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ONLINE DISPUTE RESOLUTION - ODR

INTRODUCTION

These last decades, various Alternative Dispute Resolution methods (ADR) have been developed seeking the out – of – Court settlement of disputes. The main ADR are: arbitration, mediation, conciliation, adjudication of claim(s) and compromise. The common characteristics of all the Alternative Dispute Resolution methods, the use of which expands the more and more, are that they are much quicker and much more cost effective as compared to legal proceedings. In addition, the out – of – Court resolution of a dispute grants to the parties involved chances to restore good relations and to continue collaborating, which is almost excluded in case the dispute is solved in a Court room. The main Alternative Dispute Resolution methods and the way in which they are conducted are well known at present to almost all lawyers, although not used, for different reasons, as frequently as it would be expected. Another common characteristic of all the Alternative Dispute Resolution methods was until twenty years ago that all parties being involved in the process had to be physically present or represented during the relevant process. Yet, as of the 90s another way to conduct Alternative Dispute Resolution methods was developed : it is the online process of dispute resolution (ODR).

1. THE MAIN REASONS HAVING LED TO THE DEVELOPMENT OF ONLINE DISPUTE RESOLUTION (ODR) PROCESSES.

The setting up of Online Dispute Resolution **(ODR)** processes is due to a large extent substantial to development of e – commerce and the increase of electronic transactions. This, combined with the fact that Internet and e – features in general have been developed tremendously and very quickly, explains why **ODR** methods have expanded quickly as well.

Disputes, generated in the frame of e – commerce and e – transactions in general can hardly be tried by the Courts due to lack by the majority of the Judges of the specific knowledge needed to fully understand such kind of disputes. This is why said disputes were the first categories of disputes to which offline Alternative Dispute Resolution methods **(ADR)** were applied, since the third party or parties conducting them (arbitrator(s), mediator(s), conciliator(s)) etc.. are freely selected by the parties who obviously take care to entrust this task with persons being able to understand how electronic commerce and, in general, electronic transactions «work» and are, therefore, able to solve properly the disputes generated by such transactions. Later, it has proven that said Alternative Dispute Resolution methods could be conducted also electronically, i.e. online **(ODR).**

2. DISPUTES RANKING FOR ONLINE RESOLUTION

Technology is broadly used in **ODR** to facilitate the resolution of disputes between parties. **ODR** may be applied to a large range of disputes, including consumer to consumer **(C2C)** disputes, family disputes and even Interstate conflicts.

However the disputes mainly ranking for online resolution are those accruing out of e – commerce and electronic transactions in general, since it makes more sense to use for their solution the same medium (the Internet) which was used to conclude the transaction(s) having generated them.

The consequence of lack of sufficient knowledge and experience of the Judges in respect to electronic transactions and electronic means is that they can hardly understand – for instance – why a commercial e - transaction was not concluded without any fault of any of the concerned parties, but due to a technical problem.

As an example, we take a dispute having arisen between a consumer and an e – trader because the order placed electronically by the consumer for the purchase of some specific books has not been executed by the e – trader. The consumer claims that, due to the non-reception of the books, he has suffered an important damage because he was not able to review them on time and include data contained therein in a study he was to submit to two important companies, in respect to two important projects regarding which he hoped to be selected as sub - contractor. The e – trader claims that he has never received the order of the consumer, who nevertheless has received electronical acknowledgment of receipt. Those dealing with computers would immediately think that something did not work in the system and try to find out the explanation. A proper exploration of the issue could demonstrate that, for some reasons, the order of the consumer was treated by the e – trader’s electronic system as a spam and therefore isolated.

In the above example, the result was that the e – trader was not aware of the order sent by the client. Consequently, it could not be held responsible

for damages suffered by the consumer. It is clear that, if the dispute was brought before the Courts, though it is sure that the parties / and their lawyers would explain the situation to the Judge, he, nevertheless, would like to have confirmation by an expert of what exactly went wrong. The nomination of an expert would increase the cost of the trial and also extend its duration, i.e. it would make even stronger the disadvantages of the resolution of a dispute by means of legal proceedings as compared to its resolution by means of an alternative method regardless to whether it would be an **Offline ADR** or an **Online ADR (ODR).**

Further, thorny issues, such as the International Jurisdiction of the Court, the applicable Law and other issues emerging in case of a transborder dispute in general, would be even more difficult to be solved in case of a transborder dispute accruing out of an e – transaction if it was to be solved by a Court.

In the above example, if the books ordered by the consumer were edited in a State other than the one of the residence of the consumer and other than the State of the residence of the e – trader, which would be the State the Courts of which would have international jurisdiction to rule the case? This question would arise regardless to whether the transaction having generated the dispute was an e – transaction or not. But it is less frequent that a client orders to a booktrader abroad books which are edited in a third country putting thus in the picture three different States and three different Legislations. Actually, in a non e - transaction, the consumer could order the books directly in the country where they are edited. On the contrary, when it is an e – commerce transaction, consumers have not always direct access to the third party providing the object they order, but only to the e – trader distributing it.

3. ALTERNATIVE DISPUTE RESOLUTION METHODS APPLIED ONLINE AT PRESENT

Online arbitration and **online mediation** are at present the two Alternative Dispute Resolution methods which are conducted not only offline, but also online. **Negotiations** are also very often done online, especially if they concern matters connected to e – commerce and e – transactions in general.

4. DISPUTES ACCRUING OUT OF E – COMMERCE AND ELECTRONIC TRANSACTIONS AND THEIR MAIN CAUSES

The disputes accruing out of e – commerce and electronic transactions are usually of the same nature as those accruing out non e – commerce and non e - transactions. Save the cases where the cause of a dispute is a technical one, the causes of disputes accruing out of e – transactions are the same as those of disputes accruing out of non e – transactions, such as the non-execution or the non-appropriate execution of orders, the delay in the

delivery of the goods which have been ordered or of the services requested, the defaults of such goods, the lack of agreed specifications of the goods, the delay in the settlement of the relevant invoice(s), the way in which the down payment, if any, is considered, i.e. to what extent it has to be retained or not in case of cancellation of the order, the validity of an excessive penal clause etc..

5. THE ADVANTAGES AND THE DISADVANTAGES OF ONLINE DISPUTE RESOLUTION (ODR) VERSUS RESOLUTION OF DISPUTES BY MEANS OF LEGAL PROCEEDINGS

The main advantages of **Online Dispute Resolution (ODR)** versus resolution of disputes by means of legal proceedings are basically the same as those of the **Offline ADR**. The Online Dispute Resolution processes are quicker, less expensive, less complicated, less formal and more flexible than legal proceedings. The main disadvantages of **ODR** are (a) that the parties involved and the person conducting the resolution process are not in presence of each other (except if Skype is used). This lessens the chances to establish confidence, rapport etc.. with the third party, of developing empathy by the third party vis – a – vis the disputing parties, the chances to restore or develop good relationship between the disputing parties and (b) the impossibility to use means of proof which are not in an electronic form, (for example, unless Skype is used, witnesses cannot be heard and cross - examined by the parties).

6. THE MAIN DEFINITIONS OF «ONLINE DISPUTE RESOLUTION – O.D.R.»

Many definitions have been elaborated for **«Online Dispute Resolution - ODR».** The main ones are the following :

a. Online Dispute Resolution is a dispute resolution process which operates mainly online. This encompasses both online versions of **«Alternative Dispute Resolution – ADR»** and CyberCourts, the former being dominant. In other words, **ODR** relates to negotiation, mediation, arbitration and Court proceedings, whose proceedings are conducted online (see Schultz in «Does Online Dispute Resolution Need Governmental Intervention? The case of Architectures of Control and Trust», in North Carolina Journal of Law and Technology, Volume 6 (1), pages 71 and 72).

b. «**ODR** grows its main themes and concepts from Alternative Dispute Resolution **(ADR)** processes such as negotiation, mediation and arbitration. **ODR** uses the opportunities provided by the Internet not only to employ these processes in the online environment, but also to enhance these processes when they are used to resolve conflicts in the offline environment (see Katsh/Rifkin in «Online Dispute Resolution – Resolving conflicts in Cyberspace», San Francisco 2001, page 2).

c. «**ODR** is a broad term which encompasses many forms of Alternative Dispute Resolution incorporating the use of the Internet, websites, e – mail, communications, streaming media and other information technology as part of the dispute resolution process». This definition is given by the American Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution.

d. «Online Dispute Resolution is Information Communication Technologies **(ICT)** or **Online Technology applied to Alternative Dispute Resolution»**.

e. «Online Dispute Resolution is **ADR** services offered entirely by electronic means, without the need for the disputing parties to leave their homes / offices». This definition is given by the International Organization «Consumers' International **(CI)**».

f. Online Dispute Resolution is considered to be the out – of – Court methods of resolution of disputes accruing out of electronic transactions, which are achieved exclusively or at least regarding their most important part through the Internet, by using any kind of contemporary electronic and digital means of communication (see Spyros Ch. Makris LLM, DL University of Konstanz, Lawyer, in European Court of Justice Review 2, 2009 (15th year), page 160).

Besides the above definitions, there are some alternative terms and acronyms which can be used, such as :

- Internet Dispute Resolution **(IDR)**
- Electronic Dispute Resolution **(EDR)**
- Electronic ADR **(e - ADR)**
- Online ADR **(o - ADR)**

ODR has emerged as the most used term in recent years.

7. CHARACTERISTICS OF AN ALTERNATIVE DISPUTE RESOLUTION METHOD CONSIDERED AS AN ONLINE ONE

An Alternative Dispute Resolution method is considered as an online one when it is applied in total or at least in its largest part by using Internet and electronic means in general. **That is to say that the use of electronic means should not be merely complementary**. **But on the other hand, the use of Internet and electronic means should not be exclusive** regarding

the conduct of the Online Dispute Resolution process. Still, it should be prevailing.

In the light of the above, ODR includes all methods used to resolve disputes, which are conducted mainly through the use of Information and Communication Technology (ICT).

The assistance of **ICT** has been named by Katsh and Rifkin as the **«fourth party»** since, in addition to the two disputing parties and the third neutral party (arbitrator, mediator, negotiator etc..), **technology is the «fourth party»,** which is used by the third party as a tool for assisting the process (Katsh and Wing. «Ten years of Online Dispute Resolution (ODR) : Looking at the Past and Constructing the Future», 38 (2006) U.Tol. L. Rev. p.35)

According to one opinion, the terms ODR should be considered as covering exclusively out – of – Court Alternative Dispute Resolution (ADR) methods assisted principally with ICT tools. Yet, part of the authors incorporate a broader approach including litigation when assisted largely by ICT tools. The use of such tools in judicial proceedings was rather limited up to recently. But the last ± 10 years the electronic means are used also in judicial proceedings. In Greece, Law 4055/2012 provides that the filing by the litigants of their briefs and their supporting documents may be done electronically and that the text of the judgments is prepared electronically and then printed and signed by the Judge(s).

8. THE MAIN DIFFERENCES BETWEEN ODR METHODS AND JUDICIAL LEGAL PROCEEDINGS

The main differences between Online Dispute Resolution methods and the resolution of disputes by means of judicial proceedings is that **ODR** methods focus on solutions mutually agreeable to and mutually agreed by the parties in dispute and on the exclusive or at least very large use of electronic means for the achievement of their process, while judicial proceedings focus on the strict application of the appropriate legal dispositions and use only incidentally electronic means.

9. ONLINE ARBITRATION

Arbitration can be conducted online also.

Besides the various arbitration distinctions applying both to offline and to online arbitration, i.e. the distinction of arbitration into institutional and ad hoc and the distinction into national and international, there are other distinctions of arbitration which apply only to online arbitration, the most important of which are the **«fast track online arbitration»** and the **«documents only online arbitration».**

The «fast track arbitration» is the process where all the parties agree to have it achieved mandatorily in only one session.

The «documents only arbitration» is the process where only documents forwarded to the arbitrators by e – mail can be used as means of proof.

Online arbitration can be distinguished also into «binding» and «non – binding». «Non – binding» arbitration is the process where the arbitrators do not render any decision, but formulate only a kind of proposition for compromise, which the parties in dispute are invited, but not obliged, to accept. Clearly a «non-binding online arbitration» cannot be considered as a real arbitration in the sense granted to the term «arbitration» by the Legislation of most of the States, based on which it is expected from the arbitrators to render a binding award constituting, after fulfillment of various formalities, an enforceable title.

10. ONLINE MEDIATION

Mediation also can be conducted online.

Online mediation is conducted electronically for its bigger part, if not exclusively. That is to say that during the mediation process, the disputing parties and the mediator are in contact only through e – mail, Internet, telefaxes and possibly through conference telephone calls by means of Skype.

Consequently, the mediator and the disputing parties are not «physically» together. They can «be together» only through Skype in the cases where this way of communication is admitted. Actually, tele-conferences are admitted can be used depending on the Legislation of the State where mediation is conducted, on the decision of the mediator etc.. In case communication by Skype is not allowed, the mediator cannot have «physically» joint sessions and / or separate sessions with the parties involved, since he can communicate with them only in writing through e – mails, Internet, telefaxes etc..The negative impact of this is obvious : body language and non-verbal communication in general are excluded. The parties have not the opportunity to develop and possibly improve personal contact with each other, due to lack of eye contact, smiles, sympathy, which can emerge due to the mere fact of being seated together, lack of chances to exchange viewpoints in a friendly way, less chances to «see» that the other party is not necessarily an «enemy», that a mutually acceptable agreement is possible, that good relations can be kept and even improved, that cooperation is still possible etc...

In the light of the above, we would say, that the fact to conduct mediation online, through Internet and exclusively or almost exclusively by electronic means, deprive said alternative dispute resolution method from basic characteristics and advantages of it. Also, the role of the mediator

«shrinks» very much in case of online mediation because of what is exposed hereinabove, with as a result that the mediator is able to contribute to the finding of an agreement by the parties much less than he could do in an offline mediation process.

On the other hand, all the documents connected to the mediation process, such as the agreement of the parties for submission of their dispute to mediation, the agreement with the mediator, the agreement accruing possibly out of the mediation process and solving the dispute are drafted, exchanged, modified, commented etc.. electronically through e – mail, which – to our opinion – does not facilitate things. Especially the agreement possibly accruing out of the mediation process, it can be drafted, modified and finalized by the concerned parties in a much more efficient way, without misunderstandings and misinterpretations, if they are seated with the mediator around the same table and express their viewpoints regarding the wording of the agreement and its contents face - to – face, since this allows to eliminate more quickly objections and disagreements and to set up a text reflecting exactly the real will of the parties, which makes the document less vulnerable and secures its enforceability, because it diminishes the risk of contestation by one or by more concerned parties of its contents. Of course, drafts of the above agreement and modifications thereto can be done and exchanged electronically, but when the elaboration of the text reaches a certain level, the parties should be physically together.

11. THE «BLIND BEADING» ONLINE DISPUTE RESOLUTION

The «blind beading» dispute resolution is an Alternative Dispute Resolution method which can be processed exclusively by electronic means. **That is to say that the «blind beading» dispute resolution can be conducted only online**. An offline blind beading dispute resolution method is not conceivable as it accrues clearly out of the description set forth below.

Usually, the «blind beading» is done as follows : The disputing parties, who have agreed to use it, introduce in Internet three offers each one of them. The offers of each party are not disclosed to the other(s). Each party fixes in advance a **Zone of Possible Agreements («ZOPA»).** Thereafter, the system compares the three offers submitted by each party and, if one of them falls into the ZOPA, the agreement is automatically concluded.

The advantages of the «blind beading», which is used mainly by insurance companies, are that it is very quick and cost effective. But, to our opinion, the «blind beading» is not a real alternative dispute resolution method : there is no exchange of viewpoints, there is no exploration of both sides' interests, there is no possibility to change positions because the three offers are introduced in the system beforehand, there is no possibility to have a different approach based on the progress of the process although a different approach could prove to be more appropriate and efficient etc... Actually, it has often appeared that, during mediation, the parties change

totally their positions towards the end of the process, because they had the opportunity to take more into account their real interests. The blind beading is – to our opinion once more – rather a gambling game.

12. THE SO – CALLED MOVEMENT OF ALTERNATIVE DISPUTE RESOLUTION - ADR

Solving disputes out – of – Court began to be considered seriously in the USA more than 30 years ago, when a strong movement started and grew regarding the **«ALTERNATIVE DISPUTE RESOLUTION - ADR»** methods.

On the other hand, the development in the 60s of **«Civil Rights Movements»**, in the U.S.A. .has in a way contributed to the development of **ADR**.

According to statistics, in the USA 90% - 95% of the disputes are solved at present by means of Alternative Dispute Resolution methods.

13. THE FIRST ADR PROGRAMS

The first ADR programs are those called «Community and Neighborhood Justice Centers». These programs consist of the entrusting to Committees composed of citizens the amicable settlement of disputes between members of a community of neighbors. The main goal is to keep and possibly enhance the relations between the disputing parties.

14. THE FIRST ATTEMPTS TO ORGANIZE ONLINE ALTERNATIVE DISPUTE RESOLUTION METHODS

The first attempts to organize online Alternative Dispute Resolution methods took place in the United States of America before 10 years approximately. Since then, **ADR** have developed very quickly there, but also in Europe.

15. THE PROJECTS DEVELOPED DURING THE TRIAL PHASE OF ODR METHODS

During the trial period of ODR methods, two very important programs were developed : the «Virtual Magistrate Project» and the «Online Ombuts Office».

The Virtual Magistrate Project was applying arbitration. The Arbitral Court of the Virtual Magistrate Project had exclusive competency regarding cases of offense of the dignity and the personality by means of online publications or cases of theft of business secrets, of frauds connected to e – transactions, abuse of personal data, sending of spams etc..

The Online Ombuts Office offered for free to Internet users services of online mediation. Since 1999, the Online Ombuts Office

started to grant its services to various sites against a fee, in a very successful way.

16. OTHER IMPORTANT APPLICATIONS OF O.D.R.

Other important applications of ODR are : (a) the online arbitration processes of the Organization under the name «Internet Corporation for Assigned Names and Numbers - ICANN » and (b) the program called «European Consumer Dispute Resolution – ECODIR».

ICANN manages most of the top – level domains all over the world. Since 1999, it has set up the **«UNIFORM DISPUTE RESOLUTION POLICY - UDRP»,** which is a Regulation providing the mandatory submission to arbitration of disputes regarding the registration of top - level domains. The arbitration processes are conducted according to **the «ICANN Rules for Uniform Domain Name Dispute Resolution Policy (RUDNDRP)».** The arbitration processes are not conducted by ICANN, but by four other Organizations, which have been certified to this end. Among them, **the Organization called «e – Resolution»** and the Organization called **«Asian Domain Name Dispute Resolution Center (ADNDRC)»** conduct exclusively online the arbitration processes based on the **RUDNDRP** rules.

The **European Consumer Dispute Resolution Program (ECODIR)** started in 2001 with the support of the European Commission following a joint initiative of many European Universities and Research Centers. This program stopped its activities in 2003. Its exclusive object was to deal with disputes accruing out of international **B2C (Business to Consumers)** e – transactions offering to consumers mediation services for free. The entire process was done through Internet by using e – mails.

17. COMPANIES GRANTING SUCCESFULLY AT PRESENT O.D.R. SERVICES

The most important and well-known companies granting **ODR** services are the companies under the name **«Square Trade»** and **«Cybersettle».**

Square Trade (http:www.squaretrade.com) was formed in 1999, in San Francisco, USA. It has collaborated very closely with one of the most important internet markets, the e – Bay. Since 2000, **Square Trade** grants to the users of **e – Bay** the possibility to use online negotiation services and online mediation services seeking to solve disputes accruing out of e - transactions.

As to **Cybersettle** (http:www.cybersettle.com), it has been founded in the United States of America, in 1998. It is possibly the most successful provider of blind – beading services. It has developed a software regarding the automatic conclusion of online compromises and has obtained a patent for said software from the U.S.A. Patent and Trademark Office.

18. THE MAIN LEGAL ISSUES CONNECTED TO THE APPLICATION OF ODR METHODS

The processes of Online Alternative Dispute Resolution Methods are not governed for the moment by formal binding rules.

It should therefore be examined to what extent the legal dispositions applicable to offline **ADR** processes can be applied also to the same processes when conducted online **(ODR).**

The two main Alternative Dispute Resolution methods, i.e. arbitration and mediation, are expressly regulated by legal dispositions, when conducted offline. Said dispositions cannot apply or at least cannot fully and properly apply in case arbitration or mediation are conducted online.

In Greece, arbitration is governed by articles 867 and following of the Code of Civil Procedure when we are in presence of an inland arbitration, the Treaty of New York dated June 10, 1958 re : «Recognition and enforcement of foreign arbitral awards», which was ratified by virtue of Legislative Decree 42/1961 and Law 2735/1999 re : «International Commercial Arbitration» apply when the matter in dispute accrues out of International Commerce.

When arbitration is conducted online, the rules contained in the above legal texts cannot be fully applied, but they further do not respond to the needs of a process handled through Internet and other electronic means.

As far as mediation is concerned, besides some texts relating more particularly to consumers disputes, European Directive number 2008/52 regulates in detail mediation in civil and commercial transborder disputes. Based on the above Directive, the Member States have to introduce Mediation in their Legislation and in case Mediation is already provided for by the Legislation of any Member State(s), if any relevant legal dispositions are not in compliance with those of the dispositions of the above Directive being mandatory, then the concerned Member State(s) have to modify them accordingly.

Mediation has been introduced in Greece by virtue of Law number 3898/2010 regulating not only transborder civil and commercial disputes, but also inland ones.

Regarding mediation as well, the legal dispositions contained in the above Directive and the above mentioned Law cannot be fully applied if the mediation process is conducted online. But they do not also fit perfectly to the handling of a mediation process through Internet and by using electronic means.

The processes of Alternative Dispute Resolution are, by definition, more flexible than the judicial proceedings. This is one of the main

advantages of **ADR**. Yet, it should be examined whether said flexibility jeopardizes fundamental rights of the disputing parties.

In Greek Legislation, the arbitrators are free to fix the procedural rules to be applied to the arbitration process : the arbitrator or the Arbitral Court may decide that, although the dispute to be solved is a dispute which would be tried, in case of judicial proceedings, by the Multimember Court of First Instance where very strict procedural rules apply, the arbitration will be handled by application of the procedural rules provided for by the Greek Code of Civil Procedures for legal proceedings having as object conservative / preventive measures, which are less strict. To illustrate the above, let us take the example of the briefs of the parties, which have to be deposited with the Clerk of the Multimember Court of First Instance at least twenty (20) days before the day of the hearing of the case, while concerning an application for conservative / protective measures the relevant briefs are filed with the Court on the day of the hearing. On the other hand, the length of the period of time between the day on which an ordinary law – suit must be served upon the opponent and the day of the hearing of the case is expressly fixed by the Law (60 days in case the opponent resides in the Greek Territory or 90 days in case he resides in any other State). On the contrary, the length of the period of time which must elapse between the notification upon the opponent of an application seeking conservative / protective measures and the day of the hearing is freely fixed by the President of the competent Court and exceeds very rarely 8 to 10 days. Sometimes it is much shorter than this.

Clearly the right of the arbitrator or of the Arbitral Court to decide that they will try the dispute by applying the flexible rules applicable to conservative / protective measures proceedings does not harm since, in said legal proceedings as well, the fundamental rights are respected. Actually the service upon the defendant of an application for resolution of a dispute by arbitration before a period of time shorter than the one before which a law - suit by means of which legal proceedings start before a Court of Justice has to be served upon the opponent does not affect the right of the concerned party to defend himself because, in the process of arbitration, the defendant is already aware that a claim against him will be submitted to arbitration inasmuch as he must have been invited by the claimant to nominate his arbitrator(s) many days – if not weeks – before the hearing of the Arbitral Court.

The fundamental rights of the litigants such as the right of each one of them to be heard, the right of all litigants to be treated equally etc… as well as various fundamental obligations of the litigants such as the obligation to grant a power of attorney to their attending lawyers in the form of a notarial deed, the obligation to submit written briefs and counterbriefs they are respected also in **ADR** processes. Further the **ADR** processes must end by means of a written document as it is the case in legal proceedings. Actually,

arbitration ends when the Arbitral Court renders a written award, which becomes, after some formalities are fulfilled, an enforceable title, the agreement accruing out of a mediation process must be in the written form and becomes an enforceable title by application of the relevant legal dispositions of the Legislation of the State where the mediation process took place etc… But, when the Alternative Dispute Resolution methods are conducted online, it is difficult to respect all the fundamental rights of the litigants. For example – as already stated above – the parties are not heard and even less heard in the same room, since **ODR** processes are conducted exclusively or for their largest part through Internet and by using electronic means in general.

On the other hand, although a Court trial is public, there is a strict protection of the personal data of the litigants since – according to Greek Legislation at least - only themselves and their duly authorized attorneys have access to the file of the Court and can obtain official copies of the entire text of the judgment closing the case (a summary thereof is usually published on Internet and in Judicial Reviews). The personal data of the parties are respected also in the process of arbitration, all the more that the hearings of the Arbitral Court are not public. The above apply also to mediation one of the main and most important characteristic of the relevant process being that it is absolutely confidential. Even more, Greek Legislation allows the extension of the confidentiality also to the agreement, which possibly accrues out of a mediation process except if it has to be brought to the knowledge of Authorities, Court Bailiffs etc.. in view of its enforcement.

In case arbitration or mediation are conducted online, the confidentiality rule stands good, but all the process being done through electronic means, the confidentiality can be infringed more easily, not by the parties in conflict or their lawyers or the mediator (who are bound by the obligation not to reveal anything which was done or said during the mediation process and by the obligation for those participating in the mediation process who could otherwise be heard as witnesses (the parties cannot, in any case, be heard as witnesses) not to testify before any Court if the dispute is not solved by mediation and it is thereafter submitted to a Court of Justice), but by third parties (hackers), which makes the concerned parties reluctant in communicating personal data of them. This might complicate the process or make it less efficient.

In any event, there are legal issues which are solved in the same way regardless to whether we are in present of legal proceedings or in presence of an **offline ADR** process or in presence of an **online ADR** process (ODR). For instance, the Law applicable on the merits of a transborder dispute will be agreed by the parties. If there is no agreement of the parties in this respect, the Law, which will apply, will be the one provided for by article 25 of the Greek Civil Code or the one provided for by Regulation (EC) 5963/2008 of the European Parliament and the Council re : «The applicable Law to

contractual obligations (Rome I)» and by Regulation (EC)864/2007 of the European Parliament and the Council regarding the Law applicable to non-contractual obligations (Rome II)», if applicable (see also proposal (COM) 794 of the European Parliament and the Council – «The electronic resolution of Consumers' Disputes)». The above legal texts set forth the principle that, if the parties have not selected expressly the Law governing the merits of the case, the applicable Law will be the one which is the most closely connected to the dispute. This will apply regardless to whether the process (and more particularly the arbitration process, the other **ADR** methods not requiring the application of legal rules except those specifically applicable to them) is conducted online or offline but also regardless to whether the dispute is to be solved by means of an **ADR** or **ODR** or by means of judicial proceedings.

As a general remark, we could say that, except the difficulty if not the impossibility to apply the principle of the right of the parties to be heard and the principle that the process is oral, as well as the vulnerability of confidentiality, there are no legal issues connected to Alternative Dispute Resolution methods **(ADR)** which can be solved more easily when connected to offline Alternative Dispute Resolution methods than when connected to online Alternative Dispute Resolution methods.

19. TEXTS ELABORATED REGARDING ODR BY THE EUROPEAN UNION AND OTHER ORGANISMS

a. Besides the above Directive, the European Union has issued various texts in respect to Alternative Dispute Resolution methods regarding civil and commercial disputes in general, disputes accruing out of consumption, of e – commerce and transborder transactions. The most important texts issued by the European Union in this respect are mentioned below.

In 1993, the European Union issued the Green Paper for «Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market (COM/1993/576)».

Later on, the European Commission issued Recommendation 98/2057/EC dated March 30, 1998 regarding the principles to be applied by the competent Organs for the out – of – Court settlement of disputes accruing out of consumption.

The first text of the European Union to mention **ODR** methods is **Directive 2000/31/EC** of the European Parliament and of the Council dated June 8, 2000 re : «Certain Legal Aspects of Information Society Services, in particular Electronic Commerce in the Internal Market **(Directive on electronic commerce)**», which provides in paragraph 1 of its article 17 that **«Member States shall ensure that, in the event of disagreement between an Information Society Service Provider and the recipient of the service, their Legislation does not hamper the use of out-of-court**

schemes available under National Law for dispute settlement, including appropriate electronic means».

In 2001, the European Commission has issued Recommendation 2001/310/EC re : «Principles for the out – of – Court bodies involved in the consensual resolution of consumers disputes».

In Recommendation 2001/310/EC mentioned above, specific reference is done to the need to facilitate access to electronic means in respect to e – commerce and transborder e - transactions and disputes arising therefrom.

In 2002, the European Commission issued the Green Paper concerning Alternative Dispute Resolution methods regarding civil and commercial disputes (COM/2002/196).

In the above Green Paper the need to promote new open line services for the resolution of disputes **(ODR)** is expressly acknowledged. It is further stated therein that the services in question might also be used for the resolution of disputes non – related to electronic commerce. According to said Green Paper, the most appropriate solution to regulate matters connected to **ODR** methods is that the same principles governing the classical ways of resolution of disputes be applied also to **ODR**. For the reasons already exposed hereinabove, this is not always feasible.

In 2004, the European Parliament and the Council of the European Union have issued Regulation (EC) 2006/2004 re : «Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws (the Regulation on Consumer Protection Cooperation) ».

In 2009, the European Parliament and the Council of the EU have issued Directive 2009/22 re : «Injunctions for the Protection of Consumers' interests».

In 2011, the European Parliament and the Council of the EU have issued a proposal (COM/2011/793) for a Directive re : «The Alternative Resolution of Consumers' Disputes and the Modification of Regulation EC/2006/2004 and Directive 2009/22».

In 2011 as well, the European Parliament and the Council have issued a proposal (COM 2011/794) re : «The electronic resolution of consumers' disputes», which provides in its preamble that, among others - the following are taken into consideration :

- that the European Commission, in its act regarding the Unified Market, has pointed out the Legislation for the Alternative Dispute Resolution methods regarding disputes, which have a dimension of electronic

commerce, as one of the twelve levers for the stimulation of the development and the strengthening of the confidence to the Unified Market

- that the European Council has invited the Parliament and the Council to take by the end of 2012 a first bundle of priority measures so as a new boost be given to the Unified Market.

- that the proposed Directive should be applied under reserve of Directive 2008/52/EC of the European Parliament and the Council dated May 21, 2008 re : «Certain Matters of Mediation in Civil and Commercial Matters», of Regulation EC 44/2001 of the Council dated December 22, 2000 re : «International Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters», of Regulation (EC) 593/2008 of the European Parliament and the Council dated June 17, 2008 re : «The applicable Law to contractual obligations (Rome I)» and of Regulation (EC) 864/2007 of the European Parliament and the Council, dated July 11, 2007 re : «The Law applicable to non-contractual obligations (Rome II) ».

b. Besides the European Union, the **Organization for Economic Cooperation and Development (OECD)** supports and promotes electronic commerce. In 1999, it has published the so called «Guidelines for consumer protection in the context of electronic commerce». **OECD** promotes mainly the out – of – Court Alternative Dispute Resolution methods and especially the methods for the process of which contemporary technologies of informatics are used.

Further, an Organization under the name **«Global Business Dialogue on electronic commerce (GBDe)»**, which is an association of business companies and the **International Union of Consumers Organizations** (**Consumers International (CI)**) have issued, in 2003, guidelines for the regulation of matters connected to disputes arising accruing out of e – transactions between consumers and undertakings. Said guidelines are available at electronic address : http://www.gbd-e.org/pubs/ADR_Guideline.pdf. They set forth strict standards for the application of ODR methods and they contain a list of minimum prerequisites, which the ODR methods must fulfill when applied to the resolution of e – disputes. In a way, said guidelines recommend online arbitration, online mediation and online negotiations.

20. CONCLUSION

As stated above, the Alternative Dispute Resolution methods conducted on line, at present are, mainly, arbitration, mediation and negotiations taking place in the frame of a mediation, a compromise, or a conciliation process. The main disadvantage to have these **ADR** methods conducted online is that the parties are not heard in the same place. As already stated, even if Skype is used, it cannot be contested that the

communication through this new technology medium is different from hearing the disputing parties while all of them are in the same room. The «virtual reality» created by Skype harms - to our opinion - the chances of the process to have a positive outcome or at least it does not help the reaching of a positive outcome. No doubt that the use of electronic means can be helpful, but only as a complementary tool. It cannot be denied that the fact to be able to submit briefs to the arbitrators, memoranda and other documents to the mediator including drafts of the agreements to be signed in respect to the mediation process, the exchange between the lawyers by electronic means of drafts of the document containing the agreement having possibly accrued out of the mediation process etc.. facilitate and accelerate the whole process. Obviously the use of electronic means to conduct **ADR** processes is positive especially nowadays where informatics is part of our day – to – day life and are used the more and more in all the sectors, both professional and private. But to make of Information and Communication Technology **(ICT)** the «fourth party» in an Online Dispute Resolution method is something which totally changes the picture, especially regarding mediation, all the more that this «fourth party» might, at the end of the day, replace the third party, i.e. the mediator, as it is the case in blind beadings.

As an accredited mediator, we would like to focus on mediation and remind that this Alternative Dispute Resolution method is conducted by the mediator, who is a facilitator with specific skills acquired following specific education and training. Such skills, which are used to facilitate the parties to find out their real interests and not stick on their positions, to acknowledge the interests of the other parties, to stop seeing them as enemies etc…, such skills deployed by the mediator in order to find the real reasons of the dispute (which are often hidden or even not consciously known by the disputing parties), to make the parties find out their best alternative to a negotiated agreement **(BATNA)** and their worst alternative to a negotiated agreement **(WATNA)** and to evaluate the situation accordingly in a realistic way, to explore the advantages and the disadvantages of finding or not finding an agreement through mediation, to find win – win solutions, with as a consequence that the parties will be prepared to consider continuing collaborating after the dispute is solved, all these skills lose a large part of their efficiency if the process is done entirely or mainly online.

The use of electronic technology as a complementary tool in the frame of online mediation processes is positive, but the replacement of the human capacities and skills entirely by technology is not, since the process becomes then impersonal and distant.

As far as arbitration is concerned, our position is the same : technology could be used as an additional tool but, if done online, arbitration should never change its profile by becoming, instead of a real Alternative Dispute Resolution method ending to an enforceable award resolving definitely the dispute, just a proposition or a recommendation of the arbitrator(s), which

can be freely accepted or rejected by the disputing parties as it is the case of non – binding online arbitration.

Last but not least, we consider negatively blind beading methods, which consist of settling the dispute by gambling.

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As a general conclusion, yes to the use of Information and communication technology **(ICT)** as an additional tool, no to making of it a «fourth party» in a process of Alternative Dispute Resolution and even more no to substitute **ICT** to the third party, the third impartial facilitator, i.e. the mediator or the negotiator (in the online arbitration process, the third party i.e. the arbitrator(s), is replaced by **ICT** only in case of blind beading, since in the other kinds of online arbitration there must always be one or more arbitrators even only to formulate a proposition or a recommendation for a solution of a dispute as it is the case in non – binding arbitration processes).

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