

ONLINE DISPUTE RESOLUTION IN FAMILY MATTERS

Edyta GAPSKA, PhD

associate professor (John Paul II Catholic University of Lublin)

1. Introduction

Online Dispute Resolution is commonly referred to as resolving disputes through the Internet. It is regarded as a new generation of dispute resolution¹ representing an alternative to “win-lose” adjudicative processes². It brings an abundantly clear benefits transferring a dispute to an alternative, out-of-court, simple, efficient and time and cost-effective forum. As such it offers another particular benefit enabling parties to craft an agreement which is more likely to be complied with on the voluntary basis than decisions rendered by the court system. The use of artificial intelligence allows to derive additional profits: online system facilitates and expedites communication transferring it beyond the territorial boundaries. The Internet remains not only the best and most natural forum of resolution of conflicts arising from actions performed in cyberspace and based exclusively on electronic communication. Nowadays e-disputes include also traditional disputes relating to sale and purchase of goods and services, unfair trade practices, intellectual property, defamation³ or other financial or legal cross-border relations.

¹ E. SPIROSKA – M. RISTOVSKA: The European Union’s Normative Framework for Online Dispute Resolution (ODR) as Next Dispute Resolution Generation. *ZENITH International Journal of Multidisciplinary Research*, Vol. 11., 2014/11. 130.

² J. P. Cortés DIÉGUEZ: Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues. *Rutgers Computer & Technology Law Journal*, Vol. 35., 2008/1. 1.

³ See more about online defamation and arbitration I. Al SWELIMYEEN: *Online Arbitration and Defamation in Social Networks*. (available at: <http://www.docstoc.com/docs/77136187/Online-Arbitration-and-Defamation-in-Social-Networks>); the Author enumerates options available for a claimant to obtain a redress in case of defamation: 1) through social network policies and norms known as “the terms and conditions of use”, 2) through general laws applied by courts or 3) through self-regulation providing for self-regulatory body (community) acting online. According to the Author the most successful example of the last one is online arbitration.

There are pertinent concerns and many fears about application of ODR to family disputes; its impact is considered as both revolutionary and disruptive.⁴ Determining whether it can be effectively developed in family cases requires previous examination thereof, starting with explanation of the notion of ODR and its objectives, as well as elucidation of the current regulatory framework both in the European Union and worldwide. This analyze aims at presenting the basic characteristics of ODR, benefits of its application to family disputes as well as pinpointing the main concerns about it.

The basic assumption of presented research is that the concept of access to justice has been already reformulated and nowadays it covers not only one's right to participate in fair judicial proceedings⁵ but also the right to choose the most suitable mechanism of obtaining redress – which includes either the option of a court-based litigation or out-of-court solution, which might by as well ODR.

2. The notion and regulatory framework of Online Dispute Resolution

Online Dispute Resolution encompasses any methods of dispute resolution – arbitration, negotiations, mediation, conciliation, ombudsman and other methods of settlement (*early-neutral evaluations, complaint assistance*) – that are handled online. Online Dispute Resolution has been at its beginnings, and often still is commonly referred to as “electronic Alternative Dispute Resolution” (“e-ADR”)⁶ and is popularly equated with utilizing technology to conduct alternative dispute resolution⁷ either exclusively online or with support of technological tools.⁸ In this sense Online Dispute Resolution is an equivalent

⁴ J. L. BOWER – C. M. CHRISTENSEN: Disruptive Technologies: Catching the Wave. *Harvard Business Review*, Vol. 73., 1995/1. 43–53.

⁵ Art. 6 of the European Convention on Human Rights.

⁶ S. SCHIAVETTA: The Relationship Between e-ADR and Article 6 of the European Convention of Human Rights pursuant to the Case Law of the European Court of Human Rights. *Journal of Information. Law & Technology*, 2004. 1. available at: http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/schiavetta/. European Parliament in its resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters described it simply as “online ADR”.

⁷ C. FARAHA: Critical analysis of online dispute resolutions: the optimist, the realist and the bewildered. *Computer and Telecommunications Law Review*, Vol. 11., 2005/4. 123–128.

⁸ J. C. BETANCOURT – E. ZLATANSKA: Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward? *Arbitration*, Vol. 79., 2013/3. 256.

of offline out-of-court procedure with additional use of technological services.

Adding new technologies to the previous models of resolving disputes is indeed innovative but it is not a change of fundamental nature.⁹ Real value of ODR lays elsewhere. ODR is more than just electronic ADR.¹⁰ ODR is a broader category; it covers any forms of alternative dispute resolution that take place outside of court and are conducted at least partially online.¹¹ Virtual abilities arising from engagement of artificial intelligence are far more reaching than those which exist in offline environment. In consequence there emerged such ODR procedures which do not have offline equivalents, like automated negotiation.¹² Undoubtedly all of them, being an alternative to traditional adjudication system, serve the same goal: facilitating access to justice and making dispute resolution more flexible and efficient.¹³

According to UNCITRAL's draft Procedural Rules ODR is a mechanism for resolving disputes through an IT based platform and facilitated through the use of electronic communications and other information and communications technology.¹⁴

Initially the term ODR referred to conflicts which arose online on the basis of e-commerce (which is still an exclusive field of ODR according to European regulatory framework) and social networks.¹⁵ Over time technological services have been introduced in resolution of traditional offline conflicts.¹⁶

A significant feature of ODR systems which distinguishes it from ADR is that a neutral third party (mediator, arbitrator) is substituted by an artificial

⁹ O. RABINOVICH-EINY – E. KATSH: Digital Justice. Reshaping Boundaries in an Online Dispute Resolution Environment. *International Journal of Online Dispute Resolution*, Vol. 1., 2014. 6.

¹⁰ C. BRANNINGAN: Online Dispute Resolution. In: *Alternative Dispute Resolution Practice Manual*. Canada, Newly Acquired, 2003. 6905.

¹¹ M. PHILIPPE: ODR Redress System for Consumer Disputes. Clarifications, UNCITRAL Works & EU Regulation on ODR. *International Journal of Online Dispute Resolution*, Vol. 1., 2014. 59.

¹² SCHIAVETTA op. cit. 124.

¹³ R. BORDONE: Electronic Online Dispute Resolution: A Systems Approach–Potential, Problems and a Proposal. *Harvard Negotiation Law Review*, Vol. 3., 1998. 191.; G. KAUFMANN-KÖHLER (et al.): *Online Dispute Resolution, Challenges of Contemporary Justice*. The Hague, Kluwer Law International, 2004. 68.

¹⁴ Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, UNCITRAL Working Group III [2012] A/CN.9/WG.III/WP.112 (Online Dispute resolution), Draft Article 2 (6).

¹⁵ The pioneering application of ODR was that established on eBay or Wikipedia. See more O. RABINOVICH-EINY – E. Katsh: Technology and the Future of Dispute Systems Designs. *Harvard Negotiation Law Review*, Vol. 17., 2012. 169.

¹⁶ RABINOVICH-EINY–KATSH (2014) op. cit. 22.

intelligence, which is so called “fourth party”¹⁷ – and is described as a collection of resources, tools, which generally displace, but not replace – the human third party.

Nowadays ODR with fourth-party element might be conducted through:

- 1) automated negotiation using blind-bidding (Cybersettle) or negotiation support systems (Smart Settle, Adjusted Winner, Family Winner)
- 2) assisted negotiation, also called enhanced negotiation, mediated negotiation, direct negotiation or technologically facilitated negotiation (Split-up)¹⁸
- 3) online mediation/conciliation (The Mediation Room)
- 4) technology-assisted arbitration.

Most emerging methods of ODR are conducted by web-based, independent software systems created for the purpose of dispute resolution and involve only the parties to the dispute and the computer.

In Europe popularization of ADR forms dates back to the 1980s and owes primarily to the Council of Europe. The Committee of Ministers adopted several recommendations and other legal instruments considering it necessary to take measures both “in order to simplify the judicial procedure – which was considered to be complex, time-consuming and costly – in all appropriate cases with a view to facilitating access to justice whilst ensuring at the same time that justice is done”,¹⁹ and to relieve it by providing for bodies which, outside the judicial system, shall be at the disposal of the parties to solve their disputes. This objectives were supposed to be achieved by the conciliation of the parties and the amicable, friendly settlement of dispute either outside the judicial system or before any court proceedings have been instituted or in the course of proceedings.²⁰

¹⁷ E. KATSH – J. RIFKIN: *Online Dispute Resolution: Resolving Conflicts in Cyberspace*. San Francisco, Jossey-Bass, 2001. 93 et seq.; E. KATSH: *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*. *Lex Electronica*, Vol. 10., 2006/3. (available at: http://www.lex-electronica.org/docs/articles_65.pdf), RABINOVICH-EINY-KATSH (2012) op. cit. 178.; D. RAINEY: *Third-Party Ethics in the Age of the Fourth Party*. *International Journal of Online Dispute Resolution*, Vol. 1., 2014. 37.

¹⁸ The most significant benefit of applying assisted negotiation system is getting information about the likely outcome of a dispute — known in negotiation jargon as BATNA or ‘best alternative to a negotiated agreement’.

¹⁹ Recommendation R (81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice adopted on 14 May 1981 at the 68th Session of the Committee of Ministers.

²⁰ Recommendation R (86) 12 of the Committee of Ministers to Member States concerning measures to prevent and reduce the excessive workload in the courts adopted on 16 September 1986 at the 399th meeting of the Ministers’ Deputies, Recommendation R (2001) 9 of the

Special attention should be paid to recommendations concerning mediation in civil and in particular in family matters,²¹ which assume that “mediation may be particularly useful where judicial procedures alone are less appropriate for the parties, especially owing to the costs, the formal nature of judicial procedures, or where there is a need to maintain dialogue or contacts between the parties”.

In the early 1990s a significant change in accessibility and application of online services²² affected also Alternative Dispute Resolution and resulted in first proceedings on the Web. As far as the European Union is concerned currently Online Dispute Resolution has widened consumer protection law. Two legal instruments have been adopted:

- 1) 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) No 2006/2004 and Directive 2009/22/EC,²³
- 2) Regulation (EU) No 524/2013 Of The European Parliament and of The Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).²⁴

The new ADR Directive aims at allowing consumers and traders to solve all kinds of contractual disputes on alternative, out-of-court basis no matter what they purchased (excluding disputes regarding health and higher education) and whether they purchased it online or offline, domestically or across borders,

Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties adopted on 5 September 2001 at the 762nd meeting of the Ministers' Deputies, and in criminal matters - Recommendation R (87) 18 of the Committee of Ministers to Member States concerning the simplification of criminal justice adopted on 17 September 1987 at the 410th meeting of the Ministers' Deputies, Recommendation R (99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters adopted on 15 September 1999 at the 679th meeting of the Ministers' Deputies.

²¹ Recommendation R (98) 1 of the Committee of Ministers to Member States on family mediation adopted on 21 January 1998 at the 616th meeting of the Ministers' Deputies (its aim is not only to reduce the workload of the courts, but also to create a more acceptable solution for the parties and (in the case of children) to better protect the welfare of children) and Recommendation R (2002) 10 of the Committee of Ministers to Member States on mediation I civil matters adopted on 18 6 September 2002 at the 808⁸⁰⁸ meeting of the Ministers' Deputies which defines “dispute resolution” as a “process whereby parties negotiate over the issues in dispute in order to reach an agreement with the assistance of one or more mediators”.

²² 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 – D. RAINEY (eds.): *Online Dispute Resolution: Theory and Practice*. The Hague, Eleven International Publishing, 2012. 21.

²³ OJ L 165/63.

²⁴ OJ L 165/1.

while ODR Regulation applies to disputes between consumers and traders concerning contractual obligations stemming from online sales or service contracts. According to the ODR Regulation, an EU-wide online platform is to be set up for disputes that arise from online transactions. The platform will link all the national alternative dispute resolution entities and will operate in all official EU languages²⁵ guaranteeing accurate, up to date, clear, understandable and easily accessible information,²⁶ as well as transparency and convenience in finding a competent ODR provider and transferring a claim. Member States will implement the above mentioned rules by July 2015, while the ODR platform will be operational in January 2016.

3. Online Dispute Resolution and the Nature of Family Disputes

There is one characteristic of an approach to ODR on the European level, namely that it aims at protection of consumer rights and does not go beyond commercial transactions, whereas European Parliament itself emphasized great potential of ADR in family disputes as well.²⁷ But still ODR for family issues runs into skepticism. Fast and efficient systems of dispute resolution are believed to be an appropriate proposition for commercial disputes, not for family ones which are often tough, emotional and hard to be concluded by a mental and financial agreement.

Family conflicts have indeed a completely different nature than commercial ones:

²⁵ The platform will be operated by European Commission at an implementation cost of EURO 4,586 million from 2012 to 2020. Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), COM(2011) 794 final, 5.

²⁶ Article 5 (5) of the ODR Regulation.

²⁷ Point 2 of the European Parliament resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters (2011/2117(INI)) states that: "any approach to ADR should go beyond consumer disputes so as to include business-to-business (B2B) civil and commercial transactions, irrespective of whether they are carried out between private or public undertakings, family disputes, defamation cases and other general interest disputes or ones involving parties with different legal statuses [...] while in point 25 European Parliament emphasised that "the crucial role of types of ADR in family disputes, where it may reduce psychological harm, can help the parties to start talking again and thereby, in particular, help ensure the protection of children" as well as "potential in cross-border ADR in terms of its flexibility in particular".

- a) they do not arise on the basis of online relations, while commercial disputes originate in huge extent in online transactions;
- b) electronic commerce transactions are becoming more and more significant for supporting worldwide economic development; the common goal of resolving commercial disputes is to reach solution that will not damage the relationship and will not endanger future relations; meanwhile the goal of ODR in family conflict relation is first of all to eliminate emotional hostility in order to smooth the conflict over and make the parties start talking about their legal rights and duties even if there is actually no future for their relationship;
- c) family breakdown affects primarily social – not economical – stability and needs more communication than adjudication.

For these reasons even ODR experts are reluctant about moving towards family disputes with online techniques. Nevertheless off-line origins of family conflicts and their social context is not a barrier to ODR progress but rather a challenge which actually harmonizes with ODR goal – and that is “to change the dispute resolution system – the overall set of procedures used and the factors affecting their use – in order to encourage people to talk instead of fight about their differences.”²⁸

Family disputes, especially those involving children, are indeed more emotional in nature than legal. Therefore, it is more than adequate to relate to such kinds of conflicts the quotation with which Pablo Cortés commenced his book devoted to Online Dispute Resolution. According to the quoted view of the former Chief Justice of the United States Supreme Court “the notion that most people want black-robed judges, well-dressed lawyers, and fine panelled courtrooms as the setting to resolve their dispute is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.” That concerns also relational disputes, in which emotions play an important role and make getting to an agreement even harder and more painful. At the same time these are the matters in which reaching an agreement is the best solution for children, separating spouses and their relatives. Adjudicating who is a loser and who is a winner in family conflict is often not easy and straightforward task; in reference to some issues it is even impossible or unnecessary.

²⁸ W. B. URY (et al.): *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*. San Francisco, Jossey-Bass, 1988. XIII.

Family disputes, the same as commercial ones, need fast and cost-efficient resolution. Allocating child custody rights and deciding on their place of living or other important issues concerning their live or health, as well as division of spouses' assets especially when it would be decisive for their material, existential and housing needs – these are the issues of utmost importance, which need immediate decisions.

Another concern arises in reference to the lack of personal direct interaction between parties who are separated by electronic media.²⁹ According to some – that reduces chances of resolving dispute³⁰ which directly depend on the communication held between the parties and any negative or positive statements made during communications.³¹ When declaring abovementioned basis of so called “face theory” Ervin Goffman and his followers did not expect that the Internet would emerge as a global ground of social interactions eliminating to great extent traditional communication. Bearing in mind that technological boost some still argue that “the great paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct interpersonal contact”.³²

Undoubtedly physical presence plays an important role in building close mental relations and mutual trust. Face-to face communication provides the widest range of interpersonal communication, it carries more paralinguistic information (observation of body language, non-verbal perception, intonation of voice, facial expression)³³, nevertheless in some relations it may be destructive, while in family disputes it may even hinder any attempts to start talking because of lack of confidence in face-to-face communication arising from physical or mental violence or intimidation.³⁴ Thanks to online methods a party is able

²⁹ See more M. C. TYLER – S. S. RAINES: The Human Face of Online Dispute Resolution. *Conflict Resolution Quarterly*, Vol. 23., 2006/3. 333–342.

³⁰ S. R. Wilson – C. G. Aleman – G. B. LEATHAM: Identity Implications of Influence Goals. A Revised Analysis of Face-Threatening Acts and Application to Seeking Compliance With Same-Sex Friends. *Human Communication Research*, Vol. 25., 1998/1. 64–96.

³¹ E. GOFFMAN: *Interaction Ritual: Essays in Face-to-Face Behavior*. Originally published. New York–Chicago, Aldine Pub. Co., 1967.

³² J. B. EISEN: Are We Ready for Mediation in Cyberspace? *Brigham Young University Law Review*, 1998. 1330.

³³ G. KAUFMANN-KOHLER – T. SCHULTZ: *Online Dispute Resolution: Challenges for Contemporary Justice*. The Hague, 2004. 15–16; E. KATSH: The new Frontier: Online ADR becoming a global priority. *Dispute Resolution Magazine*, 2000. 8. (available at: www.umass.edu/cyber/katsh_aba.pdf)

³⁴ *National Alternative Dispute Resolution Advisory Council, Dispute Resolution and*

to cope with the problems requiring dealing with a person from whom she had experienced harm; that increases party's self-confidence and enables to work on a solution in the privacy of the spouses' own homes without the need of face-to-face meeting and going into irrelevant arguments opening the old emotional wounds and aggravating conflict. That is a key argument in favour of ODR application to family disputes in which parties usually represent not only opposite interests but are also hostile or belligerent. In fact online systems and services may be helpful in building the platform of communication between parties even though they are rather not typical for marital relations. They may encourage parties to start talking with each other even if hostility made them stop communicating on a face-to face basis. It might be that online forms of communication are the most appropriate to achieve an agreement when a conflict arose on a basis of traditional means of communication.

The key issue is also that a third party assisting in resolving family dispute is equipped in much more skills and professional trained in order to cope with marital and parental conflicts. That refers mostly to mediators who are believed to be experts at reading body language, active listening and agreement writing³⁵ and are in these aspects much more competent than judges.

4. Appropriateness of ODR Techniques to Family Disputes

Since family disputes should be oriented to reaching an agreement, the dispute resolution method should offer such tools which could facilitate achieving this goal. Technology provides for wide range of possibilities which could create a platform for communication on building solutions.

ODR approves either of adjudicatory or non-adjudicatory process. The first one is realized through an arbitration and results in a decision which is rendered by an arbitrator or – more often – by a panel of arbitrators, and which is binding upon both parties. Meanwhile the non-adjudicatory process is non-binding in nature and its aim is to hammer out a settlement without adjudicating of a dispute.³⁶ That characteristic makes non-adjudicatory processes most suitable

Information Technology Principles for Good Practice. 2002. 7. (available at: <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/dispute-resolution-information-technology-principles-good-practice.pdf>).

³⁵ E. KATSH – J. RIFKIN – A. GAITENBY: E-Commerce, E-Disputes and E-Dispute Resolution. In: *In the Shadow of eBay Law*. (available at: <http://www.umass.edu/cyber/katsh.pdf>).

³⁶ Some services combine both techniques and engage the same person acting as a mediator who

for family disputes which do not need indicating who is a winner or a loser, but rather concentrate on normalizing parties' mutual rights and duties (also in reference to their children and assets) for future. An assessment of the scope of these rights and duties is subjective and discretionary what makes it highly recommended for parties to define the details of a settlement by themselves.

Amongst the techniques of non-adjudicatory online dispute resolution the most appropriate for family conflicts is mediation,³⁷ in which a neutral third party without adjudicatory competences³⁸ suggests solutions or helps to work them out and assists parties when handling with the whole process.³⁹ Mediation allows for the parties to self-determine the way in which their conflict should be solved. Moreover the parties and the mediator are allowed to tailor the mediation procedure to the specifics of the individual conflict.⁴⁰ Finally, spouses expect to

is seeking to facilitate a settlement and – in the case of a failure of mediation – as an arbitrator who imposes a binding decision. That hybrid mediation-arbitration approach is referred to as Med Arb (or Arb Med – depending on which process is initiated first). See more: J. T. BLANKENSHIP: *Med-Arb: a template for adaptive ADR*. (available at: <http://blankenshiplawoffice.com/newhome/wp-content/uploads/2012/08/MEDARBhome1.pdf>); C. BARTEL: *Med-Arb As A Distinct Method Of Dispute Resolution: History, Analysis, And Potential*. *Willamette Law Review*, Vol. 27. (1991) 661.

³⁷ Historically it was also first used in the field of family disputes.

³⁸ F. STEFFEK: *Mediation in the European Union: An Introduction*. (available at: http://www.diamesolavisi.net/kiosk/documentation/Steffek_Mediation_in_the_European_Union.pdf).

³⁹ Mediation is not a homogenous method. Its development led to creation of three basic “styles”: the earliest one called facilitative mediation, in which a mediator structures the process (he asks questions, normalizes parties' points of view, assists the parties in finding an agreeable solution) while parties are in charge of outcome;

1) evaluative mediation, where mediator is empowered to indicate weaknesses of the parties' demands, evaluate their legal position, predict what a judicial decision would be, make recommendations as to the outcome of the dispute and has a greater influence on the outcome;

2) transformative mediation, in which parties are in charge of the process (empowered by a mediator to transform it) and the outcome.

Compare: L. L. RISKIN: *Mediator orientations, strategies and techniques*. *Alternatives to the High Cost of Litigation*, Vol. 12., 1994/9. 111.; S. J. IMPERATI: *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*. *Willamette Law Review*, Vol. 33., 1997/3. 706.; R. A. BARUCH BUSH – J. P. FOLGER: *The promise of mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco, Jossey-Bass, 1994.

Variants of techniques utilizing mediation include among others: Minitrial (in which parties have the opportunity to present their point of view and negotiate a settlement with a neutral advisor who might be empowered to issue a non-binding written opinion on the merits – see more at: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/05.html>), The Neutral (Confidential) Listener Technique (which allows for the parties to submit their best offers in confidence to the neutral third party (“a listener”), who informs them whether their proposals are within a negotiable range - see more at: <http://www.mediate.com/Mobile/article.cfm?id=4579>)

⁴⁰ STEFFEK op. cit. supra note 25.

have their dispute solved out without the necessity of applying for enforcement of the resolution.⁴¹

5. Practical benefits

There are many practical benefits arising from conducting family matters online:

- 1) ODR displays significant flexibility and convenience:
 - it can be initiated at any time as well as terminated whenever it does not lead to constructive solution – both decisions do not require written or other formal statements;
 - moreover parties are free to choose the most suitable technique consisting of one or combination of more technological tools appropriate for their dispute;
- 2) ODR – to a much greater extent than ADR – realizes the assumption of cost-efficiency,⁴² as it allows to participate in the process of resolving dispute without necessity of travelling or “showing-up” personally; it even allows for effective management of time, because online means of communication do not always require simultaneousness in parties responses;
- 3) The use of electronic platform facilitates an access to information through various online for a;
- 4) Because advice is available online or through the use of computer systems, it reaches the parties in real time or – at least – timely, so as it is up to date; and that is very important for family matters in which facts often change rapidly;

⁴¹ Mediation has also been recognized as a proper means of protection of children and families by the Child Abduction Section of The Hague Conference on Private International Law. The efforts of the Section resulted in publication: *MEDIATION: GUIDE TO GOOD PRACTICE*, which emphasises the role of experienced family mediators and their competence regarding a wide range of intimate cultural practices. According to Mediation Guide professional standards for mediation include:

- Confidentiality
- Neutrality
- Assistance, not legal Advice
- Legal Competency
- Get informed consent of parties to mediate (Agreement/contract to Mediate)
- Mediators Do not represent either party
- Voluntary Process

⁴² RABINOVICH-EINY–KATSH (2014) op. cit. 10–11.

- 5) It opens the floodgates for a number of documents which often cause overburdening of judges not only because of their number but also because of their unequal significance or even irrelevance for establishing of facts; meanwhile online structures coerce parties into organizing their presentation of facts and arguments and ensure that the relevant documents and facts are submitted in coherent and logical order. That also allows to get answers to a set of question eliminating the need of asking them again what obviously results in saving time, especially in relational disputes, in which parties become often attached to conflict rehearsing the story over and over again, getting it muddled and overdosed on irrelevant or even perverted facts;
- 6) The next advantage results from possibilities of storing in computer systems a lot of data which can be easily displayed, transferred or processed;
- 7) Information technology has the potential of making a settlement accessible for disadvantaged parties. It removes barriers involved by:
 - geographical isolation;
 - mobility impairment;
 - confinement or imprisonment;
 - sight or hearing impairment (f.e. through voice recognition software);
 - language difficulties (through translating software);
 - lack of confidence in face to face communication arising from physical or mental violence or intimidation;⁴³
- 8) Application of systems supporting decision-making which suggest model solutions taking into account the parties' interests leads straight to deliberating upon concrete solutions (and accepting them with or without modifications) without necessity of detailed weighing and assessing the arguments. Human interests abate the willingness to make any concessions, while by isolating the reasons why a position of one party is more appealing than the other's, participants to a dispute increase their chance of achieving agreement.⁴⁴ Still, parties remain free to reject the suggested solution and use other electronic mechanisms or techniques;

⁴³ National Alternative Dispute Resolution Advisory Council, *Dispute Resolution and Information Technology Principles for Good Practice*. March 2002. 7. (available at: <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/dispute-resolution-information-technology-principles-good-practice.pdf>)

⁴⁴ E. BELLUCCI – D. MACFARLANE – J. ZELEZNIKOW: How information technology can support family law and mediation. In. *Business information systems workshop. 13th International conference*. BIS 2010. Berlin, Germany. Berlin, 2010. 244.

- 9) Decision support systems provide parties with their BATNA (Best Alternative To a Negotiated Agreement), which gives the parties knowledge about their bargaining positions: they become aware of what results could be obtained if the negotiations are unsuccessful; they are also forced to express precisely what their priorities are – what makes a little place for manipulations;
- 10) ODR services separate parties from the problem and allow to focus on objective interests, not on positions.
- 11) The significance of this last facilitation cannot be underestimated. As opposed to civil and commercial matters, in which material facts are often provable, in family disputes arguments presented in parties' favour might be subjective what makes an assessment of family situation and weighing the parties' arguments difficult and uncertain in result.

6. Online Family Dispute Resolution – the Edge of Justice?

Despite the list of benefits identified above, there are still some tinderboxes of ODR that need pinpointing. The first concern refers to obtaining a fair settlement.

Highly developed ODR system could resolve a dispute without any support of human action just with the use of tools storing and processing information, but that would certainly rise questions and concerns about fairness of such an outcome. Assessing whether ODR systems have the capacity to resolve or help to resolve family dispute in a just way is a key challenge.

There are too few family disputes in which spouses are truly interested in fair division of their assets or at least – even if they are not, they still prefer to end the dispute possibly painlessly, without a harm made for children, even at the price of being awarded smaller part of the assets than they expected to get. Moreover financial interests are often not the most important ones for the future of family members. There are others concerning allocation of child custody rights, responsibility of the parents to decide on children's education, healthcare or place of living, designation of visiting rights, monetary consequences thereof, as well as many other important issues regarding mutual rights and obligations of the parties. There is much reluctance about appropriateness and suitability of ODR while assessing such immaterial aspects of family disputes especially when some of the arguments concerning mental relation are critical.

Those concerns could be legitimized assuming that ODR system would have the task to resolve a dispute from a beginning to an end and deliver a solution never to be modified. Nonetheless, whenever technological tools “measuring” parties’ interests and supporting decision making process are accompanied by qualified mediators (conciliators or other specialists involved) and are only to assist them and the parties in reaching an agreement, that minimalizes or even removes risk of unjust dispute settlement. Technological system must not substitute human in resolving family conflicts. These are the parties who decide upon a conclusive agreement and technology is only to facilitate and improve the process of reaching a settlement. In other words: online system or service is only a means enabling spouses to undertake an attempt to work out a solution.

Resolving family dispute does not necessarily need indicating a winner and a loser. On the contrary – those kinds of conflicts are of specific nature. They have strong emotional background, involve interests of children or are often based on mutual rights and obligations which balance each other. Therefore, the most desired outcome of family dispute is that in which everybody wins. And that is what makes family matters specific ones – they do not need adjudication (unlike f.e. criminal matters) unless the parties are not capable to work out a settlement.

When assessing whether dispute resolution process has been fair participants enumerate – as essential factors: 1) “opportunity for voice”, 2) their statements being considered by a third party, 3) the way parties to a dispute have been treated by a third party and 4) impartiality of a third party.⁴⁵ Not only an outcome, but also the manner in which it has been achieved and equal treating of the parties counts. The significant factor in the assessment of those aspects of dispute resolution is a degree of third party’s expertise drawn from a formal training, knowledge and experience.

Fairness of a settlement is also a consequence of voluntary nature of ODR. An agreement worked out and approved of by both parties is expected to guarantee substantive justice of a dispute resolution. In this aspect ODR goes even further than judicial decision which is based on the other person’s (judge’s) view and only on that information which parties managed to deliver.

However substantive justice of a settlement is possible only on the stipulation that both parties had an equal position in ODR process and that needs further comments.

⁴⁵ N. WELSH: *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?* *Washington University Law Review*, Vol. 79. (2001) 817.

A significant challenge of development of ODR is managing unequal status of parties.

Equity of parties in family dispute is sometimes (especially in disputes with violence history) illusory or at least theoretical; there is often mental advantage of one party and in fact decisional dependence of another one. In the course of judicial proceedings it is a court's task to be attentive to the rights of dependent party and safeguard the realization of the principle of equality. In such situation being resolved on the out-of-court basis it is extremely important to eliminate the possibility of abusing or even making use of relationship of dependence. Online systems – even the most modern ones – cannot substitute a human here. Family dispute are complex and cover divorce, separation, custody, division of family property, maintenance. Decision supporting systems could be useful in some of those disputes, but would not be helpful in those, in which a mental support is necessary. But still those factors are not decisive in resigning from ODR in family disputes. On the contrary – for many spouses being separated from a partner by technological tools, even a computer screen, gives a self-confidence, sense of security and stimulates willingness to start talking at all. While some objective circumstances on which parties base their wishes concerning f.e. granting them a sole custody (such as conviction of a spouse on abuse charges, his psychological illness threatening the life of children) or justifying their participation in assets must be clearly articulated as factors determining the permissible scope of suggested compromise, it happens last in the phase of “claiming”. Meanwhile first comes “naming” which leads to mental identifying a harm. “Naming” is followed by “blaming” which is a process or an act of connecting harm with its source, and last comes “claiming” which is voicing a grievance against a wrongdoer.⁴⁶ Each of these phases might be a psychological barrier hard to overcome by a mentally weaker party. If technological systems are only tools used by qualified mediators they can improve the process of dispute resolution significantly by stimulating a party and giving her courage to “name” and “blame”, what is a necessary preliminary to “claim”. Moreover it is electronic system – not a mentally or financially stronger party – that weighs interests of the parties and suggests solutions. All the process is than free of the phase of presenting the arguments which are often emotionally motivated, not objective and damaging and – as such – they may hinder reaching the settlement.

⁴⁶ RABINOVICH-EINY-KATSH (2014) op. cit. 15.

Inequality of parties may have a specific meaning, namely it may refer to digital literacy. Courts never unfairly disadvantage a party because of new technology.⁴⁷ The same should apply to Online Dispute Resolution.

Although in some parts of the world an access to the Internet is pretty high (around 100% in the United Kingdom and USA), in others it is significantly smaller.⁴⁸ There are still places in the world which lack of computers, let alone an access to the Internet. Some people are entirely unfamiliar with any technology.⁴⁹ That still causes obvious cautiousness in an approach toward development of ODR and evokes the necessity of considering a cultural approach to ODR. Bearing in mind that online dispute resolution may be beneficial, no one should claim that it is the best method. ODR should remain as an alternative available for those, who find it facilitating and are capable of making use of it. Despite these reservations it is justified to claim that resolving family disputes online is an area that will most likely expand, as new generations are becoming more comfortable with technology and recognize cost and time-savings associated with electronic means of communication.⁵⁰

Despite increasing access to the Internet digital inequality might persist by age, education or income. Barriers could relate more to cognitive abilities, skills and culture.⁵¹ Not everyone is able or willing to use the technology, finding it inappropriate for many reasons: lack of access to the Internet, lack of computer literacy, lack of acceptance for the use of unfamiliar devices or services making oneself feel socially isolated or uncertain. Those factors cause that people, even

⁴⁷ B. R. HOUGH: Let's not make it worse: issues to consider in adopting new technology. *Harvard Journal on Law and Technology*, Vol. 26., 2012/1. 266.

⁴⁸ According to the Central Statistical Office of Poland fourth part of Polish citizens does not have an access to the Internet. The reason for that is not only the lack of technological or financial opportunities, but also because some do not feel the need of having the access to the Internet (report available online: [spoleczenstwo_informacyjne_w_polsce_2014_-_notatka.pdf](http://spoleczenstwo.informacyjny.pl/polsce_2014_-_notatka.pdf)). The same average level of Internet access has been achieved in Europe, where Internet penetration amounts to 74 %. In the top 10 of European countries in terms of Internet penetration, all Scandinavian countries are represented in the top 5 (Norway – 96 %, The Netherlands, Denmark and Sweden – 95 %, Finland – 92 %). While this top 10 mainly consists of countries from Western and Northern Europe, the top 5 of the lowest Internet penetration solely comprises countries from the Eastern and Southern European regions (see more at: <http://www.adigital.org/media/2014/06/european-b2c-ecommerce-report-2014.pdf>).

⁴⁹ N. ALEXANDER: *Mobile mediation: How technology is driving the globalization of ADR*. (available at: <http://www.asiapacificmediationforum.org/resources/2006/alexander.pdf>).

⁵⁰ D. A. LARSON: Brother, can you spare a dime? Technology can reduce dispute resolution costs when times are tough and improves outcomes. *Nevada Law Journal*, Vol. 11., (2011) 523–559.

⁵¹ I. MANEVY: *Online dispute resolution: what future?* Juriscom.net, 12 janvier 2002. 33–34. (available at: <http://lthoumyre.chez.com/uni/mem/17/odr01.pdf>)

those who have high levels of access to the Internet, are not able to use it as a definitive source of information, let alone advice or assistance. In consequence these are social, cultural or psychological barriers – not technological ones – that might discourage from use of ODR. Its success then depends much on previous information about the way technological services work and on appropriate level of assistance of a third party – if necessary.

Effectiveness of online systems is also strictly linked with conjunction with face-to-face services which should be equally available for both parties regardless whether they are local or distant ones. Otherwise one may feel unfairly deprived of some opportunities which were available for other party. Moreover, the private, intimate environment of online dispute resolution – having undoubtedly its virtues – may dull party's vigilance when deciding on vital issues concerning future of the family and lead to unfavourable agreement.⁵²

As a rule ODR is conducted on a voluntary basis and depends on facultative decision of interested parties. Generally that decision does not impose on parties any irreversible consequences (unless binding ODR has been chosen) – parties are free to select technological tools systematically and flexibly depending on the achieved results; they may also terminate the process whenever they want. Free and voluntary choice of ODR (regardless whether it is binding or not) remains an appealing and essential characteristic of ODR but it requires a prior, clear and detailed information which conditions a full consciousness while engaging oneself in out-of-court online process.

It is worth noticing that in Australia family disputes are required to undergo a mandatory mediation.⁵³ At least one meeting with a specialist practitioner takes place before lodging a claim for a parenting order in the Family Court of Australia. The reasons for that are complex and – most of all – practical.

⁵² L. NADER: *No Access to Law: Alternatives to the American Judicial System*. Academic Press, 1980. 64–67.

⁵³ Australia is not the only country with mandatory prejudicial conciliation or mediation procedure. In England a party who aims at being gained an exemption from court fees must previously attend an information session concerning mediation (art. 13 of Family Law Act 1996). Mandatory conciliation sessions preceding judicial proceedings have also established position in German (art. 15a EGZPO of 15th December 1999) and Italian (Art. 5 Decreto Legislativo n. 28 of 4th March 2010) law.

In Polish civil procedure mandatory conciliation meeting in family judicial disputes concerning divorce – after 40 years of functioning – has been repealed as ineffective institution causing delays. That opinion should not refer to mediation which is carried out in assistance of a neutral and often qualified mediator and which differs greatly from a session in a courtroom during which a judge asks simply if the parties would like to conciliate.

- 1) a major factor was an increase in the breakdown of family relations what resulted in overburdening courts lacking judges and funding; court action is also expensive for family;
- 2) the next factor is emotional cost of court action to the members of a family, particularly children who suffer a lot during a court proceedings – and that stays in a strict opposition to the principle of “best interests of the child” which theoretically governs family court actions;
- 3) last but not least is a success of voluntary out-of-court dispute resolution.

The last factor must not be underestimated. The two previous ones are already visible also on European field, while the trust in out-of-court dispute resolution must be still worked on.

The next essential issue for development of ODR is the problem of confidentiality. There are many legal or cultural factors influencing people's inclination to try out-of-court dispute resolution procedure instead of judicial one. Those factors may have both: external and internal origins.

As for the first ones it might be noticed in general that degree of trust to ODR is proportional to degree of dissatisfaction with the standards, duration and expensiveness of litigious cases. The more inefficient judicial system is, the more trust and hope is placed in out-of court resolution systems. That might enhance interest in ODR in some countries, in which average length of proceedings for litigious divorce cases is excessive.⁵⁴

Dissatisfaction with judicial proceedings is not the only factor which justifies an interest in ODR. Regardless of an average duration of judicial process, parties to a family dispute opt for out-of-court dispute resolution because it offers them an assistance of a trustworthy and sympathetic confidant whom they might reveal information concerning their privacy.

Parties participating in online process of dispute resolution are believed to remain confidential to a larger extent than in open court judicial litigation.⁵⁵ Even if a trial is conducted in camera the possibility of revealing the details of a dispute persists because of public access to court decisions and written justification thereof in public domains.

⁵⁴ Like in Italy, France or Monako (where it takes more than 500 days; CEPEJ Report on European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice, 240).

⁵⁵ Most people regard arbitration as confidential (see more: A. J. SCHMITZ: Untangling the Privacy Paradox in Arbitration. *Kansas Law Review*, Vol. 54., [2006] 1212.), while also during mediation they often are able to overcome fears about lack of confidentiality revealing details about their case (O. RABINOVICH-EINY: Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation. *Harvard Negotiation Law Review*, Vol. 11., (2006) 265.).

Nevertheless there are some aspects of confidentiality that remain unsatisfied especially as far as internal relations between participants of dispute resolution are considered. Remote mediums, such as email or telephone, are not conducive to building the trust with each other let alone with an adviser. Many people encounter problems while expressing concerns through electronic means of communication. Meanwhile the trust in mediator is necessary for people to open up about their complex problems; it is also believed to play a key role in promoting cooperation, solving problems and achieving integrative solutions.⁵⁶ For these reasons the impact of human factor on building the confidence and trust cannot be underestimated. Digital delivery can and should play an important role in delivering legal services to the population as a whole but, for the foreseeable future, it will need to be supplemented by traditional, face-to-face mechanisms.

Building a trustworthy environment for resolving disputes does not exhaust the problem of confidentiality. One of the paramount concerns about ODR is preserving privacy and protection of personal data. No matter how professionally security systems would protect the cyber space in which our data will flow in, the Internet will remain insecure medium which never stays under exclusive control of ODR Provider but might be a subject of many potential attacks from all around the world. Questions arise also in reference to storing and sharing personal data after dispute settlement has been reached. It must be acknowledged that ODR providers collect data gathered when other opportunities arise and integrate them all “rendering disputing data less and less private”.⁵⁷ They do it even sort of casually since electronic communication takes place through constant copying of data while downloading and uploading information. Moreover, it might be a party to a dispute who infringes upon other’s rights, for instance by recording sounds or pictures (or both) during online session and making it available in the Internet without the other’s consent. That may happen not only with recordings, but also with documents which had been transmitted online for the purposes of dispute resolution.

Online Dispute Resolution has to face the expectations regarding confidentiality in cyberspace and protection of personal data. That is an unquestionable challenge as confidentiality remains a prerequisite in online

⁵⁶ N. EBNER: ODR and Interpersonal Trust. In: M. S. ABDEL WAHAB – E. KATSH – D. RAINEY (eds.): *Online Dispute Resolution: Theory and Practice*. The Hague, Eleven International Publishing, 2012. 218–219.

⁵⁷ RABINOVICH-EINY–KATSH (2014) op. cit. 28.

environment.⁵⁸ All the information sent and received via the Internet should be transferred in accordance with the rules of confidentiality and privacy so as the details of parties and their dispute remain known only to the parties involved. There are actually many means of securing personal data in cyberspace, including:

- using passwords or secure chatrooms, what enables a mediator to have an electronic contact with just one of the parties in a separate “cyber room” while the other party stays available to communicate in another “room;
- encryption, which is an automated process of making data inaccessible to unauthorized people by using a key which opens an access to information;
- application of system which uses read-only files and does not allow for copying or transferring text, video or audio files.

The question about security of data is to be definitely answered with participation of IT specialists which task is to ensure that data sent and received are not tampered with and remain at exclusive disposal of parties. Because the parties to a dispute often remain ignorant of the problem of data protection it should not be left to ODR provider to decide upon. Self-regulatory practices do not guarantee the right standard of data protection.

Last, but not least arises the problem of enforcement of ODR settlement. The problem is of crucial or even critical nature, as working on an agreement which turns out not to be enforceable is worthless and futile. Despite the main aim of out-of-court dispute resolution, which is resolving a dispute through the agreeable settlement, we cannot be absolutely sure about willingness of a party to comply with an outcome of a dispute resolution process. While in e-commerce the compliance could be driven by fear of exclusion from virtual marketplace, in family dispute there is no such motivator.

Deliberating upon the problem of enforceability needs not only determining whether online dispute resolution should be legally enforceable with an assistance of public authority, but also according to which law such a settlement should be enforced.

Answer to the first question may be nothing but positive even if we assume that a settlement has been reached through non-binding ODR (mediation, negotiation, conciliation) which is the most appropriate for family disputes.

⁵⁸ I. MANEVY: *Online dispute resolution: what future?* Juriscom.net, 12 janvier 2002. 27. (available at: <http://lthoumyre.chez.com/uni/mem/17/odr01.pdf>).

A settlement which concludes negotiation plays the role of a contract, which is the law binding upon parties and as such might be enforceable in a court of law. In other case all the efforts to hammer out an agreement would seem to be questionable. Parties should have a certainty that ODR can successfully substitute judicial proceedings from its beginning to an end.

Significant approach, which should be followed also on the field of ODR, has been represented in European Directive on certain aspects of mediation in civil and commercial matters.⁵⁹ The authors of the Directive expressed the view that “mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law (f.e. it regards legal aspects which may be regulated exclusively by decision of court – like divorce), including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.”⁶⁰

It is worth noticing that there is neither in the Directive nor in any other legal act a rule which would forbid application of abovementioned principles to online mediation. In consequence the content of an agreement resulting from mediation which has been made enforceable in one Member State should be recognized and declared enforceable in the other Member States in accordance with applicable Community or national law.⁶¹

⁵⁹ 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. *Official Journal* L 136 , 24/05/2008 P. 0003–0008.

⁶⁰ Point 19 of the Preamble of the Directive, *supra* note 36.

⁶¹ This could, for example, be on the basis of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Official Journal* L 351/1, 20/12/2012) or art. 46 of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. *Official Journal* L 338, 23/12/2003 P. 0001 – 0029. For comparison it is worth noticing that in USA parties decide whether or not they wish to make their agreement legally enforceable.

7. Conclusions – main challenges for ODR in Family Disputes

Technology has already changed the world. It has also affected civil procedure modifying not only specific procedural institutions, but the substance of civil litigation including the basic principles of adjudication of civil disputes.⁶²

We should be receptive to new technologies and the opportunities they create for civil disputes resolution. Making good use of abilities arising from electronic systems can make life easier and friendlier. This short analysis shows that ODR has all necessary attributes and characteristics of becoming an efficient method of resolving family disputes, especially those of cross-border nature. That thesis becomes even more evident when we take into account that not only the number of marriages between persons from different countries and cultures is rapidly growing,⁶³ but also the number of relations which break down increases. In fact a collapse is more often in international relations than in domestic ones.⁶⁴ The level of conflict in bicultural marriages may involve a greater risk for domestic violence which is defined differently by individuals and is heavily influenced by culture. Parties may differ on what constitutes domestic violence or abuse. Moreover, it is reported that child custody disputes involving denial of access or custodial interference or disputes referring to parental kidnapping has become epidemic.⁶⁵ The increasing number of those conflicts, involving also children and the problem of their physical and financial safety, requires and justifies the use of all appropriate means facilitating resolving disputes, especially those

⁶² P. CALMON: The Future of the Traditional Civil Procedure. In: M. KENGyel – Z. NEMESSÁNYI (eds.): *Electronic Technology and Civil Procedure. New Paths to Justice from Around the World*. Dordrecht–Heidelberg–New York–London, Springer, 2012. 67–87., V. HARSAGI: Digital Technology and the Character of Civil Procedure. In: KENGyel–NEMESSÁNYI (eds.) op. cit. 125–133.

⁶³ Millennial families are increasingly made up of individuals who originate from different countries. In 2010 nearly 1 in 7 new marriages in the USA were bicultural.

⁶⁴ L. FINERON: The Rights of a Child in Cross-Border Custody Disputes. *MUNOM*, 2014. 61.8% of international child abductions from the USA were committed in families where each parent held citizenship in another country and an additional 16.5% held dual citizenship. M. DABBAGH: Cross Border Family Mediation. International Standards and Protocols, available at: http://www.academia.edu/3840520/Cross_Border_Family_Mediation_International_Standards_and_Protocols, 2.

⁶⁵ According to the previously mentioned publication approximately 1,000 children from the United States are wrongfully removed or retained across international borders by a parent or family member each year. Other countries are reporting increasing incidence of international parental abduction as well.

which enable reaching a mutually approved agreement. ODR may help in achieving this goal but to what extent – that should be deeply examined.

The first and obvious challenge for ODR is to build resolution institutions (rather with than without a governmental help) able to resolve dispute professionally with the application of proper solution mechanisms, even if that would require the need of transferring a dispute from one mechanism which turned out to be chosen unsuitably to another. The institutions (dispute resolution centers) should be physically available for the parties so as to ensure face-to-face contact with a third party (neutral, mediator) if necessary.

The parties should be also equipped with proper information so as they could choose an adequate dispute resolution provider and mechanism. The need for information could be provided for by the duty for lawyers (or even judges) to inform about the possibilities of out-of-court dispute resolution. The information should refer not only to existence of ODR provider and the resolution services they offer, but also to statistics and data on the outcomes of the ODR processes.

Family dispute are emotionally and legally fragile; there are often weaker persons involved whose interests should be kept under special care. Thereof explicit rules satisfying the standards of protection are certainly beneficial here. On the other hand there are still more and more rules of law which are neither compatible with contemporary, fast developing relations nor clear enough. The regulatory activity in this field should than put all ODR mechanisms on the equal footing so as to guarantee uniform legal standards worldwide⁶⁶ without suffocating its creativity and flexibility.⁶⁷ The success of ODR does not necessarily depend on a certain regulatory approach. ODR has emerged and satisfactorily developed (f.e in Netherlands and the United Kingdom) without any legislative stimulation. That leads to conclusion that the progress of ODR depends of neither intensive nor little regulatory approach. Development of online services is so rapid that may itself compensate insufficiency of law which abilities of development are always too slow for social, cultural or technological changes. Nevertheless some basic, substantial regulations are recommended, or even necessary primarily:

- 1) to protect endangered interests of potentially weaker party and children.

Judicial proceedings – according to the UN Convention on the Rights

⁶⁶ D. G. POST: Governing Cyberspace. *Wayne Law Review*, Vol. 43., (1996) 163.

⁶⁷ F. STEFFEK: *Mediation in the European Union: An Introduction*. (available at: http://www.diamesolavisi.net/kiosk/documentation/Steffek_Mediation_in_the_European_Union.pdf).

if the Child⁶⁸ – should and often do respect the right of the child, who is capable of forming his own views, to express those views freely in all matters affecting the child and to be taken under consideration, especially by providing him the opportunity to be heard in judicial or administrative proceedings either directly or through a representative. Meanwhile self-regulatory approaches not always reach that problem. Thus a great responsibility lies with mediators and other professionals who provide online services and assist during the whole process. They should consider whether involving children in online communication or other forms of dispute resolution process could be beneficial. A regulatory framework seems to be necessary here so as to eliminate any abuses.

- 2) Particular significance of normative rules is strictly linked with the problem of protection of personal data which face the risk of constant transfer, processing and utilizing, especially without a consent or with infringement of privacy.
- 3) Legal instruments play also a significant role for creating enforcement mechanisms which are a condition of the success of ODR. Guaranteeing that parties comply with a settlement, or – in other words – ensuring enforcement of an outcome of ODR, is a significant argument encouraging parties to participate in ODR. It is worth noticing that UNCITRAL Working Group has also emphasized this problem suggesting that in commerce disputes not only public but also “private enforcement mechanisms could be effective in many instances, particularly at the early stages of ODR.” It was also expressed that public and private enforcement mechanisms are not mutually exclusive and that without a mandatory outcome, the process would not be effective and its integrity could not be ensured.⁶⁹ Usefulness of private enforcement mechanisms in family disputes remains questionable especially when we take into account that such conflicts are independent of any previous or future online activities – in contrast to commercial disputes. Bearing that in mind, as well as taking into account social nature of family conflicts and their significance for common weal, we should rather link the future

⁶⁸ Art. 12, clauses 1 and 2 of the UNCRC.

⁶⁹ A/CN.9/744 – Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session (New York, 21– 25 May 2012), Para 120.

of online dispute resolution with public enforcement mechanism which in fact exist so far on the basis of:

- 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,⁷⁰
- Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations⁷¹
- It is also worth mentioning that Convention on the International Recovery of Child Support and other Forms of Family Maintenance adopted in Hague on 23 November 2007 consists of rules which aim at improving co-operation securing the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child. According to art. 19 the term “decision” also includes a settlement or agreement concluded before or approved by such an authority, while in art. 30 provides that a maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin. It is significant that the Convention seeks to take advantage of advances in technologies and new opportunities,

⁷⁰ OJ L 136, 24.05.2008.

According to art. 6:

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

⁷¹ OJ L 007, 10.01.2009.

According to art. 48:

1. Court settlements and authentic instruments which are enforceable in the Member State of origin shall be recognised in another Member State and be enforceable there in the same way as decisions - in accordance with Chapter IV (what means that settlements shall be recognised in another Member State without any special procedure being required and without any possibility of opposing its recognition, and those which are enforceable in the State of origin shall be enforceable in another Member State without the need for a declaration of enforceability or – in a Member State not bound by the 2007 Hague Protocol – after being declared enforceable).

- 4) General regulatory framework shall also determine (to some extent) according to which law a dispute is evaluated. Some online services will not require that since the problem of different substantive law will not always arise, particularly when parties discuss the issues subordinated to the same legal order. Nonetheless some issues at stake, concerning decisions relating to child's health or future (like circumcision, a blood transfusion, vaccination, arranged or underage marriage) may be regulated and treated entirely differently in given legal and cultural environments. If online services and ODR providers are to evolve, they should act according to uniform standards of protection. Self-regulatory activities of ODR providers should remain to some extent under public (legal) control.

In all those aspects a density of regulatory approach and standards of protection should be harmonized as far as possible so as to ensure that there is an ODR scheme complying with certain minimum standards. Otherwise virtual borderless platform of dispute resolution will be radically diversified what brings the risk of disproportion in protection of human rights.

Member States of European Union may follow some satisfactorily functioning examples and take steps towards achieving desired – but still not exaggerated – level of ODR development and sophistication and application thereof to disputes which could benefit from it. That is inevitable since ADR – which has been proved beneficial also in family matters – cannot avoid being transformed by information technology.⁷²

⁷² E. KATSH – J. RIFKIN: *Online Dispute Resolution: Resolving Disputes in Cyberspace*. San Francisco, Jossey-Bass, 2001. 3.