From Negotiations to Online Mediation in EU Law

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Abstract

This article examines how negotiation evolved from adaptive behavior of Homo sapiens at the dawn of humanity to a set of personal skills of negotiators and then to smart negotiating and alternative dispute resolutions. Furthermore, the author discusses how online dispute resolution with AI-tools has evolved into a newly developed type of electronic platform for ADR and why online mediation was the way out under the COVID-19 restrictions and is still the most frequently used mediation method but with regard to the proper technlogical and legislative development. The article discusses legal rulings in the EU and its Member States that focus on whether parties can be forced into mediation before they can go to court, rather than promoting the benefits of ADR. However, the benefits of new forms of negotiation should not be overestimated. This article argues that the most advanced software, even AI-based, is only a tool to assist humans and should not be seen as a replacement for human expertise.

Keywords: negotiation, dispute resolution, ADR/ODR, online mediation, EU law

The very best way to win is to defeat the enemy without fighting
Sun Tzu

The practice of negotiating has evolved from a casual activity to a professional skill-set that can be studied and practiced for years before mastery is achieved.[1] Smart negotiating shows how to achieve aims and avoid negotiation mistakes as we seek to make a deal, reach an agreement, or negotiate in everyday business practice.[2] If mistakes have been made, online mediation with a neutral third party using advanced technology may save the day and assist in still making a good bargain in terms of speed, cost, and efficiency.

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1 See, for example, Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, Penguin Books 2011; Steve Gates, *The Negotiation Book – Your Definitive Guide to Successful Negotiating*, Capstone/Wiley, 3rd ed. 2023; David A. Lax & James K. Sebenius, *3D Negotiation – Powerful Tools to Change the Game in Your Most Important Deals,* Harvard Business School 2006; and Jim Reiman, *Negotiation Simplified – a Framework and Process for Understanding and Improving Negotiating Results*, Amplify Publishing 2021.

2 For comprehensive analysis from a legal perspective see Chris Honeyman & Andrea Kupfer Schneider (eds.), *The Negotiator's Desk Reference*, DRI Press 2017. In two volumes, with a total of 101 chapters on almost 1,500 pages, written by many of the leading experts, this work covers literally every aspect of the theory and practice of negotiation.

1. Historic Retrospective

The etymological origins of the term "negotiation" can be traced to the Latin phrase "negare otium", which literally means "to deny leisure".[3] "Negotiacioun" means "a dealing with people, trafficking" from Old French negociacion "business, trade", and directly from Latin negotiationem (nominative negotiatio) "business, traffic", (noun of action from past participle stem of negotiari); "carry on business, do business, act as a banker", from negotium "a business, employment, occupation, affair (public or private)". It also refers to "difficulty, pains, trouble, labor", literally "lack of leisure", from neg- "not" (from PIE root *ne- "not") + otium "ease, leisure", a word of unknown origin". Far from the mere denial of leisure, negotiating has become an important skill in how "to communicate with another or others in search of mutual agreement".[4]

Anthropological research suggests that negotiative behaviors predate this linguistic root by approximately 200,000 years, coinciding with the emergence of Homo sapiens. From an anthropological perspective, early humans like their modern counterparts, faced resource scarcity and were compelled to engage in bargaining to ensure their survival and that of their kin.[5]

In the context of primitive human societies, not all individuals possessed the capacity to devise innovative solutions to ongoing challenges and to overcome resource limitations. Consequently, they were obliged to develop effective communication strategies to facilitate value exchange and mutually beneficial agreements with other members of their species. This adaptive behavior was crucial for the perpetuation of the human lineage.

After a few hundred thousand years of practice, which made at least some members of the human species quite good at negotiating, recent advances in technology are bringing about crucial changes in the negotiation process itself and making tools available in support of this process that could not be even imagined before.[6] As a result, Alternative Dispute Resolution has not just become a veritable

3 *Origins of Negotiation: From Ancient Rome to the 21st Century*, MyEducator, https://app.myeducator.com/reader/web/1816b/chapter01/gp80b/.

4 Online Etymology Dictionary, negotiation (v.), https://www.etymonline.com/word/negotiation.

5 *Origins of Negotiation: From Ancient Rome to the 21st Century*, MyEducator, https://app.myeducator.com/reader/web/1816b/chapter01/gp80b/. See also J. A. M. Reif & F.C. Brodbeck (2014), "Initiation of negotiation and its role in negotiation research: Foundations of a theoretical model", *Organizational Psychology Review*, 4(4), 363-381, https://doi.org/10.1177/2041386614547248; as well as Carrie J. Menkel-Meadow, "The Origins of Problem Solving Negotiation and Its Use in the Present (21 May 2018)", in Sarah Cole, Art Hinshaw and Andrea Kupfer Schneider (eds.), *Discussions in Dispute Resolution,* UC Irvine School of Law Research Paper No. 2018-40, Available at SSRN: https://ssrn.com/abstract=3182643.

6 For details, see, inter alia, Thomas J. Stipanowich, "Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution", *Cardozo Journal of Conflict Resolution* 2017, Vol. 18, No. 3, pp. 513-549.

science, it has gone mainstream, to the extent that literally everyone should have a solid understanding of the options and techniques.[7]

2. Modern Day ADR

Alternative Dispute Resolution (ADR) is "a collective description of methods of resolving disputes otherwise than through the normal trial process'"[8] or – to say it differently, ADR provides ways of resolving a dispute without having to go to court. Despite different types of ADR, they all have the potential to resolve a dispute outside the traditional courtroom setting. That is why all types of ADR provide an 'alternative' to litigation (without any court involvement). ADR has traditionally been seen as a more flexible, cost-effective, and less adversarial alternative to litigation.

Advanced digital technologies have pushed ADR processes to great transformations, enhancing efficiency, accessibility, and effectiveness. This article explores how technology is changing ADR, focusing on smart negotiations and online mediation.

There are many types of ADR as well as different approaches to classification.

The U.S. Equal Employment Opportunity Commission (EEOC), responsible for enforcing federal laws that prohibit workplace discrimination has produced one of the most comprehensive lists of types of ADR:[9]

1 Mediation – "Mediation is the intervention in a dispute or negotiation of an acceptable impartial and neutral third party, who has no decision-making authority."
2 Ombuds – "Ombuds are individuals who rely on a number of techniques to resolve disputes. These techniques include counseling, mediating, conciliating, and fact finding."
3 Peer Review – "Peer Review is a problem-solving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision."
4 Fact Finding – "Fact Finding is the use of an impartial expert (or group) selected by the parties, by the agency, or by an individual with the authority to appoint a fact finder, in order to determine what the 'facts' are in a dispute."
5 Early Neutral Evaluation – "Early Neutral Evaluation uses a neutral or an impartial third party to provide an objective evaluation, sometimes in writing, of the strengths and weaknesses of a case."
6 Settlement Conference – "Settlement conferences are meetings which are typically conducted by a settlement judge or referee to assist the parties in reaching a mutually acceptable settlement of the disputed matter."

7 A particularly useful reference in this regard is Gary T. Furlong, *The Conflict Resolution Toolbox – Models and Maps for Analyzing, Diagnosing, and Resolving Conflict*, Wiley 2020.
8 ADR definition, Glossary, LexisNexis. https://www.lexisnexis.co.uk/legal/glossary/adr.
9 Types of ADR Techniques, The U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/federal-sector/types-adr-techniques.

7 Facilitation – "Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The term facilitator is often used interchangeably with the term mediator, but a facilitator does not typically become as involved in the substantives issues as does a mediator."

The European Commission narrowed the list down to five fewer types of ADR: mediation, conciliation, ombudsmen and -women, arbitration, and complaints boards.[10]

In the United Kingdom (UK), some scholars recognize only four main types of ADR, namely negotiation, mediation, arbitration and conciliation. Importantly, "some forms of ADR are not legally binding. If an agreement is not legally binding, there is no legal enforcement on the agreement if one party decides to later change their mind. In this instance, the case will have to be brought back to court for a judge to make a legally binding decision."[11]

The leading treatise in the United States focuses on just three ADR "processes", namely negotiation, mediation, and arbitration. However, it does acknowledge "adaptations", "variations", and "hybrid processes".[12]

Despite many different types of classification, mediation is almost always mentioned as the most common and widely used method of ADR.[13]

In general, only litigation and arbitration can produce legally enforceable decisions by neutrals, although the parties themselves can negotiate a legally enforceable decision in the form of a contract, with or without the help of a mediator, facilitator, ombuds, expert, or referee. This presents parties to a dispute with the question, whether to pursue non-binding mechanisms of ADR before traditional litigation, usually in defendant court, or arbitration. Professor Emmert provides the following guidelines for commercial disputes:

After a dispute has arisen, consent-based forms of ADR are more likely to succeed if:

– the parties have a long-standing business relationship and/or are interested in future business with each other, and/or
– all parties acted in good faith in the current situation and it is not clear that only one side is responsible for whatever went wrong and triggered the current dispute, and/or

10 Alternative dispute resolution for consumers. European Commission, https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en.

11 Joseph Navas, "What Are The Four Types Of Alternative Dispute Resolution (ADR)?", *Britton&Time*. 28 November 2023, https://brittontime.com/2021/02/05/what-are-the-four-types-of-alternative-dispute-resolution-adr/?_gl=1*vmvu2a*_up*MQ..*_ga*MTg1MTcwMjQ5NS4xNzE5OTMxMTY0*_ga_PB794C5G14*MTcxOTkzMTE2My4xLjAuMTcxOTkzMTE2My4wLjAuMA.

12 See Carrie J. Menkel-Meadow, Lela Porter Love, Andrea Kupfer-Schneider, and Michal Moffitt, *Dispute Resolution – Beyond the Adversarial Model*, Wolters Kluwer, 3rd ed., 2019.

13 See, for example, Herbert Smith Freehills LLP, Pros and Cons of Common ADR Processes, Lexology, 2 October 2012, https://www.lexology.com/library/detail.aspx?g=898e2165-013f-4cdd-9769-ea74fd3753c5; as well as The International Institute for Conflict Prevention & Resolution (CPR), https://drs.cpradr.org/rules/mediation/cpr-mediation-procedure.

– all parties are interested in keeping the dispute and the underlying business transaction confidential and no party would benefit from exposing quality or financial problems of the other side, and/or
– the dispute is similarly important or unimportant to all parties so that everyone has a bit of room to maneuver and can make some concessions.

In contrast, consent-based ADR is not as likely to succeed if:
– at least one party does not have a significant interest in preserving the business relationship, and/or
– it is fairly clear that one side is not acting in good faith and/or is probably alone at fault, and is therefore not really interested in a swift and fair resolution that is bound to come out against it, and/or
– at least one party can gain leverage by exposing quality problems with the goods or services of the other party and/or financial or other problems of the other party, and/or
– at least one party has little or no room to make concessions because a successful resolution of the dispute is potentially a matter of survival for them.

As legal counsel, ask yourself the following questions, which will impact the willingness of the parties to negotiate and/or settle versus dragging the dispute through arbitration or the courts, regardless of time and cost:
– What happens if there is no settlement? Confidential and relatively quick arbitration? Or public and potentially protracted litigation? What are the best and worst alternatives to a negotiated agreement for each side?
– What are the financial and economic implications of the dispute? *E.g.*, is this potentially threatening the survival of a business?
– Are there questions of principle involved for one or both parties, which make it hard to agree in spite of relatively small financial stakes?
– Are there differences in the perception of fairness and justice?
– Are there cultural differences that make it difficult to reconcile?
– Are claims or defenses being made for strategic purposes, for example, to persuade someone with a stronger position to enter into a settlement? To delay payments due? To go on a fishing expedition for documents of or about a potential competitor?
– Does a party want or should we get a binding public precedent instead of a private inter partes settlement?
– How and where does media publicity come into play? Who wants it? Who wants to avoid it?
– Does the dispute have symbolic value to one of the parties? Would a public victory have a special symbolic value?
– What about time factors? Which party has time on her side? Will there be a need for an injunction on behalf of the other party?
– What about emotional factors such as humiliation or revenge? Draw a line from totally rational to totally emotional and try to determine where the parties stand on this continuum. Emotion is poor counsel in negotiations.
– Are personality factors involved? How inclined are the parties to accept a mutually compromising settlement versus combative litigation?

– What are the practical considerations, such as cost, fee shifting, and risk? How much can and will a party spend in ADR? In litigation?

  In the end, your default assumption should be that ADR is better than litigation unless there are specific reasons to think otherwise. You may want to write down all the pros and cons of ADR versus litigation and discuss them with your client before sleepwalking carelessly into litigation. In almost all cases, your focus as legal counsel should be on *how* to design the best possible ADR procedure for an IBT or a dispute, rather than *whether* to do ADR in the first place.[14]

Because of the many advantages of ADR in general, and mediation in particular, there are by now many high-quality institutions and professionals offering their services and they are picking up an ever-larger share of civil and commercial disputes around the world.

3. A Late Start for Mediation in the European Union and an Emphasis on Pre-Litigation Procedures

Although mediation had a long tradition in several of the Member States, at the level of the European Union (EU), the first steps towards the adoption of legal bases providing for mediation instead of litigation were taken only in 1999, when the EU political leaders formally decided "in order to facilitate access to justice", the EU Member States should create "alternative, extra-judicial procedures" for dispute resolution.[15] Still, it took the EU another nine years to adopt Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on Certain Aspects of Mediation in Civil and Commercial Matters (the Mediation Directive).[16] The Mediation Directive was designed "to facilitate access to alternative dispute resolution mechanisms and promote the amicable settlement of disputes while encouraging the use of mediation".[17] The Mediation Directive had to be implemented by the Member States into national law by 21 May 2011. As a direct result of the Directive, the national laws of all Member States are now providing the same minimum standards for mediation procedures, for example with regard to confidentiality (Art. 7), and quality control mechanisms for mediation service providers (Art. 4). The rules apply to cross-border disputes in civil and commercial matters, including family law. They apply if at least one of the parties is domiciled in an EU Member State different from that of any other party (Art. 2).

14 Frank Emmert, *International Business Transactions*, Carolina Academic Press, 2nd ed. 2021, at pp. 864-866, emphasis in the original.

15 Tampere European Council 15 and 16 October 199, Presidency Conclusions. European Parliament, para 30, https://www.europarl.europa.eu/summits/tam_en.htm.

16 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters. https://eur-lex.europa.eu/eli/dir/2008/52/oj.

17 Giuseppe De Palo, *A Ten-Year-Long "EU Mediation Paradox" - When an EU Directive Needs To Be More …Directive*, European Parliament, November 2018, www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf.

In the Directive, mediation is defined as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question" (Art. 3). Mediation, as required by the text of the directive, should generally be confidential.[18] Member States have an obligation "to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework" (Preamble, para. 7). Interestingly, the Directive also provides that "written agreements resulting from mediation" should generally be enforceable (Art. 6).

However, even now "the EU Mediation Directive remains very far from reaching its stated goals of encouraging the use of mediation and especially achieving a "balanced relationship between mediation and judicial proceedings" (Art. 1).[19] According to a study conducted by the European Parliament in 2018, mediation was still used in less than 1 percent of all cases ultimately settled by civil and commercial litigation in the EU.[20] By contrast to the approach taken in most other parts of the world, at least in commercial disputes, the EU does not see mediation so much as part of a general package of ADR options, with arbitration as the final and binding option, where needed. Rather, the approach seems to be one of nudging parties into mediation before they resort to litigation, basically as a way of relieving the pressure on the courts. For that reason, the discussion is often about the question whether mediation should be an "opt-in" before parties can go to court, or be mandatory, with or without an "opt-out" option. Case law from several Member States and the European Court of Justice is quite clear in this respect, namely that a strict requirement of mediation before litigation is incompatible with constitutional guarantees of access to justice.[21]

In particular when comparing the EU approach to the approach taken elsewhere in the world, it is surprising that the EU and its Member States are focusing on the

18 Milan Remáč, *Mediation Directive 2008/52/EC*, European Parliamentary Research Service. November 2018. https://www.europarl.europa.eu/cmsdata/226405/EPRS_ATAG_627135_Mediation_Directive-FINAL.pdf

19 Giuseppe De Palo, *Present and Future of Mediation in the European Union*, 28 November 2018. https://www.linkedin.com/pulse/present-future-mediation-european-union-giuseppe-de-palo/.

20 *Ibid*.

21 Giuseppe De Palo, *A Ten-Year-Long "EU Mediation Paradox" - When an EU Directive Needs To Be More …Directive*, European Parliament, November 2018, www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf. Although the situation differs from Member State to Member State, several national court decisions have declared at least certain kinds of mediation mandates to be unconstitutional. In 2014, the Romanian Constitutional Court ruled a provision in the 2006 Mediation Act to be unconstitutional because it required a cost-free information session with a mediator before parties could proceed to litigation (Decision 266/2014; see Constantin Adi Gavrilă, *Mediation and Access to Justice, the Romanian Experience*, https://jusmundi.com/en/document/pdf/publication/en-mediation-and-access-to-justice-the-romanian-experience). The

question whether parties can be *made to* mediate *before* they can go to court, rather than educating parties about the many benefits of ADR so that will *want to* mediate *instead* of going to court.

4. E-Commerce

The marked rise in online sales in recent years, coupled with contractual issues revealed by the energy crisis, underscores the need for an efficient, cost-effective, and equitable method for resolving disputes between consumers and traders. These disputes typically involve the return of funds, repair of defective products, or contract termination due to unfair terms. Although ADR mechanisms represent a significant advancement for consumers, the digitalization of the consumer market, procedural complexities, and lack of awareness challenge the current ADR framework established by the EU in 2013 with Directive 2013/11 on Alternative Dispute Resolution for Consumer Disputes (the ADR Directive),[22] and Regulation 524/2013 on Online Dispute Resolution for Consumer Disputes (the ODR Regulation). By contrast to EU directives, EU regulations are self-executing and do not require implementation into national law by the legislative organs of the Member States. Nevertheless, and despite multiple updates, the Online Dispute Resolution platform envisaged by the ODR Regulation has not met its intended goals.[23] Consequently, on 17 October 2023, the European Commission proposed targeted amendments to the ADR Directive and the repeal of the ODR Regulation. Additionally, it introduced a new recommendation setting quality standards for online marketplaces and EU trade associations offering dispute resolution systems.

2014 decision was confirmed in 2018 (Decision 560/2018). Similarly, a mediation mandate scheduled to enter into force in Bulgaria on 1 July 2024 was declared unconstitutional on that very day (https://www.bta.bg/en/news/bulgaria/700668-provisions-under-mediation-act-and-code-of-civil-procedure-declared-unconstituti). Both decisions are compatible with the interpretation of EU law as provided by the European Court of Justice. In its judgment of 14 June 2017 in Case C-75/16 *Menini and Rampanelli*, the ECJ held that EU law does not preclude a requirement in national "which prescribes recourse to a mediation procedure as a condition for the admissibility of legal proceedings", as long as this does not prevent the parties from "their right of access to the judicial system". (ECLI:EU:C:2017:457, at p. 15). In other words, the Member States can encourage but they cannot require mediation. See also the decision no. 2023/160 E., 2024/77 K. of the Turkish Constitutional Court of 14 March 2024 (Beril Yayla Sapan, Asena Aytuğ Keser & Kardelen Dorken, *Constitutional Court Annulled the Sanction for Non-Attendance to Mandatory Mediation*, Gün + Partners, 21 May 2024, https://gun.av.tr/insights/articles/constitutional-court-annulled-the-sanction-for-non-attendance-to-mandatory-mediation). A recent order of the ECJ of 3 September 2024 in Case C-658/23 *Investkapital*, seems to indicate, however, that the ECJ is willing to leave the question to national law. For additional analysis see Jacqueline M. Nolan-Haley, "Is Europe Headed Down the Primrose Path with Mandatory Mediation?", 37 *N.C. J. INT'L L.* 981 (2011), available at: https://scholarship.law.unc.edu/ncilj/vol37/iss4/5.

22 See Directive 2013/11 on Alternative Dispute Resolution for Consumer Disputes, OJ 2013 L 165, pp. 63-79.

23 The European Parliament conducted an evaluation of the system and published a report in February 2024. See Susanna Tenhunen & Jonathan Blanckaert, *EU Framework on Alternative Dispute Resolution for Consumer*, European Parliamentary Research Service, https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/757788/EPRS_BRI(2024)757788_EN.pdf.

These proposals aim to modernize the ADR framework and contribute to the Better Regulation agenda by simplifying regulations and reducing administrative burdens. During the ninth legislature, the European Parliament has addressed ADR within the context of consumer protection policies, including access to redress and automated decision-making. Furthermore, Parliament has handled several petitions from citizens regarding the practical implementation and application of ADR mechanisms.[24] Several decisions of the Court of Justice of the European Union have also clarified certain provisions of the ADR Directive, thereby enhancing legal certainty.

First, in Case C-380/19, the European Court of Justice (ECJ) held that traders have to inform consumers about ADR options and requirements:

> Article 13(1) and (2) of Directive 2013/11 are to be interpreted as meaning that a trader who provides in an accessible manner on his website the general terms and conditions of sales or service contracts, but concludes no contracts with consumers via that website, must provide in his general terms and conditions information about the ADR entity or ADR entities by which that trader is covered, when that trader commits to or is obliged to use that entity or those entities to resolve disputes with consumers. It is not sufficient in that respect that the trader either provides that information in other documents accessible on his website, or under other tabs thereof, or provides that information to the consumer in a separate document from the general terms and conditions, upon conclusion of the contract subject to those general terms and conditions.[25]

Second, the judgment of 14 June 2017 in *Case C-75/16,* as mentioned above, clarified that it is up to national law to decide whether mediation will be required before a case can be brought to court, as long as "such a requirement does not prevent the parties from exercising their right of access to the judicial system".[26]

This decision confirmed the long-standing approach of the ECJ, adopted long before the introduction of the Mediation Directive and the European framework. Already on 18 March 2010, the Court had ruled in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, Rosalba Alassini et al., that EU law does not preclude national rules requiring in certain consumer protection cases "an attempt

24 *Ibid.*

25 Judgment of the Court (Sixth Chamber) of 25 June 2020, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v. Deutsche Apotheker- und Ärztebank eG*. Request for a preliminary ruling from the Oberlandesgericht Düsseldorf, Case C-380/19, para 36, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019CJ0380.

26 EU law does not preclude national legislation which provides that, in disputes involving consumers, mandatory mediation should take place before any court proceedings. Court of Justice of the European Union press release No. 62/17 Luxembourg, 14 June 2017. Judgment in Case C-75/16 *Livio Menini and Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa*, https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-06/cp170062en.pdf.

to settle the dispute out of court" as an admissibility requirement for litigation. The ECJ added some conditions, however:

> Nor do the principles of equivalence and effectiveness or the principle of effective judicial protection preclude national legislation which imposes, in respect of such disputes, prior implementation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.[27]

Since there are no specific rules for the training and qualification of mediators and there is no code of conduct at the European level, any such rules and requirements are also left to the Member States. In general, registered mediators are not categorized by specific areas of expertise, such as family-, medical-, or construction conflicts. Instead, information about a mediator's field of practice is recorded independently. Any individual who has fulfilled whatever is the required training and meets the necessary criteria at the national level can be included in the registry of mediators, if there is one. While the term "mediator" – just like the term "arbitrator" – is not a protected professional designation, the title "registered mediator" may be restricted and not available in certain Member States, Austria being an example, to those who do not meet certain requirements.[28]

A European chapter of the project "Rebooting Mediation" has been launched in March 2024. It is part of a worldwide effort and specifically aims at "Rebooting the EU Mediation Directive".[29] The project first seeks "to assess the status and impact of mediation legislation for civil and commercial cases in EU Member States and the United Kingdom".[30] The promoters "strongly believe[…] that increasing mediation use is fundamental to the advancement of the United Nations Sustainable Development Agenda Goal No. 16 to ensure universal access to justice and achieve peaceful and inclusive societies".[31]

27 ECLI:EU:C:2010:146. For discussion see Susanna Tenhunen & Jonathan Blanckaert, *EU Framework on Alternative Dispute Resolution for Consumers*, European Parliamentary Research Service, www.europarl.europa.eu/RegData/etudes/BRIE/2024/757788/EPRS_BRI(2024)757788_EN.pdf.

28 Mediation in EU countries, European e-Justice. https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?AUSTRIA&member=1.

29 Federica Simonelli, *2024 Rebooting Mediation – Global Edition*, Dialogue Through Conflict Foundation, 2 May 2024, https://mediate.com/2024-rebooting-mediation-global-edition/.

30 *Ibid.*

31 *Ibid.*

5. Online Dispute Resolution

Alternative Dispute Resolutions, in particular the procedures that promote settlement rather than binding decisions by neutrals, are good examples where digital and online services can expand options, improve quality, and reduce cost. Until quite recently, we used to say that Online Dispute Resolution is a newly developed type of electronic platform for Alternative Dispute Resolution. However, Online Dispute Resolution (ODR) has been operational since 1995, marked by the initiation of the Virtual Magistrate Project by the National Center for Automated Information Research in collaboration with the Cyberspace Law Institute in Chicago. The purpose of the Virtual Magistrate Project was to facilitate swift preliminary resolutions for specific types of online content disputes in an efficient, cost-effective, and impartial manner. As articulated in its concept paper, the project aimed to provide arbitration for the prompt, interim settlement of disagreements involving users of online platforms and those who assert harm due to inappropriate messages, postings, or files. The inaugural case, Tierney and Email America, involved a complaint regarding Email America's alleged spamming of its advertisement on America Online, contravening America Online's Terms of Service. This case was adjudicated by a virtual court within a mere twelve days. However, the ruling of the Virtual Magistrate Project has stirred controversy owing to the treatment of the complaint, with critics arguing that the initial decision resembles a mere publicity endeavor, despite the project's intended positive outcomes.[32]

Meanwhile, several well-known ODR systems or platforms have emerged, such as eBay's dispute resolution platform,[33] Smartsettle,[34] VirtualCourthouse,[35] and the Modria Software, as used, for example by the Modria Resolution Center for the American Arbitration Association,[36] as well as the Centre for Effective Dispute Resolution (CEDR).[37]

ODR platforms are handling hundreds of millions of disputes every year. This digital approach to dispute resolution represents a significant evolution in conflict management practices, reflecting the broader societal shift towards digital solutions. While electricity availability is still a big issue for more than 12% of humanity,[38] and some 35% of the world's population remain large unconnected to

32 Snidha Mehra & Anil Rathore, *Arbitration, Mediation & Negotiations Heading the Digital Way*, 21 May 2021, LiveLaw.in., https://www.livelaw.in/law-firms/articles/arbitration-mediation-negotiations-digital-way-174483.

33 eBay's Resolution Center handles more than 60 million disputes annually, making it one of the largest ODR systems globally; 90% of the cases are resolved without third-party interventions or court involvement. For analysis see Louis F. Del Duca, Colin Rule & Kathryn Rimpfel, "eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers", 6 *Y.B. Arb. & Mediation* 204 (2014).

34 https://www.smartsettle.com/.

35 https://virtualcourthouse.com/.

36 https://aaa-nynf.modria.com/.

37 https://cedr.modria.com/.

38 Hannah Ritchie, Pablo Rosado and Max Roser, *Access to Energy. Our World in Data,* https://ourworldindata.org/energy-access.

the internet,[39] demand for ODR services has been booming.[40] As such, ODR can be viewed as both a product of and a contributor to the ongoing digital revolution, further blurring the boundaries between traditional offline activities and their online counterparts.

However, it is acknowledged that there is a major difference between implementing ODR mechanisms under national law versus implementing ODR mechanisms in accordance with international law. The challenges stem from the fact that there is no widely implemented international or multilateral treaty on mediation. Significant differences from one country to another have to be acknowledged, including about the concept of "ODR disputes" itself. There is no consensus who may participate in ODR dispute settlement, let alone on the optimal rules, means, platforms, or procedures, for ODR. Among other problems, different approaches may lead to "strategic forum shopping" since ODR disputes have "overlapping jurisdictions".[41]

Most recently, the term "ODR" has been extended from its initial usage to the encompass the latest technological advances. ODR has now evolved to include smart courts and becomes part of a narrative of blockchain technologies and smart contracts 'taking over' the law (many authors call "ODR+"). In this context, the term "ODR+" includes all technology that assists or affects dispute resolution, such as smart courts and smart contracts, but also artificial intelligence ("AI"), big data, and blockchains (amongst others).[42] Smart contracts running on blockchains may well become the next evolution of dispute resolution, since they can not only retain immutable versions of the contract and dispute settlement clauses, but also the payment or amount in dispute. The software executes itself upon the occurrence of certain predefined events, for example timely shipping confirmation by a carrier. In this way, smart contracts have the potential to provide for fast and fair redress in cases of disputes.

6. Online Mediation

Online mediation has become popular during the COVID-19 pandemic and remains the most widely used mediation method. Several mediation providers offer online

39 Ani Petrosyan, *Internet usage worldwide - Statistics & Facts*, *Statista,* 16 May 2024, https://www.statista.com/topics/1145/internet-usage-worldwide/#editorsPicks.

40 An excellent resource is provided by Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey (eds.), *Online Dispute Resolution: Theory and Practice – A Treatise on Technology and Dispute Resolution*, Eleven International Publishing 2012.

41 Julien Chaisse, *Smart Courts, Smart Contracts, and the Future of Online Dispute Resolution,* https://stanford-jblp.pubpub.org/pub/future-of-odr/release/1.

42 See also John Zeleznikow, "Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts?", 8 *Int'l J. Ct. Admin.* 2017, p. 30-45, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999339; Michael J. Dennis, "APEC Online Dispute Resolution Framework", 6 *Int'l J. O.D.R.* (2019), p. 138-143, https://heinonline.org/HOL/LandingPage?handle=hein.journals/ijodr6&div=14&id=&page; Wendy Carlson, "Increasing Access to Justice Through Online Dispute Resolution", 6 *Int'l J. O.D.R.* 2020, p. 17-31, https://www.elevenjournals.com/tijdschrift/ijodr/2020/1/IJODR_2352-5002_2020_006_001_003.

mediation as a default option. However, the parties can require that mediation be conducted in person. Online mediation (OM) is usually seen as an integral part of the wider ODR movement.

Many attempts have been made to sharpen the definition and meaning of the term online mediation. Scholars tend to link OM to regular negotiations and derived mediation. While negotiation and mediation are also the most well-known types of ADR, OM can be defined as traditional ADR supplemented by modern information and communication tools (ICT): e-mail, voice and video messengers, etc. Zoom is the most common digital platform used.[43]

More particular ODR features have been described by others. For Hörnle, ODR is not just a transplant of ADR into the online environment, as the transformative power of the technology must not be underestimated.[44] ICT in online mediation is not just a communication medium. It actually supports the mediator in resolving the dispute. Dispute resolution experts Katsh and Rifkin show how technology – in the form of online resources – can take on the role of a "fourth party", working with and assisting the traditional third party in settling conflicts more efficiently.[45] Other scholars even insist that the technology that has become the fourth party in dispute resolution may "over time […] become the neutral party, and dispute resolution may revert to a triangular idea of dispute resolution".[46]

Modern AI-driven technologies (software) work separately and autonomously from their users. The technology is not "being used" but rather functioning on its own, implementing the program's aims. In addition to more general AI platforms like ChatGPT, some technologies are more sophisticated and specifically designed for dispute resolution purposes. "Only applying the latter ones we deal with ODR, while the use of traditional web instruments does not create any added value, and consequently does not need additional attention and research (it is not ODR in its pure form, but rather technically-facilitated dispute resolution)."[47] The emergence of improved web technologies permits the development of complex and ever more specialized internet services for various uses. The concept of 'software as a service' is one of them.

Software as a Service (SaaS) is a cloud-based software delivery model where applications are hosted remotely and accessed via the internet. In this approach, a cloud provider manages the software and makes it available to users online. The software company can either use its infrastructure or partner with a cloud provider to host the application.[48] An emerging area in the SaaS landscape is online

43 *Mediations in Italy: Overview, Practical Law UK Practice Note Overview*, LCA, 6 February 2023, https://www.lcalex.it/en/mediations-in-italy-overview/.

44 J Hörnle, *Cross-border Internet Dispute Resolution*, Cambridge University Press 2009, p. 86, https://assets.cambridge.org/97805218/96207/frontmatter/9780521896207_frontmatter.pdf.

45 Ethan Katsh & Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, June 2001, https://dl.acm.org/doi/10.5555/558866.

46 Julien Chaisse, *Smart Courts, Smart Contracts, and the Future of Online Dispute Resolution*, https://stanford-jblp.pubpub.org/pub/future-of-odr/release/1.

47 Victor Terekhov, *Online Mediation: A Game Changer oR Much Ado about Nothing?*, p. 37, https://ajee-journal.com/upload/attaches/att_1569575810.pdf.

48 Mitchell Grant, "What Is Software as a Service (SaaS)? Definition and Examples", *Investopedia*, 4 July 2024, https://www.investopedia.com/terms/s/software-as-a-service-saas.asp.

mediation, which shows potential as a new application of this technology-driven service model.

As a consequence, some researchers are already promoting a new term – Technologically advanced mediation (TAD) to distinguish these advanced options from more traditional online mediation: "Despite being quite close to each other, they have sufficient differences." It is essential to differentiate between situations in which traditional procedures have integrated certain modern technologies and those in which information technology tools serve as the driving force of the entire process, such that their absence would render the process infeasible. . Even more, only the latter one was determined as 'online mediation', while 'traditional mediation' was defined as mediation through regular telecommunication technologies.[49]

Based on recent experience in India, Rahul Kumar Gaur underlined that as "ODR progresses to a more advanced stage, it has transformed into a dynamic process that goes beyond the electronic alternative dispute resolution (E-ADR)". The author also came back to the "fourth party" concept: "ODR can function as a fourth system party, employing algorithmic integration with advanced tools such as intelligent decision support systems, smart negotiation tools, automated resolution, and machine learning". By contrast to the EU, the Indian Government has taken several steps towards the "promotion" of ODR.[50] However, mediation on a voluntary base in the EU does not preclude progress in ODR.

7. Conclusion

Negotiations have taken place since the dawn of civilization. It was the long way the negotiation from a strong advantage and even a privilege for high-ranked citizens in medieval Europe to online mediation through special "assisted" software complemented by AI.

Online mediation represents an advanced stage within the broader framework of Online Dispute Resolution (ODR), which, in turn, is a component of the wider Alternative Dispute Resolution (ADR) landscape. Currently, a diverse array of terms and definitions—including ADR/E-ADR, ODR/ODR+, online mediation, and technologically enhanced mediation—are in use, necessitating more rigorous clarification and standardization. However, this discussion lies beyond the scope of the present article.

There is no specific international or bilateral treaty governing mediation, including online mediation, nor is there a clearly defined concept of "ODR disputes". Furthermore, the participation in ODR dispute resolution remains ambiguous. The absence of uniform rules results in inconsistent treatment of online mediation,

49 Victor Terekhov, *Online Mediation: A Game Changer oR Much Ado about Nothing?*, p. 37-38, https://ajee-journal.com/upload/attaches/att_1569575810.pdf.

50 Rahul Kumar Gaur, *Tech-Driven Justice: Unraveling The Dynamics Of Online Dispute Resolution*, 9 June 2024, https://www.livelaw.in/lawschool/articles/future-of-justice-technology-alternative-dispute-resolution-260027.

which may give rise to "strategic forum shopping", as ODR disputes often involve "overlapping and competing jurisdictions".

ODR platforms are utilized by millions of individuals globally, marking a significant evolution in conflict management practices. Although one-third of the world's population still lacks internet access and traditional, in-person dispute resolution methods remain dominant, online mediation is poised to carve out a distinct niche within the broader landscape of dispute resolution.

It is evident that modern technologies, particularly in the context of dispute resolution, are often overestimated. The practical application of online mediation, even in Europe, accounts for less than 1% of all disputes. Consequently, the value and market potential of such technologies, including artificial intelligence, are frequently inflated.

While advanced software and artificial intelligence have become integral to daily life, their role should not be viewed as a replacement for human expertise. Much like electronic calculators and pc's with the latest bookkeeping sofware did not supplant the need for accountants, highly advanced technologies are unlikely to replace judges. These tools may serve as aids, but they cannot substitute the human element in sensitive areas such as dispute resolution and online mediation.