Vassiliki Koumpli,
Research Associate,
Hellenic Institute of International and Foreign Law,
Attorney at Law, Athens Bar Association, Greece

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SOME CONSIDERATIONS ON THE POSITION OF VULNERABLE PARTIES IN MEDIATION

Abstract**:** *This paper discusses the position of vulnerable parties in mediation. Further to describing the legal framework of the new institution in Greece and identifying the 'vulnerable parties' therein, the paper examines whether mediation actually constitutes a threat to the procedural rights of vulnerable parties, and whether particular rules of procedural fairness could assure that such parties will be afforded adequate protection in accordance with their rights under constitutional law. The analysis includes the assessment of the parties' positions at two procedural stages: first, at the stage of accessing a mediation process, with particular reference to the current legal aid regime; second, at the stage of conducting a mediation process, with specific reference to the role of the mediator. Subsequently, by focusing on the recent developments in the field of consumer dispute resolution, the paper examines whether and to what extent mediation itself can be an instrument for protecting vulnerable parties. The paper ends summarising the author's concluding remarks.*

Key words**:** *mediation, vulnerable parties, legal aid, mediator, independence, impartiality, confidentiality, consumers, ADR, ODR***.**

1. Introduction

Mediation is a recent trend in conflict resolution in almost all jurisdictions. Although it is primarily a philosophical concept known to most civilisations (Αντωνέλος, Πλέσσα, 2014: 1-12), its promotion nowadays is based on a policy choice concerning the governance of the state and the administration of justice.

* vkoumpli@hiifl.gr

Traditionally, it has been considered that it is a duty of the sovereign to protect, as far as possible, every member of the society from the injustice or oppression of every other member of society (Kulms, 2013: 206). By applying this principle, Article 6 of the European Convention on Human Rights as well as Article 20 of the Greek Constitution guarantee access to justice in litigation and fair trial. In this sense, the constantly increasing number of disputes has been welcomed as a sign of democratisation and a decisive step towards the cultural and social emancipation of the citizen (Νίκας, 2012: 338). However, the court workload and the crisis-related budget constraints have driven regulators towards mediation schemes, which are grounded on efficiency reasons. Thus, such 'privatisation of justice' aims primarily at offering cost-effective procedures to settle cases without trial[1].

Within this framework, on 4 April 2008, the European Parliament enacted Directive 2008/52/EC on certain aspects of mediation in civil and commercial disputes (hereafter: the Mediation Directive)[2]. Greece has been one of the first EU Member States to implement the Mediation Directive by enacting Law 3898/2010[3] (hereafter: the Greek Mediation Act), which applies to both cross-border and domestic mediations (see, among others, Diamantopoulos, Koumpli, 2014: *passim*; Κλαμαρής, 2015: *passim*, with further references). Mediation is defined as a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator[4]. Mediation obviously differs from any other out-of-court or conciliatory dispute resolution process due to the mandatory participation of the mediator, namely a third person in relation to the parties, who is asked to conduct mediation. The parties may in principle agree to have recourse to mediation before or during the pendency of a suit (mediation *ex voluntate*)[5]; they may also be invited by the

1 From the perspective of the economic theory, the product of judicial decision-making has the attributes of a public good, which is accessible to everybody. The exact administration of justice requires a policy decision on the allocation of public funds for subsidising judicial rule-making. The excessive use of public goods ('tragedy of the commons'), which will decrease the benefits for all users, is addressed by their (partial) privatisation: market mechanisms are thought to usher in a more efficient use (Kulms, 2013: 209).

2 Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ C 286, 17.11.2005, 1.

3 Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211 [in Greek: Νόμος 3898/2010. Διαμεσολάβηση σε αστικές και εμπορικές υποθέσεις, ΦΕΚ Α 211].

4 Article 4. Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

5 Article 3(1)(a). Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

court to do so during the pendency of a suit (mediation *ex juditio*)[6]; mediation may further be ordered by another EU court[7] as well as be imposed by another provision of law (mediation *ex lege*)[8]. The above-mentioned legal framework applies to private law disputes, which can be referred to mediation upon agreement of the parties, provided that they have the right to dispose of the relative rights and obligations[9]. Revenue, customs or administrative law matters as well as matters concerning the liability of the state for acts or omissions in the exercise of state authority (*acta iure imperii*) are currently excluded from the scope of the mediation regulation in Greece[10] (Άνθιμος, 2010: 475). It should be highlighted that, at the moment, only in the field of over-indebted individuals does mediation in the strict sense, as established by the Greek Mediation Act, explicitly apply on a voluntary basis by reference of Article 2 of the Greek Mediation Act[11].

Apart from the provisions of the Greek Mediation Act, a judicial mediation procedure is provided by Article 214B of the Greek Code of Civil Procedure[12] (see, among others, Θάνου-Χριστοφίλου, 2013: 937 et seq.; Φράγκου, 2014: 15 et seq.). This scheme is also voluntary and conducted exclusively by judges. Recourse to judicial mediation may take place before filing a suit or during *lis pendens*. In the latter case, the court –when it considers it appropriate and having taken account of all circumstances of the case– may invite the parties at any stage of the proceedings to use judicial mediation. Once the parties agree, the court shall adjourn the case for a hearing on a short date, which shall not exceed six months.

6 Article 3(1)(b). Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

7 Article 3(1)(c). Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

8 Article 3(1)(d). Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

9 Article 2 Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

10 Explanatory Report to Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211 (Article 2).

11 Law 3869/2010. Debt arrangements for over-indebted individuals and other provisions, Government Gazette A 130 [in Greek: Νόμος 3869/2010. Ρύθμιση οφειλών υπερχρεωμένων φυσικών προσώπων και άλλες διατάξεις, ΦΕΚ Α 130], as amended by Law 4161/2013. Programme to facilitate borrowers, amendments in Law 3869/2010 and other provisions, Government Gazette A 143 [in Greek: Νόμος 4161/2013. Πρόγραμμα διευκόλυνσης για ενήμερους δανειολήπτες, τροποποιήσεις στο ν. 3869/2010 και άλλες διατάξεις, ΦΕΚ Α 143].

12 Article 214B was added to the Greek Code of Civil Procedure (Presidential Decree 503/1985, Government Gazette A 182; in Greek: Κώδικας Πολιτικής Δικονομίας. ΠΔ 503/1985, ΦΕΚ Α 182) by Article 7(1). Law 4055/2012. Fair trial and reasonable duration thereof, Government Gazette A 51 [in Greek: Νόμος 4055/2012. Δίκαιη δίκη και εύλογη διάρκεια αυτής, ΦΕΚ Α 51].

The procedure of judicial mediation contains separate and joint hearings and discussions among the attorneys of the parties and the mediator judge, who may offer the parties non-binding suggestions as regards the resolution of the dispute.

This paper aims to consider the position of vulnerable parties in mediation proceedings in Greece. In legal theory, consumers, passengers, employees, insurance policyholders, maintenance creditors, especially minors, as well as financially weak persons are generally perceived to be vulnerable parties as compared to their contracting counterparts. The sources of their perceived vulnerability can be their economic weakness, their economic or social dependence, their informational disadvantage in comparison with their counterparts, or even their mental or intellectual disadvantage (cf. Rühl, 2014: 340-346). Given that the constitutionally provided procedural guarantees in litigation, such as the right of access to justice and the right to a fair trial[13], are not considered to apply to mediation proceedings, one may wonder whether such proceedings will ultimately constitute a serious risk for the position of vulnerable parties. At the same time, it should also be borne in mind that particular mediation schemes can have a significantly lower cost –or even no cost at all– for the parties, thus constituting an easily accessible means of dispute resolution for weaker parties.

Under these circumstances, part 2 of this paper examines whether mediation actually constitutes a threat to the rights of vulnerable parties and whether particular rules of procedural fairness could assure that such parties will be afforded adequate protection in accordance with their rights under constitutional law. Subsequently, focusing on consumer dispute resolution, part 3 examines whether and to what extent mediation itself can be an instrument for protecting vulnerable parties. Part 4 provides the author's concluding remarks[14].

2. Mediation as a threat to the rights of vulnerable parties?

It is well established that the absence of procedural guarantees in mediation constitutes a threat to the rights of the parties, particularly the vulnerable ones. In this respect, section 2.1. deals with the access of vulnerable persons to a mediation process, focusing on the issue of the availability of legal aid for such cases, whereas section 2.2. deals with the issue of fairness of the mediation process and how it could be ensured.

13 As provided by Article 6 of the European Convention on Human Rights and Article 20 of the Greek Constitution.

14 The present analysis is necessarily limited to regulated mediations. Greek law, however, does not exclude the so-called 'wild' mediations (Esplugues, 2014: 584), which fall outside the scope of the Greek Mediation Act and do not fulfil the requirements envisaged therein.

2.1. Access to the mediation process

Recourse to mediation is strongly encouraged at the EU level and in Greece. Parties to a dispute are incited to use it on the grounds that it is speedy, cost-effective and likely to adapt to their needs. At the same time, nevertheless, mediation is a private justice device entailing costs for those using it. In fact, such costs could sometimes be higher than those incurred by referring the dispute to the courts, depending on the complexity of the particular case (Anthimos, 2012: 161; Esplugues, 2014: 685). Inevitably, this gives rise to the issue of availability of legal aid for the parties involved.

In Greece, the mediators' remuneration is to be calculated on an hourly basis and their engagement cannot exceed 24 hours, including preparation time. The parties and the mediator, however, can agree otherwise as regards the mediator's remuneration method (Klamaris, Chronopoulou, 2013: 592; Kourtis, 2013: 213)[15]. The mediator's remuneration shall be borne by the parties in equal shares, unless otherwise agreed by the parties. The parties shall also bear the fees of their attorneys[16]. The particular determination and adjudication of the hourly-based mediator's remuneration shall be made by the Minister of Justice[17]. It is to be noted that there is no provision about the mediator's remuneration in case of judicial mediation[18]. Apart from the mediator's remuneration, in both cases of mediation[19], when the mediator submits the original document of the settlement agreement to the court of first instance of the jurisdiction where the mediation took place, the interested party shall pay a relevant fee[20].

15 Article 12(1). Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

16 Article 9(2). Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

17 Article 12(3). Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211. By virtue of Decision of the Minister of Justice, Transparency and Human Rights Nr. 1460/ οικ./27.1.2012. Determination of mediator's fees, Government Gazette B 281 [in Greek: Απόφαση Υπουργού Δικαιοσύνης, Διαφάνειας και Ανθρωπίνων Δικαιωμάτων υπ' αριθ. 1460/ οικ./27.1.2012. Καθορισμός αμοιβής διαμεσολαβητή, ΦΕΚ Β 281], the mediator's hourly based remuneration has been determined at the amount of 100,00 euros.

18 Under Article 214B. Greek Code of Civil Procedure.

19 Under Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211, and under the Article 214B. Greek Code of Civil Procedure.

20 Article 9. Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211. Decision of the Ministers of Finance and Justice, Transparency and Human Rights Nr. 85485 οικ./18.9.2012. Determination of administrative fees for mediation, Government Gazette B 2693 [in Greek: Απόφαση Υπουργών Οικονομικών και Δικαιοσύνης, Διαφάνειας και Ανθρωπίνων Δικαιωμάτων υπ' αριθ. 85485 οικ./18.9.2012. Καθορισμός παραβόλων διαμεσολάβησης, ΦΕΚ Β 2693] has set the relevant fee at the amount of 100,00 euros.

Neither the Greek Mediation Act nor other special legislation contains provisions dealing with legal aid for the mediation process in particular. The general provisions of Articles 194 et seq. of the Greek Code of Civil Procedure on the 'benefit of poverty' and Law 3226/2004 on legal aid in civil and commercial disputes[21] could only be applicable to mediation where recourse to mediation is required by the law or ordered by the court[22]. In this case, legal aid could cover all mediation costs, including the remuneration of attorneys and mediators. If mediation is conducted on a totally voluntary basis, legal aid cannot be granted under the existing legal framework.

Particular mention should be made of Article 10(c) of Law 3226/2004, which provides that "in case of cross-border disputes legal aid may also consist in the appointment of a legal adviser to assist with the settlement of the dispute before the commencement of a court proceeding". It has been argued that this provision could be understood as also covering the attorney's remuneration in case of mediation, but it could not be considered as covering the mediator's remuneration and other costs of mediation (Άνθιμος, 2010: 480-481; Anthimos, 2012: 154; Άνθιμος, 2014: 45). One should take into account, nonetheless, that this legal aid scheme aims at covering out-of-court procedures (such as mediation) only "where recourse to them is required by the law or ordered by the court". In this sense, a provision on granting legal aid for pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings could hardly be understood as also covering the attorney's remuneration in case of voluntary mediation[23].

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21 Law 3226/2004. Legal aid to citizens with low income etc., Government Gazette A 24 [in Greek: Νόμος 3226/2004. Νομική βοήθεια σε πολίτες χαμηλού εισοδήματος κ.λπ., ΦΕΚ Α 24] has been promulgated to implement Directive 2002/8/EC of the Council of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating legal aid for such disputes, EE L 26, 31.1.2003, 41. It introduced a complete system of legal aid for civil and commercial matters covering both internal disputes as well as disputes with cross-border implications when the parties are citizens of a Member State of the European Union or have their domicile or residence in a Member State. After its enactment, the application of the provisions of Articles 194 et seq. Greek Code of Civil Procedure in case of civil and commercial disputes has been limited to legal entities as well as to individuals who are not citizens of a Member State of the European Union and have their domicile or residence outside the European Union (Yessiou-Faltsi, 2011: 206).

22 Given that such provisions also apply to actions that do not constitute "trial" (Article 196(1). Greek Code of Civil Procedure; Article 8(1). Law 3226/2004. Legal aid to citizens with low income etc., Government Gazette A 24), but their operation should be required by the law (e.g. in case of enforcement processes) or ordered by the court (e.g. when the court orders the production of evidence on the content of the foreign law applicable; see, instead of others, Ορφανίδης, 2010: 437).

23 See Recitals (11) and (21) and Article 10. Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial

That said, it should be clear that under the current regime in Greece legal aid can be granted in mediation proceedings only when recourse to it is ordered by the court (since there is no law requiring recourse to mediation so far) as well as in case of judicial mediation. Of course, there is no doubt that legal aid can be granted under the provisions of Articles 194 et seq. of the Greek Code of Civil Procedure and Law 3226/2004 for the enforcement of authentic instruments embodying a mediation agreement. It is unknown whether the omission of the Greek legislator to address the issue is deliberate. In an attempt to assess the existing legal framework, one can easily come to a conclusion that weaker parties are by no means encouraged to refer their disputes to mediation. Especially with regard to the dispute resolution concerning small claims, mediation seems to be a 'pretty luxurious means' (Anthimos, 2012: 161).

Obviously, the access of vulnerable parties to mediation is closely associated with the funding of mediation. The desire to foster recourse to mediation by providing legal aid to the parties or even public funding for particular mediation schemes has to balance the policy choice of reducing public spending on the administration of justice (Hopt, Steffek, 2013: 32-33; Esplugues, 2014: 687). The situation does not seem to be favourable in Greece. The relatively low court costs (on the one hand), in combination with significant delays in the state-administered justice and difficulties concerning the enforcement of court decisions (Anthimos, 2012: 158) on the other hand, have not prevented claimants and defendants respectively from preferring Greek courts to solve their disputes. Increasing the cost for recourse to the courts and lowering the mediation cost could be an incentive for litigants to switch proceedings. In any case, it seems that the state will initially have to bear a part of funding of the mediation processes so as to ensure the access of vulnerable parties to mediation. In the long term, this does not appear to be a serious burden for the state budget as compared with the funding of the state administered justice given the complexity of its procedures and the instances of jurisdiction available.

2.2. Fairness of the mediation process

It is a general principle of the Mediation Directive that the mediator shall conduct the mediation in an effective, impartial and competent way[24]. As a consequence, the mediator has a duty to disclose any circumstances which could constitute

matters, OJ C 286, 17.11.2005, 1.

24 Article 3(b). Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ C 286, 17.11.2005, 1; Section 2. European Code of Conduct for Mediators.

a conflict of interest or affect his impartiality. In addition, an obligation of confidentiality exists both during and after the mediation[25].

Applying the European regime, the Greek Mediation Act[26] refers to the Greek Code of Conduct for Mediators[27], which provides for the independence and impartiality of the mediator. If there are any circumstances that may, or may be seen to, affect a mediator's independence or give rise to a conflict of interests, the mediator must disclose those circumstances to the parties before acting or continuing to act –this duty being a continuing obligation throughout the mediation process. Such circumstances include any personal or business relationship with one or more of the parties, any financial or other interest, direct or indirect, in the outcome of the mediation, as well as the mediator or a member of his firm having acted in any capacity other than a mediator for one or more of the parties. In such cases, the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation in full independence in order to ensure complete impartiality, and the parties explicitly consent. Mediators are also obliged at all times to act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

Moreover, both the Greek Mediation Act[28] and the Greek Code of Conduct for Mediators provide for the duty of confidentiality. Accordingly, the mediator must keep confidential all information arising out of or in connection with the mediation (including the fact that the mediation is to take place or has taken place), unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.

25 As a result, the mediator cannot be summoned as a witness before a national court or arbitral tribunal. Article 7. Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ C 286, 17.11.2005, 1; Section 4. European Code of Conduct for Mediators.

26 Article 7(2)(b). Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

27 Decision of the Minister of Justice, Transparency and Human Rights Nr. 109088 οικ./ 12.12.2011. Procedure for recognition of mediators' accreditation – Adoption of Code of Conduct for Accredited Mediators and Determination of sanction for infringements thereof, Government Gazette B 2824 [in Greek: Απόφαση Υπουργού Δικαιοσύνης, Διαφάνειας και Ανθρωπίνων Δικαιωμάτων υπ' αριθ. 109088 οικ./12.12.2011. Διαδικασία αναγνώρισης τίτλων διαπίστευσης διαμεσολαβητών – Θέσπιση Κώδικα Δεοντολογίας διαπιστευμένων διαμεσολαβητών και Καθορισμός κυρώσεων για παραβάσεις αυτού, ΦΕΚ Β 2824].

28 Article 10. Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

In case of breach of his duties the mediator is only liable for fraud[29] (by contrast with arbitrators, who are also liable for gross negligence[30]). Furthermore, the Minister of Justice, Transparency and Human Rights can impose the sanction of temporary or permanent suspension of the mediator's accreditation[31].

In theory, the existing legal framework providing for relevant due process criteria could be considered adequate for the protection of vulnerable parties. In practice, however, some additional considerations should be made. First, as mediator's impartiality arguably consists in abstaining from giving legal advice to the parties, the latter, and particularly the weaker ones, are unlikely to suffer only as long as they are represented by counsels. On this ground, the Greek legislator has provided that the parties shall attend the mediation process with an attorney[32]. But this necessarily incurs significant additional costs for the parties, which can eventually prevent them from resolving their dispute in cases where mediation could be the only opportunity to obtain procedural justice when they cannot afford a trial with attorney representation.

Secondly, one can note that the trustworthiness of the mediator, which is essentially based on his independence and impartiality, seems to be regulated so as to resemble the independence and impartiality of the judge in an attempt to give an equivalent prestige to the former and authority to the latter. It should be taken into account, nonetheless, that the independence and impartiality of the judge is actually a constitutional obligation intrinsically associated with his institutional role, whereas the independence and impartiality of the mediator is mostly a matter of professional intelligence and good professional conduct. The provision of strict conditions and sanctions in this respect could be a serious deterrent factor for the flexibility and, ultimately, the problem-solving ability of the mediator (Κολτσάκη, 2014: 82).

Thirdly, sometimes the confidentiality of the mediation process can entail negative effects to third parties (often vulnerable ones) who are not directly participating in the process. For instance, environmental disputes settled by agreement may have a negative impact on the inhabitants of a region; patent disputes settled by agreement may have anticompetitive effects on consumers; product liability settlements may also create negative effects by abolishing a

29 Article 8(4). Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

30 Article 881. Greek Code of Civil Procedure.

31 This sanction is provided by the Greek Code of Conduct for Mediators.

32 Article 8(1). Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

warning function for consumers (see in this respect Kulms, 2013: 224-225). In such cases, a certain degree of transparency seems to be necessary.

3. Mediation as a means of protecting vulnerable parties?

Having analysed the implications concerning the access to mediation processes and their overall fairness as regards vulnerable parties, this section focuses on the latest developments in the field of mediation dealing with consumers, who are arguably the paradigmatic example of weaker parties. Section 3.1. contains a succinct presentation of the new EU regime embodied in the EU Directive on Alternative Dispute Resolution (ADR) and the EU Regulation on Online Dispute Resolution (ODR) for consumer disputes, whereas section 3.2. attempts to provide a short assessment thereof[33].

3.1. An overview of the new EU regime on ADR and ODR for consumer disputes

Recently, an important step has been made at EU level concerning consumer dispute resolution. Directive 2013/11/EU on alternative dispute resolution for consumer disputes[34] has been enacted so as to apply to both domestic and cross-border ADR proceedings (hereafter: the ADR Directive). It is intended to apply horizontally to all types of ADR procedures, including mediation as provided by the Mediation Directive[35]. The ADR Directive shall be transposed to Greek law by 9 July 2015[36]. Its aim is to ensure access to simple, efficient, fast and low-cost ways of resolving disputes arising from sales or service contracts. The permanent ADR entities that will be established according to the ADR Directive should conclude online and offline dispute resolution proceedings in an effec-

33 In Greece, Article 11 of Law 2251/1994 on consumer protection provides a special scheme for the resolution of consumer complaints, which is funded by the state. Such scheme does not prevent the parties from referring their disputes to mediation or to the court (Law 2251/1994. Consumer Protection, Government Gazette A 191; in Greek: Νόμος 2251/1994. Προστασία των καταναλωτών, ΦΕΚ Α 191).

34 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 63.

35 Article 3(2). Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 63.

36 Article 25(1). Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 63.

tive[37] and fair[38] way. The parties should have access to such procedures without being obliged to retain a lawyer; at the same time, however, the parties should not be deprived of their right to get independent advice or to be represented or assisted by a third party at any stage of the procedure. The parties should also have the possibility to withdraw from the proceedings at any stage if they are dissatisfied with the performance or the operation of the proceedings.

The ADR Directive is accompanied by Regulation (EU) No 524/2013[39] on online dispute resolution for consumer disputes (hereafter: the ODR Regulation), which is applicable from 9 January 2016[40]. The ODR Regulation aims to create an ODR platform at the Union level. This should take the form of an interactive website offering a single point of entry to consumers and traders seeking to resolve disputes out-of-court in case they have arisen from online transactions. The ODR platform should have the following functions: (a) it should provide general information regarding the out-of-court resolution of contractual disputes between traders and consumers arising from online sales and service contracts; (b) it should allow consumers and traders to submit complaints by filling in an electronic complaint form available in all the official languages of the institutions of the Union and to attach relevant documents; (c) it should transmit complaints to an ADR entity competent to deal with the dispute concerned; (d) it should offer, free of charge, an electronic case management tool which enables ADR entities to conduct the dispute resolution procedure with the parties through the ODR platform[41].

37 Article 8. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 63.

38 Article 9. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 63.

39 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 1.

40 Article 22(2). Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 1.

41 Recital 18. Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 1.

3.2. An assessment of the new EU regime on ADR and ODR for consumer disputes

Admittedly, the basic innovation of the new EU regime consists in the introduction of online dispute resolution. An assessment thereof, thus, necessarily presupposes a reference to existing online dispute resolution schemes. ODR is defined as the resolution of a dispute through the use of technology, which involves no face-to-face contact but does involve the possibility of using a neutral third party to resolve the dispute (Komnios, 2013, 419 et seq.; Komnios, 2014: 31 et seq.). Only few individuals (and particularly consumers) in Greece have any idea what ODR entails. However, the resolution of disputes online is nothing new to the majority of online shoppers abroad. For instance, Amazon uses an ODR type platform called A-to-Z Guarantee that allows unsatisfied customers the opportunity to initiate a dispute with an Amazon-based merchant. In addition, other e-commerce sites such as China-based Alibaba Group have tested the use of panelists, drawn from website users, to resolve a narrow type of sale-related dispute (Raymond, Stemler, 2015: 373-375). At the same time, it is well demonstrated that many platforms are launched only to fail, due to cost associated with their maintenance, upkeep and service. It has been argued in this respect that the solution is no other than to reduce costs by automating as much of the system as possible, which also means to remove the human, neutral decision-maker, who is considered to be the most costly factor (Shackelford, Raymond, 2014: 618-619). Such unregulated ODR schemes could raise concerns about their transparency and procedural fairness, particularly when they are launched or funded by the individual trader. The ADR Directive seems to adequately ensure the transparency of the provided ADR schemes and the fairness of the process since it establishes an extended and strict framework of requirements regarding the expertise, independence and impartiality of the natural persons in charge of ADR, transparency of ADR entities and effectiveness and fairness of ADR processes[42].

The ADR Directive also addresses cost concerns providing that ADR procedures should preferably be free of charge for consumers. In the event that costs are applied, they should not exceed a nominal fee so that the procedure remains accessible, attractive and inexpensive[43]. To that end, it is up to the Member States to decide on an appropriate form of funding for ADR entities on their territories.

42 Articles 5-12. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 63.

43 Recital (41) and Article 8(c). Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 63.

The ADR Directive should be without prejudice to the question of whether ADR entities are publicly or privately funded or funded through a combination of public and private funding. Nevertheless, ADR entities should be encouraged to specifically consider private forms of funding and to utilise public funds only at Member State's discretion. In this respect, businesses or professional associations could possibly fund ADR entities[44].

In view of the foregoing considerations, it is expected that the implementation will initially be a challenge, especially in EU Member States such as Greece, where minimal ADR systems are in existence. In the long run, however, the new framework including the ADR Directive and the ODR Regulation is expected to substantially facilitate consumer dispute resolution, ensuring both rights-protection and cost-effectiveness at the same time.

4. Conclusion

The analysis has shown that the issue of the position of vulnerable parties in mediation and their protection is closely associated with the funding of mediation proceedings. The state will initially have to bear a part of the funding of mediation processes so as to ensure the access of vulnerable parties to mediation proceedings. In the long term, this does not seem to be a serious burden for the State budget as compared with the funding of the state administered justice, given the complexity of the proceedings and the instances of jurisdiction available.

It has also been shown that the current regime providing for certain due process criteria could be generally considered to be protective of vulnerable parties. However, the strict adherence to the principles of independence, impartiality and confidentiality can sometimes lead to unfair situations for weaker parties and deprive mediation of its role as a flexible problem-solving tool.

Finally, we could be more optimistic about the future of mediation in consumer dispute resolution after the implementation of the provisions of the ADR Directive and the ODR Regulation. The said regime is expected to significantly facilitate recourse of consumer disputes to mediation schemes in a convenient, fast and cost-effective way for both interested parties and the state. It remains to be seen how the Greek legislator will implement this legal regime.

44 Recital (46). Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, 63.

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Vassiliki Koumpli,
Научно-истраживачки сарадник,
Хеленски институт за међународно и страно право,
Атина, Грчка

НЕКА ЗАПАЖАЊА О ПОЛОЖАЈУ СЛАБИЈЕ СТРАНЕ У МЕДИЈАЦИЈИ

Резиме

Медијација представља пре свега филозофски концепт који је познат у готово свим цивилизацијама. У савременом друштву, промоција овог концепта се у великој мери заснива на извесним политичким одлукама у погледу начина управљања државом, који је првенствено усмерен ка важним економским и бужетским питањима, функционисању правосудног система као и трошковима које тај систем подразумева за цело друштво. С обзиром да је медијација релативно нови тренд у правосудном систему, можемо се запитати да ли се и у којој мери још увек примењују традиционалне процесне гаранције. У том погледу, од великог је значаја сагледати положај осетљивије или слабије стране у поступку медијације. Поред покушаја индентификације „осетљиве или слабије" стране у процесу медијације, сврха овог рада је да процени положај „слабије стране" у оквиру две специфичне фазе процеса медијације: а) у фази приступања процесу медијације, са посебним освртом на могуће режиме правне помоћи, и б) у фази спровођења поступка медијације, са посебним освртом на улогу медијатора и евентуалну потребу да правни заступници странака присуствују процесу и помажу странкама. На основу дате анализе, аутор изводи одређене закључке.

Кључне речи: *медијација, осетљива/слабија страна, правна помоћ, медијатор, независност, непристрасност, поверљивост, потрошачи, алтернативно решавање спорова, online решавање спорова.*