

## **Comparison of the Online Dispute Resolution (ODR) with Litigation for Internet Related Disputes**

In today's contemporary world, there are serious improvements which create a communication era and definitely internet is the most known tool of this creation. Thanks to the internet, territorial boundaries and any type of limitations were destroyed in a short time. Thus, the trade between people, firms and countries are also affected. Because, in light of the technological advantages and disadvantages of the internet, trade systems and conditions are changed day to day.

As an example of the improvements, firms can communicate each other through use of the internet to enter into electronic contracts of sale even if they are located in different countries. Today's computing technologies give a chance to users to download intangible / digitised goods onto computers without the need of physical delivery.<sup>1</sup>

At that point, the electronic commerce should be defined also to clarify type of the disputes. The meaning of electronic commerce can be interpreted as "*conducted in digital form or on an electronic platform*" or "*selling or buying goods and services on the Internet*"<sup>2</sup>

In addition to this definition; there are several other definitions which are produced by different entities. To exemplify, the Organisation for Economic Cooperation and Development (OECD) clarifies the meaning of electronic commerce from an economic and social point of view as "*all forms of commercial transactions involving both organizations and individuals, which are based upon the electronic processing and transmission of data, including text, sound and visual*

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<sup>1</sup> Faye Fangfei Wang, *Law of Electronic Commercial Transactions* (2nd edn, Routledge 2014) 223

<sup>2</sup> Faye Fangfei Wang, *Law of Electronic Commercial Transactions* (2nd edn, Routledge 2014) 7

*images. It also refers to the effects that the electronic exchange of commercial information may have on the institutions and process that support and govern commercial activities.*<sup>3</sup>

There is no doubt about that a myriad sides of the electronic commerce is beneficial to develop economic efficiency and profitability. However, from another perspective, cross-border disputes which are arisen and sourced from electronic commerce are much more complicated than paper-based environment in terms of detecting features such as the place of domicile, the place of business and the place of performance.<sup>4</sup> Furthermore, it should be noted that international regulations which involves UNCITRAL Model Law on Electronic Commerce<sup>5</sup> and the UN Convention on the Use of Electronic Communications in International Contracts<sup>6</sup> have no provision in regard to determination of the details of internet jurisdiction.

Due to lacking of clear regulation regarding to internet related disputes, the need of the solution for this type of conflicts was also occurred. Therefore, alternative dispute resolution (ADR) was evaluated and Online Dispute Resolution (ODR) system was constituted.

According to Article 2/1 of the UNCITRAL Draft Procedural Rules on Online Dispute Resolution for Cross-border Electronic Commerce Transactions 2013<sup>7</sup>, ODR can be defined as

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<sup>3</sup> Science Technology Industry, *Electronic Commerce: Opportunities and Challenges for Government*, (Organization for Economic Co-operation and Development 1997) 7

<sup>4</sup> Faye Fangfei Wang, *Law of Electronic Commercial Transactions* (2nd edn, Routledge 2014) 223

<sup>5</sup> UNCITRAL Model Law on Electronic Commerce

<sup>6</sup> UN Convention on the Use of Electronic Communications in International Contracts

<sup>7</sup> UNCITRAL Draft Procedural Rules on Online Dispute Resolution for Cross-border Electronic Commerce Transactions 2013

*a “mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology”<sup>8</sup>*

Although the ODR will be analysed and discussed in detail in this essay, some significant points of the ODR should be shared earlier. Basically, the features of the ODR are summarized as simple, efficient, fast and low-cost. In particular, for cross-border internet related disputes, ODR is accepted as a chance with these features and on the contrary of court solution, it shows much more flexibility.

In this essay, the ODR will be discussed and compared with cross-border litigation system in terms of being best placed resolution for internet related disputes. As an example and as an explanation, domain name cases will be also critically examined to detect more appropriate judgment system for this type internet related disputes. Additionally, resolution service provider of eBay will be shared to clarify application of the ODR in general mean.

### **Cross-border Litigation**

As it is known, ADR and particularly ODR are new generation solutions for commercial disputes and litigation is the oldest and essential way of the disputes. Definitely, this circumstance is also valid for internet related disputes. At that point, litigation system should be analysed to determine the better platform to resolve internet related disputes and especially domain name cases.

### **Conflict of Laws**

In the sense of cross-border litigation, conflict of laws one of the hardest problematic for application. This circumstance is linked with existence of several courts that have a competence

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<sup>8</sup> UNCITRAL Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Draft Procedural Rules, A/CN9/WGIII/WP.119, 11 March 2013

to hear the case. In other words, conflict of law is branch of international interstate laws and international law which controls all proceedings concerning a foreign law issue.<sup>9</sup>

To be more clear regard to the problem, if there is a conflict about the right of hearing a case, it must be specified to detect which court will be in charge for exercising jurisdiction. Therefore, at first step, particular legislations are analysed yet if there is not, the courts must evaluate and interpret the jurisdictional rules to resolve disputes. This general rule is also applicable for the domain name cases and all internet related disputes.

Hague Convention on Choice on Court Agreements 2005<sup>10</sup> and Brussels I Regulation 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>11</sup> that is replaced by the Brussels I Regulation (Recast) 2012 are regulated civil and commercial issues for conflict of laws.

Especially, Hague Convention on Choice on Court Agreements 2005 is a significant milestone to enable harmonization in private international law. Article 5 of the Convention can be accepted as an evidence for that determination: *“The Court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that state.”*<sup>12</sup>

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<sup>9</sup> <http://conflictoflaws.uslegal.com/> Accessed on: 05 April 2015

<sup>10</sup> Hague Convention on Choice on Court Agreements 2005

<sup>11</sup> Brussels I Regulation 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

<sup>12</sup> [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98) Accessed on: 07 April 2015

Moreover, for civil and commercial and thoroughly domain name cases and all internet related disputes matters' jurisdiction are governed by Brussels I Regulation (EC No. 44/2001)<sup>13</sup> in the scope of the European Union. In Brussels I Regulation, choice of court clauses is also stated under Article 23 which is modified as Article 25. Pursuant to the Article “*...in a form which accords with practices which the parties have established between themselves.*” and also “*any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.*”<sup>14</sup> This article also proves the recognition of electronic communications.

Definitely, all of these evaluations must be within the scope of the domain name cases and the internet related disputes. Therefore, applicability of the General Jurisdiction Rules should be detected also. Brussels I Regulation, in its second article, refers that without taking into account the nationality of the people which are domiciled in a member state shall be sued in the court of that state. The regulation also involves rules about domicile of individuals and domicile and corporations.

On the other hand, the Regulation comprises a provision about delivery of goods and in that provision, it shows also the rule of electronic commerce. Pursuant to Article 5/1-b, place of performance is the place of delivery of goods, or the place where the services were provided or should have been provided. Additionally, if the place of delivery has a close relation to determine special jurisdiction, an electronic contract does not show any difference from paper-based

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<sup>13</sup> Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matter, EC No. 44/2001, <[http://ec.europa.eu/civiljustice/jurisdiction\\_courts/jurisdiction\\_courts\\_ec\\_en.htm](http://ec.europa.eu/civiljustice/jurisdiction_courts/jurisdiction_courts_ec_en.htm)> Accessed on: 08 April 2015

<sup>14</sup> <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN>> Accessed on: 06 April 2015

contract. Because in terms of involving provision about the delivery of goods, electronic contract is accepted like paper-based contract.<sup>15</sup>

To clarify difficulties of cross-border litigation for all types of the internet related disputes, an example case can be shown. If there is more than one place of delivery or there is more than one place of service performance, another uncertainty is also occurred. In the **Color Drack GmbH v. Lexx International Vertriebs GmbH**<sup>16</sup> case the Court examined that “*whether the first indent of Article 5(1) (b) of the Brussels I Regulation applied in the case of a contract for the sales of goods involving several places of delivery within a single Member State*” or “*whether the plaintiff could sue in the court for the place of delivery of its choice*” and “*whether Article 5(1) (b) can apply to a contract involving several places of delivery in different Member States.*”<sup>17</sup>

As it is understood, in these conditions, defendant may be not to know where the claimant sue him although he can know that any court would place in a Member State of performance of the obligation. Disputes which involve element of foreignness are complicated also in terms of detecting applicable law. Therefore, in particular domain name cases and all internet related disputes are also affected weakness of cross-border litigation.

### **Choice of Law**

Applicable law, in other words, choice of law can be defined as the law that is chosen for to resolve the dispute and so parties have to find applicable law after deciding which court will be in charge.

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<sup>15</sup> Faye Fangfei Wang, ‘Obstacles and Solutions to Internet Jurisdiction A Comparative Analysis of the EU and US Laws’, [2008] Journal of International Commercial Law and Technology, Vol.3, Issue 4, 235.

<sup>16</sup> Case C-386/05 Color Drack GmbH v. Lexx International Vertriebs GmbH [2007]

<sup>17</sup><<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d0f130de65e529833e1e4f1488eecd89acbe877.e34KaxiLc3eQc40LaxqMbN4ObxaMe0?text=&docid=61471&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=236561>> Accessed on: 07 April 2015

For the internet related disputes, location and timing are basis points for determining internet choice of law. However, by and large, the location where the contract is signed enables the substantive law to govern the agreements in line with the rules of private international law.<sup>18</sup>

Moreover, Rome I Regulation<sup>19</sup> states the applicable law in its Article 3 which refers the freedom of choice. Pursuant to the article, the contract shall be governed by the law that chosen by parties and in addition to that, the choice must be expressly or clearly.<sup>20</sup> The same regulation comprises also some presumptions to create more understandable system for cross-border litigation but definitely, when it is compared with the ODR, impracticability of it can be apparent.

### **Online Dispute Resolution**

Online Dispute Resolution (ODR) is a component of the Alternative Dispute Resolutions (ADR). As it is well known, ADR has become effective from beginning of the 1980s for international commercial transaction disputes. Thus, application of the cross-border litigation system has decreased.<sup>21</sup>

At first, ADR has included arbitration, mediation, conciliation and negotiation and all of them were accepted more efficient, flexible, confidential and low-cost than litigation system. However, in the early 1990s, electronic commerce has become widespread and because of the nature of electronic commerce, new complicated issues were occurred. To illustrate, different

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<sup>18</sup> Faye Fangfei Wang, 'Obstacles and Solutions to Internet Jurisdiction A Comparative Analysis of the EU and US Laws', [2008] Journal of International Commercial Law and Technology, Vol.3, Issue 4, 251.

<sup>19</sup> Regulation (EC) No 593/2008 of The European Parliament and of The Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

<sup>20</sup> <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN> > Accessed on: 10 April 2015

<sup>21</sup> Efficiency of Online Dispute Resolution: A Case Study Bruno DEFFAINS & Yannick Gabuthy-Communications & Strategies, no. 60, 4th quarter 2005, p. 201

rules and procedures in different countries, jurisdictional boundaries, lacking of legal experts and difficulty of the determining place of business or place of performance were required developing a new type of ADR. Born of the ODR can be explained in this way briefly.<sup>22</sup>

ODR can be also interpreted as a supply for the demand of cross-border online shopping. As it is known, cross border online shopping has specific problems which include misrepresentation, non-delivery of goods and the difficulty of obtaining refunds.<sup>23</sup>

### **Domain Name Disputes**

In practical manner, domain name infringement disputes are widespread types of the disputes to use ODR as domain names non-territorial. As known, domain names are unique and global. Thanks to being unique, a domain name can be used by only one entity globally.

Lacking of reliable and accurate contact details of domain name registrants, it can cause the circumstance that plaintiff would find it hard to protect his rights because of the missing link of the defendant's personal information. Therefore, existence of *personam* jurisdiction is impossible on the website and to deal with this problem, courts must have a special rule.<sup>24</sup>

For instance, US Anticybersquatting Consumer Protection Act<sup>25</sup> (ACPA) which regulates specific rules concerning in rem jurisdiction to prevent cybersquatting. Thanks to the rule, right holder of trademark has a right to bring a civil action against the domain name itself in the US district court. The case of ***Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de***

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<sup>22</sup> Faye Fangfei Wang, *Law of Electronic Commercial Transactions* (2nd edn, Routledge 2014) 272

<sup>23</sup> Johnson D.R. and Post D. 'Law and Borders - The Rise of Law in Cyberspace', [1996] *Stanford Law Review*, Vol. 48, 1370

<sup>24</sup> Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China* (Cambridge 2010) 145

<sup>25</sup> US Anticybersquatting Consumer Protection Act

**Barcelona**<sup>26</sup> shows how a party whom lost a domain name dispute can take standing as a plaintiff in a federal court. The domain name was registered by a Spanish couple to service about tourism information, a chat room, advertising and links to reach other websites. Before Barcelona.com, Inc. started a lawsuit in a federal court, the city council of Barcelona (Excelentísimo Ayuntamiento de Barcelona) whom has almost 100 registrations with the name of 'Barcelona' filed a complaint with WIPO and won the Uniform Dispute Resolution Policy proceedings. The domain name was ordered to be transferred to the City Council. Before that transfer, Barcelona.com, Inc. started a lawsuit in the District Court for the Eastern District of Virginia and it claims that the registration of the domain name is lawful. The Court held that at first, Barcelona.com, Inc completed registration with the US registrar, NSI; second, it has e-mail address in New York yet there is no office space or telephone number and no employees. Therefore, this circumstance has a clear link with ACPA criteria for an *in rem* action. So 'Barcelona.com' domain name was named as a complainant in the lawsuit in the US. The decision of the Court validated the transfer pursuant to the ACPA through the *in rem* jurisdiction.<sup>27</sup>

Two fundamental features of the domain name disputes are really clear which are brought under the ACPA. One of them is that US courts can apply specific legislation to the subject matter without identifying a person or entity as the plaintiff. The other one is that US courts enforce the judgement by directly instructing the domain name registrars to cancel or

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<sup>26</sup> Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona, 189 F. Supp, 2d 367 (E.D. Va. 2002), rev'd and vacated, 330 F. 3d. 617 (4<sup>th</sup> Circuit 2003)

<sup>27</sup> Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China* (Cambridge 2010) 146

transfer the disputed domain name. Via the internet; withdrawal, cancellation or transfer of the domain names can be done by registrars as the dispute objects are in electronic forms.<sup>28</sup>

At that point, ODR was constituted as a solution of the in particular domain name disputes. Using of domain names has a relation with trademarks. Because, trademarks are also used to domain names but the difference between nature of trademarks and the nature of domain names cause another problem. To clarify, the main reason of this problem is that there is no connection between trademarks and domain names registrations. As it is known, trademarks give territorial rights to owners on the contrary of domain names. However, domain names system grants a global right. Thus, trademark can be protected just in geographical location while the domain names are protected globally. Therefore, trademarks can tolerate similar goods and services which are in different territories. But, domain names, thanks to being global and unique, can be used by only one entity in the world. Due to these features of the domain names, without territory yet with registrar, ODR is the most suitable method to resolve domain name disputes.

Moreover, consumers are also encouraged to apply ODR for resolving any type of online shopping disputes and privacy protection issues. Some online merchants also incentive application of ODR and they constitutes free ODR services for their customers. To give an example and enable more information about this service, 'eBay' will be also shared as a global successful example of the ODR services.<sup>29</sup>

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<sup>28</sup> Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China* (Cambridge 2010) 147

## eBay Example

There are serious firms and institutions that are applying ODR all over the world such as eBay, Rechtwijzer2.0, Canadian Civil Resolution Tribunal, Financial Ombudsman Service, Nominet, Resolver, Youstice, Online Schlichter, Cybersettle, Modria, Traffic Penalty Tribunal and etc. To clarify performance of these ODR providers, eBay can be an excellent example.<sup>30</sup>

A remarkable 60 million disagreements amongst traders on eBay are resolved every year using ODR. eBay operates an online dispute resolution system to resolve disputes which arisen between buyers and sellers. Effective dispute resolution is essential to maintain consumer confidence. Thus, eBay also ensure that both parties in the transaction feel protected well.<sup>31</sup>

According to ODR system of the eBay, the processes begin with a question which is asked by eBay to buyer to diagnose the specifics of their complaint, and to suggest their preferred solution. Both parties, namely buyers and sellers are encouraged to communicate each other directly through its messaging platform that also called as an ODR platform to share information between the parties.

Nevertheless, if the dispute cannot be resolved, it is escalated to the Resolution Services team within Customer Support for a decision. In that system, there is also a money back guarantee providing that recovery is limited to the purchase price for the buyer and full reimbursement for the seller. PayPal freezes the money which is involved in the dispute, ensuring

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<sup>29</sup> Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China* (Cambridge 2010) 148

<sup>30</sup> Civil Justice Council Online Dispute Resolution Advisory Group, Online Dispute Resolution For Low Value Civil Claims (February 2015)11  
<<https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>>  
Accessed on: 05 April 2015

<sup>31</sup> Gill C. & Others, Models of Alternative Dispute Resolution (ADR) A report for the Legal Ombudsman [2014] 31

enforcement of the final decision. 80 % of the disputes are concluded through the ODR process automatically every year.<sup>32</sup>

### **The Fourth Party**

Moreover, one of the significant interpretations of the ODR also indicates significance of the technology on internet related disputes. According to the interpretation, technology is a fourth party of these types of disputes. It acts fourth party role. Arbitrators and mediators are referred as a third party and in addition to them, after ODR was introduced, the technology also plays a major role in managing the process and setting the agenda and by this way it is accepted as a fourth party.<sup>33</sup>

### **Fundamental Features of the ODR**

To enable well understanding for advantages of the ODR, making a clear list can be an efficient way. ODR gives a chance to parties to have low-cost and speedy judgment. Also control of processes and choice of forum option should be noticed as advantages. In addition to them, flexibility of process and evident and confidentiality prove client satisfaction in ODR.<sup>34</sup>

### **ODR Processes**

ODR consists of several steps to conclude a decision. Filing and initiation step is a first phase of judgement. Then, Arbitrators must be selected and preliminary hearing which involves identifying facts and issues must be completed. Information exchange and preparation for hearings is also another step of the judgement. At hearings level, identifying alternative solutions and discussions about the solutions are performed and then post-hearing submission level

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<sup>32</sup> Hodges C. and Benhor, I. *The hidden world of Consumer ADR: Redress and Behavior The Foundation for Law, Justice and Society in affiliation with The Centre for Socio-Legal Studies*(University of Oxford 2011).

<sup>33</sup> E. Katsh and J. RIFKIN, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass Press 2001)

involves revising and confirming solutions before the award. Finally, the award is made by arbitrators at last step.<sup>35</sup>

### **Disadvantages of the ODR**

Disadvantages of the ODR can be summarized in specific titles easily. At first, ODR systems can appear impersonal. Furthermore, it does not work as well for the complex disputes and the dispute resolution may be limited to money back as is the case with eBay. Additionally, disputants are unable to vent their emotions and meaningful empathy is lost. Moreover, mistrust of ODR providers and consumer ignorance of ODR and issues of confidentiality must be also noted as disadvantages. Besides, considering about the ability of the parties to use electronic devices to communicate each other is significant. Because it is also another problematical circumstance for ODR due to lacking of ability and knowledge to use the internet.<sup>36</sup>

### **Conclusion**

As it is shown in this essay, in general mean, for all types of the internet related disputes and particularly for domain name cases, cross-border litigation system does not work well. The main reason is that the internet is a tool of this era to create wider world for everyone. Therefore, thanks to the nature of the internet, it involves new types and more complicated disputes. However, cross-border litigation system is a solution of the old types disputes and in today's world, its application is not adequate to resolve internet related disputes.

With the development of the world trade, the world becomes smaller day to day and thoroughly types of the commercial disputes are also changed. Therefore, Alternative Dispute

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<sup>34</sup> Faye Fangfei Wang, Internet Litigation and ODR (Brunel University Blackboard 2015) 6

<sup>35</sup> Faye Fangfei Wang, Internet Litigation and ODR, (Brunel University Blackboard 2015) 8

<sup>36</sup> Gill C. & Others, Models of Alternative Dispute Resolution (ADR) A report for the Legal Ombudsman [2014] 30

Resolution system is much more applicable and effective than cross-border litigation. Online Dispute Resolution is also a way of the commercial disputes especially for internet related cases. Domain name cases are shared in this essay to enable more information and create well comparison with cross-border litigation.

ODR, as a solution of domain name cases at the best place yet to be much more applicable for any types of the internet related disputes, it must be improved. Because, it is applicable for small cases in general. To overcome this problem and to provide more referable resolution system as eBay ODR Service Provider, ODR must be revised and improved by ADR institutions and firms and people who are parts of the e-commerce should be more knowledgeable about the existence and application of the ODR.

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