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Legal framework and harmonization of ADR/ODR methods

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Quantitative and qualitative benefits are emerging from ADR/ODR methods but the lack of legal and technical interoperability, the uncertainty about the value of the outcomes obtained through these methods, and the proliferation of many heterogeneous and fragmented practices, regulations and rules, especially in cross border disputes, do not contribute to creating an atmosphere of trust. Mindful of the proven usefulness of such mechanisms, we hereby propose the draft of an international legal instrument for this significant socio-economic sector. This initiative would enhance the progressive harmonization of international substantive and procedural domestic laws and would foster the expansion of ADR/ODR methods worldwide.

Key words: ADR, ODR, mediation, resolution mechanisms, court-connected mediation, interoperability, relational justice, standards, ethics, principles, framework.

INTRODUCTION

ADR and ODR (Alternative Dispute Resolution/Online Dispute Resolution) are commonly accepted acronyms used to describe extrajudicial methods of dispute resolution such as mediation, conciliation or arbitration. This is a phenomenon with ancient roots (Vilalta, 2009a) that emerged in recent times- due in part to the growth of new online contexts and also to the severe exhaustion of the overburdened court systems worldwide. Slow, rigid and high cost processes are crucial reasons for a general dissatisfaction with courts (Friedman and Pérez Perdomo, 2003).

Judicial inefficiency has led to high costs, both in terms of public spending and legal advice in the private sector. It has also led to a growing disaffection with courts (as recently highlighted by the Secretary-General of the International Institute for the Unification of Private Law UNIDROIT, Estrella, 2009) raised in line with the increase of these new mechanisms, particularly those that are developed in an on-line environment, which are challenging traditional justice avenues by reason of their speed, cost efficiency and flexible, tailored proceedings

(Katsh, 2001; Rule, 2002).

During this period, estates, with relatively little notice, have been more than willing to allow dispute resolution processes to migrate to cyberspace. This has occurred not only with no resistance but with some encouragement (Katsh, 2006).

At the risk of overgeneralization, it might be said that from the results of the various experiences among professionals, virtual platforms and public initiatives, in addition to the significant advances in artificial intelligence and information technology, it is abundantly clear that many of these mechanisms – miscalled “alternatives” – will continue to evolve and permeate into society. (Alpa, 2004; Hattotuwa, 2008; Hörnle, 2009; Galves, 2009; CEN/ISSS, 2009); The flow and transmission of information are promoting the self administered application of law (Galanter, 1985). Quantitative and qualitative benefits are emerging from ADR/ODR methods.

These methods enable instant communication between the parties, asynchronous or not, and offer the possibility of creating and implementing new protocols

that detect abnormal patterns of behavior, thus, "supervising" the process and outcomes of professionals involved. Information technology facilitates the improvement of such methods in order to guarantee the quality of the service (Rabinovich-Einy, 2006).

Nevertheless, consumers and other actors with unbalanced power in business transactions (asymmetrical contracts) require the recognition and guarantee of the protection of their rights and personal values; also local particularities demand a bottom-up treatment; and this legal framework and control cannot be left only in the hands of the market (Perlingieri, 2009; Mattei, 2009) especially in cross border transactions..

In addition, providers are beginning to ascertain some technical and legal problems that impair interaction with the administration of justice.

The lack of legal and technical interoperability, the uncertainty about the value of the outcomes obtained through these methods, and the proliferation of many heterogeneous and fragmented practices, regulations and rules – sometimes even contradictory – do not contribute to creating an atmosphere of trust in these methods.

The new challenge is, thus, finding tools that, on the one hand, will enable the states to guarantee effective legal protection to their citizens beyond their boundaries, according to their rights, principles and values; and, on the other hand, deliver trust, convenience and expertise to these methods for many different kinds of conflicts (Katsh, 2006).

That is why the rules and principles regulating the practices of ADR and ODR should be systemized and standardized. Of course, such standardization will only be made by taking into account the specific traits and trends of each legal culture, the environment (offline/online), the modality (determinative/advisory/facilitative) and the scope (civil/consumers/labor/other issues).

Attention should be focused on identifying models, principles and processes; recognition of outcomes, if reached, in accordance with substantive and formal legal requirements; and providing legal interoperability. This is because these methods and the court systems are not contradictory but complementary and they need to interact, particularly within cross border transactions.

Indeed, sometimes the work of experts with no legislative power and the harmonization initiatives and standardization processes offered a distorted perception of a theoretical and intellectually irrelevant work (Bonell, 1997; Estrella Faria, 2009).

However, these processes help the national legislative powers to enact and integrate into their domestic systems, common legal solutions accordingly with their constitutional legal framework and legitimacy. In addition, this will enable the removal of contradictory and

ineffective rules in order to improve alternative resolution methods.

SHAPING OF SUITABLE LEGAL INSTRUMENTS FOR THE HARMONIZATION OF STANDARDS AND ETHICS OF ONLINE DISPUTE RESOLUTION METHODS

One plausible way to address the complex process of modeling an appropriate international legal instrument for the harmonization of ADRs and ODRs is by sequential and coordinated series of steps or stages:

The phase of knowledge (data collection, state of the art, identification of interests).

1. The phase of understanding (data analysis).
2. The management phase (dogmatic, theoretical study; organization and taxonomy; design of the discipline).
3. The practical phase and preparation of the appropriate legal instrument (setting the key elements for achieving the objectives, choice of the instrument and writing).

This pattern is in part inspired by the classical tripartite division of the Constantinesco comparative method: to know in order to understand, and to understand in order to compare, that is, phase of "knowledge" of "understanding" and "comparison" or synthesis.

Phase of knowledge

This early stage includes, but is not limited to, the exploration of the different institutes submitted for study (negotiation, settlement, mediation, conciliation, arbitration), by means of information on content, structure, function and effects collection. Thus, wherever there is an initiative that seeks to undertake this systematic work, field studies must be conducted and monitored in order to show the state of the art of all institutes, the socioeconomic and media environment in which they operate and the identification of the needs they aim to cover. An exploration necessarily requires the active involvement of its agents (public and private), academics and practitioners in order to know their own interests and concerns. As to this scope, it is useful to hold surveys; qualitative and quantitative polls; meetings with professionals, institutions and platforms; holding discussion forums and workshops; fostering field studies and academic cross-disciplinary research; and doing some statistical analysis and economic study of the various models that operate in the market (econometrics).

From these data, it may be possible to conduct a diagnosis of the state of ADR/ODRs, that is, knowledge of what exists, how it operates, which are their interests and

goals as well as the obtained outcomes.

Many efforts to do this have been undertaken in specific sectors or delimited territorial areas, although most are in an embryonic stage. In any case, we can assert, provisionally, that the idea of trust, the need to always keep a significant level of confidence and reliability on ADR and ODR practices is a constant demand from both clients and service providers. Trust has become a core issue that inspires policy decisions by ADR/ODR providers because it is a key factor to their growth. And experts advocate the certainty of process flow, predictability of rules, transparency of institutions and expertise of practitioners.

Phase of understanding

Institutions and legal provisions need to be analyzed in the context of their legal culture and the social environment where they thrive. This is because their ratio is not pre-existing to the social context but functionalized, that is to say, taking into account the moment and the place where they will be applied, and in accordance to the principles and values of the legal system to which they belong (Perlingieri, 2009). With regard to ADR and ODR, it was found that in countries with legal systems that have a strong moral or customary roots, where legal and social spheres are closely overlapped and determinative methods of resolution are not really an option but a last resort, there is a widespread use of ADRs some of which are institutionally embedded. In the legal tradition of civil law (or continental law), courts are being more reluctant to accept other means of resolution that are outside their jurisdiction. This is because they believe they are the sole guarantors of public policy and the only ones with enforcement power. Finally, in the legal tradition of common (or Anglo-Saxon) law, the courts encourage the parties to take the initiative of a previous mediation attempt before going to trial (Vilalta, 2009b). From this perspective, it must be said that despite the existing significant differences between legal cultures and traditions, most of these methods have thrived likewise in their essential features in order to guarantee the respect of certain principles and standards of conduct. And this leads to enacting similar practical legal provisions (Vilalta, 2010).

Phase of management

This intermediate stage involves intellectual study consisting of theoretical, systematic study of outcomes, in addition to the mapping of taxonomies and some dogmatic, methodological groundwork. In the field of ADRs

ADRs and ODRs, some remarkable studies have already been done, but there is still much to be achieved. *Online* dispute resolutions have developed applications that exceed the scope and extension of *off-line* processes. Thus, it may appear necessary to distinguish not only between consensual and adversarial systems, but also between ODR platforms and service providers:

1. ODR platforms are intended to accommodate ODR services managed by third providers and supply technical and logistical assistance for the correct implementation of systems and technology (tools and software for dispute resolution mechanisms).
2. And ODR service providers are legal entities that carry out ODR redress at the request of third parties in conflict. Within this category, we should distinguish, however, between:

(i) Providers whose business is to provide and monitor automated information, negotiation, or communication mechanisms (managers of ODR automat systems) at the request of parties in conflict. In these circumstances, ethical requirements and standards should be limited to the manner in which such mechanisms work, in addition to the obligation of custody of all the information collected. For these providers, impartiality as a standard or ethical requirement should not be requested, because it is a quality only applicable to individuals, not entities or mechanisms. However, independence, defined as avoidance of conflicts of interest, will be a must in most cases and can be achieved with transparency policies. Also fairness in relation to the software algorithms may also be a requirement to them.

(ii) And providers whose services consist of mediation, conciliation and arbitration activities through a panel of experts. In these circumstances, providers will probably have to make sure that the practitioners carrying out advisory or facilitative tasks have expertise and have committed themselves to act impartially. Liability should be addressed primary to the expert or practitioner, and subsidiary to the service provider; a contingency that may be covered by insurance companies. Independence will, as well, be a must in most cases and can be achieved with transparency policies. Neutrality, in the sense of non imposed solutions or approaches, would only be a concern for mediation or conciliation experts, but not for arbitrators.

The meaning and scope of some of the main standards and ethics generally assigned to ADR/ODR mechanisms have to be studied, analyzed and identified, in order to enhance "trust". Also the particular features of any culture, any arena – that is consumers, family, labor, matters – and the different environments – off line/on line – may be taken into account.

PRACTICAL PHASE AND PREPARATION OF THE APPROPRIATE LEGAL INSTRUMENT

As earlier described, this last stage requires a previous work of setting key elements and objectives, and constitutes the ultimate step in selecting and implementing the appropriate legal instrument.

Interesting proposals for a Pan-European harmonization have already been made. One of the most significant is Pablo Cortes' proposal on EU regulation for consumer disputes; this involves setting out certain standards of quality and measures to ensure expertise and balance as a counterweight to equal opportunities between the parties (Cortes, 2007). The proposal was founded on the idea that regulation of some standards ensures the enforcement of consumer protection. Also the creation of a brand of pan-European trust for accountability could pave the way for admission of private methods of disputes resolution between businesses and consumers into the EU, and thus the growth of the domestic market.

The agreements and decisions reached through ADR/ODR service providers pursuant to these standards could become enforceable by the courts. For consumer matters, though, also a worldwide harmonization is needed in our view, because B2C transactions, nowadays, have no physical or regional boundaries.

Mindful of the proven usefulness of an international legal instrument for this socio-economic sector, we hereby propose the study and selection of one that can better fill this need, distinguishing between three broad categories of legal instruments:

1. The legislative nature instruments, including conventions, model laws and treaties (*hard law*).
2. The explanatory featured instruments, like legislative guides and legal guidelines for use in legal practice (*soft law*).
3. And finally, the contractual nature instruments, like standard contract clauses (*soft law*).

Among the various hard and soft law instruments described hereto, the choice is not always easy and sometimes requires selecting some complementary instruments. In either case, the international conventions and the legal instruments generally referred to as "hard law" have shown certain concerns, in recent times, that must be taken into consideration before this choice. From the experience of international and intergovernmental bodies such as UNIDROIT and UNCITRAL, it has been found that this option involves starting long, expensive processes full of formalities, which leaves very little flexibility to states in their implementation into domestic law. Given that the process for amendment or modification is usually as complex as its own enactment

or promulgation, it is extremely difficult to change or reform. This should not be underestimated, especially when the institution to be harmonized, by its nature or socioeconomic dynamics, needs to be continually adjusted or adapted to the new challenges and changing reality. Furthermore, it is also clear that in order to be generally accepted, the legal instrument should gain maximum consensus; bringing together all the interests involved, and be respectful to legal traditions as well, because any sacrifice may become a new obstacle to harmonization.

CONCLUSIVE INSIGHTS

Taking into account the earlier stated brief description as to the state of the art on ADR/ODR mechanisms, with the aim of always enhancing trust even at the risk of oversimplifying it, it may appear wise to conclude with two early prospective insights: (a) Firstly, that model laws and legislative guides, due to their particular features, may be more suitable instruments than conventions for the progressive harmonization of practices and laws in ADR/ODRs matters. Model law offers the advantage of its outstanding reputation at international level. This is because it is highly valued by the states and has become the international benchmark for any domestic legislative initiative. The fact that it is not a binding instrument does not constitute a real obstacle, but a value for the states that are competent in their internal strategies at a domestic level.

Also model laws are appealing to legislative bodies because they enable a soft, gentle accommodation in accordance to the requirements of their own legal systems, and they also set free areas where uniformity is not strictly necessary in terms of opportunity (Estrella Faria, 2009). The second alternative, the so-called legislative guides (or recommendations) are more purely exegetical, explanatory instruments.

Given the proliferation of excessive non-binding recommendations enacted by organizations – some very heterogeneous and sometimes even contradictory – the most appropriate tool for the effectiveness of ADR and ODR harmonization standards may be, in this case in my view, an international model law.

(b) Secondly, there is little doubt that early research groundwork for the future implementation of a legal instrument of such impact on the marketplace may be better conducted by a prominent and worldwide recognized international institution in the sector of Disputes Resolution. This will involve embracing the whole spectrum of experts, practitioners, scholars and academics with the auspices of an intergovernmental institution like UNCITRAL, which has long tradition and prominent

outcomes in the field of development of harmonized international legal instruments by reason of its international, inter-governmental nature and its flexibility in operational structure. This goal would enhance the enhance the progressive harmonization of international substantive and procedural domestic laws through a bottom-up approach in the production of global law.

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