

PART XV

CONSENSUAL DISPUTE RESOLUTION AND ARBITRATION

CHAPTER 1

Consensual Dispute Resolution

*Antonio Cabral**

<https://www.cplj.org/publications/15-1-consensual-dispute-resolution>

TABLE OF CONTENTS

1	Introduction	1
2	Characteristics of Consensual Dispute Resolution Procedures.....	4
3	‘Alternative’ or ‘adequate’? Integration between Procedures and Dispute Resolution Design. The ‘multi-door courthouse’ and Its Different Sub-systems.	8
4	Dispute Systems Design and the Consensualization of Dispute Resolution. Consensual Decision Making. Procedural Agreements and Contracts.....	10
5	Dispute Resolution Sub-Systems and Their Interplay	13
6	Types of Consensual Dispute Resolution Procedures	14
6.1	Negotiation	14
6.2	Mediation.....	15
6.3	Conciliation	24
6.4	Other Types of ADR.....	26
6.4.1	Collaborative Law	26
6.4.2	Dispute Boards.....	29
7	Online Dispute Resolution	33
7.1	Concept of ODR. Traditional ADR and ODR. Private and State-run ODR. ODR and Online Courts	34
7.2	Technology as a ‘Fourth Party’. Is There a Need for a New Theoretical Background?	38
7.3	Types of ODR. E-negotiation, E-mediation and E-arbitration.....	40
7.4	Benefits and Disadvantages of ICT Applied to Dispute Resolution	43
7.5	New Skills and Different Approaches	49
7.6	Dispute Systems Design and ODR.....	51
7.6.1	Incentives and Prevention of Conflicts	52
7.6.2	Dispute Systems Design and Procedural Safeguards.....	55

7.7 Concluding Remarks on the Future of ODR and How Technology Might Impact Civil Justice	59
Abbreviations and Acronyms	63
Legislation	65
International/Supranational	65
National	65
Cases	67
National	67
Bibliography	68

1 INTRODUCTION

- 1 Throughout the course of history, human communities began to solve their disputes privately, but those primitive types of conflict resolution often involved the use of force and violence. As modern societies evolved, conflict resolution shifted from a totally private matter to a state activity. The turning point might be identified with the evolution of civil procedure in Roman Law, when the state absorbed almost entirely the task of resolving disputes. In time, separation of powers led to the organization of the judiciary, a branch of state activities that was meant to be the sole *locus* of dispute resolution.
- 2 Nevertheless, this was not enough to make private resolution of disputes vanish. Still in medieval times, even before nation-states started to be organized, even some rather primitive legal systems provided parties with several dispute resolution procedures that were very similar to contemporary ones, allowing litigants to move from adjudicative to cooperative methods as the conflict required.¹ Therefore one can see a pendulum swing between systems in which dispute resolution is predominantly public or private.
- 3 However, in the last century, and especially in the past few decades, the study of dispute resolution began to increase the number of sophisticated private mechanisms of conflict-solving. The so-called *Alternative Dispute Resolution* (ADR) was a concept developed since the late 1970s², and roughly embraces not only consensual proceedings such as negotiation, mediation, conciliation, but also other types of adversarial adjudicative procedures such as arbitration. In fact, studies related to the theory of conflicts identify possible solutions for disputes by way of two major groups of mechanisms. Some are depicted as *adversarial*, such as litigation and arbitration, others have a more *collaborative* functioning, as for example negotiation, mediation or conciliation.
- 4 Indeed ADR is a wide concept that encompasses forms of adjudication – for example, arbitration – in which the decree of a third-party (the arbitrator) will determine the outcome of the dispute, but it also covers consensual methods of conflict resolution by which the parties themselves try to find a solution for the dispute, such as negotiation, mediation, conciliation, etc.³ Even though all of them could fit into the category of ADR, our focus in this segment will be on the *consensual* methods of dispute resolution.

* Full Professor at the University of Rio de Janeiro, Brazil.

¹ Valerie Sanchez refers to that as a dispute processing ‘continuum’. V Sanchez, ‘Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today’, (1996) 11 (1) Ohio State Journal on Dispute Resolution, 2-11, 18-19.

² T Main, ‘Mediation: An Unlikely Villain’, (2019) 34 (3) Ohio State Journal of Dispute Resolution, 542-543.

³ One can also see hybrid or multi-step forms of dispute resolution, such as med-arb clauses. Cf O Chase, *Law, Culture and Ritual: Disputing Systems in Cross-cultural Context* (New York University Press, 2005), 94 ff; P Costa e Silva, *A nova face da justiça: os meios extrajudiciais de resolução de controvérsias*

- 5 Conflict resolutions do not have to be necessarily associated with a war, a duel, or a fight, and are not always supposed to be painful and stressful. That image might be misleading even in court litigation but seems to be more wrong when private dispute resolution is taken into account. Private means of dispute resolution emphasize party self-determination, with a more harmonious participation of the interested stakeholders in solving the conflict.⁴
- 6 Thus, consensual dispute resolution assumes the parties to the dispute are better suited to respond to their own needs and should be the protagonists of conflict-solving. There are many advantages that stem from that assumption. Indeed, several studies showed that the empowerment of parties in private ordering provides personal development, fosters creative problem-solving, enables the continuity of co-operation between business partners (which could produce future economic benefits)⁵, and speaks in favor of a peaceful solution of disputes (*ne cives ad arma veniant*). In this context, ADR is viewed as a means of incrementing communication between the parties, strengthening interpersonal relationships and ultimately contributing to peace building and cohesion of social bonds.⁶ On the other side, consensual dispute resolutions involve parties directly in a less formal and more comprehensible procedure than those provided for in court litigation. In addition to that, participation makes the involved parties feel responsible for the outcome⁷ and therefore more keen to comply with the terms of the agreement.
- 7 On the other hand, boosted by the access to justice movement, the development of ADR was also part of the search for a more adequate civil justice, incrementing quality and quantity of paths to dispute resolution, instruments to respond to social conflicts that any legal system should provide to the citizens. In this context, ADR appeared as a way to enhance diversity and efficiency in dispute managing.⁸ So the evolution of ADR was in

(Coimbra, 2009), 19, 35-38; M Galanter, 'Justice in many rooms: courts, private ordering, and indigenous law', (1981) 19 *Journal of Legal Pluralism*, 1-2: 'the view that the justice to which we seek access is a product that is produced – or at least distributed – exclusively by the state'.

⁴ C Menkel-Meadow, 'The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation' in I Macduff (ed), *Essays on Mediation: Dealing with Disputes in the 21st Century* (Wolters Kluwer, 2016), 31; F Steffek, 'Mediation', in J Basedow, K J Hopt, R Zimmermann and A Stier (ed), *The Max Planck Encyclopedia of European Private Law* (vol.II, Oxford University Press, 2012), 1162.

⁵ S Chong and F Steffek, 'Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention', (2019) 31 *Singapore Academy of Law Journal*, 454.

⁶ S Ali, 'Nudging Civil Justice: Examining Voluntary and Mandatory Court Mediation User Experience in Twelve Regions', (2018) 19 (2) *Cardozo Journal of Conflict Resolution*, 271-272.

⁷ K J Hopt and F Steffek, 'Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues', in K J Hopt and F Steffek (ed), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press, 2013), 12; U Jeretina and A Uzelac, 'Alternative Dispute Resolution for Consumer Cases: Are Divergences an Obstacle to Effective Access to Justice?', (2014) XII (4) *Mednarodna revija za javno upravo* (International Public Administration Review), 40.

⁸ Ali (n 6) 271-272; M Vargas and C Fuentes, *Introducción al Derecho Procesal: Nuevas Aproximaciones*, (Der, 2018), 26-30.

part the legacy of the search for a more efficient and fair dispute resolution system, creating incentives for better access to justice through consensual solutions.⁹

- 8 Nevertheless, in many jurisdictions, the development of new forms of dispute resolution was a result of a desperate need to reduce the work overload of the judiciary. After years of litigation explosion, parties and States started seeking alternatives to deal with the long delays experimented by litigants that brought their conflicts to trial. Taking disputes to ADR impacts the justice system by reducing the number of pending cases in court litigation, relieving the pressure over court hearings' calendar, and ultimately leading to lower overall costs of dispute resolution, which is important as a public policy to alleviate the judiciary budget. Therefore, improving access to justice was not the sole argument justifying ADR implementation.¹⁰ ADR appeared sometimes as a means to rationalize the scarce resources of court litigation, reducing the burdens that the explosion of caseload caused for the judiciary worldwide.¹¹ Undoubtedly, all over the globe, judges are overloaded, and promoting ADR could reduce the workflow of claims that were being channelled to courts.¹²
- 9 But the ADR movement was also a response to the inefficiency experimented in court litigation due to the rigidity of its bureaucracy. From the parties' perspective, ADR would provide an escape route from the existing formalities of court procedures, providing a more flexible and amenable framework, adaptable procedures that were more suitable to that specific conflict, and which could also solve the dispute not only in less time but also with lower costs.
- 10 And after some decades since the strengthening of this movement towards the consensualization of dispute resolution, the development of ADR made these mechanisms quite common in most jurisdictions, both in common law and civil law.¹³

⁹ R Caponi, 'La giustizia civile alla prova della mediazione: quadro generale', (2010) V Foro italiano, c.89.

¹⁰ Even if, at some level, access to justice comes up in political discourse and in legal literature. See some interesting discussion about this in L Giannini, 'Es la mediación obligatoria en Argentina un instrumento de acceso a la justicia?', (2015) 2 Revista Iberoamericana de Derecho Procesal, 94.

¹¹ Cf T Main, 'Arbitration, What Is It Good For?', (2017) 18 Nevada Law Journal, 468.

¹² Cf Jeretina and Uzelac (n 7), 43-45. About this movement in Latin America, and the reasons that invigorated its offspring, cf N Alcalá Zamora y Castillo, *Proceso, autocomposición y autodefensa* (UNAM, 1991); M Illera, 'Los mecanismos alternativos de solución de conflictos: una opción que complementa la actividad jurisdiccional', in M Vásquez (ed), *Temas Actuales en Derecho Procesal y Administración de Justicia: Estudios críticos y comentarios al Código General del Proceso* (Universidad del Norte, 2014), 104-116; N Belloso, 'Formas alternativas de resolución de conflictos: Experiencias en Latinoamérica', (2004) 48 Revista Sequencia, 173-202.

¹³ In Europe, M Gouveia, *Curso de resolução alternativa de litígios*, Coimbra, 2011, 83-87. In Brazil, the country's *Conselho Nacional de Justiça* (National Council of Justice) has implemented several policies to foment the use and diffusion of ADRs in the judiciary, the most important resolution n.125/2010, which determined the creation of *Centros Judiciários de Solução Consensual de Conflito* ('Judicial Centers for Consensual Conflict-Solving') that since were established and are functioning in every court. These

2 CHARACTERISTICS OF CONSENSUAL DISPUTE RESOLUTION PROCEDURES

- 11 Some main features are often pointed out as typical to consensual dispute resolution procedures.
- 12 First, they are usually *non-coersive*. Parties must accept to submit themselves to ADR. Even those jurisdictions that provide for mediation/conciliation sessions as mandatory requirements to file a lawsuit in court do not oblige the parties to remain indefinitely in those proceedings. It usually is a matter of voluntarily submitting oneself to consensual attempts of conflict solving. In some jurisdictions, as we shall see in later sections, mandatory ADR exist, but usually parties are obligated to negotiate in good faith and to appear at least to one joint session of negotiation.¹⁴
- 13 Another feature of ADRs is *orality*. Most negotiation, mediation and conciliation proceedings entail to some extent oral sessions in which parties to the dispute, their lawyers or agents appear in person for direct interaction.¹⁵ Orality makes the procedure more human, and also permits the negotiators to explore paralinguistic signals of non-verbal communication.¹⁶
- 14 In addition, legal scholars often speak of *informality* as a characteristic of consensual dispute resolution procedures. Informality relates not only to the flexibility of the proceedings, but also to the attitude that parties and their representatives should have in their mutual interplay. This is relevant to foster a natural, relaxed and comfortable environment, deemed essential to reach settlement.
- 15 Another very important feature of ADR is *confidentiality*.¹⁷ In fact, confidentiality does not apply to all ADR mechanisms, especially when used by judges or court officials (see below). But in mediation, for example, confidentiality is understood to be the basis for trust building (the confidence that parties have in the third-person aiding the negotiation) and is essential to present a discussion environment in which the parties feel secure to speak their minds, to express freely their concerns and beliefs, and to

centres must provide services of mediation and conciliation, as well as guidance and information for the citizens. In the same sense, statutory provisions were later improved. Art 3 §2 of the Code of Civil Procedure enacted in 2015 provides that the 'State should promote the amicable solution for the disputes' and §3 of the same Art 3 states that 'conciliation, mediation and other methods of consensual solution of disputes must be stimulated by judges, lawyers, public defenders, prosecutors, including during the course of court procedures. In legal literature, cf A Cabral, *Convenções processuais: teoria geral dos negócios jurídicos processuais* (3rd ed, Juspodivm, 2020), 164-165.

¹⁴ F Steffek, 'Rechtsvergleichende Erfahrungen für die Regelung der Mediation', (2010) 74 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 851; W. Schwab, 'Collaborative law: a closer look at an emerging practice', (2004) 4 *Pepperdine Dispute Resolution Law Journal*, 358.

¹⁵ For the Japanese legal system, cf M Haga, 'Japan', in C Esplugués and S Barona (ed), *Global Perspectives on ADR* (Intersentia, 2014), 274.

¹⁶ We shall see in later sections how technology might be changing this scenario. See also A Cabral, 'Online Dispute Resolution', in D Mitidiero, A Cabral and P Lucon (ed), *Artificial Intelligence and its Impacts on the System of Civil Justice - IAPL Online Conference 2021* (RT, 2023), 54 ff.

¹⁷ L Cadiet and T Clay, *Les modes alternatifs de règlement des conflits* (3rd ed, Dalloz, 2019), 52-53.

debate about the proposals of the counter-parties. If those discussions were to be always public, one could observe a chilling-effect, with the parties avoiding to disclose their positions. Indeed, privacy and confidentiality in dispute resolution procedures have always been at the basis of the parties' choice over the method of dispute resolution.¹⁸

- 16 *Neutrality or impartiality* of negotiators, mediators and conciliators is also a paramount feature, even if not essential to all types of ADR.¹⁹ Impartiality is relevant to warrant equality between parties and to avoid the unbalancing forces that could make some disputants prevail by imposing their will to the others. The search for a neutral conductor aims at preventing not only an undue influence over the outcome, but also to preserve the relationships between the involved parties.
- 17 From another angle, ADR is usually a matter of private autonomy²⁰, so one of its key aspects is that ADR is a result of joint consensus. Some scholars argue that freedom of contract, which is a fundamental principle in most legal systems, places the rights of the individuals at the centre of the legal activity, and from that legal norm follow the principles of party autonomy and party disposition, empowering persons to shape dispute resolution methods and their formalities.²¹ Indeed, regardless of a unified normative framework, in most jurisdictions the general legal background for the requirements and enforceability of ADR agreements is the general law of contract.²²
- 18 Depending on voluntary agreements, ADR often apply to disposable legal relationships. Therefore in most legal systems one can find limits as to the possibilities of the application of ADR to conflicts involving labour law, consumer protection, antitrust cases, rights of vulnerable or incapable persons, inheritance, cases involving civil aspects of criminal offenses, and cases in which the counterpart lives abroad or cannot be located.²³ The general assumption is that in these fields the legal rights involved are not always disposable or parties are not equal and the negotiation interactions do not guarantee informed consent.
- 19 Another consequence of the voluntary aspect of ADR is that they usually cannot be imposed on unwilling disputants. In this sense, many legal systems choose not to allow legal norms to create obstacles to a person initiating a lawsuit before the judiciary. In

¹⁸ In a historical perspective, see in the same sense Sanchez (n 1) 19.

¹⁹ Among others, Haga (n 15) 259; L Giannini, *La mediación en Argentina* (Rubinzal, 2015), 39-41. Some argue these are key features of mediation, but not a part of its 'core definition'. In this sense, Hopt and Steffek (n 7) 13.

²⁰ L Kriesberg, *Constructive conflicts: from escalation to resolution* (3rd ed, Rowman & Littlefield, 2007), 266; Cadet and Clay (n 17) 53-54; Cabral (n 13) 169-212; F Tartuce, *Mediação nos conflitos civis* (2nd ed, Método, 2015); A Câmara, *O novo processo civil brasileiro* (Atlas, 2015), 5-6.

²¹ R Caponi, 'Just Settlement' or 'Just About Settlement'? Mediated Agreements: A Comparative Overview of the Basics', (2015) 79 (1) *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 117-118.

²² Ibid 129-130.

²³ I Ormachea, *Manual de conciliación procesal y pre-procesal* (Academia de La Magistratura, 2000), 144-145; J La Rosa and G Rivas, *Teoría del conflicto y mecanismos de solución* (Tarea, 2018), 75 ff.

these jurisdictions, attempts to enforce mandatory ADR prior to accessing courts is usually interpreted as violating the right to access to justice.²⁴ Thus the choice to submit oneself to litigation is often based on freedom of contract. There must be a willful agreement by which the parties consensually shift the *locus* of the dispute resolution from the regular court proceeding to some other alternative more suitable to their needs. This can appear as a necessary first step of negotiations prior to commencing an adversarial proceeding, or as a total exclusion of courts altogether (as in arbitration). Due to this interpretation of the principle of access to justice, in many legal systems statutory rules cannot prevent parties from going straight to court. People involved in a conflict have the right to seek judiciary relief whenever unable to solve the dispute themselves. Therefore, in several jurisdictions, mediation eg, cannot be imposed as a previous and necessary step to filing a lawsuit in court.

- 20 However, if the parties to an agreement willingly establish ADR as the means to solve conflicts that might arise from the contract, those clauses are deemed valid because they represent a result of self-determination. For example, agreements to mediate (clauses that set forth a mediation procedure to which parties have to attend prior to litigation or arbitration) are admissible because they reflect the disputants' private autonomy.²⁵
- 21 Other jurisdictions have taken a different path of making mediation or conciliation procedures a mandatory requirement, a first step that parties have to take prior to going to court. Those legal systems depart from the idea that in dispute resolution, settlement-type procedures should be attempted first, with adjudication – especially court litigation – being the last resort (*ultima ratio*). So, jurisdictions provide for a specific requirement for the lawsuits to be admissible before the judiciary: parties must present evidence of having previously engaged in mediation/conciliation procedures in order for their claims to be heard in court. This is the case of the regulation of the European Union (and most

²⁴ That seems to be the case in most Latin-American legal systems, and that may be a consequence of interpreting Art 8 of the American Convention of Human Rights. In this sense, E Oteiza, 'Punto de vista: MARC/ADR y diversidad de culturas: el ejemplo Latinoamericano', in H Zaneti Jr. and T Navarro Xavier (org), *Justiça Multiportas* (Juspodivm, 2016), 748 ff.

²⁵ In Italy, cf D Dalfino, 'Transazione, conciliazione e mediazione nel nuovo sistema di tutela collettiva dei diritti individuali omogenei', (2020) 11 (3) Civil Procedure Review, 39. About private autonomy in ADR procedures, A Uzelac, 'Comments on Law on Mediation Procedure of Bosnia and Herzegovina', in A Novo (ed), *Paths of Mediation in Bosnia and Herzegovina* (IFC, 2009), 31.

national jurisdictions of that juridical space)²⁶ and of some legal systems in Latin America.²⁷

- 22 The underlying premise of this approach is that a pending lawsuit at the judiciary is not submitted to the interests of the parties, confined to their sphere of legal rights. Each lawsuit burdens the judiciary and therefore imposes costs that are beared by the whole society in a scenario of scarce funds in the public budget. In light of this economic concern, many jurisdictions have begun to reframe the principle of access to justice.²⁸ In this perspective, if several possible dispute resolution settings are offered to the parties to solve their dispute, the option between amicable, consensual methods or adjudication procedures should not only be a matter of personal convenience, but rather an institutional choice, supported by policies of underlying public interests.²⁹

²⁶ In Italy, statutory provisions established mediation as a pre-condition to proceed in court, with exceptions in cases in which urgent provisional measures are to be filed in court (Art 5 and 6, decreto legislativo n.28/2010). Cf A D De Santis, 'Rapporti tra mediazione, conciliazione e processo civile', in A Maietta (org), *La nuova mediazione civile e commerciale* (Cedam, 2014), 185-187, 200-204, 215; B Polisenio, 'La 'giustizia alternativa' tra mediazione ordinata ex officio e conciliazione giudiziale della controversia', in *Scritti in memoria di F. Cipriani* (Edizioni Scientifiche Italiane, 2020), 651; D Dalfino, 'La (persuasiva) soluzione delle sezioni unite in tema di mediazione e opposizione a decreto ingiuntivo', (2020) I, *Foro italiano*, 4.

²⁷ Art 6 of the Peruvian Conciliation Act establishes as a prerequisite for filing a lawsuit in court the demonstration that the plaintiff has previously tried to reach settlement through a conciliation proceeding with the defendant (at least one invitation to the other party to attend to a conciliation hearing). Cf La Rosa and Rivas (n 23) 75 ff; Ormachea (n 23) 144-145. In Argentina there is a federal regulation and complementary norms that depict a different scenario depending on the province. In the federal level and in some provinces, mediation is mandatory, consisting of a requirement that must be previously fulfilled before going to court. One of the few exceptions are cases in which there is urgency of obtaining relief. Mandatory mediation has been seen from the Argentine Supreme Court as a valid requisite that does not violate access to justice. The party meets the requirement if asks for a mediation session, even if the mediation does not happen because de other parties do not attend. Cf Giannini (n 19) 25-29, 36-38, 164-167. In Bolivia, conciliation is mandatory as a requirement to file the lawsuit (Code of Civil Procedure, Art 292). There are a few exceptions such as cases in which people are not able to dispose of their own interest, where there is urgency and the need for provisional measures, or when the opposing party is in an uncertain place or lives in a foreign country. Also in Colombia, conciliation is a mandatory requirement to file the lawsuit (as provided for in Ley n° 640/2001). If parties do not present proof of having previously attended a conciliation session, the judge can strike out the claim for inadmissibility grounds, except when provisional measures are needed (Articles 90.7 and 590, both of the *Código General de Proceso*). Cf M Fandiño, L Espinosa and M Sucunza, *Estudio Comparado sobre Las Reformas Procesales Civiles en América Latina*. (Centro de Estudios Jurídicos de las Americas, 2020), 251-252; F Bragança and F Miranda Netto (org), *Panorama legal da mediação na América Latina* (PPGSD-UFF, 2020), 257 ff.

²⁸ See some aspects of that evolution in P Gottwald, 'Mediation und gerichtlicher Vergleich: Unterschiede und Gemeinsamkeiten', in G Lüke, T Mikami and H Prütting (org), *Festschrift Akira Ishikawa zum 70. Geburtstag* (De Gruyter, 2001), 137-155. This economic approach has also led to the understanding that the judiciary should not be called to solve each and every dispute that might emerge in a community, only those of higher value (*de minimis non curat praetor*), more complex or that simply could not be solved by the parties. In many jurisdictions, this led to the development of simplified special procedures such as small claims courts, or even to assign these low-value claims to lay judges, with mediation tracks prior to the commencement of the proceedings.

²⁹ Caponi (n 21) 119.

3 'ALTERNATIVE' OR 'ADEQUATE'? INTEGRATION BETWEEN PROCEDURES AND DISPUTE RESOLUTION DESIGN. THE 'MULTI-DOOR COURTHOUSE' AND ITS DIFFERENT SUB-SYSTEMS.

- 23 The adjective 'alternative' may not be the most precise term to qualify these methods of conflict-solving understood as ADR. On the one hand, the word 'alternative' relies on the assumption that the standard form of dispute resolution would be litigation, and every other instrument would be an alternative to courts. But nowadays one can see that many disputes should not be taken to the judiciary because there is a better suited *locus* to solve them.³⁰
- 24 Therefore, in recent times, legal scholars have begun to speak not of 'alternative', but of 'adequate' or 'effective' dispute resolution methods. The underlying idea is to search for the most suitable means of conflict-solving.³¹ The choice of the proper dispute resolution mechanism must take into account the appropriateness of a method for a particular dispute. This analysis should consider, among others, the following factors: (a) the nature of the dispute and the merits of the case; (b) a prognosis of success of the negotiations for an amicable solution, which can be measured by the previous use of other settlement methods and the effectiveness of the attempts to reach an understanding; (c) if the projected delays in opting for alternative dispute resolution would be harmful to the projected outcomes; (d) whether the costs either of court proceedings or of alternative dispute resolution would be too high.³²
- 25 Regardless of those factors, if a dispute resolution procedure is supposed to be adequate rather than seen as an 'alternative' to litigation, it would be consistent to conclude that these mechanisms should be understood as *complementary* to each other.³³ Thus they must be *integrated*, forming what is thought to be a 'multi-door' system.³⁴ The image of the *atrium* of a courthouse with many doors is descriptive of a model by which the legal system offers the individuals diverse paths to solve their disputes, each one of them suitable to some types of cases, and all of them capable of combining to one another.³⁵

³⁰ A Kupfer Schneider, 'Building a pedagogy of problem-solving: learning to choose among ADR processes', (2000) 5 Harvard Negotiation Law Review, 119 ff. See the criticism of the expression 'alternative' in Cadet and Clay (n 17) 11-12.

³¹ This is a concern of several legal systems, both in Europe and in Latin America. Cf F Didier Jr. and H Zaneti Jr., 'Justiça multiportas e tutela adequada em litígios complexos', in H Zaneti Jr. and T Navarro Xavier (org.), *Justiça Multiportas* (Juspodivm, 2016), 39; Costa e Silva (n 3) 35.

³² On the different relevant factors that must be taken into account in that choice, cf Hopt and Steffek (n 7) 21.

³³ N Andrews, 'The Modern Civil Process in England: Links Between Private and Public Forms of Dispute Resolution', (2009) 14 Zeitschrift für Zivilprozeß International, 3-32; Caponi (n 21) 127.

³⁴ F Sander, 'Varieties of dispute processing', (1976) 70 Federal Rules Decisions, 131; G Kessler and L Finkelstein, 'The Evolution of a Multi-Door Courthouse', (1988) 37 Catholic University Law Review, 577 ff.

³⁵ R Mazzei and B Chagas, 'Breve ensaio sobre a postura dos atores processuais em relação aos métodos adequados de solução de conflitos', in H Zaneti Jr. and T Navarro Xavier (org.), *Justiça Multiportas* (Juspodivm, 2016), 2.

Litigation should therefore not be considered as a 'primary' dispute resolution procedure, but rather conceived as one option among many others.

- 26 This brings us to another topic that reflects a major trend, which is the *design* of dispute resolution mechanisms.³⁶ Parties can come together and contractually define procedures and instruments that fit the profile of their conflict, sometimes mixing techniques and features of other ADRs, or even creating new forms of procedures.³⁷ In some jurisdictions, parties can even choose litigation and then consensually shape the rules and formalities of court proceedings. This particular tendency relates to another important topic, that of the 'procedural agreements', allowed to variable extent, in many countries (see below).
- 27 In this context of multiple procedures and tools of consensual dispute resolution, there is no general preference in favor of a certain ADR method over the others.³⁸ And in jurisdictions in which the disputants are not obligated to search for ADR before going to court, it seems fair to say that there is also no priority of ADR over litigation. In the absence of a systemic preference, the question is always of adequacy/suitability.
- 28 From another perspective, because of the historical evolution of consensual dispute resolution procedures, and the fact that they emerged as an alternative to courts, they are usually seen as of private initiative, carried out in collaborative proceedings, whereas litigation would be of public nature, conducted in adversarial procedures.
- 29 But this rather extremist view approached conflict-solving from a one-sided angle, whether public or private, either performed by state officials or only by the parties themselves. One could think of a more balanced picture of both private and public procedures of conflict-solving intertwined.³⁹ In this combination, maybe dispute resolution procedures should be looked at from the outset as 'dispute resolution systems' or 'sub-systems' which are in many ways interlinked and dependent on one another.
- 30 Indeed, on the one hand, private forms of ADR frequently need courts' authority, otherwise they would be non-binding.⁴⁰ If the outcomes of ADR proceedings are not enforceable by courts, the absence of effective enforcement mechanisms of the

³⁶ N Rogers, R Bordone, F Sander and C McEwen. *Designing Systems and Processes for Managing Disputes* (Wolters Kluwer, 2013).

³⁷ Didier Jr. and Zaneti Jr. (n 31) 62-63.

³⁸ F Steffek *et alii*, 'Guide for Regulating Dispute Resolution (GRDR): Principles and Comments', in F Steffek, H Unberath, H Genn, R Greger and C Menkel-Meadow (org). *Regulating Dispute Resolution – ADR and Access to Justice at the Crossroads* (Hart, 2013), 13, 15.

³⁹ On the relationship between adjudication and consensual methods of dispute resolution, cf R Caponi, 'Mediation and State Civil Justice', (2011) 2 *Opinio Juris in Comparatione*, 1-6.

⁴⁰ Main (n 2) 562-563.

agreements obtained in ADR could be harmful in terms of legal certainty and legal security (predictability).⁴¹

- 31 In addition to that, courts themselves began to offer ADR services, state-run procedures of a more collaborative structure, insourcing ADR into one of the several 'tracks' or 'services' that a person could encounter in a 'menu' of dispute resolution mechanisms provided by the judiciary.⁴² The most prominent example are court-connected or court-annexed mediation procedures (see below). This is a format that responded to the ideal of a true multidoor courthouse, with several instruments of dispute resolution 'under the same roof'.⁴³ One example is the judicial settlement conference, in which judges themselves act as facilitators to the negotiation.⁴⁴
- 32 As we can see, nowadays dispute resolution systems are not 'pure and simple', but rather mixed or hybrid. Therefore, a legal system committed to dispute resolution should also embrace forms of ADR services provided by public bodies or courts. In the same sense, state-run consensual dispute resolution should also be encompassed by the definition of ADR.⁴⁵ With those characteristics in mind, maybe ADR should not be seen as 'escape routes' or as remedies to litigation's inefficiencies after all, but rather as 'added value', established in order to enhance the variety and effectiveness of the dispute resolution responses in a given legal system.⁴⁶

4 DISPUTE SYSTEMS DESIGN AND THE CONSENSUALIZATION OF DISPUTE RESOLUTION. CONSENSUAL DECISION MAKING. PROCEDURAL AGREEMENTS AND CONTRACTS.

- 33 *Dispute systems design* (DSD) can be defined as the activity of the disputants of tailoring the architecture of the dispute resolution setting, adapting the existing frameworks to their concrete needs and to the characteristics of the dispute in hand.
- 34 Dispute systems design aims at helping people, organizations and society as a whole to solve disputes in an efficient manner, channelling efforts into productive activities while avoiding waste of time and resources in unproductive ones.⁴⁷ The goal is to find adequate instruments because not every tool fits every dispute.⁴⁸

⁴¹ Chong and Steffek (n 5) 452.

⁴² Haga (n 15) 258.

⁴³ Sander (n 34) 131.

⁴⁴ Main (n 2) 564-565.

⁴⁵ In this sense, Caponi (n 21) 121-122. Referring to public bodies providing ADR in Slovenia, supervised by administrative or regulatory entities Jeretina and Uzelac (n 7), 41, 59 ff.

⁴⁶ Caponi (n 21) 127.

⁴⁷ This idea dates back to the seminal work from W Ury, J Brett and S Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Jossey Bass, 1988), 41-121.

⁴⁸ A Nylund, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation', in A Nylund, K Ervasti and L Adrian (ed), *Nordic Mediation Research* (Springer, 2018), 10.

- 35 As mentioned above, in early stages of the development of the subject in theory and in practice, ADR was seen as a solely private enterprise. In this perspective, whenever applied to ADR, dispute systems design was an activity that should define out-of-court ADR settings. But in time, as highlighted in the previous section, courts have begun to implement ADR services combined with the traditional structures of litigation.
- 36 Following this trend, the idea of a party-driven procedure, based on voluntary agreements of the interested parties, gained at least two other interesting and promising perspectives, both of them reaching similar results by the use of different approaches.
- 37 A first approach is to foster consensualization by way of joint applications or joint requests of the parties. The disputants agree upon certain aspects of the procedure and submit their consensual proposal to the court. The agreement is not binding or enforceable as a contract, so judges can decide otherwise. However, in most jurisdictions, courts will not only consider but also tend to respect the agreement and implement the desired outcome. This idea is consistent with the consolidated efforts to foster participative case management and also with the so called 'principle of cooperation', a growing trend in many jurisdictions from which a collaborative model of civil litigation could be built, a procedural setting in which judges and parties share responsibilities for interpreting and applying the normative framework of procedural law to produce fair outcomes by way of court proceedings that unfold in a timely manner and with lower costs.
- 38 The second tendency that can be seen in terms of consensual instruments for dispute systems design is the empowerment of parties to shape dispute resolution proceedings within court litigation by way of the so-called 'procedural agreements' or 'procedural contracts', the possibility for the disputants to determine the rules of court litigation procedures in a contract or legal transaction. The contractually stipulated rules derogate statutory default provisions and ultimately establish the formalities of court

procedures.⁴⁹ Indeed, in a growing number of legal systems, those negotiated rules are deemed to be valid legal norms, binding and enforceable by the court, so judges must apply the proceeding as designed by the parties if there is no other public or third-party interest that suggests otherwise.⁵⁰

- 39 Although in many jurisdictions the idea of an inflexible court procedure, conducted and defined solely by legislators and judges still dominates legal scholarship and case-law, procedural agreements have been a trend for quite some time in several legal systems, reflecting a contemporary 'alternative' to traditional court litigation, without representing a flight from the judiciary.⁵¹ The alternative here relies on the flexibility of the proceeding, which can be adapted by the parties in order to make litigation better suited to their needs and to the substantive rights in play.
- 40 Moreover, in more or less intense fashion, these forms of consensualization of civil litigation – either by joint applications and consensual decision-making or by a contractually-designed procedure – question the assumption that 'private' and 'public' dispute resolution systems are two worlds apart. On the contrary, flexibilization and adaptation can be promoted within court litigation and with active engagement and participation of the disputants.⁵² Dispute systems design allows parties to project, plan

⁴⁹ In comparative perspective, cf A Cabral, 'Designing procedure by contract: litigation agreements in contemporary civil procedure', (2019) 9 *International Journal of Procedural Law*, 364-375; R Caponi, 'Autonomia privata e processo civile: gli accordi processuali', (2010) 1 (2) *Civil Procedure Review*, 44 ff; A Chizzini, 'Konventionalprozess e poteri delle parti', (2015) LXX (1) *Rivista di Diritto Processuale*, 46 ff; A Nylund and A Cabral (eds). *Contractualisation of Civil Litigation* (Intersentia, 2023); A Cabral, 'Procedural Contracts and Agreements: An Introduction to a New Era of Party Autonomy in Litigation', in A Cabral and A Nylund (ed), *Shaping Civil Litigation Using Procedural Agreements* (Eleven, 2024). The jurisdictions with the most visible development in this regard are France, Brazil and the USA. For the French legal system, Cf L Cadiet, 'Le jeu du contrat et du procès' in *Philosophie du Droit et Droit Économique. Mélanges offerts à Gérard Farjat* (Frison-Roche, 1999), 23-24; L Cadiet, 'Les conventions relatives au procès en droit français: sur la contractualisation du règlement des litiges', (2008) LXII (3) *Accordi di parte e Processo: Supplemento della Rivista Trimestrale di Diritto e Procedura Civile*; L Cadiet and E Jeuland, *Droit judiciaire privé* (8th ed, LGDJ, 2013), 282, 357-358; L Cadiet, J Normand and S Amrani-Mekki, *Théorie générale du procès* (LGDJ, 2010), 542-543; Pezzani, *Il regime convenzionale delle prove* (Giuffrè, 2009), 1 ff. For the Brazilian legal system, cf Cabral (n 13) 121-168; F Didier Jr., 'Atypical procedural agreements in the 2015 Brazilian Civil Procedure Code', (2018) 23 *Zeitschrift für Zivilprozeß International*, 219 ff; R Godinho, 'A autonomia das partes no projeto de Código de Processo Civil: a atribuição convencional do ônus da prova', in A Freire *et alii* (org), *Novas tendências do processo civil* (vol. III, Juspodivm, 2014), 558-559. For the US legal system, cf K Davis and H Hershkoff, 'Contracting for procedure', (2011) 63 (2) *William & Mary Law Review*, 517 ff; R Rhee, 'Toward procedural optionality: private ordering of public adjudication', (2009) 84 *New York University Law Review*, 514 ff; J Dodge, 'The limits of procedural private ordering', (2011) 97 (4) *Virginia Law Review*, 726-766; M Moffit, 'Customized litigation: the case for making civil procedure negotiable', (2007) 75 *George Washington Law Review*, 461 ff.

⁵⁰ Cabral (n 50) 379-380.

⁵¹ Cabral (n 13) 210, 255-256.

⁵² L Cadiet, 'Case management judiciaire et déformalisation de la procédure', (2008) 125, *Revue française d'administration publique*, 149 ff; Rhee (n 50), 516-518; Cabral (n 50) 376-377.

and influence the design of their dispute resolution method not only away and apart from the judiciary but embedded with court proceedings.

- 41 Nevertheless, neither party autonomy nor joint requests provide litigants to the same freedom they have in designing out-of-court procedural settings (either arbitration or other consensual ADR procedures). Since the negotiated or agreed rules are meant to govern court litigation, issues of public policy must be taken into account. In most jurisdictions, courts' powers to decide on joint applications or to control the procedural agreements tend to be more intense than to control contracts in general because the effects of procedural agreements can impact state activities performed in the public interests of an efficient administration of justice. Therefore the intensity of oversight over these consensual outcomes in litigation is usually higher than the control courts exert over other out-of-court ADR agreements.⁵³ There are several variations on the standards and grounds for invalidity, ranging from abuse or fraud, uncapability or vulnerability of one of the parties (unbalancing powers to negotiate or agreed outcomes in detriment of weaker parties) to transfer of negative externalities to the judiciary (eg, extraordinary costs or burdens).⁵⁴

5 DISPUTE RESOLUTION SUB-SYSTEMS AND THEIR INTERPLAY

- 42 From the perspective set forth in the previous sections, if dispute resolution systems or sub-systems are somehow intertwined in hybrid forms within the legal system (both of private and public nature), one of the major challenges for the following years is to map: (i) how these methods interplay; (ii) if and when the choice for one of them creates impediments for the use of another procedure; and (iii) how a dispute resolution method can act in support of others.
- 43 For example, agreements to mediate pose temporary obstacles for the parties to go to court; courts themselves play an important role in ADR, not only in providing state-run ADR (eg, court-annexed mediation), but also when they are called to ensure the effectiveness of ADR (for example, claims in aid of arbitration, anti-suit injunctions, enforcement of procedural contracts, enforcement of arbitral awards or settlements obtained in mediation/conciliation proceedings).
- 44 Indeed, ADR has to be somehow linked to the legal system of public enforcement. If courts do not enforce mediation-obtained agreements and arbitral awards, these methods of dispute resolution would be ineffective.⁵⁵ On the other side, the public

⁵³ L Cadiet, 'Les conventions relatives au procès en droit français sur la contractualisation du règlement des litiges', (n 50), 74; Cadiet and Jeuland (n 50), 384.

⁵⁴ Andrews argues that the court should examine and control litigation agreements, on its own motion, regarding issues of illegality. N Andrews, 'Procedure, Party Agreement, and Contract', (2021) 1 *Giustizia consensuale*, 78-79. On the limits in which negotiation about procedure should be allowed, cf Cabral (n 13) 358-420.

⁵⁵ Main (n 11) 459-460.

machinery of justice is still needed to avoid unequal bargaining power and prevent unjust settlements and agreements in detriment of weaker parties. This is the case, for example, in consumer disputes.⁵⁶ So maybe ADR should not be seen as an alternative or rival to litigation, but rather understood as *partners* in effective dispute resolution.

6 TYPES OF CONSENSUAL DISPUTE RESOLUTION PROCEDURES

- 45 It is not always easy to describe the differences between types of ADR procedures. Because of their procedural flexibility, statutory frameworks vary intensely among legal systems, as do the roles and functions of the involved persons and many other aspects. Nevertheless, some basic concepts and important issues may be raised here, even as a general overview.

6.1 Negotiation

- 46 Negotiation is part of our day-to-day life,⁵⁷ and its usage for solving problems in human communities dates back to Antiquity.⁵⁸ Furthermore, negotiation is a concept that is not necessarily directed to conflict-solving. But when referring to the dynamics related to a dispute, negotiation can be defined as the method through which the parties to a conflict try to reach a compromise,⁵⁹ an interaction among several agents to achieve an agreement.
- 47 Negotiation is often mentioned as one of the main types of alternative dispute resolution, but is also present at many other ADR schemes as a phase or step, and therefore some scholars do not include negotiation as an autonomous means of dispute resolution, but rather as a stage of other ADR settings.
- 48 Depending on the kind of negotiation, there are different dynamics that guide the procedure, and diverse techniques are used. From that perspective, negotiation can be driven by legal positions or by legal interests. Legal position-oriented negotiation often focuses on *goals*, and the behaviour of the negotiator is concentrated on getting to those goals with minimum effort of time and cost. The closer the outcome is to the pre-established goals, the better the results. This is a very competitive and often depicted as *egocentric* approach to negotiation, in which the objective of the parties is simply to win. So, this type of negotiation applies more aggressive methods of communication,

⁵⁶ In Europe a whole institutional framework to deal with these consumer disputes and their peculiarities is envisaged by Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) n. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ 2013 L 165/63.

⁵⁷ C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd ed, Jossey Bass 2003), 20-22; M C Cavalli and L Quinteros, *Introducción a la gestión no adversarial de conflictos* (Reus, 2010), 79.

⁵⁸ J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (Jossey Bass, 1984), 1 ff.

⁵⁹ Cf P Cunha, *Conflito e negociação* (Asa, 2001), 49.

exploring fears and concerns to persuade the other parties. On the other hand, interest-based negotiation respects an ideal of satisfying one's own interests but without disconsidering the interests of the others involved. The goal is to solve the problem, to terminate the dispute, thus it aims at understanding the underlying necessities of every player in search for common grounds. It is a more cooperative approach to negotiation, applying integrative forms of communication without necessary confrontation.⁶⁰

- 49 Nowadays legal scholars admit that both attitudes may intertwine in negotiation. Negotiators can be cooperative and still aim for the optimal result. Therefore, a mixed approach is not only possible, but in some contexts might even be desirable.⁶¹
- 50 When it comes to analyzing who are the persons involved, parties can negotiate on their own or they can count on the help of a professional trained in negotiation skills (so-called *assisted negotiation*).
- 51 In relation to the types of disputes to which negotiation might be efficient and adequate, one must remember that in almost every conflict, in court or outside the judiciary, negotiation is often present. But when we think of negotiation as an alternative to prevent the dispute from escalating to court confrontation and to avoid unnecessary burdens, it appears to be most effective in cases in which the parties maintain a good relationship and can discuss the issues objectively and peacefully.

6.2 Mediation

- 52 Despite the several variations in defining mediation, it is possible to identify a common core.⁶² Mediation is a consensual type of ADR based on the voluntary participation of the parties, performed with the assistance of one or multiple neutral intermediaries – the mediator(s) – that lack the authority to impose a solution upon the parties and are

⁶⁰ Attorneys have an important role not only in knowing the case and establishing limits to the negotiation, but also in realizing that it might not only be about winning. Sometimes other intermediate solutions might be adequate for their clients. Cf R Mnookin, S Peppet, A Tulumello. *Beyond Winning: Negotiation to Create Value in Deals and Disputes* (Harvard University Press, 2000), 93-94.

⁶¹ R Lewicki, B Barry and D Saunders. *Essentials of Negotiation* (6th ed, New York, 2016), 80-112; Gouveia (n 13) 36-39.

⁶² The Austrian Mediation Act defines mediation: as 'an activity voluntarily entered into by the Parties, where a professionally trained and neutral intermediary (mediator), using recognized methods, promotes the communication between the parties in a systematic manner, with the aim of enabling the Parties to themselves reach a resolution of their dispute'. Art 2 (3) of the United Nations Convention on International Settlement Agreements resulting from Mediation, also known as the 'Singapore Convention on Mediation', defines mediation as 'a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute'. In the European context, it is worth mentioning the European Mediation Directive (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), Art 3.

in charge of facilitating communication between them, with the goal of making parties themselves be involved in and responsible for achieving a solution for their dispute.⁶³

- 53 Mediation can be performed either in or out-of-court,⁶⁴ but there has been an intense debate on whether it could be performed by judges.⁶⁵ Most legal systems do not admit judges as protagonists of mediation, and the decline of this role of the judge has been noted in many jurisdictions since the 1970s.⁶⁶
- 54 However, following the idea of a 'multi-door courthouse', many legal systems began to organize what is known as court-annexed or court-connected mediation.⁶⁷ In this scenario, one of the major debates in legal scholarship nowadays is whether judges themselves or other court officials should take active roles in mediation.⁶⁸
- 55 One of the risks of inserting mediation into courts is the possible contamination that consensual procedures might suffer from the usual confrontation and dualistic approach of litigation settings.⁶⁹ Court-annexed or court-connected mediation is deemed inappropriate, for example, because parties could refrain – by fear or concern – from speaking their minds if they know that the judge will be the one to adjudicate the dispute if it comes to trial.⁷⁰ So it would not be advisable that the judge assigned to adjudicate the case would act also as a mediator in the same matter. This conclusion is consistent with the concept of mediation adopted early in this section, which excludes any adjudicative powers of the mediator. Therefore, any attempts made by the judge of the case to drive parties into settlement could only fit into the category of conciliation, but not mediation. Nevertheless, our definition encompasses mediation performed by

⁶³ Hopt and Steffek (n 7) 11.

⁶⁴ As for the French legal system, cf Cadiet and Clay (n 17) 33 ff, 42-44.

⁶⁵ On the debate of the ideal locus of mediation, J M Bargaen, *Gerichtsinterne Mediation: Eine Kernaufgabe der rechtsprechenden Gewalt* (Mohr Siebeck, 2008); R Greger, 'Gerichtsinterne Mediation auf dem Prüfstand', (2013) *Zeitschrift für Konfliktmanagement*, 9 ff.

⁶⁶ N Picardi, 'Il giudice conciliatore: Costruzione e crisi di un modello', (1980) *Il Giustizia Civile*, 56 ff; M Cappelletti, 'Appunti su conciliatore e conciliazione', in *Scritti in onore di Egidio Tossato* (vol.III, Giuffrè, 1984).

⁶⁷ In comparative perspective, cf K Funken, 'Comparative Dispute Management: Court-connected Mediation in Japan and Germany', (2002) 3 (2) *German Law Journal*, 4; Uzelac (n 25), 31; Jeretina and Uzelac (n 7), 61-62. As for the Japanese legal system cf R Nishikawa, 'Judges and ADR in Japan', (2001) 18 (3) *Journal of International Arbitration*, 363.

⁶⁸ The discussion is immense and goes back for decades. Among many who have dealt with the topic, cf R Bush, 'Staying in orbit, or breaking free: the relationship of mediation to the courts over four decades', (2008) 84 (3) *North Dakota Law Review*, 705 ff; S Press, 'Institutionalization: savior or saboteur of mediation?', (1997) 24 (4) *Florida State University Law Review*, 904-906; M Wolf, 'Normative Aspekte richterlicher Vergleichstätigkeit', (1976) 89 *Zeitschrift für Zivilprozeß*, 262-267.

⁶⁹ C Menkel-Meadow, 'Pursuing settlement in an adversary culture: a tale of innovation co-opted or 'the law of ADR'', (1991) 19 (1) *Florida State University Law Review*, 17-19.

⁷⁰ Gouveia (n 13) 83-87.

judiciary civil servants and/or judges who are *not* responsible for adjudicating the matter.⁷¹

- 56 Anyway, acknowledging that mediation can in some legal systems be performed by court-run structures allows us to classify mediation, when it comes to the public or private nature of the service provided, in *private mediation* (whenever performed by private entities or persons); *court-connected* or *court-annexed mediation* (which is coordinated with court proceedings and can be institutionally detached from the judiciary); and *judicial mediation*, related directly to litigation, performed in courthouses and by the judge or staff personnel of the judiciary.⁷²
- 57 Another issue related to the core definition of mediation is confidentiality, a characteristic many legal scholars argue to be essential to mediation. However, although confidentiality is frequently seen in mediation, it does not seem to be an essential feature of this type of ADR. The utility of confidentiality relies on the idea of guaranteeing an environment free from the fears that parties might have of revealing information that could prove to harm their positions should the case end up in future litigation. To avoid that outcome, many legal systems provide for exclusionary rules and exceptions that permit those involved in mediation to refuse to reveal information in future court procedures. But confidentiality in mediation does not exclude the possibility of private information exchange between the mediator and just one of the involved parties (meeting usually called *caucus*), information that shall be used only if convenient to control the flow of communication and convey sensitive data.
- 58 In legal literature, mediation is often seen as the most prominent form of ADR, usually applicable for any legal relationship to which the parties can dispose of. Examples of cases in which mediation is suitable are those involving contracts for goods and services

⁷¹ One example frequently cited is the German experience of the ‘mediatives Güterichterverfahren’, provided for in § 278 n.5 of the German Zivilprozessordnung (ZPO). In this regard, cf F Steffek, ‘Rechtsfragen der Mediation und des Güterichterverfahrens: Rechtsanwendung und Regulierung im Spiegel von Rechtsvergleich und Rechtstatsachen’, (2013) 21 Zeitschrift für Europäisches Privatrecht, 538; B Hess, ‘Vom Regierungsentwurf zum Mediationsgesetz’, in C Fischer and H Unberath (org), *Das neue Mediationsgesetz: Rechtliche Rahmenbedingungen der Mediation* (Beck, 2013), 17 ff. The possibilities of state-run mediation services exist also in Latin America. In Brazil, parties can opt to attend private out-of-court mediation chambers or file their lawsuit in court and rely on a court-connected mediation center funded by the judiciary. The parties can also appoint a mediator of their choice through an agreement (Art 168 of the Code of Civil Procedure). Cf A Cabral, ‘Mediation und Schlichtung nach brasilianischem Recht’, (2017) 116 Zeitschrift für Vergleichende Rechtswissenschaft, 349-350. In Argentina, there are public out-of-court mediation services, provided for by the Executive (the Ministry of Justice) and the Judiciary, and also private mediation centers. Parties can choose among those types of structure, and they can also appoint a certain mediator by way of an agreement. If there is no agreement to appoint a mediator, one of the parties can appear in court (the competent court for a potential lawsuit) and ask for a mediator to be randomly picked out of a list of official public mediators. Cf Giannini (n 19) 61.

⁷² See these types of mediation in Steffek (n 4) 1163; Hopt and Steffek (n 7) 20 ff. In comparative perspective, the Japanese legal system appears as one of those that rely intensely on state-run ADR, also in procedures in which the judge is the facilitator. Cf Haga (n 15) 257 ff.

and landlord-tenant issues. Factors that should be taken into account when referring a case to mediation are, among others: if a speedy solution is desired; if an outcome other than that possible via court ruling is desirable; the importance of confidential treatment of the subject-matter; if there are more people involved in the conflict than just the parties present in the proceedings, etc.

- 59 On the other hand, some subject-matters are not amenable or are at least regarded as inappropriate for mediation, like those involving incapable people and victims of intra-family violence. Legal systems take different approaches as to permitting mediation of labour rights and inheritance issues.⁷³
- 60 Among the several subject-matters that can indeed be dealt with in mediation, are those disputes related to 'coexistential legal relationships'⁷⁴, especially those in family matters or in legal issues involving relatives, neighbours, friends and any other long-term relationship.⁷⁵ While adjudication tends to distance itself from the parties, mediation targets the social conflict, exploring the parties' life backgrounds. Therefore, departing from the ideal of a 'mending justice', mediation appears as the dispute resolution method that provides a better understanding of the conflict, since the emergence of a dispute does not have to represent a full rupture in the relationship between the parties, but rather a topical and temporary disturbance.⁷⁶ Thus mediation provides longstanding solutions that seem essential in these cases.
- 61 The mediator does not have adjudicatory powers for any decision-making. Therefore, the mediator should act as a neutral subject to the dispute. For the purpose of brokering a settlement, the mediator should facilitate and encourage the parties to move towards an agreement, but should not propose outcomes or comment on the merits.⁷⁷ The role of the mediator is to induce mutual trust and to remind parties that negotiation can be cooperative, fomenting an understanding that will enable parties themselves to come up with a solution.⁷⁸ The mediator should lead parties to a consensual solution,

⁷³ In Argentina, mediation is only applicable in cases in which the subject-matter is that of disposable legal rights. Labour rights and inheritance cases, for example, are deemed indisposable, so mediation in labor matters is not admitted in Argentina. Cf Giannini (n 19) 34.

⁷⁴ M Cappelletti, *Dimensioni della giustizia nelle società contemporanee* (Il Mulino, 1994), 90-93.

⁷⁵ Giannini (n 19) 168.

⁷⁶ Hopt and Steffek (n 7) 12.

⁷⁷ An exception is the state of the regulation in Italy, where the mediator has a more active role, and can suggest outcomes. Nevertheless, since they do not have adjudicative powers, these mere suggestions are not binding. Cf D Dalfino, 'Mediazione, processo, ruolo dei giudici: una questione di bilanciamento', in I Canfora and A Genovese (org), *Risoluzione alternativa delle controversie tra accesso alla giustizia e regolazione del mercato* (Edizioni Scientifiche Italiane, 2018), 84, 94; F P Luiso, 'La "proposta" del mediatore', (2021) 1 *Giustizia consensuale*, 31-38; Polisenio (n 26) 659.

⁷⁸ L Fuller, 'Mediation: Its Forms and Functions', (1971) 44 *Southern California Law Review*, 316, 326.

investigating the underlying interests and stimulating the parties to find their options to put an end to the dispute.⁷⁹

- 62 Contrary to trial courts, where judges ascertain facts and combine them with legal rules, rendering authoritative decisions on the merits, mediation does not intend to produce rule-type determination to parties' behaviour. Mediation is conflict-oriented, directed to persons, and aims at resolving the conflict in a peaceful manner. It is very different from litigation, which is 'rights-oriented' and works with adversarial frameworks. Nevertheless, mediation can be very effective in dispute resolution, even if not imposed by any person in a position of 'authority'.⁸⁰
- 63 Indeed, mediation has several advantages if compared to litigation and to other types of ADR. It can lead to faster resolution with fewer costs while reducing the huge overload that burdens the judiciary.⁸¹ Fewer cases that would end up in court would lead to fewer trials and less congestion of court hearing's calendars, giving judges more time to devote to cases that could not be resolved amicably and thus require their attention.
- 64 There are different kinds of mediation. The procedure can be conducted by a formerly established mediation chamber or center (institutional mediation), or the parties can appoint mediator(s) to act at a single case (*ad hoc* mediation). Some legal systems only admit voluntary mediation, others provide for mandatory mediation. In most jurisdictions, mediation can be carried out both previously and simultaneously (in parallel or incidental) to court procedures.
- 65 It is accurate to say that most of the researched jurisdictions have statutory provisions regulating mediation. In Europe, there has been a long-time tradition involving mediation, and the regulation of the procedure dates back to the 1990s. In the French legal system, mediation was introduced by courts in the 1960s before being validated by the *Cour de cassation* in 1993 as a kind of conciliation (Art 21 Code of Civil Procedure) and then specifically inserted in the CPC in 1996 (Art 131-1). In England, one of the overriding objectives of the Civil Procedure Rules of 1999 was to encourage the parties to use an alternative dispute resolution procedure, and mediation has developed strongly since then. Statutory provisions permit the court to refer the case to the mediation service when the judge deems it appropriate.⁸² Germany enacted in 1999 *Gesetz zur Förderung der außergerichtlichen Streitbeilegung* (statutory provisions for the promotion of alternative dispute resolution) and in 2012 *Mediationsgesetz* (the Mediation Act) was approved. The Austrian regulation (Mediation in Civil Matters Act or *Zivilrechts-Mediations-Gesetz*) came into force in 2004. In Spain, *Ley 5/2012 de*

⁷⁹ This is one of the basic differences between mediation and conciliation, since the conciliator has greater influence over the outcome, she can suggest possible solutions and is even allowed to produce a non-binding conciliation decision. In this sense, Steffek (n 4) 1163; Hopt and Steffek (n 7) 16.

⁸⁰ In this sense, Fuller (n 79) 315.

⁸¹ Steffek (n 14) 845.

⁸² Cf Civil Procedure Rules, Part 1.4 (2) (e) and Part 26.4A, for example.

Mediación en Asuntos Civiles y Mercantiles (the Mediation Statute for Civil and Commercial Matters) was approved in 2012. In Italy, the first Mediation Act of 2010 was pronounced unconstitutional by a decision of the *Corte costituzionale* (Constitutional Court) of 2012, and the current regulation (following statutory provisions of 2013), established a mandatory meeting between parties and the mediator to analyse if there is a prospect of successful mediation proceedings. But the statute also provides that the judge can compel parties to pursue mediation either on public or private mediation services.⁸³

- 66 In Latin America, the developments in regulation were only observed since the mid 2000s.⁸⁴ Comprehensive regulations exist in Brazil, Argentina, Chile, Ecuador and Nicaragua.⁸⁵ In other legal systems to this day there is no regulation for mediation whatsoever.⁸⁶
- 67 Regardless of these existing normative provisions, jurisdictions around the world adopt very different approaches as to the regulation of mediation, with visible cultural and institutional differences.⁸⁷ Some choose to regulate only a general framework, leaving more room for the parties to design and control the proceedings. Other legal systems have detailed norms on procedures, formal requirements, the role of the mediator, the effects of the agreements and settlements obtained in mediation, the intensity of judicial

⁸³ R Caponi, 'Italian Civil Justice System: Most Significant Innovations in the Last Years (2009– 2012)', in O Chase *et alii* (ed), *Civil Litigation in Comparative Context* (West, 2013), 136; Dalfino (n 78) 83-84 and note 18; De Santis (n 26) 182 ff.

⁸⁴ Comparative studies in Latin America have concluded that a regulation implementing this integration between ADR and court litigation is still needed in most jurisdictions in the region. Cf Fandiño, Espinosa and Sucunza (n 27) 101 ff.

⁸⁵ The Brazilian Code of Civil Procedure has an entire chapter about mediation and conciliation, including the cases involving public bodies of the Executive (Art 165 until 175). After the approval of the Code of Civil Procedure, the Brazilian Parliament approved a Mediation Act (Statute n.13.140/2015), regulating many aspects that were already clear tendencies in practice: mediation as a voluntary procedure, parties' choice between in-court mediation or out-of-court private mediators/mediation chambers, duties of mediators, confidentiality of the sessions, etc. Cf F Didier Jr., *Curso de Direito Processual Civil* (vol I, 18th ed, Juspodivm, 2016), 278 ff; Cabral (n 72) 342 ff. In Argentina, a statute from 1995 (Ley 24.573), applicable to federal cases, introduced mediation as a requirement for the admissibility of a claim in court. This statute was later revoked and substituted by the mediation act of the year 2010 (Ley 26.589), which maintained the requirement. Several provinces in Argentina have their own particular regulations, with detailed provisions on many aspects that vary a lot among them. For example, on the professional aspects of the mediator's role and function, in Argentina, most provinces require the mediator to be a lawyer, and those who admit other professionals, require at least a college degree. Cf Giannini (n 19) 31-33.

⁸⁶ This is the case of Colombia and Bolivia, among other countries. Many Latin American jurisdictions still have to go through a cultural change in order to move from a legal rights-adversarial approach to the conflicts to a more consensual and non coercive base of dispute resolution. Only then will mediation become a reality. In this sense, M Vargas, 'Mediación familiar en Chile: La experiencia del Programa de Resolución de Conflictos anexo a Tribunales', in *Resolución Alternativa de Conflictos* (Centro de Estudios Justicia de las Américas, 2001), 70.

⁸⁷ Steffek (n 14) 846.

control and even a discipline of educational requirements and professional obligations of accredited mediators.⁸⁸

- 68 Since mediation frequently relies on the consensus of the interested parties, most legal systems require the personal presence of the parties during the mediation sessions, with few exceptions, for example, if the parties' residence is far away from the sessions' venue, in which case they can be represented by a lawyer.⁸⁹
- 69 Engagement of parties in mediation also varies. Some legal systems such as England and Wales, France, The Netherlands, Singapore, etc, adopt only voluntary mediation, understanding that compelling parties to mediate would be inconsistent with the voluntary nature of the mediation procedure. Those jurisdictions provide opt-out rules, therefore parties are free to step out whenever they want without any court supervision,⁹⁰ and there is no consequence for the parties for not engaging in mediation proceedings.⁹¹
- 70 Other legal systems admit that the judge can mandate that the parties attend to mediation sessions, even if one or all of them are reluctant to do so. In other jurisdictions, parties can only be ordered to present themselves to a mediator to be informed of the aims and procedures available.⁹² The design of mandatory mediation varies across the globe, with several different approaches to regulation.⁹³ Sometimes mandatory mediation exists for every kind of dispute, but other legal systems limit it to a certain type of cases or under a particular claim value. In respect to the initiative to begin procedures, variations in regulation reveal different approaches, from compelling orders to mediate to party-controlled initiation.⁹⁴
- 71 Court mandated mediation is practiced in several legal systems, such as the USA (federal courts), Australia (federal courts), India, China, Japan,⁹⁵ Italy,⁹⁶ and some countries in

⁸⁸ Hopt and Steffek (n 7) 17-19; Steffek (n 14) 847-848.

⁸⁹ This is what happens in Argentina. Cf Giannini (n 19) 42-43.

⁹⁰ Ali (n 6) 272-274.

⁹¹ The European Mediation Directive (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, OJ 2008 L 136/3), applicable to cross-border disputes, allows the court to invite parties to use mediation to reach settlement (Art 5 (1)). But the European model respects the voluntary nature of mediation and does not provide for court orders forcing the parties to mediate. Hopt and Steffek (n 7) 6.

⁹² In France, for example, the Code of Civil Procedure (Art 131-1) provide for a court order of such a nature (décision ordonnant la médiation). Mandatory mediation is also provided for in the USA see, in comparative perspective, Hopt and Steffek (n 7) 12.

⁹³ C Menkel-Meadow, 'Variations in the Uptake of and Resistance to Mediation Outside of the United States', in A Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (vol.8, Brill-Nijhoff, 2015), 197.

⁹⁴ Ali (n 6) 270-271.

⁹⁵ See the comparative study of Ali (n 6) 274 ff.

⁹⁶ In Italy, mediation can be voluntary, but it can also be ordered by the judge. Cf Dalfino (n 25) 39, 41; Polisenio (n 26) 650 ff.

Latin America.⁹⁷ In those legal systems, mediation is usually determined by the judge, who refers to mediation as a dispute that has already reached the courts,⁹⁸ assigning to private mediators the task of facilitating the process.⁹⁹

- 72 Some scholars are optimistic about mandatory mediation and argue that it might be useful to overcome information asymmetries and as a form of integrating the courts into the mediation process. Some also say that providing mediation as a pre-condition to litigate in court reduces the costs of judiciary activities, promotes speedy resolution of conflicts,¹⁰⁰ and might be useful in cases in which parties are simply not aware of mediation possibilities or are not familiar with the costs of the judicial litigation procedures. Nevertheless, some empirical studies showed that voluntary or nudged court mediation have more efficiency and higher percentage of settlement, than mandatory mediation.¹⁰¹
- 73 In other jurisdictions, if not by means of court orders, judges at least 'recommend' that parties should search for mediation. These recommendations are not binding, but act as convincing foment to an amicable resolution.¹⁰²
- 74 Some other legal systems constrain parties to participate in mediation (compulsory attendance to court-annexed mediation sessions), limiting the grounds not to attend to mediation sessions, or establishing adverse consequences (costs and fines/sanctions)¹⁰³ for unjustifiable refusal to participate.¹⁰⁴ Nevertheless, parties would only be obligated

⁹⁷ In Nicaragua, mediation is mandatory as requirement to file a lawsuit (Art 407 Code of Civil Procedure). Cf Fandiño, Espinosa and Sucunza (n 27) 397. In Chile, mandatory mediation is provided for a few subject-matters (for example, family matters, health care, intellectual property rights). On this issue, cf R García and C Fuentes, 'Framing Court System for Case Management Chile', in L Cadet and Y Fu (org), *Papers of the IAPL Tianjin Conference*, 2017, 9; C Riego, 'Solución de conflictos en el sistema de salud, mediación y arbitraje en un contexto institucional', (2019) 33 *Revista Chilena de Derecho Privado*, 46-52; Vargas and Fuentes (n 8) 31-33.

⁹⁸ R Caponi, 'La mediazione nelle legislazioni straniere', in H Zaneti Jr. and T Xavier Cabral (org), *Justiça Multiportas* (Juspodivm, 2016), 767 ff.

⁹⁹ Ali (n 6) 271.

¹⁰⁰ Hopt and Steffek (n 7) 24-25.

¹⁰¹ Of course, cultural and structural factors (external to the legal framework) might also interfere with the overall results, as acknowledges Ali (n 6) 277 ff.

¹⁰² Hopt and Steffek (n 7) 26; Chong and Steffek (n 5) 451; Uzelac (n 25), 27.

¹⁰³ This is the solution in Brazil. In legal literature, cf Câmara (n 20) 199-200; Didier Jr. (n 86) 631 ff; E Cambi, 'Comment', in T Wambier, E Talamini, F Didier Jr. and B Dantas (org), *Breves comentários ao novo Código de Processo Civil* (RT, 2015), 875 ff. The possibility of fining the party reluctant to participate or in case of any non-cooperative behaviour is also provided for in the Italian legal system. Cf Dalfino (n 78) 84-85.

¹⁰⁴ Ali (n 6) ff.

to attend and negotiate in good faith, since there is no legal duty obligating them to reach settlement.¹⁰⁵

- 75 Many legal systems do not have an extensive regulation on agreements to mediate (those establishing previous mediation as a requirement to litigating in court). Some of the exceptions are Poland,¹⁰⁶ Brazil,¹⁰⁷ Bosnia and Herzegovina.¹⁰⁸
- 76 As to the formalities of the agreement, some jurisdictions require written form for the mediation agreement to be enforceable.¹⁰⁹ Some others admit that an oral agreement would be binding and enforceable. Most legal systems derive the consequences of non-compliance to the agreement from the general provisions of both substantive and procedural law, following that litigation or arbitration procedures should be dismissed, and/or attribution to the non-compliant party of costs of adversarial proceedings. In France, case-law established that agreements to mediate are *prima facie* enforceable, and parties must proceed to mediation before exploring any other options to dispute resolution, such as arbitration or litigation.¹¹⁰ This seems to be also the case in Germany, where claims cannot be filed in court before the attendance of the parties to a mediation session.¹¹¹
- 77 As for enforcement of the agreements obtained in mediation, and the judicial control over the procedure, regulations are also very different. In most jurisdictions, however, once settlement is reached, it is enforceable without any need for ratification or court approval,¹¹² and there is little or no room for judicial discretion or oversight about the

¹⁰⁵ In comparative perspective, cf Steffek (n 14) 851. For the Italian legal system, cf Polisenio (n 26) 656. In Brazil, the Mediation Act of 2015 provides that mediation is mandatory. But the ordinary proceeding provided for at the Code of Civil Procedure starts with a mediation or conciliation hearing to attempt to solve the dispute through settlement (Art 334). The attendance of the parties at the mediation hearing is mandatory. If they do not attend, they can be fined. Except for family matters, in which the hearing will take place no matter what, the judge is allowed not to schedule the mediation hearing is only when all parties to the dispute have already expressed in writing their unwillingness to settle.

¹⁰⁶ Hopt and Steffek (n 7) 30.

¹⁰⁷ Art 168 (Code of Civil Procedure)

¹⁰⁸ Uzelac (n 25), 28-29, 36 ff.

¹⁰⁹ This requirement is seen in the EU Mediation Directive, for example. Speaking of England and Wales, cf Andrews (n 54), 95-96.

¹¹⁰ Cour de cassation, chambre mixte, 14 Feb. 2003, no 00-19.423: 'Il résulte des articles 122 et 124 du nouveau Code de procédure civile que les fins de non-recevoir ne sont pas limitativement énumérées ; que, licite, la clause d'un contrat instituant une procédure de conciliation obligatoire et préalable à la saisine du juge, dont la mise en oeuvre suspend jusqu'à son issue le cours de la prescription, constitue une fin de non-recevoir qui s'impose au juge si les parties l'invoquent'; loosely translated: 'It follows from Articles 122 and 124 of the New Code of Civil Procedure that there is no exhaustive list of grounds for dismissal; that a contractual clause instituting a compulsory conciliation procedure prior to referral to the court, the implementation of which suspends the running of the limitation period until its conclusion, constitutes a ground for dismissal which is binding on the court if the parties invoke it'. In legal literature, see K Deckert, 'Mediation in Frankreich' in K J Hopt and F Steffek (eds), *Mediation: Rechtstatsachen, Rechtsvergleich, Regelungen* (Mohr Siebeck, 2008), 196.

¹¹¹ Chong and Steffek (n 5) 463-464.

¹¹² For the Italian legal system, cf De Santis (n 26) 233-234.

procedure designed by the parties.¹¹³ Some legal systems require the approval of the agreement in court,¹¹⁴ and others give agreements similar enforceability effects as every other contract or legal transaction. If the agreements obtained in mediation are ratified in court (either as a requirement for their validity or voluntarily taken to the judge by the parties), these agreements usually have similar effects as court rulings ('consent judgment').¹¹⁵

6.3 Conciliation

- 78 Conciliation is the method of dispute resolution through which parties count on a third person, called conciliator, who acts as a facilitator helping the parties do reach settlement. Although there is intense debate on the issue, it is the general understanding in some legal systems that conciliators could have a more active role than the mediator. Dealing with the conflict objectively, they would be allowed to suggest possible outcomes.¹¹⁶
- 79 This type of dispute resolution procedure is suitable to conflicts in which the parties do not have a long-lasting relationship (vg episodical commercial trades, traffic accident cases, sport, energy, intellectual property, insurance, or medical disputes). Conciliation may also be applicable to cases where the legal rights in play cannot be waived or disposed of by the parties in total, thus sometimes conciliation can take place when disputes that cannot be solved in mediation.

¹¹³ Japan is an exception, since the judge can control fairness and justice of the settlement. Cf Nishikawa (n 68) 366-367.

¹¹⁴ In Argentina, the judicial control over agreements and settlements obtained in mediation varies depending on the province. Some provinces do not require any ratification of the agreement by the court; some others limit that requirement to certain kinds of dispute (such as those referring to labour rights and legal situations involving minors and handicapped people); and there are provinces in which each and every settlement must be ratified in court. This has an impact on the enforceability and execution of those agreements. Cf Giannini (n 19) 44-50.

¹¹⁵ Nishikawa (n 68) 364.

¹¹⁶ The differences between the roles of the mediator and the conciliator vary quite a bit from a comparative perspective. Cf Hopt and Steffek (n 7) 12, 16, 57-58.

- 80 Expressly provided for in statutory norms in most jurisdictions,¹¹⁷ conciliation is possible during court proceedings or outside the judiciary and can usually be conducted by the parties themselves or with the aid of a third person.
- 81 Unlike mediation, most jurisdictions admit conciliations led by the judge and/or by court officials.¹¹⁸ This is the case in Italy and Croatia,¹¹⁹ in Japan (whose legal system has a longtime tradition of conciliation conducted both in and out-of-court¹²⁰), and also in some jurisdictions in Latin America.¹²¹

¹¹⁷ For example, judicial conciliation in France is regulated in statutory provisions for quite a long time, Extrajudicial conciliation methods, however, are regulated since 1978 and both forms are now provided for at the *Código de Procedure Civile* (Art 128-131 for judicial conciliation; Art 1536-1541 for extrajudicial conciliation). The role of the conciliator in France is also disciplined at the Justice Organization Code (*Code de l'organisation judiciaire* - Art R131-12). Cf Cadiet and Clay (n 17) 31-32, 40-42. In Latin America, we see examples of conciliation statutory regulation regarding conciliation in many legal systems. In Peru, conciliation is formally regulated and can encompass both private conflicts and disputes involving public administration. The Code of Civil Procedure (Art 324) allows parties to choose the center in which they will try to conciliate. So conciliation can be conducted outside the courts in private chambers. But whenever this choice is not made by the parties, the judge will set a date for a conciliation hearing and the judge will function as a conciliator. If a settlement is reached, it can be ratified by the judge and will have the same force as if it were a judicial sentence (*res iudicata*, as provided for in Art 327 of the Code of Civil Procedure). In 1997 the country enacted a Conciliation Act (Ley 26.872, with modifications by the legislative decree n.1071) that disciplines conciliation between parties, regulating both judicial and extrajudicial conciliation. The statute provides in Art 18 that the written transcript of the conciliation obtained in a hearing constitutes an enforceable document (*titulo ejecutivo*), in accordance with Art 688.3 of the Code of Civil Procedure. Colombia's Conciliation Act was first enacted in 1998 (Decreto n.1818) and later modified in 2001 (Ley n.640), established with very few exceptions that out-of-court conciliation attempt is a mandatory requirement for filing lawsuits in court. In 2012 similar provisions were incorporated into the Code of Civil Procedure (Codigo General de Proceso, Art 621 §1°). In legal literature, cf L M Reyes, 'Comentarios sobre las reformas introducidas por el nuevo Código General del Proceso en materia de familia', in M Vásquez (ed). *Temas Actuales en Derecho Procesal y Administración de Justicia: Estudios críticos y comentarios al Código General del Proceso*. (Universidad del Norte, 2014), 247-248.

¹¹⁸ Vargas (n 87) 71-72.

¹¹⁹ In Italy, conciliation can be performed in court and by the judge, and they can make proposals suggesting outcomes (Art 185, 185-bis of the Code of Civil Procedure). Cf Dalfino (n 78) 90-91; Polisenio (n 26) 659. Cf S Dalla Bontà, 'Questioni vecchie e nuove in tema di conciliazione giudiziale', (2014) 1 Il Giusto Processo Civile, 219 ff. The Croatian Conciliation Act of 2011 allows 'judges-conciliators' to conduct the proceeding, but they cannot act as adjudicators in the same case (art 16). Cf A Uzelac, 'Croatia (Croatian National Report)', in J. Paulsson, P Sanders and A J van der Berg (ed), *International Handbook on Commercial Arbitration*, Suppl. 109 (Kluwer Law, 2020), 57-60.

¹²⁰ Nishikawa (n 68) 362. Indeed, in Japan the judge has an important role in conciliation, either conducting solely the procedure or integrating a 'conciliation committee'. Haga (n 15) 273. For references on the historical tradition of the Japanese legal system, cf Y Taniguchi, 'How much does Japanese civil procedure belong to the civil law and to the common law?', in J Walker and O Chase (org), *Common law, civil law and the future of categories* (Lexis Nexis, 2010), 210-211; L Cadiet, T Clay and E Jeuland (coord), *Médiation et arbitrage. Alternative Dispute Resolution: Alternative à la justice ou justice alternative? Perspectives comparatives* (Litec, 2005), 153-160.

¹²¹ For the Chilean legal system, cf Vargas and Fuentes (n 8) 34-36. For Bolivia, see Fandiño, Espinosa and Sucunza (n 27) 252, stating that in Bolivia conciliation can be performed by judges during the judicial process (Art 234 of the Code of Civil Procedure).

- 82 As for the judge's control over conciliation, when performed out of court, agreements obtained in conciliation are usually binding and enforceable, and in some jurisdictions, whenever negotiated in court during judicial proceedings, settlements obtained in conciliation procedures have the force of a consent judgment and are subject to *res iudicata* rules.¹²²

6.4 Other Types of ADR

- 83 As highlighted before, the most debated consensual types of ADR are negotiation, mediation and conciliation. But the attention drawn to these methods does not entail a complete list and does not represent an exhaustive typology. In fact, there is a large variety of other consensual dispute resolution procedures that are also grouped under the label of ADR in many jurisdictions, such as mini-trial, binding advice, ombudsman procedures, early neutral evaluation, expert opinion, dispute boards, collaborative law and several other variants.¹²³
- 84 In the comparative perspective, different legal systems take variable approaches in regulating these other ADR procedures, and most of them do not present a common normative framework. ADR settings are usually flexible and there is a very thin line separating different procedures. For that reason, sometimes it is hard to find a functional equivalent to compare, which makes it difficult to describe most of them as a unique conceptual phenomenon.¹²⁴ Anyway, due to the importance that some of them have acquired both in theory and in practice, a few general remarks might be useful.

6.4.1 Collaborative Law

- 85 The type of ADR known as *collaborative law* is a form of assisted negotiation and represents, from a structural perspective, a 'mediation without mediator'. This method wishes to offer an out-of-court procedure for a peaceful solution of conflicts without the presidency or help of a central figure.¹²⁵
- 86 Collaborative law unfolds in a procedure called 'four-way settlement meetings', direct negotiations carried out by the involved parties and/or by their attorneys or representatives.¹²⁶ In fact, it does not have to be necessarily an interplay between four

¹²² In Japan, cf Haga (n 15) 283. In Latin America, this is the case for example in Brazil (Art 487, III, 'b', of the Code of Civil Procedure), Colombia, (Art 20 *Ley* n.640/2001) and Bolivia (Art 237 of the Code of Civil Procedure). Just a few jurisdictions require that agreements obtained in conciliation have to be approved by the judge. In Latin America, one of these exceptions is the legal system of Honduras. Cf Fandiño, Espinosa and Sucunza (n 27) 303, 380.

¹²³ Cf M Virgós, 'Procedimientos alternativos de resolución de controversias y comercio internacional', (2007) 11 *Anuario de la Facultad de Derecho*, 84.

¹²⁴ On the difficulties in comparing and differentiating several types of ADR, cf Hopt and Steffek (n 7) 15.

¹²⁵ M Engel, *Collaborative law: Mediation ohne Mediator*, (Mohr Siebeck 2010), 80 ff.

¹²⁶ S Blake, J Browne and S Sime. *The Jackson ADR Handbook* (Oxford University Press, 2013), n. 2.16, 14.

subjects because lawyers interact among them and parties often do the same, in what could be depicted as 'parallel dialogues'.¹²⁷

- 87 In this type of ADR, if the negotiation fails to reach a consensual outcome, parties cannot hire the same lawyers for later stages of litigation or arbitration, and the attorneys who took part in the negotiation have to recuse themselves to defend their clients in court.¹²⁸ This occurs due to the so-called 'disqualification clause', which generates incentives to the lawyers to commit themselves to obtain settlement. The disqualification clause also prevents a secret agenda of the parties' representatives, sometimes hiding conflicts of interests depending on the form of payment of their fees.¹²⁹
- 88 In collaborative law settings, the impediment to represent the party in future litigation is the reason why a legal counselor may act simultaneously as a lawyer and as one of the conductors of the negotiation,¹³⁰ functioning as a facilitator who should look for the efficiency and success of the procedure.
- 89 During the proceedings, parties have to commit to negotiate in good faith¹³¹ and not to threaten the other parties with a possible lawsuit, because this aggressive behavior tends to undermine cooperation and a peaceful solution, as it can make the conflict escalate (even irrationally). It can also be counter-productive because it consumes resources and increases costs, time and energy of everyone involved.¹³²
- 90 Collaborative law procedures have been often used in family law, inheritance disputes, labour conflicts, and commercial/economic cases. Some companies are beginning to adopt this method also to solve in-house disputes.¹³³

¹²⁷ J Lawrence, 'Collaborative lawyering: a new development in conflict resolution', 17 Ohio State Journal on Dispute Resolution (2002), 434; P Tesler, *Collaborative law: achieving effective resolution in divorce without litigation* (2nd ed, American Bar Association, 2008), 81.

¹²⁸ Engel (n 125) 77-78; Tesler (n 127) 253, 257.

¹²⁹ J Lande, 'Possibilities for collaborative law: ethics and practice of lawyer disqualification and process control in a new model of lawyering', (2003) 64 Ohio State Law Journal, 1352-1353, 1375. Engel (n 125) 198-220, 238 ff. There is debate on whether this clause is absolutely necessary or not, but it appears to be the prevailing understanding that it would be fundamental to qualify the negotiation procedure as collaborative law. In fact, there is another similar ADR method (named *cooperative law*), that works almost the same way but does not entail a *disqualification clause* neither the prohibition of judicial threats. Engel (n 125) 181 ff. Debating if mediation would be compatible with the attorney's function in a legal system, R Greger, *Mediation und Schlichtung – Anwaltssache?* in M Buschbell-Steeger, F Jansen, G Leverkinck, H Schmidt (ed), *Festschrift für Karl Eichele* (Nomos, 2013), 182 ff.

¹³⁰ B Winick, 'Therapeutic jurisprudence and the role of counsel in litigation', (2000) 37 (1) California Western Law Review, 105 ff; J Chanen, 'Collaborative counselors: newest ADR option wins converts while suffering some growing pains', (2006) 92 (6) American Bar Association Journal, 52-57.

¹³¹ Schwab (n 14) 358.

¹³² Kriesberg (n 20) 266.

¹³³ As observes Andrews (n 33) 20-32.

- 91 One major advantage of this type of ADR is the lower cost if compared to mediation. And since the role of the lawyers is different, third-party interests tend to be taken more into consideration (eg, children's rights in family disputes between married people).¹³⁴
- 92 The design of this kind of procedure is defined by agreement of the parties, who can adapt the proceeding to their needs and goals. Therefore, formalities are flexible.
- 93 Not many legal systems regulate collaborative law in statutory provisions. Although with roots in the common law tradition, clearly inspired by the law and practices in Canada (especially Québec) and the USA,¹³⁵ this technique has also attracted attention in the civil law tradition.¹³⁶
- 94 One exception to the normative framework seems to be the French legal system, which provides for a 'covenant for a participative procedure', an agreement made by the disputants whose solution has not been assigned to a judge or arbitrator yet, by which the parties commit to act jointly to negotiate in good faith the solution of their dispute.¹³⁷
- 95 In France, the covenant for a participative procedure only applies to waivable interests. The agreement has to be signed in written form before the lawsuit is filed, detailing the issues at dispute, the necessary documents for the discussion, and the form through which they will be exchanged between the parties.¹³⁸ Throughout the negotiations, the parties' lawyers must be present to conduct the proceedings.¹³⁹ If parties so want, they can be also assisted by technicians or experts.¹⁴⁰ Once a settlement is reached, they can choose to take it to the judicial approval.¹⁴¹
- 96 As long as the proceeding lasts, parties cannot access courts and any claim should be dismissed. Exceptions are cases of urgency or if the counterpart did not comply, refusing to submit oneself to the participative procedure.¹⁴² In more complex negotiations – those that take longer to come to an end – parties can separate the procedure in stages,

¹³⁴ B Polisenio, 'Negoziazione assistita e accordi 'amministrativi' in materia di separazione e divorzio', (2015) 1 Il Giusto Processo Civile, 191-192. In the same sense, Engel (n 125) 96.

¹³⁵ C Fairman, 'A proposed model rule for collaborative law', (2005) 21 Ohio State Journal of Dispute Resolution, 73-122; Lande (n 128) 1352-1353, 1375; Schwab (n 14) 358.

¹³⁶ E Bonnet, 'La convention de procédure participative', (2011) 3 Procédures, 11; A Cabral and L Cunha, 'Negociação direta ou resolução colaborativa de disputas', (2016) 259, Revista de Processo, 471-489.

¹³⁷ This type of dispute resolution was introduced in the French Civil Code in 2010 (Articles 2062-2068), and has some aspects regulated in the *Code de Procédure Civile* (Art 1542-1564). Cf L Cadiet, 'Le développement de la procédure participative', (2020) 5 Procédures, 17-22; Cadiet and Clay (n 17) 35-36; O Mattos, 'Une nouveauté: la convention de procédure participative', (2011) 1 Cahiers de Droit de L'entreprise, 10.

¹³⁸ C Peulvé, 'La dimension processuelle de la procédure participative', (2012) 76 Petites Affiches, 6-7.

¹³⁹ Cadiet and Jeuland (n 50) 303-304.

¹⁴⁰ Peulvé (n 139) 8.

¹⁴¹ S Sauphanor, 'La convention de procédure participative: aspects pratiques', (2011) 1 Gazzete du Palais, 24.

¹⁴² Cadiet and Jeuland (n 50) 304.

between which they are allowed to drop the negotiations and go to court.¹⁴³ Nevertheless, the agreement must have a fixed term, in which the procedure must end. Therefore, it has been called ‘pact of non-aggression in a fixed term’.¹⁴⁴

- 97 The most important difference between the French *procédure participative* and the methods of collaborative law practiced in the common law circle is the role and duties of the lawyers. In this particular procedure in France, they are allowed to represent the parties in court if the negotiation is unsuccessful.¹⁴⁵
- 98 Inspired by the French legal system, in 2014 Italy also inserted in statutory law a similar form of lawyer-assisted negotiation. The *covenant for assisted negotiation* is a consensual arrangement between the parties agreeing to engage in negotiations in good faith and with loyalty. When parties contractually commit themselves to that type of negotiation, they cannot go to court without resorting first to the assisted negotiation procedure.¹⁴⁶ The agreement to engage in this collaborative negotiation must have written form and the parties have the obligation to keep confidentiality.¹⁴⁷

6.4.2 Dispute Boards

- 99 Dispute boards are panels, committees or counsels created to solve conflicts that might arise from a particular contract. Their members are appointed by an agreement of the interested parties and panels are formed even before the performance of contractual obligations initiates.¹⁴⁸ A dispute board usually has standing activity (full-term model): they are appointed since the beginning of the works and are on permanent stand-by throughout the entire contract performance.
- 100 This type of ADR was developed in the USA in the area of construction contracts to avoid the long duration and high costs of judicial lawsuits and the growing complexity and extended duration of arbitration proceedings in this field. Construction and infrastructure were the areas of the emergence of such ADR because those kinds of

¹⁴³ Sauphanor (n 141) 23.

¹⁴⁴ H Poivey-Leclercq, ‘La convention de procédure participative: ‘un pacte de non agression à durée déterminée’, (2011) 4 JCP La Semaine Juridique, édition générale, 154.

¹⁴⁵ Cadet and Clay (n 17) 7-9.

¹⁴⁶ Art 2 and 3 of the legislative decree n.132/2014, later converted into statute 162/2014. This agreement does not impede lawsuits in court in consumer matters. In legal literature, cf Dalfino (n 26) 4-5.

¹⁴⁷ Art 2, comma 4, and Art 9, of the legislative decree n.132/2014, later converted into statute 162/2014. Cf G Liuzzi, ‘La procedura di negoziazione assistita da uno o più avvocati’, (2015) 1 Il Giusto Processo Civile, 1-31; Polisenò (n 134) 197.

¹⁴⁸ In practice, dispute boards are formed of usually three, but there is no absolute formula. If only one person is designated, then it could be called *dispute expert*. Cf V Capasso, ‘Dispute boards: what if they were multi-tiered arbitration?’, (2018) LIV (3) Rivista di diritto internazionale privato e processuale, 715, note 18. All three members are frequently chosen by consensus among the parties. An exception is the Italian legal system, where statutory provisions allow each party to choose one and those members will elect the third one. Cf C Costanzi, ‘Dal dispute board al collegio consultivo tecnico: profili comparatistici, diacronici e critici della semplificazione ‘all’italiana’’, (2021) XXI (2) AmbienteDiritto.it, 17-18.

contracts have complex obligations and long duration to be performed. But dispute boards are nowadays usually set to solve conflicts not only in contracts of infrastructure¹⁴⁹, but also in cases regarding investments, long-term supply contracts and controversies in complex commercial disputes.

- 101 Some of the advantages of this type of ADR are the costs (usually lower if compared to arbitration), and also the specialization of board members in the subject-matter. Moreover, since the boards are formed even before the commencement of contract performance, members have familiarity with the specific project and will follow the trade or deal from its closing to the full execution of the contractual obligations.¹⁵⁰ Thus, whenever called, they can establish dialogue and respond to the controversy very fast, providing solution that allows adequate and prompt contract performance even if some disputed issues need further adjustments, or may turn out to be subject-matter of future arbitration or litigation procedures.¹⁵¹ Sometimes upon consultation of the dispute board, the controversial issue does not even escalate into a true dispute,¹⁵² so this structure is deemed to be very effective also in terms of conflict avoidance.¹⁵³
- 102 The major advantage, though, is the permanent or standing activity of the dispute boards during contract performance. Board members often know the contract very well and, whenever called to solve an issue or point of disagreement, are ready to deliver opinions or decisions for the disputed issues in a timely and cost-effective manner. Therefore, the costs of constantly maintaining the board during the execution of construction, for example, ultimately pay off. Every topic of controversy is solved almost in real time by the board, preventing disputed issues from piling up – which could escalate the conflict – and also avoiding the stay of the contracted obligations.
- 103 Since the dispute board is constantly on standby, this tends to pressure parties not to take any dispute to the board, but only those with solid grounds, in order not to lose credibility with the panel.
- 104 Payment-related issues, applicable law, jurisdiction, the proper law of the contract, *lex fori* debates, evidence admissibility and enforceability are some of the issues usually referred to the dispute board first hand. These issues sometimes would not be taken to

¹⁴⁹ G-S Hök, 'Dispute Adjudication in Civil Law Countries – Phantom or Effective Dispute Resolution Method?', (2011) 28 (4) International Construction Law Review, 422-426.

¹⁵⁰ G Paredes, 'Dispute Boards y Arbitraje en Construcción: ¿Compiten o se Complementan?', in R Hernández (coord), *Dispute Boards en Latinoamérica: Experiencias y Retos* (Pontificia Universidad Católica de Peru, 2014), 151.

¹⁵¹ It has also been noted that dispute boards decisions are often admitted as evidence in future adjudicative procedures, such as arbitration. Cf D Figueroa, 'Dispute Boards for Infrastructure Projects in Latin America: A New Kid on the Block', (2017) 11 (2) Dispute Resolution International, 154.

¹⁵² Figueroa (n 150) 152.

¹⁵³ M Padovan, 'In merito al collegio consultivo tecnico, alcuni spunti comparatistici', (2017) 1 Rivista Trimestrale degli Appalti, 9; Capasso (n 149) 713.

arbitration right away, and if so, this could split the conflict into multiple related procedures, which is also seen as inefficient.

- 105 The structure and competences of dispute boards are highly flexible, and the parties are allowed to choose the format and the duration and proceedings that most fit the (actual or possible) debates over the contract. Dispute boards have a contractual base, and it is up to the parties to provide the kind of control of the board's conclusions. They can choose, for that purpose, arbitration or litigation, accessible only after the board has issued their opinion or decision. If any lawsuit is filed in court or any arbitration procedure is initiated prior to that, it should be dismissed.
- 106 The goal of dispute boards is to produce effects ranging from a neutral expert assessment/evaluation and arbitration proceedings. Dispute boards can be designed to make binding decisions (then called *dispute adjudication boards* - DAB)¹⁵⁴, or only to make recommendations, publishing non-binding opinions (so-called *dispute review boards* - DRB)¹⁵⁵, that can turn into binding determinations if the parties do not present a 'notice of dissatisfaction' within a default term.¹⁵⁶ But the boards can also cumulate both activities of recommending and adjudicating (*combined dispute boards* - CDB)¹⁵⁷, depending on the powers conferred to the panel by the parties.
- 107 Note that this is a huge difference between this kind of ADR and mediation/conciliation, because the boards actually issue an opinion (whether binding or not) on the merits of the disputed issue.¹⁵⁸ In fact, since dispute boards make formal statements and determinations assessing who is right regarding a certain issue of law or fact, their goal is to push into an ideal solution of that dispute, whereas in mediation or conciliation parties might find a common ground in order to settle, renouncing to something they might be entitled to.
- 108 However, although the dispute boards make determinations as to some disputed issues, even when binding, their decisions are not expected to be enforceable in court as if they

¹⁵⁴ Articles 4, n.1, and 5, n.1 of the International Chamber of Commerce's Dispute Board Rules.

¹⁵⁵ Art 4, n.2 of the International Chamber of Commerce's Dispute Board Rules defines the dispute review board (DRB) as the kind of dispute board in which the committee has merely a consultive function, incapable of issuing binding decisions. In a similar sense is Art 3, n.1 of the regulation of the Chartered Institute of Arbitrators. Depending on the institution, sometimes regulations provide that if the parties do not appeal the recommendation of the dispute review board, the recommendation could acquire binding force.

¹⁵⁶ Costanzi (n 148) 8.

¹⁵⁷ Art 6, n.1, of the International Chamber of Commerce's Dispute Board Rules.

¹⁵⁸ Another difference that is pointed out in legal literature is that the board should not consult individually with one of the parties (by contrast to what happens in mediation). About the differences between the several kinds of dispute boards, cf Padovan (n 153) 9.

were arbitral awards.¹⁵⁹ In case of non-compliance, after the decision of the board has been rendered, it might still be necessary to resort to arbitration or court litigation.¹⁶⁰

- 109 As previously highlighted, although developed in the common law tradition, other civil law jurisdictions have been adhering to this kind of dispute resolution method, especially after the publication of a specific regulation by the International Chamber of Commerce.¹⁶¹⁻¹⁶²

¹⁵⁹ Capasso (n 149) 719.

¹⁶⁰ On the enforcement of dispute boards decisions, cf C Chern, *Chern on Dispute Boards: Practice and Procedure* (Routledge, 2015), 407 ff; N Gould, 'Enforcing a Dispute Board's Decision: Issues and Considerations', *International Construction Law Review*, 2012, 442 ff. Of course, flexibility in designing ADR allows parties to assign the board powers to resolve the dispute as arbitrators, even if it is not the standard form used in practice. Regarding this possibility, cf V Capasso, 'About the relationship between dispute board and emergency arbitrator', (2019) XXIX (1) *Revista dell'Arbitrato*, 181.

¹⁶¹ In Italy, Statute n.120/2020, converting a previous governmental decree whose goal was to simplify contractual proceedings due to the COVID-19 pandemic, established the possibility of forming a *collegio consultivo tecnico* ('consulting technical committee'), which will usually be voluntary but can also be obligatory in contracts involving large sums (until the end of 2021). These committees were inspired by the dispute boards of the common law but actually have a different format. See in this regard, I Lombardini, 'Riflessioni sul nuovo Collegio Consultivo Tecnico negli appalti pubblici (Art 6 del d.l. 16 luglio 2020, n.76, cd.'Decreto Semplificazioni', convertito con modifiche in l.11 settembre 2020, n.120', (2020) 4 *Rivista dell'arbitrato*, 846, 849-854. For example, the determinations of the committee are not adjudicative, just consultive, they are viewed as amendments to the contractual obligations, so they have a contractual nature, have equivalent effects as a settlement and are subject to default. Costanzi (n 148) 2-3, 25. For other references in the European legal literature, see C Seppälä, 'The new FIDIC provision for a dispute adjudication board', (1997) 8 *Le droit des Affaires Internationales*, 967; P Malinvaud, 'Réflexions sur le Dispute Adjudication Board', in *Le droit privé français à la fin du XXe siècle* (Litec, 2001), 241 ff; C Koch, 'Nouveau règlement de la CCI relatif aux Dispute Board', (2004) 15 (2) *Bulletin de la Cour internationale d'arbitrage de la CCI*, 10; L Demeyere, 'Alternative dispute resolution. Dispute boards and the new rules of the International Chamber of Commerce (ICC)', (2005) 1 *Journal of International Dispute Resolution*, 23; V Mahnken, 'Why International Dispute Settlement Institutions Should Offer Ad Hoc Dispute Board Rules', (2006) 23 *International Construction Law Review*, 433; F Laugwitz, *Einvernehmlicher Streitbeilegung internationaler Wirtschaftsstreitigkeiten unter der ADR-Regeln der Internationalen Handelskammer* (Mohr Siebeck 2016), 81. In Japan, the Construction Business Act provides for a possible screening panel for solving disputes in construction contracts related to issues such as defective buildings, contractual default, non-payment, etc. Cf Haga (n 15) 258. Statutory provisions do not provide for the same format as the dispute boards usually have, but it shows the concern to establish specific forms of dispute resolution procedures for construction and infrastructure contracts.

¹⁶² This type of ADR has attracted attention in some jurisdictions in Latin America, such as Peru, Chile and Brazil. In other jurisdictions in Latin America, the issue is hardly ever seen in legal literature: Figueroa (n 150) 162 ff. In Brazil, there are several academic studies about dispute boards: A Wald, 'Dispute resolution boards: evolução recente', (2011) 30 *Revista de Arbitragem e Mediação*, 139-151; M Machado, 'A aplicabilidade dos dispute boards no Regime Diferenciado de Contratações Públicas', (2018) 110 (1), *Revista de Doutrina e Jurisprudência*, 12-31; R Ranzolin, 'A eficácia dos dispute boards no direito brasileiro', (2017), 52 *Revista de Arbitragem e Mediação*, 197-219. But their use in practice has just recently begun to grow with statutory provisions since 2021 at the federal level that allow their use for contracts with the public administration.

7 ONLINE DISPUTE RESOLUTION

- 110 For decades we assumed that dispute resolution would require face-to-face interactions and personal meetings, whether in or out of court. But with time, the growth of e-commerce brought more and more transactions online, followed by a large number of conflicts and disputes arising from them. Handling and solving those disputes, sometimes involving parties located in different countries, called out for methods of conflict resolution that would respond with speedy, reliable and cost-efficient proceedings. The offline face-to-face litigation procedures and even the more flexible and private traditional alternative dispute resolution instruments could not provide adequate settings. Therefore, platforms of dispute resolution services started to be integrated into online marketplaces. If some disagreement would be originated from a purchase online transaction, for example, computer software would channel that dispute to negotiation, mediation, or other redress options.¹⁶³
- 111 This context provided the perfect backdrop for the development of what is understood as *online dispute resolution* (ODR). The legal debate over the subject began in the 1990s, and the primitive stages of the development of ODR services were dedicated to those legal transactions that appeared solely online.¹⁶⁴ In this ‘first generation’ of ODR, the goal was to facilitate communications through the Internet,¹⁶⁵ and the factor that attracted the use of ODR was the type of conflict, usually limited to simple cases of online disputes.
- 112 More recently, however, ODR began to be employed to offline disputes¹⁶⁶, not necessarily related to e-commerce and also applied in complex cases. So, the different online dispute resolution tools are now serving a large variety of conflicts, amplifying the range of ODR.
- 113 The challenge of depicting a comprehensive scenario about ODR is daunting because of a multitude of practices and norms that vary widely around the world and tend to change

¹⁶³ This was seen as absolutely essential to the development of e-commerce, because if websites do not provide alternatives to swiftly and quickly solving the dispute, they tend to lose trust over time, and users will move to another negotiation/purchase environment where these services are provided for.

¹⁶⁴ E Katsh and J Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, 2001), 50.

¹⁶⁵ G Rühl, ‘Digitale Justiz, oder: Zivilverfahren für das 21. Jahrhundert’, (2020) 75 (17) *Juristen Zeitung*, 811-812.

¹⁶⁶ For further development, Cabral (n 16); E Katsh, ‘ODR: A Look at History. A Few Thoughts About the Present and Some Speculation About the Future’, in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 21-25. In the same sense, Dalla Bontà points out that the ODR platform launched by the EU for consumer disputes can be applied to offline disputes. S Dalla Bontà, ‘Una giustizia "co-esistenziale" online nello spazio giuridico europeo? Spunti critici sul pacchetto ADR-ODR per i consumatori’, (2021) 1 *Giustizia Consensuale*, 207.

rapidly as technology advances.¹⁶⁷ In the following topics, the goal is to elaborate on the concept of ODR, its main characteristics, types and methods, the differences between ODR and traditional ADR instruments, the benefits and disadvantages of ODR, the concerns about procedural fairness and some foreseeable trends for the future.

7.1 Concept of ODR. Traditional ADR and ODR. Private and State-run ODR. ODR and Online Courts

- 114 There are very different approaches and definitions on the scope and on the types of ODR. What can be considered ODR is one of the most controversial issues in the legal literature related to this subject. Services are diversified and scholars describe ODR as very different tasks, such as online mediation, online arbitration, complaint handling, automated and assisted negotiation, facilitation of information exchange, online settlement conferences etc.
- 115 Due to this variety, some questions can be raised: in order to qualify a procedure as ODR, would it be necessary that all stages or phases of the proceeding be conducted online? Or would some combination of offline face-to-face procedures with elements of an online platform suffice? Are ODR methods necessarily apart from litigation or can state-run services (funded and provided by the judiciary) be considered as another type of ODR?
- 116 In this chapter we adopt a wider concept of ODR. A service or procedure may qualify as such if information and communications technology (ICT) provides some kind of assistance in the dispute resolution proceeding, in whichever phase and for at least one of the parties and/or the facilitators (mediator, arbitrator, adjudicator). Therefore, one can define as ODR not only proceedings that are fully automated, but also those services through which technology *facilitates* to some degree or during some stages a predominantly face-to-face procedure. In this broader sense, ODR is understood as the ‘use of online environments to facilitate communications and dispute resolution’.
- 117 Indeed, when it comes to dealing with online disputes, parties tend to search for systems that handle the entire proceeding, but for offline disputes, ODR tools can prove to be useful to ameliorate some aspect or phase of the process instead of managing the whole. In fact, traditional face-to-face ADR are borrowing applications from ICT to boost their effectiveness by assisting mediators, conciliators and arbitrators in their traditional procedural settings. In mediation, for example, ODR systems can target one of a few

¹⁶⁷ In fact, ODR systems usually have a limited longevity. Most of the services provided at the early stages of its evolution no longer exist, new players emerge, and new products keep popping up in the market. See A Pearlstein, B Hanson and N Ebner, ‘ODR in North America’, in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 446. For those reasons, we will not describe in detail all of the historically relevant tools and their procedures, nor will we be dealing with specifics of particular ODR services.

activities that the mediator would perform (brainstorming, prioritizing, options drafting etc), and contribute to a more efficient performance of those tasks.¹⁶⁸

- 118 Another interesting conceptual discussion is whether ODR is another kind of alternative dispute resolution or if it represents a new form of dispute resolution procedure that qualitatively differs from traditional ADR. As we will see in later sections, nowadays it seems inaccurate to assume that ODR is simply analogue to ADR; nor is it always another type of procedure of the same genus. ODR is not simply an online version of well-known ADR schemes.¹⁶⁹ Sometimes it gains different formats, often hybrid or mixed, in other settings ODR is not a completely new proceeding, but just some tool or instrument to make traditional (online or offline) procedures more efficient.
- 119 This brings us to another debate, on the private or public nature of ODR. Online dispute resolution mechanisms began to evolve outside the judiciary, in private companies.¹⁷⁰ And since their origins, ODR procedures were not meant to be a substitute for courts or even to be applied by them; they were created to fill a vacuum of traditional ADR instruments.¹⁷¹
- 120 But we have seen for quite some time bodies of the judiciary using online forms of procedural justice and implementing them in or out of court.¹⁷² This movement poses the question of whether these technological features, when applied by public bodies to litigation procedures, would be encompassed by the concept of ODR.

¹⁶⁸ Katsh (n 165) 28.

¹⁶⁹ T Schultz, G Kaufmann-Kohler, D Langer and V Bonnet, 'Online Dispute Resolution: The State of the Art and the Issues', *E-com Research Project of the University of Geneva*, 2001. In the same sense, D Nunes, 'A Technological Shift in Procedural Law (From Automation to Transformation): Can Legal Procedure be Adapted through Technology?', in D Nunes, P Lucon and E Wolkart (org), *Inteligência artificial e Direito Processual: os impactos da virada tecnológica no direito processual* (Juspodivm, 2020), 53. On the debate about if ODR is similar to ADR or has qualitative differences, see C Menkel-Meadow, 'Is ODR ADR? Reflections of an ADR Founder from the 15th ODR Conference', (2016) 3 (1) *International Journal on Online Dispute Resolution*, 4-7; C Rule, 'Is ODR ADR? A Response to Carrie Menkel-Meadow', (2016) 3 (1) *International Journal on Online Dispute Resolution*, 8 ff.

¹⁷⁰ Indeed, many enterprises started to develop computer systems by which conflicts could be solved very quickly and at low cost. The eBay online platform for the settlement of disputes related to purchases and sales made via its website was one of the well-known examples of private ODR systems that had enormous success in the past years, with a very high settlement rate.

¹⁷¹ A Mentovich, J J Prescott and O Rabinovich-Einy, 'Are litigation outcome disparities inevitable? Courts, Technology and the future of impartiality', (2020) 71 (4) *Alabama Law Review*, 928; E Katsh and C Rule, 'What We Know and Need to Know about Online Dispute Resolution', (2016) 67 *South Carolina Law Review*, 329; E Katsh and O Rabinovich-Einy, 'Technology and the Future of Dispute Systems Design', (2012) 17 *Harvard Negotiation Law Review*, 164.

¹⁷² N Ebner and E Greenberg, 'Strengthening Online Dispute Resolution Justice,' (2020) 63 *Washington University Journal of Law & Policy*, 69-71; M Phillipe, 'Access to Justice Through Online Dispute Resolution Is Not Science Fiction: A Practitioner's Perspective on the Good, the Bad and the Future', in L Oliveira and S Hourani (ed), *Access to Justice in Arbitration: Concept, Context and Practice* (Wolters Kluwer, 2020), 221.

- 121 Thus, ODR can be competing or complementary to traditional state-run court systems. Its birth in the private sector is due mainly to the fact that in that sphere there were no obstacles in terms of legal norms to prevent the development of such procedures. Nevertheless, the concept of *online dispute resolution* covers the use of ICT for both alternative dispute resolution and the use of those methods by the judiciary itself. It is a concept that fits into litigation and can be applied to court proceedings. Therefore, it is not correct to depict ODR as solely a private initiative. Both public and private ODR mechanisms have in common the fact that they use technology as a way of providing and exchanging information, which can help resolving conflicts either at the judiciary or at out-of-court settings.¹⁷³ For example, online mediation and conciliation can be performed both out of court and within a judicial procedure, or at least in court-annexed or court-connected online platforms.
- 122 Indeed, many ODR tools are becoming more and more visible in judicial proceedings in many legal systems, features such as e-filing, video web conferencing, electronic court and case management, virtual courtrooms, etc.¹⁷⁴ ODR systems contribute to a speedy exchange of documents, pleadings, motions, and fast data registration, making it easier for the court's clerks (judicial secretariats) to verify deadlines.
- 123 Some jurisdictions provide for ODR for whatever kind of subject matter, others limit ODR to misdemeanours or disputes of low value and little complexity, such as consumer rights, traffic accidents, car and apartment rentals, neighbour rights disputes, etc.
- 124 In some legal systems, there are courts that function entirely online, the so-called e-courts, cyber courts or online courts, which have been a growing trend for a few years.¹⁷⁵ Online courts usually have benefits for parties because they reduce delays and costs associated to an offline court case (for example, travel costs). On the other hand, it

¹⁷³ M Legg, 'The future of dispute resolution: online ADR and online courts', (2016) 3 University of New South Wales Law Research Series, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848097 accessed 31 December 2023.

¹⁷⁴ R Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, 2008), 201-210; N Vermeys and K Benyekhlef, 'ODR and the Courts', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 307.

¹⁷⁵ The term online courts or cyber courts refers to court structures and proceedings that take place mainly or solely online. Online courts have been working in many jurisdictions, such as Brazil, India, the USA, Lithuania, the UK, the Netherlands, China and Singapore. See E Katsh and O Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press, 2017), 16 ff; M Deguchi and M Myashita, 'Online Dispute Resolution (ODR) in Asia', in D Mitidiero, A Cabral and P Lucon (ed), *Artificial Intelligence and its Impacts on the System of Civil Justice - IAPL Online Conference 2021* (RT, 2023) 84 ff; Ebner and Greenberg (n 171), 77 ff; Phillipe (n 171), 237; Mentovich, Prescott and Rabinovich-Einy (n 170) 931: 'Developed by local legal-aid providers, an online process in the Netherlands for a time offered new opportunities for reaching consensual divorces and addressing neighbor disputes. Another court, in the District of Hangzhou, China, is already handling e-commerce, copyright, and financial-services-related claims online. More recently, Singapore incorporated ODR into its court system for two claim types: motor-accident claims and spousal- and child-support actions'.

assists in the resolution of disputes that continue to be submitted to the face-to-face judiciary, since they can offer statistical data and intelligent information management.

- 125 Furthermore, there is an element of public accountability and social control strongly present in online courts that is not found in alternative dispute resolution methods, at least not in the same manner and intensity. Indeed, judicial decisions are usually public, and judges are subject to constant surveillance by internal affairs and external control bodies. In ADR, on the other hand, the format of a *private justice*, based on consensus, is not accompanied by the same institutional safeguards to assure those values. Therefore, this is another element that differentiates online courts from other types of ODR and makes state procedures (official and public, even if online) more suitable for solving certain kinds of conflicts.
- 126 There is also an important sociological aspect that makes online courts beneficial and, often, preferential: judges have high social legitimacy.¹⁷⁶ As representatives of the state, they are seen as the personification of an institutional power, an impartial and legitimate third party to impose an outcome on the private sphere of the parties.
- 127 For the parties, e-courts were challenging up until ten years ago, but the amount of usage of online services during the COVID-19 pandemic led to a better understanding of the proceedings and systems, and ultimately to their larger acceptance since it made tech-wary users more confident now than they used to be.
- 128 Some scholars criticize this movement of a *digital justice*, saying that a court-provided ODR system would mean that state courts would be establishing an ‘alternative to themselves’. But we should not confront courts and ODR, or ODR and traditional ADR. It is better to oppose ODR to offline dispute resolution instruments. And from the concept of ODR adopted here, both online ADR and online courts are parts of ODR.¹⁷⁷
- 129 As has been perceived over the years, courts do not always provide services for litigation; they too have a role in consent-based dispute resolution, as we have seen in many jurisdictions with the court-annexed or court-connected mediation and conciliation initiatives.¹⁷⁸ In the same sense, in the past years many experiments of court annexed ODR schemes have been seen. ODRs are now an asset, a value added to traditional court proceedings.¹⁷⁹
- 130 On the other hand, as the next sections will show, state-run ODR can fill the gaps and reduce problems that private ODR systems still face, such as lack of trust, security, deficit

¹⁷⁶ In this sense, Sanchez (n 1) 5.

¹⁷⁷ In this sense, G Kaufmann-Kohler and T Schultz, *Online Dispute Resolution: Challenges for contemporary justice* (Kluwer Law, 2004), 5-7.

¹⁷⁸ T Schultz, ‘An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR’, in *Proceedings of the UNECE Forum on ODR*, 2003, 5, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=896678 accessed 31 December 2023.

¹⁷⁹ Ebner and Greenberg (n 171), 70.

of enforcement, etc.¹⁸⁰ They can offer services with low impact on public expenditures since budget issues prevent many countries from expanding their judiciary services.¹⁸¹ And as courts facilitate settlement, agreements obtained in those proceedings are qualified as ‘consent judgments’ (often after approval or ratification by the judge) and then easier to enforce.¹⁸²

7.2 Technology as a ‘Fourth Party’. Is There a Need for a New Theoretical Background?

- 131 As we have seen, ODR was born to fill gaps of the traditional ADR instruments, adding new features and making old ones more efficient. But the use of ICT to solve disputes poses a question: should technology be only the means, or could it model the shape of procedures? In the end of the day, if ODR is not simply an online version of ADR, could its features structurally transform these methods, calling for a new theoretical background?
- 132 Some scholars argue that the evolution of ICT created models that are essentially distinct from traditional ADR. ODR would produce a ‘technological shift in dispute resolution, not a merely procedural one’.¹⁸³ In this sense, Katsh and Rifkin referred to technology as the ‘fourth party’ in ODR schemes¹⁸⁴, as technology would not only assist a neutral third party (mediator, for instance)¹⁸⁵, but it would also have a role that could impact power allocation between parties and the opportunities that appear for them at the different ODR phases.¹⁸⁶
- 133 The idea of technology as a ‘fourth party’ stems from the observation that while some ODR systems simply emulate traditional ADR proceedings with online interfaces (a

¹⁸⁰ Vermeys and Benyekhlef (n 173), 309 ff.

¹⁸¹ Acknowledging this problem, Ebner and Greenberg (n 171), 66.

¹⁸² In this sense, Kaufmann-Kohler and Schultz (n 176), 41-42. This is not always observed for online dispute resolution methods based on voluntary engagement of the parties. Indeed, these ADR procedures are founded on cooperation and consensus, which certainly brings peace and gives effectiveness to the solution but, when consensus is impossible to reach or whenever the parties cannot agree on a commonly desired outcome, the conflict may go unresolved. This will hardly ever happen in the context of cybercourts, which undeniably represents an advantage of online courts over consensual online dispute resolution methods. ODR instruments can also be used to solve citizenship issues. Since petitions from citizens have to be dealt with and responded by government bodies, ICT can prove to be useful to enhance dialogue and reduce bias, a tool to resolve problems between government and citizens. With this scope, some services originally designed to deal with commercial or consumer disputes have been adapted and applied, for example to claims and controversies against municipalities. Cf Katsh (n 165) 27. See also Z Yun, T Sze, T Li and C Nagarajan, ‘Online Dispute Resolution in Asia’, in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 525.

¹⁸³ Vermeys and Benyekhlef (n 173), 307.

¹⁸⁴ Katsh and Rifkin (n 163) 5.

¹⁸⁵ Katsh (n 165) 32.

¹⁸⁶ O Rabinovich-Einy and E Katsh, ‘Lessons from Online Dispute Resolution for Dispute Systems Design’, in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 67.

prosaic form of digitization), some other systems actually promote a structural change in the way proceedings are designed, creating a scheme with few similarities to traditional offline ADR.¹⁸⁷ Technology then would shape the forms of the procedure,¹⁸⁸ and indeed nowadays there are various services that interfere with written communications, deploy automatic responses to keep parties informed, create impediments for undue and aggressive language, foment brainstorming, schedule meetings and process settlement suggestions.¹⁸⁹ Language processing systems are used to identify patterns of human language and use them to facilitate problem solving; some other services analyse decisions to illustrate the winning arguments of a case, in order to use that information to push parties to settlement.¹⁹⁰ Some ICT tools can automatically elaborate motions from pre-established forms, and machine-learning systems predict outcomes, helping parties to make important choices regarding the conflict (for example, choosing the more convenient forum to litigate).¹⁹¹

- 134 Some other examples might be illustrative. Proceedings conducted in writing usually use text as the main form of communication, but ODR has shifted to the use of images and sound, intuitive graphical representations, profiting from interfaces that look for this visual design. Traditional ADR methods such as mediation were thought to be always performed in the presence of the parties, and mediators were encouraged to ask parties to tell *their side of the story* in front of each other. So many techniques of mediation were based on listening capacities and were developed to be applied in joint face-to-face sessions. But as we will see in later sections, ODR provides possibilities of asynchronous participation¹⁹², which promotes intense changes in the ways parties communicate.
- 135 According to this line of thought, all the features listed above would indicate that technology provides a medium that would never be 100% neutral; the ambience in which communication flows has strong implications on how parties interact, exchange arguments, present documents¹⁹³, and in general, on how people behave and act in a

¹⁸⁷ A Sela, 'The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends and Future Directions', (2017) 21 Lewis & Clark Law Review, 650, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3047399 accessed 31 December 2023.

¹⁸⁸ Ibid 648-649.

¹⁸⁹ P Cortés, 'The Potential of Online Dispute Resolution as a Consumer Redress Mechanism', manuscript, 2007, 18, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=998865 accessed 31 December 2023; Rühl (n 164), 811-812.

¹⁹⁰ D Engstrom and J Gelbach, 'Legal Tech, Civil Procedure, and the Future of Adversarialism', (2021) 169 University of Pennsylvania Law Review, 1021-1023, available at <https://ssrn.com/abstract=3551589> accessed 31 December 2023.

¹⁹¹ Ibid 1013-1014.

¹⁹² L Wing and D Rainey, 'Online Dispute Resolution and the Development of Theory', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 42-43.

¹⁹³ For example, a personal face-to-face interaction favors the use of emotions, metaphors, and personal storytelling; distant online interactions (on an e-platform or e-environment) are inclined to attract a more analytical, logic-based argumentation and the strategies related to it.

dispute resolution setting.¹⁹⁴ Conceived as a *fourth party*, technology would have a very specific role in ODR. Nevertheless, ODR would still be conducted and analysed today by norms created for face-to-face offline dispute resolution, rules that should not always apply online. Therefore, some scholars argue that we need to develop a new set of theories for this reality of non-face-to-face interplay.¹⁹⁵ And if technology were a new player in this field, legal theory would have to deal with T2T (technology to technology) interactions.

- 136 This proposal seems hard to concur with since legal relationships are formed only between persons, corporations or incorporeal legal entities. Technology, as we will try to demonstrate, is only the medium, and should not be seen as an independent or autonomous subject of this interaction. Differences between ODR and traditional offline settings of dispute resolution systems can be dealt with by changing day-to-day practices. But in the end of the day, ADR and ODR are in almost every feature pretty much the same activities, only performed through diverse platforms or with the use of different tools.¹⁹⁶

7.3 Types of ODR. E-negotiation, E-mediation and E-arbitration

- 137 ODR schemes and techniques vary a lot according to the role that technology plays.
- 138 Abdel Wahab talks about three categories. Technology-based ODR would be fully-fledge applications of technology to solve disputes; technology-assisted ODR mechanisms are those in which ICT is used to provide a secure and adequate means for communication and information exchange; and technology-facilitated online dispute prevention (ODP) focuses on enhancing trust and avoiding conflicts.¹⁹⁷
- 139 From another angle, Rabinovich-Einy and Katsh talk about two principal domains of ODR: tools and systems. When talking about tools, one wants to look at ODR as instruments to facilitate both online and offline dispute resolution. In this sense, ODR is not peculiar, but only provides support systems to other dispute resolution schemes. On the other hand, if the focus is on systems, ODR also includes tools, but those are used in a coordinated manner within a close setting, a whole environment for dispute resolution that can be used by a larger number of users in a regular basis.¹⁹⁸

¹⁹⁴ N Ebner, 'E-Mediation', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 384; R Beretta, 'Le procedure di negoziazione nell'era digitale. La rete: una "quarta parte" al tavolo del negoziato?', in S Dalla Bontà (org), *Comunicare, negoziare e mediare in rete* (Università degli Studi di Trento, 2021), 87 ff.

¹⁹⁵ Wing and Rainey (n 193), 37 ff.

¹⁹⁶ Rule (n 168) 8-11.

¹⁹⁷ M S Abdel Wahab, 'ODR and e-Arbitration', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 402.

¹⁹⁸ Rabinovich-Einy and Katsh (n 187), 52-55.

- 140 Moreover, when it comes to specifying the different types of ODR, the most commonly referred are: e-negotiation, e-mediation, e-arbitration.
- 141 E-negotiation is a type of ODR that encompasses any type of online transactions and agreements and is applied to a wide range of cases, from e-commerce to international peace treaties.¹⁹⁹
- 142 Some divide e-negotiation into two major groups. On one side, automated negotiation is made through online platforms without any human third party.²⁰⁰ Assisted negotiation, on the other hand, is technology being used to improve communication of the involved parties but structured to use the assistance of a third party whenever needed.²⁰¹
- 143 The most important advantages of e-negotiation are simplification and cost-efficiency. In face-to-face negotiations, procedures require coordination between all stakeholders, and sometimes complex arrangements of communication and meetings. E-negotiation reduces the operational costs of conventional negotiation procedures, profiting from asynchronous communication and with little use of experts, thus generating results in less time.²⁰²
- 144 The existing e-negotiations systems are very diversified, but most of them manage preferences and options and order the relationship between all the issues in play, assisting parties to clarify their needs and objectives, rationally evaluating proposals.
- 145 Indeed, many e-negotiation procedures begin by making parties set the important issues and indicate what their preferences are. The service organizes priorities and helps parties to focus on what really matters to them instead of hampering negotiation on issues that are not so relevant. Then the ODR system requests inputs to evaluate their relative importance in that dispute. In many e-negotiation systems, during different stages parties are asked to allocate points (from 10 up to 100, for example) on the importance of the issues under discussion. The points scale is used to encourage trade-offs rather than bargaining for as much as one could. The system ranks the issues with value, linking with the users' desire for that particular good or issue. Then each party can

¹⁹⁹ E Thiessen, P Miniato and B Hiebert, 'ODR and e-Negotiation', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 341.

²⁰⁰ T Schultz, 'Online Dispute Resolution: an Overview and Selected Issues', 2002, 3-4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898821 accessed 31 December 2023.

²⁰¹ Some scholars say that assisted negotiation does not necessarily has to be conducted by a *human* third-party. Cf Schultz (n 201), 4.

²⁰² Thiessen, Miniato and Hiebert (n 200), 346.

set a bargaining range for each issue, specifying outcomes that are optimal or bad, provided that each one expects the result to fit into those limits.²⁰³

- 146 In the first steps of the negotiation, these ODR systems exchange optimistic proposals, usually better than the 'realistic' outcomes that the parties in fact expect to obtain in the end. With clarified interests and pondering the importance of that issue for each of the parties, e-negotiation systems project possible trade-offs and compensations, according to calculated parties' satisfaction with those outcomes, generating an optimal solution for all of them.²⁰⁴
- 147 As one can see, e-negotiation has advanced as a form of dealing with preferences and allowing trade-offs to happen in a speedier way with fewer costs. With weighed issues and pondered preferences, e-negotiation systems try to reduce confrontation among the involved parties. Their algorithms create representations of parties' preferences, and sometimes generate packages (bundled positions on disputed issues), based on information given by each party, but often kept hidden from the opposing parties. This information known only by the ODR system permits a faster resolution because negotiation does not get stuck on fragments of the discussion and parties do not lose time in solving issues that do not really matter.
- 148 Another advantage of e-negotiation is the increase in time management. In conventional offline face-to-face negotiation, especially the more complex ones, disputes involve many issues and both facilitators and decision makers usually have to deal with each one at a time, which causes organizational burdens, longer delays and higher costs. With e-negotiation, issues can be tackled in parallel tracks and even simultaneously.
- 149 Another well-known ODR type is e-mediation, which normally presents fewer differences from the offline face-to-face mediation procedures. The most relevant difference of online mediation is that the interaction between the parties takes place fully (a whole virtual environment) or partially through ICT tools.²⁰⁵

²⁰³ Canada's Civil Resolution Tribunal (<https://civilresolutionbc.ca/>) uses a tool of this kind (called 'solution explorer').

²⁰⁴ Some e-negotiation systems use a process known as *double blind bidding* in single-issue negotiations. By this, parties are not aware of the specifics of the offers of the other parties. They are only notified that a negotiation is in progress. Computer systems operate to maintain secrecy to a point in which offers reach a specific range, accepted as a possible outcome for everyone (even if not the ultimate best) and then the ODR system announces that a deal was reached. For blind bidding procedures, see R Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019), 138 ff. Other ODR settings of e-negotiation use a slightly different procedure known as *visual blind bidding*, through which parties put forward suggestions, then the computer hides acceptances from the other party, and only announces the deal when hidden acceptances coincide. Cf Thiessen, Miniato and Hiebert (n 200), 343.

²⁰⁵ Schultz (n 201), 5. Also see Th Clay, *L'arbitrage en ligne* (Paris, Le Club des juristes. 2019).

- 150 In the past years, e-mediation has become useful to large corporations with offices spread out across the globe, especially when dealing with workplace mediation of disputes among co-workers.²⁰⁶
- 151 Legal scholars observe that some mediation practices that were sometimes seen in offline mediation are not used in e-mediation. For example, co-mediation is not very common online, maybe because of the facilities of asynchronous communication, but there is nothing particular to e-mediation that prohibits that practice or that would speak against it.²⁰⁷
- 152 Another type of ODR is e-arbitration, referred to as a quick and cost-effective procedure for dispute resolution, with greater levels of accessibility and efficient case management.²⁰⁸ In e-arbitration, ICT is mainly used as a tool to facilitate interaction. There does not seem to be a very different shape of e-arbitration if compared to traditional offline arbitration. Practical concerns are not very hard to deal with, usually related to technical issues such as computer systems compatibility, document formatting, customization for electronic search, online hearings that have to be attended by people in different time zones around the world, integrity/security of communications and the protection/authentication of exchanged documents.
- 153 However, two major problems seem to be hampering the development of e-arbitration so far. The first one is that in many cases arbitration clauses are inserted in adhesion or boilerplate contracts as pre-established clauses (general standard terms and conditions of the contract), which is usually understood as not imposable on the adherent party. The other problem is the variety of legal norms that would apply when we are facing e-commerce deals between parties from diverse jurisdictions. In online transactions, many times people are residents from different countries and live far apart from each other, which makes arbitration clauses difficult to enforce, sometimes with issues related to the applicable law.
- 154 The alternative to avoid those problems has been the use of non-binding arbitration. However, although less formal, non-binding arbitration is harder to execute and enforce, which is more time-consuming and generates extra costs.²⁰⁹

7.4 Benefits and Disadvantages of ICT Applied to Dispute Resolution

- 155 There are several advantages of applying technology to the resolution methods of civil disputes.

²⁰⁶ Ebner (n 195), 375. This appears to be even more useful due to the growth of home office.

²⁰⁷ Ebner (n 195), 397.

²⁰⁸ Abdel Wahab (n 198), 403.

²⁰⁹ Schultz (n 201), 10-11.

- 156 One of the major features is accessibility. With an increase in connectivity to broadband and wireless networks, communications all over the globe are available at the click of a button. People can access platforms from wherever they are and whenever they want.²¹⁰ Therefore, with greater access to technology, access to justice would be strengthened.
- 157 Related to that is an enormous cost reduction. Indeed, ODR provides for communications at very low rates,²¹¹ so these online instruments present themselves as cost-efficient methods to deal with disputes.²¹² ODR also permits self-representation from the interested parties, what reduces costs of hiring lawyers and paying their fee and allows parties to negotiate and mediate outside of regular business hours (because they do not have to go to sessions in person). On one side, this reduction of costs is important for the parties, since they do not have to miss work, have low transportation and childcare related expenses²¹³, and do not need to pay for attorney representation, which is especially important in simple or small-value disputes, when costs often play a major role.²¹⁴ But it is also much relevant from the point of view of the judiciary administration. In fact, in a scenario in which most countries have a strangled budget to apply to their judiciary services, migrating to the digital environment provides an economy of resources.²¹⁵ In fact, as the number of procedures grows exponentially, courts would have to deal with them either by hiring more employees (judges, clerks and staff) or by investing in technology. The use of ICT allows judiciaries to reduce the number of civil servants located in each court or chamber, or at least redirect them to other activities, since much of the bureaucratic procedural formalities that used to be performed by those persons could be solved automatically by the online systems.

²¹⁰ Phillippe (n 171), 229-231.

²¹¹ Katsh (n 165) 30.

²¹² J J Prescott and A Sanchez, 'Platform Procedure: Using Technology to Facilitate (Efficient) Civil Settlement', in Y-C Chang (ed), *Selection and Decision in Judicial Process around the World: Empirical Inquiries* (Cambridge University Press, 2020), 30.

²¹³ Ibid 38.

²¹⁴ *Small claims* are often defined, in different jurisdictions, by their simplicity or just by having a small value. But simplicity is not equivalent to low-value, when one qualifies a claim as simple, other factors are in play, such as the value of the claim *compared* to other debts and legal rights that the party has; the applicable law; the degree of understanding that the litigants have about the judicial process, etc. See N Spaulding, 'Online Dispute Resolution and the End of Adversarial Justice?', Stanford Law School, forthcoming article, 2021, 7.

²¹⁵ This is the case of Brazil, for example, whose judiciary has to deal with an extremely huge overload of pending cases, technology was adopted in judiciary services out of a practical necessity. Cf Cabral (n 16), 61. But this problem has been identified in other developing countries. Szlak reports that the Argentinian judiciary system relies on a lot of paperwork in written form and could benefit from going virtual. G Szlak, 'Online Dispute Resolution in Latin America', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 530.

- 158 ODR also present alternatives to storage capacity. For both parties and providers of dispute resolution methods, instead of having in custody tons of paper, terabytes of data can be stored with reasonable security in less space.
- 159 Another advantage of ODR procedures relates to the duration of the proceedings. ODR instruments usually provide a rapid flow of information and solve disputes faster, and so appear to be more adequate to the speed of online transactions, which cannot always be matched by the duration and rhythm of court litigation²¹⁶ and even of traditional ADR. Therefore, ODR contributes to reduce the delay and length of dispute resolution proceedings.²¹⁷
- 160 On the other hand, one of the major features that characterize ODR is the higher level of *asynchronous* communication provided, which allows time and opportunity for parties to craft responses, reframe messages and slow down the pace of negotiation or mediation, therefore permitting a more precise expression of questions, issues and comments. This prevents the procedure from getting out of control, for example negotiations escalating with pressure, anger or threats. In this sense, some scholars argue against the use of chat-type interactions (such as instant messaging with real time synchronous communication) because the third-party – a mediator, for instance –, would feel pressured and rushed to find a solution, with difficulties of containing and channelling the flow of information.²¹⁸
- 161 From another angle, whenever distance was an obstacle for dispute resolution, ODR is nowadays one of the best alternatives. Technology shrinks the world, reduces distances, what is relevant in cases in which travel is impossible or cost prohibitive.²¹⁹ ODR makes problems regarding distance and displacement fade away, and the outcome is economy in travel costs and acceleration in conflict resolution.²²⁰ Indeed ODR provides for

²¹⁶ Phillipe (n 171), 222.

²¹⁷ Cortés (n 190) 4; Phillipe (n 171), 222.

²¹⁸ Ebner (n 195), 381, 385-386; Rabinovich-Einy and Katsh (n 187), 64. A decade ago, it was said that text (whether synchronous or asynchronous) was the preferred communication method in ODR. In this sense, Pearlstein, Hanson and Ebner (n 166) 450. This seems to have changed after the 2020-2021 COVID-19 pandemic, since today's technology allows parties to easily meet through the internet and this practice became very popular due to the social distancing restrictions of the pandemic.

²¹⁹ This is obviously very relevant for cross-border disputes but also for disputes in a national level in countries whose territory is large (such as the USA, China, Brazil, India, Australia, Russia and several others with large territories). In disputes involving citizens and companies situated in different parts of the country distance increases costs and can in practice produce inequalities and violations to access to justice.

²²⁰ Kaufmann-Kohler and Schultz (n 176), 1-2: 'In this world of new opportunities and expectations, more and different disputes arise. People and business who never would have dealt with each other absent the borderless world of the Internet, are doing business together and entering into contracts. Consumers, who were traditionally limited to domestic markets, are buying abroad. Small and medium enterprises are entering international markets, which were before reserved to larger businesses. The commercial activities on the net increase significantly every year. Inevitably such rapidly increasing activities will generate more and more disputes. How will they be resolved? The traditional dispute resolution systems are most often ill equipped to provide effective redress. The competent court may

logistical facilitation, allowing easy contact and interaction among people from different parts of the world, and is very useful in cross-border disputes (consumer transactions, for instance), because avoids recurrent problems such as conflict of laws and lack of effective cooperation between public enforcement bodies.²²¹

- 162 Nevertheless, it is important to highlight that sometimes dispute resolution *depends* on distance, whenever there is risk of promoting face-to-face dialogue, cases to which parties might be in physical danger or psychological hazard if they were to gather together present in the same discussion environment (eg, domicile violence).
- 163 From another perspective, ODR foments in many ways the participation of interested stakeholders in dispute resolution procedures.
- 164 ODR usually permits self-representation, and therefore positions parties themselves are the protagonists of conflict solving, which contributes to a peaceful restoration of the social interlinks that were disturbed by the dispute. Compared to an adjudicated decision rendered by the judge, in procedures conducted by trial lawyers, solutions that are agreed upon in proceedings with direct interaction of the parties better serve the ideal of a 'mending justice'.²²²
- 165 ODR instruments also allow the participation of a large volume of parties, even simultaneously, which could speak in favour of their use in collective actions and other types of multi-party proceedings, in order to coordinate case management and the participation of all interested stakeholders.
- 166 In all these cases, ODR offers interaction for people and groups to intervene directly, and for many litigants who would never otherwise have the opportunity to participate, therefore fostering a better application of the right to be heard and access to justice.
- 167 Some other features of ODR level the stakes between the parties whenever there is an unbalanced power between them. This happens because ODR usually creates a less aggressive *locus* of easier communication and fewer formalities, spaces of equal dialogue and interaction.²²³ For vulnerable populations, groups or minorities, who could face biases and obstacles whenever present in court²²⁴, online proceedings seem to work as a 'blind' technique and have the potential to be more successful than other approaches

be located too far way, or be too expensive for smaller disputes, or be too slow for business needs. Traditional arbitration and other forms of alternative dispute resolution (ADR) are also often incapable of meeting the expectations of user for similar reasons – even though attempts are made at improving their efficiency. The result is a vacuum: for many of these disputes no effective resolution mechanism will be available and access to justice is simply not guaranteed'.

²²¹ Phillipe (n 171), 224-225; P Cortés, 'Online Dispute Resolution for Consumers', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 153.

²²² Cappelletti (n 66), 57; Dalla Bontà (n 166), 215.

²²³ Phillipe (n 171), 227.

²²⁴ Phillipe (n 171), 228.

to address bias.²²⁵ In the same sense, ODR fosters a more symmetric interaction between parties positioned in a hierarchy-based relation (such as employer/employee, or supervisors/subordinates etc).

- 168 Still related to equality in procedure, when it comes to cross-border disputes, ODR also provides for few or no opportunities of forum selection, which usually benefits repeat-players, large corporations and more wealthy litigants that have branches all over the world and can plan litigation more strategically.
- 169 Moreover, ODR ultimately adds convenience to dispute resolution. Even when parties are close to each other, or when there is no inequality or vulnerability issues, ODR facilitates their contact and interaction. Communication devices became cheaper and with great portability and mobility; electronic softwares and platforms run from desktop to laptops and smartphones apps.
- 170 Thus, as we can see, accessibility, equality, cost-efficiency, speed, improved participation, are some of the many benefits that stem from adopting ODR. But there are also many disadvantages of using ICT to resolve conflicts.
- 171 First of all, dispute resolution depends on communication between the interested parties. And in online interactions, people communicate and behave differently in many ways. On one side, there may be increased contentiousness, the observation that many people feel apt to 'lash out at each other' when they are online²²⁶, whereas face-to-face interactions tend to constrain aggressive behaviour to a certain extent. On the other hand, without personal encounters, the task of mediators and conciliators faces other types of hardship. Sometimes procedures lack contextual cues, even non-verbal forms of communication, often grasped by mediators/negotiators in face-to-face interactions.²²⁷
- 172 Online interactions also pose a sense of mutual invisibility or anonymity because of its faceless legal relationships. This hardens trust building and confidence in compliance with the agreements that might be reached. In fact, trust building is a facilitator to the resolution of conflicts, with a strong role in the intensity in which certain key activities develop in conflict-solving procedures, such as cooperation, information exchange and

²²⁵ Actually, some researchers balance pros and cons of online proceedings regarding this topic. As we will see later on in this section, reducing implicit biases towards some groups has to be balanced against losing relevant identity information due to the faceless interactions of ODR. Mentovich, Prescott and Rabinovich-Einy (n 170) 963-965.

²²⁶ N Ebner, 'ODR and Interpersonal Trust', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 229.

²²⁷ Another problem is that communication usually used in ODR is mainly textual, a type of communication subject to a lot of misinterpretation. With today's storage capacity, a larger number of materials can be archived, and records in video or text make words stick and parties cannot take them back.

effectiveness of negotiator's skills. So, it is accurate to say that the level of trust and distrust shapes the conflict dynamics.

- 173 And those forms of faceless communication in online procedures can also take way identity attributes of the parties (such as age, gender and race). This characteristic of ODR might reinforce the existing structural tendencies towards disparity and unequal treatment of some groups.²²⁸
- 174 Another aspect to be considered is that personal face-to-face interaction is warmer and closer, while e-communication is more distant, cold and impersonal. In disputes in which parties trust each other, empathy, generosity, rapport are often seen, and foster a more cooperative attitude to integrative outcomes, while distrust, on the other hand, can propel defensive, contentious or competitive behaviour, triggering attitudes such as threats, attacks, or making parties withhold information and lock themselves in negotiation positions difficult to withdraw from.²²⁹ Videoconferences can be palliative but not entirely replace in-person communication.
- 175 Physical distance also creates a sense of separation, which diminishes identification with others; online procedures lack in immediacy and empathy. This is why e-mediation is usually not the first choice of ODR (in an online environment, e-mediation usually follows assisted online negotiation) whereas mediation is quite often the first choice when dealing with offline dispute resolution.²³⁰
- 176 From another perspective, ODR presents problems related to privacy and security. Safe legal transactions still depend on several of these factors; false identities, privacy issues and confidentiality concerns for all stakeholders (providers, arbitrators/mediators/negotiators, parties, etc) call for the use of encryption technologies, digital signatures, invisible digital watermarks, firewalls, biometrics, and the like, in order to prevent manipulation of information and illicit access to restricted or secret documents.
- 177 Regarding this issue, legal systems have to be aware of the need for regulation; normative recognition of e-documents and e-signatures is paramount to provide legal security for the use of those electronic methods for guaranteeing privacy, integrity and authenticity. Without unified norms or at least a common normative background that would set parameters for the validity and authenticity of digital signatures, for the storage, publicity, confidentiality, data protection, transmission and sharing of documents, etc, many ODR initiatives might be held back because of lower trust levels.

²²⁸ Mentovich, Prescott and Rabinovich-Einy (n 170) 897-898.

²²⁹ Ebner (n 227), 215-221, talking about several processes of trust-building and different reasons to make people trust one another (deterrence-based, calculus-based, knowledge-based and identification-based trust).

²³⁰ Ebner (n 195), 376.

178 Language is also an issue because many ODR providers do not offer services in many languages. This is the reason why some scholars refer to 'shared idiom' as one precondition for the use of ODR,²³¹ and some studies highlighted a few years ago the reluctance of service providers to offer operational platforms in languages other than English.²³² This concern is particularly important when dealing with cross-lingual operations, especially when conflicts involve parties in different parts of the globe.²³³ An adequate online translation service might eliminate this obstacle or reduce impact on the parties' interaction.

179 There are also cultural barriers. In ODR all parties must be familiarized and comfortable with technology.²³⁴ Many generations are still not used to solving disputes online; especially in developing countries, some people are not comfortable with these platforms and do not trust private entities to be in charge of the procedure. This is not an easy problem to tackle. Of course, a new environment usually needs cultural change. But some precautionary actions might be useful to make parties more comfortable with the platform, such as demonstrations, simulations for users' training, a site tour or written tutorials, a 'frequently asked questions' section, language information, clarification on time zones of the online sessions, technical support, and a clear set of ground rules for participation (also ethical standards, such as a *netiquette*). All of this can reduce user barriers.

7.5 New Skills and Different Approaches

180 In order to avoid those problems, there is no need to reinvent the wheel. And in the last section, some key elements to address them were anticipated.

181 Sometimes it boils down to capacitation of professionals involved, who must develop new skills and techniques. In other aspects, maybe what is needed is a different approach to an old practice rather than the necessity for new tools.

182 First, professionals must reassess their beliefs on what was suitable for offline dispute resolution (eg, traditional ADR), comparing with the singularities of ODR features. For example, mediators and conciliators must acquire technological expertise of message management in online environments. Face-to-face mediators were trained to express themselves orally, with body language; if online mediation is predominantly written, this simply would not be useful or necessary.²³⁵ Mediators can try to express themselves with other types of communicative symbols and images, such as emoticons, which are

²³¹ Ebner (n 195), 380.

²³² Pearlstein, Hanson and Ebner (n 166) 449.

²³³ A related problem that is the misunderstanding of social differences, that can require different approaches from negotiators/mediators/conciliators. Cf Wing and Rainey (n 193), 45-46.

²³⁴ Cortés (n 190) 6.

²³⁵ Ebner (n 195), 388. About the different ambiances and types of communication, S Toniolo, 'Communicare tra culture "mediante" e "mediate da" la tecnologia', in S Dalla Bontà (org), *Communicare, negoziare e mediare in rete* (Università degli Studi di Trento, 2021), 17-19.

contemporary forms of transmitting emotions.²³⁶ In order to build trust or enhance its levels in ODR, mediators/negotiators can send eg, a welcome video. And they can profit from written forms of asynchronous interaction to control the flow of information, preventing the conflict from escalating. For example, if communications are passed through the mediator/negotiator (some suggest that in online mediation all messages should be sent to the mediator first),²³⁷ they might be able to reframe aggressive messages (written with a big-size font, all caps or in red colour).

- 183 An important alert is to understand the differences between synchronous and asynchronous forms of communication. For example, mediators in offline face-to-face procedures were taught to search for what was happening *during* the sessions; now in ODR they have to be worried about what is going on *in-between* sessions. Maintaining engagement is challenging, thus one should be alert in keeping up with schedules and preventing dropouts. One possible approach is to establish constant communication with the parties, giving them a sense of ‘presence’ even in asynchronous interactions.²³⁸
- 184 Another relevant concern is that the e-environment cannot diminish the offline possibilities of exercising fundamental guarantees of civil procedure. We must use the technological tools to at least match what the parties would experiment in face-to-face procedures. One of the major concerns regards hearings (whether in litigation or arbitration). In most empirical studies conducted so far, even the ones from the pandemic years of 2020-2021, the majority of analysed hearings took place with no serious technological problems; judges, lawyers, witnesses and parties in general have developed really quickly expertise and skills to deal with videoconferencing tools.²³⁹ Some examples are: sharing screen to present pictures²⁴⁰, posting links to a folder on the chat area to share documents²⁴¹, using the ‘breakout room’ feature to ensure privacy (preventing unauthorized people from hearing conversation subject to privilege) or using the ‘waiting room’ tool for witnesses to wait for the time of their testimony without having to listen to what other witnesses testified to²⁴².
- 185 However, even with the correct use of ICT tools, many people felt as if they were set aside. In order to make participants actually ‘feel present’ in the courtroom, some scholars suggest that the managing judge/presiding arbitrator should use the ‘gallery’

²³⁶ Cortés (n 190) 12.

²³⁷ C Rule and C Villamor, ‘The Importance of Language in Online Dispute Resolution’, (2004) ICC International Court of Arbitration Bulletin, Special Supplement.

²³⁸ Ebner (n 195), 390.

²³⁹ E Thornburg, ‘Observing Online Courts: Lessons from the Pandemic’, (2020) SMU Dedman School of Law Legal Studies Research Paper n. 486, p 7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696594 accessed 31 December 2023.

²⁴⁰ Thornburg (n 240), 11.

²⁴¹ Thornburg (n 240), 12.

²⁴² Of course, all these represent no full guarantee against malicious conduct and misbehavior (for example hidden people leading witnesses behind the cameras). Cf Thornburg (n 240), 28.

mode instead of the 'speaker view' function, preventing people from feeling alone or let out.²⁴³

7.6 Dispute Systems Design and ODR

- 186 As we have seen earlier, dispute systems design (DSD) was the general movement of empowering the parties to establish the architecture of the dispute resolution setting, adapting the existing frameworks to their needs.
- 187 And as some scholars argue, the use of ICT in DSD represents a big shift in dispute systems design's theory.²⁴⁴ Parties and providers can now project the architecture of a dispute resolution scheme, with the applications of ICT, to improve their platforms and adapt the existing services to their needs.
- 188 A first relevant aspect to be considered is that the type of ODR to be chosen has to be suitable for the kind of dispute at hand. The type and value of the claim are key aspects. Some disputes seem more likely to fit into ODR settings, such as complaint handling in e-commerce cases, low-value disputes between geographically distant parties; or cases in which there are trans-jurisdictional issues, and for those in which choice of law, forum selection or enforcement of court decisions appear to be problematic. Multi-party conflicts can also profit from ODR because of the facilitative features these ICT tools present.
- 189 On the other hand, some other types of conflicts are not much adequate to be conducted online. The category that quickly comes to mind is related to family law issues, usually in need of closer personal interactions; but we could add conflicts in which there is a greater disparity of power between parties.
- 190 Even when thinking of ODR not as a whole environment for dispute resolution, but as mere tools to ameliorate traditional offline ADR or court procedures, adequacy is of the essence. In this sense, some features of ICT applied to dispute resolution are more helpful in certain types of traditional ADR. For example, technology-assisted negotiation is more powerful because it allows the system to deal with a large volume of transactions and the information related to them. ODR provides for scale. E-mediation, on the other hand, presents difficulties because many times involves conflicts that tend to require a tailor-made approach, and often call for human intervention, in order to interact with the interested parties.²⁴⁵

²⁴³ Thornburg (n 240), 15.

²⁴⁴ Katsh and Rabinovich-Einy (n 170) 162.

²⁴⁵ Even so, with the adaptations of the global population to online environments after the COVID-19 pandemic, taking mediation online (per videoconference or a combination of e-mail, phone, message apps), seems natural nowadays. About e-mediation, see Ebner (n 195), 369 ff.

- 191 From another perspective, it might be accurate to assume that ODR systems are more attractive to some parties than to others. For example, creditors are more inclined to adhere to online procedures, but debtors not so much because ODR tends to oversimplify proceedings of defense, limiting allegations.²⁴⁶
- 192 Culture is a variable that cannot be underestimated in a conflict. The way that people involved in the case understand disputes, hierarchy, power, the value of social norms, the concept of what a fair process means, the perception of risk and often even the necessary timeframe to deal with an issue, every one of those aspects affects the behaviour towards a solution.²⁴⁷ And even when silent or latent, culture is an element present in the worldview of parties and interveners/facilitators. Therefore, designers of dispute resolution systems should note that a certain amount of flexibility is essential to build a 'culture-friendly' environment for the ODR, preventing this procedure from scaring away potential users.²⁴⁸

7.6.1 Incentives and Prevention of Conflicts

- 193 Another relevant factor that makes dispute systems design important are the *incentives* they can generate. In this particular field, some interesting prospects must be highlighted.
- 194 Some ODR algorithms reward generosity. They are programmed in order to move negotiating parties to zones of acceptance and agreement. The system is programmed to push the more resistant party to accept and the party who was more inclined to give up larger amounts of their *complaint* or *claim* would get better settlement deals.
- 195 Several other ODR incentives relate to the costs of the procedure. If technology continues to reduce costs in negotiation and dispute resolution, it might inhibit party default and change outcomes but generating more incentives for contract performance. Indeed, whenever costs are too high to solve a dispute, parties might settle or accept non-optimal outcomes to avoid the expenditure of time and money, even if they think they might win. But if costs of dispute resolution are low, parties tend to litigate more (or only) on the basis of merits. Questions of who is right and who is entitled to what will

²⁴⁶ Spaulding (n 215), 13: 'As matters currently stand, using low money value claims as a proxy for simplicity will result in a bifurcated system of justice – one in which low and middle income people already priced out of meaningful participation in the adversary system will have no alternative but to avail themselves of ODR systems. If these systems are designed to 'improve compliance,' efficiency, and collection, rather protect than protect users rights, this bifurcation in the administration of justice will formalize and multiply things properly understood to be bugs in the adversary system, not features'.

²⁴⁷ K Avruch, 'Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice', (2003) 20 (3) Conflict Resolution Quarterly, 351-371; Toniolo (n 237), 21 ff.

²⁴⁸ In this sense, D Rainey, 'ODR and Culture', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 204-205.

control the outcome.²⁴⁹ Therefore, reducing the duration and costs of dispute resolution may alter the behaviour of parties to a legal transaction, fomenting performance according to the contract.

- 196 Another important incentive mechanisms that have been included in many ODR schemes are *reputation systems*. Nowadays individuals feed reputation systems with their own experience in form of reviews and ratings. If a customer bought a product online and there was any problem, they can inform promptly the seller and try to solve it online; in the end, if consumers had a positive experience, they are likely to post a positive review related to that purchase, and this user-generated content provides positive and negative feedbacks accessible and searchable to all.²⁵⁰ So the incentive created by the reputation log pushes the involved parties into the solution of the dispute: buyer's ratings encourage the seller's participation and commitment to problem solving, because the seller wants to prevent negative reviews.
- 197 With the growth of those reputation systems, the dataset produced by users has enormous utility for the stakeholders to make informed choices. And as these reputation systems evolved, instead of reading hundreds of reviews from random strangers, people can filter them and look up the experience of neighbours, friends, voters of a certain political party, citizens of a specific country, whichever factors they feel appropriate to inform their decisions.²⁵¹
- 198 Reputation systems have been embedded in multi-level platforms of ODR services and whenever such a device is in place, it enhances trust and reduces risk.²⁵² While revealing the reliability of one player's trading history, it may change the overall perception of contract performance of the other party. Thus, reputation systems add incentives to negotiate on that platform, even if transaction costs are a little higher.²⁵³

²⁴⁹ Prescott and Sanchez (n 213), 30-31, 37.

²⁵⁰ Traditionally, in offline transactions, traders have always kept lists and logbooks to maintain an inventory of the relation with each player or business partner. The flow of information was not so easy to catch up with, starting by the identity of other parties, not to mention their trading history. And the inventory of information was asymmetrical, because repeat-players could estimate risk more accurately. This changes intensely with reputation systems because the one-shooters can profit from one another's experience. About this evolution cf Dalla Bontà (n 166), 241-242.

²⁵¹ C Rule and H Singh, 'ODR and Online Reputation Systems: Maintaining Trust and Accuracy Through Effective Redress', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 175-195. Some systems started to provide bi-directional feedback inputs: buyers and sellers can both leave feedback and rate the other parties in a transaction. Some other systems allow only buyers to rate sellers. Single-directional inputs are usually chosen because some enterprises were afraid that a bi-directional rating would embarrass consumers and they would leave the website, never using it again; or that one party who was allowed to review would not be straightforward due to fear to receive a negative *retaliation-rating*.

²⁵² Katsh (n 165) 25-27.

²⁵³ It is important to remember that people may accept higher service costs in exchange for lower risks or vice versa (assume greater risks for lower rates).

- 199 This brings us to a final topic. Dispute systems design has always developed mechanisms to deal with disputes and try to resolve them once the conflict has arisen. However, in recent years scholars have observed that dispute systems design has been shifting to put emphasis at *prevention*, not only resolution.²⁵⁴ With captology strategies as a background,²⁵⁵ dispute systems design started focusing on *conflict avoidance* instead of dealing with disputes on an *ad hoc* basis, after the conflict has emerged.²⁵⁶ Whereas traditional offline ADR would only focus on solving the case at hand, *online dispute prevention* (ODP) procedures are aiming at conflict management,²⁵⁷ using big data and artificial intelligence to track and identify causes of problems and then apply ICT to avoid disputes.²⁵⁸
- 200 Conflict prevention generally is supposed to be a good thing, but since online conflict prevention mechanisms are mainly private,²⁵⁹ we need to remember that they work on a different basis, and their main objective is not to offer access to justice through a fair procedure.
- 201 Indeed, due process and access to justice concerns vary a lot from private ODR settings to online courts, and the design of ODR reveals preferences for a set of values instead of others.²⁶⁰ In state-run ODR one should consider resources, budget, and the interests of all stakeholders, while in private ODR services, the main goal is usually to generate confidence/trust and engagement.²⁶¹ Many systems operate from a non neutral structure and platforms can induce behaviour if ODR is designed by companies to gather information on the users and project procedural settings that can turn out to be

²⁵⁴ As Nylund highlights, DSD also focused on preventing conflicts from escalating, Nylund (n 48), 23. But then again, in this case, conflicts have already arisen. The point we wish to highlight here is another one, that is preventing disputes from ever appearing. In this sense, D Nunes and C Paolinelli, 'Access to Justice and the Technological Shift in the Brazilian Justice System: Technology-assisted Dispute Management and the Alignment of Expectations for a citizen-centric transformation – new designs, choice architecture and appropriate dispute handling', in D Nunes, I Werneck and P Lucon (org), *Processo e tecnologia: os impactos da virada tecnológica no âmbito mundial* (Juspodivm, 2021), 118 ff, 139-141.

²⁵⁵ Captology is the field that analyses the use of computing technology as persuasive tool to induce behavior and influence change in people's attitudes.

²⁵⁶ Spaulding (n 215), 3: 'the conjunction of data mining, predictive analytics, and dispute systems design will help prevent disputes from arising in the first place'. In the same sense, Katsh and Rabinovich-Einy (n 170) 178-180.

²⁵⁷ Susskind speaks of 'dispute containment': R Susskind. *Tomorrow's Lawyers: an Introduction to Your Future* (2nd ed, Oxford University Press, 2017), 95.

²⁵⁸ Rabinovich-Einy and Katsh (n 187), 69-71.

²⁵⁹ We should not exclude the possibility of big data being and AI being used by courts to avoid litigation. See F Ferrand, 'Faut-il s'adapter? De l'avenir du procès civil: reddition ou résistance?', in K Miki (org), *Challenges for Civil Justice as We Move Beyond Globalization and Technical Change – XVI IAPL Congress on Procedural Law* (Kobe, 2019), 32-38, 45-47.

²⁶⁰ Katsh and Rabinovich-Einy (n 170) 197.

²⁶¹ As private entrepreneurs acknowledge, cf Katsh and Rule (n 170), 334-335. Alerting for the problems this approach could bring to a justice system, cf Nunes (n 168), 54-55.

profitable by preventing conflicts from ever arising or at least from ending up in court.²⁶² In the end it can turn into a form to manipulate choices and preferences using information obtained by social interaction online.²⁶³ Therefore, in order for them to be implemented efficiently, regulators have to establish ethical standards and one must take into account factors such as the protection of personal data.

7.6.2 Dispute Systems Design and Procedural Safeguards

- 202 In designing ODR systems, important concerns relate to the fundamental guarantees of due process. Technology has to advance with ethical boundaries,²⁶⁴ and when it comes to designing dispute resolution systems, simply looking for efficiency might not be enough.²⁶⁵ One has to ensure what has been called ‘procedural regularity’²⁶⁶, weighing other important issues such as access, equality, transparency and accountability of ODR models.²⁶⁷
- 203 This topic tackles some of those issues, but in general we cannot adopt a fully pessimistic approach, neither foster a naive and unconditional plea in favour of ODR. On one side, technology is not always evil, will not necessarily harm due process and diminish legal rights of vulnerable parties; nor does ODR carry intrinsic violations to the rule of law or to access to justice. In fact, ODR promotes the rule of law and amplifies access to justice while providing a pre-judicial phase of conflict-solving, and also by dealing with low-value disputes with a cost-efficient procedural structure.²⁶⁸ On the other hand, one

²⁶² ‘These opportunities arise from the capacity of ODR systems to exploit the information they gather about pending disputes to assist in ‘automatic detection of problems, obviating the need to passively wait for complaints to arrive and allowing proactive remedying of the problem even before a potential complainant has been made aware of its existence’. Spaulding (n 215), 16.

²⁶³ Spaulding (n 215), 17.

²⁶⁴ L Wing, ‘Ethical Principles for Online Dispute Resolution: A GPS Device for the Field’, (2016) 3 (1) International Journal on Online Dispute Resolution, 17-18; Phillipe (n 171), 223.

²⁶⁵ Some legal scholars have envisaged in the applications of ICT to judicial procedures potential violations of procedural fundamental guarantees of civil procedure. On this debate, see B Heil, *IT-Anwendung im Zivilprozess: Untersuchung zur Anwendung künstlicher Intelligenz im Recht und zum strukturierten elektronischen Verfahren* (Mohr Siebeck, 2020), 122-127.

²⁶⁶ See J Kroll, J Huey, S Barocas, E Felten, J Reidenberg, D Robinson and H Yu. ‘Accountable Algorithms’, (2017) 165 University of Pennsylvania Law Review, 633 ff.

²⁶⁷ A Sela, ‘Streamlining Justice: How Online Courts Can Resolve the Challenges of pro se Litigation’, (2016) 26 (2) Cornell Journal of Law and Public Policy, 349; Mentovich, Prescott and Rabinovich-Einy (n 170) 976.

²⁶⁸ ‘Secondly, ODR has a broader potential to promote the rule of law, because its streamlined efficiency can, when used properly, yield effective dispute resolution in massive numbers of low value claims. And the judicial paradigm is at its worst in dealing with massive volumes of claims, and in dealing with low value claims. We should face the fact that a community cannot attain the rule of law by using the judicial paradigm to resolve massive volumes of low value disputes. ODR may actually be an advance toward the rule of law, because of our ninth requirement of the rule of law: that disputes should be resolved. ODR is a potentially decent way of resolving disputes that cannot be resolved through the judicial paradigm’. (T Endicott, ‘The Rule of Law and Online Dispute Resolution’, 5, available at <https://ssrn.com/abstract=3278695> accessed 31 December 2023, also published in A Facheci, T Endicott and A Noriega (ed), *Online Dispute Resolution: virtud cívica digital, democracia y derecho* (CEU, 2017), 21-36).

cannot be only optimistic about ICT applied to dispute resolution. ODR violates procedural due process if it imposes proceedings based on a judiciary policy only focused on lowering costs; and it can also hamper access to justice when the online model appears as the sole opportunity for the individual, coercing or compelling people to join due to lack of alternatives. If badly designed, instead of solving access to justice problems, ODR may end up building new and different obstacles.

- 204 Therefore, technology has to advance with procedural safeguards in dispute resolution systems design. While designing ODR for courts, one has to ensure that alternatives are integrated in a way that preserves procedural fairness.²⁶⁹ On the other hand, even when designing out-of-court ODR, many concerns regarding procedural aspects are of the essence.
- 205 Access to justice has to be dealt with as the human right it represents; so, platforms must continuously be improved to ensure accessibility; providers must present transparent and accessible information about the conditions of use, ethical rules and standards for procedural fairness. ODR systems that establish a whole platform for conflict solving cannot turn into a compulsory e-environment. If the legal system does not provide for an alternative, serious questions about the rule of law and access to justice arise.²⁷⁰
- 206 Equality is also a major concern and could be violated if stronger parties dominate the proceeding in these platforms, or if parties are vulnerable litigants whose choices are driven by algorithm-predicted outcomes suggesting interpretations of the law that they might be able to challenge in court.²⁷¹
- 207 Simplification and re-structuring of ODR services must involve online support to the parties, written and video tutorials with explanations on the specifics of the proceedings, a helping hand especially important because ODR may promote a true revolution regarding self-representation.²⁷² But once again, parties cannot be left alone. Challenges for self-representation online involve aspects such as juridical knowledge and possibilities of participating in proceedings and voluntarily express oneself. If ODR speaks in favour of an effective empowerment of individuals to solve their conflicts on their own, dispute systems must be designed to allow them to make informed choices. And

²⁶⁹ S Smith and J Martinez, 'An Analytic Framework for Dispute Systems Design', (2009) 14 *Harvard Negotiation Law Review*, 129-133; L Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict', (2008) 24 *Ohio State Journal on Dispute Resolution*, 18-20.

²⁷⁰ Endicott (n 269), 8: 'This, I propose, is the paradigm of ODR that does not endanger the rule of law, because of its facilitative function and the lack of compulsion. We could imagine the EU scheme endangering the rule of law. It would do so if it became unavoidable in effect. That could happen if (as we might imagine), the EU or member states used the existence of the ODR Platform as an excuse for providing no other form of legal recourse, or as an excuse for withdrawing from regulating online trade. And the hypothetical danger would become a reality if online traders were able to capture the dispute resolution providers, and if there were no legal control of the conduct of those providers'.

²⁷¹ Spaulding (n 215), 5.

²⁷² Sela (n 188), 668-669.

over time it is likely to imagine that individuals might gain a better knowledge of the judicial system and of their legal rights by way of accessing ODR directly,²⁷³ but only if these systems are designed also to provide them with this information.

- 208 If parties are not represented by counsel, it is relevant to evaluate if the procedure gives the parties time and opportunities to reflect and to respond accordingly (limited pre-written options and time constraints are to be avoided). The study and practice of choice architecture (how options are presented to users and the impact of this presentation on users' choice) is paramount. One must remember that self-represented litigants frequently lack legal knowledge to handle their case properly, for example to organize legal arguments and transmit them to others.²⁷⁴
- 209 Moreover, a key aspect is that the platform, whether text-based or with elements of audio and video, must be accessible to everyone and comfortable for users (eg, elements of visual law may be successfully used to provide friendly dashboards).
- 210 Another major concern in terms of procedural equality is digital exclusion or digital illiteracy, the inability to use ICT instruments.²⁷⁵ Especially in developing countries, educational and infrastructure problems (number of personal computers and of internet providers, capacity of broadband services, etc) are obstacles against the development of ODR.²⁷⁶ People do not have proper training skills to deal with technology, and many do not have the necessary hardware to access these systems. Digital exclusion of citizens raises a very important concern. People must have not only the knowledge, but also the means to use ODR platforms, otherwise there could be an unlawful barrier to access to justice. In fact, preconditions to access ODR are, among others, a regular internet access and computers, as well as the necessary basic skills to navigate through the ODR systems. Therefore, for the progressive implementation of ODR systems, authorities must carry out a strategic plan for digital inclusion, and ODR systems must be user-friendly.²⁷⁷

²⁷³ As Ebner and Greenberg argue: Ebner and Greenberg (n 171), 84-85.

²⁷⁴ Judges and arbitrators can act to equalize the positions of the parties but then they are pressured by impartiality concerns. See in this regard, Sela (n 268), 352.

²⁷⁵ Speaking of 'digital illiteracy', Nunes and Paolinelli (n 255) 140.

²⁷⁶ M S Abdel Wahab, 'Online Dispute Resolution for Africa', in M S Abdel Wahab, E Katsh and D Rainey (ed), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012), 562-563. This reality can be seen in many countries, such as those in the African continent and many in Latin-America. But it is also a concern in Germany: Rühl (n 164), 814.

²⁷⁷ Cf Jeretina and Uzelac (n 7), 40, 49. In this sense Legg (n 172), 10: 'An ODR website or app must be user friendly so that attention must be paid to design, content, navigation and functionality. In short, user friendly means it must be easy to understand and use for disputants. [...] Equally, in the small claims dispute resolution space this means designing technological solutions that can be used by people with varying levels of education and financial resources'. In Brazil, in 2021, the National Council of Justice issued the recommendation number 101, exhorting courts to provide services to guarantee that individuals with no or limited access to computing devices would still be able to attend hearings and effectively participate in judicial proceedings.

- 211 Furthermore, when speaking of procedural safeguards related to access to justice and due process, one must think of a fair procedure as providing the interested parties with impartiality, voice and consideration of arguments by the deciding authority.²⁷⁸
- 212 Impartiality means neutrality of those in charge of the proceeding. Dispute systems have to indicate how the procedure works to produce outcomes that are favourable to one of the parties. Voice encompasses the opportunity to express oneself and influence the final outcome. Parties should be able to input information to their best interest. In ODR, it is important that the dispute system design provides the parties with realistic choices, not only customized (pre-given) options. Consideration of parties' arguments is paramount to prove that they were effectively heard. ODR could be designed so that the system at some point demonstrates that the arguments were considered by presenting a summary of the parties' inputs. If this processing of arguments was made with no human intervention, but only by algorithms or artificial intelligence tools, it may only be acceptable if parties are aware that the proceeding is being carried out by *bots*, and if some means to contact a human being is provided for during the whole process. So, there must be a constant possibility to *channel* the dispute to a human third-party, not only when cases involve large sums of money, but also whenever parties ask for it.
- 213 Some level of state control might be needed, starting from minimal legislation standards or any normative architecture setting principles and guidelines to guarantee procedural fairness.²⁷⁹ Governments can also act in other areas, applying and enforcing those norms,²⁸⁰ overseeing ODR services, only to accredit private ones that fit certain standards.
- 214 Funding of ODR services is an important discussion. Most ODR systems are not public, and so far, private funding seems to have driven the evolution of ODR systems. But this can affect what we understand to be a fair dispute resolution scheme within the rule of law.²⁸¹ Some level of transparency have to be in play in order to ensure impartiality and avoid conflicts of interest that might come up when the system provider is funded by one of the involved parties to the dispute.
- 215 When ODR is linked to courts, whether state run ODR or by partnerships to offer tools to facilitate online or offline litigation, another problem arises, that is if and how ODR procedures are to be related to the proprietary of the technology involved. Since technology systems represent a key factor in helping courts manage multiple cases while reducing their operational costs, providers that offer those services take on a major role in online litigation, even if they have no fidelity to the parties' interests. As Spaulding

²⁷⁸ About procedural fairness, see N Welsh 'ODR: A Time for Celebration and the Embrace of Procedural Safeguards', *ADR Hub* (4 July 2016), available at <http://www.adrhub.com/profiles/blogs/procedural-justice-in-odr> accessed 31 December 2023.

²⁷⁹ C Rule, *Online Dispute Resolution for Businesses, B2B, E-Commerce, Consumer, Employment, Insurance and Other Commercial Conflicts* (Jossey-Bass, 2002), 111.

²⁸⁰ Schultz (n 177), 3.

²⁸¹ Spaulding (n 215), 15.

notices, 'users of ODR platforms become mere tertiary beneficiaries in this framework, whereas they are in principle the core right holders in the adversary system'.²⁸²

- 216 One could think of other types of arrangements to avoid leaving court ODR technology in the hands of private players. In some jurisdictions, governments have established online platforms that provide different kinds of ODR services free of charge for the parties.²⁸³ But some studies argue that, if ODR is provided for free, it could encourage frivolous claims; on the other hand, too high rates could prevent people from ever using ODR, which would not be a desirable outcome.
- 217 Anyway, these are just a few insights on how to ensure procedural safeguards of ODR procedures that might be useful for legislators and dispute systems designers.
- 218 One final alert is that designers have to be aware of users' needs. The ideal would be to involve users in the design.²⁸⁴ But users' participation in DSD should serve at least as an alert for designers to consider their experience.²⁸⁵

7.7 Concluding Remarks on the Future of ODR and How Technology Might Impact Civil Justice

- 219 Since the beginning of the study of ODR dating back to the 1990s, maybe the biggest fever around the subject could be seen around the 2010s. In the past decade, the development of the topic seems to have stagnated. If at some point many people thought that ODR would absorb great portions of dispute resolution and even several aspects of litigation, with time there was little improvement in theory and the usage of ODR in practice appeared somewhat frustrating.²⁸⁶
- 220 So, what could we predict for the future? ODR is still today in great measure an extension or a tool to traditional ADR schemes. But in the future, some scholars argue that it could evolve into something quite different. This qualitative differentiation would come from the understanding of technology as the 'fourth party'.²⁸⁷ But even when ODR creates

²⁸² Spaulding (n 215), 15.

²⁸³ Examples can be found in Austria (Austrian Internet Ombudsstelle - <https://www.ombudsstelle.at>), Mexico (<https://concilianet.profeco.gob.mx>) and Brazil (www.consumidor.gov.br). In Belgium, a well-known service for online mediation, negotiation or arbitration is called *Belmed*, which is a service free of charge for the parties, but other players such as mediators and conciliators may charge for their services. See also S Voet, 'Belmed: The Belgian Digital Portal for Consumer A(O)DR', 2013, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245017 accessed 31 December 2023.

²⁸⁴ Phillipe (n 171), 238-248.

²⁸⁵ Arguing that lawyers are important stakeholders, and that they should participate and be consulted in the ODR design, Ebner and Greenberg (n 171), 104 ff.

²⁸⁶ P Cortés and A Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress', 2014, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414098 accessed 31 December 2023.

²⁸⁷ J Rifkin, 'Online Dispute Resolution: Theory and Practice of the Fourth Party', (2001) 19 (1) Conflict Resolution Quarterly, 117 ff.

new forms of interaction to a point in which we can see a structural difference in online and offline procedures,²⁸⁸ it has to be limited by the normative framework of the rule of law. And as Ebner puts it, 'technology is only a tool, it should not define practice'.²⁸⁹

- 221 One probable scenario is that ODR may grow to be even more useful to the judiciary itself, either by combining online ADR instruments with face-to-face offline litigation, or by merging completely into online courts, especially in judicial proceedings for small claims, in which the costs of establishing and maintaining physical structures is too high, and the human labour resources employed raises budget issues worldwide.
- 222 From another perspective, legal tech instruments might advance faster in areas in which behaviour is standardized and in which case-law data is abundant, like the management of repetitive claims.²⁹⁰
- 223 A predictable future application of ODR is the development of *hybrid* procedural settings combining elements and schemes of online and offline dispute resolution. Dispute resolution would profit from the benefits of ODR (technological efficiency, accessibility, online support, self-representation, asynchronous communication) but still open to the human necessities of face-to-face interactions in some offline disputes.²⁹¹ These hybrid procedures could be designed as *multi-layered structures*: after diagnosing the conflict, the system would forward the proceeding to one or another option, first automated e-negotiation, then e-mediation or offline mediation, and if settlement is not obtained, then online arbitration, online courts or even offline traditional courts.²⁹²
- 224 Furthermore, and this might be one of the major developments in the future, we can see how ODR systems are evolving to contribute not only to how disputes are resolved, but how conflicts can be prevented (ODP).²⁹³ By targeting problems and identifying the causes of disputes, these instruments could create incentives for change in companies' practices and people's behaviour.²⁹⁴ On the other hand, if some of the ODP mechanisms raise concerns as to manipulation of user's choices and illegal use of private information, if well designed they could provide conditions for equal interaction between parties, in

²⁸⁸ Indeed, ODR is not merely digitization of the proceedings. Digitization is an important feature of dispute resolution systems nowadays, even if merely as a tool to build a huge database which will be useful to other means of automation, AI interfaces and the like; but digitization itself not always leads to a full transformation of the platform. When thinking of technology as a *fourth party*, scholars are thinking about a more sophisticated type of online setting.

²⁸⁹ Ebner (n 195), 382.

²⁹⁰ Engstrom and Gelbach (n 191), 1029.

²⁹¹ Sela (n 188), 671.

²⁹² Cabral (n 16), 74. As for the presence of a human being, we might also see some kind of combination. For example, algorithm-driven systems can process a large quantity of information with no human intervention, and channel cases to human live mediators if suitable.

²⁹³ Katsh (n 165) 32.

²⁹⁴ Sela (n 188), 676.

the benefit of the most vulnerable by empowering the one shooters (consumers, for example) and giving them more leverage to negotiate.

- 225 From another angle, technology may modify several aspects of the justice system. For example, in some jurisdictions, some costs of procedure which are associated with the use of ICT have gone up, and it remains unclear whether those costs will fall down in the future.²⁹⁵
- 226 Moreover, the growth of ODR made some scholars question the importance and role of lawyers in civil justice because of self-representation, and the probable encouragement from courts themselves to more lawyerless litigation (unless compelling reasons to proceed otherwise).²⁹⁶ The role of lawyers may also be altered due to the increasing number of tasks assigned to non-jurists (engineers or experts in technology) in dispute systems design.²⁹⁷
- 227 And technology might also change the role of courts. If previously regarded only as adjudicators, judges can function as facilitators (disseminating information to the parties) and ultimately as designers of a dispute resolution setting. Indeed, Frank Sander's ideal of a 'multi-door system' seems to be no longer a task of fitting a dispute into one of several possible procedures and then deal with it. Since ODR provides a wide variety of possible combinations, the 'muti-door' system should nowadays be thought as a '*multi-modal*' system, and instead of referring a case to mediation, the role of the court would be to 'navigate' the dispute through different procedural instruments in a mixed setting,²⁹⁸ moving from one to the other as circumstances require, also with possibilities to modify the dispute resolution schemes throughout different stages of the conflict.²⁹⁹
- 228 If this proves to be right, and judicial procedures become faster and more cost-efficient dispute resolution systems with the application of ICT, litigants might be more inclined to initiate claims before courts. In the past, with the prospect of a bureaucratic, slow and inefficient judicial procedure, they might have avoided going to court for adjudication. However, with increment in technology, parties might see judges as facilitators of

²⁹⁵ For example, the costs of e-discovery in the USA have gone up due to 'predictive coding' tools, using machine learning to flag relevant documents. But it is hard to predict whether the costs of evidence-taking in the digital world will remain high. Some costs might go up, but as time passes and technology becomes more handy for day to day use, the curve of costs might decrease. Cf Engstrom and Gelbach (n 191), 1046-1051.

²⁹⁶ Ebner and Greenberg (n 171), 86-87.

²⁹⁷ Engstrom and Gelbach (n 191), 1046: 'technologists (the people who develop, tune, and deploy the models) and technologist experts (the people who opine about the quality of this or that approach before judges in motions practice)'. In the same sense, Katsh and Rabinovich-Einy (n 170) 199.

²⁹⁸ Cabral (n 16), 75.

²⁹⁹ This approach has been noted by J Sorabji, 'The Online Solutions Court - a Multi-Door Courthouse for the 21st Century', (2017) 36 (1) Civil Justice Quarterly, 86-100; and D Q Anderson, 'The Convergence of ADR and ODR in the Courts: The Impact on Access to Justice', (2019) 38 (1) Civil Justice Quarterly, 126-143.

conflict solving.³⁰⁰ This would also have an indirect impact on the role of lawyers, and in the view that people have of the trade-offs involving going to court and resolving disputes through ADR.³⁰¹

- 229 Once again, as technology moves forward, it creates advantages and disadvantages; we cannot see the role of technology neither with full enthusiasm, nor with an unjustifiable scepticism.

³⁰⁰ As argue O Rabinovitch-Einy and E Katsh, 'Access to Digital Justice: Fair and Efficient Processes for the Modern Age', (2017) 18 *Cardozo Journal of Conflict Resolution*, 648.

³⁰¹ Ebner and Greenberg (n 171), 85.

ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
ALI	American Law Institute
Art	Article/Articles
BGH	Bundesgerichtshof (Federal Court of Justice) [Germany]
CDB	Combined Dispute Boards
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	confer (compare)
ch	chapter
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
DAB	Dispute Adjudication Boards
DRB	Dispute Review Boards
DSD	Dispute systems design
ECLI	European Case Law Identifier
ed	editor/editors
edn	edition/editions
eg	exempli gratia (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
ibid	ibidem (in the same place)
ICT	Information and Communication Technologies
ie	id est (that is)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
ODP	Online Dispute Prevention
ODR	Online Dispute Resolution
para	paragraph/paragraphs
pt	part
Sec	Section/Sections
supp	supplement/supplements
T2T	Technology to Technology
trans/tr	translated, translation/translator

UK	United Kingdom
UNIDROIT	Institut international pour l'unification du droit privé (International Institute for the Unification of Private Law)
US / USA	United States of America
v	versus
vg	<i>verbi gratia</i>
vol	volume/volumes

LEGISLATION

International/Supranational

European Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (EU)

European Mediation Directive (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 (EU).

American Convention of Human Rights 1969

International Chamber of Commerce's Dispute Board Rules (International Chamber of Commerce)

United Nations Convention on International Settlement Agreements resulting from Mediation (UN)

National

Civil Procedure Rules 1999 (England and Wales)

Code of Civil Procedure 1975 (France)

Code of Civil Procedure 1993 (Peru)

Codice di Procedura Civile (Code of Civil Procedure) (Italy)

Código de Processo Civil 2015 (Code of Civil Procedure) (Brazil)

Código General de Proceso 2012 (Code of Civil Procedure) (Colombia)

Código Procesal Civil 2013 (Bolivia)

Construction Business Act 2008 (Japan)

Croatian Conciliation Act 2011

Decreto legislativo n.28/2010 (Legislative Decree n.28/2010) (Italy)

Gesetz zur Förderung der außergerichtlichen Streitbeilegung 1999 (Statutory provisions for the promotion of alternative dispute resolution) (Germany)

Legge n.120/2020 (Statute n.120 of 2020) (Italy)

Legge n.162/2014 (Statute n.162/2014) (Italy)

Lei de Mediação n.13.140/2015 (Mediation Act) (Brazil)

Ley 24.573/1995 (Statute n.24.573 from 1995) (Argentina),

Ley 26.589/2010 (Mediation Act) (Argentina)

Ley 26.872/1997 (Conciliation Act) (Peru)

Ley 5 de Mediación en Asuntos Civiles y Mercantiles 2012 (Mediation Act for Civil and Commercial Matters) (Spain)

Ley n° 640 2001 (Conciliation Act 2001) (Colombia)

Mediation Act 2010 (Italy)

Mediationsgesetz 2012 (Mediation Act) (Germany).

Zivilprozessordnung (Code of Civil Procedure) (Germany)

Zivilrechts-Mediations-Gesetz 2004 (Mediation in Civil Matters Act) (Austria)

CASES

National

Case n. 00-19.423 (Cour de cassation, France) chambre mixte, 14 Feb. 2003.

BIBLIOGRAPHY

- Abdel Wahab M S, 'ODR and e-Arbitration', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).
- , 'Online Dispute Resolution for Africa', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012)
- Alcalá Zamora y Castillo N, *Proceso, autocomposición y autodefensa* (UNAM, 1991).
- Ali S, 'Nudging Civil Justice: Examining Voluntary and Mandatory Court Mediation User Experience in Twelve Regions', (2018) 19 (2) *Cardozo Journal of Conflict Resolution*.
- Anderson D Q, 'The Convergence of ADR and ODR in the Courts: The Impact on Access to Justice', (2019) 38 (1) *Civil Justice Quarterly*.
- Andrews N, 'The Modern Civil Process in England: Links Between Private and Public Forms of Dispute Resolution', (2009) 14 *Zeitschrift für Zivilprozeß International*.
- , 'Procedure, Party Agreement, and Contract', (2021) 1 *Giustizia consensuale*.
- Avruch K, 'Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice', (2003) 20 (3) *Conflict Resolution Quarterly*.
- Bargen J M, *Gerichtsinterne Mediation: Eine Kernaufgabe der rechtsprechenden Gewalt* (Mohr Siebeck, 2008).
- Belloso N, 'Formas alternativas de resolución de conflictos: Experiencias en Latinoamérica', (2004) 48 *Revista Sequencia*.
- Beretta R, 'Le procedure di negoziazione nell'era digitale. La rete: una "quarta parte" al tavolo del negoziato?', in S Dalla Bontà (org). *Communicare, negoziare e mediare in rete* (Università degli Studi di Trento, 2021).
- Bingham L, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict', (2008) 24 *Ohio State Journal on Dispute Resolution*.
- Blake S, Browne J and Sime S. *The Jackson ADR Handbook* (Oxford University Press, 2013).
- Bonnet E, 'La convention de procédure participative', (2011) 3 *Procédures*.
- Bragança F and Miranda Netto F (org.). *Panorama legal da mediação na América Latina* (PPGSD-UFF, 2020).
- Bush R, 'Staying in orbit, or breaking free: the relationship of mediation to the courts over four decades', (2008) 84 (3) *North Dakota Law Review*.

- Cabral A, 'Procedural Contracts and Agreements: An Introduction to a New Era of Party Autonomy in Litigation', in A. Cabral and A. Nylund (eds.). *Shaping Civil Litigation Using Procedural Agreements* (Eleven, 2024).
- , *Convenções processuais: teoria geral dos negócios jurídicos processuais* (3rd ed., Juspodivm, 2020).
- , 'Designing procedure by contract: litigation agreements in contemporary civil procedure', (2019) 9 *International Journal of Procedural Law*.
- , 'Mediation und Schlichtung nach brasilianischem Recht', (2017) 116 *Zeitschrift für Vergleichende Rechtswissenschaft*.
- , 'Online Dispute Resolution', in D Mitidiero, A Cabral and P Lucon (eds). *Artificial Intelligence and its Impacts on the System of Civil Justice - IAPL Online Conference 2021* (RT, 2023).
- Cabral A and Cunha L. 'Negociação direta ou resolução colaborativa de disputas', (2016) 259, *Revista de Processo*.
- Cabral A and Nylund A (eds). *Contractualisation of Civil Litigation* (Intersentia, 2023).
- Cadiet L, 'Le jeu du contrat et du procès'. in *Philosophie du Droit et Droit Économique. Mélanges offerts à Gérard Farjat* (Frison-Roche, 1999).
- , 'Case management judiciaire et déformalisation de la procédure', (2008) 125, *Revue française d'administration publique*.
- , 'Les conventions relatives au procès en droit français: sur la contractualisation du règlement des litiges', (2008) LXII (3) *Accordi di parte e Processo: Supplemento della Rivista Trimestrale di Diritto e Procedura Civile*.
- , 'Le developpement de la procédure participative', (2020) 5 *Procédures*.
- Cadiet L and Clay T. *Les modes alternatifs de règlement des conflits* (3rd ed., Dalloz, 2019).
- Cadiet L, Clay T and Jeuland E (coord), *Médiation et arbitrage. Alternative Dispute Resolution: Alternative à la justice ou justice alternative? Perspectives comparatives* (Litec, 2005).
- Cadiet L and Jeuland E, *Droit judiciaire privé* (8th ed, LGDJ, 2013).
- Cadiet L, Normand J and Amrani-Mekki S. *Théorie générale du procès* (LGDJ, 2010).
- Câmara A, *O novo processo civil brasileiro* (Atlas, 2015).
- Cambi E, 'Comment', in T Wambier, E Talamini, F Didier Jr. and B Dantas (org.). *Breves comentários ao novo Código de Processo Civil* (RT, 2015).
- Capasso V, 'Dispute boards: what if they were multi-tiered arbitration?', (2018) LIV (3) *Rivista di diritto internazionale privato e processuale*.

—, 'About the relationship between dispute board and emergency arbitrator', (2019) XXIX (1) *Revista dell'Arbitrato*.

Caponi R, 'Autonomia privata e processo civile: gli accordi processuali', (2010) 1 (2) *Civil Procedure Review*.

—, 'La giustizia civile alla prova della mediazione: quadro generale', (2010) V *Foro italiano*.

—, 'Mediation and State Civil Justice', (2011) 2 *Opinio Juris in Comparatione*.

—, 'Italian Civil Justice System: Most Significant Innovations in the Last Years (2009– 2012)', in O Chase et alii (eds). *Civil Litigation in Comparative Context* (West, 2013).

—, 'Just Settlement' or 'Just About Settlement'? Mediated Agreements: A Comparative Overview of the Basics', (2015) 79 (1) *Rabels Zeitschrift für ausländisches und internationales Privatrecht*.

—, 'La mediazione nelle legislazioni straniere', in H Zaneti Jr. and T Xavier Cabral (org.). *Justiça Multiportas* (Juspodivm, 2016).

Cappelletti M, 'Appunti su conciliatore e conciliazione', in *Scritti in onore di Egidio Tossato* (vol.III, Giuffrè, 1984).

—, *Dimensioni della giustizia nelle società contemporanee* (Il Mulino, 1994).

Cavalli M C and Quinteros L, *Introducción a la gestión no adversarial de conflictos* (Reus, 2010).

Chanen J, 'Collaborative counselors: newest ADR option wins converts, while suffering some growing pains', (2006) 92 (6) *American Bar Association Journal*.

Chase O, *Law, Culture and Ritual: Disputing Systems in Cross-cultural Context* (New York University Press, 2005).

Chern C, *Chern on Dispute Boards: Practice and Procedure* (Routledge, 2015).

Chizzini A, 'Konventionalprozess e poteri delle parti', (2015) LXX (1) *Rivista di Diritto Processuale*.

Chong S and Steffek F, 'Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention', (2019) 31 *Singapore Academy of Law Journal*.

Cortés P, 'The Potential of Online Dispute Resolution as a Consumer Redress Mechanism', manuscript, 2007.

—, 'Online Dispute Resolution for Consumers', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).

Cortés P and Lodder A, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress', 2014, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414098.

Costa e Silva P, *A nova face da justiça: os meios extrajudiciais de resolução de controvérsias* (Coimbra, 2009).

Costanzi C, 'Dal dispute board al collegio consultivo tecnico: profili comparatistici, diacronici e critici della semplificazione 'all'italiana'', (2021) XXI (2) *AmbienteDiritto.it*.

Cunha P, *Conflito e negociação* (Asa, 2001).

Dalfino D, 'Mediazione, processo, ruolo dei giudici: una questione di bilanciamento', in I Canfora and A Genovese (org). *Risoluzione alternativa delle controversie tra accesso alla giustizia e regolazione del mercato* (Edizioni Scientifiche Italiane, 2018).

—, 'La (persuasiva) soluzione delle sezioni unite in tema di mediazione e opposizione a decreto ingiuntivo', (2020) I, *Foro italiano*.

—, 'Transazione, conciliazione e mediazione nel nuovo sistema di tutela collettiva dei diritti individuali omogenei', (2020) 11 (3) *Civil Procedure Review*.

Dalla Bontà S, 'Questioni vecchie e nuove in tema di conciliazione giudiziale', (2014) 1 *Il Giusto Processo Civile*.

—, 'Una giustizia "co-esistenziale" online nello spazio giuridico europeo? Spunti critici sul pacchetto ADR-ODR per i consumatori', (2021) 1 *Giustizia consensuale*.

Davis K and Hershkoff H, 'Contracting for procedure', (2011) 63 (2) *William & Mary Law Review*.

De Santis A D, 'Rapporti tra mediazione, conciliazione e processo civile', in A Maietta (org.). *La nuova mediazione civile e commerciale* (Cedam, 2014).

Deckert K, 'Mediation in Frankreich' in K J Hopt and F Steffek (eds), *Mediation: Rechtstatsachen, Rechtsvergleich, Regelungen* (Mohr Siebeck, 2008).

Deguchi M and Myashita M, 'Online Dispute Resolution (ODR) in Asia', in E Oteiza, P Lucon and D Mitidiero (eds). *Artificial Intelligence and its Impacts on the Civil Justice System. Papers of the IAPL Porto Alegre Conference, 2021*.

Demeyere L, 'Alternative dispute resolution. Dispute boards and the new rules of the International Chamber of Commerce (ICC)', (2005) 1 *Journal of International Dispute Resolution*.

Didier Jr F and Zaneti Jr H, 'Justiça multiportas e tutela adequada em litígios complexos', in H Zaneti Jr. and T Navarro Xavier (org). *Justiça Multiportas* (Juspodivm, 2016).

Didier Jr F, *Curso de Direito Processual Civil* (vol.I, 18th ed, Juspodivm, 2016).

—, 'Atypical procedural agreements in the 2015 Brazilian Civil Procedure Code', (2018) 23 *Zeitschrift für Zivilprozeß International*.

Dodge J, 'The limits of procedural private ordering', (2011) 97 (4) *Virginia Law Review*.

Ebner N, 'E-Mediation', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).

—, 'ODR and Interpersonal Trust', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).

Ebner N and Greenberg E, 'Strengthening Online Dispute Resolution Justice,' (2020) 63 *Washington University Journal of Law & Policy*.

Endicott T, 'The Rule of Law and Online Dispute Resolution', in A Facheci, T Endicott and A Noriega (eds), *Online Dispute Resolution: virtud cívica digital, democracia y derecho* (CEU, 2017).

Engel M, *Collaborative law: Mediation ohne Mediator*, (Mohr Siebeck 2010).

Engstrom D and Gelbach J, 'Legal Tech, Civil Procedure, and the Future of Adversarialism', (2021) 169 *University of Pennsylvania Law Review*.

Fairman C, 'A proposed model rule for collaborative law', (2005) 21 *Ohio State Journal of Dispute Resolution*.

Fandiño M, Espinosa L and Sucunza M, *Estudio Comparado sobre Las Reformas Procesales Civiles en América Latina*. (Centro de Estudios Jurídicos de las Americas, 2020).

Ferrand F, 'Faut-il s'adapter? De l'avenir du procès civil: reddition ou résistance?', in K Miki (org). *Challenges for Civil Justice as We Move Beyond Globalization and Technical Change – XVI IAPL Congress on Procedural Law* (Kobe, 2019).

Figueroa D, 'Dispute Boards for Infrastructure Projects in Latin America: A New Kid on the Block', (2017) 11 (2) *Dispute Resolution International*.

Folberg J and Taylor A, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (Jossey Bass, 1984).

Fuller L, 'Mediation: Its Forms and Functions', (1971) 44 *Southern California Law Review*.

Funken K, 'Comparative Dispute Management: Court-connected Mediation in Japan and Germany', (2002) 3 (2) *German Law Journal*.

Galanter M, 'Justice in many rooms: courts, private ordering, and indigenous law', (1981) 19 *Journal of Legal Pluralism*.

García R and Fuentes C, 'Framing Court System for Case Management Chile', in L Cadiet and Y Fu (org.). Papers of the IAPL Tianjin Conference, 2017.

Giannini L, 'Es la mediación obligatoria en Argentina un instrumento de acceso a la justicia?', (2015) 2 Revista Iberoamericana de Derecho Procesal.

—, La mediación en Argentina (Rubinzal, 2015).

Godinho R, 'A autonomia das partes no projeto de Código de Processo Civil: a atribuição convencional do ônus da prova', in A Freire et alii (org). Novas tendências do processo civil (vol. III, Juspodivm, 2014).

Gottwald P, 'Mediation und gerichtlicher Vergleich: Unterschiede und Gemeinsamkeiten', in G Lüke, T Mikami and H Prütting (org). Festschrift Akira Ishikawa zum 70. Geburtstag (De Gruyter, 2001).

Gould N, 'Enforcing a Dispute Board's Decision: Issues and Considerations', International Construction Law Review, 2012.

Gouveia M, Curso de resolução alternativa de litígios, Coimbra, 2011.

Greger R, 'Gerichtsinterne Mediation auf dem Prüfstand', (2013) Zeitschrift für Konfliktmanagement.

—, 'Mediation und Schlichtung – Anwaltssache?', in M Buschbell-Steege, F Jansen, G Leverkinck, H Schmidt (eds), Festschrift für Karl Eichele (Nomos, 2013).

Haga M, 'Japan', in C Esplugués and S Barona (eds). Global Perspectives on ADR (Intersentia, 2014).

Heil B, IT-Anwendung im Zivilprozess: Untersuchung zur Anwendung künstlicher Intelligenz im Recht und zum strukturierten elektronischen Verfahren (Mohr Siebeck, 2020).

Hess B, 'Vom Regierungsentwurf zum Mediationsgesetz', in C Fischer and H Unberath (org). Das neue Mediationsgesetz: Rechtliche Rahmenbedingungen der Mediation (Beck, 2013).

Hök G S, 'Dispute Adjudication in Civil Law Countries – Phantom or Effective Dispute Resolution Method?', (2011) 28 (4) International Construction Law Review.

Hopt K J and Steffek F, 'Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues', in K J Hopt and F Steffek (eds). Mediation: Principles and Regulation in Comparative Perspective (Oxford University Press, 2013).

Illera M, 'Los mecanismos alternativos de solución de conflictos: una opción que complementa la actividad jurisdiccional', in M Vásquez (ed). Temas Actuales en Derecho Procesal y Administración de Justicia: Estudios críticos y comentarios al Código General del Proceso (Universidad del Norte, 2014).

Jeretina U and Uzelac A, 'Alternative Dispute Resolution for Consumer Cases: Are Divergences an Obstacle to Effective Access to Justice?', (2014) XII (4) *Mednarodna revija za javno upravo* (International Public Administration Review).

Katsh E, 'ODR: A Look at History. A Few Thoughts About the Present and Some Speculation About the Future', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).

Katsh E and Rabinovich-Einy O, 'Technology and the Future of Dispute Systems Design', (2012) 17 *Harvard Negotiation Law Review*.

—, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press, 2017).

Katsh E and Rifkin J, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, 2001).

Katsh E and Rule C, 'What We Know and Need to Know about Online Dispute Resolution', (2016) 67 *South Carolina Law Review*.

Kaufmann-Kohler G and Schultz T, *Online Dispute Resolution: Challenges for contemporary justice* (Kluwer Law, 2004).

Kessler G and Finkelstein L, 'The Evolution of a Multi-Door Courthouse', (1988) 37 *Catholic University Law Review*.

Koch C, 'Nouveau règlement de la CCI relatif aux Dispute Board', (2004) 15 (2) *Bulletin de la Cour internationale d'arbitrage de la CCI*.

Kriesberg L, *Constructive conflicts: from escalation to resolution* (3rd ed, Rowman & Littlefield, 2007).

Kroll J, Huey J, Barocas S, Felten E, Reidenberg J, Robinson D and Yu H, 'Accountable Algorithms', (2017) 165 *University of Pennsylvania Law Review*.

Kupfer Schneider A, 'Building a pedagogy of problem-solving: learning to choose among ADR processes', (2000) 5 *Harvard Negotiation Law Review*.

La Rosa J and Rivas G, *Teoría del conflicto y mecanismos de solución* (Tarea, 2018).

Lande J, 'Possibilities for collaborative law: ethics and practice of lawyer disqualification and process control in a new model of lawyering', (2003) 64 *Ohio State Law Journal*.

Laugwitz F, *Einvernehmlicher Streitbeilegung internationaler Wirtschaftsstreitigkeiten unter der ADR-Regeln der Internationalen Handelskammer* (Mohr Siebeck 2016).

Lawrence J, 'Collaborative lawyering: a new development in conflict resolution', 17 *Ohio State Journal on Dispute Resolution* (2002).

Legg M, 'The future of dispute resolution: online ADR and online courts', (2016) 3 University of New South Wales Law Research Series.

Lewicki R, Barry B and Saunders D, *Essentials of Negotiation* (6th ed., New York, 2016).

Liuzzi G, 'La procedura di negoziazione assistita da uno o più avvocati', (2015) 1 *Il Giusto Processo Civile*.

Lombardini I, 'Riflessioni sul nuovo Collegio Consultivo Tecnico negli appalti pubblici (Art 6 del d.l. 16 luglio 2020, n.76, cd.'Decreto Semplificazioni', convertito con modifiche in l.11 settembre 2020, n.120', (2020) 4 *Rivista dell'arbitrato*.

Luiso F P, 'La "proposta" del mediatore', (2021) 1 *Giustizia consensuale*.

Machado M, 'A aplicabilidade dos dispute boards no Regime Diferenciado de Contratações Públicas', (2018) 110 (1), *Revista de Doutrina e Jurisprudência*.

Mahnken V, 'Why International Dispute Settlement Institutions Should Offer Ad Hoc Dispute Board Rules', (2006) 23 *International Construction Law Review*.

Main T, 'Arbitration, What Is It Good For?', (2017) 18 *Nevada Law Journal*.

—, 'Mediation: An Unlikely Villain', (2019) 34 (3) *Ohio State Journal of Dispute Resolution*.

Malinvaud P, 'Réflexions sur le Dispute Adjudication Board', in *Le droit privé français à la fin du XXe siècle* (Litec, 2001).

Mattos O, 'Une nouveauté: la convention de procédure participative', (2011) 1 *Cahiers de Droit de L'entreprise*.

Mazzei R and Chagas B, 'Breve ensaio sobre a postura dos atores processuais em relação aos métodos adequados de solução de conflitos', in H Zaneti Jr. and T Navarro Xavier (org.). *Justiça Multiportas* (Juspodivm, 2016).

Menkel-Meadow C, 'Pursuing settlement in an adversary culture: a tale of innovation co-opted or 'the law of ADR', (1991) 19 (1) *Florida State University Law Review*.

—, 'Variations in the Uptake of and Resistance to Mediation Outside of the United States', in A Rovine (ed). *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (vol.8, Brill-Nijhoff, 2015).

—, 'Is ODR ADR? Reflections of an ADR Founder from the 15th ODR Conference', (2016) 3 (1) *International Journal on Online Dispute Resolution*.

—, 'The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation' in I Macduff (ed). *Essays on Mediation: Dealing with Disputes in the 21st Century* (Wolters Kluwer, 2016).

Mentovich A, Prescott J J and Rabinovich-Einy O, 'Are litigation outcome disparities inevitable? Courts, Technology and the future of impartiality', (2020) 71 (4) Alabama Law Review.

Mnookin R, Peppet S, Tulumello A, *Beyond Winning: Negotiation to Create Value in Deals and Disputes* (Harvard University Press, 2000).

Moffit M, 'Customized litigation: the case for making civil procedure negotiable', (2007) 75 George Washington Law Review.

Moore C, *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd ed, Jossey Bass, 2003).

Nishikawa R, 'Judges and ADR in Japan', (2001) 18 (3) Journal of International Arbitration.

Nunes D, 'A Technological Shift in Procedural Law (From Automation to Transformation): Can Legal Procedure be Adapted through Technology?', in D Nunes, P Lucon and E Wolkart (org). *Inteligência artificial e Direito Processual: os impactos da virada tecnológica no direito processual* (Juspodivm, 2020).

Nunes D and Paolinelli C, 'Access to Justice and the Technological Shift in the Brazilian Justice System: Technology-assisted Dispute Management and the Alignment of Expectations for a citizen-centric transformation – new designs, choice architecture and appropriate dispute handling', in D Nunes, I Werneck and P Lucon (orgs). *Processo e tecnologia: os impactos da virada tecnológica no âmbito mundial* (Juspodivm, 2021).

Nylund A, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation', in A Nylund, K Ervasti and L Adrian (eds). *Nordic Mediation Research* (Springer, 2018).

Nylund A and Cabral A (eds). *Contractualisation of Civil Litigation* (Intersentia, 2023).

—, *Shaping Civil Litigation Using Procedural Agreements* (Eleven, 2024).

Ormachea I, *Manual de conciliación procesal y pre-procesal* (Academia de La Magistratura, 2000).

Oteiza E, 'Punto de vista: MARC/ADR y diversidad de culturas: el ejemplo Latinoamericano', in H Zaneti Jr. and T Navarro Xavier (org). *Justiça Multiportas* (Juspodivm, 2016).

Padovan M, 'In merito al collegio consultivo tecnico, alcuni spunti comparatistici', (2017) 1 Rivista Trimestrale degli Appalti.

Paredes G, 'Dispute Boards y Arbitraje en Construcción: ¿Compiten o se Complementan?', in R Hernández (coord), *Dispute Boards en Latinoamérica: Experiencias y Retos* (Pontificia Universidad Catolica de Peru, 2014).

Pearlstein A, Hanson B and Ebner N, 'ODR in North America', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).

Peulvé C, 'La dimension processuelle de la procédure participative', (2012) 76 *Petites Affiches*.

Pezzani T M, *Il regime convenzionale delle prove* (Giuffrè, 2009).

Phillipe M, 'Access to Justice Through Online Dispute Resolution Is Not Science Fiction: A Practitioner's Perspective on the Good, the Bad and the Future', in L Oliveira and S Hourani (eds). *Access to Justice in Arbitration: Concept, Context and Practice* (Wolters Kluwer, 2020).

Picardi N, 'Il giudice conciliatore: Costruzione e crisi di un modello', (1980) *Il Giustizia Civile*.

Poivey-Leclercq H, 'La convention de procédure participative: 'un pacte de non agression à durée déterminée'', (2011) 4 *JCP La Semaine Juridique*, édition générale.

Poliseno B, 'Negoziazione assistita e accordi 'amministrativi' in materia di separazione e divorzio', (2015) 1 *Il Giusto Processo Civile*.

—, 'La 'giustizia alternativa' tra mediazione ordinata ex officio e conciliazione giudiziale della controversia', in *Scritti in memoria di F. Cipriani* (Edizioni Scientifiche Italiane, 2020).

Prescott J J and Sanchez A, 'Platform Procedure: Using Technology to Facilitate (Efficient) Civil Settlement', in Y-C Chang (ed). *Selection and Decision in Judicial Process around the World: Empirical Inquiries* (Cambridge University Press, 2020).

Press S, 'Institutionalization: savior or saboteur of mediation?', (1997) 24 (4) *Florida State University Law Review*.

Rabinovich-Einy O and Katsh E, 'Lessons from Online Dispute Resolution for Dispute Systems Design', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).

—, 'Access to Digital Justice: Fair and Efficient Processes for the Modern Age', (2017) 18 *Cardozo Journal of Conflict Resolution*.

Rainey D, 'ODR and Culture', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).

Ranzolin R, 'A eficácia dos dispute boards no direito brasileiro', (2017), 52 *Revista de Arbitragem e Mediação*.

Reyes L M, 'Comentarios sobre las reformas introducidas por el nuevo Código General del Proceso en materia de familia', in M Vásquez (ed). *Temas Actuales en*

Derecho Procesal y Administración de Justicia: Estudios críticos y comentarios al Código General del Proceso. (Universidad del Norte, 2014).

Rhee R, 'Toward procedural optionality: private ordering of public adjudication', (2009) 84 *New York University Law Review*.

Riego C, 'Solución de conflictos en el sistema de salud, mediación y arbitraje en un contexto institucional', (2019) 33 *Revista Chilena de Derecho Privado*.

Rifkin J, 'Online Dispute Resolution: Theory and Practice of the Fourth Party', (2001) 19 (1) *Conflict Resolution Quarterly*.

Rogers N, Bordone R, Sander F and McEwen C. *Designing Systems and Processes for Managing Disputes* (Wolters Kluwer, 2013).

Rühl G, 'Digitale Justiz, oder: Zivilverfahren für das 21. Jahrhundert', (2020) 75 (17) *Juristen Zeitung*.

Rule C, *Online Dispute Resolution for Businesses, B2B, E-Commerce, Consumer, Employment, Insurance and Other Commercial Conflicts* (Jossey-Bass, 2002).

—, 'Is ODR ADR? A Response to Carrie Menkel-Meadow', (2016) 3 (1) *International Journal on Online Dispute Resolution*.

Rule C and Singh H, 'ODR and Online Reputation Systems: Maintaining Trust and Accuracy Through Effective Redress', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).

Rule C and Villamor C, 'The Importance of Language in Online Dispute Resolution', (2004) *ICC International Court of Arbitration Bulletin, Special Supplement*.

Sanchez V, 'Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today', (1996) 11 (1) *Ohio State Journal on Dispute Resolution*.

Sander F, 'Varieties of dispute processing', (1976) 70 *Federal Rules Decisions*.

Sauphanor S, 'La convention de procédure participative: aspects pratiques', (2011) 1 *Gazette du Palais*.

Schultz T, 'Online Dispute Resolution: an Overview and Selected Issues', 2002, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=898821.

—, 'An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR', in *Proceedings of the UNECE Forum on ODR*, 2003.

Schultz T, Kaufmman-Kohler G, Langer D and Bonnet V, 'Online Dispute Resolution: The State of the Art and the Issues', *E-com Research Project of the University of Geneva*, 2001.

Schwab W, 'Collaborative law: a closer look at an emerging practice', (2004) 4 *Pepperdine Dispute Resolution Law Journal*.

Sela A, 'Streamlining Justice: How Online Courts Can Resolve the Challenges of pro se Litigation', (2016) 26 (2) Cornell Journal of Law and Public Policy.

—, 'The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends and Future Directions', (2017) 21 Lewis & Clark Law Review.

Seppälä C, 'The new FIDIC provision for a dispute adjudication board', (1997) 8 Le droit des Affaires Internationales.

Smith S and Martinez J, 'An Analytic Framework for Dispute Systems Design', ^[L]_{SEP} (2009) 14 Harvard Negotiation Law Review.

Sorabji J, 'The Online Solutions Court - a Multi-Door Courthouse for the 21st Century', (2017) 36 (1) Civil Justice Quarterly.

Spaulding N, 'Online Dispute Resolution and the End of Adversarial Justice?', Stanford Law School, forthcoming article, 2021.

Steffek F, 'Rechtsvergleichende Erfahrungen für die Regelung der Mediation', (2010) 74 Rabels Zeitschrift für ausländisches und internationales Privatrecht.

—, 'Mediation', in J Basedow, K J Hopt, R Zimmermann and A Stier (eds). The Max Planck Encyclopedia of European Private Law (vol.II, Oxford University Press, 2012).

—, 'Rechtsfragen der Mediation und des Güterichterverfahrens: Rechtsanwendung und Regulierung im Spiegel von Rechtsvergleich und Rechtstatsachen', (2013) 21 Zeitschrift für Europäisches Privatrecht.

Steffek F et alii, 'Guide for Regulating Dispute Resolution (GRDR): Principles and Comments', in F Steffek, H Unberath, H Genn, R Greger and C Menkel-Meadow (org). Regulating Dispute Resolution – ADR and Access to Justice at the Crossroads (Hart, 2013).

Susskind R, The End of Lawyers? Rethinking the Nature of Legal Services (Oxford University Press, 2008).

—, Tomorrow's Lawyers: an Introduction to Your Future (2nd ed, Oxford University Press, 2017).

—, Online Courts and the Future of Justice (Oxford University Press, 2019).

Szlak G, 'Online Dispute Resolution in Latin America', in M S Abdel Wahab, E Katsh and D Rainey (eds), Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution (Eleven, 2012).

Taniguchi Y, 'How much does japanese civil procedure belong to the civil law and to the common law?', in J Walker and O Chase (org). Common law, civil law and the future of categories (Lexis Nexis, 2010).

- Tartuce F, *Mediação nos conflitos civis* (2nd ed., Método, 2015).
- Tesler P, *Collaborative law: achieving effective resolution in divorce without litigation* (2nd ed., American Bar Association, 2008).
- Thiessen E, Miniato P and Hiebert B, 'ODR and e-Negotiation', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).
- Thornburg E, 'Observing Online Courts: Lessons from the Pandemic', (2020) SMU Dedman School of Law Legal Studies Research Paper n. 486, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696594.
- Toniolo S, 'Comunicare tra culture "mediante" e "mediate da" la tecnologia', in S Dalla Bontà (org). *Comunicare, negoziare e mediare in rete* (Università degli Studi di Trento, 2021).
- Ury W, Brett J and Goldberg S. *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Jossey Bass, 1988).
- Uzelac A, 'Comments on Law on Mediation Procedure of Bosnia and Herzegovina', in A Novo (ed). *Paths of Mediation in Bosnia and Herzegovina* (IFC, 2009).
- , 'Croatia (Croatian National Report)', in J. Paulsson, P Sanders and A J van der Berg (ed), *International Handbook on Commercial Arbitration*, Suppl. 109 (Kluwer Law, 2020).
- Vargas M, 'Mediación familiar en Chile: La experiencia del Programa de Resolución de Conflictos anexo a Tribunales', in *Resolución Alternativa de Conflictos* (Centro de Estudios Justicia de las Américas, 2001).
- Vargas M and Fuentes C, *Introducción al Derecho Procesal: Nuevas Aproximaciones*, (Der, 2018).
- Vermeys N and Benyekhlef K, 'ODR and the Courts', in M S Abdel Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven, 2012).
- Virgós M, 'Procedimientos alternativos de resolución de controversias y comercio internacional', (2007) 11 *Anuario de la Facultad de Derecho*.
- Voet S, 'Belmed: The Belgian Digital Portal for Consumer A(O)DR', 2013, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245017.
- Wald A, 'Dispute resolution boards: evolução recente', (2011) 30 *Revista de Arbitragem e Mediação*.
- Welsh N, 'ODR: A Time for Celebration and the Embrace of Procedural Safeguards', *ADR Hub* (July, 4th, 2016), available at <http://www.adrhub.com/profiles/blogs/procedural-justice-in-odr>.

Wing L, 'Ethical Principles for Online Dispute Resolution: A GPS Device for the Field', (2016) 3 (1) International Journal on On- line Dispute Resolution.

Wing L and Rainey D, 'Online Dispute Resolution and the Development of Theory', in M S Abdel Wahab, E Katsh and D Rainey (eds), Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution (Eleven, 2012).

Winick B, 'Therapeutic jurisprudence and the role of counsel in litigation', (2000) 37 (1) California Western Law Review.

Wolf M, 'Normative Aspekte richterlicher Vergleichstätigkeit', (1976) 89 Zeitschrift für Zivilprozeß.

Yun Z, Sze T, Li T and Nagarajan C, 'Online Dispute Resolution in Asia', in M S Abdel Wahab, E Katsh and D Rainey (eds), Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution (Eleven, 2012).