View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by Hochschulschriftenserver - Universität Frankfurt am Main

25th IVR World Congress
LAW SCIENCE AND TECHNOLOGY
Frankfurt am Main
15–20 August 2011

Paper Series

No. 102 / 2012

Series A

Methodology, Logics, Hermeneutics, Linguistics, Law and Finance

Clara Calheiros

Justice Online: A New Kind of Justice?

URN: urn:nbn:de:hebis:30:3-249600

This paper series has been produced using texts submitted by authors until April 2012.
No responsibility is assumed for the content of abstracts.

Conference Organizers:
Professor Dr. Dr. h.c. Ulfrid Neumann, Goethe University, Frankfurt/Main
Professor Dr. Klaus Günther, Goethe University, Frankfurt/Main; Speaker of the Cluster of Excellence "The Formation of Normative Orders"
Professor Dr. Lorenz Schulz M.A., Goethe University, Frankfurt/Main

Edited by:
Goethe University Frankfurt am Main
Department of Law
Grüneburgplatz 1
60629 Frankfurt am Main
Tel.: [+49] (0)69 - 798 34341
Fax: [+49] (0)69 - 798 34523

Clara Calheiros, Braga / Portugal

Justice Online: A New Kind of Justice?

Abstract: It is a fact that mediation and other alternative dispute resolution means are becoming increasingly popular. Actually, governments are encouraging people to use them instead of going to Court, as they are quicker, cheaper and more informal than trials, and can be implemented using internet. The author focus on the analysis of the structure and purposes of mediation, in particular. The paper aims to discuss and understand what kind of justice, if any, is offered by alternative dispute resolution.
Keywords: Mediation, ODR, ADR, Legal Judgment, Conflict

I. Introduction

The legal systems have not been indifferent to the numerous technological changes of our time. Indeed, legal systems had to accommodate a set of predictions for norms in order to regulate how technology, in its many applications in our daily lives, is used, creating a range of criteria for the resolution of conflicts based on this use. This phenomenon in itself has been a considerable challenge to the legal world, with which it is still trying to cope. Examples include electronic procurement, cyber crime, and the use of biotechnological innovations, among many others. This has led some authors to consider that the law is now confronted with the need to regulate and translate a new kind of fact: virtual facts.[1]

However, it seemed more interesting to try to analyze how technological means are increasingly turning into instruments for implementing the law. Moreover, given that in the everyday practice of the courts technological means are now an important tool of work, the fact remains that here technological means play an accessory role, merely facilitating support for the undertakings of the different law enforcement officials. It seems to me that it is precisely in the field of ADR (Alternative Dispute Resolution) that the use of technological means has potential to change how citizens relate to the law and its expectations regarding it. It was therefore the reason for the choice of ADR as a subject of reflection, situated within the broader theme proposed for this Congress.

My analysis will set forth from the historical and current reality of the ADR, with emphasis given to the use that mediation makes of electronic means, particularly of new information technologies. I will try to understand the particular purpose that mediation serves

[1] See, e.g., CALVO GONZÁLEZ, “Hechos dificiles y razonamiento probatorio”, p. 5, available online - http://webpersonal.uma.es/~JCALVO/docs/hechos.pdf.

from the perspective of mediators, citizens and the State, but also what results it leads to in practice, in confrontation with the more formal means of achievement of the Law.

II. The preference towards alternative dispute resolution methods

Nowadays, the European states in general and Portugal in particular, have been encouraging the increased use of alternative means of conflict resolution. In the case of Portugal, such began with the establishment of the means of arbitration and has, in recent years extended to the use of mediation.[2] At present, in Portugal, the legislation in force provides for the use of mediation in different fields of law, some particularly sensitive from a social point of view. Thus, there is family mediation, mediation in penal matters, regarding consumer law, and labour law, among others. The reasons behind why different states follow this policy cannot be separated from the high economic costs associated with maintaining the traditional and more formal systems of legal administration. In fact, mediation was recently mentioned in the recent IMF Program designed to help solving the Portuguese financial crisis, as one of the positive measures that could improve the efficiency of the Portuguese legal system.

What seems interesting is to try to understand how these mechanisms work, particularly mediation as we shall see, in which way and in what sense they satisfy the interests of those who seek them. Through this, one can gain perspective on the kind of Justice that is offered by these means.

In recent years the philosophy of law has paid much attention to judicial decisions and has sought to understand such through the contributions of philosophy of language, among others. But what has it to say about what happens in ADR?

In the case of arbitration one can consider that there is close proximity to the judicial model, since there is still a judgment and a process that leads to this. The reasons that can cause someone to prefer the use of arbitration instead of resorting to ordinary judicial process, are of diverse nature: there may be a better quality decision because the arbitrator is an expert in the area (as often happens in matters of commercial law), a lower risk of media exposure (common fear when there are large companies or brands involved), faster procedure or lower costs (as in the case of consumer law). In any case, there is yet the hope that once there is a decision, that it will be fair. The arbitration model continues to be three-way, in that there is an independent third party that, faithful to the image of a truly balanced scale, looks to find the equilibrium (in the manner least constricted by the rules of positive law, of course) between the positions that confront one another.

[2] An overview of portuguese reality can be found at http://www.mediadoresdeconflitos.pt/?Area=5&SubArea=3

Thus we find here a certain proximity that many authors have pointed out, between arbitration and the judicial settlement of conflicts. Moreover, when recalling the historical experience of Roman law, such becomes even more evident.

Mediation, instead, is said to be a collaborative process in which an independent facilitator (the mediator) acts in order to help the parties to collectively find a satisfactory solution to the conflict. We therefore conclude that mediation is the model of alternative dispute resolution that may diverge more profoundly from that which underlies the legal guarantees of Law. This is one of the reasons for having chosen mediation as the particular subject of my analysis, although it is not the only one. In fact, I additionally found that mediation is an alternative dispute resolution mechanism that is used particularly by means of electronic communications, which seems to have to have boosted the success of it. As a result, we can find here an intersection between technology and law that seems particularly promising.

There is still no thorough and complete study of the results of the implementation of the new mechanisms of mediation in the various sectors of law in Portugal, because it is a recent reality in our country.[3] There are, however, several experiences of ADR implementation worldwide that seem very promising. So, I have tried to took the recent publication of a study undertaken in Catalonia and made a few remarks concerning the process of mediation and its association with the idea of justice as the aim of applying the law.

In truth, despite the caution that comparisons and transpositions of other cultures' experiences should inspire in us, we believe that some cultural and social similarities exist among many major European urban areas, which today experience similar problems in many aspects.

III. Mediation: a historical reality

Alternative means of conflict resolution are long-standing in the history of Humanity. Indeed, some even understand that they preceded an institutionalized Justice. In Roman law we found two distinct kinds of arbitration: *arbitrium boni viri* and *arbitrium ex compromisso*, the first being conducted by an *arbitrator* under a contract celebrated in good faith and the second by an *arbiter* in the face of litigation and under threat of a *poena*. These could be seen as an historical precedent to the ADR.

[3] For a general overview see Observatório Permanente da Justiça, *Percursos da informalização e da desjudicialização – por caminhos da reforma da administração da justiça (análise comparada)*, Coimbra: Faculdade de Economia/Centro de Estudos Sociais, 2001.

Very interesting as well is the medieval institution of French origin, the *amicabilis compositor,* referred to by Romanists and canonists. This is a figure whose actions aimed to address the resolution of conflicts, guided by a spirit of conciliation, charity and of love of thy neighbour. For the authors of the era, the *amicabilis compositor* seemed to be inspired by the *arbitrium boni viri* distinguished by the failure to grant him a power of decision, to pronounce a sentence, but rather to reconcile, to establish an agreement between parties, according to their will. There are also those who approximate this figure preferentially to the Roman *tractator concordiae* whose activity was to facilitate an agreement.

It is particularly interesting that in the Middle Ages, resorting to amicable settlements was more common in matters of succession, where arguments were required to be guarded in the family circle, and in disputes that took place in particular communities, as was the case of monasteries and convents. Later on, when a true distinction between the *modus operandi* of the amicable settlement and the arbitration itself ceased to exist, the recourse to these "alternative" means (as we would say today), resulted in a waiver to apply the law to the dispute concerned, which converged to the various factors present in medieval society: lack of clarity in the law, rejection of Roman law, of the spirit of Christian charity and love of thy neighbour.

In more recent years the modern mediation crystallised as a way to address dissatisfaction with the legal system and to reform the administration and delivery of justice, as we shall see. [4]

IV. The alternative dispute resolution methods (ADR) on a global scale

In recent decades the use of alternative dispute resolution methods was also the subject of globalization. Indeed, through a quick Internet search, we can find a wide range of news and sites that tell us about the accession of many different countries from all continents to this practice. A recent article published on the internet[5], gave an account of recent developments in the implementation of mediation mechanisms and such in about a dozen countries around the globe: Germany, Ireland, Russia, Rwanda, Sri Lanka, Singapore, Malaysia, Colombia, Philippines and Australia. Experiences are thus very different from one another.

An interesting experience, that seems to have good results, with surprisingly good results, in view of compliance and effectiveness of procedures, is the one that has taken place

---

[4] See LEATHES, Michael, , *2020 vision- where in the world will mediation be in 10 years*?, available at http://www.mediate.com/articles/where_will_mediation_be_in_10_years.cfm

[5] See SEAT, Keith, *International Mediation Developments,* available online at http://www.mediate.com/articles/intlmeddevNov2010.cfm

in Brazil, through the establishment of so-called "Houses of Citizenship,"[6] though here with less recourse to electronic means. These are presented as alternative venues to the traditional judicial process, which are more accessible to all citizens because it is the closest and cheapest way to access the law. In fact, at these Houses of Citizenship, mediation is done by volunteers who come from the community, providing a free and impartial service to their fellow citizens from their social community. In principle, the procedure is entirely oral. In such cases, the ADR function as ways of enlargement of the access to justice in the sense that it allows people who otherwise would never have the chance to go to court, to obtain a solution to their problems. They also trust this solution to de fair as it is the result of the intervention of someone whose authority both parties ahkowledge

In regards more specifically to the reality in Europe, we know that the European Union has encouraged the various member states to increase the use of the most diverse mechanisms for alternative dispute resolution, including mediation based principally on electronic means, Thus, as regards to the latter, a Directive on mediation covering the areas of civil and commercial matters was approved in 2008. The target-disputes are those that are cross-border in nature and of the above-mentioned legal areas, involving at least a person concerned residing in a Member State other than that of any other party, on the date in which the parties consent, by agreement, to resort to mediation or when mediation is ordered by a court.

The Directive, which must be transposed by all Member States until 21 May 2011, establishes a set of parameters and guarantees that must be observed by the various mediation procedures to be adopted: existence of incentives to promote the training of quality mediators; possibility of an invitation to resort to mediation, addressed by the judge in court, where deemed appropriate; enforceability of agreements obtained on request of the parties, ensuring confidentiality and suspension of time limits for the lodging of actions during a mediation procedure.

We also speak of a phenomenon of globalization in terms of the fields of the law covered by the alternative means of conflict resolution, particularly mediation. They vary from country to country in accordance with their respective situations and the types of conflicts which are more frequent. A traditional, long standing field of ADR implementation respects commercial law, but several others have joined it in recent years: under environmental law (reconciliation of community and individual interests), in civil law (road accidents, insurance, leasing, succession, co-property, etc.), community law (emerging conflicts between various communities), family law (divorce and separation, division of property, child custody and

[6] An overview of this brazilian experience can be found at
http://www.tj.sc.gov.br/institucional/casadacidadania/cidadania.htm

alimony) in criminal law (for certain types of crimes), in labour law and in administrative law (particularly in tendering procedures and supply of goods to the State).

Particularly promising seem to be certain types of intervention areas of alternative dispute resolution mechanisms such as school mediation and consumer rights protection. In both cases, the conflicts already have a virtual or technological dimension since the first case, cyberbullying, is precisely one of the most recent manifestations of the phenomenon of bullying, while in the latter case we highlight the huge number of commercial transactions taking place daily over the internet. Indeed, today there are even some areas of product marketing in which the virtual offering is the most important, if not almost exclusively, which is what happens with the booking of hotels and the purchase of air travel. In these cases, the use of virtual mechanisms of mediation, for example, seems a natural consequence of the nature and origin of the conflict itself.

V. Mediation and Technology

As stated, there seems to be a natural propensity to use virtual means when resorting to ADR when the source of the conflict itself already has a connection to the universe of new information technologies. However, even when this is not the case, it is certain that the implementation of diverse ADR means, particularly mediation, has been done through these new information technologies, known as Online Dispute Resolution (ODR).

In a recent article that examines the relationship that can be established between ADR and ODR, Professor Marta POBLET[7] of the Autonomous University of Barcelona, who has been conducting studies in the field, draws a general picture of the relationship that can be established between these means. Thus, it appears that the ODR services available on the market have been mainly targeting for arbitration and mediation. In the latter case, it is noted that some of the more sophisticated ODR products also provide other related services, such as the appointment of mediators and their own training in this field. There are two communication models used: the synchronous and asynchronous, with the latter seeming to predominate in the case of mediation. The explanation seems to lie in the fact that this type of communication encourages the creation of a more friendly discourse by the mediator and gives him/her more reaction time in the management of responses to incoming messages.

In fact, new information and communication technologies, especially the Internet, offer an enviable window of opportunity to all of the mediation and arbitration centres. Even when

[7] See POBLET, Marta (2010), "ODR 3.0? Lecciones desde Sri Lanka, India o Haiti".In *Justicia relacional y métodos electrónicos de resolución (ODR): hacia una armonización técnica y legal"*[online] *IDP.Revista de Internet, Derecho y Política*.n.º10.UOC

they function in a physical space, they nevertheless use the Internet at least as a way to publicize their services and establish that first contact with potential customers. In some cases these services are already provided exclusively through the Web and we can honestly speak of true e-justice. Michael LEATHES, Director of the International Mediation Institute, believes that in the near future:

"Online Dispute Resolution (ODR) will acquire a new significance, enabling mediations to be less dependent on logistics and participant ability to travel. Mediators will be able to use secure technological environments to ensure confidentiality, providing virtual caucus rooms that guarantee privacy. New technology will enable users to have the same confidence in the security of these systems as online banking – they are, in fact, safer than today's physical meeting rooms, which are vulnerable to eavesdropping devices." [8]

I tend to agree with him.

1. The Catalan Experience: remarks from the White Book

The recently published White Book of Mediation of Catalonia (*Llibre Blanc de la Mediació a Catalunya*), conducted a serious and rigorous analysis and assessment study of this experience in Catalonia, based on treatment of a wide range of statistical data, but also with the implementation of other research techniques such as interviews. It has concluded that the areas of intervention of this mechanism are multiple and have not had similar results: there are clearly some more successful areas than others. One such case is precisely family mediation, which had a high utilization and success rate, measured by the actual scope of reaching an agreement at the end of the mediation procedure, but also by having a high rate of compliance to the agreement obtained.

As the White Book concludes, it is in the cases where a larger number of agreements are reached that we verify that this medium actually saves the State a lot of money. Indeed, it is assumed that, by extending mediation to 20% of new cases entered in the family court, such would represent a savings of 4 million Euros annually, not counting the fact that this procedure has a much shorter average duration (usually less than 3 months)..[9]

The White Book also tried to analyze the use of various information technologies in implementing mediation mechanisms. Thus, it was concluded that these are generally present in all the legal areas of mediation actions, being an indispensable instrument for the

---

[8] See LEATHES, Michael, , "2020 vision- where in the world will mediation be in 10 years?", available at http://www.mediate.com/articles/where_will_mediation_be_in_10_years.cfm

[9] The "Llibre Blanc de la Mediació a Catalunya" [White Book of Mediation of Catalonia] can be found at http://www.llibreblancmediacio.com/ . See p. 60.

dissemination of this medium and also a way of curbing the costs of its operation. Moreover, it was found that the use of information technology is more present in the initial presentation of the objectives of mediation to potential interested parties and in the development of initial contacts, favouring the use of phone and email. The use of videoconferencing or chat, for example, to ensure the conciliation sessions is more scarce and in some cases, nonexistent. Face to face sessions still prevail.[10]

The White Book also contains a very significant reference, from the standpoint of the path that leads to the development of the relationship between ADR, and information technologies, to the development of a prototype that supports the management of the process and practice of mediation, which is expected to assist in the conduct of future real procedures of mediation.

2. What to expect when resorting to mediation

The way different Web sites present mediation is coincident in the emphasis they place on the results that interested parties can expect from the use of this alternative mechanism.

The guarantees that mediators offer to the parties are their impartial performance and confidentiality. Simultaneously, mediation is described as a means of conflict resolution that allows parties to have control over the proceedings and their outcome.

Peculiar is insisting on the idea that mediation may be a way to secure a more perfect justice, insofar as it states that it is closer to the citizen and more humane. What should be understood by a more "humane" justice system is not at all obvious. Since justice is the work of men, there does not seem to be any form of administration of justice that is not human. Moreover, much of the criticism directed at the traditional forms of administration of justice base their foundation on the verification of the Latin maxim: "*errare humanum est* ".

This idea of "humanity" that is associated with mediation specifically, even when it is based to a greater or lesser degree on electronic means (not very "human" ...) seems to have to do with a set of ideas that are subtly present in the discourse presentation of this mechanism.

So the first idea that strikes me as alluded to by this route is that mediation is a Justice without losers, nor winners. In other words, the agreement to be eventually established will hopefully be one that is satisfactory to both parties involved.

Secondly, the humanity of the solution promised also seems to result from the fact that the mediator, although an impartial third party as would be a judge, presents himself stripped of "*auctoritas*". The mediator is at the same level as the parties, not looking for their binding

[10] "Llibre Blanc…", op. cit., p. 62 and 63.

nor acting in the sense of syndicating at every moment the behaviours involved. The very environment in which the mediation takes place is secularized, unlike that which is intentionally sought after on the dramatic stage of the Courts, in the staging of power that is there embodied in the many signs of judiciary power (judge's and solicitor's robes and gowns, furniture, artwork, flags) and, ultimately, of state power. In cases where mediation may take place entirely by electronic means, "Justice" reaches us inside our home, much the same way that we are delivered any other commercial product ordered over the Internet ... The agreement made is guaranteed to work as self-binding, a commitment that even when it may be enforceable, is felt by the parties as something that is "theirs", that is like a bond or undertaking of a contractual nature.

Thirdly, it seems that an important element for the construction of the "humanity" of mediation has to do with the fact that the confidentiality inherent to these procedures avoids public exposure that, to a greater or lesser extent, is always involved in traditional means of administration of justice. The parties therefore feel more shielded from the scrutiny of others which also facilitates the reaching of an agreement as it will consequently decrease the fear of "losing face".

Finally it should be noted that the agreement reached through mediation appears to be a fairer solution to the conflict since it is not the result of a syllogistic operation of application of a general norm to that specific conflict. The mediated solution results in an outcome tailored to that specific situation, without any concern for a more general sense of justice that is present in the law.

In short, the solution of a conflict obtained through mediation is, supposedly more "human" because it is perceived as a fairer solution, in the extent that it is more consensual, equal, confidential, informal and private. At any rate, it is the opposite of what characterizes judicial law.

3. ADR: true Justice online?

At the end of these considerations on the present spectrum of the functioning of the mechanisms of ADR, particularly mediation, which uses to a greater or lesser degree the Internet as a working platform, it is possible to perform a series of exploratory discussions on the relationship between these mechanisms and the functioning of the traditional legal means.

The first thing that strikes me is the direct link to another viewing angle of legal frameworks that months ago, at a Conference of Philosophy of Law in Porto, Professor Reis Marques presented: that globalization, among its many ramifications, was changing how

states outlined their legal systems to the precise extent they wanted, in a global market, attracting large multinational companies with the offering of better conditions (more favourable tax and labour rules, etc.). Professor Reis Marques spoke then of the behaviour of large multinational companies that would go around the world doing "legal shopping". However, in parallel, I wonder if mediation online will not eventually turn justice into a product similar to that which already happens with the legal frameworks that exist today under a competitive regime. This is a very different scenario from that which we are familiar with, associated with the traditional systems of justice where the idea that the courts are in competition with each other does not exist, implying there is a quest for the fairer Court. The logic is reversed: it is that there are rules of jurisdiction and of the matter, as well as randomness in the distribution of procedures that prevent the choice of a trial judge. The idea that justice is a virtue and that some judges might be fairer (or simply better prepared) than others, and therefore their services might be the most sought after is not part of the equation. This is not the case in mediation. Is this an advantage? The interested parties seem to think so.

Secondly, it seems appropriate to me to conclude that mediation appears to be a medium that offers a way to privatize the administration of justice, to the extent that the state is replaced by a multiplicity of entities that offer their services in a competitive way preferably on the Internet. Here the state takes on the role of an observer and plays a purely administrative role when carrying out the recognition of the mediator's ability to exercise these functions. And it may be added that it re-enters the path of its citizens when these confer enforceability to the agreement, by ensuring its compliance through the use of force. One must admit that the commitment of the different States in encouraging the use of ADR does not seem to be entirely disinterested, that is, it is not presented as unfamiliar to the recognition that they represent a substantial saving of economic resources that otherwise the state would have to invest in the traditional means of justice.

On the other hand, mediation also seems to lead to a depreciation of legal knowledge since for their performance, rather than a concern for the understanding of the Law on behalf of the mediator, what seems to be of importance is the dominion of a set of skills and competencies for the management of social and personal conflicts, with emphasis on the familiarity with psychology. In fact, the mediator, as an independent third party, does not act as the vertex of a pyramid (that is the model of arbitration and lawsuits) but rather as the straight line between two separate points. Its role appeals to the objectivity that a third observer, an external point of view, necessarily will have over the conflict and its motivations: the rational and the emotional.

In parallel, this depreciation of legal knowledge is also present in the fact that the parties appear without legal representation, which could likely create entropy in the functioning of this system.

The fact that mediation can be conducted via the Internet enhances the depersonalization of justice, in that it is not possible to know for sure who is actually behind the communications. In effect, we can already find on the internet, on sites related to the universe of mediation, accounts of some mediators that were the subject of swindles and think that the same thing could still happen to those that pursue mediation services through the Internet, at the rate that these are increasing.

Resorting to mediation online may enable the resolution of a conflict that otherwise the parties would not be able to obtain either due to the distance they are from one another (often in e-commerce), or by the high economic costs that the access to traditional means of justice implicates.

Mediation, as a non-adversarial model, also appears to be based on the logic of the division of responsibilities and, consequently, on the idea that at the end of the procedure both parties come out as winners. Thus we seek to restore social peace rather than obtain a fair solution to the conflict.

Address:
Clara Calheiros
Associate Prof.
Escola de Direito
Universidade do Minho
Campus de Gualtar
4710-057 BRAGA
PORTUGAL