

An analysis of the role of different players in e-mediation: the (legal) implications

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abstract

Besides the two parties who are involved in a dispute, and the independent third, in ODR literature it is widely accepted that the labelling of technology as the Fourth Party is a clear, strong metaphor. In order to get a good understanding of who is doing what in ODR, I believe the notion of the Fifth Party could be helpful. In this paper I elaborate upon this notion in the context of e-mediation. This additional distinguished Fifth Party is the provider of the technology used in e-mediation (e.g., chat or e-mail). The singling out of a Fifth Party as a separate entity has several implications. From an economic/legal point of view it influences the forum shopping possibilities and freedom of choice of e-mediation services. From a pure legal point of view the Fifth Party complicates amongst others the liability of the e-mediation service providers. This paper elaborates upon the (dis)advantages of forum shopping, freedom of choice and liability.

Stephanie H. Bol, An analysis of the role of different players in e-mediation: the (legal) implications, John Zeleznikow,, Arno R. Lodder, *Second international ODR Workshop (odrworkshop.info)*, Tilburg: Wolf Legal Publishers, pp 23-29, 2005.

1. Introduction

Electronic mediation or e-mediation is, next to e-arbitration and blind bidding, one of the prominent forms of Alternative Dispute Resolution (ADR) in the online environment. Just like mediation in the off line environment, the e-mediation process is aimed at finding a win-win solution to a conflict with the help of a Third – impartial and independent (‘neutral’)- Party.

In offline mediation three parties are involved: the two parties having a dispute and the Third Party/mediator. In the online environment technology supports these three parties, and forms an essential and integral part of the dispute resolution process. To clarify the influence of technology in ODR/e-mediation it is often referred to as the Fourth Party (Katsh & Rifkin 2001). In order to get a good understanding of who is doing what in ODR, I believe the notion of the Fifth Party could be helpful. This additional distinguished Fifth Party is the provider of the technology used in e-mediation (e.g., chat or e-mail).

Normally, the e-mediator (Third Party) owns the e-mediation tools (fourth party). So the e-mediation website (Fifth Party) provides chat, e-mail and/or other communication facilities (‘e-mediation tools’). In that situation the Third and the Fifth Party coincide. An example is the Dutch e-mediation website ran by the Dutch mediator Erik Roelvink <www.emediation.nl>, who next to e-mail communication offers a chat program that can be used for the e-mediation.

However, the Third and Fifth Party may be really different entities in the ODR process. The Fifth Party is then the party who is the supplier of the technique, so this party is not the technology itself, but provides a website with e-mediation tools. This Fifth Party as such does not use the chat or e-mail facilities. Rather, an e-mediator who should be considered as the recipient of the ODR service this Fifth Party is providing, uses the e-mediation tools. To my knowledge, nowadays it is common use that when parties enter an e-mediation website the provider of the site offers e-mediation as a total concept: the e-mediation tools and e-mediator are included in the e-mediation(service).

In the future, especially when e-mediation has become more common, I expect offline mediators to expand their practice more and more to the online environment (cf. Märker & Trénel 2003).

Not necessarily to have the mediation taking place online from the very start of the process until the signing of the contract with the agreed outcome, but at least to have parts of the mediation process taking place online. Obviously, not every mediator will always be able or willing to have his own e-mediation website. Some mediators simply won't have the money and/or desire to develop an e-mediation website, which can be very expensive by all the measures that have to be taken to fully guarantee the privacy and confidentiality of the e-mediation process (cf. Schultz, Kaufmann-Kohler, Langer and Bonnet 2001). Another reason might be that such an investment will not be profitable, on the basis of the amount of e-mediation cases the (e-)mediator has or is expecting to have. Using an e-mediation website on which the e-mediation can take place is then an appropriate solution. The mere licensing of a single e-mediation tool could also be an option.

If one distinguishes so to say five 'players', then various combinations of e-mediation service providers are possible. This paper first outlines these combinations and discusses some of the problems natural persons and entities involved in the e-mediation have to deal with when the overall e-mediation (process) is not controlled by one party (as nowadays by the e-mediator). Subsequently some further practical and in particular legal implications are addressed.

2. Participants in e-mediation

It is important to note that in this paper an e-mediation website refers to a website on which e-mediation tools are provided. A mediator's website used only for promoting the mediation skills, is not called an e-mediation website. I like to restrict the term e-mediation website to those sites where the actual online mediation takes place.

The acknowledgement of a Fifth Party that I suggest to call the e-mediation technique provider, leads to the following three types of e-mediation (service) providers:

2.1 the e-mediation-mediator

This is the e-mediator who does not have his own e-mediation website, but just has a website (not an e-mediation website!) on which he promotes his own services/skills as an e-mediator. This party is the Third Party in e-mediation.

2.2 the e-mediation-technique-provider

The services of this provider are the offering of e-mediation tools (chat, e-mail, etc.). This e-mediation provider is not an e-mediator. This provider should also not be confused with a company that provides licenses for e-mediation software (read: e-mediation tools) that the licensee can use to create his own e-mediation website. In order to speak of an e-mediation-technique-provider this provider must actually deliver services that are used during the mediation process on the site of this provider. This party is the Fifth Party in e-mediation.

2.3 the e-mediation-overall-provider

This party is the party who facilitates the e-mediation process from the beginning until the end. This party has an e-mediation website and either is also an e-mediator or offers the services of one or more e-mediators. This provider is a combination of the Third and the Fifth Party in e-mediation. This Fifth Party can indicate one of the following situations:

1. an e-mediation-mediator (Third Party) who owns an e-mediation website on which he thus provides e-mediation tools (Fifth Party)
2. an e-mediation-technique-provider (Fifth Party) who does not only offer e-mediation tools on his e-mediation website, but also offers the services of e-mediators. These e-mediator services can be provided by e-mediators under contract by the Fifth Party or by e-mediators working on a free-lance basis.

3. Contractual relationships

E-mediation provider(s) and the parties involved in the dispute can have different kinds of contractual relationships, depending on the type of e-mediation dispute resolution provider.

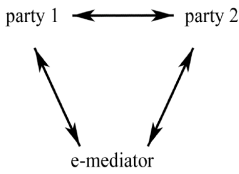


Figure 1. Contractual relationships

First, parties involved in the dispute always have obligations and duties to each other and to the e-mediator. The following picture illustrates the contractual relationships between the two conflicting parties and the e-mediator.

It is also possible that the e-mediator has obligations and duties to another e-mediation provider. For instance, the e-mediation-mediator using the services of an e-mediation-technique-provider for the e-mediation process.

It might then even be so that the e-mediation-technique-provider and the parties involved in the dispute also have specific obligations and duties to each other (See Section 'Legal Issues'). In the latter case there will be six different kinds of contracts instead of four, when only the e-mediation-mediator ('on behalf of parties') has a contractual relationship with the e-mediation-technique-provider. Actually, six is the maximum amount of contracts in the context of the Fifth Party e-mediation process.

In figure 2, all four human participants in e-mediation have a contractual relationship with each other. Except for the fourth party, all parties in the e-mediation(process) are human.

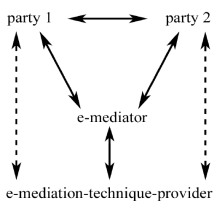


Figure 2. Contractual relationships

In the future this might change with regard to the Third Party, the e-mediator. The role of the mediator could diminish due to the use of argumentation and negotiation systems (Lodder & Zeleznikow 2005) and/ or other technical applications (Gordon & Märker 2003). If the

role of this Third Party has eventually been overtaken by the technology, the Third Party as such will no longer exist. The fourth party then also has become the Third Party. It might be questioned whether the online mediation procedure could then still be called e-mediation. Automated mediation might be a better name, which could clarify the difference between mediation with human interference and without.

4. Pros and cons of service selection

There are several advantages of separating e-mediators (Third Parties) from e-mediation technique suppliers (Fifth Parties). In the following the starting point is a comparison between:

- the nowadays regular e-mediation provider (cf. the e-mediation-overall-provider), and;
- the different e-mediation-mediator (Third Party) and e-mediation-technique-provider (Fifth Party).

4.1 Some advantages

First of all, forum shopping might increase if the above described three kinds of e-mediation service providers are all operating. The result of this probably is a good or better prize/quality ratio for e-mediation services. The parties in dispute can profit from this development.

Second, the parties in dispute have more opportunities when they have the option to either select an e-mediation-overall-provider or select both an e-mediation-mediator and an e-mediation-technique-provider. Also, parties not necessarily have to take the e-mediator that is connected to/offered by a specific e-mediation web site/e-mediation technique supplier.

Parties can choose for example the e-mediator who they already know or the e-mediator they consider as most suitable to resolve their dispute, because he has a specific expertise in for instance the domain at hand such as divorces or ICT issues. This especially is an advantage in case of national e-mediation web sites that do not offer e-mediator services, do not have e-mediators under contract or at free-lance basis, and do not present a list of preferred mediators they have a special relation with. Parties can then try to find the acquired e-mediator abroad,

but use the national e-mediation web site that parties probably are familiar with. The opposite situation might also occur, so a specialized or preferred mediator from the home country and a well-known or otherwise adequate foreign e-mediation technique supplier are selected by parties.

Even though the internet is characterized as a 24/7 economy, the third advantage can be found in the availability -‘opening hours’- of e-mediation web sites which are due to the working hours of e-mediators. E-mediators are human and humans in general do not work 24 hours a day, at least not seven days a week. As a consequence most e-mediation web sites cannot be considered 24/7 providers. Especially when it concerns chat as a real-time e-mediation tool, all parties involved in the e-mediation need to be present at the same time (Rule 2002). For e-mail it could be said that the facility is ‘partly’ closed at certain moments. 24/7 access is possible (Ponte & Cavenagh 2005), but one has to realise it is to be expected that the specific e-mediator only will answer parties’ e-mail during his working hours.

By separating the e-mediator from the e-mediation technique supplier it becomes possible for parties who do not have time during the day, for example, to solve their dispute in the evening by selecting a mediator from a different time zone. Language barriers will influence the convenience of this proposed solution, but for English speaking persons the 24/7 availability of e-mediators easily can be realised (e.g., USA, UK, Australia). Besides, this makes it possible to solve disputes of parties living in different continents/time zones, so in case of a US and Australian party, a UK mediator could be selected.

4.2 Some disadvantages

The e-mediators chosen by the parties in dispute, will not always be experienced in using the e-mediation tools offered by the e-mediation-technique-provider who was selected by the parties in dispute.

The greater opportunity of forum shopping can become a real disadvantage for some e-mediation-mediators as well as for e-mediation-

technique-providers, because of the information given on web sites of these service providers. Based on this information parties decide to get involved with a specific e-mediation service provider. The lack of information or specific promotional information like how many disputes the specific e-mediator solved successfully (track record), let parties make wrongful comparisons or persuade parties in a wrongful way to choose for a specific e-mediator. Naturally, once the competition between the e-mediation provider gets tougher, the inability to provide adequate information becomes more of a problem.

5. Legal issues: the liability of the Fifth and Third Party in e-mediation

There are several situations in which the distinction into the different parties in e-mediation becomes relevant from a legal point of view. One example is the provider of technology established in the US, and an e-mediator as well as the parties (e.g., consumers) living in one of the EU member states. This e-mediator, as a provider of an information society service (Directive 2000/31/EC on electronic commerce) or distant seller (Directive 97/7/EC on distance selling), should/ has to live up to several information requirements. The US based provider of technology on the other hand has no duties in this respect. Obviously, if the technology provider had been EU based, the information requirements (e.g., information regarding the identity, geographic and electronic address of the provider, the costs of de service, the technical steps to conclude the contract, etc.) had to be fulfilled.

In the remainder of this paper I explore one other particularly interesting legal consequence of the proposed distinction of a Fifth Party. This concerns the liability of the different parties involved in the e-mediation process.

The liability of e-mediation service providers is probably the most important legal issue that will cause a lot of difficulties in the future e-mediation setting with a Third and Fifth Party operating individually, at least far more than in the current setting of e-mediation.

The current e-mediation setting is the one with one e-mediation website offering both the e-

mediation tools and the e-mediation-mediator. Parties involved in a dispute using these current e-mediation sites are bounded by just one contractual relationship. Finally, the overall e-mediation service is offered by one entity. Depending on the nametag put on this e-mediation resolution provider, parties involved in the dispute enter the agreement to mediate with the e-mediator as representative of the e-mediation company ('entity') or the e-mediation company (often the 'name of the website').

As these parties operate as one (e-mediation service) party to the public at large, parties never have the uncertainty of whom they have to hold responsible for faults due to the e-mediation technique (e.g., the chat program is not working properly) or the actions of the e-mediation-mediator during the e-mediation. Parties deal with just one party: the company behind the e-mediation website. Any complaint can be addressed to this 'e-mediation website'.

Except for a technical failure on the part of parties involved in the dispute, one could think of outdated computer equipment and/or software or a slow internet connection as a result of which the chat or videoconferencing facilities do not work adequately. Especially when very specific equipment or software is required for the use of an e-mediation tool, the e-mediation service provider has the duty to inform the parties involved in the dispute about these requirements (cf. ABA Proposed Guidelines for Recommended Best Practices for Online Dispute Resolution Service Providers). In case this information was not provided, the e-mediation service provider can probably be held liable for the existing failure.

A technical failure the e-mediation service provider cannot be held responsible for is the drop out of the internet connection (on the part of the ISP). Unless, of course, the e-mediation provider is also the ISP. But e-mediation service providers being ISP's are rare.

The e-mediation service provider cannot be held responsible for the technical failures outlined in the paragraph above in the first place. But what if the e-mediation service provider is held responsible by parties involved in the dispute:

which e-mediation service provider will actually be held liable when there is not one overall e-mediation service provider in the way the current e-mediation services are provided? There can be several different contracts between e-mediation service providers excluding the liability of one e-mediation service provider by another e-mediation service provider (Yunis 2003). This will cause parties involved in a dispute a lot of problems in case of holding someone liable for faults during the e-mediation.

If one envisions the Fifth Party in e-mediation, the e-mediator and the above named e-mediation company (the e-mediation technique supplier, Fifth Party), often will not be the same person and/or operate to the public at large as one (legal) entity. There are exceptions though, namely in case of the e-mediation-overall-provider. If an e-mediator owns his own e-mediation website (so he uses his own e-mediation tools) this person is operating as one legal entity and will be the only person or company (depending on the nametag at the time of entering the agreement to mediate with parties involved in the dispute) who can be held responsible for any fault except for some of the above described technical failures.

Sometimes this is also the case for the e-mediation-technique-provider (as an e-mediation-overall-provider) who offers e-mediator services as well, depending on the working relationship between the e-mediator and the technique provider. If the e-mediator is under contract of the e-mediation-technique-provider than the latter can be held responsible for defaults of the e-mediator which is his employee. If the e-mediator works on a free-lance basis, the e-mediation-technique-provider is not necessarily responsible for the actions of the e-mediator. In that case the Fifth Party can be seen as a kind of intermediary (not mediator!), who passes the buck to the particular e-mediation-mediator when parties actually start the e-mediation on his website with the particular e-mediator.

In all cases where the Fifth Party works separated from the Third Party, the e-mediation-mediator using the e-mediation website of the e-mediation-technique-provider, the Third and Fifth Party enter into an agreement in which it is

to be expected the technique provider excludes liability for technical defaults. Even though this Fifth Party is the one who in principle can be held responsible for e-mail or chat facilities not functioning well, for instance e-mails do not arrive in the web box or the chat communication get stuck. The reason for this exclusion will be that these defaults can also be caused, and probably in 9 out of 10 cases will be caused, by the users of the particular tool or others like ISP's. This will not only have undesirable consequences for the e-mediation-mediator, but also for the parties involved in the dispute.

Assume the parties only enter into an agreement with the e-mediation-mediator who excludes the technical failures during the e-mediation in his General Terms and Conditions on his website. Since usually Terms and Conditions are hardly read (if at all) by the users, they will hold the e-mediation-mediator responsible for any faults, because they entered into an agreement with him. Due to the contractual exclusion of responsibility the parties will probably not be able to substantiate any claim in this respect.

When parties involved in a dispute choose an e-mediation-mediator and e-mediation-technique-provider the same situation might occur. In this case is it not inconceivable that the parties in the dispute enter into an agreement with the Fifth Party as well as with the Third Party and the Third Party enters into an agreement with the Fifth Party. Unfortunately, probably no four party contract will be drawn up. Under these circumstance this should be preferred because such a contract would reveal an overview of all contractual relationships and the exclusion(s) of liability.

It will be clear by now that the in my opinion inevitable separation of current e-mediation services (the Third Party is also the Fifth Party) into two separate e-mediation providers requires the attention of all participants. A recommendation is to anticipate on this future situation when fifth parties are entering the scene, by already start thinking of implementing (legal) rules when specific e-mediation or ODR regulations are made.

6. Closing Remarks

Currently most e-mediation providers deliver both the technology and the human mediation skills. I believe that in the future those two services will also be provided independently. The provider of only the technology (commonly referred to as the Fourth Party) is then called the Fifth Party. The e-mediator is of course the Third Party. This separation of services seems to have positive economic effects, but causes all sorts of mainly legal problems.

From a legal point of view, it will in particular be important to clarify the liability issues. This calls for contractual relationships that make at least clear what obligations and duties all the (human) parties in e-mediation have, especially in relation to the parties having a dispute. This does not mean that there should be many contracts. For instance, if the e-mediator has a contract with an e-mediation-technique-provider, in my opinion the Third Party should take responsibility for this Fifth Party in relation to the parties involved in the dispute. This means that an agreement between the parties involved in the dispute and the Fifth Party is not necessary.

Too many (written) agreements might cause insecurities and do harm to parties' trust in e-mediation. Trust is especially what is needed in the online environment. The best solution can be expected from (non-)governmental regulations (Ponte & Cavenagh 2005) concerning the contractual relationships between all the human parties involved in e-mediation services. It may, however, take some time before those are in order.

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