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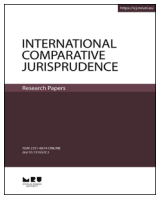

Online dispute resolution: The future of justice

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ABSTRACT

The purpose of this study is to present the main facets of online dispute resolution, including a definition of the term, the types of resolution available, and the most recent legal regulations in this area.

The article is an in-depth study of this field, discussing online mediation and electronic arbitration, their uses and their relationships with e-commerce.

The strengths and weaknesses of online dispute resolution are identified and used to help formulate de lege ferenda stipulations.

The paper is divided into three parts. Part I looks at preliminary aspects of online dispute resolution (ODR), including a definition of the term and an examination of its phases of development, implementation examples and the relationship between ODR and technology. Part II is devoted to examining the two most frequent forms of ODR: online mediation and electronic arbitration. Part III is an analysis of consumer disputes arising from commercial transactions made using electronic communications. As an example of the implementation of ODR, the author emphasises the importance of new European regulations on that and alternative dispute resolution (ADR): Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

1. Introduction

Considerations with regard to online dispute resolution should be preceded by presenting their means of functioning – namely the Internet, a prototype of which was constituted by the military network ARPANET created by the United States Department of Defense. In 1468, this department established the federal Advanced Research Projects Agency (ARPA), which engaged in the development of military technology in the fields of defence and security in cooperation with the academic world. In 1980, the military unit that operated under the name ARPANET was disconnected from the academic unit, which was named INTERNET.

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In 1990, the Defense Advanced Research Projects Agency (DARPA) – transformed in 1972 from ARPA – formally completed its work on the development of a civilian network. The Internet was managed at the time by US federal institutions, and acquired the status of a public good in 1991 (Russell, 2014; Salus, 1946).

A short description of the history of the Internet shows the speed of development of the network, which has transformed from an academic project, through a federal military plan, into a public good and the most powerful medium of the 21st century. This is confirmed by data that show a constant increase in the number of Internet users.

The International Telecommunication Union (ITU), an international organisation that manages the telecommunications market, monitors the development of the Internet. According to statistical data and a report published on 23 December 2014 under the title "World Telecommunication/ICT Indicators Database 2014 (18th Edition)", the number of users of the network exceeded 3 billion, compared with under 14 million in 1993.

The Internet is a 21st-century medium that has revolutionised many areas of life. It fulfils many functions and as a common source of information, communications tool and global trading platform has become the engine for introducing modern technological solutions within existing fields of activity.

The Internet has had an impact on many areas of public life, including law. Its fast expansion has caused many positive phenomena, such as the computerisation of certain areas of law (its administration, for example), but has also highlighted the non-compliance of the legal framework with new realities (such as within the scope of intellectual property rights). The global character of the Internet has changed approaches with regard to access to information, impacting on copyright and press law. The absence of territorial limitations has highlighted that many provisions concerning private international law are out of date and that the development of electronic commerce has made it necessary to introduce new regulations (Directive on electronic commerce, 2000).

The dynamic growth of the Internet in national and international commerce has created a need to look at statutory frameworks for defining and dealing with legal non-compliance (Johnson & Post, 1996) are considered to be the creators of the aforementioned idea). Despite the problems cited, new methods of communication have improved many areas of law – including modernising processes for the out-of-court settlement of disputes, examples of which are constituted by systems for online dispute resolution.

The purpose of this article is to analyse new methods for out-of-court dispute resolution that could be used as alternative options in the future.

2. Online dispute resolution: preliminary issues

There have essentially been four phases in the development of online dispute resolution (ODR) (Tyler, 2003). The first, which ran from 1990 to 1996, was an amateur stage in which electronic solutions were in a test period. In the ensuing years (1997–1998), ODR developed dynamically and the first commercial web portals that offered services in this area were established. The next phase (business) ran from 1999 to 2000. Given the favourable period of economic development, especially in IT services, many companies initiated projects based on electronic dispute resolution, but a large number no longer operate on the market. The year 2001 marked the beginning of an institutional phase, during which ODR techniques were introduced into institutions such as the courts and administration authorities.

One of the first cases of online dispute resolution involved a procedure started in the United States of America in which the opposing sides decided to seek a new method to settle their dispute (Wang, 2008). The case was pending before the Online Ombuds Office at the Center for Information Technology and Dispute Resolution at the University of Massachusetts. Ethan Katsh and Janet Rifkin, who founded the entity and are considered leading promoters of the ODR issue, started mediation procedures via only e-mail communications and this eventually resulted in a settlement being signed (Katsh & Rifkin, 2001). Among others, the Online Ombuds Office offered mediation services for auction portal eBay. In 1999, this collaboration had transformed into the SquareTrade portal, one of the first commercial ODR providers in the area of consumer disputes in the US market (Lodder & Zeleznikow, 2010, p. 76). Among its most prominent services was online mediation, which was initiated by filling in a complaint form on which the methods for dispute resolution were indicated.[1] After voluntary acceptance of the electronic method for resolution, the other party would respond by choosing the relevant option. In the event of failure to reach a settlement, the parties would be directed to the negotiation phase. This was supported by the mediator, which communicated with them using the tool for electronic communication – e-mail.[2]

Another example of an early portal that offered automated online mediation is CyberSettle, which was established in 1998 and also in the US. Its main advantage was the functionality acquired through creating a network of specialised Internet applications that enabled various forms of communication. The system enabled negotiations to be conducted using the Internet platform, starting by logging in and providing basic information such as first name, surname, e-mail address, date of the event and type of case. The party would then issue an invitation to participate in a so-called out-of-court blind-bidding process, specifying the maximum amount (it would claim) in the event of signing a settlement. Upon acceptance by the other party, a phase started in which offers were collected – the contents of which were known only by the interested

[1] The cooperation between these entities ended in 2008, when eBay introduced its own system for out-of-court dispute resolution.
[2] The web portal SquareTrade does not offer the aforementioned services (as of March 2015).

parties. The number of proposals would not exceed three, but until the other party proposed an equal or lower amount, they were not disclosed to the other party. The adopted solution allowed the settlement of disputes regarding specific values of claims, excluding consideration of the issue of legal liability. When the parties reached consensus, the offer would be mutually presented. The confidentiality of the procedure provided significant value, particularly in the event of ultimate failure to reach an agreement and referral to court. The portal offered additional services in the form of support from the mediator, which communicated with each party separately without disclosing the contents of their offers.[3]

Many factors explain the decreasing number of ODR entities after 2000. Establishing electronic platforms that enable the transfer of dispute-resolution processes to the Internet incurs significant initial costs, even when choosing licensed technological solutions of the SaaS variety.[4] To ensure the security of the system, it is necessary to introduce safeguards to protect against loss of data and hacking, which significantly increases starting costs.

Moreover, in most cases ODR systems were created in the US. In the European Union, such services started to appear at the start of the 21st century, so their adoption was less dynamic. It seems that the number of entities providing ODR services will increase in the EU. Existing examples, such as the ombudsmen in Austria and Germany and online mediation systems in Italy and the UK, might in the future be replaced with new forms of ODR systems (Gill et al., 2014).

The trends cited can be seen in the many cases of systems being introduced for small-claims procedures and legal-advice systems in the Netherlands (Smith, 2014). With regard to implementation of EU regulation of the European Parliament and Council of 21 May 2013 on online resolution for consumer disputes and launching the platform for ODR services for consumer disputes planned for January 2016, it can be assumed that the popularity of similar solutions would have an impact on increasing their number, especially in Europe.

Looking at the history of ODR development, it can be seen that the first web portals established at the end of the 1990s were replaced with new competitive platforms that used modern technologies and constantly improved the services offered, replacing outdated solutions that were unattractive for Internet users.

A current market leader in ODR is the portal Modria.com, which was established in 2011 and cooperates with eBay, among others. Its domination results from a vast range of tools that it offers to customers. The platform allows mediation and arbitration, and enables all activities to have a simple and intuitive form. The success of the Modria Resolution Center is linked to a constant expansion in scope of the services offered. One of the latest examples is a project started in mid-2014 that involves cooperation with the American Arbitration Association (AAA) and acting as a service platform for the insurance cases of "New York No-Fault Insurance (NYNF)" – estimated to number more than 100,000 per year.

2.1. The definition of online dispute resolution

Online dispute resolution (ODR) is a form of online settlement that uses alternative methods for dispute resolution (alternative dispute resolution).[5] The term covers disputes that are partially or fully settled over the Internet, having been initiated in cyberspace but with a source outside it (offline) (Abdel Wahab, Katsh, & Rainey, 2012). In literature on the subject, the terms electronic ADR (eADR), online ADR (oADR) and Internet dispute resolution (iDR) are treated as synonymous.

There is no permanent system for reporting the number of entities that use online dispute resolution. Published research focuses mainly on showing levels of alternative dispute resolution (ADR) use in specific countries.[6] However, there is no similar record on entities offering its online form (European Parliament, 2011).

In accordance with published research, it can be stated that the number of ODR providers is not constant between years. Pursuant to analysis conducted by Conley Tyler, they numbered no less than 115 in 2004 (Conley Tyler, 2004). As shown in research by Suquet, Poblet, Noriega, and Gabarró (2010) the number had decreased to 30% of this figure (less than 40 active ODR systems) (Suquet et al., 2010).

2.2. ODR and technology

Online dispute resolution constitutes an implementation of existing forms of ADR that enables its use on the Internet. The main assumption of alternative methods of dispute resolution – that is, the presence of a third party during the process of reaching an agreement – remains unchanged. However, this has attained a different character because of the use of modern forms of communication. There are therefore indirect ways of submitting requests or evidence (Settle Today), as well as of carrying out a full online process together with issuing a judgement at the end of proceedings (WIPO).

In the case of ODR, the technological aspect is crucial for the effectiveness of the process. With reference to research published in 2010 by Lodder and Zeleznikow, ODR systems may be divided according to the forms of synchronous and

[3] A popular current provider of ODR services for negotiations is Smartsettle: www.smartsettle.com.

[4] Software as a service (SaaS) is a method of providing services through the distribution of software via the Internet.

[5] In international legislation, there is no official definition of the term "online dispute resolution". The other version of the term is "electronic dispute resolution".

[6] The European Commission maintains permanent monitoring of the institutions that offer ADR services in member states. In 2014 there were 750 such institutions in the EU, but the number differs in each country. The list of ADR entities notified by the European Commission is available at: www.ec.europa.eu/consumers/archive/redress_cons/schemes_en.htm.

asynchronous communication used. Looking at the first type, entities may communicate with each other in real time by using Messenger or Skype. In the asynchronous form, communication is not conducted at the same time – via e-mail, for example – and is therefore less direct such as with using the services of the National Arbitration Forum. Research by Suquet, Poblet, Noriega and Gabarró has shown that the second form constitutes the most frequently used solution (42%), but as many as 48% of ODR providers use the two forms jointly (Suquet et al., 2010, p. 4). Low usage levels of online forms such as chat (10%) suggest that ODR systems fail to fully exploit the IT possibilities of extensive programmes, with their focus still on less modern methods such as forums.

Each form of ODR may use a different technological system, individualising the course of a given process. Online mediation can take different forms, from a fully automated Internet platform using a portal based on electronic chat or videoconferencing (TheMediationRoom.com), to exclusive use of the asynchronous form of communication, i.e. through methods such as e-mail (RisolviOnline.com).

The first option constitutes a system involving video meetings or online conversations (chat), during which possibilities for dispute resolution are analysed with the mediator – a more direct form of ODR. The second option is used, for example, in mediation within the scope of pecuniary obligations. Using a system of submitted offers, the parties agree on an amount that is acceptable for all parties without the need to meet directly. Electronic arbitration, which refers to amicable proceedings conducted via the Internet, may take either a synchronous (Smartsettle) or asynchronous form (Settle Today).

ODR techniques can be used in many ways, with different levels of integration into proceedings. Systems that have an intensive impact on proceedings may “support” parties by suggesting arguments or assessing their levels of satisfaction at each stage. Using advanced technologies allows the creation of computer algorithms that analyse all data entered into the system (Family_Winner).

3. Online mediation and electronic arbitration

The number of electronic forms of alternative methods for dispute resolution changes over time, but mediation (74% of ODR providers) and arbitration (40% of ODR providers) are most frequently used. Just behind these is negotiation. Modern hybrid forms of ADR differ from classic models, being based on chosen elements of mediation and arbitration that constitute innovative and alternative joint methods. The leading examples are Med-Arb and a mini-trial (Ross & Conlon, 2000). At a European level, modern solutions have not been adopted to the same extent, giving way to classic models.

3.1. Online mediation

To analyse the legal grounds for using online mediation, it is necessary to refer to regulations with regard to alternative methods of dispute resolution. The EU's moves to create freedom, security and justice correlate with the promotion of ADR, with special reference to mediation.

The main normative act on mediation (excluding arbitration) consists of a document published on 19 April 2002 by the Commission of the European Communities under the title “Green Paper on alternative dispute resolution in civil and commercial law”. The main objective of this was to “initiate a broad-based consultation of those involved in a certain number of legal issues which have been raised as regards alternative dispute resolution in civil and commercial law”.

A positive reception to the Green Paper accelerated the work of the European Commission with regard to new regulations in the area of ADR, among which the most important is Directive 2008/52/EC of the European Parliament and Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. This legal act does not refer to electronic solutions, so the legal grounds for their application are a result of an interpretation of the regulations in force.

Literature on the subject describes two meanings of the term “online mediation” – the first relating to the place in which the legal relation for the dispute was created, and the second having its basis in the online tools used to resolve the dispute, regardless of the place of its creation. The author of this article favours the second meaning, which sets the framework for the analysis undertaken.

A typical model for the process of online mediation starts when an e-mail is sent to the parties containing the basic information on proceedings. Virtual meetings are conducted in so-called “chat rooms”, which constitute virtual versions of meeting rooms. These can be carried out separately with each party or simultaneously with all parties. The electronic tools used for communication purposes improve on the classic form of ADR and enable increased flexibility because virtual mediation sometimes becomes electronic negotiation and vice versa (Bellucci & Zeleznikow, 2005). Online mediation is usually conducted through text-based communication, and meetings in real time – such as teleconferences – happen more rarely (Hopt & Steffek, 2013, p. 291).

Mediation executes one of the main functions of law – the resolution of disputes – while keeping a consensual and non-binding character (Suquet et al., 2010, p. 4). The electronic form enables new possibilities that were previously unavailable, such as the simultaneous presence of many parties without the hindrance of needing personal attendance at a specific place and time. In accordance with quoted research, asynchronous online mediation is the most popular form, allowing greater flexibility because of 24-h access to the platform (Alexander, 2006, p. 417). Cost-savings resulting from a lack of need for the presence of a professional proxy or the delivery of documents are also important. Moreover, online mediation conducted via an electronic platform allows the whole process to be registered, and therefore to be replayed.

In assessing the practice of online mediation, it can be stated that such a form is not appropriate for all types of dispute. The use of Internet tools changes the rules of communication, depriving it of its direct character and verbal elements. In extreme cases, the mediating person may be replaced with an electronic tool, distorting the nature of mediation to a significant extent (Ross, 2010).

Analysing the concerns of parties on the use of mediation in civil proceedings, it may be suggested that most of these are the same as in the case of the online version – such as concerns about the lack of impact on the course of proceedings, excessive costs or the protractedness of the process.

The main feature that distinguishes classic ADR from the online type is the aforementioned location of mediation proceedings. Classic meeting rooms are replaced with a virtual space in which there is no direct contact with the participants in the dispute. The mediating person, with whom relations are built in a classic way, is transformed into an electronic, intangible form, which constitutes a cause for concern among the participants (Hopt & Steffek, 2013, p. 66). A lack of direct contact results in reduced personal dynamics in the overall process and problems with creating appropriate mental connections of participants to the dispute, which may result in lack of will to settle it amicably. In virtual reality, it is important to build a high level of trust in mediators as well as the IT tools used, creating a significant background for mediation proceedings.

3.2. Electronic arbitration

Regulation on the written form of agreement on arbitration in international trade was introduced in article II clause 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1468). The regulation was eased through the introduction of a clause 2 that extended the definition of the term "written form" with "exchange of letters or telegrams". This introduced the possibility of concluding an agreement on arbitration in the form of two separate homonymous statements of will, and other way of exchanging letters. Moreover, allowing use of the telegraphic form enabled other ways of sending statements of will at a distance while preserving their contents, including e-mail.

The liberalisation of opinion, as a result of which clause 2 was introduced in article II of the convention, suggests that in times of increasing importance of electronic communication, the interpretation allowing the conclusion of an agreement on arbitration in an electronic form that meets the obligation to send statements of will remotely while preserving their content seems relevant (Newcombe & Paradell, 2009, p. 25). The interpretation of article II clause 2 of the convention, which indicates minimum requirements that allow for invoking more liberal provisions in given countries, has been increasingly highlighted in the doctrine.

Electronic arbitration is less popular than online mediation, even though it is allowed on the basis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and directive on electronic commerce (2000).

Moreover, amended regulations of the United Nations Commission on International Trade Law (UNCITRAL) entered into force on 15 August 2010. The provisions also take into consideration the impact of the Internet on the reality of conducting arbitration proceedings in the area of international trade – for example, in relation to regulation on deliveries using electronic means of communication – so they say international tendencies should be reflected in national legislation.

The most prominent example of the use of online arbitration is in disputes over Internet domains. On 24 October 1999, the Internet Corporation for Assigned Names and Numbers (ICANN) – the institution responsible for granting the names of Internet domains – adopted the Uniform Domain Name Dispute Resolution Policy (UDRP). This was set out in two documents: the Uniform Domain Name Dispute Resolution Policy, which consisted of a collection of substantive rules for resolving domain-name disputes; and the Rules for Uniform Domain Name Dispute Resolution Policy, which constituted the rules of procedure before arbitration courts. The introduced rules related to specific domain addresses, such as .com, .org and .net, being applicable in relation to entities that had unlawfully registered an Internet domain, endangering or infringing the rights to protection of trademarks of third parties. The UDRP sets the rules for concluding agreements on registration and administration of domains, including regulations that oblige disputes to be settled amicably and thus avoid problems involving the jurisdiction of courts.

Disputes over domains are settled by accredited entities, the most important in Europe being the World Intellectual Property Organization Arbitration and Mediation Center, which was established in 1994 and has conducted electronic arbitration proceedings since 2010.

The asynchronous process begins after a complaint is submitted via electronic means, which is confirmed by feedback sent by WIPO. A formal examination of the complaint is then carried out – including with regard to paying the fee, dependable on number of domain names included in the complaint and type of panelist (a complaint compliance review) – for up to three days.[7] If there are any deficiencies, the complainant can remove them within five days. After confirmation of the correctness of a complaint, the relevant procedure starts in the form of formal administrative proceedings – about which the other party is informed via electronic means of communication. The other party can submit a response within 20 days. If this is not submitted, the panel deciding on the dispute will make a decision based on the evidence provided by the

[7] The costs of arbitration proceedings before the WIPO Center depend on the size of the claim and additional factors such as the number of disputed Internet domains or composition of the panel. For example, total costs for proceedings on a claim that does not exceed $2,500,000.00 comprise a registration fee of $2000.00, an administration fee of $2000.00, and remuneration for the arbiters, depending on the hours of work. A cost calculator is available at the official website of the WIPO Center.

complainant. After 20 days response period, the Center will appoint a list of members of an administrative panel, consisting of one or three people. Upon the consent of both parties, a single-member panel will be appointed. If one of the parties raises an objection, the complainant and other party are entitled to choose three people from the list of panellists. The Center will endeavour to appoint one panellist from the list of candidates provided by each party, with a third panellist appointed individually for each case. The panel will send its decision on the complaint within 14 days to the Center, which then delivers the decision to the parties, the registrar and ICANN. Within 10 days of receipt of the decision, the registrar is obligated to transfer the domain name, in accordance with article 4(k) of UDRP.[8]

A positive example of ICANN introducing new out-of-court methods for resolving disputes with regard to trademarks is the procedure for a uniform rapid suspension (URS) system, applied for the first time in February 2013 by the National Arbitration Forum (FORUM). The main purpose of this is to create a fast and inexpensive way of resolving online disputes on the violation of intellectual property rights by making it impossible for third parties to run websites registered that breach the aforementioned rights. The system for instant suspension of the domain name begins with the submission of a complaint by the holder of rights to protection of the trademark to an entity accredited by ICANN that offers URS services.[9] Formal requirements with regard to the complaint are equivalent to those specified in the UDRP and are examined within two days of the complaint's submission. If the outcome is positive, the entity responsible for registering the fact of the agreement's conclusion with the Registry is notified the following day, and the contents of the disputed domain address are then blocked. The party in breach is notified and has a period of about 14 days to submit a response. A negative outcome (such as a lack of response) results in automatic suspension of the domain name. The system does not however allow the transfer of domain rights to the holder of rights to the trademark until the end of the period of unlawful registration, when the domain is blocked, despite the fact that the registered entity remains unchanged.

The main difference between URS and the UDRP is that the new system has a narrower personal scope and that under this system it is not possible to execute the transfer of the domain name. Furthermore, in the case of URS there are no appeal proceedings. The costs in the case of URS are lower, leading to shorter proceedings, a narrowing of the material scope of proceedings to simple (uncontested) cases, and a very limited number of means for carrying out procedures over the electronic system. As a result, the cost of proceedings varies from $300 to $500, and considering a cost for UDRP proceedings of $7000, this means there is growing interest in URS procedures. All the elements of URS mentioned accelerate overall proceedings, but the limited personal and material scope of such proceedings and a lack of the possibility to enforce the domain's transfer discourage potential users.

The settlement of domain name disputes in an environment that is identical to the initial environment of the domain constitutes an excellent example of the implementation of ODR techniques. The system of creating advanced networks for arbitration courts that use the Internet more frequently not only to communicate, but also to settle disputes, is a positive example of specialised legal methods based on modern Internet tools.

In disputes on Internet domains, the use of online arbitration is effective and, thanks to a constant broadening of the range of services within the scope of ADR by ICANN and WIPO, it looks likely that the number of cases resolved in an amicable manner will increase in the coming years.

The crucial issue is whether each type of dispute that might be resolved using alternative methods will be subjected to proceedings conducted online. Does virtual reality have a nature that does not affect the result of proceedings and would the process of dispute resolution and – most importantly – its outcome, therefore be the same in the case of traditional ADR and modern ODR?

An additional element in the form of an electronic tool changes the traditional ADR model and might have a decisive impact on the shape of the process. Automatic data blocking, user verification, the management of meetings, and the hearings schedule might simplify the process for issuing decisions and have an impact on significantly decreasing the complementary role of a third party. The use of ODR techniques should take place only in areas in which parties are not deprived of rights and such rights are not limited.

Furthermore, such implementations are effective for people who want to save time and money in the event that the size of the claim does not correspond with the possible costs of proceedings.

Barriers that slow down the common implementation of the ODR techniques are not based only on technological aspects. The attitudes of the conflicting parties play a key part with respect to alternative methods for dispute resolution, including their electronic forms. The voluntary nature of such processes must have a basis in a high level of trust towards the supporting person (mediator) or the person who decides on the issues disputed (arbiter), and should never be limited, as indicated by the practice of implementing UDRP principles throughout the world.[10] Computer programmes might improve communication, which is a crucial issue for entities separated by a significant distance. However, they might also constitute a barrier that cannot be accepted – particularly within the scope of cases that have an emotional involvement, such as family matters.

[8] All decisions made in the arbitration proceedings conducted by the World Intellectual Property Organization Arbitration and Mediation Center are public and available on the WIPO website.

[9] The first URS providers were the National Arbitration Forum (FORUM) and the Asian Domain Name Dispute Resolution Centre (ADNDRC).

[10] Arbitration proceedings based on Uniform Domain Name Dispute Resolution Policy (UDRP) impose the aforementioned regulation on the registrars of Internet domains, with a direct impact on all users, partially limiting their freedom within the scope of choosing the settlement method for the dispute.

The public perception of ODR shall encourage the use of modern forms, and formal legal obstacles should be reduced – offering the opportunity to those who, bearing in mind the limitations of electronic methods, are not afraid to settle disputes by using them (IDABC, 2004).

4. ODR in consumer disputes

The protection of consumers lies within the competences of the EU and member states, with its formal basis, inter alia, in article 169 clause 1 and article 169 clause 2a of the Treaty on the Functioning of the European Union (2012), article 2c of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007), and in article 38 of the Charter of Fundamental Rights of the European Union (2010).

This obligation is all the more important given the existence of the European internal market, which should ensure unified protection of consumer rights. A guarantee of this is provided, inter alia, by ADR and ODR systems, which allow quicker and less-expensive settlement of disputes (in comparison with common courts). Each member state implements competition and consumer-protection policies individually, resulting in differing levels of access to ADR services.

The European Commission's recommendation no. 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, which defined basic rules on this activity and related proceedings, is an important piece of regulation in the area of consumer disputes. The Commission's recommendation no. 2001/310/EC published in 2001, which amended previous conclusions within the scope of activity of the aforementioned bodies and promoted ADR, is another important document in this area.

The resolution of consumer disputes that arise on the basis of commercial transactions by means of electronic communication are an example of effective implementation of ODR techniques. The creation of a system that enables the conclusion of disputes between a consumer and trader using the same medium over which the purchase or sales transaction was made – that is, the Internet – is a logical extension of introducing e-commerce.

4.1. Characteristics of ODR in the case of consumer disputes

In a report published by the European Commission (which constantly monitor's the community's consumer market) under the title "Consumer Markets Scoreboard 10th edition – June 2014", it was shown that the level of protection in the consumer market differs among member states. As a result, Internet shoppers have a limited trust in traders from other EU countries (European Commission, 2014).

At the same time, many consumers do not have the knowledge of legal systems for dispute resolution in the event of nonconformity of goods with a contract. Despite concerns, the proportion of consumers who participated in cross-border e-commerce increased from 20% in 2004 to 45% in 2012, with the effect of increasing the number of complaints in this area (European Commission, 2013). As indicated in the report from 2013: "As many as 45% of European consumers have made at least one online purchase in the past year [2012]. This represents an increase of 2 percentage points since 2011 and a 5-point increase since 2010. With this growth rate, the proportion of Internet shoppers will have met or exceeded 50% by 2015, in line with the target set out in the Digital Agenda for Europe".[11]

E-commerce disputes are non-personal, so ODR techniques free from direct interactions are tools that allow effective dispute resolution. As a result, consumer disputes constituted the main focus of services provided by portals such as SquareTrade and CyberSettle, customers of which included popular auction portals. This trend continues to date, with some disputes that arise on the basis of transactions made using the eBay portal still settled by external entities that offer ODR services, such as Modria.com. At the same time, autonomous systems have been created (for example, eBay's Resolution Centre). Each auction platform uses its own ODR system or finished solutions in cooperation with other auction platforms.

To tackle consumer problems with regard to goods and services purchased on the EU's internal market, the directive of the European Parliament and Council on alternative resolutions for consumer disputes and regulation on online resolutions for consumer disputes were produced. New regulations shall apply to disputes between consumers and traders within the scope of contractual obligations that arise under sales or service contracts in all economic sectors – with some exceptions – that are concluded via or outside the Internet (Akseli, Garde, & van Boom, 2014, p. 169).

Such solutions involve establishing a network of institutions that provide high-quality ADR services for consumers and a system that provides the general public with information on out-of-court methods.

[11] The creation of the European Consumer Centres Network (ECC-Net), in which associated institutions offer consumers help and legal advice in the area of consumer disputes free of charge, is a positive step towards ensuring fast and inexpensive alternative methods of dispute resolution to consumers in the region who purchase goods and services. As shown by ECCNet statistics, a significant proportion (24%) of complaints that these entities decided on in the EU related to violations of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. However, only 8% of the 24 % of complaints cited were submitted to institutions that provided ADR (see Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (Official Journal L 2007.319.1)). The statistics come from an ECCNet report published in 2012 "Help and Advice on your purchases abroad – The European Consumer Centres Network 2012 Annual Report".

4.2. Directive 2013/11/EU on ADR for consumer disputes and resolution 524/2013 on ODR for consumer disputes

On 18 June 2013, the following documents were published: Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [34]. Member states were obligated to implement the aforementioned legal acts until July 2015, with a date of January 2016 set for launching the ODR platform.[12]

The ADR directive and ODR regulation for consumer disputes are aimed at improving the retail market by introducing a complex system of alternative options for resolution and Internet solutions for out-of-court methods. The legislative changes will enable stabilisation of the EU's internal market by providing consumers with an alternative to the common judiciary and traders with a tool to avoid multi-annual processes (Del Duca, Rule, & Loebl, 2012).

The ADR directive applies to procedures for out-of-court resolution of domestic and cross-border disputes concerning contractual obligations that stem from sales or service contracts between a trader established in the EU and a consumer resident in the region – setting the material scope for ODR regulation.

The directive does not introduce a definition of the forms of ADR in consumer disputes, but mediation is included in this term.[13] Article 2 determines a wide material scope for the directive, not excluding out-of-court proceedings. However, in clause 29 of the preamble, which refers to the principles of confidentiality and privacy, the wording of the provision suggests that arbitration proceedings should be treated as separate from ADR proceedings.

The advantage of the ADR system is the exclusion of the problematic aspect of choice of law. In accordance with article 6 clause 2 of the regulation of the European Parliament and Council no. 593/2008 of 17 June 2008, parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with article 3. Such a choice may not, however, deprive the consumer of the protection afforded to him or her through provisions that cannot be deviated from under the law that, in the absence of choice, would have been applicable. Pursuant to article 44 of the directive's preamble, in a situation that involves a conflict of laws and in which the law applicable to the sales or service contract is determined in accordance with articles 6(1) and (2) of the Rome I regulation, "the solution imposed by the ADR entity should not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State in which the consumer is habitually resident. In a situation involving a conflict of laws, where the law applicable to the sales or service contract is determined in accordance with Article 5(1) to (3) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, the solution imposed by the ADR entity should not result in the consumer being deprived of the protection afforded to the consumer by the mandatory rules of the law of the Member State in which the consumer is habitually resident." Exclusion of the application of article 6 clause 2 of the Rome 1 regulation should be based on specific rules that ensure the consumer's protection at a levels equivalent to statutory legislation. The assumptions adopted in the directive allows the problem of clashes between the legislation of member states to be resolved, improving and speeding up the entire ADR processes.

In accordance with the directive, proceedings with regard to resolving out-of-court consumer disputes are based on the principles of transparency, voluntariness and fairness of treatment. Article 7 of the directive introduces the requirement of transparency for ADR entities, which are obligated to provide parties with clear and easily understandable information, such as contact data (for instance, postal and e-mail addresses) and information about whether or not the parties can withdraw from the procedure. The voluntariness of proceedings is referred to in article 10 of the directive, emphasising that a decision on the choice of procedure remains solely with the parties and does not deprive them of the right to bring action before the courts. Fairness of treatment can be understood as a number of obligations imposed on ADR entities with regard to information (article 9 of the directive). Furthermore, article 5 clause 2 determines a list of obligations that a member state should impose on an ADR entity, among which is an obligation to enable the exchange of information between the parties via electronic means or, if applicable, by post.

The material and personal scope of the ODR regulation in clause 9 of the preamble and in article 2 clause 1 relate directly to the provisions of directive 2013/11/EU of 21 May 2013 on ADR, with the exception of disputes between consumers and traders that arise from sales or service contracts concluded offline and disputes between traders specified in clause 15 of the preamble.[14]

Under the directive, the procedure for filing complaints should only take place on the Internet via a dedicated electronic platform available in official EU languages.[15] After filling in the complaint form, the seller will be notified about its contents

[12] Member states were given 24 months from July 2013 to transpose the directive's provisions into national legal system. The deadline was 9 July 2015. The provisions of the regulation will enter into force on 9 January 2016, with some exceptions.

[13] A direct reference to mediation in the directive can be found in clause 19 of the preamble.

[14] In clause 14 of the regulation's preamble, a definition of "online sales or service contract" is included, whereby the term covers a sales or service contract in which the trader, or their intermediary, offers goods or services on a website or by other electronic means and the consumer orders them on that website or by other electronic means. This definition should also cover cases in which the consumer has accessed a website or other information-society service through an electronic mobile device such as a mobile phone.

[15] In accordance with clause 18 sentence 3 of the regulation's preamble: "It [the ODR platform] should allow consumers and traders to submit complaints by filling in an electronic complaint form available in all the official languages of the institutions of the Union and to attach relevant documents. It should transmit complaints to an ADR entity competent to deal with the dispute concerned. The ODR platform should offer, free of charge, an electronic

so that within 10 calendar days they can choose an entity that provides ADR services – to which the consumer is entitled to grant consent within the next 10 days. The ODR platform automatically delivers the complaint to the ADR entity or entities previously chosen by the parties. Such entities should immediately notify the parties about receipt of the complaint or refusal to deal with a given dispute pursuant to article 5 clause 4 of the directive. If the parties fail within 30 calendar days of submission of the complaint form to agree on an ADR entity, or the entity refuses to deal with the dispute, the complaint will not be processed further under this procedure.

The ADR entities will be assessed by the European Commission so they can be entered into the registry of entities competent to settle consumer disputes out of court. This enables the creation of an ODR contact points network related to the existing European Consumer Centres Network by organisational (national) structure. The provisions of article 6 of the directive impose quality requirements, emphasising that it is necessary that ADR entities "possess the necessary expertise and are independent and impartial". The assumptions cited suggest that in many member states, including Poland, it would be necessary to introduce a deep reform of the existing ADR system for consumer disputes to allow the unification of requirements applicable to natural persons conducting, for example, mediation proceedings.

The outcome of ADR proceedings has no binding force, and in accordance with article 9 clause 3 of the directive, different solutions might be adopted in national law. The issue of binding force with regard to the outcome of proceedings for parties is determined in clause 43 of the preamble: "An agreement between a consumer and a trader to submit complaints to an ADR entity should not be binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute. Furthermore, in ADR procedures which aim at resolving the dispute by imposing a solution, the solution imposed should be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. Specific acceptance by the trader should not be required if national rules provide that such solutions are binding on traders".

In terms of guaranteeing the confidentiality and protection of personal data of the entities that constitute an ODR platform, the resolution refers to the provisions of the Directive of the European Parliament and of the Council of 24 October 1946 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

The solutions that will be introduced under the new regulation should have a significant effect on consumers, who would be provided with fast and inexpensive ways of settling disputes with traders. Traders would incur additional costs at the start, but would be forced to improve existing internal systems for deciding on complaints to ensure a high level of functionality and effectiveness.[16]

New legal regulations will be connected with a number of changes in the scope of law of member states at the level of statutory legislation. It will be necessary to introduce material provisions that regulate the area of out-of-court consumer disputes, procedural provisions that enable the amendment of existing acts to offer a different scope of competence for entities that provide out-of-court settlement systems for disputes, and institutional provisions. Institutional provisions will be directly related to article 5 of the directive, which outlines member states' obligation to ensure that consumers have access to alternative methods for the resolution of disputes that involve a trader established in the territory of a given member state.

5. Conclusion

Pursuing claims before the courts or out of court is part of the right to access to justice protected at an international, European and national level. This postulate is based on autonomy in choosing a way to settle a dispute – whether before the common courts or by using alternative methods. However, the availability of the latter rests with national initiatives that support the creation of institutions providing ADR services or private activities (Fiadjoe, 2013, p. 34).

The material and personal scope for using ODR methods is not unlimited (Goodman, 2003). Online mediation offers a wide range of implementation methods, confirmed by its fastest-growing branches: consumer and family law. However, many legal issues, such as classifying violations or legal liability, cannot be resolved through electronic mediation. A lack of direct contact in the course of mediation does not favour the creation of trust, which is the basis for directing a claim to be settled by any out-of-court processes. Electronic communication, despite its apparent accessibility, might also create a number of mental barriers that prevent effective mediation.

(*footnote continued*)
case management tool which enables ADR entities to conduct the dispute resolution procedure with the parties through the ODR platform. ADR entities should not be obliged to use the case management tool."

[16] The aforementioned directive and regulation impose a number of obligations on the seller to change the contents of commercial contracts and documents to adjust them in line with new regulations (such as providing information on receipts). This signifies additional costs, while simultaneously allowing the financing of ADR systems in sectors in which outofcourt solutions were not previously applicable. Countries with lower levels of usage of alternative methods for dispute resolution will incur higher costs in remedying deficiencies in the existing system.

The material scope for applying online arbitration is also limited. When formulating postulates on changes within the scope of law, the introduction of additional solutions in the form of electronic arbitration proceedings should be considered – especially with regard to legal problems that arise on the Internet. The idea of creating a network of permanent arbitration courts that can be used in the event of domain name disputes is the right direction to take not only for the development of ODR techniques, but also to preserve the competitiveness of services on the market.

Empirical research on ODR methods indicates that they are most efficient for disputes with a low level of complexity. Legal relationships between conflicting parties with a specific character and type of claim, and on the basis of clear provisions, might be subjected to ODR techniques. It is necessary to create a legal framework involving electronic tools, such as platforms and Internet portals, that enable the automatic resolution of disputes without the need for legal classification, time-consuming hearings.

Unfortunately, the legislation of many member states does not allow the implementation of electronic out-of-court proceedings. In the case of Poland, many difficulties are faced by mediation conducted exclusively online. Decisions of the court that direct parties to mediation, which in accordance with article 183^1 § 2 of the Polish Code of Civil Procedure constituting one of the grounds for initiating mediation, under article 131 of the Polish Code of Civil Procedure must be issued in a form specified in the provision, which excludes the possibility of electronic communication (Act amending the Polish Civil Procedure Code, 2005). Within the scope of settlement approved by the court on the basis of article 183^{12} § 2 of the Polish Code of Civil Procedure, an online format is also not possible with regard to the requirement for parties to submit signatures together with minutes containing the mediator's signature. Furthermore, in the case of arbitration proceedings, the country's legal system does not allow all activities in this area to be conducted by electronic means. In accordance with article 1197 of the Polish Code of Civil Procedure, the judgement of the arbitration court must be drawn up in writing. The lack of adjustment of provisions to modern communication forms is present in many EU countries, slowing down the implementation of ODR techniques (such as France).

Despite an anticipated increase in ODR use in the EU for implementing the provisions of the ADR directive and ODR regulation in consumer disputes, these techniques will not become common because they are only relevant to specific types of dispute. It seems likely that mediation and arbitration proceedings will be supported by electronic communications more frequently, but this does not mean that all their processes will be transferred to the Internet and that mediators and arbiters will be replaced by computer programmes.

The non-verbal nature and lack of direct contact in the use of electronic methods might be the most crucial advantages and disadvantages for some participants. The psychological aspect of building parties' trust might not work in the case of remote communication. The supporters of electronic methods emphasise the importance of direct procedures that improve knowledge of the parties' interests and create a positive emotional environment. But this does not necessarily need to constitute part of an out-of-court procedure for dispute resolution, which, given its deformalised character, creates a high level of freedom in the proceedings conducted.

The rarity of out-of-court methods that have been transferred to the Internet might be justified by a lack of trust in modern forms of dispute resolution (Susskind, 2013). In countries with highly developed economies, a larger percentage of people have access to the Internet. Meanwhile, it would be easier to implement ODR solutions in countries with a higher level of ADR use. Nations that do not have a confidence towards alternative forms of dispute resolution, with a belief in the primacy of the common judiciary over out-of-court forms, have more difficulty adopting new methods – and this slows down the creation of a European network of ODR providers.

The implementation of new regulations on ADR and ODR in consumer disputes at a European level invites reflection on the current challenges faced in this area. The main problem is a lack of organisational structure among ADR providers in some member states. The existing entities fail to promote their services, meaning that they remain inaccessible and unknown to many potential customers. This state of affairs discourages their use, giving an impression of low quality in the services provided. The establishment of a central institution to coordinate the creation of a network of entities providing out-of-court methods for resolving disputes might be a step in the right direction. The execution of the aforementioned postulate shall be easier in relation to the mediation proceedings. Arbitration, which consists of quasi-court procedures with an adjudicating nature, needs significantly higher requirements to be met, but it is possible in operating a system to introduce solutions that improve the current situation.

It seems, however, that the provisions of the cited directive and regulation will provide an effective impulse to popularising alternative methods of dispute resolution, with unified quality requirements in each member state. A developed network of institutions that provide mediation services will help to relieve the justice system and comply with the principles of a fair process conducted in a reasonable amount of time. Furthermore, it will contribute to ensuring sectoral and geographic filling of the market of out-of-court methods for dispute resolution in the EU.

In this study, mixed methods were used to analyse and collect quantitative and qualitative data. Documentary, textual and statistical analyses of public records were used to explore the relationships between justice, alternative dispute resolution and online dispute resolution.

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