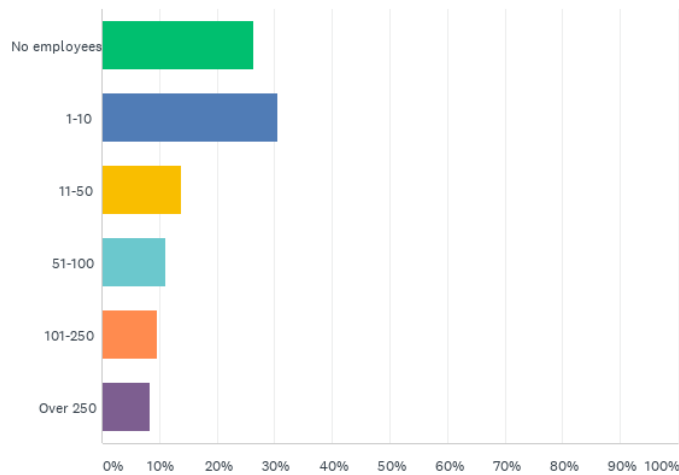
Overall, the timing is ripe for a platform such as this and any accompanying legislative and policy proposal, especially in light of the government's priority to support SMEs as the engine of the UK's post-COVID economic recovery.

Appendix 1

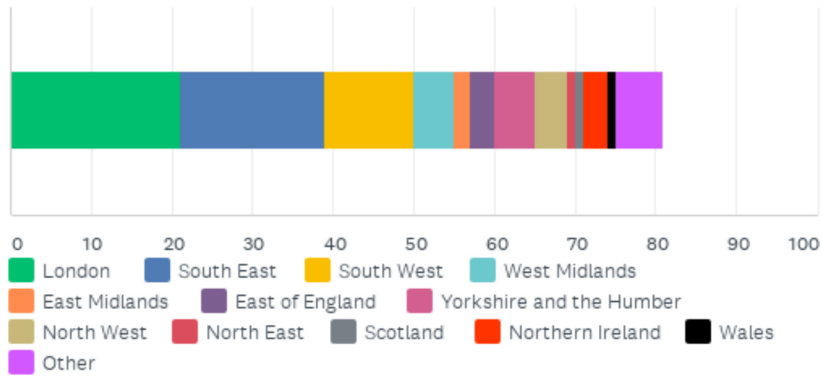
Q1 What type of ownership structure is your business or organisation?



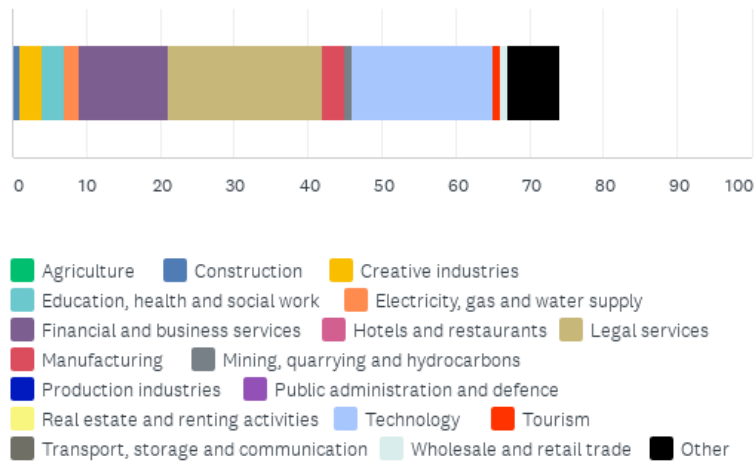
Q2 How many employees are there in your business or organisation?



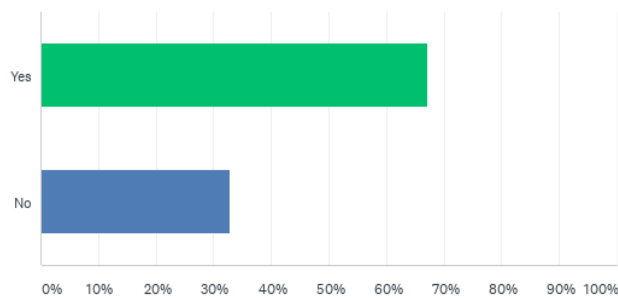
Q3 Where is your business or organisation based?



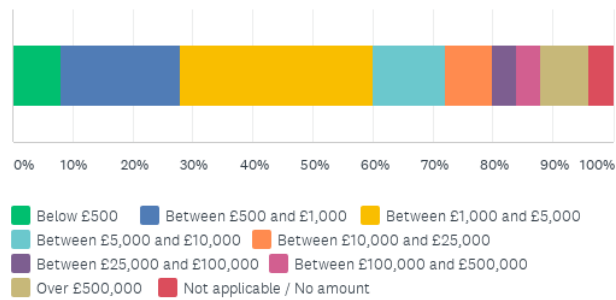
Q4 What is your business industry or sector?



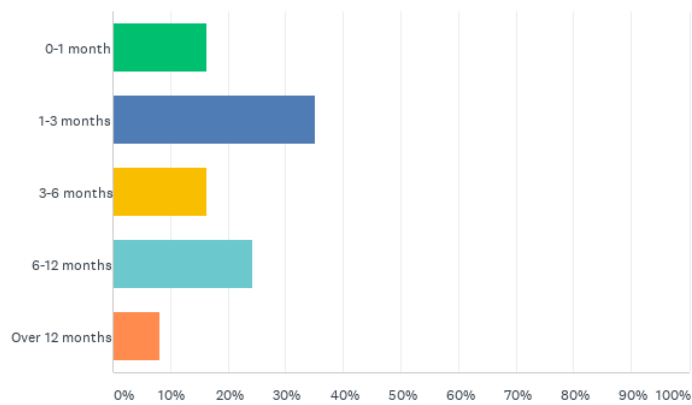
Q5 Has your business tried to recover late or non-payment of debt lawfully owed to it over the past 3 years?



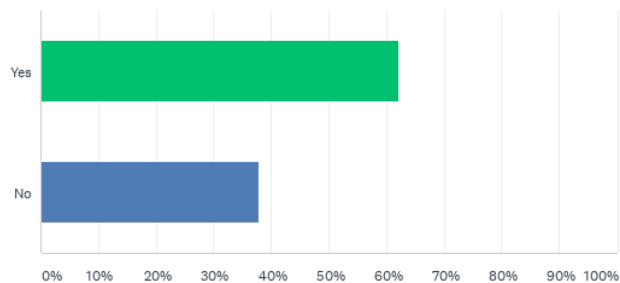
Q6 What is the average size of an unpaid or late debt that your business has had to recover over the past 3 years?



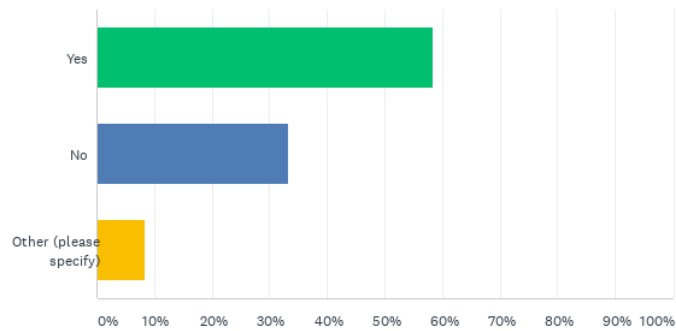
Q7 If the payment is undisputed, what is the average amount of time between your business invoicing a client or customer and receiving the agreed payment?



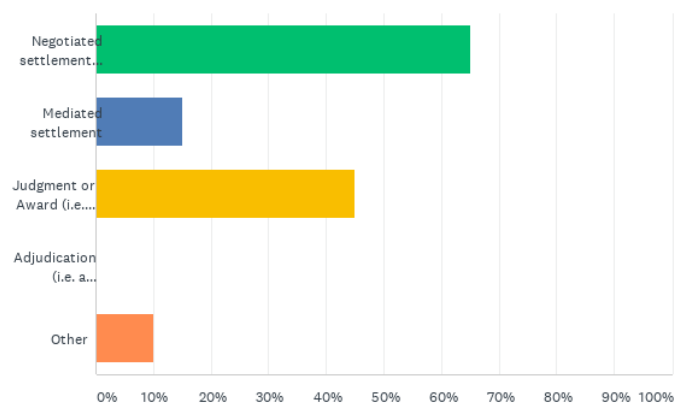
Q8 Have you sought to recover your debt through the courts?



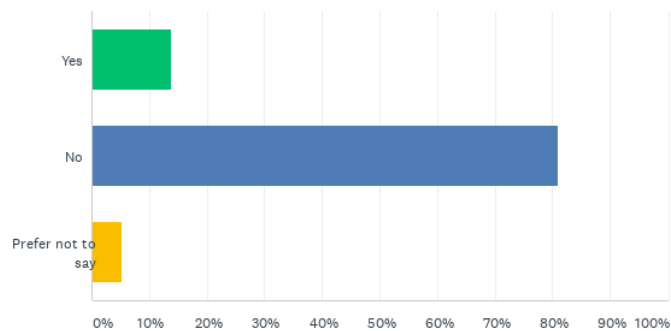
Q9 Has any debt that you have tried to recover over the past three years been disputed by the debtor?



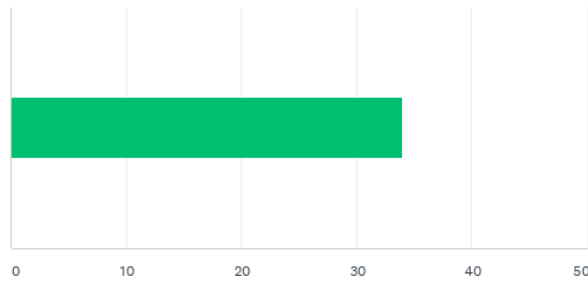
Q10 What was the outcome (or typical outcome) of the dispute resolution procedures for your debt disputes?



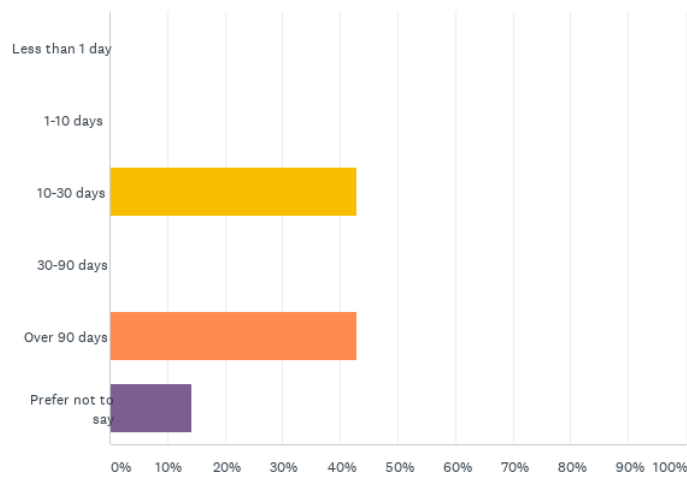
Q11 Have you had any claims of debt against you (i.e. you were the debtor) over the past three years?



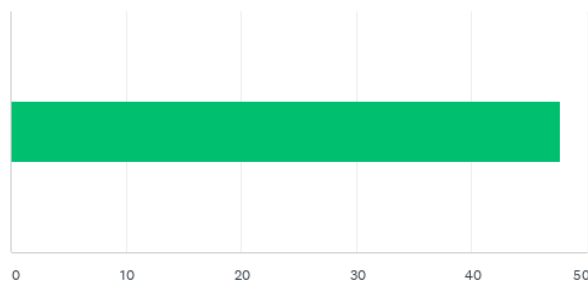
Q12 Approximately what proportion of the claims against you (as a debtor) in the past 3 years were settled with the creditor?



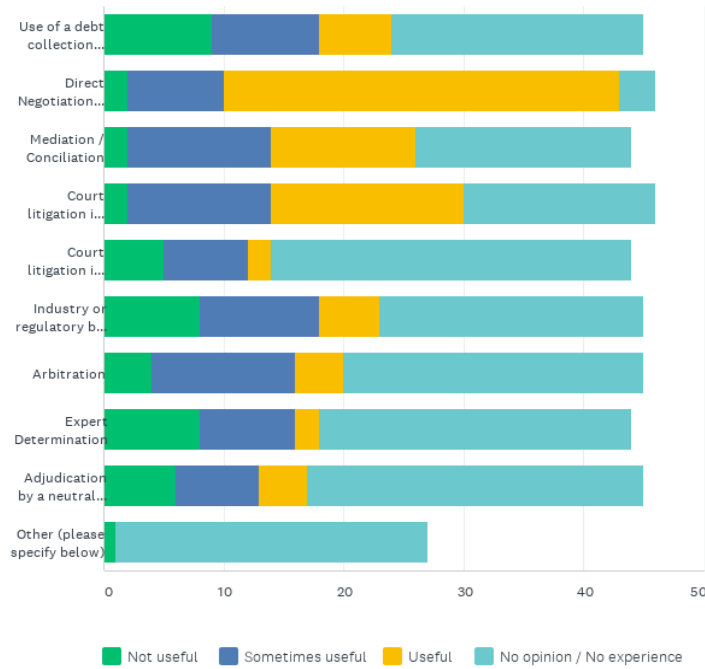
Q13 If you did not dispute the claim, what was the average time you took to settle a claim with the creditor (from the time you received the letter of claim) ?



Q14 Approximately what proportion of the claims against you (as a debtor) in the past 3 years did you dispute?



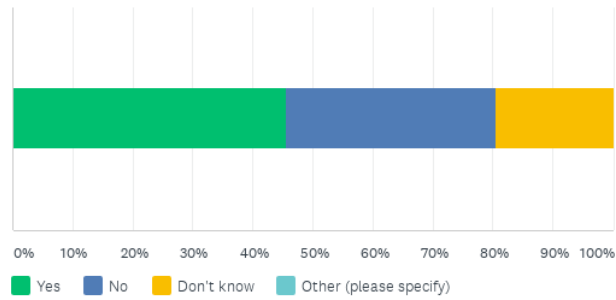
Q15 How useful are the following dispute resolution procedures for resolving your debt-related disputes?



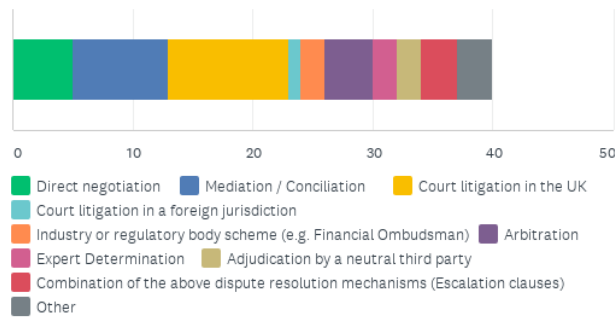
Q16 What are the main factors you consider when selecting a process to resolve a debt dispute? (pick 5)



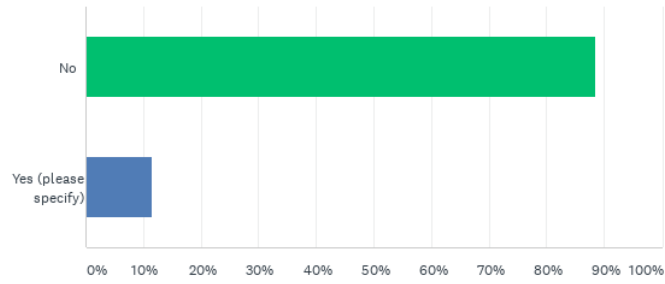
Q17 Do your contracts contain dispute resolution clauses (i.e. where and how a dispute arising from the contract will be resolved)?



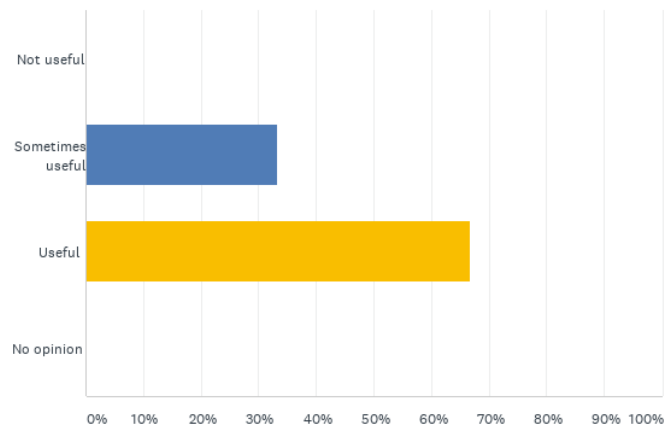
Q18 If those clauses exist, what type of dispute resolution mechanisms are typically included in those clauses?



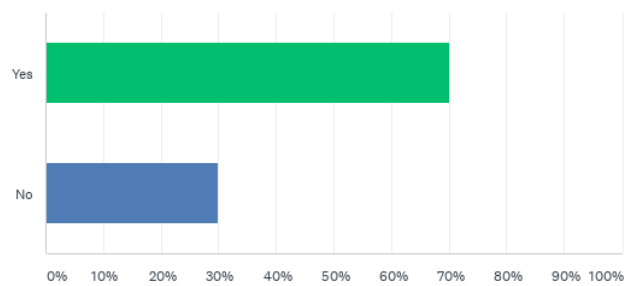
Q19 Have you used any online system for debt recovery or disputes?



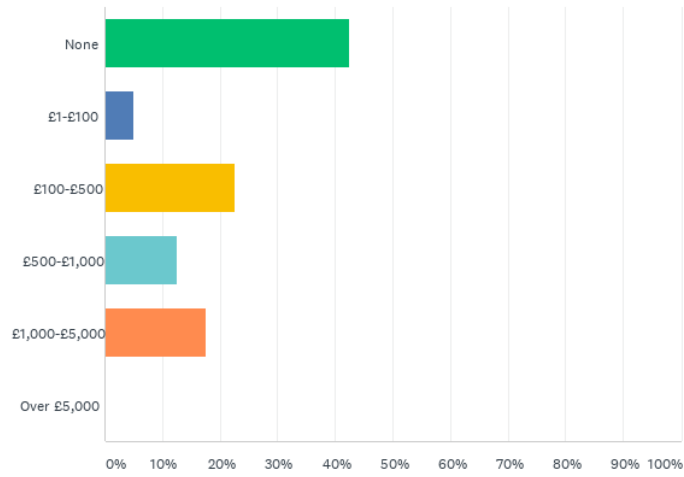
Q20 If yes, have you found the system:



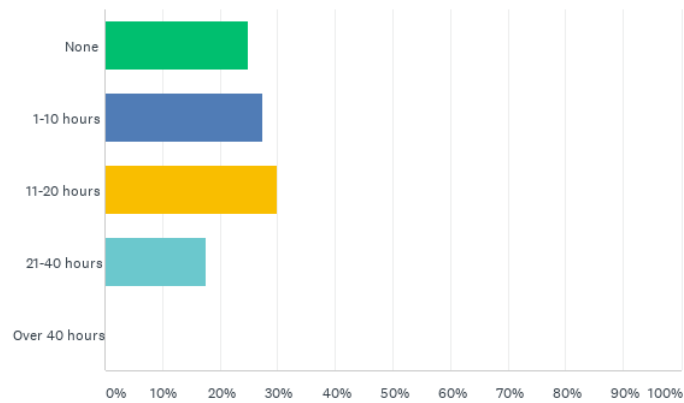
Q21 Would you consider using an online system to resolve debt disputes?



Q22 What is the average amount that you have spent on recovering a debt?



Q23 What is the average number of management hours (i.e. time spent by managers of the business) that you have spent on recovering a debt?



D3: Solution Design

An open ODR platform for UK SMEs



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1. Introduction

This document is a high-level solution design for an Online Dispute Resolution (ODR) platform addressing the immediate needs of SMEs. It contains a statement of requirements including applicable government and industry standards for digital services, and non-functional requirements such as security, accessibility and performance. A high-level technical design and likely timelines for implementation is included. The level of detail and completeness of the solution design has been matched to successful past Invitations to Tender, that is the aim is to describe the solution but allow potential future suppliers to propose different innovative implementations. The purpose of D3 is therefore to support a proposed Phase 2 development of the ODR platform. This document articulates a general solution but then focuses down to a technically achievable First Release. The rationale for this is that it was important to plan the general solution first, so that it is not restricted to a specific sector and cannot be applied outside that but then to choose an 'exemplar Process' to build on top of the basic platform.

2. Other Documents

This document should be read in conjunction with two other project deliverables:

D2 *Report on User & Legal Feasibility*

D4 *High Level Business Case*

D2: Report on User & Legal Feasibility includes the results of primary user research and the findings regarding user demand and needs, as well as analysis of the appropriate legal mechanisms for dispute resolution and enforcement.

D4: High Level Business Case provides a high-level business case for development of a full system.

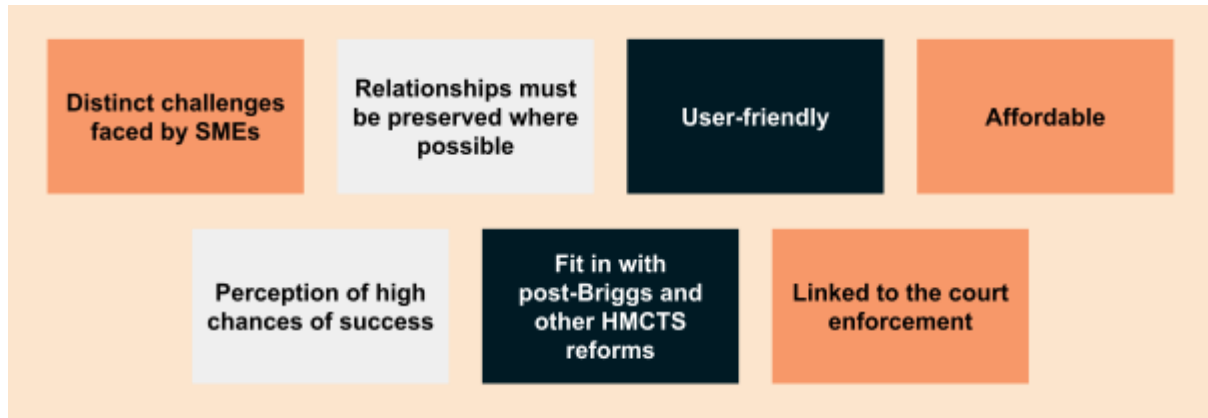
3. Background

As described in more detail in D2, it is estimated that around 72% of the disputes that small businesses in the UK face relate to late or non-payment of debt. The resolution of such disputes is often considered to be time-consuming and costly. This project has explored the feasibility of a technology-enabled, legally effective online dispute resolution platform for SMEs. It is expected that this feasibility study (Phase 1) will act as a foundation for further development of the platform (Phase 2).

The solution described in this document is based on stakeholder interviews, user research and draws on the extensive experience of members of the consortium that has conducted the study as well as Tech Nation. The solution vision set out below draws on the *D2 Report on User & Legal Feasibility* delivered in parallel to this document. D3 serves as the project's "definitive statement" of the ODR solution that is proposed and was refined and developed throughout the project.

4. Solution Design and Rationale

Key findings



The solution design has been informed by extensive stakeholder interviews and user research, detailed in full in *D2: Report on User & Legal Feasibility*. Key findings are:

- **There are distinct challenges that SMEs face when initiating debt disputes.** The challenges are different when entering into a dispute with large, important clients, whose custom may be financially important to the SME, and when entering into a dispute with another SME or smaller organisation, with which the disputant may have existing relationships.
- **Existing business relationships that are constructive and beneficial must be preserved,** in so far as possible, throughout the dispute resolution process.
- **SMEs need to be convinced that employing ODR is a user-friendly and affordable process, with a high probability of success.** It would be highly desirable for both the cost and time for the resolution process to be minimal and predictable.
- **There is already a plethora of dispute resolution services for SMEs in the UK ecosystem,** including trade associations, ADR providers, and the

court system. An ODR solution should complement these. To have uptake, it must provide a significantly better solution overall to the existing alternatives.

- **The solution should fit post-Briggs policy reforms and complement current and future HMCTS reforms.**
- Settlement or other resolution outcomes, including adjudication outcomes (see *D2: Report on User & Legal Feasibility* for details and recommendations on adjudication), produced through the platform **must be linked to court enforcement**. The platform must considerably streamline this process.

The solution design has been informed by extensive stakeholder interviews and user research, detailed in full in *D2: Report on User & Legal Feasibility*.

Analysis of these and other findings indicate that the most promising solution would be an open, extensible Online Dispute Resolution platform, outside the court system but linked to it by a pathway to enforcement.

The proposed solution is a direct answer to the challenge inherent in the UK's complex dispute resolution ecosystem – which has many different players, with established positions and interests – and to the challenge of profuse variety among the vast number of SMEs across the UK. The proposal is to design, build, and establish a general, open, and extensible *dispute resolution software platform*, which has a case management foundation specially tuned for SME disputes and the capability to build interfaces to all the relevant players in the complex ecosystem.

An aim of the solution is to deliberately align from the outset to the legitimate interests of existing UK players, such as trade associations, big corporates, and ADR providers. Building a platform that works *with* these interests, rather than competing, will promote greater buy-in and use, immediately and in the near term. Making the platform extensible and open will, in the medium to longer term, foster innovation

and promote the creation of better solutions through competition – perhaps sector specific ones.

On top of the platform, at its launch, there will be one exemplar realisation of a complete online, web-based dispute resolution system for SMEs – with all the tools and interfaces needed to realise a basic but effective end-to-end debt dispute resolution process. The aspiration for this First Release will be to have as uniform a user-interface for as wide a range of SMEs sizes and management structures as possible, and for the system to be usable by all SMEs. To achieve this, the interface and user experience may have to be, to some extent, adaptive to the class of SME end-user that is engaged with the system. It is also noted that custom interfaces for different classes of SME end-user cannot be absolutely ruled out, if user research in Phase 2 indicates this is necessary for success. It may be important to ensure the early design and implementation efforts in Phase 2 will begin with a definite end-user focus, and for this an important sector of SMEs could be identified that would maximise early impact and establish visibility for the platform solution.

Together with the underlying platform, this ODR system would constitute a First Release that would establish the platform's entry into the UK ecosystem, whilst addressing the urgent needs of the sector of SMEs identified. As traction and experience are gained, this system will be extended – and others created – to enhance effectiveness, build capacity, and widen the addressed market.

A distinguishing characteristic of the platform and initial dispute resolution process will be that it will be specifically tuned to the needs of SMEs, informed by as much knowledge of how SME disputes can be resolved as can be gained by user research. Significant user and behavioural research will be needed in the development of the platform in Phase 2. Some stakeholder research has already made manifest – to give just one example – that both SMEs and large corporates could benefit substantially from an efficient case management portal for large corporates, so that all disputes with SMEs in their supply chain are gathered efficiently together. If adoption of this were linked, say, to subscription to the Prompt Payment Code or other initiatives of the Small Business Commissioner – and made

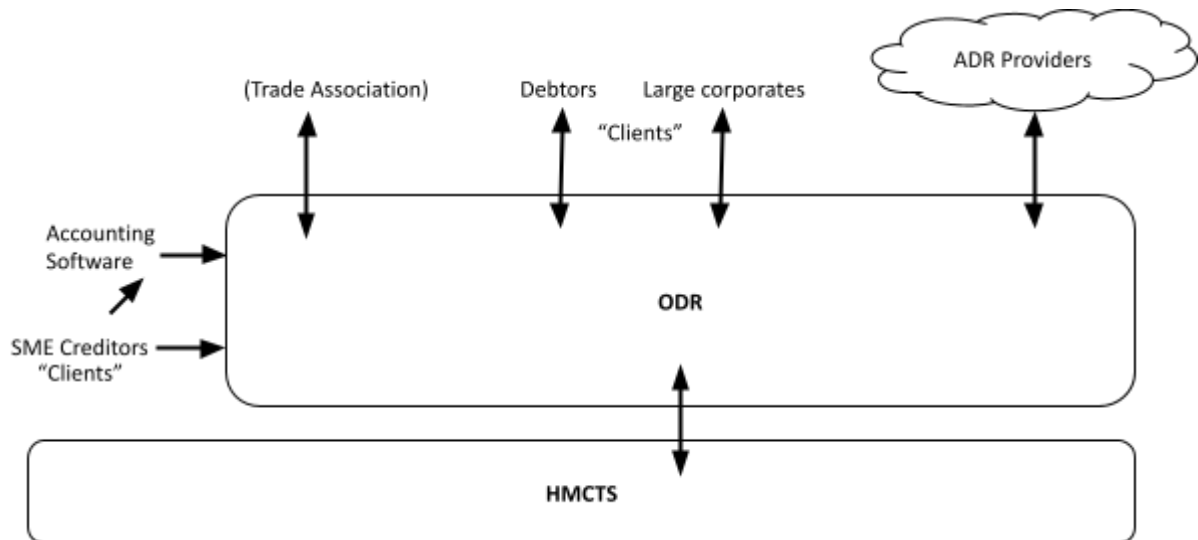
a mark of corporate social responsibility – this would go a long way to helping SME suppliers.

The platform flows and the dispute resolution processes it offers will be constrained, so that all users know at all times where they are in the process and what the next steps are. There will be only one, universal ‘case representation’ within the system, so that all user interfaces or any dispute resolution algorithm integrating with the system will work on the same case data.

The platform will, however, not simply be a case management system. A fundamental requirement for its flows and processes is that it ‘adds structure’ to a dispute representation as it moves forward through a resolution process, capturing information needed to make subsequent steps efficient and settlement of the dispute more likely. At the same time, any data gathered – and any user effort – will always be proportionate to the stage of the resolution process they are at. All information gathered and held by the platform will be carefully tracked and its communication controlled, so that – for example – discussions and interactions between the parties in one part of the platform are without prejudice to subsequent adjudication, mediation, or other proceedings.

The final outcome of disputes that are settled “algorithmically” by the ODR system itself, or through external ADR providers who assist with disputes lodged in the platform, will be either an electronically lodged *settlement contract* or an enforceable adjudication decision. For the settlement contract, the platform will support a controlled ‘space’ of settlement terms as outcomes, rather than admit an unconstrained, free-form agreement between the parties. In the longer term – but not for the First Release – there could be platform-enabled algorithmic monitoring of fulfilment of the contract, subject to suitable bank or financial system integration. For adjudication, the ODR platform will provide a streamlined route into enforcement action by the courts.

An Open Platform Approach



The platform will be outside the court system but can integrate into HMCTS online systems by being able – seamlessly and efficiently – receive data relating to a dispute from the courts (e.g. if the parties agree to switch from the courts to the platform to resolve a claim) and to transfer data relating to a dispute into the court system (e.g. if the parties challenge an adjudication decision from the platform as well as for enforcement purposes). The ability to deliver this functionality will depend on alignment and cooperation with HMCTS, and on there being the required technical capabilities in HMCTS systems.

One of the most compelling features of the platform is a direct pathway to court enforcement for disputes resolved by adjudication within the platform. This will be a unique capability of the platform and place it well ahead of all other solutions. For negotiated and mediated settlements, enforcement will be through the online contract of settlement between the parties. This will be implemented in such a way that, if the contract is breached, the case can be injected directly into HMCTS online systems, with all the data needed by that process. As described in D2, a statutory adjudication scheme similar to that of the construction industry can enable a fast-track route in the County Court for enforcing the adjudication decision (for example, through a summary judgment and enforcement order).

This open platform approach would also enable integration with other relevant systems. For example, there could be API integration into commodity accounting packages such as Xero, QuickBooks and Sage. This could allow push-button creation of a dispute claim on the platform in cases where the accounting package shows payment as being very late. This would serve as a channel for increasing use of the system.

4.1. Benefits and Value Proposition

SMEs require a solution for debt disputes that is clear, user-friendly, simple, affordable, and expedient. The proposed platform and process are specialised to SMEs in pursuit of these aims. As already noted, there is a wide variety of SMEs that might benefit – and what would suit a sole trader or small family firm, at least at the interface level, might not be so appropriate for a larger firm, with a finance director and other officers. The First Release could therefore be designed with a focus on one important sector of SMEs with sufficient scale to establish visibility and impact for the platform, whilst supporting as wide a range of SME sizes and structures as possible. The core platform, on the other hand, will be fully general so that other solutions can also be realised. It may be important to ensure that all solutions realised with the platform include common branding elements, so as not to fragment the market unnecessarily.

A significant societal benefit of the approach is that it aims, ultimately, to widen the funnel and address the needs of SMEs in England, Wales and Northern Ireland at scale. FSB data¹ indicate that SMEs often do not raise disputes and have low awareness of the benefits of ADR. The platform, promoted at sufficiently high level of visibility and with sufficient HMCTS and government support, can aim to address both these issues. At the same time as bringing more disputes to settlement, the platform will take low-complexity workload off HMCTS – allowing the courts to use their time to address the more complex or persistently acrimonious disputes.

¹ Tied Up: Unravelling the Dispute Resolution Process for Small Firms. Federation of Small Business, November 2016.

One of the most innovative aspects of the platform is an emphasis on computer-supported informal settlement, which will be strongly facilitated by the platform algorithms and design of the user experience. This is an ambitious goal and to get this right will require significant user research beyond what has been possible in this small feasibility study. But the potential benefits – in terms of cost effectiveness and the preservation of business relationships – could be very significant. The FSB report that 43 per cent of FSB members surveyed resolved their most recent dispute through either informal or semi-formal means², so this mechanism has significant potential to make a real difference to SMEs.

It is essential that the platform and its implemented dispute resolution processes are widely viewed as legitimate, trustworthy, and effective. HMCTS buy-in and an efficient, solid integration with the court system for enforcement, will be essential in establishing legitimacy for the platform. Endorsement or other recognition from the Office of the Small Business Commissioner and trade associations – and buy-in from large corporates as part of their CSR policies and programmes – will also be key to this. At the same time, the open, flexible, and extendable nature of a platform approach will open a ‘controlled door’ to private sector innovation and suppliers.

Finally, the platform will complement the existing ADR ecosystem, rather than competing with it. This will bring more business to ADR suppliers whilst raising the beneficial engagement with ADR to a greater range of SMEs. The FSB ascribes the low engagement by SMEs in ADR to two factors: lack of knowledge by SMEs and their trusted advisors about ADR and fragmentation on the supply-side, making the market hard for resource-constrained small businesses to navigate.³ The platform will benefit SMEs by addressing both these issues.

² Ibid, page 17.

³ Ibid, page 24.

5. Platform Users

In characterising the users of the platform, for the purposes of this report, we focus on the primary and secondary users of the platform and First Release dispute resolution system. For the First Release, we do not offer functionality specifically for solicitors, for example. But the platform will be architected so that these and additional users can be integrated in a later phase.

5.1. Primary Users of the First Release

The primary platform and First Release solution users are the following.

1. **Creditor [Cd]**. This is the disputant who is owed money. The target will always be SMEs who may range from sole traders up to limited companies with 250 employees. (Larger companies with small disputes will not be excluded - but are not the targeted users.) We assume the First Release of the platform and ODR system will exist for the benefit of all types of SME, but for focus it is proposed that a significant, but specific sector could be identified that will maximise the chances of the platform gaining traction and being seen as an effective and trustworthy solution.

FSB research indicates that the vast majority of disputes are those in which there is a customer-supplier relationship.⁴ The platform solution design will distinguish between two categories:

2. **Debtor [Db]**. This is the disputant who owes the credit money. This user category includes all businesses except large corporates, whether smaller, of equal size, or larger than the creditor, but excludes private individuals. In SME-to-SME disputes, there has sometimes been a longstanding or close business that has broken down, so there may be an emotional element in these disputes. The platform process design must take this into account, for

⁴ Ibid, page 10.

example by implementing measures to make the articulation of disputes as factual and objective as possible.

3. **Large Corporate Debtor [CDb]**. Stakeholder interviews have identified large companies as common counterparties to an SME's debt claim. There is said to be a UK culture of slow payment and that there is a power imbalance between large corporates and their SME suppliers. With big corporates, payment issues may also just be a consequence of inefficient internal processes. A 'bulk' interface for large corporates will be defined in Phase 2 as a demonstrator only, pursuant to a strategy for building large corporate engagement. This will focus specifically on disputes, and not the more general culture of late payment.
4. **ADR Provider [AP]**. These primarily comprise accredited mediation and adjudication professionals, though the full range in the marketplace of suitable suppliers will have to be surveyed in Phase 2. All these professionals have their own standards and culture but will have to be qualified as willing and able to take on platform cases, at a fee rate and with the expectation that they work with the overall platform resolution process – for example by mediators lodging the results of their assistance as contracts within the platform. For economic reasons, ADR providers may prefer large cases to smaller ones – but if some of the administration overhead in handling smaller cases can be taken off their hands by the platform, it might be financially attractive to settle small-value disputes.

5.2. Secondary Users of the First Release

1. **Platform Provider [PP]**. This is in essence whoever owns and/or operates the platform. They will need to perform platform maintenance, data archiving, run reports, execute any GDPR-related actions – among other functions.

2. **HMCTS [MoJ]**. The court service is a key secondary user in that the platform will need to support HMCTS integration. A negotiated or mediated settlement on the platform results in an online contract between the parties - but if the contract is breached the case will be injected directly into HMCTS online systems, with all the data needed. This will be an enforcement capability that places the platform well ahead of its competitors.

3. **SME Trade Associations [TA]**. The primary drivers of these organisations are to offer value to their members and, in some cases, to develop or sustain standards. These associations are businesses, often not-for-profit, whose income depends on member subscriptions – and so the value to members is vital to these organisations. Some trade associations, such as the FSB, do already have guidance and services they offer their members to resolve debt disputes. The most common cases, however, are sector-specific associations that provide assistance for disputes with private individuals, which the platform will not address. There is, therefore, scope for the platform to align with the interests of trade associations and their members by offering a means to introduce or enhance member services. The platform will offer a means for trade associations to introduce branding and/or specialist signposting specifically for their members.

5.3. Non-Targeted Users First Release

For Phase 2, for maximum focus, the system will make only the minimum of specialised provision for certain potential users that may, nonetheless, be catered for more fully in future phases of the roll out. These users are not expressly excluded, and can use the system – but they will not be actively targeted as primary users.

1. **Solicitors**. The Law Society has indicated that, as a matter of policy, it supports ODR and the use of technology to help resolve disputes more cost-effectively and quickly. But for some larger SMEs, pre-court consultation

with solicitors may be a time-honoured pathway to approaching a dispute – e.g. to assess its viability and the options. This may make it hard to get ODR to be seen as a viable alternative for those organisations. For smaller debts or smaller SMEs, however, it would not make economic sense for businesses to consult. For the First Release, therefore, no special functionality will be provided for solicitors.

However, it is likely that some creditors or debtors will want a dispute on the platform to be handled for them by a third party, such as a solicitor. And we would not want the platform to be seen as suppressing the right to legal assistance. It is proposed to handle this by having, in the registration process, as simple a mechanism as possible for a third party to identify themselves as such and indicate the party for whom they are acting.

2. **Large corporate creditors.** These will not be expressly excluded and can use the system if it benefits them. The First Release will, however, not have special capabilities and functionality specifically for large corporate creditors.
3. **Some SME segments** – e.g. construction – may have their own ADR ecosystem (e.g. mandatory adjudication). Other sectors, such as the financial sector, have an ombudsman to deal with particular types of complaints and grievances. Some disputes require expert determination. For Phase 2, the First Release platform and dispute resolution process will steer clear of the domains of these established, specialist ADR providers.
4. **Third-party Solution Providers.** The long-term vision for the platform is to be open to third-party tools and solutions, on top of the case management API and in conjunction with the systems for creating settlement contracts. The Phase 2 platform will be architected so as not to preclude this, but these secondary users will not be catered for in the First Release.

5.4. Non-users of the system

The platform will not cater for disputes involving private individuals – for example consumers – as parties to the dispute, either as a creditor or a debtor. The platform is intended for business-to-business disputes (including SMEs that are sole traders or companies with one director).

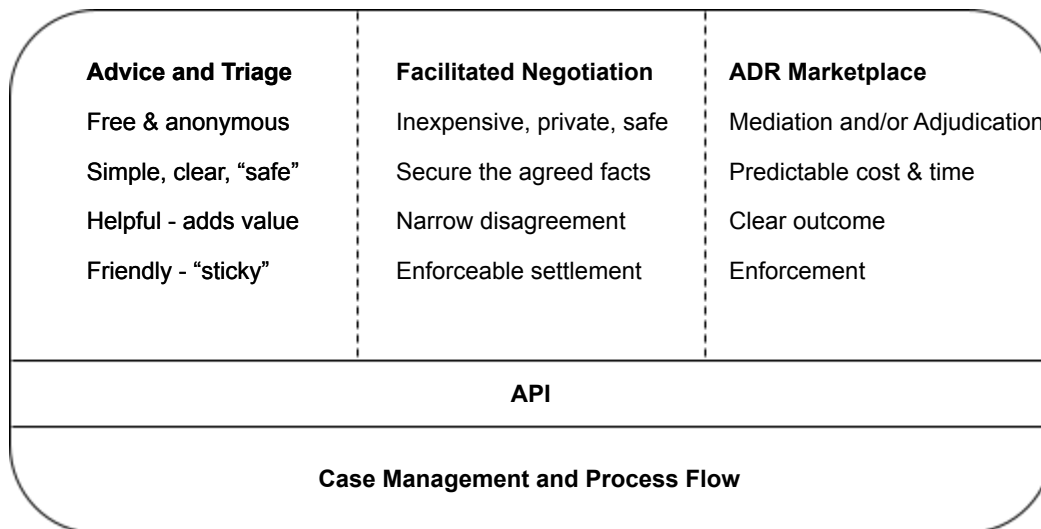
6. The Dispute Resolution Process

The dispute resolution process supported by the platform follows an escalation model, with three Tiers: Advice and Triage, Facilitated Negotiation, and the ADR Marketplace. These are broadly consistent with the model recommended by the FSB.⁵ This is a very natural structure that – very broadly speaking – is commonly seen in other solutions such as the Canadian Civil Resolution Tribunal⁶. In the proposed platform, however, both the Advice and Triage Tier and the Facilitated Negotiation Tier will be more innovative and ambitious – and have stronger computer algorithm support – than previously envisaged solutions. The process can, however, be seen as an evolution of the first two “tiers” advocated in the FSB report that has been made possible by technological progression since the creation of that report. For the First Release, at least, a formal arbitration option *within* the platform itself will not be offered, though participants may resort to it to resolve the dispute outside the platform.

⁵ Ibid, page 41.

⁶ <https://civilresolutionbc.ca>.

Proposed Platform and Process



Every dispute will go through the second Tier, which offers a computer-facilitated negotiation arena. At which stage the case will be settled or progressed to Tier 3. Most disputes will originate from SMEs passing through Tier 1, though one can suppose that some disputes will go directly into Tier 2. Examples include disputes from seasoned creditor users of the platform, or disputes originating from accounting software. The exact mechanism is to be determined in Phase 2.

Disputes that get settled – whether by negotiation in Tier 2 or mediation in Tier 3 – will result in a settlement contract; the platform will facilitate the creation of these using a 'settlement builder' tool, in the case of platform-facilitated resolution, and the recording of these in the case of third-party assisted resolution. The space of settlement contracts that the platform admits will cover all the most common outcomes and be well formulated and clear.

The first tier will be free and anonymous, and will offer orientation, advice, and signposting if appropriate in the most user-friendly and attractive way possible. The primary aim is to provide an attractive entry point into the platform, but also to qualify out cases for which it is not suitable by directing them elsewhere.

A qualified SME user would then pass into the Facilitated Negotiation Tier, which would require an affordable fee in the case of a successful settlement. At this point the debtor will be identified, contacted, and invited to the platform – which will

facilitate a negotiation between them, with suitable computer-assisted support to maximise the opportunities for success. A recommendation to progress to the third tier will be made by the platform where negotiation is observed not to be converging successfully, according to some objective criteria that all users will understand in advance.

The third tier will have a fee based on claim amount. In the full platform, there are several options for the operation of the ADR Marketplace. There could be a standing panel, with the platform identifying and recommending the best ADR service for the case, or a mechanism for ADR providers to bid for cases, or some other arrangement. For the First Release the ADR Marketplace may be simpler. The fundamental requirements in all cases, however, are predictable cost and time, a clear outcome lodged back in the platform, and enforceability in case the outcomes of a settlement contract or an adjudication decision is not carried out by either party.

6.1. Tier 1 - Advice and Triage

A primary aim of the first Tier will be to develop a granular identification of the dispute, but it will also build some structured case collateral that can be useful for later phases. The beginnings, for example, of a chronology, if possible. But in any case the amount under dispute, or other data essential to triage and advice. Any data collected here directly from the user should be proportionate to this stage of the process and easy to provide. The first tier will be very user-friendly and 'sticky', so that users come to appreciate the platform and get drawn into using it for their dispute.

The first Tier will also allow the possibility to offer branding and bespoke advice and guidance from sector-specific trade associations for their members. This is a way to get buy-in from these associations and to attract more disputes. Further research will be needed to determine whether it is necessary to offer superficially different variants of the entire solution for different sectors or for the members of different trade associations, or whether the bespoke elements could be displayed selectively by a universal solution depending on the user or some credential or token they present to

attest to membership of their trade association. The viability of this does not have to be decided up front, as long as the architecture does not preclude it.

For disputes against large corporates that have signed up to the platform, or even mandated its use for their suppliers, there will be reassuring signals to the SME creditor that this is a 'safe', trustworthy, and independent channel through which to raise their dispute. (For the First Release, this will be a demonstrator only.)

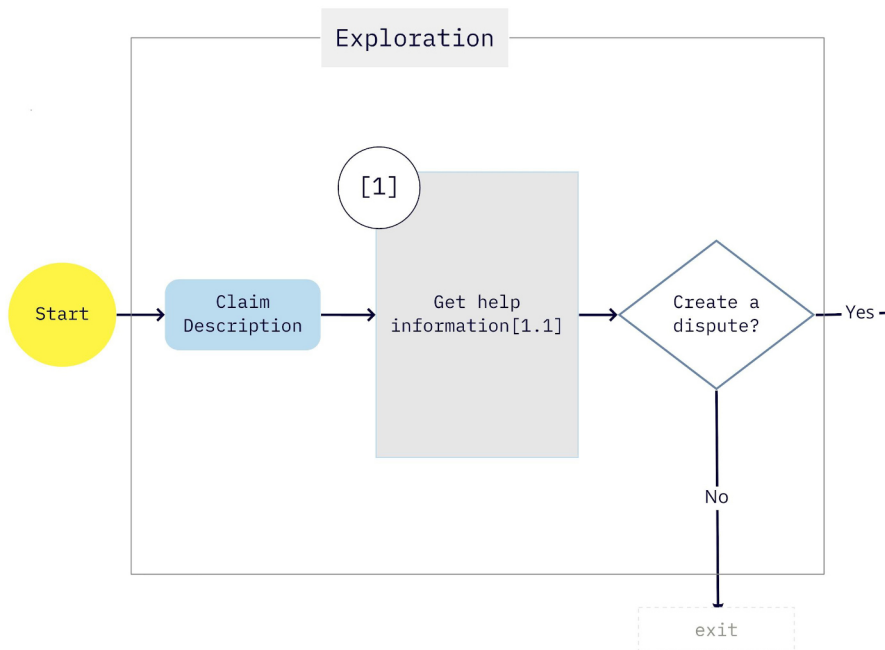
There may, over time, be more fundamentally different interfaces to this Tier. So, for example, a very friendly and inviting interface would be suitable for small SMEs, such as sole traders, but medium sized or larger ones may wish to see something more business-like. If, in due course, the platform is to be used by even larger businesses – beyond the scale of SMEs – then they may require yet another interface. Again, the viability of this and requirements do not have to be decided up front, as long as the architecture could in due course admit this.

6.1.1. Illustrative Customer Journey – Tier 1 of the First Release

Imagine the scenario where a Creditor is owed £1,000 GBP by a Debtor.

Stage 1.1 – Creditor Engagement

The creditor, having heard about the platform – perhaps through their trade association – goes to its website online. They are offered clear and simple information about what the platform can and cannot do for them and asked a series of simple questions about their dispute. If the dispute is appropriate for the platform, they are invited to enter the next tier, with a clear explanation of the potential costs, timescales, and outcomes.



6.2. Tier 2 – Platform-Facilitated Negotiation

On entry to the second Tier, the Creditor must provide further information about the dispute, including a timeline and evidence. The Debtor is then invited to join the platform and enter into a process that is aimed above all at a negotiated settlement that is satisfactory to both parties and preserves or strengthens their business relationships. There might be, for example, special handling of SME-to-SME disputes among parties with longstanding business relationships but which have lost trust. If a settlement is reached in this Tier, and it is appropriate to do so, the platform may offer additional value by recommending suitable methods for future dispute avoidance.

In the longer term, the platform will have the capability to host a range of settlement tools and algorithms – including innovative third-party solutions. An example might be a completely software-facilitated blind bidding tool. The platform will make this possible through an API or other form of open architecture that allows computerised automatic dispute-resolution tools to integrate. Such an architecture would also allow the platform providers also to develop new tools, as the platform becomes more mature. This will make an early launch of the platform with basic functionality

possible, but also allow continuous improvement as experience with what works is gained – and as data on cases is acquired.

The basic functionality required for the First Release is the capacity to negotiate a settlement and capture it into a digital settlement contract, suitable for enforcement by court action in case of failure to perform or to escalate to an adjudication. In cases where the Debtor agrees to the debt but cannot straightforwardly pay, the platform can assist the agreement of a payment schedule or other reasonable compromise as part of the contract of settlement. In cases where there the Debtor has an objection to paying, the platform will assist the parties in gaining agreement on the objective facts they can agree on – narrowing the region of disagreement as much as possible and characterising it in objective terms. The aim is to help the parties find a point of balance and remove the emotional component. At the same time, the platform in Tier 2 will expose both parties to the costs and disruption that would ensue in case of court action, inviting them to visualise the ‘value of settling peacefully’.

Achieving an effective process with these characteristics will require, in Phase 2, significant user research and advice from behavioural psychology as well as experienced ADR practitioners.

If a negotiated settlement cannot be reached, by some objective and transparent criteria, the platform will make a recommendation that the dispute proceed to the third Tier and receive the assistance of a skilled human ADR professional.

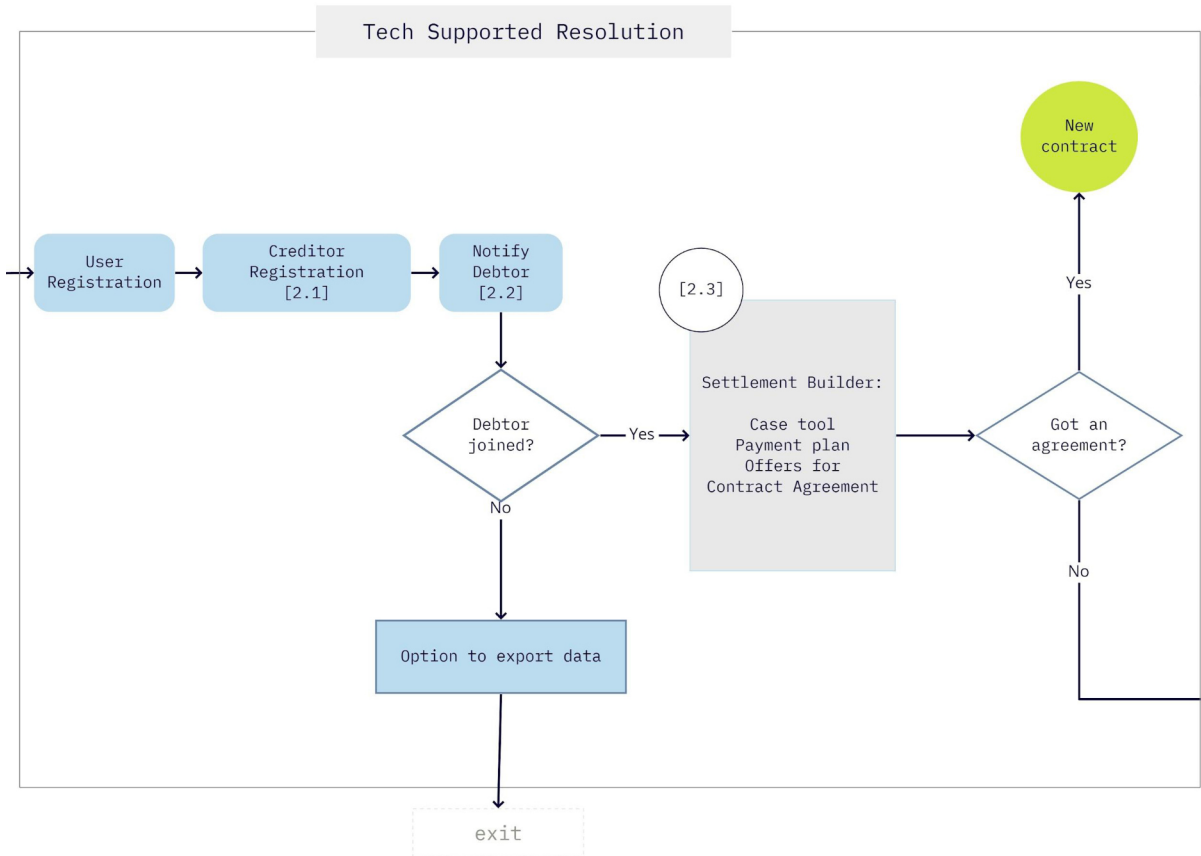
Finally, the First Release will include a demonstrator for a bulk dispute management tool for large corporates, by which any disputes initiated by SMEs with them can be handled efficiently and quickly. This will be positioned as being based on a trusted and independent platform, certified and endorsed by HMCTS, trade associations, and the Small Business Commissioner.

The aim of the demonstrator is to build support among companies and other stakeholders for large corporate engagement with the platform. One possibility is to propose the institution of some kind of ‘ethical badge’ that a participating large

company could display. Known good citizens among UK large corporates could be enlisted to promote this. There is also the possibility of establishing a platform as a dispute resolution channel that corporates would mandate in their contracts with suppliers. One of the principles of the Prompt Payment Code is ‘ensuring there is a system for dealing with complaints and disputes which is communicated to Suppliers’.

Stakeholder research revealed that the treatment of SME suppliers is a UK cultural issue, and the only solution was to make the health of the supply chain a board-level agenda item. The problem is that late payments, for example, may be because of the actions of employees well below board level and fragmented and hence not visible. But a corporate commitment to the platform might be discussed at board level – and, once adopted, the board could get regular analytics on disputes.

6.2.1. Illustrative Customer Journey – Tier 2 of the First Release



Stage 2.1 – Creditor Registration

The Creditor registers and enters details of their claim: the amount and a chronology and uploads any supporting evidence such as purchase orders and invoices. The Creditor also enters the email address of the Debtor. (If the Creditor knows of any existing contractual agreement by the Debtor to use the system, this can be referenced.)

Stage 2.2 – Respondent Receives Invitation

The Debtor receives an email notification of the dispute and an email-specific link to access the platform. The invitation would mention that the matter could end up in court if not responded to and contain enough case context to be seen as legitimate, whilst not communicating sensitive case information by email. A time limit, known to the Creditor, would be stipulated.

The Debtor joins the platform, registers as easily as possible (including agreeing to terms and conditions as necessary), and views the case information and supporting evidence. If both parties decide to progress to Settlement Building they will be bound by the platform to either come to a settlement or an adjudication.

Stage 2.3 – Platform-Facilitated Negotiation

Stage 2.3a

The Debtor agrees it is liable and the parties agree a payment sum and/or payment plan.

The Debtor agrees it owes the debt and makes proposals to pay via secure payment through the Platform. The Creditor is notified and parties use the Settlement Builder to agree a proposal, which then becomes a binding settlement contract. The parties are clearly informed of the nature of their agreement.

Stage 2.3b

The Debtor denies it is liable for reasons A, B and C.

The Settlement Builder proposes statements to which the parties must respond, stating whether they agree or disagree and providing reasons.

The Debtor and Creditor agree there was a contract and that the Creditor did the work. But the Debtor was not happy with the work. The platform elicits a focussed statement of the issue, in objective and factual terms.

There is an option to make secure payment immediately or according to some agreed schedule. The platform receives payment and passes on to the Creditor the agreed amount(s) minus a flat fee of £49.

Meanwhile there is an option to submit offers to settle the dispute. The parties can entertain 3 offers (say), after which the case goes to Tier 3.

6.3. Tier 3 - The ADR Marketplace

The third Tier will not have its own in-house resolution specialists, but act as a kind of marketplace for independent ADR Providers to provide services. These may be offering mediation or adjudication. They will connect to the platform and the platform will collect a fixed fee on every dispute resolved by them. The platform would aim to present third-party ADR providers with 'clean' and well-structured cases, so that they can be as efficient as possible. For example, any agreed facts would be known and clearly recorded.

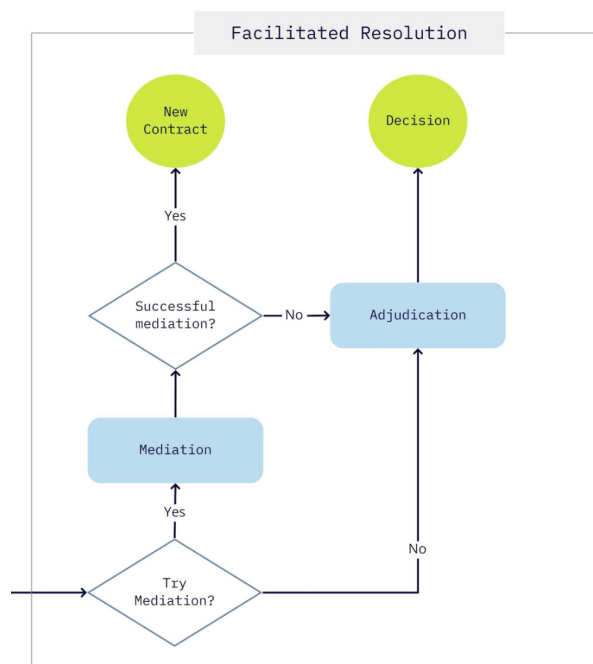
Our aim is that the disputes themselves would always remain firmly *within* the platform so ADR providers would need a special interface and interaction protocol for working with cases that are 'in' the platform. The platform will ensure the interactions at these interfaces are regulated and work with the overall flow and not against it. The protocols will have to be carefully specified and controlled, and this will take significant ADR-provider user research in phase 2.

6.3.1. Illustrative Customer Journey – Tier 3 of the First Release

The parties, having failed to settle in Tier 2, now move to Tier 3 and the ADR Marketplace. The parties can choose to have the case picked up by a mediator to attempt to reach a settlement. If they fail to reach a settlement or choose not to try mediation, the case is passed to an adjudication provider who is registered with the platform and signed up its expectations for timescales and outcomes.

The proposed mediation and adjudication services will operate within certain limits

- The costs are fixed.
- The case size will be above a specified value.
- This will be a documents-only process.
- There will be a maximum time to reach a settlement or issue a decision.



In our illustration the case goes to mediation:

Stage 3.1 - The Illustrative Case goes to Mediation

The Mediator is privy to the triage exercise, the timeline, any offers to settle, the points of agreement and disagreement, and all the supporting evidence provided. The aim is to provide them with as 'clean' and well-structured a case as possible. Mediators would be independents who pay an annual subscription to be on the platform. They also pay 2.5% of every case fee they receive via the platform.

There could be two possible models: Mediators could be notified about a case and then bid to mediate it. The mediator charging the lowest fee is auto-allocated the dispute. Or there could be an Uber model – e.g. a fee estimate – and the case gets automatically allocated to a members of a panel of mediators based on whether they are available.

7. Phasing of Platform Roll-out

A full platform of the kind envisaged in section 4 would be a significant software engineering project and accompanied by extensive – and expensive – user research with all the classes of users. Aiming for a ‘big bang’ – the launch of a full platform that can operate at scale and which serves all the possible users of every type – would be risky, unless very significant resources could be marshalled. A phased approach is therefore proposed.

The small-scale feasibility study that has produced this report is Phase 1. Phase 2 will produce a general platform that supports all the process flows needed to realise a basic but effective end-to-end debt dispute resolution process for SMEs, as attractively and effectively as possible. This will constitute First Release that will establish the platform’s position in the marketplace and the ecosystems in England, Wales and Northern Ireland.

The strategy is to launch with a solution that is unique and highly functional, delivering hard value to SMEs. In essence, the value would be to obtain a resolution that is really final and get the peace of mind, whilst preserving business relationships.

This initial version would include the following essential elements:

1. An underlying case data representation and case management flow that is legally compliant and ‘curates’ disputes within the platform from end to end. This should have an API that allows a variety of settlement processes and tools to be built on top, the collection of which can be enhanced over time.
2. An implementation of Tier 1 that captures data while the end-user is exploring their options and getting to know the platform. This should have the possibility to integrate sector-specific branding or advice sources, in particular from the trade associations. The design of Tier 1 will initially focus on a specific class of SME user, but the system will be usable by as

broad a range of SMEs as possible. Insofar as a common user experience can be provided, this will be highly desirable. If necessary, however, the architecture will admit the creation of different interfaces for different SME sectors.

3. An implementation of at least two settlement tools within Tier 2. The first would provide the negotiation function that would allow the disputants to move towards settlement between them. The second would be a 'demonstrator' interface for large corporates to manage cases in which they are the debtor. The purpose of this in Phase 2 is to gain buy-in for engagement by large corporates, rather than as an immediately deployable interface.
4. A 'settlement builder' tool that the parties use in Tier 2 to forge a contract between them, in case of a successful negotiation. Optionally, this could be integrated with a payments handling system that could record the execution of the contract and launch an enforcement case into HMCTS if it is breached.
5. The Phase 2 platform will initially rely on a simplistic mechanism for passing cases to ADR providers and getting a log of results back from them. The output could, if necessary, be on documents on (digital) paper, and the results received with a simple user interface operated by the ADR provider. In time, this would be expected to grow into a fully supported 'ADR marketplace'.

The high-level technical design and requirements that follow in sections 8 and 9 are for this First Release solution.

7.1 Features for Future Consideration

Several extensions could be considered for the platform after the completion of Phase 2. In addition, of course, to continuous enhancement of the negotiation tools in Tier 2, potential extensions include:

1. Full implementation and deployment of the large corporate debtor interface.
2. Accommodation of multi-party disputes, beyond a single creditor and a single debtor.
3. A smart contract implementation of settlement contracts, with monitoring for compliance by the platform.
4. The capability of debtors with complaints about the quality of goods or services received to themselves initiate a dispute on the platform. For Phase 2, only creditors may initiate a dispute.

8. High-Level Technical Design

8.1. Overview

The application leverages the common infrastructure 3-tier architectural pattern in the execution environment hosted in the cloud. This pattern segregates into 3 different layers – one public and 2 private layers. The intent is the public layer acts as a shield over the private layers. Public layers are accessible from the internet. However, the accessibility to the private layers are strictly controlled and is only accessible from inside the cloud network. The separation of layers is based on well-architected cloud frameworks and ensures security of information and assets.

Another aspect of our architectural pattern is to achieve high availability by distributing applications across multiple availability zones in a region. For AWS and Azure - the two market leading cloud providers - every region is a geographical area and has multiple availability zones in each region. As per best practices, we have split our network across 3 zones to achieve high availability and redundancy. In case of failure of instances in one zone, the traffic will be seamlessly re-routed to another.

Our network is split into 3 tiers and can be configured across 3 zones using subnets

- Web Layer: This layer consists of 3 public subnets with one each in every AZ
- Application Layer: This layer consists of 3 private subnets with one each in every AZ
- Database Layer: This layer consists of 3 private subnets with one each in every AZ

8.2. Illustrative Key Technologies

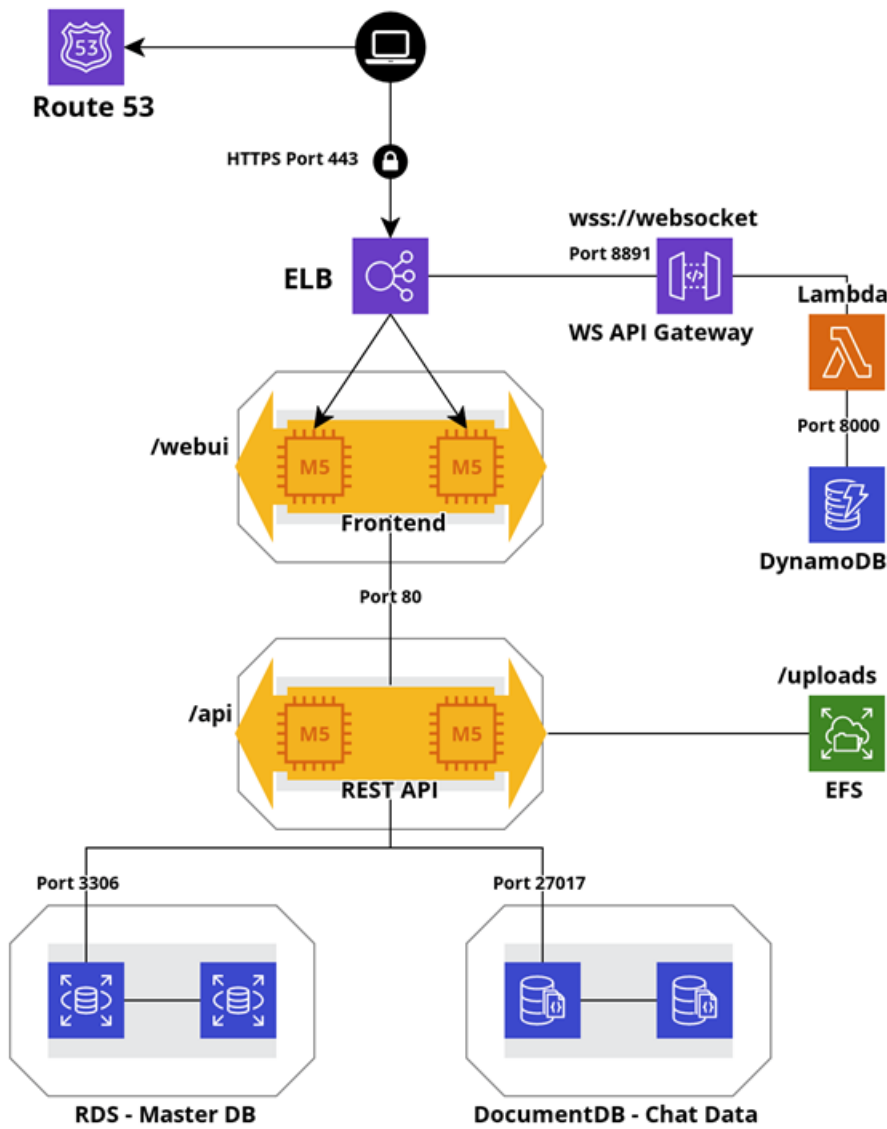
In the following text we provide an illustration of suitable technologies with which the solution could be built. However, it would be open to the supplier to propose an alternative technology stack:

Technology	Version
Angular	7.2
Ant Design for Angular	7.5
JQuery	3.4.1
Angular PDF Viewer	5.3
Chart.js	2.9
Stripe	2.0
PayPal	5.0
PHP	7.2
Laravel	5.8
RDS - MySQL	8.x
DocumentDB	Latest (AWS)
AWS API Gateway	Latest (AWS)

AWS EBS	Latest (AWS)
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8.3. Illustrative Technical Architecture

Below we present an architecture and set of components to illustrate an appropriate solution. It would be open to the developer to propose alternative architectures with similar characteristics of scalability, separation of concerns, redundancy and security:



ELB - An Elastic Load Balancing load balancer configured to distribute requests to the instances running our application. A load balancer also eliminates the need to expose our instances directly to the internet.

Frontend - An Amazon Elastic Compute Cloud (Amazon EC2) virtual machine (2 M5 instances) configured to run docker based web app (HTML) on the Nginx platform as Frontend web/ui.

REST API - An Amazon Elastic Compute Cloud (Amazon EC2) virtual machine (2 M5 instances) configured to run PHP - Laravel based web app on the Nginx Platform as Backend / REST API.

WS API Gateway - AWS API Gateway is deployed with web socket to serve Chat application process in our web app.

EFS Files & Folders - AWS EFS storage used to store all case files & folders which are uploaded in our web app

RDS Master DB - AWS RDS MySQL is used as the Master Database for our web app.

Document DB Chat Data - AWS DocumentDB (NoSQL) as replacement for MongoDB is used to store Chat messages in our web app.

AWS Lambda – AWS Lambda functions are invoked for managing chat sessions in our web app.

AWS DynamoDB - Amazon DynamoDB is a key-value and document database used for storing session information during chat in our web app.

9. Requirements for the First Release

9.1. First Release Purpose and Scope

SMEs require a solution for debt disputes that is clear, user-friendly, simple, affordable, and expedient. The proposed platform and process are specialized to SMEs in pursuit of these aims. As already noted, there is a wide variety of SMEs that might benefit – and what would suit a sole trader or small family firm, at least at the interface level, might not be so appropriate for a larger firm, with a finance director and other officers. The First Release will therefore address one important sector of SMEs with sufficient scale to establish visibility and impact for the platform, whilst the core platform will be general so that other solutions can also be realised.

For the First Release, we exclude – for example – solicitors. However, the platform will be architected so that these and additional users can be integrated in a later phase.

The primary platform and First Release solution users are the Creditor, Debtor (including Large Corporate Debtor) and ADR Provider. Non-targeted users and non-users of the First Release are enumerated in sections 5.3 and 5.4

The essential functionality required for the First Release is the capacity to negotiate a settlement and capture it into a digital settlement contract, suitable for enforcement by court action in case of failure to perform. In cases where the Debtor agrees to the debt but cannot straightforwardly pay, the platform will assist the agreement of a payment schedule or other reasonable compromise as part of the contract of settlement. In cases where there the Debtor has an objection to paying, the platform will assist the parties in gaining agreement on the objective facts they can agree on – narrowing the region of disagreement as much as possible and characterising it in objective terms.

The First Release provides an exemplar realisation of a complete online, web-based dispute resolution system for an important sector of SMEs – with all the tools and interfaces needed to realise a basic but effective end-to-end debt dispute resolution process. The SME profile for this sector will be chosen to maximise early impact and establish visibility for the platform.

The First Release would establish the platform’s entry into the UK ecosystem, whilst addressing the urgent needs of the sector of SMEs targeted. As traction and experience are gained, this system will be extended – and others created – to enhance effectiveness, build capacity, and widen the addressable market.

9.2. Functional requirements

9.2.1. Tier 1 First Release Requirements

Ref.	User(s).	Description
T101	Cr.	The user MUST be able access Tier 1 of the First Release on the world-wide web, anonymously and without charge.
T102	Cr.	The First Release MUST offer a user experience that is clear, user-friendly, and simple.
T103	CR.	The Tier 1 user experience SHOULD be attractive and ‘sticky’, encouraging users to stay on the platform until either their dispute is qualified out, or they elect to proceed to Tier 2.
T104	Cr.	The First Release SHOULD allow users who are members of a trade association to identify and authenticate their membership, whilst remaining anonymous.
T105	Cr.	The First Release’s privacy policy MUST explain in clear terms the sense in which access to Tier 1 is ‘anonymous’.
T106	Cr.	The First Release MUST allow the user to leave their session and return later, returning to the prior state of their engagement with Tier 1.

T107	Cr.	The First Release SHOULD offer the option for registered Platform users to log into their account, relinquishing their anonymous standing, whilst remaining in Tier 1.
T108 a	Cr.	For registered users who are logged in, the Platform COULD automatically populate, using any relevant user account data, all relevant information fields that are normally requested from anonymous users.
T108 b	Cr.	The Platform MUST allow the user subsequently to change any information fields that have been populated automatically using persistent account data.
T109	Cr.	The First Release MUST, in Tier 1, explain clearly and in simple terms the scope of the First Release's services, the resolution process it offers, the cost, and the expected time it will take.
T110	Cr.	The First Release COULD provide an interactive question-answering facility for users who have questions about the First Release services.
T111	Cr.	The First Release MUST elicit from the user sufficient basic facts of the dispute to qualify them for use of the First Release's services.
T112	Cr.	The First Release MUST provide all users, without charge, general information suited to their dispute.
T113	Cr.	The First Release SHOULD offer users who have authenticated as members of a trade association such specialist information as has been provided by the trade association for this purpose.
T114	Cr.	The First Release MUST NOT offer users with qualified disputes who have authenticated as members of a trade association advice that will encourage them to leave the platform.

T115	Cr.	The First Release MUST offer users whose dispute is not qualified for the platform advice and signposting to other sources of help.
T116	Cr.	The First Release SHOULD offer users whose dispute is not qualified for the platform, and who have authenticated as members of a trade association, such specialist advice and signposting to other sources of help as have been provided by the trade association for this purpose.
T117	Cr.	The First Release SHOULD provide a clear indication in Tier 1 of the large corporates that have signed up to use the platform.
T118	Cr.	The First Release MUST offer a qualified user the opportunity to proceed to Tier 2.
T119	TA	An SME trade association SHOULD be able to apply their branding and specialist signposting to the platform.

9.2.2. Tier 2 First Release Requirements – Stage 2.1

Stage 2.1 - Creditor Registration

Ref.	User(s).	Description
T201	Cr.	The user SHOULD be reminded of the process they are about to enter, including its costs, timescales, and potential outcomes.
T202	Cr, Db. CDB.	The First Release MUST be designed so that the entire dispute resolution process aims to preserve good business relationships.
T203	Cr.	The First Release MUST ask the user to indicate whether they already have a platform account or not.

T204	Cr.	If the user does not have a platform account, the First Release MUST invite them to register on the platform and create an account, including at least a user-id, an email address, a password, the name of their SME, how many employees the SME has, and the annual turnover of the SME. The platform logs this user information in a profile associated with the SME and user-id.
T205	Cr.	The platform COULD automatically obtain further background information about the SME from online public sources, such as Companies House. Only such information will be obtained as can be utilised in a dispute resolution to the benefit of the user.
T206	Cr.	If the user already has a platform account, the First Release MUST ask the user to log into their account.
T207	Cr.	The Platform MUST offer users with a registered account a means to reset their password if they have forgotten it.
T208	Cr.	The Platform MUST offer users with a registered account a means to edit their account details.
T209	Cr.	The First Release MUST obtain the basic details of the dispute from the Cr. user: the identity of the counterparty company, the nature of the dispute, the amount of the claim, and any contact information for the counterparty the user can supply.
T210	Cr.	The First Release WILL NOT HAVE a process for handling multi-party disputes, beyond a single Cr. and a single Db. or CDb.
T211	Cr, Db, CDb.	The Platform MUST be designed in such a way that multi-party disputes, with more than a single Cr. and a single Db. or CDb, can in future be accommodated.
T212	Cr.	The First Release MUST make clear the information about the dispute that will be sent to the counterparty when initially contacted and gain explicit consent to communicate this information.

T213	Cr.	The platform COULD automatically obtain further background information about the counterparty from online public sources, such as Companies House. Only such information will be obtained as can be utilised in a dispute resolution to the benefit of the user and in a way that preserves or enhances business relationships.
T214	Cr.	The Platform MUST NOT accept disputes where the counterparty is a private individual.
T215	Cr.	Where the dispute is with a CDb that has signed up to use the platform, the First Release MUST inform the Cr. and seek to assist with provision of contact details.
T216	Cr.	Where the user is unsure of the correct contact details of the counterparty, the First Release COULD provide assistance or advice for locating this information.
T217	Cr.	The First Release MUST assist the user in articulating a chronology of key events leading to the dispute, including the dates of purchase orders, invoices, payments due, and payments made.
T218	Cr.	The First Release MUST offer to receive electronic copies of any evidence the user wishes to lodge in support of the dispute.
T218 b	Cr.	The admissible categories of evidence that can be lodged MUST be predetermined by the Platform.
T219	Cr.	The platform MUST create a structured representation of the dispute that ties together the basic details, the chronology, and the evidence – and display this to the user in an objective and clear form.
T220	Cr.	The First Release MUST invite the user to request that a suitable notification be sent to the counterparty, with such details as will substantiate the authenticity of the notice.

9.2.3. Tier 2 First Release Requirements – Stage 2.2

Stage 2.2 – Respondent Receives Invitation

Ref.	User(s).	Description
T221	Db.	The Platform MUST send an email notifying the counterparty of the claim, providing such details as will substantiate the authenticity of the notice.
T222	Db.	The platform MUST provide, in the notification email, an easy and secure means for the counterparty to access Tier 2 of the First Release and directly access the dispute case – without registration.
T223	CDb.	If the Counterparty is a large corporation signed up to use the platform, the First Release MUST provide a notification of the dispute case in the corporation's dispute management interface.
T224	CDb.	The platform MUST offer means for expedited, efficient, and professional executions of all counterparty actions by large corporates that have signed up to settle disputes with the platform.
T225	Db, CDb, Cr.	In notifying the counterparty, the First Release MUST always indicate a deadline by which a response is required, which information is known to the Cr. user.
T226	Db, CDb.	The First Release MUST ask the counterparty user to indicate whether they already have a platform account or not, unless they are a large corporation signed up to use the platform.
T227	Cr.	The First Release MUST keep the Cr. informed of the counterparty's response, or lack of response in case the deadline has passed.
T228	Cr.	In case there has been no response from the counterparty to the invitation to engage, the First Release COULD offer the Cr. a choice between reissuing the invitation or launching a court

		claim in the online money claims systems of HMCTS or arbitration. If the debtor has contractually engaged to use the platform then the matter could proceed to a default adjudication.
T229	Cr, MoJ.	Where an invitation to engage has been persistently declined or ignored by the counterparty, and the Cr. wishes to launch a court claim, the Platform MUST create a claim in the court system in a clearly defined representation and as efficiently available for court system handling as is possible.
T230	Db, CDb.	The First Release MUST inform the counterparty, clearly and in simple terms, the scope of the First Release's services, the resolution process it offers, the cost, and the expected time it will take. The First Release MUST make clear the reasons for using the process to the counterparty.
T231	Db, CDb.	The First Release MUST gain explicit agreement from the counterparty to enter the resolution process and work within its rules. (This could be a simple re-confirmation if they have already agreed.)
T232	Cr.	The First Release MUST inform the Cr. of the counterparty's willingness to enter the resolution process.
T233	Cr, MoJ.	Where an invitation to enter the process has been explicitly declined or ignored by the counterparty, and the Cr. wishes to launch a court claim, the Platform MUST create a claim in the court system in a clearly defined representation and as efficiently available for court system handling as is possible.
T234	Db, CDb.	The First Release MUST provide the counterparty with access to the dispute basic details, chronology and evidence – inviting them to review the case.
T235	Db, CDb.	The First Release MUST offer the counterparty the choice between agreeing it is liable and denying it is liable.

9.2.4. Tier 2 First Release Requirements - Stage 2.3a

Stage 2.3a - Debtor accepts liability

Ref.	User(s).	Description
T236	Cr, Db, CDB.	The First Release MUST inform both the Cr. and the counterparty that the counterparty agrees it is liable and invite them to work together to agree a settlement plan.
T237	Cr, Db, CDB.	The Platform MUST obtain explicit agreement from both parties to enter the settlement negotiation process.
T238	Cr, Db, CDB.	The First Release MUST gain explicit agreement from both parties to enter the settlement agreement process and to work within its rules. The benefits to both sides MUST be clearly explained.
T239	Cr, Db, CDB.	The First Release MUST provide both parties with access to a <i>settlement builder</i> tool, by which they can together agree a payment plan, including amounts and dates.
T240	Cr, Db, CDB.	The Platform MUST implement a definite 'space' of possible payment plan terms, which the parties can explore in negotiation.
T241	Cr, Db, CDB.	The Platform MUST encapsulate the settlement reached in a binding contract of settlement, which can give rise to court action if breached.

9.2.5. Tier 2 First Release Requirements - Stage 2.3b

Stage 2.3b - Debtor denies liability

Ref.	User(s).	Description
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T242	Cr, Db, CDb.	The First Release MUST inform both the Cr. and the counterparty that the counterparty denies it is liable and invite them to work together to review the grounds for disagreement in an objective manner..
T243	Cr, Db, CDb.	The Platform MUST obtain explicit agreement from both parties to enter the Settlement process.
T244	Cr, Db, CDb.	The First Release MUST gain explicit agreement from both parties to enter the Settlement process and to work within its rules. The benefits to both sides MUST be clearly explained.
T245	Cr, Db, CDb.	The platform MUST determine the scope of disagreement by offering statements to which the parties must respond and each state whether they agree or disagree. This process will be made as objective, dispassionate, and simple as possible.
T246	Cr, Db, CDb.	The platform MUST record the facts that are agreed, about which the parties disagree, and that have not been determined – and make this information easy to view and review by both parties at any time.
T247	Cr, Db, CDb.	The Platform MUST allow either party, at any time in the stage 2.2b process, to make an offer to the other party. The offers allowed by the platform MUST be consistent with the payment plans that can be created using the settlement builder.
T248	Cr, Db, CDb.	The Platform MUST place a predetermined limit on the number of offers that each party may make during stage 2.2b of the process.
T249	Cr, Db, CDb.	The Platform MUST make it easy for the parties to monitor the number of offers made throughout stage 2.2b.
T250	Cr, Db, CDb.	If an offer made during stage 2.2b is informally accepted, the platform MUST transfer the parties to the most efficient point within the stage 2.2a process. They must not be made to start again or redo any work.

T251	Cr, Db, CDb.	If the parties have reached the offer limit, the platform MUST initiate progression to Tier 3. The benefits, costs, and timelines must be made clear.
T252	Cr, Db, CDb.	The First Release MUST make clear to the parties what platform-recorded information about the dispute will be made available to the ADR professional who assists them in Tier 3.
T253	Cr, Db, CDb.	The First Release MUST make progression to Tier 3 available, by agreement, to the parties at any point during stage 2.2 – but MUST offer encouragement and reasons to settle the matter between themselves.

9.2.6. Tier 3 First Release Requirements

Ref.	User(s).	Description
T301	Cr, Db, CDb.	On entry to Tier 3, the First Release COULD remind the parties of the process they are about to enter, including its costs, timescales, and potential outcomes.
T302	Cr, Db, CDb.	The Platform MUST obtain explicit agreement from both parties about which process provided by the ADR Marketplace they wish to undertake first: mediation or adjudication.
T303	Cr, Db, CDb, AP.	The First Release MUST provide a means by which an available and willing external ADR provider is identified to assist with the dispute.
T304	AP	The Platform COULD give the ADR provider pool access to basic facts about the dispute, suitably anonymised, to assist in matching ADR providers to the dispute.
T305	Cr, Db, CDb, AP.	The First Release MUST gain agreement from the parties that resolution of the dispute will be assisted by the identified ADR professional.
T306	AP.	The Platform MUST prepare a dossier for the ADR professional, comprising basic information about the dispute,

		<p>such as the chronology, any offers to settle, the points of the parties' agreement and disagreement, and supporting documents uploaded by the parties. In signing up to the platform, the parties agree to this dossier being shared with the ADR professional.</p> <p>NB: some materials the dossier will be subject to the 'without prejudice' rule if the dispute is brought to arbitration or litigation <i>outside</i> the platform (in which case these materials will be removed from the data bundle transferred to the arbitrator or HMCTS).</p>
T307	Cr, Db, CDb, AP.	The Platform MUST give a deadline by which the ADR assisted process will be completed.
T308	Cr, Db, CDb, AP.	The ADR professional and parties engage in discussions aimed at forging a settlement. The First Release COULD provide and mandate evidence sharing, messaging, audio and video technology to facilitate this.
T309	AP	The First Release MUST provide a mechanism by which the ADR Professional will create a settlement contract (for Mediation) or Decision (for Adjudication) in the platform for the dispute of the same kind as the settlement builder creates.
T310	AP	The First Release MUST allow only the Platform's financial payment plan terms to be used in any settlement forged with the assistance of an ADR professional.
T311	AP, Cr, Db, CDb.	The First Release SHOULD allow further non-financial settlement terms to be agreed through an ADR provider and recorded on the platform than could be agreed in Tier 2.
T312	AP	The Platform MUST provide a mechanism by which, in the case that settlement within the required timeframe has not been possible to achieve with the assistance of the ADR professional, the ADR professional will record this outcome on the platform.

T313	Cr.	In the case that settlement has not been achieved via mediation with an ADR professional, the platform MUST escalate to adjudication (return to requirement T302).
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9.3. Integration Requirements

Integration with other services in the ecosystem is important to the ODR platform. In particular the First Release users should be confident that data in the platform can be transferred to HMCTS should the dispute escalate (see Tier 3).

The mechanism for HMCTS integration is currently to export a 'data bundle'. This is an HMCTS term for a set of structured files which can be uploaded to HMCTS to raise a case in MCOL. Currently this process would require some manual attention but can be made much easier by the platform providing a carefully designed export tool. The user experience would be of an expedited process.

Looking forward the First Release must be aligned to the HMCTS reform programme which will establish future end-to-end API integrations. The reform program targets 2023 for delivery. It is difficult to provide more detail at this early stage except to state that the architecture described below is designed to support API integration with HMCTS (at the First Release stage) and third-party systems (such as case management systems) in the future.

The interface with Arbitration Providers has similar requirements to HMCTS. We provide an open platform that can call APIs on third-party systems and use structure file export as a fallback mechanism.

9.4. Non-functional requirements

9.4.1. Technical Features of Current System

The system should be hosted on a cloud platform. This provides flexible, scalable and cost-effective hosting with good support for effective development.

As a direct consequence of the architectural choices (see 9.8.3) the platform should be technology agnostic as needed. The solution will consist in a web application (see 9.8.11 for supported browsers and screen resolutions). The solution will not include a mobile phone application.

9.4.2. Volumetrics

It is reasonable to design the First Release software platform to manage 250,000 users from the beginning. This is based on data from sources such as the Claims Portal UK which had 29,000 claimant representatives and 20,000 insurer/compensators registered in September 2020.⁷ Over Q2 2020 there were 77,000 specified money claims.⁸ As a cloud application the platform should be able to scale to more users without noticeable impact on performance.

9.4.3. Implementation considerations

The platform should be architected as a set of software services (a widely used approach e.g. https://en.wikipedia.org/wiki/Service-oriented_architecture) following well-known architectural principles to support cloud development: this will enhance the scalability and maintainability of the platform while still being flexible as to a solution.

The front end should be developed following user-centred techniques to provide the most intuitive experience possible for as many of the users regardless of demographics such as age or technological background.

9.4.4. Training

⁷ <https://www.claimsportal.org.uk/media/3115/claims-portal-service-report-september-2020.pdf>.

⁸

<https://www.gov.uk/government/publications/civil-justice-statistics-quarterly-april-to-june-2020/civil-justice-statistics-quarterly-april-to-june-2020#money-claims>.

The objective is that the user interface will be sufficiently intuitive that most users will not need training to use the application. The user interface should include an onboarding flow for new users. Online documentation will be available to support users who need further guidance or for specialist tasks such as setting up an account.

9.4.5. Accessibility

The application should meet W3C Web Content Accessibility Guidelines level 2 <https://www.w3.org/TR/WCAG20/> to comply with UK guidelines.

The platform needs to be available in English and Welsh according to the preference of the user.

9.4.6. Performance

The services that make up the application should not have response times greater than 3 seconds for any request. However, some interactions with the user may depend on external factors such as signal quality or broadband connection and the system should be resilient in these cases.

9.4.7. Audit Requirements

The solution should provide an audit of changes made by the user and/or administrators and it must be possible for system developers and administrators to access the recorded information if they need it. It must be possible to set a time limit on the retention of audit records.

9.4.8. Business Security and Data Protection

The application will record sensitive information and so it should comply with data protection regulations in place, specifically GDPR. The application should provide a high level of data security such as ISO 27001.

Any portals used must support standard web security protocols e.g. SSL, this also includes the communication between public available services that make up the application.

9.4.9. Supported browsers and screen resolutions

The application will work with the following screen resolutions:

- larger mobile phones (devices with resolutions $\geq 576\text{px}$);
- tablets ($\geq 768\text{px}$);
- laptops ($\geq 992\text{px}$);
- desktops ($\geq 1200\text{px}$)

The application will be compatible with the following browsers:

- Windows
 - Edge (latest version)
 - Google Chrome (latest version)
 - Mozilla Firefox (latest version)
- macOS
 - Google Chrome (latest version)
 - Mozilla Firefox (latest version)
 - Safari (latest version)

10. Conclusion

This document has presented a high-level solution design for an Online Dispute Resolution (ODR) platform addressing the immediate needs of SMEs. The level of detail and completeness of the solution design has been matched to successful past Invitations to Tender as the aim is to describe the solution but allow potential future suppliers to propose different innovative implementations. Any subsequent implementation project should include an initial phase of more detailed design and requirements clarification. However, this Solution Design has defined how the ODR platform sits within the legislative and technical environment, how enforcement will be achieved and the main user flows through the system. The proposed solution also highlights the importance of integration with external systems so that the new platform transforms the current ODR market rather than simply being another product.

This solution design is also detailed enough that firm expectations can be set regarding platform development. The costs of development are addressed in D4 Business Plan. Using modern cloud development architecture and tools a first feature complete version of the platform could be brought to market in 9 months. This should include a concerted effort at UX design since it is noticeable that our description of an effective ODR platform uses concepts like 'sticky', 'friendly' at Tier 1 and 'unemotional' and 'de-escalation' at Tier 2.

In the course of researching and developing this Solution Design we have become convinced that the proposed ODR platform is innovative, achievable and able to meet the needs of SMEs in a new disruptive manner.

D4: Business case

A high level business case for an ODR platform



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Introduction

This document proposes a solution to the problem of late payments arising from disputes and provides an estimate of the funding required to create and introduce the solution along with an assessment that shows that the project can be self-sustaining after the initial investment. More specifically, the document outlines a business model that includes a hypothetical pricing and top-down estimations of the number of users, the number of times the service is used, revenues, and costs. An Excel file with more detailed information accompanies this document.¹

This document also analyses the competitive advantage of the solution proposed. This document is an integration of the two previous drafts, D2 and D3. After touching on the funding model options that can be considered, it explains why an investment in this solution can be paid back in four years and will generate a significant desirable socio-economic impact on the UK SME sector.

¹ Cfr.

https://docs.google.com/spreadsheets/d/1IE1CSbePUsGy2QuD_k-AnVTj7mLCiMA4KQdsAeH9V4Y/edit#gid=2091287133

1. Business model and value proposition

Time and costs are of essence for dispute resolution for small and medium enterprises (SMEs).

Mediation and adjudication services have the potential to resolve disputes faster than government courts, especially when they are offered online.

The business model proposes a 'pay per service' model for these services rather than a flat access fee. In the model, the platform keeps an average of 1% of the value of the dispute service fee charged by the mediators or adjudicators. There is no cost to embed a dispute resolution clause in a contract. The cost is only incurred if a dispute arises and is sent by one of the parties to the platform.

We have estimated that the total mediation/adjudication fees will be equal to or lower than fees for existing solutions, which cost from 3% to 10% of the dispute's value for large disputes and a maximum of 10% for small disputes. In phase two of this project we would seek to validate these estimates.

The proposed solution imposes time limits on procedures, so that in the worst case scenario the entire dispute resolution procedure lasts 77 days maximum.

Facilitated negotiation is a cheaper approach that can work between parties that are relatively amicable. We propose a 'pay for success' or 'success guaranteed' no-risk model for facilitated negotiation. Parties can specify facilitated negotiation as a first resort in their contracts for no charge. If they use a facilitated negotiation service but are unable to resolve their dispute through the service there is also no charge. They are required to pay only if they successfully resolve their dispute. A price of GBP 49 is consistent with normal SAAS pricing and has been used for our projections.

	<i>Time Limit</i>	<i>Cost / Business Model</i>
Facilitated Negotiation	14 days	GBP49 ticket paid by the creditor <u>only in case of success</u> .
Mediation	14 days	<ul style="list-style-type: none"> platform fee: 1% of the claim's value mediator's fee: 3%-10% of the claim's value
Adjudication	21 days	<ul style="list-style-type: none"> platform fee: 1% of the claim's value adjudicator's fee: 3%-10% of the claim's value
Enforcement²	28 days	TBD

2. Faster, cheaper, user-friendly justice: competitive advantages

This solution is faster and cheaper than courts. It also addresses the 43% of disputes (according to the FSB Report³) today solved in informal ways with ad hoc facilitated negotiation procedures. In this case the competitive advantage stands in providing an effective tool which is safe and secure and fast, compared to long informal procedures that take weeks or months

It will be more affordable than currently existing ADRs thanks to the digitisation of the procedure. It does not present a threat of competition for the current dispute resolution practitioners; it is a tool that they are welcome to use that will expand the market for their services.

² This hypothesis arises from the proposal of legislative intervention to deliver fast-track enforcement procedure before the Courts reducing time from 62 days to 28 days.

³

<https://www.fsb.org.uk/resources-page/tied-up--unravelling-the-dispute-resolution-process-for-small-firms.html>

Importantly, the user experience is at the centre. The tool can only help if people are comfortable using it. To ensure rapid adoption, the project will focus on offering a form of user-friendly justice, keeping the experience of the user in mind at all times in the design process.

2.1. Time vs Courts

Based on a hypothetical case where an unsuccessful facilitated negotiation attempt on the platform precedes an arbitration and enforcement is needed after the arbitration award has been made, we estimate the solution can save an SME 333 days of chasing a late payment.⁴

	Courts	New Solution
Total Time (days)	437	104
Filing and service 30	30	14 (facilitated negotiation)
Trial and judgement	345	28 (adjudication)
Enforcement	62	62 ⁵

⁴ Cfr. the Doing Business Report

https://www.doingbusiness.org/en/data/exploreeconomies/united-kingdom#DB_ec

⁵ The proposal advanced in D2 suggests the introduction of a faster digital procedure for enforcing the adjudicated decision. For the purpose of the present estimation we did not take any into consideration

2.2. Costs vs Courts

To analyse the cost structure of resolving a dispute conventionally or with the platform from the user perspective, we can look at data in the Doing Business Report⁶:

- The average court fee is 9.5% of the dispute value according to the DBR data. The model proposes a fee of 5% for an adjudication procedure on the platform based on market conditions and the platform's efficient approach. The platform can deliver dispute resolution at close to half of the cost.
- In the model we assume that there will be no attorney fees in a dispute over a small amount (i.e. GBP 2500) The solution will be designed to guide users so that people can use it without a lawyer. In cases of disputes over larger amounts, like the ones taken in consideration by the World Bank analysis (60K+ value), it is reasonable to assume that the attorney fees for a quick, digital procedure of adjudication will not be the same for a procedural, offline Court procedure that extends for more than 400 days. This is an assumption that we cannot validate until the product is out in the market but we believe it is a good starting point.

Cash flow is a key concern for most SMEs. The great advantage of this system is that the party that is owed money will be able to recover their money quickly - in less than three months instead of waiting over a year - offsetting the small fee they pay to use the service

⁶ The Doing Business Report of the World Bank measures the cost of the dispute with this logic: https://www.doingbusiness.org/en/data/exploreconomies/united-kingdom#DB_ec

	Courts	New Solution
Total Costs (percentage of the value of the dispute)	45.7%	TBD after the validation phase.
Attorney Fees	35%	Expected to be lower. ⁷
Court Fees	9.5%	5%
Enforcement Fees	1.2%	TBD

⁷ This assumption must be validated in the future. A precise estimate cannot be made until people begin to use the platform.

3. Financials

The primary goal of this business case is to answer the question “is this project self-sustainable?”

Given the lack of data it is not possible to make a precise financial forecast for revenue, but it is possible to understand whether the market dimension and the existing benchmarks suggest that the business model will be able to produce revenues and profits. While revenue predictions are uncertain, it is possible to be more precise with regard to the costs of the initiative. The funding required is based on the costs the project is expected to incur and the velocity and amount of the expected revenues.

3.1. Summary

3.1.1. Top Line

The key findings are that this business can be self-sustainable and, ideally, can be highly profitable, as is common in successful software-based solutions that scale.

Given the market size and a conservative market penetration for a solution that offers a good product-market fit, we project Y3 revenues of more than 3M and growing up to above 10M annually in the long term.

This conservative scenario assumes a relatively slow take off in Y0, Y1 and Y2.

		Y1	Y2	Y3	Y4	Y5	Y6
Revenues	£0	£436	£1,017	£3,522	£8,382	£13,958	£14,656
Total costs from PL	£486	£1,465	£1,710	£2,895	£3,245	£3,650	£3,650
EBITDA	-£486	-£1,029	-£693	£627	£5,137	£10,308	£11,006

*amounts expressed in thousands of GDP

3.1.2. Dispute Volumes

	Y1	Y2	Y3	Y4	Y5	Y6
Total number of yearly disputes solved by the platform	5,663	13,530	32,350	54,935	93,292	97,957

3.1.3. Funding required: GBP 3.5M and payback in Y4

The estimated funding need of GBP 3.5M includes the losses on Y1 and Y2, subsequent to a Validation Phase of up to 12 months with a limited team. The estimate includes a buffer for possible delays that is equal to 4 months of average Y1 monthly expenditures costs.

According to the cash flow expectations in a conservative scenario, the model predicts that this business will need three years to take off. Between Y3 and Y4 it should be possible to pay back the initial funding.

3.1.4. Validation Phase for 6-9 months

Given the lack of data for completing an accurate bottom-up financial forecast, we suggest allocating 500K (of the 3.5M) for the initial 6-9 months with a limited team of 3 people working to create a minimum viable product. The goal is to refine and validate the product-market fit and pre-validate some distribution channels before the enlargement of the team and the development of a complete platform. This will allow us to review and adjust the current estimates and projections and mitigate the risks of the initiative based on more complete information.

3.2. Funding Model Options

In terms of funding models, we have considered that Tech Nation (or other relevant body) could receive public funding in the form of a soft-loan to be paid back in 4 years. This model would allow the team to build and run the project in a non-exclusively entrepreneurial way, where profits are sought but in balance with public good.

As an alternative, the project could be funded with a Mixed Lending Equity model in which private entities would run the project. In this case, the government could limit the risks and find entrepreneurs in the market who are willing to co-fund and run the project.

3.3. Assumption of public-backed initiative

One of our key findings is that penetrating the market without public backing would entail significantly higher customer acquisition costs: Expenditures would be needed both for making the solution known and for convincing the user to adopt it. This business case is made assuming that the disputes will come with a much lower customer acquisition cost generated thanks to the official endorsement of public institutions.

Just as an example, we have estimated the required marketing budget for a venture without active endorsement from major public institutions to contrast with the budget a publicly supported venture would require. In our estimate, the customer acquisition cost starts at GBP 75.69 and decreases over the years. The projection indicates that more than GBP 5M would have to be spent in year 3 and GBP 10M in year 5.

Marketing metrics (Startup Scenario)	Validation phase	Y1	Y2	Y3	Y4	Y5	Y6
Total expenses in marketing (Ads)	£15,000	£1,762,117	£2,466,964	£5,624,677	£6,412,132	£10,900,624	£1,323,647
CAC		£75.69	£75.69	£71.91	£68.31	£68.31	£68.31

One could ask whether the estimate of costs in a public scenario should include new costs to other public entities for promoting the platform. We have instead assumed that existing internal resources are adequate and will not be supplemented. For the other departments and entities it seems reasonable to assume that the communication channels are already in place and there will not be new additional costs associated with endorsing the solution.

4. Revenues

4.1. Methodology

Our goal in estimating revenue is to determine whether the project can be sustainable at scale.

A core assumption of our model is that adoption of the platform by users has been encouraged by the endorsement of public institutions such as MoJ, HMCTS, FSB Commissioner, who have shown the effectiveness of this strategy by successfully endorsing Online Civil Money Claims.

The goal of this estimate is to provide a conservative or worst case scenario given the fact that the product has a product-market fit that will have already been validated in the first 6-9 month phase of the dedicated phase.

We adopted a top-down approach based on the market size identified as GBP 12.4B of value in disputes per year. This data comes from the FSB Report.⁸ We estimated a progressive⁹ market penetration that is lower than the benchmark set by Online Money Claims because both parties must opt in to this system voluntarily whereas a claimant can compel their counterparty to use OCMC. The market penetration estimate represents the projected effect of using software vendors as a Distribution Channel.

We established two potential target markets: SME disputes and disputes between medium and large enterprises and their customers, as distinct from disputes where both counterparties are large companies. The model does not contemplate solving disputes between large companies that can involve very large sums (though the platform is viable for this use case). We have assumed an average dispute value of

⁸ Cfr. p.6 of the FSB Report, 2016

⁹ These are the assumptions: Small business user base growth rates: 140% for the first three years, 70% for year 4 and 5, 5% after year 5. Medium/large business growth rate: 100% for the first three years, 60% for year 4 and 5, 5% after year 5

GBP 18,000 for SME disputes. For disputes between medium and large companies and their customers, we have assumed a lower average value of GBP 5,000. The FSB Report indicates that the SME market is GBP 12.4B.

The model assumes the following penetration rates for the SME and MLE dispute resolution markets:

<i>Small Businesses</i>	Y1	Y2	Y3	Y4	Y5	Y6
Estimated Market Penetration	0.80%	1.92%	4.61%	7.83%	13.32%	13.98%

<i>Medium and Large Businesses</i>	Y1	Y2	Y3	Y4	Y5	Y6
Estimated Market Penetration	0.35%	0.70%	1.40%	2.24%	3.58%	3.76%

As seen, the market penetration at Y5 for SME disputes is 13.3% and for the ML disputes is 3.6%. This penetration rate estimated for at Y5 can be considered conservative, if this solution is officially endorsed by public institutions.¹⁰

Other important assumptions are:

- 60% of the disputes are solved with the Facilitated Negotiation procedure and the 40% are solved with mediation or adjudication. This assumption has been made for conservative purposes, the revenues are higher for mediation and adjudication.
- To avoid double counting and ensure a conservative estimate we did not consider the possibility of unsuccessful mediation procedures that are ultimately resolved by adjudication procedures.
- We did not include any platform fee for enforcement since this depends on strategic elements that today are not defined.

¹⁰ Cfr. <https://www.lightercapital.com/blog/what-is-market-penetration-strategy-definition-examples>

4.2. Coherence check compared to Online Money Claims

To test our model, we made a comparison with Online Money Claims (OMC). OMC has been able to solve 100,000 disputes in 18 months. Our model estimates the platform can reach that level of use at the end of Y4. The scenario we discuss is therefore more conservative, estimating it will take twice as long to achieve the benchmark established by the OMC case.

Comparison with Online Money Claims	Y1	Y2	Y3	Y4	Y5	Y6
Total number of disputes solved by the platform in a given year	5,663	13,530	32,350	54,935	93,292	97,957
Cumulative number of disputes solved platform	5,663	19,192	51,543	106,477	199,769	297,726

4.3. Coherence check based on a Distribution Channel

We have analysed a scenario based on one of the potential distribution channels this solution could have. This provides a basis for a future bottom-up analysis. Incorporating the solution with existing invoicing software platforms is one of the most promising potential distribution channels.

To be able to link directly from invoices to a dispute resolution clause which is mandatory for the parties could be a powerful instrument for addressing the late payment problem for SMEs. They would be able to access this solution with one click, directly from the software that they already use for managing their invoices and cash flow.

We estimated that, in Y1, the solution can recruit software vendor partners that serve 10% of the market. Because the solution will be endorsed by trusted authorities and a small number of invoicing software vendors platforms serve a large number of clients we think this goal is conservative.

With this approach we estimated 6,889 disputes can be solved on the platform in the first year. This is just one of the distribution channels and it should be a channel with high velocity of expansion, since it relies on convincing a relatively small group of vendors that serve a large market and direct integration with software the target market is already using makes adoption very easy.

Considering that this channel alone would allow the platform to reach its Y1 goal for number of disputes solved, our goal appears conservative.

4.4 Other scenarios

Just for analysis purposes we considered a scenario¹¹ where the platform is able to resolve 100,000 disputes in 18 months, reaching the benchmark established by Online Money Claims. This is a sensitivity scenario related to the market penetration. This could constitute a best case if new legislation does not make this platform mandatory, but does establish some clear benefits in using it. We estimated that in Y4 the market penetration reaches 70% of the currently defined market. In that case the revenues progress would look like this.

	Y1	Y2	Y3	Y4	Y5	Y6
Total revenue						
optimistic scenario	£9,657,45	£33,458,4	£76,540,	£93,125,6	£95,337,1	£97,659,
	3.00	45.20	053.33	85.33	02.93	091.41

In the Excel sheet we also explore a scenario where the Platform has been made mandatory for SMEs so revenues could be even higher.

¹¹ You can find the Excel document here

https://docs.google.com/spreadsheets/d/1TgT5RErDLTllamqQ_h91g64PXbbqBTqCU3t05wBSyEo/edit#gid=1086920200

5. Costs

The plan calls for a validation phase with a small team and a cost of GBP 500K. After the product-market fit has been confirmed or adjusted as necessary, the team will be enlarged to begin development. Of this GBP 500K, around half would be dedicated to external software development and the salary of an internal Chief Product Officer. The plan calls for hiring an external IT provider to limit costs, and hiring an internal Chief Technology Officer only after Y3.

With a burn rate of GBP 1.78M in Y1, which begins after the 6-9 month validation phase, a full extended team paid in accordance with market conditions can be ensured. This estimate includes marketing and business development costs, a full marketing team for the Informative Portal, and a customer success team to support the users.

It is worth noting that this business does not have significant marginal costs that would increase as revenues go up; costs are mostly fixed. The adjudicators and mediators are third parties that are not paid by the platform, so their increasing activity does not generate extra costs. With regard to the facilitated negotiation tool, that is a 100% digital solution with no active human involved. In other words, this approach is completely scalable.

Total Costs per Area	Validation phase	Y1	Y2	Y3	Y4	Y5
		CEO	£ 110,000	£ 140,000	£ 140,000	£ 240,000
Legal	£ 20,000	£ 110,000	£ 110,000	£ 200,000	£ 250,000	£ 250,000
IT	£ 246,000	£ 485,000	£ 515,000	£ 660,000	£ 520,000	£ 700,000
Marketing & Comm	£ 50,000	£ 440,000	£ 490,000	£ 930,000	£ 990,000	1,020,000
Operations Business	£ -	£ 155,000	£ 210,000	£ 515,000	£ 625,000	£ 790,000
Dev	£ 10,000	£ 265,000	£ 405,000	£ 350,000	£ 420,000	£ 430,000
General	£ 50,000	£ 190,000	£ 190,000	£ 200,000	£ 220,000	£ 240,000
		£	£	£	£	£
Total	£ 486,000	1,785,000	2,060,000	3,095,000	3,295,000	3,700,000

6. Conclusions

The market size and the existence of other solutions such as Online Civil Money Claims suggest that there is room for a viable business. The costs for creating the platform and running the several components of the business is around GBP 1.8M per year. Based on the assumptions in the model, it is prudent to assume revenue in the first two years will be inadequate to cover costs, but in subsequent years the project can fund its own operations. We recommend beginning with a 6 to 9 month validation phase to validate the product-market fit and the product-channel fit, specifically with regard to potential partnerships and their ability to bring disputes to the platform. The project could be funded with a loan by public entities or with a mixed loan and equity deal.

A GBP3.5M investment today could empower UK businesses to resolve over 200,000 disputes in 5 years, addressing the massive problem that is stifling the UK economy by unlocking GBP 3.4B that otherwise would be locked up due to a lack of effective and accessible dispute resolution.

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