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**FUTURE PROOFING ODR – A CRITICAL REVIEW OF KEY
PROCESSES IN A MODERN TECHNOLOGICAL WORLD**

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Abstract

This dissertation explores the Online Dispute Resolution field, bringing in a broader concept of the method and critical analysis of its current situation in Europe. It will take into consideration the EU ODR platform as the central scope of the work, walking through the historical barriers faced and the legal challenges to its progress. The actual ODR market position in Europe will be critically assessed in order to future proof it.

This research aims to answer the question: Can we trust the online methods as the future of Alternative Dispute Resolution? For the sake of this work, the positivism philosophy was adopted from the hypothesis that ODR is already the future. Furthermore, the approach chosen to conduct this research was deductive. The data collected respects the mixed method, which includes qualitative and quantitative data. A case study was the strategy adopted in this research as it has the EU ODR platform as the main focus, but includes other private platforms as a way to show different perspectives in the ODR environment.

From the abovementioned, it was concluded that the ODR future in Europe is promising, as it has the potential to be the most used dispute resolution tool for consumer's cross-border disputes, although it has to overcome some cultural and legal barriers that have the scope to protect the users' rights, it is also a progress setback.

Keywords: Online Dispute Resolution (ODR), Security, Trust, Future Proof.

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Figure 1. EU ODR platform – the number of complaints submitted per month. European Commission (2019, p.23). Report on the application of Directive EU 2013/11 and Regulation EU No 524/2013 on online dispute resolution for consumer disputes.
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Acronyms

ADR – Alternative Dispute Resolution

B2B – Business to Business

B2C – Business to Consumer

CA – Certification Authorities

CoE – Council of Europe

DARPA – Defence Advanced Research Projects Agency

e-ADR – Electronic Alternative Dispute Resolution

ECC-NET – European Consumer Centres Network

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

EEA – European Economic Area

FTC – Federal Trade Commission

GDPR – General Data Protection Regulation

ICT – Information and Communication Technology

ICANN – Uniform Domain-Name Dispute Resolution Policy

ISP – Internet Service Provider

ODP – Online Dispute Prevention

ODR – Online Dispute Resolution

UNCITRAL – United Nations Commission on International Trade Law

USD – United States Dollar

VM – Virtual Magistrate

Introduction

The rapid pace of the digital transformation in human's life has achieved a high expressive peak in recent years. The human's interaction has turned out to a simple small screen where it is possible to meet a person on the other side of the globe. These new ways of interaction have also affected businesses, which must reinvent themselves in order not to be run over by new tech companies.

The tech revolution also reached ways of resolving disputes. Some time ago, the Alternative Dispute Resolutions – ADR methods were being called as the revolutionary ways of solving the disputes as an alternative for the bureaucratic, expensive, and uncertain classic litigation. But even those novelties methods could not escape from the digital world and had to adapt themselves to attend online disputes.

Looking to overturn the geographic barriers to deliver better service, many lawyers, mediators, and arbitrators have attended to e-mediations and e-arbitrations, where the whole process is done by electronic means, in addition to strategies developed to approach and settle with parties who feel threatened or intimidated by the other, or is reluctant to meet in person.

Conversely, those methods are not approved for every mediator and arbitrator, who defends the human interaction as a crucial point to resolve the dispute, since the feelings involved and the expectation of being heard in the process are dogmatic points of the ADR methods.

Notwithstanding, the demand for ways to resolve disputes in a faster and non-expensive manner has met the technology, rising the Online Dispute Resolution – ODR. Although it does not have an agreement regarding the concept, in this method, online platforms use the benefits of information technology, to settle the dispute in a cost-effective manner for both parties.

The use of technology to solve disputes is facing arguments in relation to the security and

confidentiality issues in its processes. Since every action is recorded and can be stored in clouds and hard drives, complaints about non-authorised third parties having access and modifying the files have given strength to the side against the tech revolution.

In a modern world, it is undoubted that all professionals in almost every sector have to adapt themselves to offer technological services under the risk of having their business shut down. The Covid-19 pandemic also contributed to accelerating the digitalisation of services, showing that technology might be the easiest and fastest way of reaching out to people that would never know about their product/service in other ways.

Aims and Objectives

This work aims to critically evaluate the online dispute resolution scenario in Europe, bringing in the conflicting conceptualisation of the term ODR, and clarifying the usage of the method, its coverage, and offer a broad answer about the method. The EU ODR platform will be the central frame of this work, as the new technology is applied to domestic and cross-border consumer disputes within the EEA. Two other ODR platforms will also be analysed, CyberSettle and SquareTrade, as a fully automated negotiation software and a private ODR platform used by eBay and PayPal, respectively.

The barriers faced by ODR methods will be explored in a special direction towards the security and confidentiality issues. As an online procedure, it requires electronic communication. Even though the ODR providers guarantee the protection of their users, the cyberspace cannot be considered as a safe environment. This dissertation goes through these questions and the challenges in relation to the legal setbacks faced by the ODR methods.

Exploring the ODR market penetration is also an objective of this work. It is known that the ODR methods have not reached their full potential yet and has been facing some historical and

cultural barriers to be used as planned. To critically analyse how the ODR has been exploited within Europe and explain the points in which it is failing will help to understand better where the improvement points might be.

The Scope and Limitation of the Research

The scope of this work is to critically review the key processes of ODR and assess the impact of technology in the dispute resolution processes. In a modern world, technology has an important role in every area, which includes dispute resolution. The new tools developed are not just to facilitate agreement but to effectively be part of the entire procedure, many times acting as a party.

We acknowledge the existence of countless programs with the same function around the world, but for the purpose of this paper, it will be considered just the European area, in addition to the CyberSettle and SquareTrade platforms, American companies, due to their pioneering spirit and differential factors, always justifying their applicability in the European context.

Contribution

The importance of this work relies on the fact that the digital revolution is a part of the peoples' life now. Since the invention of the cyberspace to the boom of e-commerce, the necessity of creating adequate tools to solve the conflicts online was imperative. This research contribution is to offer a critical analysis of the ODR systems, helping to achieve a better understanding of its concept and functionalities, which has a great value to the alternative dispute resolution area.

Dissertation Road Map

This research is divided into chapters to a better understanding of its purpose. Chapter 1 is the literature review, where it is outlined current theories and arguments related to the scope of this

work. The main authors are also cited in this part, concentrating on an important background of the subject approached.

Chapter 2 aims to explain which research approaches will be considered for the sake of this paper, alongside the philosophy, design strategy and ethical considerations carried out.

Chapter 3 will examine the inherent concepts related to Online Dispute Resolution to allow the readers to familiarise with the object dealt in this work, bringing three of the main ODR platforms and explaining the extension of ODR concept to e-ADR.

Chapter 4 relates to the numbers reached by ODR in Europe, showing the results obtained in official reports and the market penetration of the method.

Chapter 5 will approach the subject discussions, joining in the whole material covered in this research and rising up questions about the ODR future-proofing, and chapter 6 will bring the conclusions.

1. Literature Review

1.1 The historical brief of ODR (Online Dispute Resolution)

Technology has been changing our lives in uncountable ways, bringing comfort and velocity to our daily transactions as it can be done wherever the users are. Following this track, the conflict involving online disputants has become more usual than expected in the origins of the online dispute resolution methods.

To understand the concept and the transformation that the Cyberspace brought to us is crucial to acknowledge how this global network of networks connecting millions of users worldwide via many devices that we call Internet began.

According to Katsh (2011) and Mania (2015), the Internet was created in 1969 in the United States by a strict group composed by military and academic professionals aiming the development of military technology with the primary purpose of enabling the movement and data exchange over a network. But it was only formally completed to broader usage in the early 1990s, with the development of a civilian network launched by the Defence Advanced Research Projects Agency (DARPA).

Notwithstanding, in the middle of 1980s, the United States government supported the establishment of a network of five supercomputing centres, the NSFnet. According to Keefer and Baiget (2001), NSFnet intended to support research and education in US institutions. Still, the usage was limited by its policy declaration for the acceptable use of the Internet, which included a range of prohibited activities.

Based on the aforementioned, it is fair to say that the non-military usage of the Internet began in the middle of the 1980s, reaching a broader “civilians” users by the 1990s. From that point, the world would experience the most prominent and fastest transformation in peoples’ lives, caused by the digital revolution.

On the same page, the concept of the term Cyberspace is generally used to describe activities that happen into an online space accessible through an internet connection, expressing the idea of a web where several actions can be done at the same time, by different people, being connected by servers (Internet). The term Cyberspace was first defined by Willian Gibson (Irish Times, 2003) in his novel *Neuromancer* (1984), where since then it has been used with an even more comprehensive range.

The Internet, or more precisely, the Cyberspace, became more abundant after the first Internet Service Provider (ISP) was launched in 1992 when anyone could access the Web. However, the academic crew were still the main users in the first half of the decade, as the research

incentives, military and non-military, was the main focus.

Notwithstanding, concerned about destructive behaviours online, Ed Krol (1992) explained the importance of self-regulation on the Internet, writing a range of behaviours to be avoided while navigating, such as excessive game playing, excessive ill-conceived use, hateful, harassing, or other antisocial behaviour, intentional damage or interference with others, and publicly accessible obscene files. These were written in his book *The Whole Internet*, which came up to be the bible of the first users.

Bringing these set of conducts to be avoided to recent times, the accuracy of those is questionable for both sides, as according to Forbes the online porn industry was worth about \$97 billion in 2019 and the game industry is believed to worth \$300 billion by 2025. On the other hand, the social media, which also became powerful online businesses, have been used to actually attack other people and cultures from behind the screens, turning into a massive source of conflict on the Cyberspace.

Since the civilians had their Internet access granted, as aforementioned, the Web uses has changed, occasioning the theoretical classification of the Web into two phases. Conform Katsh (2011) the first stage is called Web 1.0, representing the Internet usage for researching and information collection. The second stage, Web 2.0, is conceived by the users' collaboration through online platforms, where they can share experiences, activities, knowledge, and business, where through Marketspace Model and Customer Relationship dimensions, business innovation is also evaluated among incumbent organisations making use of the Internet.

The term Web 2.0 was invented by O'Reilly Media in 2004, and defined as 'the business revolution in the computer industry caused by the move to the internet as platform, and an attempt to understand the rules for success on that new platform' (O'Reilly, 2004).

Similarly, electronic commerce (e-commerce) is expanding in a larger and faster pace never seen before. It offers online consumers a vast selection of products and businesses, where people located in different parts of the world can be reached and contract with each other at the click of a mouse.

Although Web 2.0 brought enormous facilities for people's life, it goes without saying that the number of conflicts also increased. In this virtual environment, where activities and transactions take place amongst strangers (sometimes they don't even contact directly with each other), the potential for misunderstanding, mistake and fraud is enhanced. The significant number of transactions inevitably leads to disagreements, like buyers often complaining about quality, appearance or delivery of purchased goods and services. Sellers and vendors in their turn, face difficulties on payments, delays, wrong delivery addresses, and misunderstandings with return policies.

In this track, the demand for ways to resolve online disputes in a faster and non-expensive manner has met the technology, launching the Online Dispute Resolution – ODR. In this method, online platforms use the benefits of artificial intelligence, through algorithms, to settle the dispute in the best way possible for both parties without the intervention of the independent third party.

According to Katsh (2014), Online Dispute Resolution (ODR) origins are traceable to the early 1990s and to a prediction and an observation made at the time. It was around that time when it began to be clear that Cyberspace would not be a pleasant place, and there would be a need for tools, resources and expertise in responding to the disputes that would occur.

In the same way, Cortés (2014) lecture that the first ODR scheme ever launched was the Virtual Magistrate (VM), located in Villanova University (Philadelphia, USA) and founded by the National Centre for Automated Information Research in 1995. This project came up as a

voluntary online arbitration procedure, aiming to sort disputes between Service Providers (ISPs) and users.

At that time, VM had the competence to deal with disputes arising from defamation, intellectual property, fraud, and illegal appropriation of commercial secrets. Still, the project thereof just rendered one decision in *Tierney v Email America* (1996), therefore, a not very popular scheme.

In case *Tierney v Email America* (1996) were a complaint made by James Tierney about an advertisement posted by Email America on AOL's website, where it was offered for sale mass email addresses, which was considered by the claimant as a spamming promotion. The decision rendered ordered that AOL (America Online) remove the email bulking advertise.

The VM project was not successful, which, according to Benyekhlef & Gélinas (2005), it might have happened for three reasons. The first one was the exclusion of all commercial transactions, including those where arbitration seemed to be an appropriate method. Furthermore, in the authors' point of view, for some of the competencies given to the VM, mediation might have been more appropriate. The second reason was on account of the primitive software used, which relied mainly on non-secure email. For the last reason, they claimed for the impossibility of effectively enforce the arbitral award rendered.

Furthermore, other authors, as Katsh & Rifkin (2001) also believed that the main difficulty faced by the scheme was to persuade respondents to participate in the arbitration. A great example was AOL, the largest ISP at the time, where they had informally agreed to refer their disputes to the VM but since they had the power and independence to terminate their contracts for almost any reason, they decided not to risk and keep the control over the situations instead.

As it is stated by Katsh (2014), ten years ago, many were sceptical of the need and potential of ODR; today, it is well understood. Most importantly, ODR, which was initially focused on

disputes related to online activities, is now employed in offline disputes. Rather than finding disputes that can utilise ODR, the new challenge is finding tools that can deliver trust, convenience, and expertise for many different kinds of conflict.

Cortés (2014) divide the emergence of ODR into four different phases. The first one is named Hobbyist phase, starting from the creation of the Internet until 1995, and it is markable for the inexistence of a proper ODR system. During this time, the first disputes arose from the Internet, and informal ODR mechanisms were used. Aiming to deal with the disputes, some ideas came up as how to solve them in an effective manner. The Experimental phase was the second, from 1995 to 1998, when the first ODR initiatives were used by the not-for-profit organisation as more disputes started to appear. From 1998 to 2002, we had the Entrepreneurial phase when the ODR industry began to emerge, and commercial enterprises had successful initiatives. At this period, two important companies were set up: CyberSettle and SquareTrade, which will appear later in this piece of work. In the end, the Institutional phase, which started in 2002 and went to the actual days. It indicates to the adoption of ODR programmes by public bodies, as Online Money Claim in England and Wales and the Online Small Claims in Ireland.

In spite of the fact that, yet, the litigation is the most common way of sorting out disputes, as is well known, territoriality is a point of struggle in Courts in the whole world, as jurisdictional questions may arise due to events occurred online with parts in different places. These questions enforced the necessity of launching methods which will attend to people wherever they are, and technology is the easiest and fastest way of making it happen.

Notwithstanding, ODR methods are not the only emergent, but traditional Alternative Dispute Resolution methods have been turned into e-ADR. In the late 1990s, various start-ups began offering e-mediation or online mediation services to organisations and the general public where the companies developed a roster of trained online mediators who they would assign to facilitate

online dispute resolution, primarily through email.

In the first part of this work, it is possible to realise how technology has been making part of our lives through a timeline of events that turns out into the modern world. The digital transformation is bringing us facilities and changing the ways of doing things, as it is possible to see the adaptation/creation of methods of solving disputes to an online platform, even the traditional ones are “upgrading” themselves to also attend in the Cyberspace. For the purpose of this work, both online methods ODR and e-ADR will be critically analysed to identify whether they are effective or not and expose their positive and negative points.

1.2 ODR Legal Frame

Looking for enhancing the usage of technology to solve disputes in a most cost-effective process within the European Union (EU), the Commission of the European Communities released the 2002 Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, pointing out that ‘ADR is a political priority, repeatedly declared by the European Union institutions, whose task it is to promote these alternative techniques, to ensure an environment propitious to their development and to do what it can guarantee quality. This political priority was specifically asserted in the context of the information society, where the role of new online dispute resolution (ODR) services has been recognised as a form of web-based cross-border dispute resolution’ (Commission of the European Communities, 2002, p.5).

Nonetheless, the usage of ODR and e-ADR as a more cost-effective manner to solve a dispute is facing challenges within the European Law since the Article 6 of the European Convention on Human Rights (ECHR) established the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, or simply a fair trial. The challenges thereto are related to the minimum procedural guarantees and the possibility to

waive the right held in Article 6 by the parties either in the voluntary or compulsory e-ADR procedures.

This digital transformation has arisen heated debates about ethical considerations and confidentiality in ODR and e-ADR methods, ‘the integration of technology into all kinds of third-party work does not mean that the ethical standards developed for ‘traditional’ third-party work must be thrown out and rewritten. It does, however, mean that each of the ethical considerations common to third-party work must be reinterpreted in light of the impact of technology’ (Rainey, 2014, p.38).

Indeed, the digitalisation of the procedures must follow the ethical standards in which any dispute resolution system is based. However, the adaptation to the online environment requires other practical debates and observation of the issues arising.

Then, the same author completes: “The adjustment in ethical standards will be evolutionary, not revolutionary, and will be accomplished over time through dialogue with practitioners who are facing the new demands, restrictions and freedoms brought to third-party practice by technology” (Rainey, 2014, p. 38).

In the same page, Katsh & Rifkin (2001) have introduced the idea that technology acts as a fourth party, alongside the disputants and the mediation and arbitration. According to Gabuthy & Deffains (2005), this idea is interesting because it indicates the important role technology can play in guiding litigants towards agreement (technology is not just about replicating face-to-face interactions). In addition to facilitating the interaction process, online practitioners need to think through the various communication options available and design a communication environment that can address the issues under discussion and the dynamics between the parties.

Although the use of technology has brought us to huge transformations, still some of the same

concerns exposed in the classical ADR methods are more evident when dealing with ODR and e-ADR, as security of data and confidentiality. Since in any dispute resolution system the parties have to exchange information in order to deal with facts, proofs, and arguments, the issue of confidentiality breach and leaking of sensitive data realised within the ODR or e-ADR methods has brought up uncountable debates.

According to Pecnard (2004), information may be transmitted to other parties via many different technological means, such as emails, chat rooms, discussion boards, or videoconferencing, which, as we have seen, were not created with security and trust in mind.

Still, in the same author's thoughts, the security is a key issue in ODR, as it is in e-commerce in general, since it concerns the reliability of technology for users, also creating trust and confidence in the online environment. Regarding the ODR, the main focus of security is information protection.

As it could be seen, technology usage is facing barriers regarding data security protection and confidentiality of information disclaimed during the process of ODR and e-ADR. In the same way, the EU previous law and regulations have challenged the full potential using the methods thereof in cross-border disputes, even though they have been supported for the EU commissions.

In the second stage of this work, the conflicts with European law will be brought up, in special the article 6 of the ECHR. Nevertheless, the conflict with the EU law, a critical analysis of data security and confidentiality issues in e-ADR and ODR processes will be made.

1.3 The ODR Usage in Europe

Although the European Union is known for its strong regulations, sometimes their people encounter difficulties to solve their demands on cross border rights violation, mainly in

consumer cases.

Having in mind that problems occurred in the Cyberspace should be resolved online, in 2016 was launched the Online Dispute Resolution (ODR) platform by the EU Commission, which, the Commissioner for Justice, Consumers and Gender Equality, states that ‘while we are still in an early phase of this new tool, we can already say that the Online Dispute Resolution platform has been well received by consumers. We also see that the mere fact of a consumer using the platform often is incentive enough for traders to resolve the dispute. We are giving consumers a practical tool to help them benefit from their rights in practice. On the other side, traders also have a lot to gain from this platform and should use it more. Particularly for online traders, it is essential to be seen as reliable by potential consumers. Using this tool will help them earn consumer trust whilst providing them with a simple and fast way of resolving disputes’. (Commissioner of Justice, Consumer, and Gender Equality, 2016)

This new tool launched by the EU Commission shows us that the ODR methods are being considered the future of the dispute resolution, as it can solve demands wherever the disputants are, in a cost-effective manner.

The EU Commission claims that in its first year, the ODR platform was lodged with more than 24,000 consumer complaints. Furthermore, more than a third of the complaints regarded to cross-border purchases within the EU, which was considered a success.

It is well known that the justice system is struggling with an increased volume of disputes and pressure to resolve them quickly, cheaply and proportionately while delivering a better experience for all involved.

Regarding the ability to manage disputes and administer justice online, in 2016, Thomson Reuters produced an in-depth report analysing the ODR technology, which says that it has vast

potential to reduce fixed and operating costs in particular for four groups: the court services, regulators and ombudsmen, private mediators and consumer businesses.

In this way, the last part of this work will go through the market penetration of ODR and e-ADR methods, bringing the numbers of users of the methods thereof and evaluating them in a critical analysis of what was expected and what is really happening. Also, it will be possible to realise how the countries within the EU are reacting to digital methods and which are the main complaints lodged.

2. Methodology and Methods

Conducting a research project is a job which asks the researcher to show their point of view about a subject through data collection, therefore offering the results expected or the divergence reached. To make it happens is necessary to follow a precedent methodology and then expose the methods used.

Research Methodology and Research Methods usually have their concept mixed, however, conducting a research project with this extension calls the necessity of clarification about the difference between them. In Saunders et al. (2007) words, the term “methodology” refers to the philosophy or theory from which the research will be approached, whilst the term “method” refers to the procedures or steps that must be followed to obtain and analyse the data that support or provide more information in an investigation.

Acknowledging the concepts thereof makes the confusion is plausible, which in other words, it is possible to say that the methods are simply the tools used to obtain the data or collecting its results. The methodology is the justification for using the methods chosen.

This chapter aims to present the Methodology and Methods used to base this dissertation, walking through the steps to be followed and the tools used to achieve the final results.

2.1 Research Philosophy

Adopting a research philosophy is a way of showing important assumptions about the way in which the researcher views the world. According to Johnson and Clark (cited in Saunders et al. 2007) as researchers, it is necessary to be aware of the philosophical commitments that are made through the choices of research strategy since this has a significant impact not only on what it is done but it is understood what has been investigated.

Saunders et al. (2007) complete the aforementioned thought saying that the philosophy adopted will be influenced by practical procedures, whilst the assumptions made regarding will define the methods used, and those will support the research strategy for facts and data collection and analysis.

Another crucial point to explain the research philosophy adopted is the pragmatism, which in Saunders et al. (2007) words, pragmatism argues that the most important determinant of the epistemology, ontology and axiology you adopt is the research question.

Furthermore, Abbas Tashakkori and Teddlie (1998) suggest that pragmatism rejects the existence of absolute and unobjectionable truth. Conversely, it considers that the ideas are provisional and always subject to change since future research might modify them.

The main goal of this work is to critically analyse the Online Dispute Resolutions and Electronic Alternative Dispute Resolution methods, aiming the answer of the question: Can we trust the online methods as the future of Alternative Dispute Resolution? For that reason, this study will make assumptions from an epistemological point, as it is based on assumptions about knowledge and how knowledge is communicated to others.

The research philosophy adopted by this study is the positivism, which establishes a hypothesis to be tested through data collection. The data found will be tested, and the findings will be

critically analysed to confirm the hypothesis, refute it, or is inconclusive.

This project hypothesises if the online dispute resolution and the electronic dispute resolution methods will be the future of the dispute resolution.

Having the hypothesis thereof, the approach chosen to conduct this research was deductive, which according to Vanderstoep and Johnson (2008) is the process of reasoning that flows from a theory/hypothesis to systematic observation to conclusion.

2.2 Research Design and Method

Following up to the next step of research conduction, it is crucial to determine how which type of data will be collected to base the hypothesis proposed.

According to Creswell (2007), Qualitative research can be defined as a course of action in which the researcher establishes an integrated point of view that offers a detailed perspective of the sources of a natural environment.

Conversely, the Quantitative research is well defined by VanderStoep and Johnston (2009), when he is said that it involves the use of statistics and mathematics to obtain results. Also, this method of collecting data is conclusive in its purpose since it tries to quantify the problem and understand how widespread it is by searching for results that can be projected to a larger population.

In short, the qualitative data is linked to written information, and quantitative data is connected to numbers.

Notwithstanding the two short definitions above mentioned, it is also possible to acquire qualitative data to be analysed quantitatively, and quantitative data can be processed qualitatively. This cross over of methods is called mixed methods, where both can be collected

and analysed together.

According to Tashakkori and Creswell (2008), mixed methods provide flexibility, due to the fact that they conceptualise the term integration, and for this reason, it has been used by different researchers from different studies' area, although it does not have the same acceptance in all fields.

Furthermore, according to Sanders et al. (2019), The collection of quantitative and qualitative data does not have to follow a specific order, and they can be conducted at the same time, and for this reason, they can be classified as concurrent mixed methods.

For the sake of this work, the mixed method will be used, as it is necessary to collect concepts and arguments to sustain the hypothesis created, which is primarily qualitative data. In the same way, the critical analysis of numbers to scale the broader use of the ODR and e-ADR methods is essentially quantitative data.

The research strategy chosen was the case study as few different ODR methods will be analysed and compared with the main target that is the European Online Dispute Resolution website. The e-ADR methods will also be analysed and compared. Furthermore, the methods chosen to guide this research was through Primary and Secondary Data as the main data analysed comes from data already collected as written documents and official statistics, combined with Legal Research.

According to Robson 2002 (cited in Saunders et al., 2019), a case study is a strategy for doing research which involves an empirical investigation of a particular contemporary phenomenon within its real-life context using multiple sources of evidence.

As aforementioned, this research seeks to future proof the technology usage in dispute resolution methods (ODR and e-ADR) where platforms that already have been used will be

critical analysed.

2.3 Ethical Considerations

Since this project involves data from experts and recognised people and from all those who participate indirectly in it, the ethical considerations in this dissertation are oriented to the protection of the confidentiality of the subjects participating in the research and to the access of any information that they provide.

3. Presentation of Data

3.1 A Critical Evaluation of the Processes of ODR and e-ADR

3.1.1 The Actual Concept of Online Dispute Resolution

Although the subject of Online Dispute Resolution has been discussed over the decades, its conceptualisation has caused heated debates and divergences. The method logic expression would bring the thoughts of a transition of the dispute resolution mechanisms to the online environment. Still, the doctrine has not reached an agreement about the matter.

The main problem on this matter circles around whether ODR is the same as conventional ADR when it is complemented or assisted with ICT (“Information and Communication Technology”) tools, or it is a whole new method in addition to conventional ADR.

Bringing up this collision, Calliess (2006) states that “on the one hand, ODR relates to the resolution of disputes that result from online conduct, i.e. from communications and transactions which come about through the use of the Internet Domain name disputes are a prominent example as are disputes related to e-commerce. On the other hand, ODR relates to the use of online communication technology in the resolution process, even if the dispute itself

has an offline origin”.

Looking for contextualising the matter, Cortés (2011), takes into consideration a broader concept that includes all the online procedures conducted on the internet through a tailored online platform to resolve disputes. The author assumes, though, that this concept is still evolving.

In accordance with the aforementioned, Hörnle, Hewitson, and Chernohorenko (2018) understand that however acknowledging that there is no clear concept of ODR, “it consists in the practice of a range of techniques using various software tools”, that includes filling platforms by parties or their advocates, storage of evidence, artificial intelligence to generate decisions based on previous judgments, platforms to facilitate communication through videoconference, chat boxes, audio clips, etc., and artificial intelligence to enhance pre adjudicatory processes, such as negotiation and mediation, by generating most common resolution to complainants (assisted negotiation) or blind-biding negotiation, as well as replacing the human third neutral party in mediation sessions.

Conversely, the American Bar discerns ODR as a literal transposition of ADR methods into the Online environment, where technology-based tools enhance its outcomes. The possibility of resolving offline disputes through ODR tools are also possible according to them.

The concept thereof is maximised by the American Arbitration Association, which brings the definition as “a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of all three. In this respect, it is often seen as being the online equivalent of alternative dispute resolution. However, ODR can also augment these traditional means of resolving disputes by applying innovative techniques and online technologies to the process.”

On the other hand, authors such as Benyekhlef and Vermeys (2015), consider the term ODR outdated and not correspondent to the reality of how technology has been assisting the resolution of disputes that arise online. They suggest that it would be better expressed by the name Technologically Assisted Dispute Resolution Systems or Services (or TADRS), considering that in their words, the most known ODR systems so far, such as eBay feedback system, “are moving away from the ODR models towards more comprehensive conflict resolution solutions”.

Regarding ODR, technology can also play a crucial role in managing the process of settling disputes, becoming which is called the fourth party. This concept considers that the plaintiff and the defendant are the parties of the process, and the third party would be the mediator, arbitrator, or facilitator.

The technology acting as a fourth party approach was introduced by Katsh and Rifkin (2001), which is an interesting idea as it indicates the significant role technology can play guiding the litigants towards an agreement, and not just being about replicating face-to-face interactions.

Another interesting definition was made by DeMars (2015) as she states that “an ODR system may be as simple as an email-based process for collecting documents. It could also be a process that uses highly sophisticated systems including data collection and storage, automated response processes, computer assisted resolution, internet supported conferencing, and a multitude of other services”.

In addition to all of the above, Cortés (2011) goes even further and divided ODR into two categories, dispute avoidance and dispute resolution, where the first refers to the use of ICT to impede the occurrence of disputes between the parties and the resolution of disputes at an early stage without requiring the disputants to become fully engaged in a dispute resolution process. The second refers to ICT as applied in settlement of disputes.

Bringing in the ODR to Europe, it is relevant to show the approach made by Hörnle (2012), where the author understands that the “European consumer protection law is currently being widened to add Online Dispute Resolution (ODR) into the toolbox of European consumer redress.”, and it comes to the encounter to Pablo Cortés (2011) position, that suggests that for the sake of the e-commerce growth in European territories, in order to foment the balanced development of the economy in the whole continent, it is paramount to make consumers believe that in case of any problem that may occur from online trading, they will be supported and have it sensibly redressed.

The EU created an ODR platform for cross-border B2C e-commerce disputes to ensure that such disputes can be solved efficiently, following the guidelines of the Regulation EU n° 524/2013. This Platform will be approached with more details later in this work.

Hörnle also highlighted the fact that the EU Proposals and the UNCITRAL Working Group III have distinct goals when trying to create a legal framework for ODR. While the European Union aims the improvement of consumer protection by establishing high standards to be followed by ADR and ODR providers in order to increase trust on these mechanisms and consequently to increase the e-commerce, UNCITRAL has a more pragmatical approach, which consists in creating “a cost-effective procedure for high-volume, low-value disputes”.

For the purpose of this work, ODR will be treated as a different tool than the conventional ADR, where the fundamentals of artificial intelligence will be explored since the simple digital replication of these methods will be structured as e-ADR, which will be also be approached by this dissertation.

3.1.2 The Main Online Dispute Resolution Platforms

Despite the fact of the actual existence of a considerable amount of ODR platforms, this work

will critically analyse three of them: The European ODR platform, as an effective B2C tool launched by the European Commission, Cybersettle, as a fully automated Cyber-Negotiation, and SquareTrade, as a private hybrid platform that includes direct negotiation and e-mediation, having the disputes deriving out of eBay as their main cases.

3.1.2.1 European Online Dispute Resolution Platform

The European Online Dispute Resolution (EU ODR) Platform is an ODR tool launched in 2016 to attend the Regulation EU n° 524/2013, which aimed the high-level consumer protection in online cross-border transactions within Europe, and facilitate the independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between consumers and traders online.

The Platform is accessed online, available in all EU members languages, free of charge, and in accordance with Article 2 of the Regulation “shall apply to the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union through the intervention of an ADR entity listed in accordance with Article 20(2) of Directive 2013/11/EU and which involves the use of the ODR platform”.

Although the initial purpose of the Platform was towards the cross-border consumer disputes, it also allowed people to sort domestic disputes, which are those where consumer and traders are based in the same jurisdiction.

It is essential to say that the EU ODR platform comprises just disputes originated in the Online environment. Notwithstanding, the conflict diagnosis tool considers the offline type of conflict and gives alternatives other than the use of the Platform, such as an alternative dispute resolution body. Each body has its own rules and procedures, which possibly include fees.

The Alternative Dispute Resolution procedures are provided by neutral out-of-court bodies such as conciliators, mediators, arbitrators, the ombudsman and complaints boards, and they are able to handle any contractual disputes arisen with a trader established in the EU. The ADR bodies also have to meet strict EU quality criteria, which include the principles of effectiveness, fairness, independence, and transparency in their procedures.

The EU ODR platform was developed to be straightforward for consumers, attending the Regulation abovementioned. To start a complaint, first, it is necessary to go through the conflict diagnosis tool, where the consumer will be required to select the type of problem they are facing, and it will be shown the options to handle that.

The Platform requires the consumer to inform if they had tried to directly resolve the issue with the trader, although it does not prevent consumers who did not try it in antecedence of the platform usage.

In online purchase disputes, the consumer will be able to choose between direct negotiation with the trader or agree on another out-of-court dispute resolution body to resolve the dispute. If the first option is chosen, the parties will have 90 days to reach an agreement, otherwise, the case will be automatically closed by the software administrator. On the other hand, if the consumer chooses to submit the case to a neutral third party, the parties will have 30 days to agree on a dispute resolution body.

It is necessary to explain that in the first years, the EU ODR Platform did not allow the parties to negotiate directly, neither exchange messages nor documents to prove their case. The whole process was through the ADR body, and it had the discretion of using the Platform to communicate or not. The changes were implemented after the not satisfactory results obtained in 2017 and 2018. The market penetration of ODR methods will be further analysed in this work.

Moving on, to file a complaint form, the consumer will be asked to provide personal details and information on the trader, alongside the description of the problem. On this point, it is necessary to draw the attention to the compliance with the General Data Protection Regulation (GDPR) as personal data will be delivered with the *ab initio* purpose of just filing a claim. The data protection regarding ODR methods will be further analysed in this paper.

After filing the complaint, the trader will be contacted and required to accept or decline the complaint. If they accept, the parties will be able to exchange messages, attach documents that may be useful to prove their case and schedule an online meeting within 90 days, using just the platform-tools. If they fail on reaching an agreement before the deadline, as abovementioned, the case will be closed.

Conversely, suppose the trader decided, for any reason, not directly negotiate with the consumer. In that case, they may send a list of ADR bodies to the consumer seeking to help them to find a mutually acceptable agreement. In this case, the deadline to agree with an ADR body is 30 days, or the case will be closed.

Notwithstanding, if the parties fail to resolve their dispute through the EU ODR platform, other options are given to the consumers to redress the issue. They may contact the local European Consumer Centre to get advice and ask them to contact the trader on their behalf, or even go to court using the European Small Claims Procedure.

By the way the Platform operates, it has been clear the intention of establishing the high-level consumer protection required by the Regulation EU n° 524/2013, offering them different dispute resolution tools that may attend their need in different levels and stages of a conflict.

3.1.2.2 CyberSettle

Considering the assumption that ODR methods are not just a replication of face-to-face

interactions and it can play a major role in guiding the parties towards an agreement, it is possible to say that Cybersettle fills this requirement and fits in the fourth party role conceptualised by Katsh and Rifkin (2001).

Cybersettle was created in 1996 by Charlie Brofman, after a blind bid bargain during an insurance claim trial, where both parties were well aware of what amount would eventually settle the case, but neither wanted to compromise their bargaining position, rendering their bottom line offers secretly to a court clerk, who was instructed to give a sign if the offers were within a range. If it were not, the court clerk would destroy the papers and would not reveal the numbers.

According to Deffains and Gabuthy (2005), Cybersettle consists of proprietary software that utilises the internet as a mean of engaging the parties in the automated negotiation of monetary sums. This concept is clear and shows how technology has evolved and, by chance, replaced the human interaction on the negotiation process.

The resolution process initiates when a claimant files their complaint in the ODR provider. Then, the defendant party is contacted by the provider using the information brought by the claimant, with an invitation to participate in the Online Dispute Resolution process. If accepted, a response needs to be filed by the defendant.

At this point, the Cybersettle system allows the parties to submit double-blind bids in rounds of offers to enable settlements to occur in a range of disputes. The parties may submit three bids of minimum offers or demands, and they will be played against each other until a round is completed. For each offer or demand, the software adds 20% in order to create a settlement range between the claimant and the defendant maximum amount.

Receiving the proposals, the software analyses whether the defendant's offer is within the

settlement range, generating three possible scenarios. If it is within the range, the case will be settled for the average of the two proposals, occasioning the first scenario. The second case is if the defendant's proposal is strictly more significant than the maximum settlement amount, then the case will be settled for this amount (maximum). The third regards the possibility of the defendant's offer is below the settlement range, thus making an agreement impossible.

In their study, Deffains and Gabuthy (2005) found two possible sources of inefficiencies in relation to Cybersettle design. The first one is the existence of incomplete information, which according to them, not all mutually beneficial agreements can be attained via the procedure.

The second source of inefficiency is the impact of the settlement factor on the defendant's bargaining behaviour, where the software bargaining structure creates a negotiation situation incentivising the parties to exploit the settlement factor strategically and to adopt aggressive positions, leading to inefficient collective results.

Notwithstanding the points raised by the authors above, Cybersettle is the world-leading private ODR company, a pioneer on the automated negotiation process, and the main reason why ODR methods should not be considered just a replication of face-to-face interaction but an actual fourth party on the dispute resolution procedure.

It is essential to reveal that Cybersettle is not a platform to be used by consumer and traders, whether online or offline transactions, but it can be used by insurance companies, financial services, law firms, corporations, public services, and professional service companies. The requirement for the software usage is the dispute involves a monetary sum.

3.1.2.3 SquareTrade

SquareTrade was founded in mid-1999, integrating the ODR system into the SquareTrade Seal, the internet's world largest Trustmark program for online small business sellers. It is also the

first partnered with the world's largest online marketplace, eBay, to handle disputes between buyers and sellers around the globe.

The ODR platform was created to offer a powerful tool to help customers to address their issues in a non-expensive, quick, and effective manner, thus meeting the ODR core principles.

Considering that the disputes handled by SquareTrade have an average value of USD 70-100, eBay recognised that its users had no real alternatives to address their issues, since the costs associated to court procedures are prohibitive, and costs with the conventional ADR methods would be higher than the sum involved in the dispute.

Another determinant factor that culminated the SquareTrade establishment was the geographical distance of the parties. Seeing that eBay is an online marketplace where buyers and sellers can meet regardless of their location, an ODR platform should offer the same facilities.

Rabonovich-Einy (2006) has an interesting point of view about SquareTrade, illustrating it as a platform for discrete contractual disputes, over low-dollar-value transactions, in which the parties are strangers to one another. The author then completes that the disputes occurring in the platform tend to be less emotionally charged, and the disputants changed to be relatively indifferent to confidentiality.

It is crucial, though, to draw attention to the "relatively indifferent to confidentiality". It is widely known that confidentiality plays an important role in any kind of alternative dispute resolution, including the online procedures. To make any ADR process work, the parties must communicate openly, without fear that these statements may be used against them on further occasions.

The way SquareTrade works is taking place entirely on their website, where there are two

phases of ODR. The first one is automated negotiation, offering the two parties an opportunity to resolve their problem by themselves, free of charge. The second applies if the first does not work so that the parties can request the service of a professionally trained SquareTrade mediator.

Initiating the automated process, the consumer needs to fill out an online complaint form, which gives the option of choosing from one of several descriptions of the type of problem or fill out an open-space box with a description of the issue. Moreover, the consumer is also asked to select one or more solutions that they would be satisfied, selecting within the options, or writing down in the open-space box.

The other party is notified via email by the system, provided with basic information regarding the complaint. Then, the respondent is invited to participate in picking a solution offered among several options or providing a response form by suggesting an alternative.

As it is noticeable, the SquareTrade software acts as a fourth party in the dispute resolution process, interacting with the parties, reframing the problem, and showing possible solutions for the case.

Rabonovich-Einy (2006) thinks about the SquareTrade software as a hybrid of negotiation and mediation, as it allows the parties to formulate and reformulate the problem and solution and moves them from a problem mode to a solution mode.

If the parties do not resolve the issue in the automated platform, the issue might be referred to online mediation (e-Mediation). It means that a trained mediator will intervene in the process to help the parties to understand why they are in conflict and help them to find a solution that meets their needs. The difference is that all the process will take place through asynchronous email communication. This process also includes fees established by the company.

SquareTrade mission is to build trust in transactions and to encourage online commerce by reducing risk for buyers and sellers. The company considers ODR as the most appropriate process for assisting consumers in problems arising out of online transactions. Even though their services are not offered exclusively to eBay users, the disputes arising from there are the most numerous among SquareTrade's caseload.

3.1.3 e-ADR

As it was shown in this paper, in a broader concept, ODR includes e-ADR in their tool's range. Nonetheless, it is strongly defended in this work that ODR methods are not just a digital replication of face-to-face interactions and is imperative to describe e-ADR and how it operates. For the propose of this work, it will be analysed just e-Mediation and e-Arbitration as the main e-ADR methods.

3.1.3.1 e-Mediation

Although the possibility to say that e-mediation and face-to-face mediation are indeed closely related, there is a wide range of elements characterising e-mediation as a distinctive field of practice.

Druckman and Koeszegi (2017) state that e-mediation refers to the use of a web-based support system aiming the facilitation of conflict resolution and negotiation processes. It is also not attached to only e-business, such as marketplaces and e-commerce in general, but it may include such areas as family mediation, labour negotiations, peace negotiations, and environmental conflicts. In other words, it is possible to say that e-mediation is a form of alternative dispute resolution, where the mediation is performed by utilising ICT tool.

According to the Harvard Program on Negotiation (2013), in the late 1990s, various start-ups began offering e-mediation services to organisations and the general public. The companies

developed a roster of trained mediators whom they would assign to facilitate dispute resolution online, primarily through email. E-mediation is now offered across the globe, both by service providers and increasingly by individual mediators.

Indeed, considering the dynamic growth of mediation as an area of practice, it would be difficult to isolate a dispute area in which e-mediation is not offered or would not be considered suitable by a mediator. The concept that ODR, in a broader concept, is only suitable for disputes originating in online activity has been left behind.

Regarding the usage of e-mediation in comparison to the conventional face-to-face method, Ebner (2012) explain that it is not always the first parties' choice. The difference in the methods goes for that traditional ADR usually assumes a breakdown in communication or other negotiation difficulties between the parties, leading to the mediation process as the first choice, considering it is the best communication fixer.

However, when the topic is ODR, in a broader concept, in many cases, negotiation difficulties are viewed as being a result of distance, of low dispute value, or parties not knowing how to contact each other. Therefore, some ODR providers, which also uses e-mediation in their tools' range, focus on using technology as a way of bringing parties into contact without bringing involving a live mediator.

Notwithstanding, it is plausible to state that in some situations the e-mediation is rather recommended in opposing to the traditional face-to-face. These may happen when the parties, or the chosen mediator, are located in different geographic areas, or when the dispute in question arises from an online transaction where the parties never met and do not have any connection.

Another situation concerns to power imbalance of the disputants, such as when one feels

threatened or intimidated by the presence of the other and is reluctant to meet in person. It may happen in occasions of inter-party violence which makes convening in the same room a risky prospect.

Bringing in the e-mediation concept to the current situation, because of covid-19, social distancing has become a mandatory practice around the globe. While practising social distancing, it has become difficult for people to arrange mediation, which spiked the interest in online procedures. With the help of technology, videoconferences are being arranged to enhance the e-mediation results.

Following the track, Ebner (2012) states that the cost-effectiveness of e-mediation is the main advantage for the parties. Although the existence of different models for pricing it, there are often no different than face-to-face services. The real benefit of costs saving comes from the travels, where the parties will not need to spend any penny to attend the procedure and will also save time, making the e-mediation a convenient method. The possibility of accessing the mediator expertise in any given geographical region is also an advantage.

Regarding the e-mediation process, the same author relates the communication. In asynchronous processes, the slowed-down pace can allow the mediator a more intentional application of their toolbox, since they have more time to reflex on the messages sent and apply the adequate technique. There is also the possibility of simultaneous caucusing, which saves process-time, and records are preserved and reviewable.

From the aforementioned, it is necessary to draw attention for two points. The first is related to text communication, as, in practice, it is the most prevalent form of communication in e-mediation. Although it can minimise the effects of “good talkers” or dominant figures, this type is prone to misinterpretation, to misattribution, and to causing deterioration of trust. Further in this work, the importance of trust in ODR will be approached.

The second point regards the possibility of preserving and reviewing the communication exchanged. In a first look, it might not be seen as a problem, as the possibility of reviewing the process could allow a more seamless process and joint frames of reference. Nonetheless, this practice might open the doors for revisions afterwards and out of the purposes of the e-mediation, breaching the rights stated on the General Data Protection Regulation (GDPR). This matter will also be further appreciated in this work.

Listing the disadvantages for the parties in e-mediation, Ebner (2012) states that in cases where the parties file a case and are contacted by a mediator assigned by a service provider, the contact and assessment of the mediators can be challenging. The good negotiation techniques, such as dominance, volume, and body language, have no significant effect on online procedures.

In relation to the procedural disadvantages, the lack of warmth, empathy, immediacy, rapport, and other attitudes are the most common issues related to the online procedure. In fact, several times the conventional mediation comes into practice to fix a broken communication between the parties, and a skilled mediator needs to figure out the underlying reasons that led to the dispute. In online procedures, this task is extremely difficult as there is no physical interaction among all the parties involved in the process.

Regarding the mediator skills, there is still a debate among specialists. On the one hand, Raines (2006) suggests that for the online mediation, the requirements are the same general skill set of a conventional mediation, in addition to twists necessary by technology. On the other hand, the report made by the Distance Mediation Project explains that for distance mediation, different skills are required, which involves a different mediation style rather than merely new tools in the mediation toolbox.

In fact, there are some necessary skills for providing face-to-face services that are simply not needed in online procedures. Ebner (2012) convey with the idea that all tools in the traditional

mediation need to be closely re-examined for suitability and application online, citing the communication via body language, that is an important skill for face-to-face interaction but not necessary in online sessions, although it might be useful in videoconferences.

Furthermore, regarding the essential active listening skills, the online environment requires adaptation. In an asynchronous e-mediation, the technique of mirroring and reframing the parties' statements do not seem to be effective since it is written. According to Ebner (2012), a good way of turning around these barriers and reach the point of using these techniques, which shows the parties that they are being heard, and create empathy and trust, is to stress, in words, that they have read the party's message. Although it might be seen as a simple opening line, they convey the powerful message that the party was heard.

It is possible to say that e-mediation is the most widely offered service in the ODR system, either as the primary or secondary tool, where it is facing an exponential growth as their practitioners are taking their traditional practice online. It is inevitable the use of technology to enhance the outcomes of traditional practices, although the conventional reconcilable method is, in fact, unreplaceable.

3.1.3.2 e-Arbitration

Using the broader concept of ODR as any dispute resolution process carried online, it is imperative to considerer the practice of e-arbitration. The term e-arbitration or online arbitration have been recently used to describe forms of arbitration that solely or at least heavily rely on the information of technology.

Different of state court procedures, with few technologically advanced national court systems exceptions like Brazil, arbitration permits exceptional procedural flexibility and so is positioned to adapt to technological progress much faster than domestic forms of dispute resolution.

According to Markert and Burghardt (2017), “e-arbitration can be understood as the predominant use of information technology for the arbitral process, whereby particularly the conduct of evidentiary hearings, but also the formation of the arbitration agreement and the rendering of arbitral awards in electronic form constitute pertinent, but not constitutive, elements”.

This concept comes from the idea that e-arbitration is not merely synonymous of the digitalisation of the legal workflow, but technological means must become the rule, and not the exception.

Complementing the aforementioned, Wahab (2012) states that in essence, e-arbitration requires sufficient utilisation of ICT applications, where the ICTs employed should not be used as a simple assisting tool in the process, but integrating and embedding into the process itself and indispensable for its proper functioning and administration.

With the rising of e-commerce in the early 1990s, a demand for dispute resolution through electronic communication was created, coming up the firsts e-arbitration ideas. As it was mentioned before in this paper, the Virtual Magistrate (VM) was launched as an e-arbitration pilot project for the resolution of disputes involving users of the Cyberspace, people who claimed to be harmed by wrongful messages, posting, or files, and system operators. Nonetheless, as explained before, this project was not very popular and was considered as a failure.

Nowadays, several institutions are providing e-arbitration services, such as Onlinearbitration.net, ADR.eu, Online Arbitration Network, eCourt., Inspection Arbitration Service, ZipCourt, e-Arbitration-T, and the South African Institute of Intellectual Property Law ODR Scheme, it indicates that the ODR, in special e-arbitration, the arena is dynamic and changing.

Wahab (2012) define the role of technology in ODR into three categories: Technology-assisted ODR mechanisms, Technology-based ODR mechanisms, and Technology-facilitated online dispute prevention (ODP) guarantees. The first one is where the role of technology is restricted to the provision of an adequate and secure medium of communication and information exchange. The second can be said as the fully automated ODR, acting as the fourth part. And the last one helps reduce the risk of potential e-disputes and incontrovertibly enhances trust and security in e-business, such as reputational systems.

Indeed, the e-arbitration would fit into the first category, since a fully automated decision-making system in real legal disputes is not available yet, remaining necessary the human factor, essentially represented in the human arbitrator. Conversely, as it was abovementioned, just the exchange of electronic communication or submissions, or even the use of videoconferencing for arbitration hearings, are not enough to characterise the process as e-arbitration, but just a mere utilisation of ICT in arbitral proceedings.

In Wahab (2012) words, e-arbitration, *strictu sensu*, would mean the full integration of ICT into arbitral proceedings, where the whole procedure, or a substantial part of it, takes place online, which includes filings, submissions, hearings, and awards.

In comparison to conventional arbitration, the electronic method has some advantages. It is possible to say that e-arbitration is a faster procedure, as communication means are electronic. It is also much more cost-effective, saving from the travels, where the parties do not need to spend money to attend to hearings, which saves time as well. In relation to the meetings and hearings, e-arbitration has a considerable advantage regarding accessibility and availability, since the whole procedure is online, the parties just need an internet connection to attend the call. It is also suitable for both extraordinarily complex and high-value disputes, and small claims.

In respect of the more complex disputes, Markert and Burghardt (2017) state that the parties and arbitrators still prefer face-to-face meetings and at least some paper for highly complex cases, or even the lack of necessary infrastructure in e-Arbitration required for management of such large cases.

Nonetheless, online arbitration also presents some disadvantages, which Wahab (2012) classified into technical and legal concerns. The first one relates to technical standards and compatibility of systems, variation in the parties' technical abilities and expertise, security and confidentiality of arbitral proceedings and communication, ability to organise and conduct hearings online, and integrity and authentication. These technical issues are no exclusive to e-arbitration, but may apply for all ODR schemes, and are innate to technology usage.

The legal issues are in respect to the legal and adjudicatory nature of such proceedings, which are ordinarily subject to strict procedural norms and standards that are needed to protect the integrity of the proceedings at large to avert subsequent challenge to arbitral awards. A great example is given by Schiavetta (2004), where she claims that e-ADR providers should be obliged to offer minimum procedural guarantees in respect of Article 6 of the European Convention on Human Rights.

Since the whole e-Arbitration agreement, proceedings, and awards are in electronic form, without a geographic centre, an issue regarding the seat of arbitration might arise. Although the arbitral seat is not just about the geographic centre but more about having a national legal order as a fallback option, the parties are expected to choose it in their arbitral agreement, making sure that the court rules of the seat chosen are able to deal with e-procedures issues.

For all the above, it is possible to say that e-arbitration is a mechanism in expansion. However, the necessary human intervention, it is clear that technological procedures are in activity not just to facilitate the arbitral process but effectively conduct it.

3.2 A Critical risk analysis of data security and confidentiality issues in e-ADR and ODR processes

3.2.1 Security and Trust

Handling technology usage requires a certain amount of computer science knowledge. The basic guidelines of internet navigation are indispensable if one party wants to settle a dispute online, or if the dispute settlement were required to be online.

Notwithstanding, having a deeper knowledge about the internet users' rights is a masterpiece that every user should know to be secure on Cyberspace, mainly those who frequently purchase via online channels and those who want to settle their arising disputes through online methods.

Security is indeed a vital issue regarding ODR and e-ADR methods as well as in e-commerce in general. About the definitions of security, they seem to fluctuate and to find no straight diagnosis. The terminology meaning walks through many different aspects such as confidentiality, secrecy, transparency, authentication, signature, integrity control of information, and privacy. In the Pecnard (2004) thoughts, regardless of the broader range of meanings that the term "security" has, the main focus of security in ODR is protecting information.

In the same line, according to Schultz et al. (2002) protecting information has two aspects: the transmission and the storage of information, which are exposed to the risks of unauthorised third parties being capable of accessing the information, and, a *fortiori*, altering this information.

The aforementioned risks are indeed a huge problem faced by internet users. Cybersecurity issues are becoming a daily struggle for companies as almost every software can be hacked, and websites get hacked every day, and some of those hacks are fatal to businesses attacked.

According to the Varonis.com, data breaches exposed 4.1 billion records in the first half of 2019. In the same page, over 500 million consumers, dating back to 2014, had their information compromised in the Marriott-Starwood data breach made public in 2018. In 2016, 3 billion Yahoo accounts were hacked in one of the most significant breaches of all time. In the same year, Uber reported that hackers stole the information of over 57 million riders and drivers.

Keeping up with the numbers, Forbes.com says that 83% of enterprise workloads will be in the cloud by 2020, and for 66% of IT professionals say security is their most significant concern in adopting an enterprise cloud computing strategy.

Moving on, trust and confidence are also essential factors when navigating online, which, according to Pecnard (2004), security is crucial for creating them in the online environment.

Wilkison (cited in Pecnard, 2004) classify trust as the third significant factor critical to the development of the e-society, alongside to awareness and access, Which is confirmed by Katsh and Rifikin (2001), as they state that trust is as important for the success of many web-based enterprises as a convenience, although it is easily ignored and neglected.

In spite of the natural acknowledgement of the importance of trust, the concept of the term is quite slippery. Still, it is interestingly explained by Colin Rule and Larry Friedberg as 'at its highest level, trust is a social concept. Trust is something that exists between people. Trust implies relationships – one person depending upon another person. As a result, trust facilitates human interaction. When trust exists between people, it lowers the individual resistance parties may have to cooperate. If you trust that someone will not take advantage of you, you can open yourself to working with them without hesitation.' (Rule and Friedberg, 2006, p. 194)

On the one hand, the role of trust in ODR and e-ADR is crucial, since the parties already come from an issue unresolved and it is necessary to deposit trust on the tool or method to solve their

dispute. It is essential to believe that the ODR service provider will respect their confidentiality and will act impartially and nonjudgmentally. On the other hand, ODR and e-ADR have an important performance in repairing broken relationships, mainly those that experienced a catastrophic negative trust experience.

Most of these terrible experiences on ODR are from customers in online purchase. It is well known that trust is the cornerstone of customer relationships in the e-commerce market, which brings reputation (safe company website) and enhancer the business brand.

According to Cortés (2011), ODR seeks to provide trust in online commercial contexts, but it has a remaining lack of trust in ODR itself. This distrust is raised by the impotence of a newly acquired scepticism that comes from the number of disputes arising out of e-commerce.

In fact, many companies are reluctant to announce their ODR channel out in front of customers, for fear that it will make them focus on the negative side by generating the thought of transaction problems in their head, harming the reputed trust. Conversely, having an ODR channel may show that the company cares about the customers' problems and they will try to solve it.

In Cortés (2011) thoughts there are several ways by which ODR providers can enhance confidence in their services, where providing press articles and contact information, and supplying simple information about the process and third neutrals are the basics ones, the use of trustmarks and the provision of feedback mechanisms are the newbies' technological ways.

The aforementioned author completes saying that the feedback is a major advantage that ODR has over ADR, concluding that the parties should be allowed to provide feedback regardless of whether their process was successful or not. In accordance with the author, in fact, the best insights on how to improve ODR are given by the users, which thereupon an effective feedback system can be invaluable.

Looking for information collection relating consumers' experiences to use them in generating ratings on other metrics that can demonstrate how satisfied a consumer is toward a specific trader, the reputational systems were created.

Regarding the subject, Vilalta (2019) states that 'electronic feedback, reputation, and private execution systems are complementary ancillary tools that provide significant added value to webs and digital intermediary platforms as they play an essential role in creating the necessary trust and credibility'. The same author lists and explains some other mechanisms that a reputation system may have in order to be more a conflict resolution tool that is able to provide a more complete and effective redress to consumers' issues, such as ratings, chargebacks and payment escrow, Trustmark, blacklist, and others. A better understanding of these features will be given in the following paragraphs.

The relation between reputational systems and trust on the Cyberspace is even more tightened regarding the users' reviews as the company's image will be exposed to everybody, paving the way to sneaky fake reviews. This concern is raised by Cortés (2011), Mania (2015) and Vilalta (2019) and it is legitimate regards to the vulnerability the companies face by the possibility of getting false allegations by users that in bad faith aim to destroy a certain company's reputation. The effects of fake reviews may be massive for any company if the reputation systems administrators do not adopt measures to prevent it from happening or from acting rapidly to minimise the negative impacts on businesses when it happens.

The importance of reputational systems is shown in a survey held by BrightLocal in 2019 revealing that 76% of consumers trust online reviews as much as recommendations from family and friends, which means that the weight that online reviews have on consumers decision making is huge and to ensure a reputation system is reliable, and a useful conflict management tool in order to be the right mean for consumer disputes redress, the reputation system

administrator must comply with certain standards regarding users identity checking, review of content and prevention of fraudulent reviews.

Those concepts and statistics thereupon may bring us some insights on the risks of Cyberspace, which arise the questions: How the communication exchanged, and data collected in ODR and e-ADR processes are stored and what is done with it? To answer these questions, first is necessary to understand how the communication is exchanged in ODR and e-ADR processes.

3.2.2 Communication and Confidentiality

It is well known that communication has a key role in any conflict resolution method, whether online or not, as it can dramatically switch the atmosphere from warfare to a friendly tone depending on how it is conducted, which may increase the possibility of an agreement between the parties.

In terms of electronic communication, setting the correct tone is not that simple as all parties are behind the screen. For one side, according to Smith (1998), people with good typing skills and high data flow connection can dominate a chat-room meeting, which also includes real-time communication tools as a videoconference. From the other side, in the Shell (1995) point of view, typing and the time lag caused people to pay more attention to the substantive content of messages, lessened the emotional stress brought up by conflict resolution and made it easier to overcome socioeconomic differences, which implies the usage of emails.

Comparing the communication exchanged within the online methods above with the traditional offline ADR since this last one takes place physically, the parts can assume, therefore, that sensitive information is not communicated to external parties. Conversely, in online methods, documents are copied more often, and the full exclusion of those documents is hard to prove, generating feelings of insecurity toward digital methods.

ODR systems endeavour to replicate human interactions, for instance, through email exchanges, voice communications, videoconferences. Technology allowed us to interact with others, even though we are not physically close. Therefore, some ODR providers also offer online chatrooms and threaded discussion, replicating the caucus on conventional ADR methods.

Although technology has approached communication, it is widely acknowledged that unprotected email and web-based communications are more vulnerable than communications by paper documents. In Rainey (2014) thoughts, email is the worst and least secure form of online communication, easiest to accidentally misuse and most likely to be hacked.

In the same line, Schultz et al. (2002) affirm that standard emails clearly do not meet the requirements of the protection of the confidentiality and integrity of the information.

Keeping the track, it goes without saying that if ODR providers state that the collected information is treated confidentially, this does not necessarily mean that such information cannot be accidentally (or not) accessed by third parties, which implies that electronic communication needs to be protected by electronic means, and the data must be secured in the whole ODR procedure.

To overturn those security barriers, a common alternative is to encrypt the emails. According to Panda Security, Email encryption is the process of disguising the content of your email messages to protect them from being read by unwanted parties. Sensitive information such as social security numbers, passwords, login credentials and bank account numbers are vulnerable when sent via email.

Another alternative to reduce the risk of alteration and repudiation of a message is by digital signatures, which according to Schultz et al. (2002), it is a cryptographic instrument attributed

by trusted private or public Certification Authorities (CA) to identify people previously.

Regarding e-ADR methods, primarily speaking about e-mediation, the range of available communication means is often unclear or flexible. It is well known that mediation, whether online or not, is an agreed process where the parties have almost total control of the acts and how it will be. For this reason, regarding e-mediation, some rules determine the communication solely by email, but it may be extended to telephone calls, teleconferencing, message posting, videoconferencing, and voice mail.

As it was mentioned before in this work, the confidentiality is often stressed in mediation. According to Schultz et al. (2002), in order to achieve satisfactory results, the mediation has to take place in a context in which the parties and attorneys can communicate openly, without fear that these statements may be used against them outside the mediation.

Still in the authors' words, regarding online mediation, all institutions have held private and confidential the proceedings proper, with some exceptions regarding information of the proceedings that sometimes are publicised as aggregate data but concealing the identity of the parties.

When the subject is e-Arbitration, the means of communications are almost the same as in e-mediation, however, in this case, it is crucial to draw the attention to relevant evidence and arguments used by appropriate means, under the risk of having the entire arbitration process declared null.

Regarding the confidentiality in arbitration, the parties usually expect it from the process. According to Schultz et al. (2002), the survey of existing policies reveals that the privacy of the proceedings proper is almost always provided, which means that the procedure acts will not be publicised unless required by the arbitrator.

The same authors also state that the only type of ODR providers that publicise the results in many details are under the Uniform Domain-Name Dispute Resolution Policy (ICANN). Who intend to submit their dispute to them are required to publicise all decisions in full text, including the name of the parties, on the internet, except when a panel decides otherwise, which can occur in exceptional circumstances.

Cortés (2011) states that in order to enhance trust in ODR providers, some relevant information must be given to the parties, particularly when the ODR provider offers an alternative forum for resolving rights that consumers may have recognised in a legal process.

In a logical order of manners, the parties cannot trust an online mechanism that will deal with their problems without knowing the minimum of information. In a consumer dispute, facts such as the type of ODR procedure and its restrictions, requirements that must be met, criteria for third parties, the costs of the entire process including possible extras, the laws applicable, and enforceability of decisions and agreements must be disclosed to the public.

About the publication of some acts, Cortés (2011) explain the particular importance of the publication of reasoned decisions, which in his opinion is necessary to create a degree of transparency and legal certainty, essential to increasing trust in ODR.

In an agreement with the explanation thereof, transparency is a crucial principle of online businesses, which includes the companies which provide ODR or e-ADR services. In addition to accountability, transparency is considered one of the two main pillars of good corporate governance, bringing the image of honesty and openness.

Conversely, the same author affirms that the publication of decisions may hamper confidentiality, which is one of the main attractions of ADR, wherein a B2C dispute, businesses do not want publicity to their wrongs, and many users are keen to maintain their privacy.

Cortés (2011) sums up that a certain balance between these two basic elements, confidentiality and transparency, despite the antagonism, must be met in order to develop an effective system.

In accordance to the aforementioned, Gaitenby (2004) suggests that, in order to find the balance, the names of the parties should be kept confidential, fitting into a transparent online process where the decision is published altogether to the name and profile of the neutral third party. Other ideas to show transparency without breaking the confidentiality is to use impersonal statistical data, sample cases, selective publication of decision etc.

Despite the fact of the parties expecting confidentiality in ODR and e-ADR methods, it is reasonable to say that the term confidentiality has no common definition in the legal field. The Concise Oxford Dictionary defines confidentiality as: 'spoken or written in confidence; charged with secret'.

According to Üstün (2019), confidentiality in the context of ODR could be defined as the non-disclosure of case information, documentation, and results as well as the secrecy of communication, which may include personal information, such as email addresses, phone numbers and credit card information involved in consumer disputes.

The concept aforementioned is interesting because it brings the minimum data security standard expected by the disputants when they initiate a dispute, especially the secrecy of communication exchanged, regardless of the conflict resolution method chosen. Adequate protection of confidential information is fundamental to many ADR processes, be they online or otherwise.

Notwithstanding, not every ADR processes have confidentiality at its core, often assurances that what is exchanged remains confidential, even if in limited parts. Goldacre (2002) gives the example of confidentiality in a family mediation may have a different meaning from a commercial dispute regarding what is the sensitive information.

So on, it could explain why confidentiality is an important principle in ADR, and for extension in ODR. People, in general, may not express themselves comfortably in courtrooms, as sensitive information may need to be disclosed, and the feeling of security is absent in court procedure. Conversely, the ODR methods must ensure the confidentiality of communication and data necessary to submit a complaint and the answer of the defendants.

The personal information, as it was cited above, also need to remain strictly confidential, since this sort of information may be used for illicit purposes, such as fraud. According to a report submitted in 2001 by the Federal Trade Commission (FTC) in America, 42% of the 204,000 consumer complaints were regarding fraud, and it is estimated that as many as 9 million Americans have their identities stolen each year.

Moving on, to have an idea how the personal details must be protected from online scammers, the UK's National Fraud Authority publishes an Annual Fraud Indicator report which for 2013 estimates that cyber-fraud represented 41% of all crimes reported to the Action Fraud agency, with an average individual loss of £3,689. On the same way, Europol suggests that victims lose around €290 billion each year worldwide as a result of cybercrime, making it more profitable than the global trade in marijuana, cocaine and heroin combined.

Moreover, the European Consumer Centres Network (ECC-Net) reported that cross-border consumer behaviour has changed due to perceived internet frauds. According to the Commission, in a consumer survey, 62% of consumers who had not made a cross-border distance purchase said that fears about fraud put them off. In another survey, around a fifth of respondents expressed concerns that the payment card details may be stolen (21%) and that personal data may be misused (19%) when buying products online in another EU country.

3.2.3 ODR, e-ADR, and Data Protection

In the modern world, almost everything is made online as a result of a fast-paced environment. Social media are more deeply in our lives than we can imagine since our profiles are used to identify us in the way we want to be perceived.

These digital identifications are full of data, which can be considered gold in the digital world since this asset has become the key business model of countless companies. They use the data found to reach out to every possible prospect, sometimes without the knowledge and permission of them. Other companies work exclusively selling data to other business, so they can reach out to the ones they are interested and make the right offer to the right person in a convenient manner.

Data is wildly defined as any information that is not categorised. For this reason, data can be perceived as the smallest part of the information, where it is frequently quantified, easily transferred, structured, and seized by machines.

On the other hand, personal data is more compact. According to the article 4(1) of the General Data Protection Regulation (GDPR), "personal data means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, genetic, mental, economic, cultural or social identity of the natural person".

The concept of personal data can be summarised as any information that a living individual can be identified from, or even different pieces of information gathered together leading to the identification of a particular person, which include name and surname, ID number, home

address, email, location data, internet protocol (IP) address, a cookie ID, the advertising identifier of someone's phone.

The opportunities to store different types of personal data are evolving extremely quickly with vast amounts of personal data being shared and transferred around in the Cyberspace. This unauthorised and careless processing of data is making it increasingly difficult for people to maintain control of their personal information, and it is causing significant damage around.

When users sign up in most online applications, they automatically lend their data to the company that holds the product, willingly or not, to get convenience or information in return. Notwithstanding, incorrect processing of personal data might bring about a situation where a person has their personal details used for other purposes, including criminal ones.

Information, data privacy and security concerns are a persistent trend that has been reported since computers started to boot up. The increasing importance of data protection was pushed into the development of a fundamental human right which came under Article 8 of the Charter of Fundamental Rights of the European Union.

The Charter states that everyone has the right to the protection of personal data concerning themselves. Furthermore, it affirms that such data must be processed fairly for the specified purposes consented by the entitled of the data. The owner of the data also has the right of access and rectification.

The privacy of data, and consequently, its protection, refers to the practices, safeguards, and rules to protect the personal information and ensure that the person will remain in control of it. In addition, data protection must protect the fundamental rights and freedoms of the person related to that data, as it was mentioned before.

Seeking enforcement to the data protection concepts, the Directive 95/46 EC was released on

the protection of individuals with regard of the processing of personal data and on the free movement of such data, bringing and defining rights and obligations regarding the data usage, and placing clear responsibilities on the shoulders of data controllers.

Bringing these concepts to dispute resolution, according to Hang (2001), one major obstacle facing ODRs is the protection of sensitive material. This barrier occurs due to the fact that someone could easily print out emails used in the process and share that information without anyone else's knowledge. Such practice would not happen in traditional ADR since, in the hypothesis of someone wanting to record the proceedings, the other parties involved would know about it.

Even though the means of transmitting information may be secure, there is the possibility of an intervention of a third party at sending and receiving computers. Pecnard (2004) classify this risk as to the human element and sees that as the real weak point.

Richard Hill (cited in Penard, 2004) states that 'the point is that the real risk to confidentiality comes from within an organisation's office, not from somebody tapping into communications infrastructure somewhere in the middle of the ocean'.

In accordance with the aforementioned, the risk in accessing information within organisations where usernames and passwords (personal data) are directly or accidentally provided to someone else is, in fact, extremely high. The probability of sensitive information alongside personal data of third parties be leaked to unauthorised persons are also huge.

The companies operating ODR mechanisms and ADR bodies need to be aware of these occurrences and create instruments to prevent and process those sensitive information within the organisation so unauthorised persons will not have access to third parties data.

Another factor confronting ODR processes, regarding personal data, is the protection of stored

information. As well known, in Online Dispute Resolution mechanisms, whatever means are used, there is automatic storage of all information exchanged by the parties.

Katsh and Rifkin (2001) see this instrument with good eyes, explaining that this storage system in ODR is one of the significant benefits as it may be used for building feedback and intelligence into the process and in recreating who said what, what was said, and under which circumstance.

In the same line, Pecnard (2004) states that in comparison to the offline environment, where, particularly in face-to-face interactions, most of the discussion is oral. Therefore, the transcript of exchanges between parties allows the third party involved to review the course of the discussion in order to provide a more efficient intervention.

Nonetheless, it comes without saying that this automatic storage of information can create privacy problems in relation to personal information. As it was mentioned before, parties must have control of their own information to determine who will be granted access to the information in under which terms and circumstances.

The tremendous challenge faced by the ODR systems concerning this automatic data storage and its reanalysis by the third party may be the principles of "purpose limitation", "data minimisation", and "storage limitation", described in Article 5 (1) of the GDPR.

The first one states that personal data shall be "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes". The exceptions to this principle are, in accordance with Article 89(1), archiving purposes in the public interest, scientific or historical research, or statistical purposes.

In a first analysis, 'building feedback and intelligence into the process and in recreating who said what, what was said, and under which circumstance' may be not classified as specified, explicit, and legitimate purposes in ODR and e-ADR processes, therefore, in confronting with

the Article 5 (1) (b) of the GDPR.

Zarsky (2017) states that purpose limitation is one of the cornerstones of the EU's data protection regime, adding that to comply with this principle requires that entities will need to inform their data subjects of the future forms of processing they will engage in and closely monitor their practices to assure they did not exceed the permitted realm of analyses.

The second principle states that personal data shall be "adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed". It refers to the scope and categories of data initially collected. Furthermore, it also refers to the limited duration during which personal data may be retained and the requirement that such data be deleted after its intended use.

In a technical concept, Antignac, Sands and Schneider state that 'the goal of the data minimisation process is to minimise the input data so only what is necessary is given to the program. (...) In other words, data minimisation is the process of ensuring that the range of inputs provided to a program is reduced such that when two inputs result in the same response, then one of them can be considered redundant' (Antignac, Sands and Scheneider, 2017, p.1).

This principle brings to the data owners the feeling of security as it implies that data controllers have fewer opportunities to undermine the data protection rights and also minimise the risk of data leakage. Zarsky (2017) understands that with fewer data, data controllers will be unable to go beyond consented usage or violate their user's privacy in other ways.

The data minimisation principle can be combined with the storage limitation principle, transcript on Article 5 (1) (e) of the GDPR, which states that personal data shall be: kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed.

The exceptions for this principle are also found in Article 89 (1) of the GDPR, but it requires the implementation of the appropriate technical and organisational measures required by the regulation in order to safeguard the rights and freedoms of the data subject.

This principle came across to ensure that the usage of personal data will be only during the necessary time, which in other words means that the personal data will be legally available to the controller just during the ongoing relationship with the data subject. Since the occasion has ceased, the personal data should be deleted.

One more time, the feedback built through "recreating who said what, what was said, and under which circumstance" brings the feeling of *ad aeternum* data storage, since this data might be used in an analogy of law cases to revise and justify what was done in similar occasions.

Seeking compliance with the GDPR, the European Commission launched, regarding the online dispute resolution for consumer disputes, the Regulation EU n° 524/2013, which explicitly states in Article 12 (3) that the personal data kept in the database shall be automatically deleted, at the latest, six months after the date of conclusion of the dispute. This provision challenges what was said by the authors above and ensure that the GDPR is being respected by the European ODR platform.

Acknowledging the possibility of potential loopholes in the GDPR, Zarsky (2017) understands that in situations which meet the definition of "statistical purpose", the GDPR concedes that minimisation could be achieved by pseudonymisation.

On the other hand, the same author also recognises that removing identifiers to archive pseudonymity can potentially undermine the quality of the results derived, as the data would be purposefully altered. The aggregation of different datasets would be rendered difficult.

The use of stored data pseudonymised in ODR and e-ADR tools seems to be reasonable since

the impossibility of the subject identification would not challenge the Article 5 (1) (c) of the GDPR, besides, in relation to publication in ODR and e-ADR processes, authors such as Gaitenby (2004) and Katsh (2011) defend the idea of keeping the parties names confidential in order to find the balance, fitting in to a transparent online process where the decision is published altogether to the name and profile of the neutral third party.

It is worth stressing that in accordance with Article 7 (2) of the GDPR, the consent for data storage for the purpose of future reviewing in ODR and e-ADR processes must be given in a clear and distinguishable form from the main matters. In other words, the parties must express their consent for data storage explicitly, as their personal data and sensitive information may be revised from time to time.

4. Data findings

4.1 A critical review of market penetration by e-ADR and ODR in Europe

4.1.1 The Historical Barriers for Out-of-Court Dispute Resolution

As well known, litigation is a formal way of dispute resolution, even considering the time consuming, costs, relationship damages due to the adversarial shape, yet it is the most used to solve conflicts.

Alternative dispute resolution methods, such as conciliation, mediation and arbitration, have been used as a cost-effective manner to solve some problems. Still, these forms have been not fully potentially used due to cultural difficulties and to lack of awareness of these forms of dispute resolution. Furthermore, the online dispute resolution methods, in a broader concept, are facing even more significant barriers to achieve the full potential.

The most common factors that influence the parties against proposing or participating in ADR

processes, and by extension ODR, includes a lack of confidence in the opposing party's good faith, a requirement for an enforceable judgment or order as soon as possible, a feeling that the time is not yet right for conciliatory manners or it is too late, a reluctance to reveal weak points in the case or expose strategic objectives, and a lack of confidence in the process and the skills of a third party.

Another barrier faced by ADR methods comes from the parties representants. A Discussion Paper released by the Lord Chancellor's Department UK suggests that many court practitioners view the suggestion or agreement to a form of ADR as a sign of weakness, setting aside other amicable forms of solving the dispute.

Regarding the use of e-ADR and ODR in cross-border disputes, a considerable challenge being faced by the out-of-court procedures is to meet the minimum procedural guarantees established by the Article 6 of the European Convention Human Rights (ECHR), which states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Indeed, the disputants will not choose the alternative methods instead of the traditional court if they do not believe that the system is fair. However, it is necessary to take into consideration when the ADR procedure is voluntary or compulsory.

When the parties spontaneously opt to resolve their dispute out-of-court, it does not imply further complications, since most ADR procedures are non-binding in nature, which will not withdraw the parties right of going to court to protest a fairness breach of the procedure, although it compels the ADR providers to establish rules in a self-regulatory approach to meet basic standards of justice if they want their users to believe in their work.

When it respects to binding decisions affecting the parties' ability to go to court, it has graver

consequences, which means that the government have to find ways to ensure that the ADR systems are operating in accordance with the Article 6 of the ECHR, or the whole process will not be effective.

Schiavetta (2004) explains that States signatory to the Council of Europe (CoE) must regulate ADR procedures that result in binding awards to ensure the implementation of the guarantees. In addition, such regulatory action will also grant the responsibility to certify whether the guarantees have been met to the judiciary.

Nonetheless the voluntary nature of ADR systems, it is not wrong to state that compulsory ADR has been used, i.e. required by law. It was initially used for labour disputes, but it is exploited in many areas of law. An example is the case of the Federation of Offshore Workers' Trade Union v. Norway (2002), wherein ECtHR held that the use of compulsory arbitration to prevent strike action was permitted because of pressing societal interests. In this case, if workers within the oil and gas industry had been allowed to strike Norway would run into problems with regards to funding its state budget, which would have had repercussions for social security services.

Notwithstanding the practical replacement of the court system institutionally with other bodies by the compulsory ADR system, the rights stated in Article 6 must be guaranteed. According to Schiavetta (2004), even when the compulsory ADR is used, the Convention rights can be implemented in their entirety prior to exhaustion. Furthermore, steps must be taken to safeguard Article 6, either by the ADR tribunal offering it themselves or a supervised body make them comply with the Convention.

As it is shown, out-of-court procedures are still facing some barriers to achieving their full proposal, although it has been more required in recent years. The following chapter will analyse the market penetration of the online dispute resolution systems, bringing numbers disclosed by

the main bodies about the usage of the technology to solve disputes.

4.1.2 The EU ODR Platform Market Penetration

Exploring the market penetration of ODR in Europe requires the collection of data and numbers. For the sake of this chapter, will be considered the data based on reports by the European Commission regarding the EU ODR platform usage.

In relation to the EU ODR platform, the European Commission released two reports with regarding the first (European Commission, 2017) and second (European Commission,2018) year statistics, and the latest report on the application of the ADR Directive and the ODR Regulation (European Commission, 2019). The data collection for the reports was 15 February 2016 to 15 February 2017, and 15 February 2017 to 14 February 2018, respectively.

In its first year, the website registered 1.9 million visitors, with an average of 160,00 unique visitors per month. The EU ODR platform received around 24,000 complaints, which means an average of 2,000 complaints per month. More than a third of the complaints concerned cross-border purchase within the EU, and most complaints were about clothing and footwear, airline tickets and information and communication technology goods (European Commission, 2017).

In the same year, German, the United Kingdom, and Spain were ranked as the countries where the most complaints were filed, with Ireland figuring in the eighth position (European Commission, 2017). It is necessary to add that Germany and the UK also happen to be in the top five countries with the largest retail e-commerce sales worldwide (eMarketer, 2017).

The same report showed that from those 24,000 complaints, 85% were automatically closed because the parties could not agree on an ADR body to handle the complaint within the 30 days, 9% were closed because the trader refused to participate in the process, and 4% of the cases were closed because the one or both parties withdrew from the process at some point.

In respect of the usage of ADR body to solve the dispute, only 2% of the complaints moved forward. However, it is estimated that half of these cases could not be handled by the ADR bodies in reason of procedural failures. In addition, in some instances, either consumers or traders withdrew from the procedure before it was completed.

Furthermore, less than 1% of the cases were submitted to mediation, which 2/3 of those cases reached the final outcome within the 90-days deadline. These numbers mean that only about 21 cases out of 24,000 were dealt with by an ADR entity and achieved a final outcome.

Notwithstanding, the Commission estimates that around 44% of the submitted complaints were settled outside the ODR platform by direct contact between the parties, which may give some credit to the platform as consumer disputes settlement facilitator.

About the first-year numbers, the Commissioner for Justice, Consumer and Gender Equality, Věra Jourová assessed the results with good eyes, announcing that 'while we are still in an early phase of this new tool, we can already say that the Online Dispute Resolution platform has been well received by consumers. We also see that the mere fact of a consumer using the platform often is incentive enough for traders to resolve the dispute. We are giving consumers a practical tool to help them benefit from their rights in practice. On the other side, traders also have a lot to gain from this platform and should use it more. Particularly for online traders it is essential to be seen as reliable by potential consumers. Using this tool will help them earn consumer trust, whilst providing them with a simple and fast way of resolving disputes'. (Commissioner for Justice, Consumer and Gender Equality, 2017)

In relation to the second year, the number of complaints rose 50% in comparison to the first year, with 36,000 claims submissions for the period analysed, and the website reached the mark of 5 million people visiting. The Commission interprets this increase in complaints as a growing awareness and satisfaction with the platform among consumers.

Notwithstanding the increased complaints` numbers, the amount of cases that reached the ADR procedure stage remained in 2%, while it is believed that the total complaints resolved by the ADR entities were just 1%.

Again, the highest numbers of complaints came from German and UK consumers, followed by French, Spanish, and Italian consumers. The traders who received more complaints were also located in Germany and the UK, followed by Hungary (European Commission, 2018).

In the same report, it is possible to notice that 81% of the complaints were closed automatically after the 30-days deadline, whereas around 37% of the consumers were contacted directly by the trader to settle the dispute bilaterally. Besides, in 13% of the cases, the trader signed that they did not want to engage in the platform's settlement process.

The withdraw rate remained in 4% of the cases, which was interpreted by the Commission as a sign that the parties probably reached a consensual solution without walking through the platform processes, although there is no conclusive data.

For the second year, the sectors which received the highest share of complaints were the airlines (13%), followed by clothing and footwear (11%), and ICT goods (8%), which was pretty similar to the first year (European Commission, 2018). The top percentage in the two years might be explained as these areas are also the ones which online purchase are highest in the European Union (Eurostat, 2018).

The last report released by the European Commission in 2019 brought the numbers of complaints until the middle of the year, which has a slight increase in comparison to the previous years, with an average of 3,800 complaints per month as shown in the graphic below:

ODR platform – number of complaints submitted per month

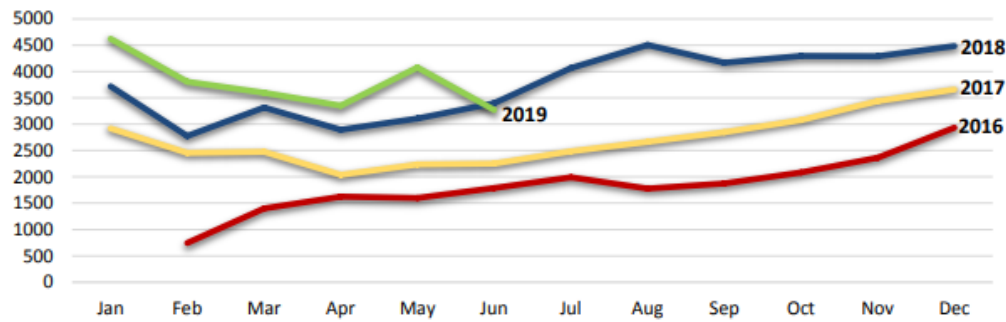


Figure 1. EU ODR platform – the number of complaints submitted per month. European Commission (2019, p.23). Report on the application of Directive EU 2013/11 and Regulation EU No 524/2013 on online dispute resolution for consumer disputes.

Another interesting fact disclosed in the report was that most of the complaints relate to domestic disputes (56%), despite the fact that the EU ODR platform was originally launched to facilitate cross-border disputes. Furthermore, most grievances reported was regarding the delivery (23%), inconformity with the order (15%), and defective/cause damage (12%).

In its conclusion, the report says that the ODR platform provides a centralised and multilingual hub for resolving online disputes, triggering a direct settlement in up to 42% of cases. However, the European Commission also understand that after three-and-a-half years after the launch of the ODR platform, it is underused and has yet to reach its full potential.

4.1.3 The Impact of ODR Technology

Technology has revolutionised the way companies are conducting business, bringing both tangible and intangible benefits that helps increase turnovers and improve the customers' experience. For these reasons, companies are investing even more in online tools to solve customers' disputes originated from their products and services.

A great example can be seen on eBay, using a successful dispute resolution provider, SquareTrade, which claims in their website to handle over 150,000 cases every year, with a 90% success rate for completed cases.

This trend reached the European Union, which via EU Regulation No. 524/2013 makes it mandatory for online traders that offer goods/services to consumers via a website or other electronic means to include an easily accessible electronic link to the EU ODR website on their sales platform, alongside a direct contact e-mail address must be provided.

Looking for assessing the impact of ODR technology on dispute resolution in the UK, the giant Thomson Reuters released a report in 2016, where 40 subject matter experts and market participants from each of the relevant market areas were interviewed. The interviewees were developed solution providers, dispute system experts, senior court representatives, ombudsmen, and commercial business using or seeking to use ODR.

The report classifies four sectors where the ODR technology is making a more significant impact, which are businesses, ADR providers and Lawyers, Ombudsman and Regulators, and Court Services. Each of these four groups has been struggling with an increased volume of disputes and pressure to resolve them quickly, cheaply, and proportionately, while delivering a better experience for all involved.

In relation to businesses, the representatives stressed that the impact of the ODR technology could be seen when the disputes are sorted quickly and privately before they go to court, avoiding expensive litigation and potential reputation damage. Another factor is that ODR would also allow businesses to proactively manage and prevent disputes and spot weaknesses in services or supply chain through management information.

Furthermore, the range of applications mirrors the vast spectrum of business models, and

apparently, businesses that focus on internet/distance transactions or efficient markets are natural adopters of ODR systems. In fact, disputes arisen in the online environment should be sorted online.

The second group, composed for ADR providers and lawyers, declared that ODR drives efficiency and may ease a variety of pain points from working in different time zones and languages. The interviewees of this group are people with experience in relatively low-value cases and in large, complex, cross-border disputes, which often involve businesses and governments.

Regarding the size and complexity of the dispute, the interviewees explained that the type of dispute should lead the type of technology that is used to resolve it, focusing on case-by-case efficiency. Conversely, the interviewees with an institutional view of efficiency gains believe that the new technology investment is better suited on dealing with high volumes of low-level cases, while the high-level should be dealt with face-to-face, low-tech resolution.

In relation to the third group, the Ombudsmen and regulators, the main benefit of using ODR technology is the acceleration in resolving disputes, since they deal with a large volume of disputes. According to the interviewees, the settling point is not the price but the timing of resolution.

For the fourth group, the court service is concerned with enhancing access to justice, improving the user experience and saving costs. The Briggs interim report highlights the publicity that such matters have gained, and interviewees pointed out that ODR technologies have already been applied across the infrastructure in pockets where there are strong drivers. The Money Claim Online system and, in the criminal area, videoconferencing in bail applications (which reduces logistics costs) are two such examples.

Nonetheless, it is not just for those four groups that ODR technology has a more significant impact, but also for the user's life. According to the ThomsonReuters (2016) report, it fundamentally changes the experience of people in resolving disputes.

The report lists the interviewees' arguments on the need for the system design for maximum effectiveness. According to the answers, for the ODR to be effective, it requires investment in a well-designed and user-focused system. It also needs adequate safeguards for online systems, including high standards of privacy and data security. To increase users' satisfaction and encourage greater adoption, it should be sensitive to the emotional aspects of disputes, improving the emotional experience, and speeding up the resolution of disputes. They also acknowledge the importance of balance between face-to-face and virtual methods, depending on the context.

Regarding the impact on adopters, the ThomsonReuters (2016) report says that it is required investment of time and resources, as the interviewees stressed some key points in relation to efficiency benefits, workforce impacts, selecting technology, and adoption and transformation.

For the first, it was agreed that ODR improves efficiency, highlighting the factors of speed, timeliness, provision of correct information the proportionality of approaches and the management of information. For the workforce impacts, the answers stressed that ODR adopters would need to consider the changing skillset required of people in the process of dispute resolution, alongside the possible need of changing the types of people involved.

In respect of selecting technology, the answers were that the ODR adopters would need to select from a variety of ODR technology applications, in accordance with their needs. For the adoptions and transformation required, the interviewees considered that it should be included the external adoptions factors, such as whether ODR makes it easier to mandate ADR, and whether effective internal transformation plans are placed.

The report, therefore, concludes that the interviews showed an ODR technology market in flux, making impacts to different extents in different spheres of dispute resolution, which, in fact, has a more significant impact on the transfer of disputes away from just one sphere of resolution and toward another.

Although it may depend on other factors such as enforceability, attitudes to culture and tradition and the willingness of institutions and government to foot the bill for modern, centrally-provided dispute resolution, the report also states that if one sphere proves more adaptable and better suited to technology and can deliver outcomes more efficiently, then it presents a powerful motive for the migration of civil disputes.

5. Discussions

5.1. Important considerations about the Processes of ODR and e-ADR

It is undeniable that technology has revolutionised our world, creating amazing tools and resources, and putting information at our fingertips. In the dispute resolution field, technology has been changing the way the people deal with conflict, letting behind the old-fashioned way of bringing every problem to a judge's hand. Nowadays, the solution of a dispute can be found within 90 days, with the help of a fully automated software to intermediate the parties' needs and requirements.

The advance of online dispute resolution tools has brought many discussions, even regarding its concept. On the one hand, some consider that every dispute resolution method that is conducted online may figure in the ODR concept, matching a mere face-to-face replication in a digital environment, using technology tools to facilitate the interaction.

On the other hand, the notion of technology effectively working as a fourth part in the dispute, considering the mediator or arbitrator as the third. This approach takes into consideration that

technology does not just facilitate the process but acts as an essential tool that cannot be missed.

Establishing a unique concept is a difficult job and yet unfair. Considering just the fully automatic processes as ODR walks through a path where it would give privileges to some providers, as CyberSettle, which has a specific algorithm to reach a desirable amount within a range of proposals but would exclude the EU ODR platform, which was designed to redirect the consumer disputes to a dispute resolution body, having a human touch in the facilitation process.

After two years of the EU ODR platform, it launched the direct negotiation tool, indeed, but it does not twist the aims of the platform, that is to foster alternative methods to cross-border consumer disputes, but just add an important low-cost tool, making the dispute resolution process even faster.

The strict conceptualisation would leave the e-ADR methods out. The processes of e-Mediation and e-Arbitration, for many, are considered as ODR methods, but for others excluded. There is no agreement regarding these methods, but it is undeniable that both represent powerful resources to the conflict resolution area.

On one side, the replication of face-to-face interactions through technology facilitation, such as videoconferencing, on the other side, a 100% online processes where the entire communication might be through text messages, emails, or another software purposely design to make the e-ADR viable. Furthermore, in respect of e-Arbitrations, the whole process is conducted online, where the parties can file their claim and defence into the system, and the award is rendered online.

Once more, the human touch is inevitable, but it does not annul the fundamental role of technology in the process. On e-Mediation processes, the mediator needs to acquire different

skills, not just to learn how the digital tools work, but effectively use it in their favour.

It is unknown whether technology will a 100% replace the human factor in the dispute resolution field or not since the machine cannot understand feelings and discover underlying reasons behind people's announcements. Notwithstanding, creating barriers for technology usage is such a regression since it has shown the potential to deal with a large number of cases at a faster pace, which with a human intervention would be impossible.

5.2. E-ADR and ODR Barriers and Legal Frame

The issues related to security and trust are not exclusive to ODR and e-ADR methods. Every online platform, regardless of their field, faces problems with trust and security when operating. The e-commerce is a great demonstration on how it works, as it relies on their reputation to build trust with their consumers, and hire online security experts to transmit the safe feeling to their users.

In respect of ODR and e-ADR, the main security focus is on protecting information. This concept walks through the transmission and the storage of information as to its relevant aspects. When operating online, the risk of unauthorised third parties accessing and altering information is imminent, letting the providers with the responsibility to prevent the cyberattacks.

Conversely, the role of trust in ODR and e-ADR processes is imperative, since the parties must believe that the service provided is confidential, impartial, and non-judgemental. These principles are inherent from ADR methods, therefore acquired on the online processes.

The necessity of security and trust in ODR and e-ADR processes is unequivocal. These methods rely on web-based communication, such as emails, voice messages, and videoconferences, and these data, alongside the personal data of the parties, are stored in hard drives or clouds.

The protection of personal data was upgraded to a fundamental right under Article 8 of the Charter of Fundamental Rights of the European Union, which states that such data must be processed fairly for the specific purposes consented by the entitled of the data.

Such protection gained even more amplitude with the GDPR in Europe but also brought some question regarding the evolution of the ODR tools. In a process where someone could easily print out emails and share information without anyone else's knowledge the concerns about the security and confidentiality rise.

In fact, data breaching is a huge problem faced by online platforms, with innumerable cases occurring every year even with all precautions taken. The possibility of the personal data leak is real, and the online services holders must rely on the best security programs to protect their users and the confidentiality of the processes.

In relation to ODR systems, the challenge faced on GDPR goes further. Some authors defend the possibility of building feedback and intelligence into the process, although it is not the main purpose of data collection in the ODR programs. The review of ODR cases is undeniable a good way of assessing the quality and improvement, nevertheless, it would require data storage for "other purposes", directly challenge the GDPR norms.

Furthermore, the data storage for reviewing purposes would expose those data to a non-authorized third person, who may hack it and use for criminal reasons. The principle of storage limitation stated in Article 5 (1) (e) of the GDPR aims to establish a maximum length for data storage, therefore protecting the personal data. The Regulation EU n° 524/2013 determine the automatic delete of personal data, in the latest, six months after the conclusion of the dispute.

Whether those impositions are considered a barrier for the progress, it might never be clear, but the protection of personal data is a fundamental right and must be enforced at any circumstance.

Nevertheless, the development requires revisions and assessment of the past to improve future actions.

5.3. The ODR Market

Historically, the out-of-court dispute resolution methods have some barriers to achieve their full potentials, such as cultural difficulties and lack of awareness. The litigation is still the most used method to solve disputes, even though the high costs and the long length inherent in the court processes.

Online dispute resolution methods do not fall far from it. Although it was considered successful by many, the EU ODR platform numbers have not shown that it achieves the full potential yet.

The numbers pointed that significant part of the disputes, although initiated through the platform, has been settled by direct contact between the parties, and most of the complaints were closed automatically due to non-agreement within the deadline, displaying that the platform is underuse.

Notwithstanding, since the EU ODR platform was launched, the number of complaints has increased year-by-year. It has to be considered that it is still something new, and the lack of awareness is a barrier to be overturned by the providers, even though it is compulsory to online traders within EEU to provide a link to the ODR server.

Whether ODR will be the main dispute resolution method in the future or not is a question intangible for the moment, but the impact its technology has been making in the dispute resolution field is unquestionable.

The giants' online platform eBay and PayPal, even being in different niches, are relying on the same provider to deal with the disputes involving their customers, SquareTrade, and have been

obtaining satisfactory feedbacks as the issues have been resolved, which according to the ODR provider, with 90% success rate for completed cases.

The dispute resolution professionals have also been impacted by the ODR technology, having their workflow volume reduced due to the effectiveness and speed of the methods, mainly with the massive low-value cases. Interviews conducted in the UK presented a general satisfaction with the ODR technology, although the acknowledgement that the suitability for the technology used should be measured in a case-by-case flow.

The technology came, in fact, to facilitate people's life. In the ODR field, the market penetration of such technology is still slow, even though it has received good feedback from its users. Whether it will be the future of ADR or not, the answer cannot be concise yet since the human contact is still essential in some sensitive cases, the warming face-to-face interactions are still an important factor to dispute resolution.

6. Conclusion

The Online Dispute Resolution scenario in Europe is in expansion, improving its mechanisms and tools to adapt to the user's needs. The historical cultural and legal barriers have to be overcome in order to achieve its full potential and delivery the expected results.

This paper aimed to put into questions the actual ODR and e-ADR scenarios to prove their future effectiveness through a critical analysis of the processes. The discussions about the conceptualisation and coverage of the term ODR brought us the necessity of rationalising the role of technology in its process, ending up with the explanation that it is not just the use of technology to facilitate the settlement what defines an ODR method, but the whole process being conducted through digital means.

It was also viewed that e-ADR processes are also included in the ODR range. The human factor

indispensable for processes such as e-Arbitration and e-Mediation does not make it a mere transposition of face-to-face interactions but requires new training of those professionals to implement adequate techniques to these processes when they are conducted entirely online. Therefore, making e-ADR a part of the ODR concept, distributed in a different category in relation to the automated processes.

The security and trust principles, although not exclusive for ODR methods, have to be guaranteed in them. The confidentiality inherent of ADR processes is more than ever required in the online environment due to the imminent possibility of unauthorised third parties accessing and modifying the files, jeopardising the whole process.

The legal protection of personal and sensitive data in the ODR methods was also explored. The challenges in complying with the GDPR in opposing to revising the actions in order to improve the service delivered will generate heated debates. On the one hand, we have the fundamental right of personal data protection. On the other hand, we have a progress setback.

The market penetration of the ODR systems in Europe are still walking in a small pace. The lack of awareness about the procedure and the necessity of building trust are crucial factors that might be leading to the platform underuse. The EU ODR platform is still considered a new tool on consumer disputes, even though the electronic traders must facilitate access to it in their websites.

The future of ODR in Europe is promising, and it seems that the EU ODR platform will be the most used dispute resolution tool for consumer's cross-border disputes, mainly to low-value claims, since it is free of charge and offer a faster way to have their issues solved.

7. Reflections

Being an international student is not an easy job. While we need to absorb as much content as possible, we have to reinvent ourselves in another language and culture. The challenges are enormous, but in each barrier overcome, it is a reason to be proud of ourselves, because we deserve to accomplish the best.

Writing down this dissertation brought me insights that I have never thought before. I have always been passionate about law and technology, and the opportunity to write about both in the same piece of work made me thrive.

Online Dispute Resolution systems that I had had just little contact before this project has expanded in my mind, and the chance to critically analyse the methods, see how they work, and the legal consequences of their actions were a wonderful surprise. Nowadays it is possible to settle with a bargain software which will come with an ideal agreement for both parties or to solve a cross-border consumer dispute without going to court. How technology is helping and modifying our lives are, in fact, surprisingly awesome.

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