

New Form of Justice in 21st Century: Mediation and Online Dispute Resolution^[1]

Modern development requires society to create and implement all possible means and mechanisms for peaceful development and progress in the world based on less loss of time and rational actions. Society should well understand that world peace, real introduction of social dialogue, establishment of the culture of dialogue in society – development and much more acceptance of each other in everyday life should be achieved, which is largely a challenge during the last centuries, although all states establish mechanisms at the legislative level, which should reduce disputes in courts and tensions in society.

IRAKLI KANDASHVILI, PhD in law, Professor of Grigol Robakidze University
ORCID –0000-0002-7651-9277, e-mail: iraklikandashvili@gmail.com

KEYWORDS: mediation, dispute resolution

¹ The author would like to thank Max Planck Institute for Comparative and International Private Law in Hamburg (Germany) for awarding opportunity of research at the Institute's library (July-August 2023).

1 | Introduction – mediation as effective new form of dispute resolution

Modern development requires society to create and implement all possible means and mechanisms for peaceful development and progress in the world based on less loss of time and rational actions^[2]. Society should understand well that world peace, real introduction of social dialogue^[3], establishment of the culture of dialogue in society – development and much more acceptance of each other in everyday life should be achieved, that is largely a challenge during the last centuries, although all states establish mechanisms at the legislative level, which should reduce disputes in courts and tension in society^[4].

Today, mediation is the fastest developing alternative mechanism of dispute resolution in the world^[5], which is characterized by the involvement of a third independent^[6], unbiased^[7] and neutral person^[8], within the framework of a confidential and structured negotiation process^[9], delegating the possibility of making a decision on the dispute to the parties of the conflict. Mediation is an effective alternative dispute resolution tool^[10] because it involves a third party or parties who assist the parties to reach an agreement that is in their best interest^[11].

² Laura Wanner, *Institutions and Dispute Settlement*, 2nd ed. (Leiden: Brill Nijhoff publishing, 2022), 457.

³ Lenka Hola, Martina Urbanova, Milos Vecera, Jan, Holas, *Mediation in the Reflection of Law and Society* (Alphen aan den Rijn: Wolters Kluwer, 2022), 13.

⁴ Stephen J. Ware, *Principles of Alternative Dispute Resolution*, 3rd Ed (West Academic Publishing, 2016), 393.

⁵ Alexander Nadja, *International and Comparative Mediation* (Alphen aan den Rijn: Wolters Kluwer, 2009), 1.

⁶ Susan Blake, Julie Browne, Stuart Sime, *The Jackson ADR Handbook*, 2nd ed. (Oxford: Oxford University Press, 2016), 144.

⁷ Christian Campbell, *International Mediation* (Wolters Kluwer, 2020), 95.

⁸ Thomas Trenczek, Detlev Berning, Cristina Lenz, H.D. Will, *Mediation und Konfliktmanagement. Handbuch*, 2nd ed. (Baden-Baden: Nomos, 2017), 50.

⁹ Stefan Tutzel, Gerhard Wegen, Stephan Wilske, *Commercial Dispute Resolution in Germany*, 2nd ed. (München: C.H. Beck, 2016), 191.

¹⁰ EU-Mediationsrichtlinie 2008, Art. 3a.

¹¹ Georg Berkel, *Zur Diskussion gestellt: Deal Mediation als Konfliktbeilegung*, *Zeitschrift für Konfliktmanagement (ZKM)* (Köln: Verlag Otto Schmidt, 2018), 61.

There is no^[12] single definition of mediation^[13]. Mediation is an old^[14], traditional technique of solving the conflict which was re-discovered in the 20th century as a rapidly growing^[15] effective means^[16] for solving conflict. Mediation was used^[17] centuries ago, its popularity, so called „Re-discover”^[18] as an alternative dispute resolution mechanism, especially has been growing^[19] since the 1970s, when so-called ADR movement began in the West, and the main focus of this movement was on mediation^[20] as the most practical and effective alternative dispute resolution mechanism^[21]. Mediation has been formed as a hybrid, because from the scientific point of view, it combines elements of law, psychology, psychiatry, ethnology and communication skills^[22].

¹² Buhring-Uhle Christian, Kirchhoff Lars., Scherer Gabriele, *Arbitration and Mediation in International Business*, Kluwer Law International, London, 2006, 176.

¹³ The word „mediation” has Latin root and derives from the word *medius*, which means „being in the middle”, and the term „mediation” derives from the English word *mediation* / to *mediate* (*vermitteln* in German) which means *facilitation*.

¹⁴ Penny Brooker, *Mediation Law* (London: Routledge Taylor & Francis Group, 2013), 1.

¹⁵ Richard H. McLaren, John P. Sanderson, *Innovative Dispute Resolution: The Alternative* (Toronto: Carswell, 2006), 4.

¹⁶ Werner Glenewinkel, *Mediation als aussergerichtliches Konfliktlösungsmodell* (Hanover: ibidem-Verlag, 1999), 68.

¹⁷ Klaus Englert, Horst Franke, Winfried Grieger, *Streitlösung ohne Gericht – Schlichtung, Schiedsgericht und Mediation in Bausachen* (Neuwied: Werner Verlag, 2006), 239.

¹⁸ Jan Malte von Barga, *Gerichtsinterne Mediation* (Tübingen: Mohr Siebeck, 2008), 5.

¹⁹ Brooker, *Mediation Law*, 20. (In England mediation as a key component of the civil justice system started to develop from 1996, which is known as Lord Woolf’s reform, as a result of which some changes were made to the Civil Procedure Act and the parties of the civil dispute were offered to solve the conflict via out-of-court methods. In particular, as a result of Lord Woolf changes the court was authorized to offer an alternative dispute resolution to the parties, and if the party unreasonably refused to participate in the process, the court has been given the right to impose a penalty to such party).

²⁰ James Alfini, Saron Press., Jean Sternlight, Joseph Stulberg, *Mediation Theory and Practice* (Durnham: Carolina Academic Press, 2001), 2.

²¹ Ware, *Principles of Alternative Dispute Resolution*, 387.

²² Englert, Franke, Grieger, *Streitlösung ohne Gericht – Schlichtung, Schiedsgericht und Mediation in Bausachen*, 244.

Many scientists and researchers believe^[23] that the originality of mediation lies in the fact that it simultaneously involves absolute voluntariness of parties towards the process, confidentiality of the process is provided, it is characterized with the principles of neutrality and impartiality and which is the most important, mediation offers the disputing parties a unique solution and strengthens and stabilizes future personal and business relationships between them.

There is often a skeptical opinion expressed about mediation, that it is the excessive supplement to the conflict resolution process between the parties, because the disputing parties can find solution around the conflict better than others. Although the practice has shown that the disputing parties actually cannot communicate independently in a civilized manner due to the fact that the general preconditions of the conflict do not allow them to act in such a way, but by involving the third independent and impartial party in the process, the parties seeking solution are more productively involved in the dispute resolution process^[24].

Today, many lawyers are involved in mediation as mediators or as representatives of the parties in mediation, the latter playing an important role in legal practice^[25]. Although some part of the society is still skeptical towards the functionality and outcomes of mediation^[26].

Therefore, the purpose of this publication is, on the one hand, to underline the importance of this newly developing dispute resolution mechanism and, on the other hand, to make the advantages and benefits of this dispute resolution mechanism better known and available to the global international community. Consequently, by achieving the above goal, it will automatically make the reader think of using and at least trying this mechanism in their own disputes and spreading appropriate information to others about the pros and cons of mediation, which will make society more knowledgeable about mediation and raise awareness about it.

²³ David Spencer, Michael Brogan, *Mediation Law and Practice* (Cambridge: Cambridge University Press, 2006), 3.

²⁴ Ibidem, 3.

²⁵ Richard Reuben, Leonard L. Riskin, „The Lawyer Turns Peacemaker” *American Bar Association Journal*, (1996): 54, 55.

²⁶ Elsie Leung, „Mediation: A Cultural Change” *Asian Pacific Law Review*, (2009): 17.

2 | The concept of mediation

Mediation is the negotiation process, the parties try to agree on their own truth with each other within the frame work of negotiations in mediation, so that the norms of law do not decide what they believe to be right, because it is well known to everyone that in some cases justice and legality are not compatible theses, therefore, using the negotiation mechanism within the mediation, the parties are trying to establish their own truth through an agreement when the final decision on this is acceptable to the parties.

Mediation is defined as a structured process based on a trust in which one or more neutral^[27] physical^[28] person^[29] as an out-of-conflict^[30] mediator assists the parties to complete the dispute voluntarily and with the responsibility of the parties^[31], or the concept of mediation is to let the parties to try and ensure dispute resolution^[32] with the help^[33] of mediator within the scope of structured conflict process. This is a technique^[34] for conducting negotiations in a structured manner with the aim of achieving a certain result.

Mediation offers the parties flexible^[35] alternative method of solving conflict in exchange of less time, less expenses as well as through reduction of overloading of trial proceedings. Positive side of mediation is that in the case of disagreement between the parties in the process, they always are

²⁷ Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford-Portland: Hart Publishing, 2017), 9.

²⁸ Law on Mediation in Civil Disputes, Turkey, Article 2, 2012.

²⁹ Mustafa Göksu, „Civil Litigation and Dispute Resolution in Turkey” *Banka ve Ticaret Hukuru Arastirma Enstitusu*, (2016): 275.

³⁰ Henry Brown, A. Marriott, *ADR Principles and Practice* (London: Sweet & Maxwell, Thomson Reuters, 2011), 154.

³¹ *Mediationsrecht*, ed. Horst Eidenmuller, Gerhard Wagner (Köln: Otto Schmidt 2015), 3.

³² Christian Duve, Horst Eidenmuller, Andreas Hacke, *Mediation in der Wirtschaft: Wege zum professionellen Konfliktmanagement* (Köln: Schmidt, 2011), 83.

³³ Mark Partridge, *Alternative Dispute Resolution* (Oxford: Oxford University Press, 2009), 89.

³⁴ Marian Roberts, *Mediation in Family Disputes*, 4th edition (Farnham: Ashgate, 2014), 8.

³⁵ Klaus J. Hopt, Felix Steffek, *Mediation Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013). v.

able to apply the court for dispute resolution^[36]. Mediation is oriented on parties' interests more than on their legal rights, during which an agreement achieved in mediation often more represents commercial compromise^[37] of the parties than a decision taken in relation to legal rights; This is a process promoting negotiations^[38].

Mediation is a good opportunity for the parties to define the conflict between each other, to understand the concept of claims towards each other, find out actual reasons^[39] of conflict, regulate the conflict peacefully, manage it and to create so called win-win^[40] situation, also, to prevent further initiation of the conflict and maintain relationship^[41]. In addition, the Christian doctrine also advises people to avoid^[42] conflicts.

Mediation is a good way for self-determination of the parties^[43] instead of judicial procedures where a judge has this function, or „mediation” helps the parties to decide their own affairs themselves, and the court and arbitration „interfere” in the parties' affairs^[44] for resolving the dispute.

There are strong social and constitutional prerequisites^[45] why disputing parties should have opportunity of trying to settle the dispute through a third neutral person, because a method similar to an alternative dispute resolution allows the parties to exhaust the conflict, which in turn serves the purpose of the rule of law. This form of dispute resolution helps the parties to have direct communication^[46] with each other, which usually does

³⁶ Lindblom Henrik, *Progressive Procedure: The Role of Courts, Access to Justice, Group Actions, Complex Litigation and Alternative Dispute Resolution in Comparative Perspective: Twelve Essays 1985–2015* (Uppsala: Iustus Förlag, 2017), 422.

³⁷ Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses*.

³⁸ Ware, *Principles of Alternative Dispute Resolution*, 7.

³⁹ Ashok Kumar, *Alternative Dispute Resolution System* (New Delhi: K.K. Publications, 2016), 233.

⁴⁰ Ibidem, 233.

⁴¹ Englert, Grieger, *Streitlösung ohne Gericht – Schlichtung, Schiedsgericht und Mediation in Bausachen*, 242.

⁴² Derek Roebuck, *Mediation and Arbitration in the Middle Ages (England 1154–1558)* (Oxford: Holo Books-The Arbitration Press Oxford, 2013), 51.

⁴³ Carrie Menkel-Meadow, Lela Porter Love, Andrea Kupfer Schneider, Jean R. Sternlight, *Dispute Resolution Beyond the Adversarial Model* (Austin: Wolters Kluwer Law&Business-Aspen Publishers Inc, 2011), 224.

⁴⁴ Arthur S. Meyer, *Chairman* (New York State Mediation Board, 1969), 164.

⁴⁵ John Brand, Felicity Steadman, Christopher Todd, *Commercial Mediation: A User's Guide*, 2nd ed. (Capetown: Juta Law, 2016), 13.

⁴⁶ Mark Partridge, *Alternative Dispute Resolution* (Oxford: Oxford University Press, 2009), 90.

not take place during a trial and in mediation the parties have an opportunity to overcome the large margin of alienation that is characteristic to a conflict between them.

Mediation is an impartial conduct^[47] of negotiations on dispute resolution through involvement of a third person in a nonobligatory process, often called as „conflict resolutions process”^[48]. In this process, the mediator has not a right^[49] to solve conflict between the parties and make decision^[50], and thus differs from the court^[51] and alternative dispute resolution such as arbitration, and the mediator’s authorities differ from arbitrator’s authorities^[52]. Mediation offers the parties the opportunity of conducting structured negotiations^[53] in line with the interests of the parties during which in contrast to the court and arbitration, parties themselves and not mediators, using the main principle of Mediation: Interests and not requests.

Mediation, in modern sense, is interpreted as a process in which the parties take self-determination^[54] and make decision on the case itself. International practice has established a practice that the courts must exercise justice, but not „at all costs”, and therefore on all cases where expenses can be saved the court advises^[55] the parties to apply to mediate.

Adoption of the European Directive on Mediation^[56] (2008/52/EC), implementation of which is mandatory for member states since 2011, has

⁴⁷ Christian Buhning-Uhle, Lars Kirchhoff, Gabriele Scherer, *Arbitration and Mediation in International Business* (Alphen aan den Rijn: Kluwer Law International, 2006), 176.

⁴⁸ Bargaen, *Gerichtsinterne Mediation*, 13.

⁴⁹ Ibidem, 15.

⁵⁰ Stephen B. Goldberg, Frank E.A. Sander, Rogers H. Rogers, Rudolph Sarah Cole, *Dispute Resolution, Negotiation, Mediation, Arbitration, and Other Processes*, 6th ed. (New York: Wolters Kluwer Law & Business, 2012), 121.

⁵¹ Menkel-Meadow, Porter, Schneider, Sternlight, *Dispute Resolution Beyond the Adversarial Model*, 31.

⁵² *Mediationsrecht*, ed. Eidenmüller, Wagner, 5.

⁵³ *Mandatspraxis Schiedsverfahren und Mediation*, ed. Jan K. von Schiffer (Köln-Berlin-München, Carl-Heymanns Verlag, 2005), 6.

⁵⁴ Laurence Boulle, Rachael Field, *Australian Dispute Resolution* (Chatswood: Lexis Nexis Butterworths, 2017), 58.

⁵⁵ Cyril Chern, *International Commercial Mediation* (London: Informa London, 2008), 15.

⁵⁶ Directive 2008/52/EC, of the European Parliament and of the Council, on Certain Aspects of Mediation

developed a new development perspective of mediation in Europe^[57] in order to establish a unified framework of mediation standard and support cross-border mediation.

The establishment of the mediation standard at the international level forced member states to integrate the legislative act on mediation into their national legislation, which increased the demand for mediation as an effective dispute resolution technique and the need for its further development in non-European countries.

Regarding the definition of mediation, there is a difference in European countries, between the concepts given on the one hand at a level of law, and on the other hand, which are defined by the judges, but the positions on the theory given below are homogeneous and agreed that mediation is the process based on the volunteer of the parties, in which the mediator solving the issue without legal form, implements the systematic facilitation of negotiations between the parties for the purpose to make the parties to assume responsibility for dispute resolution.

All agree that the necessary feature of this process should be the voluntary participation of the parties as full participants in the process; only in small cases the court may force the parties to participate in mediation^[58], while in all other cases it is excluded^[59]. They also agree that the third person involved in the mediation process should not have any right to decide on the issue, the essence of which is that the parties are obliged to decide on the issue^[60]. The only variety of approaches to the question is observed in the issue whether the third neutral person should have the ability to offer a solution in the form of his opinion to the parties^[61] involved in the process or what are the limits of the rights of the third neutral person to act so. Consequently, the question of the duration of the communication with the third neutral person in a number of cases remains an issue of internal

in Civil and Commercial Matters, 21 May 2008, ix. <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32008L0052>, [accessed: 30.07.2015].

⁵⁷ Klaus J. Hopt, Felix Steffek, *Mediation Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, Oxford, 2013), v.

⁵⁸ Rainer Kulms, „Mediation in the USA”, [in:] Hopt, Steffek, *Mediation Principles and Regulation in Comparative Perspective*, 1262.

⁵⁹ Markus Roth, David Gherdane, „Mediation in Austria”, [in:] Hopt, Steffek, *Mediation Principles and Regulation in Comparative Perspective*, 260.

⁶⁰ Hopt, Steffek, *Mediation Principles and Regulation in Comparative Perspective*, 12.

⁶¹ Chapter 13, C(2) (C). 729 (Netherlands), Schmiedel L., Chapter 18, B (1) (c). 920 (Canada) Ellger R., Chapter 22, A(2), pp.1138 et seq (Norway) Sperr A. in Hopt, Steffek, *Mediation Principles and Regulation in Comparative Perspective*.

regulations, professional codes and soft law of the country. Accordingly, in summary, we can say that the concept of mediation, which uses a broad consensus, should meet the following mandatory conditions^[62]:

1. There must be a dispute;
2. Participation should be voluntary;
3. Involvement of a third neutral person in the process should be ensured, who will communicate with the parties systematically; and
4. Decision-making on the issue is the responsibility of the parties.

Finally, we should take into consideration that the added value of mediation is not only that it reduces costs^[63], the court and the judge's time, is less competitive than trial, but at least it is noteworthy that by using mediation, the parties are allowed to resolve their own problems, assume responsibility and control the progress of the process, during which they can reconnect and start to warm already damaged relations, or constructively to advance its business interests and personal life without stress and effort^[64], during which the parties have a greater feeling of satisfaction towards the proceeding^[65].

3 | Form of judiciary and justice of 21st century – online dispute resolution

In parallel with the establishment of mediation as an effective alternative means of dispute resolution and the use of mediation as a form of international dispute resolution, another new innovation in the direction of mediation is being developed in European countries. This is the so-called – ODR. Online dispute resolution is an umbrella term that generally refers to the use of a technology to resolve disputes between parties^[66]. Although,

⁶² Hopt, Steffek, *Mediation Principles and Regulation in Comparative Perspective*, 13.

⁶³ Brooker, *Mediation Law*, 9.

⁶⁴ Brown, Marriott, *ADR Principles and Practice*, 107.

⁶⁵ Brooker, *Mediation Law*, 9.

⁶⁶ Judicial Council of California, ODR – Workstream findings & Recommendations, document is published at the following location, 2001, 6. www.courts.ca.gov/

it should be mentioned that the United States is a real pioneer^[67] in this field, about twenty years of experience in the USA has taught us that ODR is no more „Online ADR” than the online versions of banking, education, or gaming are simply the offline versions of these systems moved online^[68], but as of today mediation is already well implemented^[69] in many European countries.

Originally, the intent of ODR was not to displace, challenge or disrupt an existing legal regime or familiar ADR processes, but rather its goal was to fill the vacuum involving online disputes^[70].

Over the years, information technology has been transformed into information communication technologies, which are available through a wide range of technical capabilities of electronic communication^[71]. In addition, it should be noted that in parallel with the development of e-commerce occurs a need of creation of an appropriate mechanism, which will be formed as an electronic means of alternative dispute resolution^[72].

Development of electronic technologies does not have a scale; therefore, ability to solve disputes in electronic space is being created and improved

itac.htm.

⁶⁷ Vijay K. Bhatia, Christopher Candin, Maurizio Gotti, *Discourse and Practice in International Commercial Arbitration*, 2012, 213. So called „Online Mediation” was founded in July 1996 in state of Kansas, USA. In particular, a person interested in computers created a web-page which published local news, copied information from radio, television, newspapers and repeated texts of published in newspapers word by word, as a result of which the editor of local print media connected him and accused in the gross violation of copyright. As a result the site was temporarily suspended but the person applied to legal advice, contacted online ombudsman’s office, which was a few months-long project founded in Massachusetts Information Technology and Dispute Resolution Center (Amherst) by Jenet Rifkin and Ethan Katsh. In this particular case they fulfilled of function of a mediator by using electronic means (e-mail, Skype, etc.) and the parties has come to an agreement.

⁶⁸ Ethan Katsh, Colin Rule, „What We Know and Need to Know about Online Dispute Resolution” *South Carolina Law Review*, No. 2 (2016): 3. <https://scholarcommons.sc.edu/sclr/vol67/iss2/10>.

⁶⁹ Development of ODR in Italy is connected to Milan Arbitration Chamber since 2003. <http://www.risolvionline.it>.

⁷⁰ Ethan Katsh, Orna Rabinovich-Einy, *Digital Justice* (Oxford: Oxford University Press, 2017), 33.

⁷¹ Wiebke Voß, „Gerichtsverbundene Online-Streitbeilegung: ein Zukunftsmotell?” *Rabels Zeitschrift*, No. 1 (2020): 75.

⁷² Brown, Marriott, *ADR Principles and Practice*, 587.

every day^[73]. In this direction, one of the developed system operating is ODR program of WIPO^[74] (World Intellectual Property Organization) arbitration and mediation center, which offers concerning parties online to solve intellectual property issues through mediation.

On 25 October 2011, the European Parliament adopted another resolution for supporting ADR, which indicates and references to large potential^[75] of ODR development on small complaints^[76] or cross-border litigation^[77], as well as in may 2013 the European Parliament and of the Council adopted a special Regulation (EU) No 524/2013^[78] on online dispute resolution for consumer disputes, but this form of dispute resolution has critics who believe that the lack of regulation and high price of electronic technology itself is a challenge, which will interfere the establishment of an electronic form of dispute resolution and make it ineffective^[79], on the other hand, they think that the problem of further development of online dispute resolution is concluded in increased use of this form, which will result overloading of online proceeding^[80], which is supposed to become a problem for provider organizations. UNCITRAL in its ODR regulations predicts to fix several millions of cases^[81] per year in the nearest future when ODR

⁷³ Online mediation service Juripax (offers the mediators the opportunity to have online software for carrying out the process which means online forms, online platforms, proceeding program).

⁷⁴ World Intellectual Property Organisation.

⁷⁵ Civil Justice Council, ODR-report, p.5 (Online Dispute Resolution is not Science Fiction).

⁷⁶ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market* (Cambridge: Cambridge University Press, 2017), 44. (Pursuant to this Regulation the users should be able to settle the dispute online, and accordingly ADR service providers must have ODR technique, since it will be difficult to solve small disputes throughout Europe, such as disputes among consumers, with less financial costs, especially when there are cross-border disputes between the parties).

⁷⁷ Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford: Oxford University Press, 2013), Ch.10.

⁷⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0524>.

⁷⁹ Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union*, 2010, 183.

⁸⁰ Simon Johannes Heetkamp, *Online Dispute Resolution bei grenzüberschreitenden Verbraucherverträgen* (Göttingen: V&R Unipress, Universitätsverlag Osnabrück, 2018), 54.

⁸¹ Abdel Mohamed Wahab, Ethan Katsh, Daniel Rainey, *ODR: Theory and Practice, A Treatise on Technology and Dispute Resolution*, 2011, 122.

will be used, and with the development of E-Commerce, it can lead to hundreds of millions^[82] of consumption.

The legislation of a number of countries may not directly include similar term, but nothing prohibits the use of such technological means in mediation^[83]. As the use of ODR has grown in use, the ADR model in which a human mediator alone manages the flow of information between the parties has gradually been replaced by a model in which technology is viewed at as a “Fourth Party”, something that can be of value in both online and offline disputes^[84].

ODR is a practice that, after growing slowly but surely for several years, has been adopted much more widely since the mid-2020s, due to the limitations of in-person proceedings imposed by the COVID-19 pandemic, namely the impossibility of participants to safely appear in person for proceedings before state courts or mediators, the response to this problem has been to use online forms of communication^[85].

The definition of ODR is different in the literature^[86], but generally it deals with dispute resolution through the method that contains an electronic technology component, but the difference is even in this section. One thinks that “the dispute should be resolved by using the electronic technology”^[87], but there is another opinion according to which “the dispute is resolved by using the information technologies in the electronic environment”^[88].

In both cases, technology plays an important role, as the process and communication between the parties to the dispute are largely conducted through online electronic communication tools^[89].

⁸² Colin Rule, *Online Dispute Resolution for Business* (San Francisco: Jossey-Bass Publishing, 2002), 173.

⁸³ Carlos Esplugues, „Civil and Commercial Mediation in Europe” *Intersentia*, Vol. II (2014): 52–53.

⁸⁴ Katsh, Rule, „What We Know and Need to Know about Online Dispute Resolution”, 4.

⁸⁵ Moura Vicente, Oliveira Dias, Almeida Gomes, *Online Dispute Resolution* (Baden-Baden: Nomos, 2022), 9.

⁸⁶ Heetkamp, *Online Dispute Resolution bei grenzüberschreitenden Verbraucherverträgen*, 31.

⁸⁷ Duve, Eidenmüller, Hacke, *Mediation in der Wirtschaft: Wege zum professionellen Konfliktmanagement*, 209.

⁸⁸ Phillippe., *IJODR* 2014, 57, 57.

⁸⁹ Cortés, *The Law of Consumer Redress in an Evolving Digital Market*, 101.

Online dispute resolution (ODR) is perceived as an alternative tool of dispute resolution^[90] that is implemented remotely using Internet technologies^[91] that enables the parties to participate in mediation using electronic means, listen each other^[92], send information online and store online information^[93].

When using online dispute resolution as an out-of-court mechanism, online form is often referred to as^[94] a fourth party to the dispute. Online dispute resolution forms are being developed and in a number of cases, it is possible to register and manage the claim online and this new direction takes the form of alternative dispute resolution mechanism^[95].

The way and form of online dispute resolution becomes an innovative approach which creates additional comfort to the users. Especially is visible the development of practice of certain specific disputes in Europe and different states of the United States through this method, such as consumer^[96] or small business disputes (e.g. between the small business companies, the company and its consumer and etc.). It is often referred to

⁹⁰ In recent years, private service providers of online dispute resolution have been established on the international market: a) eBay's Dispute Resolution Center, which offers a dispute resolution platform in the area of transaction carried out within it; B) Modria – is a company of the former ODR director of eBay and Pay Pal – Colin Raul (2003; 2011), which has acquired online dispute resolution license from eBay and developed and developed its online software; C) The Rechtwijzer – in 2007 Dutch Legal Aid Service Board developed an online portal that aimed to assist the parties involved in the dispute to find a lawyer in electronic space, which in 2014 together with Hill (www.hiil.org/project/rechtwijzer) turned into online dispute resolution platform. D) Youstice – is also an online platform launched in 2014 which serves online resolution of small cost disputes; E) resolver -www.Resolver.co.uk – is a private platform that allows users to use the platform to regulate the dispute online.

⁹¹ The third UNCITRAL group has also worked on ODR concept, which determined technical criteria.

⁹² Ashok Kumar, *Alternative Dispute Resolution System*, 106.

⁹³ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market*, 44.

⁹⁴ Heetkamp, *Online Dispute Resolution bei grenzüberschreitenden Verbraucherverträgen*, 36–37.

⁹⁵ Heetkamp, *Online Dispute Resolution bei grenzüberschreitenden Verbraucherverträgen*, 38.

⁹⁶ See the law of the Federal Republic of Germany of 19.02.2016 on regulation of disputes in consumer matters: Verbraucherstreitbeilegungsgesetz, BGBl. 2016, Teil I Nr.9 vom 25.02.2016, S.254–274.

as ODR^[97] (Online Dispute Resolution) in the English-speaking community. Moreover, there are scientists who believe that ODR has potential and ability to solve complex high-priced disputes^[98].

Proponents of online mediation also pay attention to online integration of the principles of mediation, which is expressed in the use of electronic signature on the commitment to confidentiality in the agreement on a special form for the parties^[99].

Online mediation^[100] has all the advantages that are characteristic of traditional forms of alternative dispute resolution, which in some cases may lead to less time and financial costs^[101].

Advantages of online mediation may be^[102]:

- it is easy to schedule, taking into account the work schedules of the parties and their representatives;
- The parties can participate in the mediation process without leaving their homes and/or offices;
- Online Mediation should save costs, including those related to travel, which is particularly important when conducting cross-border mediation;
- Online space gives parties more time and opportunity to give prepared responses during the course of the mediation;
- online mediation gives the opportunity to exchange documents between the parties quickly and at almost no additional cost.

On the other hand, it should be mentioned that the main challenge of online mediation at the initial stage of its establishment is a characteristic feature of mediation, such as the need for personal contact^[103] (so-called face-to-face mediation / contact) between the parties to mediation, which in a number of cases is mentioned in the literature and practical examples as

⁹⁷ Bhatia, Candin, Gotti, *Discourse and Practice in International Commercial Arbitration*, 212.

⁹⁸ Richard Susskind, *The End of Lawyers?* (Oxford: Oxford University Press, 2010), 220.

⁹⁹ Brown, Marriott, *ADR Principles and Practice*, 593.

¹⁰⁰ McLaren, Sanderson, *Innovative Dispute Resolution: The Alternative*, 7.

¹⁰¹ Fred Galves, "Virtual Justice as Reality: Making the Resolution of E-commerce Disputes More Convenient, Legitimate, Efficient, and Secure" *Journal of Law, Technology & Policy*, No. 1 (2009).

¹⁰² McLaren, Sanderson, *Innovative Dispute Resolution: The Alternative*, 8.

¹⁰³ Esplugues, "Civil and Commercial Mediation in Europe", 52-53.

the main prerequisite for the successful completion of mediation, however, when there is a need and no alternatives, although the use of electronic means has no alternative.

However, it should be noted that in a number of cases, when the disputes between the parties are developing on an emotional background, mediation using electronic means can^[104], on the one hand, calm down the parties and, on the other hand, allow the mediator to conduct the process in a calm environment that will ultimately lead to the result.

4 | Conclusion

Mediation as an alternative dispute resolution technique has rapidly gained a strong position in everyday use as the most acceptable way for conflicting parties to reach a solution. Many European countries apply forms of mandatory use of mediation before initiating court proceedings in domestic jurisdictions, further promoting alternative dispute resolution and increasing its affordability in the society.

For the purpose of saving own finances and time, this alternative form of dispute resolution has many users among conflicting parties. Various states are also thinking and working on more innovative forms of using mediation, which will make this process more important and usable.

The main interest of the conflicting parties is, of course, to solve the dispute with less costs, less time and less stressful situation, and therefore the growing popularity and development of mediation as an alternative dispute resolution technique is reasonable and logical.

And considering the fact that the search for effective ways of international dispute resolution at the international level is increasing, when the parties apply to mediation, it is reasonable to apply online mediation mechanisms, which will ultimately lead to its institutional development and establishment in practice. Moreover, in many parts of the world the digital capabilities of dispute resolution are already greatly increased not only in ADR, but also within the framework of court proceedings^[105].

¹⁰⁴ *Mediationsrecht*, ed. Eidenmüller, Wagner, 34.

¹⁰⁵ Voß, „Gerichtsverbundene Online-Streitbeilegung: ein Zukunftsmotell?“, 70.

Online platforms for dispute resolution from the perspective of court is a bit risky, as it can contradict the principle of publicity, although in case of mediation purposes all is on the contrary, as mediation is confidential and this as well play a positive role in further establishment of ODR practice. In the parallel on-going circumstances also play a role and fact is that unprecedented use of digital platforms has been made, making it possible to maintain a reasonable pace in proceedings within the period of COVID-19 pandemic as well as certainly afterwards the well established forms of online mechanisms continue to remain in use for dispute resolution as usage has proven its effectiveness and practitioners already consider it as a practical tool for resolving disputes and the future of this mechanism really lies in an expanding array of such tools that will open new options for third parties to help reach agreement^[106].

Bibliography

- Alfini James, Saron Press., Jean Sternlight, Joseph Stulberg, *Mediation Theory and Practice*. Durnham: Carolina Acaemic Press, 2001.
- Berkel Georg, *Zur Diskussion gestellt: Deal Mediation als Konfliktbeilegung*, *Zeitschrift für Konfliktmanagement (ZKM)*. Köln: Verlag Otto Schmidt, 2018.
- Bhatia Vijay K., Christopher Candin, Maurizio Gotti, *Discourse and Practice in International Commercial Abritation*, 2012.
- Blake Susan, Julie Browne, Stuart Sime, *The Jackson ADR Handbook*, 2nd ed. Oxford: Oxford University Press, 2016.
- Boulle Laurence, Rachael Field, *Australian Dispute Resolution* (Chatswood: Lexis Nexis Butterworths, 2017.
- Brooker Penny, *Mediation Law*. London: Routledge Taylor & Francis Group, 2013.
- Campbell Christian, *International Mediation*. Wolters Kluwer, 2020.
- Chern Cyril, *International Commercial Mediation*. London: Informa, 2008.
- Cortés Pablo, *Online Dispute Resolution for Consumers in the European Union*, 2010.
- Cortés Pablo, *The Law of Consumer Redress in an Evolving Digital Market*. Cambridge: Cambridge University Press, 2017.
- Englert Klaus, Horst Franke, Winfried Grieger, *Streitlösung ohne Gericht – Schlichtung, Schiedsgericht und Mediation in Bausachen*. Neuwied: Werner Verlag, 2006.

¹⁰⁶ Katsh, Rabinovich-Einy, *Digital Justice*, 35.

- Esplugues Carlos, „Civil and Commercial Mediation in Europe” *Intersentia*, Vol. 11 (2014): 52–53.
- Galves Fred, „Virtual Justice as Reality: Making the Resolution of E-commerce Disputes More Convenient, Legitimate, Efficient, and Secure” *Journal of Law, Technology & Policy*, No. 1 (2009): 120–127.
- Glenewinkel Werner, *Mediation als aussergerichtliches Konfliktlösungsmodell*. Hanover: ibidem-Verlag, 1999.
- Göksu Mustafa, „Civil Litigation and Dispute Resolution in Turkey” *Banka ve Ticaret Hukuru Arastirma Enstitusu*, (2016):
- Hola Lenka, Martina Urbanova, Milos Vecera, Jan, Holas, *Mediation in the Reflection of Law and Society*. Alphen aan den Rijn: Wolters Kluwer, 2022.
- Hopt Klaus J., Felix Steffek, *Mediation Principles and Regulation in Comparative Perspective*. Oxford: Oxford University Press, Oxford, 2013.
- Johannes Heetkamp Simon, *Online Dispute Resolution bei grenzüberschreitenden Verbraucherverträgen*. Göttingen: V&R Unipress, Universitätsverlag Osnabrück, 2018.
- Kajkowska Ewelina, *Enforceability of Multi-Tiered Dispute Resolution Clauses*. Oxford-Portland: Hart Publishing, 2017.
- Katsh Ethan, Colin Rule, „What We Know and Need to Know about Online Dispute Resolution” *South Carolina Law Review*, No. 2 (2016): 20–30.
- Katsh Ethan, Orna Rabinovich-Einy, *Digital Justice*. Oxford: Oxford University Press, 2017.
- Leung Elsie, „Mediation: A Cultural Change” *Asian Pacific Law Review*, (2009): 39–46.
- Lindblom Henrik, *Progressive Procedure: The Role of Courts, Access to Justice, Group Actions, Complex Litigation and Alternative Dispute Resolution in Comparative Perspective: Twelve Essays 1985–2015*. Uppsala: Iustus Förlag, 2017.
- Mandatspraxis Schiedsverfahren und Mediation*, ed. Jan K. von Schiffer. Köln-Berlin-München, Carl-Heymanns Verlag, 2005
- McLaren Richard H., John P. Sanderson, *Innovative Dispute Resolution: The Alternative*, Toronto: Carswell, 2006.
- Mediationsrecht*, ed. Horst Eidenmuller, Gerhard Wagner. Köln: Otto Schmidt 2015.
- Nadja Alexander, *International and Comparative Mediation*. Wolters Kluwer, 2009.
- Reuben Richard, Leonard L. Riskin, „The Lawyer Turns Peacemaker” *American Bar Association Journal*, (1996): 54–62.
- Rule Colin, *Online Dispute Resolution for Business*. San Francisco: Jossey-Bass Publishing, 2002.
- Spencer David, Michael Brogan, *Mediation Law and Practice*. Cambridge: Cambridge University Press, 2006.
- Susskind Richard, *The End of Lawyers?*. Oxford: Oxford University Press, 2010.

- Susskind Richard, *Tomorrow's Lawyers: An Introduction to Your Future*. Oxford: Oxford University Press, 2013.
- Trenczek Thomas, Detlev Berning, Cristina Lenz, H.D. Will, *Mediation und Konfliktmanagement. Handbuch*, 2nd ed. Baden-Baden: Nomos, 2017.
- Tutzel Stefan, Gerhard Wegen, Stephan Wilske, *Commercial Dispute Resolution in Germany*, 2nd ed. Munchen: C.H. Beck, 2016.
- Vicente Moura, Oliveira Dias, Almeida Gomes, *Online Dispute Resolution*. Baden-Baden: Nomos, 2022.
- von Bargen Jan Malte, *Gerichtsinterne Mediation*. Tübingen: Mohr Siebeck, 2008.
- Wahab Abdel Mohamed, Ethan Katsh, Daniel Rainey, *ODR: Theory and Practice, A Treatise on Technology and Dispute Resolution*, 2011.
- Wanner Laura, *Institutions and Dispute Settlement*, 2nd ed. Leiden: Brill Nijhoff publishing, 2022.
- Ware Stephen J., *Principles of Alternative Dispute Resolution*, 3rd ed. West Academic Publishing, 2016.
- Wiebke Voß, „Gerichtsverbundene Online-Streitbeilegung: ein Zukunftsmotell?” *Rabels Zeitschrift*, No. 1 (2020): strony.

