

E-Commerce, ICTs and Online Dispute Resolution: Is This the Beginning of a New Professional Profile?

Aura Esther Vilalta & Rosa Pérez Martell*

Abstract

There is a close link between the growth of Internet usage, the development of mobile technology, the expansion of markets and the increasing number of online dispute resolution mechanisms (ODRs). This article seeks to start a conversation about the need to provide justice by means of effective mechanisms, in particular for e-commerce disputes and transnational litigation. It also provides some information on the recent international initiatives towards the regulation of this new arena, and concludes with an early approach to the future challenges and the impact on training, qualifications and expertise of ODR professionals and service providers.

Keywords: Mobile phones, ADR, ODR, mediation, conflict resolution.

1 Introduction: The Degree of Pervasiveness of the Internet, Mobile Communications and Online Transactions

The global use of the Internet for the purpose of exchanging goods and services has been growing rapidly in recent years.¹ Mobile telephony penetration rates in most geographic regions have reached universalization² levels, with three-quarters of the world's population now having access to mobile networks.³ Mobile

* Senior Lecturer in Civil Law at the Universitat Oberta de Catalunya (UOC), Barcelona, Spain. Fellow of the National Center of Technology and Dispute Resolution (NCTDR), University of Massachusetts – Amherst; CEO of Iusmediare, mediator and arbitrator. Vilalta has been Spanish national representative at UNCITRAL, WG III (Online Dispute Resolution) and Deputy Magistrate in the Barcelona Court of Appeals. Senior Lecturer in Procedural Law at Las Palmas de Gran Canaria University, lecturer at the Open University of Catalonia and member of the Mediation Commission at the Gran Canaria Government.

1 See International Telecommunication Union, Geneva (ITU), <www.itu.int/es/Pages/default.aspx>. For the year 2012, <www.internetworldstats.com/stats.htm>. Statistics from Go Globe.com in <www.go-globe.com/blog/internet-usage-china/>. United Kingdom Office for National Statistics, <www.ons.gov.uk/ons/rel/rdit2/internet-access--households-and-individuals/2013/stb-ia-2013.html>.

2 Thus, for instance, in Latin America recent studies reveal that the penetration rates of mobile technology in the vast majority of the countries of this region exceeded 75% at the end of 2010.

3 See 'Cell Internet Use 2013', *Pew Research Center*, 16 September 2013. <www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_CellInternetUse2013.pdf>.

phones are becoming essential tools in population centers where communications and access to justice are very limited, as these allow users to overcome the obstacles imposed by the distance between markets; negotiate prices; exchange goods and settle their disputes without incurring high travel expenditures.⁴ We believe that there is a direct relationship between the advancement of mobile technology, the opening of markets and the development of alternative mechanisms for the resolution of conflicts. Thus, we observe that:

- The use of technology in these regions focuses on sending short messages as well as on the negotiation of prices, purchasing of goods, facilitating bank transfers or requesting services.⁵
- Mobile telecommunications afford the interaction between people who are travelling, and assist in cases of emergency or natural disasters to access sources of energy, drinkable water or health services.
- Technology allows citizens to report criminal acts via SMS and smartphones.^{6,7}
- Cash can be transformed into electronic currency that is stored in the phone and then used as a form of payment⁸ in different transactions.

Consumers today have much easier access to a mobile device than to their courts.⁹ A recent report by the United Nations¹⁰ reveals that the infrastructure of the justice system is broadening thanks to the application of new information and communication technologies (ICTs), which are opening up opportunities for

- 4 In this regard, we argue that this technology should take place not only via a computer, but also via other electronic devices such as mobile phones and PDAs, although in some parts of the world, people still need to climb trees to access mobile networks, and one in four young people in developing countries are unable to read a sentence and lack even basic literacy skills. See T. Rodriguez, 'Too Fast for too Many', 2014, available at <www.free-ebooks.net/ebook/Too-Fast-for-Too-Many/pdf>.
- 5 See, e.g., rural telephones in Grameen, Bangladesh. N. Cohen, 'Rural Connectivity: Grameen Telecom's Village Phones', World Resource Institute, Washington, D.C., 2001.
- 6 In India, e.g., the *Bribe Bandh* campaign used mobile telephony to advocate for the ratification of the UN Convention against Corruption goal that was reached in May 2011. Similarly, Bribespot is a global crowdsourcing platform used to identify situations where people have been bribed or are being forced to bribe others. In Cameroon, people can report bribes via SMS so that other citizens learn about the problem.
- 7 To illustrate this point, in Egypt, Citivox assists in the fight against the harassment of women by obtaining data collected through text messages, photos and reports via video and audio, which allow citizens to describe the incidents in great detail. In Nigeria, the Civil Liberties Organization (CLO) uses mobile phones in projects like the National Alert on Torture and Extrajudicial Executions (NATEK) to inform the government and the police on abuses via SMS. In the Democratic Republic of Congo mobile telecommunications are used to help women collect, record and transmit evidence via a mobile device that can later be used to take the alleged culprits to court.
- 8 See, e.g., Afghanistan's Roshan telecom operator.
- 9 See United Nations Development Programme (UNDP), 'Mobile Technologies and Empowerment: Enhancing Human Development through Participation and Innovation', 2008, available at <www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Information%20and%20E-governance/Mobile%20Technologies%20and%20Empowerment_EN.pdf>.
- 10 United Nations Development Programme, 'Mobile Technologies and Empowerment: Enhancing Human Development through Participation and Innovation', 2012, available at <<http://undpegov.org>>.

improved access to the legal system. It also points to the fact that in many countries, the courts avail themselves of mobile telephony to perform their daily activities,¹¹ thus affording access to a legal system otherwise too expensive and complicated for large groups of illiterate populations. The cost of mobile phone infrastructure, in contrast to that of fixed telephony, is a lot lower, and this opens up access to communication in remote areas, to the point that populations in some regions are able to communicate only via mobile phones.

2 Electronic Transactions, Mobile Phones and Disputes

Online sales have shown an exponential increase in the last few years,¹² and it is estimated that soon the growth of retail sales online will surpass sales in physical stores.¹³ Today, two-thirds of buyers use smartphones to conduct their searches and purchases, and many of them avail themselves of platforms or self-serve stores for these purposes.¹⁴

- 11 See, e.g., in Kenya, India, Cambodia, the Democratic Republic of Congo, Turkey or the United States. In Turkey, the Department of the Ministry of Justice has developed an SMS-based system that provides court case information and notifications for citizens and lawyers. FrontlineSMS provides its users with a public platform designed to help strengthen judicial communication and system access. It also creates and distributes open source software. In India there is a plan in place to use FrontlineSMS to inform citizens of the dates when mobile courts are to reach their community (mobile courts are itinerant courts travelling from one community to another to help spread the justice systems).
- 12 Electronic trade via mobile devices is also growing: on eBay, for example, at a rate of almost 20% in the first half of the year 2013. (See Forbes, <www.forbes.com/sites/chuckjones/2013/10/02/ecommerce-is-growing-nicely-while-mcommerce-is-on-a-tear/>), and in the U.S. e-commerce represented 7.6% of total retail sales in 2013 (as stated recently by the U.S. Department of Commerce, excluding sales in categories not commonly purchased online).
- 13 The majority of users are middle-class buyers. Thus, on the Asian continent, electronic commerce is led by middle-class buyers. E-commerce revenues in China, for example, are expected to reach 3.3 billion yuan (compared with U.S.\$539 billion) in 2015. See S. Mulpuru, 'Forrester Vice President and Principal e-Business Analyst', available at <www.internetretailer.com/2013/03/13/us-e-commerce-grow-13-2013>. The country's expenditure in online shopping surpassed \$212.4 billion in 2013 against the \$228.7 billion recorded in the U.S.
- 14 In Japan, expectations on mobile e-commerce growth are very high, and online stores such as Rakuten.co.jp, Amazon.co.jp and Nissen.co.jp are leading the online retailers' market in this country. In Australia as well, since 2012 more than 80% of the population have been using the Internet, and more than 50% of consumers in that country shop online. See Research on International Markets, 'Global B2C E-Commerce Market Report 2013', available at <www.ystats.com/uploads/report_abstracts/1021.pdf>. Likewise, in Latin America there has been a rapid rise of B2C commerce, and it is expected that by 2015, 40% of Internet users will be buying online. The Middle East and Africa are not being left behind – the use of the Internet and the level of trust in online shopping are high in Saudi Arabia, the United Arab Emirates and Egypt (a 2012 survey showed that more than 20% of Internet users in this country buy online). In Morocco, more than half of the population used the Internet in 2012, and in less developed countries like Nigeria it is forecast that a third of the population will be using the Internet and wireless broadband when it becomes a reality across the country by 2015. See <www.ystats.com/uploads/report_abstracts/1021.pdf>

In the European region, e-commerce spending reached €128 billion in 2012, and it is estimated that the annual growth rate will near 11%.¹⁵ In 2013, an average of 61% of consumers used the Internet to purchase goods or services in the same region. The highest numbers were registered in the United Kingdom (85%), Denmark (81%) and Germany (80%), while the lowest belonged to Romania (15%), Bulgaria (22%), Estonia (28%) and Italy (32%).¹⁶ Out of all the transactions that were conducted in 2012, more than half were done by businesses (37% of companies registered in the EU-28 purchased goods or services online, against 17% who sold goods or services). During that same year, 40% of large corporations sold their goods or services online, a percentage that accounted for a total of 19% of their turnover.¹⁷ However, reports indicate that the growth rate of e-commerce will begin to decelerate in the Northern European countries of this region because many consumers already conduct their purchases online and thus there is no more room for growth. According to the aforementioned source, trade with smartphones and tablets conducted this year will extend its reach, with big brands relying increasingly more on this type of communication devices to expand globally. The international online market will experience a growth of e-commerce brands expanding into new countries and markets, and the complexity of starting a new business or launching it into new markets online will be significantly reduced. All of these events will place small and medium enterprises (SMEs) in direct competition with big brands in the online marketplace. The purchase price – but above all, the service level and attention to the client or the humanization of the process – will make all the difference.

In addition, recent statistics obtained from surveys in the B2B sector reveal that three in five businesses (60%) believe that retail B2B is moving online from their original offline locations. Similarly, 82% of surveyed companies mentioned both the demands and the expectations as well as the use of mobile devices (cited by 71%) as the main reasons behind their adaptation to the online environment. Some of the most immediate plans for these companies include:

- i The creation of a mobile store (30%),
- ii The use of mobile applications (28%) and
- iii Their establishment in online markets (25%).

15 Russia boasts the largest number of Internet users in Europe, with many foreign companies and investors currently entering the Russian electronic commerce market. In Turkey, nearly half of the population accessed the Internet in 2012, and in regard to online markets, the performance of the private e-commerce store Hepsiburada.com is worthy of mention. For more information, please visit <www.ystats.com/uploads/report_abstracts/1021.pdf>

16 See Eurostat, European Commission. <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Internet_use_statistics_-_individuals>.

17 Online billing accounts for 11% and 5% in medium- and small-sized businesses, respectively. Investment in this sector is also driving increased online spending, explains American technology and market research giant Forrester Research, a company dedicated to analyse the potential impact of technology.

Similarly, 97% of retailers consider mobile commerce to be essential, and a total of 72% are thinking about generating a mobile optimized version of their online store.¹⁸

Thus, these figures beg the following question – what is the driving force behind the growth of electronic communications and commerce? According to the aforementioned data, the users' significant reliance on smartphones and tablets has played a major role.¹⁹ However, the growth of e-commerce is intrinsically linked to the security of socio-economic conditions and the existence of highly heterogeneous rules regulating transactions. The diverse and even contradictory judicial response may be an obstacle to this growth because it does not contribute to building trust between companies and users on the online market. Another factor, related to the above – and one that impacts significantly on confidence – is payment. In some countries such as Kenya and the Philippines, payments via mobile devices take place by means of SMS text messages and via cash transfers from person to person – both very unreliable systems with little legal certainty. In others, like the United States and Japan and most European countries, payments are usually made through credit cards and NFC (Near Field Communication). In recent times, there has been an expansion in the use of payment systems through mobile phone cards and mobile banking platforms, albeit still very discreet, with 12% of mobile device owners having relied on these methods to make a payment, security being one of the main concerns of users in these types of transactions.

3 Online Dispute Resolution Mechanisms

For growth to continue, effective mechanisms for resolving online disputes are necessary. One obstacle that must be overcome is the improvement of interfaces to enable customers to carry out simple interactions such as identifying the appropriate service provider; scheduling conversations; interacting with clients; managing cases through online resolution mechanisms and conventionally looking for solutions. A second step will be to find experts in this field who are able to mediate and assist the parties involved.

In general, the use of ICTs helps users manage, transform and resolve their disputes. Let us consider for a moment the multitude of controversies that can be generated and settled in an electronic environment. These devices are used on a regular basis to access social networks, chats, emails and, more recently, disputes. Mobile technology is set to become an effective tool for the management of dis-

18 See <www.intershop.com/e-commerce-report>.

19 More than 10% of the world's population and 40% of people in less developed countries have no mobile network coverage. The gap between the urban populations and the poor or those on the periphery is also significant. See C. Blackman and L. Srivastava (Eds.), 'Telecommunications Regulation Handbook', The International Bank for Reconstruction and Development / The World Bank, InfoDev, and The International Telecommunication Union, 2011.

putes and as an efficient solution to conflicts,²⁰ while it may also become a new factor in their production. In any case, controversies will continue to exist, and in this context the benefits of combining the ODRS with mobile telephony are obvious:

- Considerable savings in time and money by simplifying procedures and protocols and by employing a cheaper technology,
- Problem resolution in a neutral environment,
- Increased availability given by the simplicity of use, relative low cost and common usage,
- Uninterrupted access and
- Increased effectiveness with improved training and participation of the people involved in it.

Furthermore, sometimes, whether for geographical or temporal reasons, online communication is the only option available given that the parties may be in distant locations, may lack the ability to travel and meet at the same time or they may simply want to avoid synchronicity of communication or presence.

The interaction between ODRS and mobile phones is another instance of the paradigm shift that technology is forcing upon socio-economic and legal behaviour. A number of questions arise in relation to the manner in which these services will be implemented in electronic and mobile telephony platforms in the very near future; for example, what type of services could be included, and how would they be implemented?

On the one hand, it is imperative that adequate services be provided that offer simple customer management/dispute resolution programs within their own companies and organizations, implementing proper complaint management practices and specific negotiation programs. Alternatively, and as a logical step, it is essential to furnish disputing parties with access to ODR service providers who offer programs designed to implement resolution processes online. Finally, the parties may wish to delegate decision-making powers to a third party so that he or she may issue a solution in the form of mere recommendations or grant them a binding and enforceable result, such as in the case of arbitration.

4 Transnational Initiatives towards the Regulation of This New Arena

4.1 *The UNCITRAL*

The United Nations, in its 44th session (Vienna, 27 June to 8 July 2011) – through its Commission on International Trade Law (UNCITRAL) – and long after having weighed the need to deal with online disputes, particularly those

20 85.8% of Spanish citizens 10 years old and above – that is, 33.4 million people – use mobile phones on a regular basis. 71.2% of this community – 29.3 million – has accessed the Internet at one time or another, according to the latest report on the use of this technology in households by red.es. In the third quarter of 2012, the number of Internet users exceeded 29 million for the first time, nearly a million more than in the previous study. Smart mobile phone use has seen a significant increase in persons 15 years and older, having now reached 41.5%, 8.4 points higher than a year before.

arising from cross-border e-commerce transactions, reaffirmed the mandate given to Working Group III to develop a regulation containing a normative framework for the settlement of online disputes including both business to business operations (B2B) and business to consumer (B2C), with the goal of promoting interaction and economic growth in the regions. Thus, the Working Group III has invested approximately three years studying how this future Regulation may respond to market needs, particularly in developing countries.

This organization focuses its efforts on designing a process that regulates disputes that take place in cross-border high-volume, low-value electronic transactions, and includes a stage of arbitration. During the first round of sessions it was noted that the experience and knowledge in the field of e-commerce and ODRS varied substantially from country to country, and thus it was key to formulate flexible proposals that accommodated this great diversity, including that developed as a result of mobile technology. Being also concerned with the interoperability of systems and processes, this future international regulation explores the use of information technology and communications in the context of traditional judicial methods, extending the range of action to disputes arising from transactions not necessarily originating online.

In general, there is a broad consensus that this pathway should be defined in terms that are broad enough to accommodate all possible technological advancements that may arise in the future, while respecting the principle of neutrality into the technological media. Therefore, the text circumvents the inclusion of any criteria that may hinder the use of new technologies, and seeks to design a simple model that is easy to implement regardless of the tool being used. The Regulation currently being designed proposes to be contractual, applicable only by agreement between the parties. The most interesting debates currently focus on determining: (i) whether the draft Regulation should provide for two separate sets of rules to regulate two independent processes, or design a multiphase, scalable process with two possible alternatives for users after exhausting the negotiation and facilitated stage, and (ii) what the content of the guidelines that accompany the Regulation should be.²¹

The debate about the way users and consumers must be protected emanates from two very different positions represented mainly by the United States of America (Group I) and the European Union (Group II), respectively.²²

21 Guidelines that would take as a starting point: (a) The practice already recommended by the American Bar Association Task Force on E-commerce and ADR, under the title of 'Recommended Best Practices for Online Dispute Resolution Service Providers' and the Final Report and Recommendations for e-commerce; (b) The agreement on alternative dispute solutions between International Consumers and the Global Business Dialogue on Electronic Commerce; (c) Recommendation 98/257/EC of the European Commission of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of Court Settlement of Consumer Disputes and (d) Recommendation of 4 April 2001 of the European Commission on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes not covered by Recommendation 98/257 / EC7. See, as a starting point, A/CN.9/WG.III /WP.110 and A/ CN.9/WG.III/WP.114.

22 See Proposal by the Governments of Colombia, United States, Honduras and Kenya. <<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V13/860/16/PDF/V1386016.pdf?OpenElement>>.

Group I asserts that consumers would be better protected if resolutions were enforceable and recognized by any State, and hence the argument for awards that may benefit from the precepts set forth by the New York Convention of 1958. From this perspective, the draft Regulation should contain a simple procedure including arbitration, and the possibility of prior submission of the parties to it, so that retailers could not evade their responsibilities before dissatisfied buyers.²³ In this light, it appears that only when retailers are bound by pre-court proceedings are they agreeable to participate in the processes.²⁴ Furthermore, the majority of awards in international commercial arbitration are completely voluntary since the parties involved in the dispute are aware of their possibility to circumvent enforcement. For the States in Group I, the justice mechanisms traditionally used to resolve disputes arising from cross-border e-commerce transactions are not a valid option. Consequently, the Regulation should provide for a clear and simple process that includes access to online arbitration awards that benefit from the recognition and enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter New York Convention 1958).²⁵

Countries in Group II, conversely,²⁶ assert that the most appropriate way to protect consumers is by means of facilitative methods, such as mediation, that avoid binding them to a system that prevents their access to the courts. These countries consider the existence of an arbitration pathway in the ODR Regulation to be problematic, particularly when derived from a submission prior to the emergence of the conflict, when consumers do not yet know the extent of the problem. In their view, it would be unlikely for awards to be enforced across borders because they would necessarily have to resort to the judicial system. They add that it is not realistic to think that arbitration awards made in the context of high-volume, low-value transactions would be carried across borders under the 1958 New York Convention,²⁷ especially when the complainant is a consumer or a

- 23 See, on this tendency and on the benefits of electronic methods for the resolution of B2B and B2C conflicts, E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass Publishers, San Francisco, CA, 2001. C. Rule, 'Online Small Claim Dispute Resolution Developments: Progress on to Soft Law for Cross-Border Consumer Sales and the Development of a Global Consumer Law Forum', 43 *Uniform Commercial Code Law Journal*, 2010, pp. 419-441. L. Del Duca, C. Rule & Z. Loebel, 'Facilitating Expansion of Cross - Border E-Commerce - Developing a Global Online Dispute Resolution system (Lessons Derived From Existing ODR Systems - Work of the United Nations Commission on International Trade)', 1 *Penn State Journal of Law & International Affairs*, 2012, p. 59, available at: <<http://elibrary.law.psu.edu/jlia/vol1/iss1/4>>; L. Del Duca, 'Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence', 42 *Texas International Law Journal*, 2007, pp. 625-649.
- 24 See G.P. Calliess, 'Online Dispute Resolution: Consumer Redress in a Global Market Place', 7 *German Law Journal*, 2006, pp. 647-660.
- 25 See UNCITRAL, <www.uncitral.org/uncitral/es/uncitral_texts/arbitration/NYConvention.html>.
- 26 See Proposal of the delegation of observers from the European Union. <access-dds-ny.un.org/doc/UNDOC/LTD/V13/836/42/PDF/V1383642.pdf?OpenElement>.
- 27 1958 New York Convention on the Recognition and the Enforcement of Foreign Arbitral Awards (1958) (hereinafter, "The New York Convention"). <www.uncitral.org/uncitral/es/uncitral_texts/arbitration/NYConvention.html>.

SME. The fact that an arbitration award is granted does not automatically lead to the possibility of the complainant enforcing it against the other party. As a result, Group II proposes a modality with a final stage consisting of a mediation or a non-binding recommendation issued by an expert, neither executive nor binding.

In other words, having exhausted the possibilities of negotiation between the parties, the process includes a final stage where an expert would assist them in reaching an agreement (facilitated negotiation). The same expert would proceed to communicate a date for the parties to submit all final documentation. Once received, the expert is to evaluate the dispute based on the information submitted by the parties and the terms of the contract before making a recommendation. The ODR provider, then, would communicate its recommendation to the parties, and this is to be recorded in the ODR platform. The recommendation would not be binding on the parties unless they agree otherwise. This notwithstanding, they would be encouraged to proceed as recommended, and the ODR provider would be able to apply the appropriate mechanisms to publicize the rate of compliance with the recommendations.

Specifically, the proposed Regulation provides a phase of facilitated agreement during which the service provider appoints a neutral mediator. Following this appointment, the mediator contacts the parties with the goal of reaching an agreement. Should this attempt at resolving the dispute fail, the final stage of the procedure would begin within ten working days from the date on which the parties were notified of the mediator's appointment. During this final stage, the parties are expected to prove any fact alleged in their claim or defence, while the mediator is empowered to reverse the burden of proof if required in exceptional circumstances by the evidence. In a nutshell, the expert evaluates the dispute on the basis of the information submitted by the parties, and taking into account the conditions of the agreement, he or she issues a recommendation. The ODR provider notifies the parties and records the recommendation in the ODR platform. This recommendation will not be binding on the parties unless otherwise agreed by them.

In addition to UNCITRAL's progress in the development of this International Regulation by Working Group III, the UN Commission is currently considering the possibility of assigning the task of writing a future International Convention on the recognition and enforcement of mediation and conciliation agreements in commercial matters to Working Group II in 2015. This would be a multilateral convention similar to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, with the main goal of endorsing the same results to mediation agreements. This initiative is based on Article 30 of UNCITRAL's Model Law on International Commercial Arbitration adopted by many countries, whereby if the parties reach an agreement during arbitration proceedings, the court may issue an award that contains the agreements reached with the same status and effect of an ordinary award.

4.2 *The European Union Initiatives*

Similarly, the European Union has recently enacted two Directives and one Regulation, with the objective of developing a homogeneous regulatory framework for

a number of key issues. The Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of Mediation in Civil and Commercial Matters, contains a range of provisions that aim at guaranteeing the availability of mediation services in all member countries. While this Directive concentrates on regulating certain general aspects pertaining to mediation in cross-border disputes, it also has a clear claim to universality. In this regard, it provides a general regulatory framework that establishes certain common and predictable principles, aiming to standardize various aspects of the mediation process in cross-border disputes.

By consolidating a normative framework that guarantees a set of common and predictable standards, the Directive encourages the development of codes of conduct to ensure that: (i) mediators abide by them; (ii) there are mechanisms that control the quality of the services; (iii) mediators are trained – prior to their assignment and continuously throughout their careers (iv) and Tribunals rely on mediation as a first stage of justice. The goal, in other words, is to promote mediation as a method of dispute resolution complementary to the courts. At the same time, a commitment to introduce a requirement for mandatory participation of lawyers in the signing of agreements that would be enforceable would have been quite desirable, as it would have achieved the involvement of such professionals, traditionally leery of this type of resolution processes. In fact, the countries that have introduced this requirement – such as Italy and Greece – have seen the use of mediation grow exponentially in their respective territories. Unfortunately, the obligation imposed by the Directive on Member States with the effect of achieving the use of mediation to reach a balanced relationship with the jurisdiction through policies aimed at promoting mediation ('Balanced Relationship Target Number') has proven to be extremely weak if not accompanied by more incisive measures requiring States to attain that objective.

On the other hand, the EU has also enacted the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes²⁸ – hereinafter 'Consumer ADR Directive' – to provide a common regulatory framework for consumer ADR and ODR procedures, out-of-court modalities on consumer dispute resolution (not only mediation), although mediation remains the quintessential mechanism.

An interesting aspect that results from the aforementioned Consumer ADR Directive is that it recognizes private entities as service providers of consumer dispute resolution. These entities are only required to have sufficient human, material and financial resources to carry out their functions, being entitled to turn to private funding. It also introduces the obligation for the consumer to contact the merchant and try to resolve the problem bilaterally before filing a claim.

28 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 On Alternative Dispute Resolution For Consumer Disputes, which amends Regulation (EC) 2006/2004 and Directive 2009/22/EC (Directive on Alternative Consumer Dispute Resolution on Consumer Matters) 18 July 2013. *Official Journal of the European Union*, L 165/63.

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In order to ensure that consumers have access to all the necessary information on the merchants and the dispute resolution bodies operating in the marketplace, providers of mediation and other forms of ADR are required to:

- a Maintain an updated website that enables parties to easily access information on the procedure, and allows consumers to file a claim with the necessary supporting documents,
- b Facilitate the electronic exchange of information between the parties and accept both domestic and cross-border disputes,
- c Make available to the public on their website the list of existing ADR entities and a link to the website of the Commission,
- d Provide certain information to the competent authority including their name, address and web address, structure, funding, legal persons and remuneration, procedural rules, fees, duration, language, types of disputes and
- e Inform every two years about the number and type of claims, the percentage of cases that are discontinued, the rate of resolutions compliance, the average duration of the procedures, systematic problems, training given to the experts and an evaluation of the efficiency of the procedures offered by the institutions.

Moreover, merchants who have voluntarily submitted their disputes to an ADR/ODR provider or are required by law to do so are urged to indicate:

- a The entity or entities that support them,
- b Information about the website of such ADR/ODR entities that can be supplied through their own contracts of sale or via the services consumers sign up for,
- c Once a claim is filed – whether in paper or in any other durable means – written indication of their intention to resort to the relevant ADR provider to resolve it.

Lastly, the European Union has also enacted the Regulation 524/2013 by the European Parliament and the Council, of 21 May 2013, on Online Dispute Resolution for Consumer Disputes (Regulation on Consumer ODR) in order to grant legitimacy to a free European online platform for the resolution of disputes available in all official languages and to establish common rules applicable to all online proceedings.

Also worthy of mention are the initiatives taken recently by the Organization for Economic Development and Cooperation (OECD) through its Committee on Consumer Policy (CCP) and the development of policy guidelines for governments and companies in the field of mobile payment platforms. These are intended to raise the level of protection afforded by service providers to consumers and to facilitate mechanisms for resolving disputes. At a regional level there are other initiatives aimed at regulating payments through mobile technology, such as the *Green Paper on the development of secure, transparent and innovative Internet and mobile payment systems in Europe*, issued by the European Commission.

4.3 Future Challenges: Impact on Expertise

The training, qualifications and expertise of online mediators and experts are two areas that have only recently begun to receive some attention. A large number of mediating institutions have proceeded to develop their own codes of conduct with the goal of regulating minimum standards applicable. The first steps were formulated in 2002 by the CPR-Georgetown on Ethics and Standards in ADR project and by the American Bar Association's²⁹ models for the accreditation of ADR professionals and institutions. These varied according to prior knowledge and experience. The first level offered basic knowledge, training, practice, skills, credibility, quality and ethics, while the second level consolidated the information in the first stage, plus training, practice, skills, credibility, quality and stricter ethics. These earlier attempts have been followed by the Code of Conduct for Mediators of the UIA Forum of Mediation Centers, 2003; the European Code of Conduct for Mediators of the European Commission, in 2004; the Model Standards of Conduct for Mediators adopted by the AAA, ABA and ACR³⁰ in 2005; the Ethical Standards for Mediators of the Law Council of Australia, 2006; the Ethical Guidelines by the JAMS and the latest Code of Professional Conduct adopted by the International Institute of Mediation (IMI), inspired by the earlier texts.

Nevertheless, the incorporation of technology in the resolution of online disputes has resulted in the emergence of new professional profiles, acting as experts in this new electronic environment. The aforementioned models have today become references and encouraged ODR service providers to incorporate formal policies, procedures, protocols, privacy policies, codes of practice and standards of conduct concerning online experts, comparable to those applied to traditional ADR.

Currently, professionals with very different backgrounds contribute to the implementation of online dispute resolution systems. This raises the following questions: What type of training should those responsible for the settlement of disputes that rely on the use of information technology and communication have? What type of accreditation should they hold for these purposes? What would be the necessary and/or ideal qualification to accredit? What is the appropriate level of practice to carry out the management/resolution of conflicts through the Internet? And, particularly, what are the skills specifically required?

From the outset, one must refer to the existing experiences in the international arena in the field of expert's accreditation. Thus, while different levels of professional certification are currently being developed from zero, there are also others that model themselves on the institutions that provide ODR services.³¹ Worthy of mention is the system of accreditation already introduced by some international bodies such as the IMI, which has developed new ways to qualify and evaluate experts, institutions and ODR procedures.

29 See the *American Bar Association's* 2002 Standards for ADR Institutions.

30 AAA (American Arbitration Association), ABA (American Bar Association) and ACR (Association for Conflict Resolution).

31 M. Tyler & J. Bornstein, 'Accreditation of Online Dispute Resolution Practitioners', 23 *Conflict Resolution Quarterly*, 2006, pp. 383–404.

Professionals are typically required to hold accreditation in the field of ODR and hold different technical skills linked to the platform they operate on, in addition to the theoretical and practical training and technical competence and skills. As far as institutions are concerned, these are expected to be transparent and independent, to provide ODR procedures that are carefully structured and to respect certain governing principles.

After an initial examination of these initiatives it is possible to conclude that the following issues are common and significant to all these organizations:

- The importance of professionals to act according to certain ethical codes and professional standards,
- That these professionals should acquire specific skills and competencies on online resolution of disputes,
- That they shall carry out the activity through structured processes.

The goal is to give credibility to the institutions, their experts and panelists, while ensuring the satisfaction of consumers. Hence, commonly recognized standards of practice are also relevant to ODR applications developed through mobile telephony and tablets. This means that both the institutions providing ODR services and the individuals who render these services must guarantee their quality, professionalism and efficiency.

In recent times, the IMI awarded a mandate to the ODR ISC Working Group to have this team of international experts define, assess and develop a set of recommendations and high-level standards for the provision of ODR services, taking into account the following aspects that have a long-term impact on the ODR industry:

- a The type of qualification criteria to be held by individual ODR practitioners that entitle them to work in this field (knowledge, skills and experience),
- b Practical criteria and skills for professionals involved in ODR procedures whether advising or representing the parties involved in the dispute,
- c Rules that are to be fulfilled by suppliers of ODR services, ISPs and platforms to manage the needs of users and protect their interests,
- d Training standards and codes of professional conduct,
- e Evaluation and accountability mechanisms,
- f Codes of conduct pertaining to disciplinary procedures in the ODR activity,
- g Evaluation of interoperability, data import/export/migration and language translation,
- h Security, privacy and data protection requirements in accordance with current laws, in compliance with the need for recording and storing data,
- i And lastly, other measures that may be positive for the development of quality ODR processes.

The aforementioned issues are intended to define and describe: (i) the theoretical knowledge intertwined with practical experience required, as training is recognized as a must and best ODR practices are expected to be standardized; (ii) availability, reputation, suitability and good faith of the professionals; (iii) skills and level of ability to work with technology and mobile devices; (iv) specific contents

of codes for professional conduct and codes of ethical conduct – that govern the activity of the experts (v) and requirements for the platforms that provide assisted and/or automated ODR services.

In relation to the last point, it would be of great value to distinguish between platforms that provide assisted ODR services and those that perform all the tasks themselves with no human involvement. In the first case, the human component shall be visible and a significant aspect for consumer or user. In the second case, technology itself should have to provide the elements that make it credible before the users.

Last of all, a number of issues related to the field of communication should also be taken into account in the training of experts. Online experts must be able to understand the verbal and written communication of people, hear what they say and be aware of the circumstances under which they express it. Another factor to consider is the necessary observation of customer behaviour – besides verbal language – as the non-verbal cues captured by the cameras of mobile devices can have an impact many times more significant than the verbal. Lastly, the activity of the experts can be significantly affected in the virtual environment if the parties are not familiar with the electronic tools being used and the expert does not make them understandable and useful to the parties.

Consider, for example, the particular features that the electronic environment imprints on the activity of mediation and conciliation. Among other tasks, traditional ADR experts build trust, facilitate communication through active listening and assertiveness, exchange information and generate alternatives by making narrative changes, reconceptualizing or reformulating the problem, helping the parties reach agreements and ensuring that these are enforced. In a virtual environment, trust is built by incorporating additionally into the process certain standards of conduct:

- a The expert shall have proficient skills in asynchronous communication – even when technology enables synchronous communication. For example, in videoconferencing, most of the processes are carried out asynchronously, which provides flexibility to processes that involve subjects that are often found in different geographical locations and in different time zones.
- b The expert shall also master many diverse linguistic registers and written communication, even if the meeting takes place synchronously. Hence, experts in online dispute resolution mechanisms must redouble their efforts to maintain a slightly formal and balanced tone in their communications – for instance, by not using capital letters on the messages – so that the parties involved in the dispute do not feel the mediator sides with the other and he or she renders them the same opportunity to be heard.
- c Another aspect to be considered – closely related to the above – is the number and intensity of communications established with one of the parties. In this virtual environment, the expert needs to ensure that this circumstance is not interpreted by the other party as bias in favor of the other. The expert shall maintain ongoing communication with the other party as well, to make him feel part of the process.

- d Furthermore, the online environment often generates the impression that communications are immediate and that the parties automatically receive the messages that are being communicated. This, in turn, creates the expectation that an answer or feedback should be sent with similar speed. Thus, the expert shall ensure that all communications have a similar pace, and that it is smooth and continuous – i.e. with rapid responses, even if the message does not resolve the issue at hand – avoiding unnecessary delays that may cause anxiety to the parties in dispute, as silence is generally interpreted very negatively in an online environment.
- e Another key issue that results from the above is the fact that communications shall be brief, concise and clear. Ambiguous or unclear language can be a source of major misunderstandings and disagreements, given that there is no accompanying body language to dispel doubts about the intentions of the party.
- f A particular emphasis needs to be placed on active listening in order to convey to the parties that one is aware of the emotions and feelings that a particular situation has generated and to guarantee an adequate understanding of what is being transmitted. This can be achieved by transcribing these emotions in writing using conciliatory language that helps generate a constructive narrative.
- g In relation to the above, the mastery by the expert of different electronic environments enables the organization of meetings between mediators and the parties in dispute (chats, for instance, allow for simultaneous and confidential conversations between mediators and parties). The management of these environments and schedules is a specific skill on which the success of the process depends in large measure.
- h Confidentiality in online processes must be scrupulously respected during communications, information exchanges and documentation delivered by electronic means to be made in a fully secure environment.
- i The parties' different levels of technological knowledge may be a serious deterrent to the proper development of the process. This is one of the reasons why the expert must ensure that the parties are afforded the same opportunities to participate and, where appropriate, assist them to overcome any differences. The expert must manage the process so that the use of different technologies does not become an obstacle for the development of an impartial, independent and neutral activity.
- j The mediator should also provide an intuitive, easy process for the parties. This aspect also depends largely on the service provider and the institution or agency that administers the system. Graphics and iconographic symbols are often useful in this activity.
- k The specialization of the expert and the platform for each sector of activity is particularly important since it increases system efficiency and helps facilitate more appropriate solutions that match the specific needs of the parties.
- l Another key issue is the expert's superior ability to access and manage online information. In virtual proceedings, professionals have access to information

that can be immediately incorporated into the process and made available to parties, allowing them to verify and assess their suitability for themselves.

5 Conclusion

A close link can be established between the growth of Internet usage, the development of mobile technology, the opening up of markets as well as the structuring of alternative dispute resolution mechanisms that cover the deficit in the administration of justice in the areas of electronic commerce. In this sense, mobile phones are becoming indispensable tools in many countries that present deficiencies in their institutions and infrastructures.

Worthy of mention are the efforts by the international community to achieve a harmonization of online dispute resolution and practices. The standards of practice, codes of ethics, training requirements and knowledge of certain competencies and skills in the art of conflict resolution, as well as the existence of structured processes, are issues that become necessarily transferred to the online arena because they attribute credibility to institutions and experts, and provide security to its users.

The communication skills in online dispute resolution are a key issue in the training of experts. Of particular importance is also the role played by the level of familiarity that experts may have with the ITCs; their ability to make them understood, accessible and useful to the parties and their formal training in the techniques and skills of alternative dispute resolution mechanisms. Without having yet created a different professional profile, there is no doubt that specialized training in this particular field has today become necessary to ensure the quality of the online services offered.