



INTERNATIONAL
HELLENIC
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ONLINE DISPUTE RESOLUTION (ODR) IN EUROPE

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A thesis submitted for the degree of

Master of Arts (MA) in Energy Law, Business, Regulation and Policy

January 2019

Thessaloniki – Greece

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I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

January 2019
Thessaloniki - Greece

Abstract

This dissertation was written as part of the MA in Energy Law, Business, Regulation and Policy at the International Hellenic University (I.H.U.).

In this dissertation, there will be a critical analysis of the development of Online Dispute Resolution (ODR) in Europe via the European Regulation on ODR No 524/2013. The thesis is divided into five chapters. To introduce the unfamiliar reader to ODR, the second chapter of this thesis, after the first introductory chapter, describes the concept of ODR, its relationship with the ADR and some ODR forms, especially online mediation and online arbitration. A short reference to the relationship between ODR and Artificial Intelligence (AI) is also analyzed in this chapter. Following, after a short description of the ADR Directive 2013/11/EU, the thesis critically examines the European Regulation on ODR No 524/2013 that took effect on 2016 with the establishment of a pan-European ODR Platform by describing the scope of this Regulation, the function of the ODR platform and its operation, according to the relevant report of the European Commission within 2017.

Furthermore, chapter four will describe the perspective of the United Nations Commission on International Trade Law (UNCITRAL) on ODR and its set of draft and non-binding ODR rules. Technical Notes, which were adopted by UNCITRAL in 2016 and constitute a set of non-binding rules that propose an international standard system on ODR, will also be analyzed in this chapter. Finally, chapter five presents final remarks and conclusions on the development of ODR in a European and a global level.

Keywords: online dispute resolution (ODR), alternative dispute resolution (ADR), e-commerce, Technical Notes, UNCITRAL.

Elisavet Beka

23 January 2019

Preface

Hereby is my dissertation “Online Dispute Resolution (ODR) in Europe”. It has been written to fulfill the graduation requirements of the MA in Energy Law, Business, Regulation and Policy at the International Hellenic University (I.H.U.). The research on this thesis was undertaken after the title was accepted by the University. I was engaged in researching and writing this dissertation from September 2018 to January 2019. It is worth stating that through this dissertation I had the chance to deepen my knowledge in the specific area of online dispute resolution.

My deepest thanks and gratitude go to my respected supervisor Prof. Komninos G. Komnios, for his support, his immediate responses to my inquiries and his valuable suggestions. He has contributed immensely towards the fulfillment of the dissertation thesis by encouraging me and guiding me through the process. I would also like to thank Prof. Athanassios Kaissis, who was my mentor during my postgraduate program, for his academic example and his devotion towards students all the way through our studies at the MA in Energy Law, Business, Regulation & Policy .

I also feel the need to express my sincere gratitude to the library staff at the Hellenic International University for their assistance and cooperation in providing me with relevant material to the thesis.

Last but certainly not least, this dissertation could not be completed without the unconditional support of my parents, Bekas Michail and Koliou Sophia, and my sister, and colleague lawyer, Beka Eleni. Their efforts and encouragement will be motivating me to achieve all my goals.

I hope you have a pleasant reading.

Beka M. Elisavet

Thessaloniki, January 23, 2019

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Introduction

It is evident that electronic commerce has rapidly developed over the last decades due to the broad access and use of the Internet worldwide. Consumers have started to participate in transactions ignoring distance, cultures and time zones. Inevitably, this growing online activity started to generate disputes that couldn't be easily settled by the traditional resolution forms of the offline market. Since the purchase of goods and services under dispute is evolving online, it seems appropriate to resolve these disputes under the same circumstances, as long as no inconvenience is caused to both consumers and businesses. As technology started to form not only the market but also the landscape of disputes, a new branch of dispute resolution that uses technological tools started to grow, online dispute resolution, known as ODR. In the view of the author, the twenty- first century draws the attention of the policy- makers to the establishment of an effective, consumer- friendly redress system based on out-of-court ODR schemes.

More specifically, ODR is the offspring of the dispute resolution world, which is continuously growing and the information technology development. Since 2000 much attention has been drawn on ODR as businesses started to use it to benefit from its advantages such as flexibility, cost- effectiveness and etc.¹ Although ODR projects made their first appearance in USA (Philadelphia, Villanova University)², it was only a matter of time for them to expand in Europe, as well. Soon the European Commission realized that the market itself could not develop efficient redress options as problems with purchased goods remained unresolved due to inadequate access to ADR entities across Europe³. Therefore, in 2016 the Commission adopted the new legislation of the ADR Directive 2013/11/EU and of the ODR Regulation 524/2013 that sets as a primal goal the protection of consumers in their e-commerce transactions

¹ Mireze, *Now where do we stand with online dispute resolution (ODR)*, 2010, p.1

² Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, p.54

³ Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, 2016, p.18

and the encouragement of the use of ODR entities in case of relevant arising disputes⁴. It is important to note out that although the legal documents mentioned above are interlinked, the scope of this paper mainly focuses on the content of the ODR Regulation and not on the content of the ADR Directive.

The aim of this thesis is to shed light on the thorny terrain of the ODR by analyzing its forms, its complex relationship with the traditional offline ADR and by examining the development of ODR in Europe via the recent implementation of the European ODR legislation. It is important to point out that the scope of this paper examines the concept of ODR in relevance to online ADR without any further analysis on the possible expanding options it might offer in the near future.

Thus, this thesis consists of five chapters, each placed on a logical order to elegantly guide the reader through the topic. After this short introduction, chapter two provides general information on the history of ODR, its complex relationship with ADR and the most prominent ODR forms, especially online mediation and online arbitration. A short reference to the relationship between ODR and Artificial Intelligence (AI) is also provided in this section. In chapter three the European Regulation on ODR No 524/2013 that took effect on 2016 with the establishment of a pan-European ODR Platform will be presented and analyzed to comprehend its content and detect possible mistakes and vague elements. More specifically, the scope of this Regulation, the function of the ODR platform and its operation, according to the relevant report of the European Commission, within 2017 will be elaborately examined. Thereafter, chapter four will describe the perspective of the United Nations Commission on International Trade Law (UNCITRAL) on ODR and its set of draft and non-binding ODR rules. Hence, this chapter also presents the adopted by UNCITRAL in 2016, Technical Notes which constitute a set of non-binding rules that promote and propose an international standard system on ODR. Finally, chapter five presents final remarks and conclusions on the development of ODR in a European and a global level.

⁴ *ibid*, p.18

THE CONCEPT OF ODR

A BRIEF HISTORY OF ODR

The first prominent ODR project was launched during the 1990s by a working group in USA (Philadelphia) at a meeting funded by the National Center for Automated Information Research and the Cyberspace Law Institute. It was a voluntary online arbitration procedure, called Virtual Magistrate Project, with the aim of resolving disputes between Internet Service Providers and users of online systems⁵. Although VM rendered only one decision (1996), its failure was not ascribed to the nature of the ODR mechanism, but rather to inadequate advertising and limited range⁶. Other well-known ODR initiatives include the Online Ombuds Office (1996) which provided online, cost-free mediation for the resolution of certain types of disputes⁷, CyberTribunal (1996) a radical project that employed both mediation and arbitration⁸ and an experiment resolving eBay disputes that later led to SquareTrade. According to Pablo Cortes, ODR can be divided into four distinct phases⁹:

(I) Hobbyist phase: from the creation of the Internet until 1995, when ODR didn't exist.

⁵ Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, p.54

Donahey, *Dispute Resolution in Cyberspace, Journal of International Arbitration*, 1998, pp.16-18

Wahab/Katsh/Rainey, *Online Dispute Resolution: Theory and Practice*, 2011, p. 400

⁶ *ibid*, p. 400

⁷ Donahey, *Dispute Resolution in Cyberspace, Journal of International Arbitration*, 1998, p.20

⁸ Wahab/Katsh/Rainey, *Online Dispute Resolution: Theory and Practice*, 2011, p. 401

⁹ Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, pp. 54-55

(II) Experimental Phase: from 1995 to 1998, when Internet started to grow and the first ODR projects came into sight by non-profit organizations (e.g. Virtual Magistrate Project, Online Ombuds Office)

(III) Entrepreneurial phase: from 1998 to 2002, when commercial enterprises started to show interest on ODR (e.g. SquareTrade and CyberSettle)

(IV) Institutional phase: from 2002 to present because of the adoption of ODR projects and regulations by public bodies/ Member States. Cooperation between the industry and the public function is widely expected, especially after the institutionalization of the process of consumer disputes via ODR in Europe (Regulation and Directive)

In the view of the author, the main conclusion from the historical development of ODR is that this dispute resolution form is closely connected to the growth of the Internet and the perception of the digital environment as a significant sector of human activity.

HOW DOES ODR DIFFER FROM ADR?

It is essential to distinguish the differences between ODR and ADR in order to comprehend the concept and the effect of ODR in the dispute resolution world. Undoubtedly, ADR is inextricably linked to out-of-court settlement procedures such as negotiation, mediation, arbitration, and conciliation in an "offline environment". Expertise mediators and arbitrators direct to solutions or resolve arising disputes in a rapid manner and, at most times, at low costs to parties that wish to reach an end and end their conflict outside the court. Clearly, the traditional process of ADR involves physical presence of the third party (mediator/ arbitrator) in a real time interaction with the opposing parties. With the advent use of Internet and technology, as mentioned above, a new form of dispute resolution came into existence, the ODR. The relationship between the use of information and communications technology (ICT) and ADR constitutes the main element in the development of ODR. Although many dispute resolvers identify ODR with the key player of technology, Internet, it is important to

keep in mind that every form of technology fulfills the definition of ODR including telephones, LCD projectors and other ordinary technological platforms¹⁰.

According to Colin Rule, former Director of the Online Dispute Resolution program for eBay and PayPal, "ODR and ADR are fundamentally the same thing". The addition of ICT to ADR leads to the expansion of an already existing professional field and not the creation of an entirely new one¹¹. The principles and the goals of ODR, based on impartiality, transparency, effectiveness, fairness, legality and justice, are identical to those of ADR. The main apparent difference between the two forms of extrajudicial resolution is the medium used in the settlement of disputes: direct human intervention on ADR, whilst programmed software on ODR. However, it must also be considered that ODR cannot be entirely equated to online ADR because as technology evolves, so does ODR and the variety of its activities, which will probably surprise us in the near future¹².

The lack of direct face-to-face contact in ODR has been widely criticized and considered to be a hurdle in the development of ODR. It is self-evident that ICT tools are not capable of utterly replacing the richness of in-person communication which includes facial expressions, gestures, tone of voice and other expressions of emotions. However, ICT communication can be perceived as one of the key advantages of ODR because of its anonymity and asynchronism. According to Hammond's study, which refers to the importance of ODR mechanisms, conflicts and their resolution, parties of a conflict tend to feel calmer and relieved by hostility stress in an online dispute resolution environment¹³. Users are not obliged to face the other party and

¹⁰ Rule, *Is ODR ADR? A response to Carrie Menkel-Meadow*, 2016, p.8

¹¹ *Ibid*, pp.8-9

¹² Wallis, *Online dispute resolution: will the talk turn to action?*, *Journal of Personal Injury Law*, 2015, p.2

¹³ Hammond, *How Do You Write "Yes"?: A Study on the Effectiveness of Online Dispute Resolution*, 2003, p. 275

interact physically with them. On the contrary, technology-based communication allows parties to take their time, organize their thoughts and feelings and concentrate on the substantive elements of the dispute instead of flinging themselves in hostile and pressurized feelings¹⁴. The same beneficial effects of the virtual environment apply to dispute resolution practitioners (mediators/arbitrators) as well, since they can take the time, they need to respond to the parties without a poker face on which is required in traditional ADR¹⁵. In addition, it is evident that although digital tools deprive from the physical face-to-face sessions, they are equipped with various visual capabilities such as video conferences, emails and combinations of text and images which significantly enhance interactivity between the parties. In my view, online communication culture by developing paralinguistic means, has managed to build the trust and security required in ODR in order to make it almost equal to offline ADR.

¹⁴ Schwartzenbacher, *Online Arbitration: A European and US Perspective*, 10 *Bocconi Legal Papers* 387, 2018, pp.389-391

¹⁵ Poblet/Casanovas, *Emotions in ODR*, 21 *Int'l Rev. L. Computers & Tech.* 145, 2007, p.150

FORMS OF ODR

Online mediation

Undoubtedly, mediation represents the most widespread dispute resolution method that benefits both parties by offering them a 'win-win' solution opposed to the judicial settlement procedure. In the traditional, offline form of this voluntary process, the impartial third party facilitates communication and directs the parties to find the path to the most advantageous agreement. In the online form, the directional role of the mediator as well as the procedural five stages (initial statement of the mediator, parties' opening statements, mediator's assistance through discussion, caucuses and decision-making) remain unchanged¹⁶. However, the tools with which the process operates differ significantly from the traditional mediation. Face-to-face communication is being replaced by video conferences, direct emails and other web communications, whilst in some companies (e.g. SmartSettle) the independent neutral third party can be partly replaced by an algorithmic software that proposes suggestions to help the parties reach an agreement, under the parties' consent¹⁷. Although online mediation is developing due to its flexibility, time efficiency, low-cost and speedy solutions, inconveniences such as technological problems attributed mostly to users' different technological skills, lack of consent of one party and difficulty in building trust throughout the process prove to be, unfortunately, quite challenging hurdles in the use of this dispute resolution method¹⁸. Consequently, online mediation seems to be suitable for less complex and inexpensive issues such as e-commerce cases (e.g. products bought online arriving late or not fitting the seller's description). As a matter of fact, the European 2008 Mediation Directive (2008/52/EC) applies to

¹⁶ Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, pp. 145-146

Lavi, *Three Is Not a Crowd: Online Mediation-Arbitration in Business to Consumer Internet Disputes*, 37 *U. Pa. J. Int'l L.* 871, 2016, p.882

¹⁷ Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, pp. 147-148

¹⁸ *Ibid*, pp.149-151

specific civil and commercial cases apart from these where parties do not have disposal of their rights under their national law. Moreover, it must be emphasized that even though this Directive promotes mediation, there are no mandatory provisions for its application which could probably lead to an increase of the impact of this Directive and of the number of mediations in EU¹⁹.

Online negotiation

Certainly, negotiation is another common method of dispute resolution that leads through dialogue to an out-of-court settlement of disputes²⁰. There are two models of online negotiation, the assisted negotiation and the automated/ blind-bidding one²¹. The first model refers to the limited categorized solutions offered in case a dispute arises. For instance, eBay's ODR platform (number of disputes reached) automatically provides the dissatisfied consumer with three options in case of a defective product issue: return of the product, partial refund or shipping of a new product by the business. The automated/ blind-bidding negotiation concerns situations where parties disagree on the type of the redress and its value. Both parties are allowed to propose their bargaining opinions and invite the other party to make their offers with the assistance of a specified software. During the negotiation process each side's suggestions are kept hidden from the other side and are disclosed when these offers enter a specific range (double blind -bidding method) or when they coincide

¹⁹ *Ibid*, p.159

Economic and Social Development, 16th International Scientific Conference on Economic and Social Development: The Legal Challenges of Modern World , 2016, p. 266

²⁰ Chan, *Getting to Yes Online: A Look at the History, Concepts, Issues and Prospects of Online Dispute Resolution Systems (ODRS)*, 83 *Phil. L.J.* 528, 2009

²¹ Cortes, *A New Regulatory Framework for Extra-Judicial Consumer Redress: Where we are and how to move forward*, 2014, p. 18

(visual blind-bidding method)²². Evidently, both models of online negotiation by promoting direct negotiation between the involved parties without the intervention of a neutral third party, they manage to avoid the extra cost, time and process of the traditional ADR negotiation. Therefore, an effective negotiation tool proves to be suitable for the resolution of low-cost ecommerce disputes.

Online arbitration

Traditional arbitration leads to a final and binding decision on both parties, determined by an independent and impartial private third party. The foreign arbitral award, which replaces the court decision, is enforced and recognized, in most countries, through the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As mentioned above, considering that (History of ODR) the first ODR project was an e-arbitration program the Virtual Magistrate, the utilization of modern ICT tools in arbitration does not seem surprising. At this point it is important to clarify that there are two distinct ways in which technology can be combined with the arbitration process: a) technology-assisted arbitration, where the electronic element/ information technology is used as a management, information and communication tool, and b) technology-based arbitration where software application utterly replaces human activity²³. In this chapter, the first category will be discussed, as the second one will be discussed below in separate chapter (Artificial Intelligence). In online arbitration, Internet facilitates the process and the communication of the parties through emails, e-filing and e-submissions, owing to the writing nature of this ADR form. The existing law and arbitral

²² Wahab/Katsh/Rainey, *Online Dispute Resolution: Theory and Practice*, 2011, p. 34 (Blind-bidding is distinguished between 2 types: double blind-binding, used by Cybersettle, and visual blind-binding, used by Smartsettle)

²³ Wahab/Katsh/Rainey, *Online Dispute Resolution: Theory and Practice*, 2011, p.402;

Philippe, *ODR Redress System for Consumer Disputes: Clarification, UNCITRAL Works & EU Regulation on ODR,1 IJODR 57,2014*, p.59

principles allow the process to take place online via the use of ICT tools²⁴. The majority of legal commentators agree that the 1958 New York Convention can be applied to e-awards as long as they meet the requirements for recognition and/or enforcement in the Article 5 of the NYC which refer to the final character of the awards, the compliance with due process issues and capability of electronic arbitrability²⁵. However, non-binding online arbitration is preferable in consumer disputes because of legal hurdles. It is common place for businesses to oblige consumers to resolve every arising dispute under arbitration, ruling out the possibility of a judicial procedure. Nevertheless, European Union protects consumers and promotes their right to seek judicial redress in legislatures of paramount importance such as the European Convention of Human Rights (Article 6) and the Brussels I Regulation (Article 17.1)²⁶. Therefore, consumers are allowed to agree to arbitration as a resolution method only after the arising of the dispute.

Online Juries / Mock Trials

In the context of ODR and Internet, it is necessary to make a concise reference to crowdsourced online dispute resolution (CODR) which includes three types of procedures: a) online opinion polls, b) online mock juries and c) CODR procedures rendering decisions that are enforced by private authorities²⁷. Cyberjuries made their first appearance (e.g. iCourthouse, SideTaker) as online opinion polls where non-experts users would vote for the one or the other party of the online posted

²⁴ Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, p. 107

²⁵ Wahab/Katsh/Rainey, *Online Dispute Resolution: Theory and Practice*, 2011, p. 430

Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, p. 112

²⁶ *Ibid*, pp. 107-108

²⁷ Van Den Herik/Dimov, *Towards Crowdsourced Online Dispute Resolution*, 7 *J. Int'l Com. L. & Tech.* 99, 2012, pp. 99-100

dispute²⁸. Soon thereafter, lawyers started to use sites such as eJury and VirtualJury in order to present shorter versions of their trivial cases (opening and closing statements of both parties) before a traditional trial. These online mock juries gave the opportunity to the involved parties to understand how other neutral parties estimate the outcome of their case, based on their commonsense judgement²⁹. The third type of CODR is connected to a dispute resolution mechanism of which the decisions are enforced through a cyberspace code (set of rules codified in the software of cyberspace) by a private authority. A prominent example of this model of CODR constitutes the Uniform Domain Name Dispute Resolution Policy (UDRP), which subsequently inspired the development of eBay's Community Review Form (ECRF) which allows eBay members to appeal against negative feedback they have gained³⁰. Even though, at present, there is a lack of information about the existence of CODR, partially because of the lack of a relevant regulatory framework, the amendment of the European Small Claims Procedure (ESCP) Regulation (EU 2015/2421) which promotes online courts for small claims, creates high expectations for the CODR future³¹.

Consequently, ODR mechanisms are endowed with a deep range of advantages such as their ability to overcome distance and time zones, their simplicity, flexibility, anonymity and cost-effectiveness. However, issues such as technological problems, the absence of a universal regulatory framework and language barriers

²⁸ Marder, *Cyberjuries: A New Role as Online Juries*, 38 *U. Tol. L. Rev.* 239, 2006, p.239

²⁹ *Ibid*, pp. 239-240

Van Den Herik/Dimov, *Towards Crowdsourced Online Dispute Resolution*, 7 *J. Int'l Com. L. & Tech.* 99, 2012, p.101

³⁰ *Ibid*, p. 101

³¹ *Ibid*, p.109

Cortes, *Online small claims courts: the reform of the European small claims procedure*, *Computer and Telecommunications Law Review*, 2016, p.1

remain crucial obstacles that need to be mitigated in the future to allow the development of ODR³².

FOURTH PARTY IN ODR AND ARTIFICIAL INTELLIGENCE

Subsequently, as technology is the revolutionary element that individualizes ODR, a reasonable question might cross the mind of the reader: What is the exact role of technology in ODR? Ethan Katsh, director of the National Center for Technology and Dispute Resolution,³³ known as the father of ODR, argues along with Janet Rifkin that technology represents the “Fourth Party” in ODR because it frequently takes on third party responsibilities, improving the delivery of services³⁴. Organization of information, performance monitoring, meeting arrangements, clarification of interests and mutually accepted outcomes constitute a few responsibilities that the so called “fourth party” can easily take on, especially in less complex e-commerce disputes. In other words, the digital environment, as it develops through the years of technological progress, it turns out to be the fourth party that aids (i.e. in automated or assisted negotiation) or complements, by being used as an assisting tool, mediators and arbitrators in the information and communication management without displacing them³⁵. In spite of

³² Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, pp. 56-59

Lavi, *Three Is Not a Crowd: Online Mediation-Arbitration in Business to Consumer Internet Disputes*, 37 *U. Pa. J. Int'l L.* 871, 2016, pp.885-910

³³ See <<http://odr.info/ethan-katsh/>> (last visited: 8/1/2019)

³⁴ Katsh, *ODR: the next Phase*, 2002

³⁵ *Ibid*

Sera, *Can computers be fair: How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 2018, p.98

Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, p. 85

the fear that the "Fourth Party" provokes, when one participates in a transaction online without the intervention of a physical presence, it is comprehensible to have any arising disputes resolved in the same online environment using identical tools³⁶.

As previously stated, online dispute resolution is inseparably linked to technological development and ICT expansion. What if Artificial Intelligence evolves so rapidly that the use of non-human third parties in ODR becomes the norm? This hypothesis has agonized Rule, Wahab and other ODR specialists through the last decade regarding the decisive integration of technology in most aspects of our everyday life³⁷. However, at the time being, English and French Laws state that non-human intelligence is not sufficient to cover the impartiality and the other essential skills that are required to act as an arbitrator³⁸. According to Lodder and Zeleznikow, active personalities in the field of A.I. and Law, Artificial Intelligence is associated with the study of automated human intelligence which has as a research subject tasks that combine human intelligence and knowledge comprehensible by computers³⁹. This combination, that promotes the advisory role of Information Technology (IT), can be depicted in their three-step model that includes a negotiation support tool which provides feedback, dialogue techniques and alternative strategies in case the previous step fails to resolve the dispute⁴⁰. It is essential to point out that the application of A.I. into ODR forms is not expected to lead to the alteration of the ethical standards of

³⁶ Katsh/Rule, *What we know and need to know about Online Dispute Resolution*, 2016, p. 331

Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, p. 85

³⁷ Cortes, *Online Dispute Resolution for Consumers in the European Union*, 2011, p.84

Wahab, *Online Arbitration: Tradition Conceptions and Innovative Trends, International Arbitration: The Coming of a New Age?*, Kluwer Law International 2013, p.2

³⁸ *Ibid*, p.3

³⁹ Wahab/Katsh/Rainey, *Online Dispute Resolution: Theory and Practice*, 2011, p.73

⁴⁰ *Ibid*, p. 74

confidentiality, impartiality, procedural fairness, mutual respect and security of information⁴¹. Currently, it seems quite distant for AI applications to evolve into entities with independent assessment and critical thinking such as human arbitrators and mediators, even so it must be noted that national laws and courts will play a key role in the integration of AI into the dispute resolution mechanisms⁴².

⁴¹ Rainey, *Third-Party Ethics in the Age of the Fourth Party*, 1 IJODR 37, 2014, p.38

⁴² Wahab/Katsh/Rainey, *Online Dispute Resolution: Theory and Practice*, 2011, p.421

ONLINE DISPUTE RESOLUTION IN EUROPE

ODR in the EU

The European Commission proceeded to the implementation of the ODR Regulation No 524/2013 to complement the ADR Directive 2009/22/EC for the online out-of-court resolution of cross-border e-commerce disputes, to offer the opportunity to consumers to settle their online disputes in a quicker, cheaper and more informal manner. According to the European Commission's press release, "in 2010, one in five consumers in the EU encountered problems when buying goods or services in the Single Market, leading to financial losses estimated at 0.4% of the EU's GDP"⁴³. Therefore, it was estimated that the establishment of a proper and transparent ADR could save around €22.5 billion a year, corresponding to 0.19% of EU GDP⁴⁴. In all respects, the aim of the ODR Platform is to promote ADR and ODR processes for consumer disputes, that remain surprisingly unappreciated in some Member States, facilitate individual redress within the European Union and protect the key-players of the Market, i.e. consumers.

ADR DIRECTIVE 2013/11/EC

Considering the integral link between the ODR Regulation 524/2013 and the ADR Directive 2013/11/EC, it is essential to briefly describe the basic aspects of this Directive. The purpose of this directive is to impose the obligation to Member States to ensure the provision of nationally certified, fair and independent alternative dispute resolution entities for consumer complaints (article 1 of ADR Directive). Member States may fulfill their obligation by ensuring the existence of private or public certified ADR schemes, by setting at least one residual certified ADR scheme that operates in all

⁴³ Morek, *New legislation on ADR and ODR for consumer disputes adopted in the European Parliament Kluwer Mediation Blog*, 2013

See <http://europa.eu/rapid/press-release_MEMO-13-193_en.htm> (last visited:8/1/2019)

⁴⁴ *Ibid*

the sectors, or by relying on ADR schemes established in other Member States (article 5§3 of ADR Directive). The scope of the Directive applies to out-of-court resolution procedures of domestic and cross border disputes, arising from sales or service contracts, where traders are established in the European Union and consumers are residents of the Union (article 2 of ADR Directive). As a matter of fact, this Directive covers only consumer complaints and not trader complaints from both online and offline contacts of sales and services⁴⁵. The restriction of not allowing traders to act as complainants is probably due to their advantageous position since their resources of information to prove their claims, in case of an arising dispute, are several in comparison to the consumers' resources.

Article 5 of the Directive analyzes the access to a CADR entity. These ADR entities must include updated, easily accessible websites that allow consumers to submit their complaints both online and offline. Hence, they should accept both domestic and cross border disputes including the ones described in the ODR Regulation 524/2013. However, it is not required for the CADR entities to offer their services in all the European languages⁴⁶. According to article 5§4 of the Directive, ADR entities are allowed, under permission of the Member States, to establish procedural rules that do not accept specific types of disputes, for instance, in the case a dispute is considered to be "frivolous". Articles 6-11 describe the quality standards of expertise, independence, impartiality, transparency, effectiveness, fairness and liberty. These principles constitute the minimum requirements for the certification of consumer alternative dispute resolution entities (CADR entities). Clearly, Member States may add extra requirements for the certification of CADR entities, if needed. It is essential to mention that according to article 7 of the Directive, the publication of decisions is not allowed due to the opposition to the principle of transparency despite the fact that it could facilitate the predictability of dispute outcomes.

⁴⁵ Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, 2016, pp.20-21

⁴⁶ *Ibid*, p. 22

Even though the participation by businesses in ADR is voluntary, businesses are obliged to inform consumers about the existence of certified ADR entities. Furthermore, in the event of an arising dispute, businesses should inform consumers about CADR and, also, whether they participate in them (article 13 of the ADR Directive). It is believed that this obligation contributes to the promotion and the awareness of ODR and ADR processes within the market⁴⁷. In addition, each Member State must designate at least one competent authority with the role of certifying ADR schemes and monitoring their operations and a single contact point (articles 18 and 20 of the ADR Directive). Article 19 presents the necessary information that the ADR schemes need to provide to the competent authorities to become CADR entities. Effective compliance to the Directive is preserved through article 22, according to which proportionate penalties may be implemented.

To conclude this short reference to the recent ADR Directive, it is worthy to state that according to Cortes, certified ADR schemes will have a competitive advantage since non-accredited ADR schemes dealing with e-commerce disputes will not be included in the European ODR Platform, which is expected to gain consumers' confidence due to its nature⁴⁸.

ODR Regulation

Scope of Application (Article 2 of the ODR Regulation)

The ODR Regulation, that took effect in February 2016, establishes the use of a pan-European online ODR platform which is monitored and maintained by the European Commission and an assisting expert group⁴⁹. It is essential to point out that

⁴⁷ Cortes, *European Union's initiatives on ADR and ODR*, 2015, p.6. For the implementation of the Directive in Greece see Komnios, *The Implementation of the Consumer ADR Directive in Greece*, EuCML 2016, pp. 244 et seq.

⁴⁸ Ibid, p.2

⁴⁹ Cortes, *The Brave New World of Consumer Redress in the European Union and the United Kingdom*, 22 *Disp. Resol. Mag.* 41, 2016, pp. 41-42

this Regulation applies exclusively on domestic and cross- border disputes that arise from online sale of goods or services between a consumer and a trader established in the EU Union ⁵⁰ (article 2 ODR Regulation)⁵¹. Disputes between traders/businesses (known as business-to- business or B2B disputes) are not covered by the application of this Regulation which is limited to the resolution of certain consumer-to-business conflicts (known as C2B disputes). Undoubtedly, a large number of the disputes concerns problems with the delivery of goods, non-conformity with online orders and problems with defective products⁵². Furthermore, traders may be complainants against consumers provided that national legislation of their Member State allows the resolution of these disputes through the intervention of an ADR entity (article 2 para 2 ODR Regulation).

One of the main issues that occurs from the scope of the ODR Regulation is the reason why this platform is precisely restricted to aid the resolution of e-commerce C2B disputes since it has been argued that this mechanism could be useful to the resolution of other types of disputes such as commercial disputes (e.g. B2B disputes) ⁵³. However, this restriction can easily be justified by the fact that this Regulation constitutes the first attempt of the European Commission to cope with the resolution of e-commerce disputes. Therefore, provided that B2B and other types of dispute may prove to be complex and high value, a restricted C2B orientated scope is

⁵⁰ Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, 2016, p. 30

⁵¹ Article 2 of the ODR Regulation :*“This Regulation shall apply to the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union through the intervention of an ADR entity listed in accordance with Article 20920 of Directive 2013/11/EU and which involves the use of the ODR platform.”*

⁵² Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, COM 2017, p.6

⁵³ Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, 2016, p. 30

more convenient for the design of the complaint forms and for the required software of the platform. Considering the above, it seems pertinent to keep in mind that the success of the operation of the ODR platform will probably lead to the expansion of it to other less straightforward and less small- value disputed issues.

The ODR Platform (Articles 5-15 of the ODR Regulation)

On 15 of February 2016, the EU- wide online ODR platform based on the EU Regulation 524/2013 was officially launched, under the estimated implementation cost of €4.586million⁵⁴. This platform, which is accessible through "Your Europe Portal", is designed to work as a single, user-friendly, online point of entry for consumers to send their e-commerce complaints to traders or to certified CADR entities which are enlisted in the European Commission's website⁵⁵. Through the platform's free of charge electronic case management tool, Consumer Alternative Dispute Resolution (CADR) entities are able to deliver their services to the parties online. The preamble of the ODR Regulation underlines the optional character of this management tool (Preamble 18) for the ADR entities that have not fully developed their technological infrastructure⁵⁶. The set of common rules that governs the functioning of the Platform,

⁵⁴ European Commission press release, See< http://europa.eu/rapid/press-release_IP-17-727_en.htm?locale=en> (last visited: 8/1/2019)

Hörnle, *Encouraging online alternative dispute resolution (ADR) in the EU and beyond*, 2013, p.10

⁵⁵ Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, 2016, p. 30

Cortes, *A New Regulatory Framework for extra-judicial consumer redress: Where we are and How to move forward*, p. 9

The list of national ADR entities notified to the European Commission is available here: See<<https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2>>(last visited: 8/1/2019)

⁵⁶ Cortes, *European Union's initiatives on ADR and ODR*, 2015, p.8

regulates, additionally, the role of the national platforms⁵⁷. These national platforms work as clearing houses in their Member States by facilitating communication between the disputants and connecting them to nationally approved ADR entities. As a matter of fact, the platform itself cannot resolve the arising disputes as it is not equipped with an automated negotiation tool⁵⁸. This absent element is considered to be a severe limitation of the Platform since it does not offer the parties the cost-effective opportunity to negotiate by themselves and settle their dispute early without the intervention of an ADR provider⁵⁹. The Platform, restricted to the clearing house and referral to the CADR entities function, does not contribute to the avoidance of future disputes. However, an adequate explanation to this insufficiency can be found in the notion that the form of this Platform represents the first step of the European Commission in the ODR sector which might later be amended.

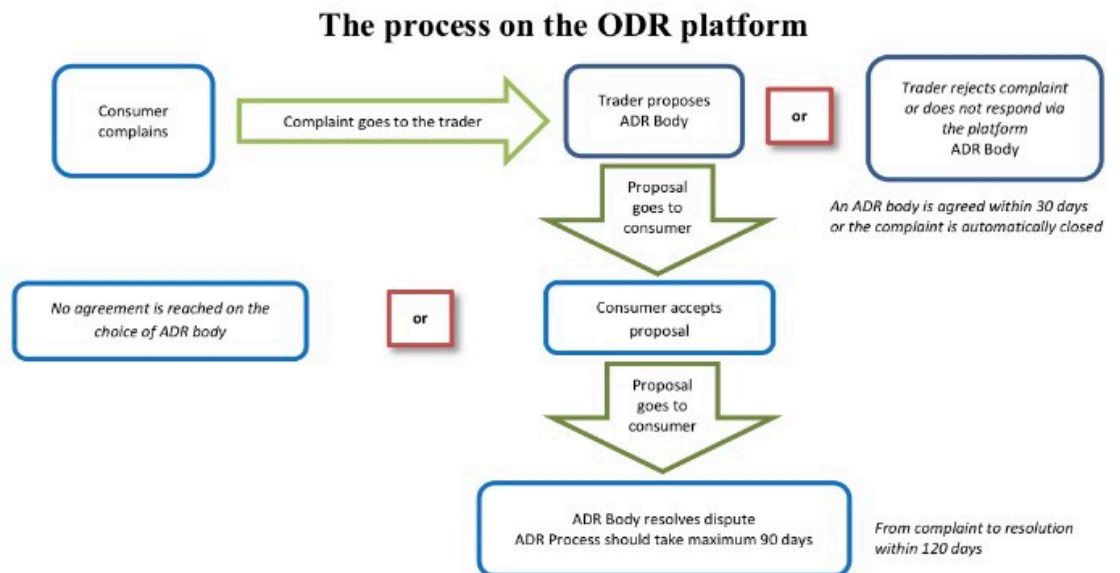
Article 5 para 4 of the ODR Regulation analyzes the platform's functions that allow the parties to resolve their disputes online via the electronic case management tool. Concisely, the ODR Platform allows the disputants to initiate the dispute resolution procedure by submitting an electronic, user-friendly complaint form with precise data in any European language (article 8 of the ODR Regulation), it informs the respondent party, it identifies the competent ADR entity and, in case of agreement by both parties, it transmits the complaint to this entity that handles the dispute online within 90 calendar days (article 10 of the ODR Regulation). Hence, a free translation tool, a feedback system to collect users' opinions on the platform and the CADR schemes, and general information on ADR and CADR entities are also available on the ODR Platform along with the case management tool. According to article 9 of the ODR

⁵⁷ Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, 2016, p. 31

⁵⁸ Cortes/ Lodder, *Consumer Dispute Resolution goes online: Reflections on the evolution of European law for out-of-court redress*, p. 21

⁵⁹ *Ibid*, pp. 21-22

Regulation, the online dispute resolution process begins after the complete fulfillment of the necessary information in the complaint form with the transmission of it to the respondent party along with other required data about the ADR entity. The same information is being automatically and instantly transmitted to the chosen by the parties ADR body through the platform. Yet, if the disputing parties fail to agree on an ADR body thirty days after the submission of the complaint form or the ADR body refuses to take on the dispute process, the complaint is being dismissed⁶⁰. Then, the disputing parties can be informed by the ODR advisors about alternative means of redress (article 9 of the ODR Regulation).



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⁶⁰ Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, 2016, p. 31

⁶¹ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, p.2

See

<https://ec.europa.eu/info/sites/info/files/first_report_on_the_functioning_of_the_odr_platform.pdf> (last visited:8/1/2019)

It is essential to mention that each Member State is obliged to designate one ODR contact point with at least two ODR advisors and inform the European Commission about it, as provided for by Article 7 of the ODR Regulation. ODR contact points must fulfill specific functions related to the complaint submission, the functioning of the platform and the availability of information about consumer rights and the means of redress. (article 7§2 of ODR Regulation). These functions can be performed not only on cross- border disputes, but also on domestic disputes, if the related Member States agree on that (article 7§3,4 of ODR Regulation). Therefore, we should not neglect the fact that this Regulation has set as a goal the increase of awareness of ADR and ODR schemes irrespective of whether the purchase took place in the domestic Member State or across borders. Thus, it is worth stating that in Greece the designated ODR contact point is the Hellenic Consumer Ombudsman - European Consumer Center of Greece⁶².

All online traders and intermediaries within the Union must include on their website their email address and an “easily accessible“ link to the ODR platform to inform consumers about this service regardless of their intention of using it (article 14 of ODR Regulation). This link, located in their general terms and conditions of sales contracts or service contracts, must also be included by the CADR entities, the centres of the European Consumer Centres Network and by business and consumers associations. Hence, the study “Online Dispute Resolution: Web-Scraping of EU Traders’ Websites” was recently conducted in a database of 19,580 European online traders to examine whether online EU traders comply with their ODR link availability obligation. The results were quite encouraging since in most homepages of the survey, the ODR link is well-functioning (100%), accessible (82%) and presented as the exact on

⁶² Komnios, *The Implementation of the Consumer ADR Directive in Greece*, EuCML 2016, p. 249

See <<https://www.eccgreece.gr/el/online-dispute-resolution/>> (last visited: 21/1/2019),
Συνήγορος του Καταναλωτή – Ευρωπαϊκό Κέντρο Καταναλωτή Ελλάδας

in the ODR Platform page (91%). Furthermore, in most websites it was quite easy to find the traders' email address (93%)⁶³.

According to article 10, after the conclusion of the dispute, the CADR entities must notify the ODR Platform about the date of receipt of the complaint, the matter of the dispute, the date of conclusion and the outcome of the case. It is doubtful, whether this transmission of information would be more effective to take place in each step of the process consecutively or altogether after the conclusion of the dispute as laid down in the Regulation. Articles 11, 12 and 13 are related to issues of confidentiality and processing of personal data which will be kept in the database only for six months after the conclusion of the dispute and then they will be automatically deleted. Hence, article 18 allows Member States to issue effective, proportionate and dissuasive penalties in case of infringement of the Regulation. The Regulation confers on the Commission the power to adopt delegated acts on the ODR Platform(article17). The functioning of the Platform and its progress must be reported to the European Parliament by the Commission every year and every three years a detailed report must be submitted to the Parliament with proposals for adaptations to this Regulation, if necessary (article 21).

Language, assistance, translation

Considering the wide range of the official EU languages (24 in number), the choice of the language in a cross- border dispute within the EU can be quite challenging. According to Preamble 18 and the Articles 5 and 6 of the ODR Regulation, parties are allowed to submit their electronic complaint form in their own official language since a free translation tool, supported by human intervention, is provided by the platform. It is crystal clear that this multi-language element renders the platform easily accessible at the very first step of the process, the complaint submission.

⁶³ *ONLINE DISPUTE RESOLUTION: WEB-SCRAPING OF EU TRADERS' WEBSITES Final Report,2018*

See <https://ec.europa.eu/info/sites/info/files/odr_webscraping_final_report_08_08_18.pdf> (last visited: 8/1/2019)

However, as mentioned above (The ODR Platform Chapter), the ODR platform working as a clearing house, does not resolve the disputes by itself, but it only links parties to the certified CADR entities by facilitating their communication. Therefore, these ADR bodies are unrestrained to choose on their own the language in which the process will be conducted.⁶⁴ It is only the complaint and some other typical information that the platform is able to translate in the consumer's language. Considering the limited functions of the ODR contact points and advisors, that do not include translation during the CADR process (Article 7§2 ODR Regulation), the language level of each consumer ends up defining the accessibility of the CADR process.⁶⁵ Inevitably, when the language level differs between consumers and traders, cases of imbalance of power can be quite common. According to Lodder and Cortes, 'this system is likely to favour repeat-players, such as traders''⁶⁶.

Since the protection of consumers constitutes one of the main focuses of this Regulation, the establishment of a language support tool would only benefit both consumers and traders. Furthermore, ODR advisors could have extended assisting duties so as to translate each step of the CADR process in a mutual language that both parties understand sufficiently e.g. the language of the transaction⁶⁷. Nonetheless, it is quite certain that this Regulation does not have as a goal the promotion of a language level discrimination between European citizens.

Critical Remarks

Undeniably, the EU marked a significant progress in the e-commerce sector with the establishment of the ODR Platform. However, it is crucial to point out some

⁶⁴ Cortes/ Lodder, *Consumer Dispute Resolution goes online: Reflections on the evolution of European law for out-of-court redress*, pp. 25-26

⁶⁵ Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, 2016, p.32

⁶⁶ Cortes/ Lodder, *Consumer Dispute Resolution goes online: Reflections on the evolution of European law for out- of-court redress*, pp. 26-27

⁶⁷ *Ibid*, pp.26-28

limitations of the ODR Regulation. In particular, consumers are not informed by the Platform when traders deny the ADR resolution of their dispute. They come to this conclusion after the 30-day deadline when the case is considered dismissed. Perhaps it would be much more convenient if traders stated on their website whether they intend to participate in the ORD process or not⁶⁸. Furthermore, it is questionable whether the ODR contact points, that notify consumers after the disregard of their complaint, contribute to the rapid settlement of the disputes or add a level of bureaucracy in the process, since this information could be automatically given by the ODR Platform (Article 9§6,8 ODR Regulation)⁶⁹. Additionally, the European Commission could encourage even more traders to participate in the ODR process by providing them with economic incentives such as reduction of possible case fees by the ADR scheme in case of an early dispute resolution⁷⁰.

It is difficult, at this point, to reach a conclusion about the beneficial results of the implementation of the ODR Regulation because of its short application period. The European Commission proceeded, on the 13th December of 2017, on the publication of the first report on the functioning of the ODR Platform following the obligation laid down in Article 21 of the ODR Regulation. According to the Report, the large number (300) of ADR bodies from 26 Member States, the designation of their national ODR contact points and the application of the ODR/ADR legislation to the EEA/EFTA States (Norway, Iceland and Lichtenstein) constitute the key elements that prove the full operation of the system⁷¹. Furthermore, the Commission performed an analysis of all

⁶⁸ Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, 2016, p.33

⁶⁹ *Ibid*

⁷⁰ Cortes, *A New Regulatory Framework for extra-judicial consumer redress: Where we are and How to move forward*, pp. 28-29

⁷¹ *REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes*, p.4

the complaints submitted on the platform between 15 February 2016 and 15 February 2017. During this period, the fact that 1.9 million people visited the platform and more than 24,000 complaints were submitted on it, indicates that a sufficient number of consumers visited the platform on its first operational year. The larger number of complaints was related to delivery of the goods issues, non-conformity with the order problems and defective goods issues in the main e-commerce sectors of clothing, footwear, airline tickets and ICT products. Since 85% of the complaints were automatically closed after the 30-day legal deadline, it is evident that the entire ODR/ADR process was operated very few times. Perhaps, language barriers, bureaucracy or traders' denial discouraged the continuation of the process. It is significant, though, to point out that 40% of consumers whose complaint was automatically closed after the deadline, communicated directly with the trader without any further involvement of the platform, as stated in the Commission's survey⁷². For this reason, it can be assumed that the ODR platform, in an undetermined manner, contributes to the avoidance of long-term disputes and encourages the direct negotiation between consumers and traders.

However, in my opinion, this preventive effect of the platform could be enhanced by the addition of a user-friendly, automated negotiation tool to the functions of the platform, which would promote even more the range of ADR/ODR schemes through this extra tool-resolution process. Clearly, there are a few issues that need to be confronted by the Commission to have the Platform functioning properly, such as technical issues involving traders' lack of responsiveness to the platform, which can be mitigated with technical measures. Traders, in general, will be motivated by the Commission to promote ODR/ADR processes by gaining feedback when they solve disputes outside the platform. Nevertheless, the 2% of complaints reaching ADR indicates that consumers are still not entirely convinced or even satisfied by the beneficial effects of the ODR Platform and that new challenges need to be confronted after the significant step of the operation of the first Eu-wide ODR Platform.

⁷² *Ibid*, pp.4-7

Number of complaints made in top 10 countries

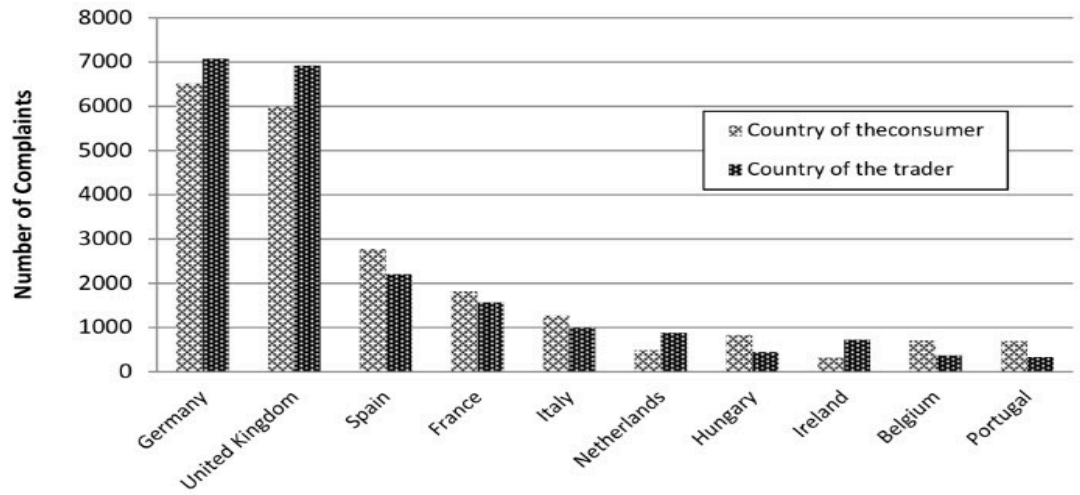


Table 2

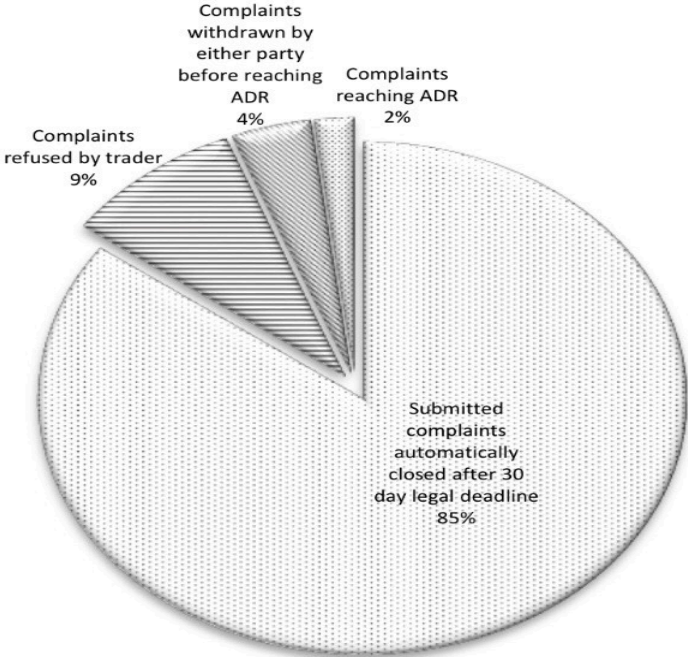
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⁷³ *Ibid*, p.5

See

<https://ec.europa.eu/info/sites/info/files/first_report_on_the_functioning_of_the_odr_platform.pdf> (last visited: 8/1/2019), Germany and UK were the highest e-shoppers in EU

The complaints life-cycle



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⁷⁴ *Ibid*

THE POTENTIAL OF ODR IN VIEW OF UNCITRAL'S REGULATORY ACTIVITY

Online Dispute Resolution Working Group III

As expected, European Union is not the only entity to decisively promote the use of ODR in the online settlement of e-commerce disputes. The United Nations Commission on International Trade Law (UNCITRAL) has been interested in the matter of cross-border e-commerce transactions since 2009, due to the absence of an agreed international standard system on ODR⁷⁵. In 2010, UNCITRAL established a working group, Working Group III (UNCITRAL WG III), committed to develop rules for the resolution of low- value and high-volume disputes including business-to-business and business-to-consumer electronic e-commerce transactions⁷⁶. Furthermore, it was pointed out that the work of this Group would not overlap with the work of the Working Group II on arbitration and conciliation, since "ODR raises separate issues, particularly those associated with the need for rapid resolution of high-volume, low-value disputes arising primarily from transactions carried out by way of electronic communications"⁷⁷. Undoubtedly, this distinction can easily be explained by the fact

⁷⁵ Mireze, *Now where do we stand with Online Dispute Resolution/(ODR)*, 2010, p.8

Mireze, *ODR Redress System for Consumer Disputes: Clarification, UNCITRAL Works & EU Regulation on ODR,1 IJODR 57*, 2014, p.63

⁷⁶ *Ibid*

Cortes, *A New Regulatory Framework for extra-judicial consumer redness: Where we are and How to move forward*, pp.11-12

Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13- 17 December 2010), p.2

⁷⁷ *Ibid*, p.4

Mireze, *ODR Redress System for Consumer Disputes: Clarification, UNCITRAL Works & EU Regulation on ODR, 1 IJODR 57*, 2014, p.64

that ODR is a complex dispute resolution form that includes a vast variety of activities such as automated negotiation and mediation in both forms of B2B and B2C disputes, apart from arbitration and conciliation which are mostly distinguished in B2B disputes. Consumer protection and adherence to national protection laws was underlined, in general, as the main policy of the ODR WG⁷⁸ along with the quick and inexpensive resolution of e-commerce disputes.

From 2010 to 2015 the UNCITRAL WG III had been working on the establishment of the procedural ODR rules for cross-border e-commerce transactions without reaching a satisfactory consensus view on the set of rules, especially on the issue of whether binding pre-dispute agreements to arbitrate concluded with consumers were to be given effect under the Rules⁷⁹. Therefore, at its forty-eighth session (Vienna, 29 June-16 July 2015), the Commission instructed the Working Group to resume its work on the elaboration of a non-binding, descriptive document reflecting the aspects of an ODR procedure on which an agreement was reached, apart from the controversial issue of the nature of the final procedural stage (arbitration/non-arbitration)⁸⁰. Hence, ODR WG III was given the time limit of one year to complete this draft procedural outcome document, which would terminate its work, the ODR considerations, despite the achieved result⁸¹. The Technical Notes which UNCITRAL adopted in 2016, constitute the result of the redefined mandate.

⁷⁸ *Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session* (Vienna, 13-17 December 2010), p.5

⁷⁹ Stegner, *Online Dispute Resolution: The Future of Consumer Dispute Resolution*, 5 *Y.B. on Int'l Arb.* 347, 2017, p.358

⁸⁰ UNCITRAL, *A/CN.9/WG.III/WP.139*, 2015, p.4

⁸¹ *Ibid*

UNCITRAL Draft Rules

The scope of the mandate of UNCITRAL WG III is not as restricted as the one of the ODR Regulation No 524/2013 as it applies to disputes from both B2B and B2C low-value, high-volume transactions⁸². UNCITRAL rules encourage both consumers and traders to be claimants and settle their complaints without restricting this action solely to consumers as stated in the EU ODR Regulation. Nevertheless, it is unclear whether there will be differences between the resolution process of B2B disputes, which are usually of higher volume and the resolution process of B2C disputes. Although the scope of the EU ODR Regulation and of the EU ADR Directive does not determine the value of the arising disputes, the UNCITRAL draft rules distinctively limit their scope to low value e-commerce transactions. Undoubtedly, the application of a narrow scope without much complexity may prove to be more practical and beneficial for both the function and the cost-effectiveness of the ODR schemes and tools. However, it is essential to mention that the elements of a low-value dispute are not being clearly defined within the text⁸³. Considering that the value of a claim is a subjective concept that depends on the priorities and the financial record of the contextually claimant, the WG III should describe the prerequisites of a low-value dispute. Hence, the ODR process can be applied to disputes arising out of both sales and service contracts. Some delegations at UNCITRAL had stated that the ODR system should be applied to specific types of

⁸² Cortes/Esteban De la Rosa, *Building a global redress system for low-value cross-border disputes*, 2013, p.3

⁸³ *Ibid*, p.3

Cortes, *A New Regulatory Framework for extra-judicial consumer redness: Where we are and How to move forward*, pp.13-14

contractual claims such as products nonequivalent to their description, non- delivery of goods or services and other claims related to eBay's dispute resolution scheme⁸⁴.

According to the UNCITRAL draft procedural document, the online dispute resolution process, which can be contractually agreed either before or after the dispute arises, should be based on the principles of fairness, due process, transparency and accountability. It is a tiered process that may commence with the stage of negotiation, as long as the parties are not willing to skip this step, continue with facilitated settlement and conclude with a third final stage which can be either arbitration or non-binding adjudication⁸⁵. UNCITRAL visualizes the first step of the process, i.e. negotiation, to take place within the ODR platform, through which the claimant will be able to directly negotiate with the respondent. In other words, an optional online negotiation tool is considered to be one of the main functions of the UNCITRAL ODR platform. However, it is quite unclear and confusing whether this negotiation tool will be provided in an automated manner, in an assisted one or in both. According to Cortes, the ODR platform may assist the computer-facilitated negotiation of the parties by providing them with standard, constantly updated by previous cases, forms⁸⁶. The respondent is given seven calendar days to respond and start the negotiation process, otherwise the next step, i.e. facilitation, is being automatically activated. The second stage commences with the appointment of an independent neutral third party that acts as a facilitator/conciliator under the parties' consensus and may propose a settlement to the parties. The neutral is not obliged to be a qualified lawyer and should not be the same with the one involved in

⁸⁴ *Ibid*

⁸⁵ *Ibid*, pp.11-12

Stegner, *Online Dispute Resolution: The Future of Consumer Dispute Resolution*, 5 *Y.B. on Int'l Arb.* 347,2017, p.35

⁸⁶ Cortes/Esteban De la Rosa, *Building a global redress system for low-value cross-border disputes*, 2013, p.4

the next stage of the process. In this stage the language selection could be a major obstacle within the process either in case of inability by the parties to choose a mutual language or in case of lack of a multilingual software provided by the ODR platform⁸⁷. Hence, if the dispute is not settled within ten calendar days of the response, then the ODR process continues automatically with the next stage. A restricted one-time extension is also provided to prevent unfairness to the respondent, following a relative agreement between the parties⁸⁸.

According to UNCITRAL, the third stage may end the process either with binding arbitration or with a non-binding decision by a third neutral party, enforced via private mechanisms such as a chargeback. The non-binding arbitration model can be implemented in the countries where pre-dispute arbitration consumer clauses are not binding⁸⁹. Most European Member States do not allow binding pre-dispute arbitration clauses because they are opposed to national consumer law, since they deprive consumers from their right to settle their dispute before the court (principle of liberty)⁹⁰. Thus, in European Union such pre-dispute arbitration clauses are considered unfair because they cause a significant power imbalance between the parties by excluding the consumer from its right to exercise other legal remedy in case of an arising dispute⁹¹. Nevertheless, in some national European jurisdictions such as Germany and Austria, these clauses are accepted if the guarantees of

⁸⁷ *Ibid*

⁸⁸ United Nations Commission on International Trade Law Working Group III (Online dispute resolution) Twenty-fifth session New York, 21-25 May 2012 Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules pp. 13-15

⁸⁹ *News from the United Nations Commission on International Trade Law (UNCITRAL)*, 17 *Unif. L. Rev.* 745, 2012, p.750

⁹⁰ Cortes/Esteban De la Rosa, *Building a global redress system for low-value cross-border disputes*, 2013, p.10

⁹¹ Annex I Unfair Terms in Consumer Contracts Directive 1993/13/EC

information and the due process principles offered to consumers are sufficiently defined and clear⁹².

Critical remarks on UNCITRAL draft rules in comparison to European ODR

Legislation

It is essential to point out that there are differences between the models UNCITRAL and the European Commission use to promote ODR for cross-border e-commerce transactions. The provisions of the UNCITRAL draft document pay special attention on time limitations in the same manner the European legal framework on ODR does. It is crystal clear that sufficient time limits, which are unlikely to lead to unfairness, contribute to an efficient and cost-effective settlement of disputes. However, the EU 524/2013 Regulation does not establish a time extent, neither does it include a multi-tiered resolution process with the first stage of direct negotiation within the ODR platform which is considered to be a severe limitation of this Regulation, as mentioned above in the chapter of the ODR in Europe.

Hence, the mandate of WG III does not set consumer protection as the primary goal as the European legal framework (Regulation EU No 524/2013 and Directive 2013/11/EU) does. UNCITRAL does not approach the ODR draft rules from a consumer protection perspective, but from the perspective of the previous WG on arbitration and conciliation⁹³. According to Julia Hörnle, an example of this can be found in draft Art. 9 (6), which provides that each party shall have the burden of proving the facts he or she relies on as part of the claim or defence⁹⁴. As a matter of fact, such a provision seems to be rather advantageous to businesses in a B2C dispute, since consumers do not have the same variety of resources and information

⁹² *Ibid*, p.11

⁹³ Hörnle, *Encouraging online alternative dispute resolution (ADR) in the EU and beyond*, 2013, p.3

⁹⁴ *Ibid*

to prove the facts of their claims. In other words, UNCITRAL'S approach does not seem to rely on the application of consumer national law, which is of great importance in the European law provided that the primal aim of the ODR European legal framework is the protection of consumers (Art. 1 ODR Regulation). However, the parties of the dispute are not allowed to use the UNCITRAL rules to overrule national consumer protection rules⁹⁵. Furthermore, there is a lack of focus on the due process and the possible problems related to it. For instance, the UNCITRAL Rules state that "the electronic addresse(s) for communication of the notice by the ODR provider to the respondent shall be the addresse(s) of the respondent which has [have] been provided by the claimant"⁹⁶. However, in case consumers fail to diligently check the ODR platform for the valid electronic address of the respondent, they might end up with an unresolved dispute.

UNCITRAL Technical Notes 2017

United Nations Commission on International Trade Law promoted its interest on ODR and its activities by adopting, in 2016, the Technical Notes on ODR. The Technical Notes aim to support ODR systems and assist them to the settlement of cross-border disputes arising from electronic low-value sales of goods or services contracts⁹⁷. The UNCITRAL Technical Notes are a descriptive, non-exhaustive and non-exclusive document without imposing any legal requirement (Non-binding nature of the Technical Notes). As mentioned above, their purpose is inextricably connected with the promotion of ODR proceedings, their use in the resolution of cross-border, low-value e-commerce disputes and the assistance of ODR administrators and platforms. They follow the same principles with the European

⁹⁵ Cortes/Lodder, *Consumer Dispute Resolution goes online: Reflections on the evolution of European law for out-of-court redress*, p. 17

⁹⁶ Hörnle, *Encouraging online alternative dispute resolution (ADR) in the EU and beyond*, 2013, p.3

⁹⁷ See <http://www.uncitral.org/uncitral/en/uncitral_texts/odr/2016Technical_notes.html> (last visited: 8/1/2019)

ODR system which involve transparency, independence, fairness, expertise and consent (Section II Principles). Additionally, according to the Section XII(Governance) of the Technical Notes, "It is desirable that ODR proceedings be subject to the same confidentiality and due process standards that apply to dispute resolution proceedings in an offline context, in particular independence, neutrality and impartiality".

The scope of these rules is restricted to disputes arising out of cross-border, low value e-commerce transactions, including both B2B and C2B transactions from sales and service contracts. Undoubtedly, both consumers and traders are encouraged to be claimants and settle their complaints without the restriction of this action solely to consumers as stated in the EU ODR Regulation.

According to the Technical Notes, the entire ODR process can be performed online through a platform. The process consists of three stages, negotiation, facilitated settlement and a final third stage. The first two stages, technology-enabled negotiation and facilitated settlement do not differ from the ones ODR WG III had promoted on its draft procedure rules. Furthermore, the first stage refers to direct negotiation between the parties through the platform, which may last a reasonable period of time (Section VII Negotiation). The second stage, which is activated after the failure of the first stage or by the parties' request, envisages the assistance by a neutral third party (Section VIII Facilitated Settlement). The third-party neutral is required to communicate with the parties in order to facilitate the settlement of their dispute. It is obvious that this stage refers to ADR forms such as mediation and conciliation and the relevant ADR entities. The final stage is implemented in the occasion the parties have not reached an agreement during the previous stages (Section IX- Final Stage). In this case, the ODR administrator/ neutral is required to inform the parties of the possible form and nature of the final procedural stage. Undoubtedly, although this provision is quite vague concerning the nature of the third stage, it allows, however, a vast variety in

the resolution forms. For instance, parties could agree on binding arbitration or even on a non-binding decision by a third neutral⁹⁸.

In the next section of the Technical Notes text, the concept of the third neutral parties is being analyzed (Section X- Appointment, powers and functions of the neutral). It is pointed out that neutrals will be appointed by the ODR administrators at the second stage of the facilitated statement, since their presence is entirely necessary at this step of the process. Neutrals should be equipped with the required professional experience to deal with the relevant disputes without them being necessarily qualified lawyers. They need to state their impartiality and independence on the dispute since impartiality and fairness are the most significant principles in the ADR forms, as mentioned above. Neutrals, in general, need to conduct the process in an efficient, fair and cost-effective manner using technological tools, i.e. video conferences, if possible. Parties are allowed to raise objections to the appointment of the neutral, while the ODR administrator is the entity in charge of deciding upon the replacement of the neutral. It is obvious that the provisions of the Technical Notes on the role of the neutrals

According to the Technical Notes, large flexibility is allowed regarding the language used in the ODR process owing to the available technological tools (Section XI- Language). Parties should be able to continue the process in their preferred language even in cases where ODR rules or ODR agreements indicate a specific language to be used. Assuming that in the last two stages of the process the parties will be able to communicate and solve possible translation issues with their ODR administrator, it is questionable what might happen in the first stage, negotiation, if a language problem occurs. Probably, an effective multi- language translation tool via the ODR platform could be offered to the parties during their negotiation process.

⁹⁸ Lederer, *The UNCITRAL Technical Notes on Online Dispute Resolution – Paper Tiger or Game Changer?*, *Kluwer Arbitration Blog*, 2018, p.2

Critical Remarks

As noted above, UNCITRAL WG III devoted six years on the development of an international set of procedural rules concerning the creation of a global ODR system including the function of an online platform, the powers of third neutral parties and the legal principles for resolving cross- border, e-commerce disputes. Undoubtedly, Technical Notes constitute a significant step in the promotion of ODR that enhances consumers' confidentiality in the use of these ADR methods. Along with the European legal framework (Regulation EU No 524/2013 and Directive 2013/11/EU), they emphasize the benefits of flexibility and cost-effectiveness that ODR provides to consumers. According to Nadine Lederer, they may serve as useful guidance for States, ODR platform providers and administrators, neutrals as well as disputing parties on how to effectively organize such proceedings⁹⁹. However, it is obvious that these rules are quite general and vague without extensively describing the manner in which the ODR proceedings can be conducted. In other words, although the basic idea of ODR and especially the concept of negotiation and neutral third parties' issues are being analyzed, the functional way for the accomplishment of these issues is being described rather unclearly within the UNCITRAL text. Therefore, it is doubtful whether these rules convince and gain the confidence of consumers and in general, of parties. The author is tempted to say that only the future will show the role of UNCITRAL and its influence on ODR and on international levels of law in general.

⁹⁹ *Ibid*, p.3

CONCLUSIONS

It is concluded that the expansion of e-commerce is one of the main characteristics of the last decade. Nonetheless, courts prove to be the less suitable medium to deal with the resolution of arising e-commerce disputes due to the high-volume of these low-value disputes¹⁰⁰. Therefore, policy-makers such as the European Commission and UNCITRAL proceeded to the development of ODR rules to promote the out-of-court resolution of disputes that arise from cross border e-commerce transactions. On the one hand, the recent European legislation (ODR Regulation EU No 524/2013 and ADR Directive 2013/11/EU) sets as a primal goal the consumer protection along with the promotion of ODR within the European Union. On the other hand, UNCITRAL approaches its draft rules mainly under the perspective of enhancing online transactions and ODR proceedings. However, the differences between the models of EU and UNCITRAL do not lead to their incompatibility, since they share the same basic principles of impartiality, independence, transparency, fairness, expertise and consent.

In the view of the author, a combination of the most effective elements of the two ODR models, the EU and the UNCITRAL one, would be closer to the most ideal e-commerce ODR system. For instance, such an ideal model would require a multi-tiered process with three stages, like the UNCITRAL model, that commences with the function of an automated negotiation tool, via the ODR platform, that offers to the parties the opportunity to resolve their arising dispute with negotiation without the intervention of third parties. Meanwhile, it should also facilitate consumers' access to information on their rights and generally respect and enhance the importance of national consumer protection law, like the EU ODR model appears to do, since one of the primal goals of e-commerce ODR systems is the protection of consumers.

¹⁰⁰ Cortes/Esteban De la Rosa, *Building a global redress system for low-value cross-border disputes*, 2013, p.15

Considering that this paper analyzes mostly the development of ODR in Europe, it is essential to make some final observations on the recent ODR European legislation. Undoubtedly, the ODR European regulatory legislation could be more effective within the e-commerce dispute resolution world and overcome possible obstacles concerning the use of the ODR Platform by incorporating incentives that encourage both traders and consumers to participate in ODR processes. The creation of a pan-European trustmark by the European Commission could be quite useful to consumers to recognize reliable traders/ businesses and CADR entities that have a high rate of resolved complaints¹⁰¹. As a matter of fact, it would act as a decisive incentive in the consumers' CADR selection. This kind of trustmark, included in the traders' website, may operate as an online label for CADR entities and link traders to them and the ODR Platform. However, so far, the European Commission has not proceeded to the creation of such a pan-European trustmark¹⁰².

In addition, the publication of feedback concerning the users' experience during the ODR process could also motivate the key players of the market, traders and consumers, to participate in ODR processes¹⁰³. For instance, if consumer review sites cooperate with the ODR platform, traders will be able to request their incorporation in these sites after the settlement of their disputes. Negative posts by consumers or reviews should be deleted after the successful resolution of disputes. Therefore, traders will be motivated to fortunately participate in ODR procedures in order to avoid negative feedback and unfavorable publicity by consumers. Furthermore, the ODR platform could also cooperate with Internet search engines e.g. Google to rank

¹⁰¹ Cortes, *A New Regulatory Framework for extra-judicial consumer redness: Where we are and How to move forward*, p. 26

¹⁰² *Ibid*

¹⁰³ *Ibid*, pp. 30-31

down traders with several unresolved complaints or disobedience to final outcomes¹⁰⁴. The economic incentive of the reduction of possible costs by the ADR schemes for traders, considering that the ODR process is free or at low cost for consumers, could also act effectively in the promotion of the EU ODR processes¹⁰⁵.

To conclude, it is a question of time whether policy-makers and the key-players of the market will gain confidence in the ODR system and realize that this dispute resolution method is the most appropriate and convenient for cross-border e-commerce arising disputes¹⁰⁶. Hence, we can overcome the possible fear of the replacement of people by artificial intelligence by realizing that ODR is not only about A.I. and technological tools, but it is a resolution form that promotes innovation in third-party sectors¹⁰⁷ and facilitates the redress system without depriving the parties from their right to settle their dispute in the court.

¹⁰⁴ *Ibid*, pp. 31-32

¹⁰⁵ *Ibid*, p.24, 28

¹⁰⁶ Cortes/Esteban De la Rosa, *Building a global redress system for low-value cross-border disputes*, 2013, p.15

¹⁰⁷ European Union News, *Technology and ADR - The Risks and Opportunities*, 2017, p.1

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