

Can a pandemic cause higher demand for online dispute resolution?

Abstract: Due to coronavirus outbreak, states all over the world adopted multiple public health measures, including closing of schools and kindergartens, services, shopping malls and restricted gathering of people. States shut down borders and citizens traveling back to their country were obligatory sent to the quarantine. It did not take long for economists to publish studies showing effects of crisis to global, European as well as Slovak economy. Negative worldwide impact of pandemic is undeniable, however it also contributed to fast-technological development in all spheres of our lives including the legal one. Increased use of electronic commerce affected number of disputes arising from them, therefore need to find an appropriate method for their settlement.

Keywords: Alternative dispute resolution, artificial intelligence, online dispute resolution, judicial procedure, coronavirus crisis

1. Introduction

“In a general way, that the higher the level of technical efficiency the more the advantages to be derived from new developments diminish as compared with the drawbacks.”

(S. Weil, Oppression and liberty)

During the life, every single person has been involved in some kind of conflict. Most of them can be easily resolved by short discussion

between the parties, in other cases, intervention of third party is necessary. Conflicts are universal and as their result processes to ensure their minimisation are developed.

Traditionally, disputes are resolved by the courts. Along with judicial proceedings, legal practice recognizes also alternative methods of dispute resolution or “ADR” providing possibilities to settle disputes without judicial interference, with possibly more satisfactory outcome. ADR includes e.g. negotiation, mediation, conciliation or arbitration proceeding. The last one mentioned, an arbitration proceeding started to be widely used after the adoption of New York Convention on the recognition and enforcement of foreign arbitral awards also known as the “New York Convention”.¹ Thanks to the New York Convention, parties using arbitration proceeding knew conditions under which the resolution will be recognised or subsequently enforced in any of the ratifying states, thus trust in the arbitration system has rapidly increased.

Even though, ADR is not a new phenomenon and nowadays it is applied on a large scale in both, national and cross border disputes given the nature of new type of disputes arising mostly out of electronic contracting, established system seems to be outdated. The progress in the field of the artificial intelligence or “AI” provides new and fresh possibilities of dispute settlement which may alter approach to this problematic as we know it today.

In coronavirus chaos, online dispute resolution methods have an ability to proceed without any significant interruption and are well placed to handle creatively and flexibly the practical difficulties arising as we navigate this new world of social distancing and remote working.

¹ New York Convention was adopted by the United nation section on 10 June 1958 and as of March 2020 was ratified by 163 states including Slovakia.

This article analyses relation between artificial intelligence (AI) and dispute resolution, already existing legal regulation within the European Union in the field of online dispute resolution (ODR) and considers various possibilities to settle conflicts using AI – probably future of dispute resolution on cross border level and possible higher demand for ODR caused by coronavirus outbreak.

2. Role of artificial intelligence in the law

There are many definitions of AI emerging since its first usage by Professor Josh McCarthy in 1955, as “the science and engineering of making intelligent machines.” Nilsson (2002)² explains AI as concerned with intelligent behaviour in artifacts, which involves perception, reasoning, learning, communicating and acting in complex environments having the ultimate goal as the development of machines able to perform what human does, possibly in even more effective way. European Commission in its report characterises AI as systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals.³ Recent development of AI led to its massive use.

Nowadays, AI is generally used to optimize knowledge-based processes, in order to make products easier to use with the

² McCarthy J., Minsky M., Rochester N., Shannon C. *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence*, 1955.

³ Communication from the commission to the european parliament, the european council, the council, the european economic and social committee and the committee of the regions Artificial Intelligence for Europe. Available on <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-237-F1-EN-MAIN-PART-1.PDF>

adoption of intelligent interfaces or to automate tasks⁴. Currently, AI represents inseparable part of our daily life in the form of e.g. opening phone with face ID, google searches, smart home devices, etc. At the same time, it is also legal sector, where AI can appear as particularly relevant.

Apart from this, an analysis of AI's role in law is necessary in order to better understand numerous possibilities of its impact to dispute resolution. There are many areas where AI is applied already in a small scale by lawyers, e.g. during legal researches and performing repetitive tasks. In addition, recent progress clearly shows that AI cause a revolution in settlement of disputes. In 2016, group of scientists developed model able to predict decision of European Court of Human Rights average accuracy of 79%.⁵ Implementation of machines into the decision-making process has a potential to eliminate any type prejudices of litigation and at the same time automatic process shall be able to render verdict during significantly shorter time. Full use of AI judge is still “music of the future”, however even today there are platforms enabling settlement of conflict by alternative method, i.e. online.

One of the examples where machines are being slowly used to resolve disputes is ODR platform created on the basis of ODR regulation within EU providing possibility to consumers residing in

⁴ CARNEIRO, D., NOVARIS, P. ANDRADE, F. ZELEZNIKOW, J., NEVERS, J.: *Online dispute resolution: an artificial intelligence perspective*. Springer Science+Business Media B.V. 2011

Aletras N, Tsarapatsanis D, Preoțiu-Pietro D, Lampos V. 2016. Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective. *PeerJ Computer Science* 2:e93 <https://doi.org/10.7717/peerj-cs.93>

⁵ Regulation (eu) no 524/2013 of the european parliament and of the council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

the EU and a trader established in the EU to resolve their conflicts out of court through the intervention of an ADR entity.⁶

3. Online dispute resolution within the EU

One of the basic principles of ADR can be portrayed by the quote of Abraham Lincoln: *“Discourage litigation, persuade your neighbour to compromise where you can. Point out to them how the nominal winner is often the loser... in expenses and waste of time.”* For years, there was a need for judges, attorneys and legislators to resolve cases as quickly as possible.

Online Dispute Resolution uses mechanisms in a technological context and represents an alternative to judicial proceeding. There is no legal definition of ODR. Generally speaking, ODR uses online, internet tools in order to resolve conflicts using ADR methods like negotiation, mediation or arbitration but also simpler approach. Besides online conflicts, ODR is used to settle conflicts that arose offline but for various reasons are resolved online. The aim of adoption of ODR regulation was linked to the fast progress of digital technology which changed the way how we communicate and accomplish everyday tasks from grocery shopping to spending a free time.

Growing use of internet and overall growth of customer purchases within EU, EU has made legislative efforts to ensure protection of our, European customers. The idea is pretty simple. Where a trade can be accomplished online, why not resolve

⁶ Article 2 Regulation (eu) no 524/2013 of the european parliament and of the council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

disputes arising out of the such trade with the same process. Present technologies allow parties and dispute resolution body to use videocalls, digital signatures and other long-distance communication methods so why not use it them to obtain better and faster results. Its advantages do not lie exclusively on affordability, better online accessibility and rapidity of reaching a solution for the conflict but at the same time other advantages defined by ODR Advisory Group⁷ which are mainly visible while resolving small value disputes, e.g. that ODR is focused, so that dispute resolution body that was chosen has required experience and knowledge, it is trustworthy and appropriate for respective type of the conflict seeing that arises from online sphere.

Lodder and Zeleznikov proposed three-step model which could provide the most effective ODR process. First step shall be performed by negotiation tool providing feedback on the likely outcome of the dispute if the negotiation were to fail.⁸ The comparison of probable decision states chance of parties to win the case but also considers other aspects, e.g. costs or duration of the litigation which are one of the reasons parties to a conflict uses ODR instead of formal judicial proceeding. Aim of the second step is to try to settle any existing dispute by argumentation techniques and the last, third one is to be applied only if previous steps failed the tool should employ decision analysis techniques and compensation/trade-off strategies in order to facilitate resolution of

⁷ JERETINA, U.: *Consumer online dispute resolution (odr) – as a key cultural change – mechanism for innovative public administration in eu*. 2018. available on: https://www.researchgate.net/publication/325145196_CONSUMER_ONLINE_DISPUTE_RESOLUTION_ODR_-_As_a_key_cultural_change_-_MECHANISM_FOR_INNOVATIVE_PUBLIC_ADMINISTRATION_IN_EU

⁸ A.R. Lodder and J. Zeleznikow, "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Systems in a Three Step Mode", *The Harvard Negotiation Law Review* (2005) 10, pp. 287- 338.

the dispute.⁹ Solely the fact, that all three steps can be performed online, means massive easement of judicial structure and at the same time parties to the conflict can reach commonly suitable solution in more flexible way.

Researchers in the field of dispute settlement using AI tools identified multiple categories in this field, where AI is currently applied also resulting from Lodder and Zeleznikov model described earlier. First of them is negotiation, or generally any ADR support system. Such system can use AI tools like artificial neural network or generic algorithms or cased based reasoning. Another one's aim is selection of appropriate dispute resolution method. Cheung at al. (2004) conducted review of literature to identify the critical selection parameters. During its testing phase, seventy percent prediction accuracy was met.¹⁰ The last one is system identifying causes of disputes, its impact on future relations.

a) Relation between ADR and ODR

Online disputes emerge mostly from relations between vendors and their customers. Online contractual relations are often cross-border, containing foreign element. In private international law, foreign element occurs in four possible forms: object, subject, legal fact and legal relationship.¹¹

In this context, we are left with question, if the ODR is part of the ADR or constitutes new group of dispute resolution methods existing along with judicial proceedings and ADR. ADR is commonly described as cheaper, faster and more efficient method used to

⁹ Ibid.

¹⁰ ILTER, D., DIKBAS, A.: *A review of the artificial intelligence applications in construction dispute resolution*.

¹¹ Lysina, P. et al. (2016): *Medzinárodné právo súkromné*, 2. edition, Bratislava: C.H.Beck.

get tailored and party-fashioned solution to legal problems, while focusing also on future relation of the parties. We are of opinion, that the aim of ODR is the same as with the ADR. ODR provides an alternative to litigation while allowing subjects to enjoy benefits commonly linked to ADR. Professor Menkel-Meadow considers ODR as one of the tools to access to dispute resolution of some kind but would not overclaim the “justice” part.¹²

We are of the opinion, that current ODR represents form of ADR. Both of these wants to achieve same goals and are having more or less similar advantages. Even though ODR is implemented worldwide right now to dispute arising from online relations, it is necessary to realise range of disputes to which it is applied. Therefore, ODR covers mostly small claim cases and leaves a wide range of conflicts to more traditional settlement methods, i.e. ADR or formal judicial proceeding.

b) *Legal regulation of ODR in the EU*

In a cross-border context, the role of ODR should not be underestimated. Whenever the foreign element is present in the legal relationship, legal norms of private international law are to be applied. The aim of private international law is to determine which courts have jurisdiction to resolve a respective case, which substantive law shall be applied to resolve respective case and regulates recognition and enforcement of those decisions.

¹² Menkel-Meadow, J., Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, the Hague, the Netherlands, 22-23 May 2016 (January 4, 2017). International Journal of Online Dispute Resolution, Vol. 3, No. 1, pp. 4-7, 2016; UC Irvine School of Law Research Paper No. 2017-01. Available at SSRN: <https://ssrn.com/abstract=2893919>

As was defined earlier, not all disputes are susceptible to be resolved on basis of ODR platform. This platform applies only to disputes which arose from online sales or service contracts¹³ in the EU and applies only to traders established within the EU.

It is necessary to stress out, that ODR platform does not replace any type of complaint procedure already existing and its utilisation is not compulsory unless the trader is part of a trade association where its rules, or other laws, require the trader to use ADR services. From its launch on 1 July 2017, consumer ODR became an integral part of EU's legal system.¹⁴

First and foremost, the claiming party which wants to use ODR platform to resolve dispute, submits a complaint by filling an electronic form available on the platform pursuant to the article 8 of the ODR regulation. Use of ODR platform is for free. Price is often relevant factor affecting decision of parties on how to resolve their dispute.

After its processing, complaint is submitted to another party to the dispute and when accepted by the second party, ODR platform assist them to find appropriate ADR body. At the end, it remains solely up to parties to agree on ADR body which shall help parties with dispute settlement. According to the article 9 paragraph 8 of the ODR regulation, if parties fail to agree within 30 calendar

¹³ The ODR regulation defines "online sales or service contracts" as any sales or service contracts for goods or services that are offered by a trader (including online marketplaces where purchases can be completed) or the trader's intermediary through a website or by other electronic means (including telephone sales or contracts concluded by email) where the goods or services have been ordered by the consumer on that website or by other electronic means.

¹⁴ Communication from the commission to the European parliament, the European council, the council, the European economic and social committee and the committee of the regions Artificial Intelligence for Europe. Available on <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-237-F1-EN-MAIN-PART-1.PDF>

days after submission of the complaint form on an ADR entity the complaint shall not be processed further.¹⁵

There is a need to explain, to which entities disputes can be submitted. In general, not every ADR body is eligible to settle online disputes via ODR platform but only those listed on the platform itself. Parties may choose according to country in which respective body operates and type of dispute which needs to be resolved. After agreement on the respective dispute resolution body, chosen body has three weeks to inform the parties whether it accepts jurisdiction to handle the complaint or not. Once the jurisdiction was accepted, the dispute shall be settled pursuant to the in line with its usual procedures, and must offer a suggested solution with 90 days, in accordance with its own procedures and practices.

At the first sight it is visible that ODR regulation does not regulate choice of law, i.e. law which is applicable to relevant contract. This problematic is left to already adopted regulation Rome 1¹⁶ which regulates applicable law for consumers contract in article 6 and pursuant to article 6 paragraph 2 parties to the consumer contract can choose applicable law under the condition that choice of law cannot result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.¹⁷

¹⁵ Article 9 paragraph 8 Regulation (eu) no 524/2013 of the European parliament and of the council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

¹⁶ The advantage of the ADR system is the exclusion of the problematic aspect of choice of law.

¹⁷ Article 6 paragraph 2 of the Regulation (EC) No 593/2008 of the European parliament and of the council of 17 June 2008 on the law applicable to contractual obligations

This means that even if the parties have chosen an applicable law, additional protection is granted to the consumer by the provisions of legal regulation otherwise applicable.

Another important aspect of the ODR regulation which is necessary to assess are the obligations which are imposed to the traders. Please note, that this obligation does not bind any trader residing in the Union, but only those engaging in online sales or online service contracts. This obligation engages traders to inform consumers on possibility to resolve potential dispute via ODR and provide link to ODR platform to consumer. Moreover, traders must inform consumer on their e-mail address.

Information obligation of traders should serve to increase knowledge on ODR and ADR in general, to inform citizens on alternatives to resolve their disputes in other way than judicial proceeding. Even though traders must fulfil its information obligation, the ODR regulation does not pose any obligation to accept dispute settlement via ODR platform by traders. Therefore, if complaint was submitted by the consumer and parties do not agree on dispute resolution body or do not reach solution in prescribed period and parties do not agree on another dispute resolution body, ODR procedure stops. If parties wish to resolve respective conflict, they should find other method to resolve their dispute.

In principle, ADR is based on voluntary choice of parties to submit their conflict to ADR body. Despite that, recent regulation of mediation (as one of the ODR methods) in the EU by the Mediation directive¹⁸ and its transposition by the Italy started discussion whether obligatory mediation before submitting

¹⁸ 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

a conflict to the court is in accordance with EU law or not. Italy launched a pilot project and defined types of disputes which had to submit their dispute to the mediator before going to judicial proceeding.

We are of an opinion, that use of ODR in small claim cross border online disputes shall be mandatory, at least to some extent, e.g. agreement on the dispute resolution body and its assessment of the dispute. This would be favourable for parties, whose dispute could be settled faster by online methods and with less expenses as well as for courts which would not have to resolve small claims dispute with foreign element.

The advantages of ODR are undeniable and even more in the time of Covid 19 crisis. After its outbreak, states all over the world adopted multiple public health measures, including closing of schools and kindergartens, services, shopping malls and restricted gathering of people. States shut down borders and citizens traveling back to their country were obligatory sent to the quarantine. It did not take long for economists to publish studies showing effects of crisis to global, European as well as Slovak economy. Coronavirus pandemic also affected functionality of the courts. E.g., in Slovakia the act was adopted, according to which during the emergency situation, courts conduct judicial proceeding only in necessary extend. This resulted into the postponement of most courts proceeding, but at the same time, internet remained untouched and its use was bigger than ever. If any dispute occurred during this time and needed to be resolved, thanks to ODR platform, they could do it even in the case of quarantine. Furthermore, parties to the disputes were often affected by travel restrictions and governmental measures therefore in the case of the dispute including foreign element, reaching a solution would take too much time.

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On the other hand, electronic communication is no substitute for the ability of face-to-face conversations to foster important process values of traditional, face-to-face dispute resolution.¹⁹

Despite all of the above-mentioned advantages of the ODR, there are some parts of the judicial proceeding that are hardly replaceable by the electronic communication means. The diversity disputes arising from human interaction (legal or otherwise) is vast and as each dispute has its own particularities, fully automated online dispute resolution can be used only in the simplest cases, as it cannot deal with particularities of each case.

Another disadvantage of ODR is its impersonality. E.g. mediation is most effective if the parties to the dispute are physically present before the mediator. Advantages of face – to – face discussion can be achieved via electronic means only partially. Even if transfer of audio or video is possible in real time, by this mean parties cannot read mutual body language and there is also lack of empathy. Such impersonality is even more visible during communication via e-mails, where it is difficult to get across subtle meanings, emotions and opinions.

Even though IT technologies such as computers, e-mails, tablets etc. are basically becoming an inseparable part of our modern lives, access to online environment and computers may pose a problem for some individuals, especially those involved in

¹⁹ EISEN, J.B.: *Are We Ready for Mediation in Cyberspace?* 1998 *BYU L. Rev.* 1305, 1308 (1998).

disputes that result from off-line transactions and individuals not able to afford or operate a computer.

The technological part of ODR also brings into spotlight the issue of confidentiality issues. Especially concerning in case involving any type of commercial, technological or other type of secret, the safety of devices used for ODR by both parties can be easily compromised in most cases. Such risks are discouraging many parties to resolve their disputes through ODR, especially since generally there is no way to ensure that the devices other party is using for ODR are secured and there can be no leak of information.

4. Future development

The ultimate goal of AI is not to help to resolve conflict “online” even if existence of online platform to settle disputes is already an important step with massive impact and massive potential. It represents just one step of the journey in order to use AI in the legal practice, to facilitate settlement of conflicts and eventually constitute the program capable of resolving conflicts by itself or only with minor human interference. In other words, online dispute resolution system helped us get used to technology in legal relations and opened new door to use AI as tool of dispute resolution.

There are multiple methods applicable to improve current dispute resolution processes. Earlier, we have briefly described the model able to predict decision of European Court of Human Right. It represents one of the categories of knowledge-based systems collecting data (judicial procedures, judgement, legal facts) from several sources. One of knowledge-based system is case-based reasoning, meaning problem solving methodology

that relies on past experiences and its data to make present choices.²⁰ This system is based on repetitive human behaviour. The key assumption is that if a new problem is similar to an old one, it will have a similar outcome.²¹

In general, it is comparison of similar situations and applying similar rules, thus having similar outcome. Another one is rule-based system where the knowledge of a specific legal domain is represented as a collection of rules of the form if <condition(s)> then action/conclusion²² or other machine learning systems attempting to learn new knowledge automatically.

Nowadays technology is capable to predict case outcome with high accuracy base on previous court decision in connection to the already existing procedures. Even if presumption was that AI in law will develop even faster and replace the role of humans in the dispute settlement procedure, it is happening very slowly and only partially in some branches of law where it is the simplest.

5. Conclusion

It is undeniable, that autonomous resolution of disputes by AI without any interference of judge or any form of third party lies in the future. Although AI applications are evolving nonstop and possess enormous potential to change judicial procedures, at this moment EU regulates only its use in the form of online platform for dispute resolution, but not further. First step was already

²⁰ CARNEIRO, D., NOVARIS, P. ANDRADE, F. ZELEZNIKOW, J., NEVERS, J.: *Online dispute resolution: an artificial intelligence perspective*. Springer Science+Business Media B.V. 2011

²¹ Ibid

²² A.R. Lodder and J. Zeleznikow, "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Systems in a Three Step Mode", *The Harvard Negotiation Law Review* (2005) 10, pp. 287-338

taken by the European parliament by indicating fundamental requirements which AI should comply with, in particular human agency and oversight, technical robustness and safety, privacy and data governance, transparency, diversity, non-discrimination and fairness, societal and environmental well-being and accountability. Fulfilling those requirements could mean adoption of new AI regulation in the field of dispute resolution.

In this paper, the research on AI and dispute resolution was focused on currently valid ODR Regulation in the EU, which was adopted recently. ODR platform serves to traders as well as customers to resolve their dispute from the comfort of their home. ODR platform has potential to replace judicial proceeding in cross-border and national online customer disputes. However, as we stressed out earlier, its larger application could be supported by its mandatory use, at least for some type of consumer cases. Such regulation can help subject to the dispute find mutually suitable decision without court proceeding and at the same time build a habit not the go to court for every smaller conflict but to use alternatives.

Even if it may sound controversial, pandemic caused by the COVID – 19 disease could (and in our opinions will) cause higher demand for alternative online dispute resolution. Still lasting pandemic and applicable measures affect also human behaviour and need to preserve social distancing if possible.

This could lead to development of the ODR methods on a wider, international scale and increase use of AI in ODR. People could discover the advantages of ODR first handed even in the midst of the pandemic, while resolving their disputes and at the same time keeping safe them safe.

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