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INTERNET CONFLICT OF LAWS: A SPACE OF OPPORTUNITIES FOR ODR*

CONFLICTO DE LEYES EN LA INTERNET: UN ESPACIO DE OPORTUNIDADES PARA LOS MEDIOS DE RESOLUCIÓN DE DISPUTAS EN LÍNEA

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Abstract

The inadequacy of current Conflict of Laws system, the lack of specialization, the high costs and long delays of court proceedings makes that traditional court adjudication as a means of resolving disputes is not always suitable for e-commerce disputes. Moreover, ADR (Alternative Dispute Resolution) offline is commonly impractical for B2C resolution of international e-commerce disputes and at times expensive enough so that B2B avoid engaging in them. This opens a Space of Opportunities for the use of ODR (Online Dispute Resolution) in e-commerce disputes. I aim to present in this venue some of the constructive ways in which ODR can be utilized to deal with the two main problems that emerge from relying on court judicial process, and ADR offline, to resolve e-commerce disputes: inadequacy of current Conflict of Laws system and the high costs and long delays of some e-commerce disputes.

Key words author: E-commerce, Conflict of Laws, Competent Jurisdiction, Applicable Law, Alternative Dispute Resolution, ADR, Online Dispute Resolution, ODR.

Key words plus: Electronic commerce - Juridies aspects, Conflict of Laws, Conflict management.

RESUMEN

El inadecuado sistema de Conflicto de Leyes actual, la falta de especialización, el alto costo y la lentitud del proceso judicial hacen que la adjudicación tradicional en los tribunales y cortes del Estado no sea siempre la mejor vía para resolver conflictos del comercio electrónico. Por otro lado, los medios alternos para la resolución de controversias (ADR), tales como el arbitraje y la mediación, son muchas veces imprácticos para la resolución de conflictos entre empresas y consumidores. Otras veces, suficientemente costosos para que las empresas mismas resuelvan los conflictos entre ellas a partir de los ADR. Esta situación abre un espacio de oportunidades para la utilización de medios para la resolución de disputas en línea (ODR). En esta ocasión, me propongo mostrar algunas de las maneras en que constructivamente se pueden utilizar los ODR para dar respuesta a dos de los mayores problemas que se originan de la adjudicación de disputas, a partir de la Adjudicación Estatal y los ADR tradicionales: el inadecuado sistema de Conflicto de Leyes, y el alto costo y la lentitud para resolver conflictos que se originan en el comercio electrónico.

Palabras clave autor: *Comercio electrónico, conflicto de leyes, corte competente, ley aplicable, resolución alternativa de conflictos, resolución de conflictos en línea.*

Palabras clave descriptor: *Comercio electrónico – Aspectos jurídicos, Derecho internacional privado, Solución de conflictos.*

SUMMARY

Introduction

Disagreements between contracting parties are common both in real and in cyberspace. However, the gestation of conflicts and their resolution differs in each space. E-commerce disputes originate with particular characteristics due to the internet nature and the way internet transactions are entered into.

Accordingly, the traditional State system based in public courts, and eventually ADR offline, are not always suitable to manage disputes, which originate in cyberspace. I can mention four main barriers or problems that emerge from relying on both systems of resolution of disputes, all of them apply to Courts, the last two apply to some ADR offline.

The first problem is the inadequacy of current private international law when applied to a non-territorial internet. Courts have problems to conciliate cyberspace's nature with the traditional competent jurisdiction and choice of law concepts, which have been funded by the notion of territoriality. The second problem is the incapability and unwillingness of courts to spend the time to keep updated on the changes both in technology and processes. This represents the biggest obstacle to the development appropriate (specialized) skills for the settlement of e-commerce disputes. The third and four problems are related to cost and time. E-disputants experiences are that in court litigation, and eventually in International Mediation and Arbitration, cost is very high (due to its international element), and delays are very long. This provokes resistance to the risk of court litigation and to the high expenses and delays of some ADR offline procedures.

In Part Two and Three of this work, the current state of the *conflict of laws* system is reviewed from a comparative perspective. In Part Four, it is demonstrate how the *conflict of laws* problem to establish jurisdiction and applicable law for e-commerce disputes can be solved by the use of ADR mechanisms. Also in Part Four, it is presented some of the current issues relating to ADR for consumers disputes. Part Five describes how ODR finds a Space of Opportunities to enhance ADR offline mechanisms. Part Six concludes.

I. CONFLICT OF JURISDICTIONS: COMPARATIVE STUDY[1]

E-commerce principally consists of buying, selling, marketing, and servicing using computer networks. For Lawrence Lessig, e-commerce represents one of the aspects of the internet revolution.[2] Internet architecture favoured the expansion of the market.

The abolition of borders in markets led to the dismantlement of the international private law system. The nature of the internet means that current rules of Private International Law (PIL) cannot be applied properly to e-transactions. There are two main reasons which sustain the premise that national legislation is inappropriate to govern the internet. Firstly, it is inappropriate because of the international character of the internet. Secondly, it is out of place because national legislation has always been designed for a material-order.[3]

Indeed, the conventional PIL approach inevitability looks to geography when determining the competent jurisdiction and deciding on the law for a dispute. Considering that for e-commerce, places are practically unallocated, questions like the one, '*where do activities occur, or where are the activities deemed to have occurred?*' may work for territorial PIL but not on the internet. This puts in crisis the whole system of conflict of laws which deems to deal with disputes having an international element.

For e-commerce disputes it means that preliminary issues, such as the assertion of competent jurisdiction and choice of law, become complex and unpredictable. In this section and in section 3 of this presentation we review the problems emerging from the application of current PIL.

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1 This section mainly reviews two main systems of conflict rules for contracts: that in place in the European Union and that of the United States.

2 Lawrence Lessig, *The Future of ideas: the Fate of the Commons in a Connected World*, 114 (Vintage Books, New York, 2002).

3 Pierre Sirinelli, *Le village virtuel et la creation normative*, in *Which Court Decides? Which Law Applies*?, 14 (Katharina Boele-Woelki & Catherine Kessedjian, Kluwer Law International, The Hague, Boston, c1998).

A. B2B Competent Court

The purpose of the *conflict of laws* is to determine how a national court shall behave when confronted with a legal dispute, with an international element.[4]

The European Union, through the Brussels Regulation (BR),[5] has adopted a common set of rules to establish *competent jurisdiction* in each of the member states.[6] The court to which an e-commerce party intends to raise a claim must ensure that it has jurisdiction to rule on the issue.[7] BR provides in art. 2 (1) a general ground to establish competent jurisdiction. The article refers to the court of the member state where the defendant is domiciled.[8] (The definition of a company's domicile is found in article 60).[9]

As an alternative article 5.1 (a)(b) establishes *Special Jurisdiction.*[10] Under this provision the defendant party in matters relating to a contract, can be sued in the courts for the place of performance of the

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4 Susan M. Nott, *For Better or Worse? The Europeanisation of the Conflict of Laws,* 24 *Liverpool Law Review*, 1-2, 3-17, 3 (2002).

5 Council Regulation (EC) No. 44/2001, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Official Journal of the European Communities, OJ L 12 of 16.01.2001].

6 Art. 1. 1. "*This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. 3. In this Regulation, the term 'Member State' shall mean Member States with the exception of Denmark.*" See for example cases: *LTU v. Eurocontrol* 19977 1 CMLR 293. *Netherlands State v. Ruffer* 1981 3 CMLR 293.

7 Christopher M. V. Clarkson & Jonathan Hill, *Jaffey on the Conflict of Laws,* 189 (2nd ed., Butterworths, 2002).

8 Article 2 (1). "*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*"

9 Article 60. 1. "*For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:*
(a) statutory seat, or
(b) central administration, or
(c) principal place of business.
2. For the purposes of the United Kingdom and Ireland 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place."

10 Article 5. "*A person domiciled in a Member State may, in another Member State, be sued: 1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;*
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
- In the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered.
- In the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided."

obligation in question: the place of performance of the obligation in question is: - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered; - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided, on matters relating to this contract.

The first questions arise: How can a Court establish the place of the specific performance in a contract of software licensing or of a sale of software, if everything can take place on the internet, where many parties in different territories are involved?

Furthermore, Article 5.5 provides that a person domiciled in a member state may, in another member state, be sued: (5) "*as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated*." How many branches does '.com' company can have in through all Europe? Can a specific *country domain name* be considered as a branch *e.g.* co.uk/, en.fr/, ne.it/, em.es/, etc.? Does it mean that many European courts can establish jurisdiction?

In the US the assertion of personal jurisdiction must be consistent with the constitutional requirement of due process; "*minimum contacts*" criterion. To satisfy the due process requirement of the U.S. Constitution,[11] a defendant must have "*sufficient minimum contacts*" with the forum such that the maintenance of the suit does not offend "*traditional notions of fair play and substantial justice*."

Under what circumstances may a United State's court assert jurisdiction over the e-commerce party based on contacts that the company has with the forum territory via use of the internet?

In the Internet context, defendants have generally claimed that a remote forum cannot establish jurisdiction because the contacts are only established through a server that is not within the forum.[12] Defendants assert that their activities are not directed at the forum

11 US Constitution, amends. V, XIV.

12 Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 *University of Pennsylvania Law Review*, 1951 (2005). http://ssrn.com/abstract=691501.

state. The contrary would mean that an e-company could be sued in all of the 50 states where its advertisements can be accessed?

There are two approaches that are dominant in US law to establish competent jurisdiction. The first of them is the three-category approach set forth in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[13] In this case it was distinguished between active and passive web sites. At the present case I was held that remote, passive web sites, did not accord personal jurisdiction to the forum. The Court stated:

> "*When a defendant makes a conscious choice to conduct business with the residents of a forum state 'it has clear notice that it is subject to suit there. ... If Dot Com had not wanted to be amenable to jurisdiction in Pennsylvania, the solution would have been simple - it could have chosen not to sell its services to Pennsylvania residents*."

Dissatisfaction with Zippo led to a revision to make it more consistent with the minimum contacts criterion. In *ALS Scan, Inc. v. Digital Service Consultants, Inc.*,[14] the Court looked to online targeting and to deleterious effects within the forum to determine if personal jurisdiction was appropriate. The court held that information transmitted into the jurisdiction over the Internet that causes harm within the jurisdiction provides minimum contacts.

The second approach in US is called "*the effects test*." In *Panavision International, L.P. v. Toeppen*,[15] the court established jurisdiction where a domain name was registered in order to divert internet traffic away from the forum.

These same inter-states principles would apply in determining whether a US court can assert authority over companies abroad.[16] This makes it very difficult to assess where jurisdiction can actually be found. A worst-case scenario would provide personal jurisdiction in every physical location where a e-business can be accessed or where it is susceptible to cause some effects.

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13 952 F. Supp. 1119 (W.D. Pa. 1997).
14 293 F.3d 707 (4th Cir. 2002).
15 141 F.3d 1316 (9th Cir.1998).
16 *Graduate Management Admission Council v. Raju*, 241 F. Supp. 2d 589 (E.D. Va. 2003). *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073 (C.D. Cal. 2003). *Yahoo! Inc. v. La Ligue contre le Racisme et l'Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004).

B. B2C Competent Court

In EU, certain restrictions have been placed on the principle of party autonomy.

These restrictions typically apply in situations where there exists a qualified degree of difference between the parties in terms of their respective negotiating strengths. An important example of such a situation is when a business sells goods or services to a consumer. Consumers are deemed as being in a weaker position than the business. Thus, the jurisdictional rules of the BR stipulate that the vendor may only sue the consumer in the country where the latter is domiciled, while the consumer may always sue the vendor in the consumer's country of domicile.[17]

BR article 15 is intended to make it easier to bring Internet-based marketing and contractual operations within the ambit of the special jurisdictional rules for consumer contracts. However, article 15 remains rather nebulous on many significant points relating to e-commerce. For example, there is no detailed guidance on the meaning of the expression '*directs such activities*' (Art 15.1.3) in the context of Internet-based marketing and contracting.

Moreover, BR does not specify what is exactly meant by an *interactive website*. We can only assume that interactivity entails a facility for exchange of information between the website and those visiting it, including a facility for placement of purchase orders.

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17 Article 15: "*In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and Article 5(5), if:*
(1) it is a contract for the sale of goods on instalment credit terms; or
(2) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
(3) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several countries including that Member State, and the contract falls within the scope of such activities.
Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of that branch, agency or establishment, be deemed to be domiciled in that Member State.
This section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation."

Other uncertainties concern, *inter alia*: whether digitised products may constitute goods; whether a website may constitute a '*branch, agency or other establishment*' (Art. 15.2); and the issue of protection of the vendor's good faith (including the extent of such protection).

In the United States as a general matter, jurisdiction for cases brought by consumers is determined as follows: (i) in the absence of a choice of forum clause in a contract, businesses are subject to specific personal jurisdiction in places where they target and sell goods to consumers; (ii) many American courts have refused to uphold choice-of forum clauses in consumer contracts on the ground that they are unfair and unreasonable.

In addition, US courts have generally held that consumer protection authorities can assert jurisdiction over foreign businesses harming American consumers.

II. Conflict of Laws: Comparative Study

As previously mention, there are two main reasons for considering the current PIL system inappropriate for establishing the law applicable to e-commerce transactions. On the one hand, conflict rules for the applicable law to a dispute lead to the application of national law to international problems. This is unsuitable because national law has been developed for national and not for international situations and, for that reason, it does not always provides the best answers to international business problems.[18] On the other hand, the techniques used in conflicts of laws rules are not always effective. They always look to connecting points in international situations but remain blind to cyber-realities.[19] It is difficult, and sometimes arbitrary, to localize some complex e-business in one applicable law.

18 Filip de Ly, *International Business Law and Lex Mercatoria*, 57 (North-Holland, Amsterdam, 1992).

19 *Ibid*, 58.

A. B2B Applicable Law

The issue of *choice of law* in the EU is also problematic. The Rome Convention (RC) allows the parties to choose which law to rule their contracts.[20] In a world without boundaries like cyberspace, it makes sense to allow contracts to govern which law applies and which do not. The competent European court will be required to appreciate whether or not there exists an implied choice of law under article 3 of the RC.[21] In the absence of expressed choice, the contract is governed by the law of the country with which it is most closely connected. The RC, as most *choice of law* rules, refers to the principle of the proper law, the law with most significant relationships or relevant contact.

Article 4.1 Paragraph 2 clarifies the expression by declaring: "*...a contract is* most closely connected *with the country where the party who is to effect the* performance which is characteristic *of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration*." The formula is deliberately vague. It represents a difficult task, since there is a risk of uncertainty as to the solution selected.

The "*characteristic*" performance is that which constitutes the centre of gravity of the contract.[22] Basically, the party providing the characteristic performance is the person to whom the payment is due, *i.e.* the delivery of goods or the provision of a service. In a contract of software licensing the party providing the characteristic performance would be the one that allows the use of the software itself; and for the sale of products is certainly the party which must be paid for the goods delivered. But how can one distinguish the

20 Adrian Briggs, *The Conflict of Laws*, 54 (Oxford University Press, Oxford, 2002).

21 Convention on the law applicable to contractual obligations (80/934/EEC). Article 3. "*Freedom of choice. 1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract*."

22 "*The submission of the contract, in the absence of a choice by the parties, to the law appropriate to the characteristic performance defines the connecting factor of the contract from the inside, and not from the outside by elements unrelated to the essence of the obligation such as the nationality of the contracting parties or the place where the contract was concluded. ...The concept of characteristic performance essentially links the contract to the social and economic environment of which it will form a part... Which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction*." *Ibid*.

domicile of a web-company that negotiate and enter into contracts from different internet interfaces through its subsidiary companies that can be accessed through different domain names registered in many jurisdictions and accessible world-wide?

Moreover, EU courts could disregard the presumption of Art 4.1.2 "*if it appears from the circumstances as a whole that the contract is more closely connected with another country.*"[23] This looks like a transgression.[24] This means that if the characteristic performance cannot be determined, an EU court can apply a different law, if it appears from the circumstances as a whole, that the contract is more closely connected with the law of another country.

This vague approach, as it prevails today in the EU, is not adequate for e-commerce. It is a bad way to handle *applicable law* for internet disputes.[25]

The US *conflict of laws* system is not better designed. It lacks clear rules and consists of several different, co-existing approaches.

Although the most significant relationship approach can be identified as in other *conflict of laws* rules, this approach provides nothing more than general guidelines and leaves considerable leeway for US judges to decide the question of applicable law. It is important to mention that the applicable law may often depend on the jurisdictional result, since US courts have an inclination to apply the *forum law*.[26]

For instance, in *Twentieth Century Fox Film Corp. v. iCrave TV*, a film studio fought successfully to apply US copyright law and obtained an injunction against a Canadian service that could legally stream video

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23 Article 4(5).

24 "The exception clause *of Article 4(5) must be used carefully and rarely since its frequent application leads to unforeseeability as to the applicable law – an unforeseeability [...].*" "*Only if it emerged that the law designated is not appropriate because other circumstances clearly militate in favour of another law would the court then use the exception clause*." This is precisely the rule laid down in a *Decision of the Dutch Hoge Raad*, whereby the court must first apply the presumption of Article 4(2) and rule out the law thus obtained only if it is obviously unsuited to the instant case. *Green Paper on the conversion of the Rome Convention into a Community instrument and its modernisation*.

25 Matthew Burnstein, *A global network in a compartmentalised legal environment*, in *Which Court Decides? Which Law Applies?* 28 (Katharina Boele-Woelki & Catherine Kessedjian, Kluwer Law International, The Hague, Boston, c1998).

26 Simone van der Hof, *The Relevance of Party Autonomy with respect to International Online B2B Contracts – A European and US Perspective*, 4. http://hcch.e-vision.nl/upload/wop/e-comm_vdhof.pdf.

in Canada from servers in Canada. US courts tend to apply its *forum law* when in their consideration it justifies the application of US law and not when it leads to the application by a *conflict* rule.[27]

B. B2C Applicable Law

In the EC, the RC contains special rules to protect the weaker parties, such as consumers. The mere fact that a contract specifies that a particular law is to be applicable shall not deprive a consumer of the protection of mandatory rules of the law normally applicable to them.

Where the parties have made not provided otherwise in their contract, a consumer contract is governed by the law of the country where the consumer is habitually resident.

In the United States the applicable law may often depend on the jurisdictional result, since US courts have an inclination to apply the forum law,[28] especially in cases of protection of consumers located within the their territory.

III. ADR FOR E-COMMERCE

ADR offers alternative means to deal with international e-commerce disputes. ADR can be more flexible and specialized than traditional Court adjudication. As a starting point, ADR can be used to evade the *conflict of laws* complicated process. However, E-disputants experiences are that in some ADR off-line cost is very high (due to its international element), and delays are sometimes long. This provokes resistance to traditional ADR.

ADR as appropriate means

In ADR no *conflict of laws* system is immediately applicable.[29] For instance, mediators do not make use at all of conflict rules, or any

27 John Rothchild, *Jurisdiction over E-Commerce Transactions: United States Law*. 2. http://hcch.e-vision.nl/upload/wop/e-comm_rothchid.pdf.
28 Simone van der Hof, *op. cit.*, 4.
29 De Ly, note 18 above, 91.

national law. The parties themselves solve their disputes through a process of negotiation, and international arbitrators are not bound to deal with conflict rules. Let me explain how the *conflict of laws* process is highly simplified in international commercial arbitration, which may be considered as the only adjudicative procedure of ADR.

The principle of party autonomy also applies for international arbitration. This means that the parties can agree that any controversy or dispute arising out of, or relating to, their e-contract, will be settled solely and exclusively by binding arbitration in X country. They can also agree that such arbitration will be conducted in accordance with the prevailing laws in *Y* country, but that the law of country *Z* will govern the merits of the case. The arbitral agreement is, in this regard, very effective because it grants jurisdiction to the arbitral tribunal and prevents courts from ruling with regard to the decision on the merits of the case. The problem of *competent jurisdiction* and *choice of law* is completely solved. Certainty and predictability is achieved as parties know where, who and how their dispute will be settled.

Moreover, even in the case where the parties entered into an arbitration agreement which does not establish the seat of the arbitration, *curial law*, nor *choice of law* for the merits of the case, the arbitration *conflict of laws* process would be easier and would provide more certainty and predictability than the courts' *conflict of laws* procedure.

When no choice has been expressed by the parties, the arbitrator will determine the place of arbitration so that there can be no misunderstanding regarding the place.[30] If the parties did not choose the law for the proceeding (*curial law*) the governing law is the law of the seat of the arbitration (*Lex loci arbitri*).[31] Parties are free to agree the law governing their substantive rights and obligations. For their own convenience, they may decide to refer to the law of a particular country, to public international law[32] or to *lex mercatoria* or, to equity and good conscience. When they have chosen the applicable law the courts and tribunals will respect that choice.

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30 *Ibid*, 85.

31 Jonathan Hill, *The Law relating to International Commercial Disputes*, 477 (Lloyd's of London Press, London, New York, 1994).

32 See, for instance, the Vienna Convention for the International Sale of Goods. http://www.cisg-online.ch.

In the absence of choice the basic principle is that the *curial law* determines the law the arbitrator must apply.[33] In practice they use the *conflict of law* rules of the law to the proceedings, which is generally the law of the seat. However, arbitrators have more freedom as to the application of the conflict rules and show a more transnational reflex. They do not tend to take a *homeward view*, that is, they do not manipulate the conflict rules so that the *Lex fori* would be the applicable law to the merits, as is often the case with court judges.

In most countries, the arbitrator is free, in the absent of a choice of law, to apply those rules of law which he considers appropriate.[34] Also, in international commercial arbitration attention has been paid to contract clauses and trade usages as viable resolution rules. For instance, article VII (1) of the European Arbitration Convention[35] provides that arbitrators shall take account of the terms of the contract and trade usages, whether or not the parties have indicated the applicable law. Similarly, under article 28 (4) of the Uncitral Model Law, the arbitral tribunal shall take into account the usages of the trade applicable to the transaction.[36]

Also, arbitration is chosen because parties are more willing to execute an arbitral award than a court judgement. This expectation is based upon the high percentage of voluntary compliance with institutionalised arbitral awards.[37] What is more, the existence of the New York Convention[38] makes it easier for an international arbitral award to be recognized and enforced in a foreign jurisdiction, than it is for a foreign national court judgement.[39]

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33 Hill, note 31 above, 481.

34 For instance France; article 1496 of the French New Code of Civil Procedure: "*The arbitrator shall determine the dispute in accordance with the rules of law that the parties have chosen; in default of such a choice, in accordance with those which he shall deem appropriate. He shall consider in any case the customs in commercial activities.*"

35 European Convention on International Commercial Arbitration. http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04011.html.

36 UNCITRAL Model Law on International Commercial Arbitration (1985). http://www.jus.uio.no/lm/un.arbitration.model.law.1985/.

37 According to the International Chamber of Commerce, 90% of the awards are spontaneously complied. *2004 Statistical Report*, *ICC International Court of Arbitration Bulletin*, 16/1, 21.

38 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10th, 1958). http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

39 De Ly, note 18 above, 85.

In brief, ADR offline offers an appropriate means to deal with international e-commerce disputes, while evading the *conflict of laws* complicated process.

B. Current consumers' issues[40]

In most countries there are no specific provisions that prohibit contractual agreements between parties to be bound by ADR after a dispute has arisen.[41]

However, the general practice appears to be that contractual provisions binding parties to ADR prior to a dispute having arisen may be regarded as an "*unfair*" contract term (mostly because of expenses issues) or contrary to public policy, notably if it deprives the consumer to the right to go to court.[42]

Legislation in EU for example mandates that consumer contracts entered prior to a dispute containing an arbitration clause are automatically invalid as unfair. Similarly, in the United Kingdom, an arbitration agreement is automatically void as unfair for consumers specifically if it relates to a claim for a small amount.

In contrast, in the United States, a consumer is free to consent to be bound by ADR but that contract law will apply to ultimately determine the validity of a contract to engage in and be bound by ADR. For example, in the United States, a contract is not invalid simply because it deprives the consumer of the right to go to court – the validity of a contract in this situation is decided on a case-by-case basis. The general rule is that such contracts are valid, irrevocable, and enforceable, except where they violate general principles of contract law, such as fraud, duress or unconscionability.

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40 Organisation for Economic Co-operation and Development, OECD, Committee for Information, Computer and Communications Policy Committee on Consumer Policy, Working Party on Information Security and Privacy, 8 (July, 2004).

41 For example, Mexico, Austria, France and Italy noted that in the case of agreements signed at the conclusion of an ADR process, contractual autonomy is recognised and agreements signed by the parties will be binding according to contract law.

42 Countries which adopted this approach included Australia, Austria, Canada, Denmark, Finland, Italy, Japan, Netherlands, Spain and Sweden.

Legislation in Japan also indicates that an agreement to refer future disputes to arbitration is valid as long as it relates to determined relations of right and disputes arising there from.

In most jurisdictions the reasons sustaining the invalidity of those ADR agreements are often based on the high cost of some ADR that would unbalance participation of parties and the opportunity for consumers to present their cases.

For instance, critics say arbitration and some international mediations can mean high filing fees. Filing a case in national courts is often very cheap if not free of charges for consumers, depending on the amount claimed. Filing fees for arbitration can cost thousands of dollars, depending on the case and the arbitration institution. Fees for hearing rooms and the arbitrator's time can run tens of thousands of dollars more and discourage individuals from pursuing a case. As well as the traveling expenses incurred in some international disputes.

IV. ODR CONTRIBUTIONS TO ADR OFFLINE

It is evident that the volume of B2B and B2C electronic commerce will continue to increase dramatically for the next decade. Consequently, it is reasonable to assume that disputes arising in the internet between small, medium and large size companies or between business and consumers can be resolved through the use of the internet.

ODR has adapted a range of traditional ADR processes for use online, including arbitration and mediation. In this sense, ODR has all the advantages of the ADR mechanism including the capacity to evade the *conflict of laws* problem of traditional court adjudication.

But ODR goes beyond ADR offline, as ODR uses the power that computer technology has, to support the storage and dissemination of information. This power can be used to solve the two main problems encountered in some ADR off-line procedures: high cost and long delays in international mediation and arbitration.[43]

43 For a comparative analysis of cost and time of ADR off-line *vis à vis* ODR cost and time procedures see Appendix A.

ODR provides an environment where communication power can be balanced. ODR can empower weaker parties, including small companies and consumers, by taking away some imbalance issues. For instance, ODR is said to avoid travel expenses, thereby reducing geographic constraints and take away a power imbalance. Rather than avoid disputes because of high cost or long distances, enterprises and consumers can seek resolution of disputes with bigger companies, which may not be possible without computer technology. Thus, consumers and businesses that may be perceived as "*petite*" at the bargaining table are no longer in this position.

Online mediation can be via email[44] or through a secure website.[45] There are many providers of online mediation including Dispute Manager, WebMediate, and Square Trade among others.[46] There are also many providers of online arbitration, including Nova Forum, Private Judge and Word & Bond.[47]

Cyber-mediation may be the only feasible option for individuals who are unable to afford travelling long distances, or for those involved in e-commerce disputes for low amounts of money.

With attorney's fees being perhaps the greatest expense in traditional litigation, or even sometimes traditional mediation and arbitrations, parties may be able to save a lot of money in cyber-mediation, where hiring an attorney is often unnecessary. For example, if the parties have determined liability and their dispute is solely over the amount of a monetary settlement, then the fully automated cyber-mediation websites discussed above may be sufficient to resolve their dispute.[48]

In addition, substantial cost savings may also result because online mediation does not require parties to pay for long-distance phone calls or teleconferencing.

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44 Email - a virtually instantaneous transfer of text messages.

45 Instant Messaging - a variant on email that can be used asynchronously and also allows synchronous online chat.

46 Melissa Conley Tyler, *Seventy-six and Counting: An Analysis of ODR Sites*, in *Proceedings of the UNECE Second Forum on Online Dispute Resolution,* 8 (Ethan Katsh & Daewon Choi, eds., Center for Information Technology and Dispute Resolution, University of Massachusetts, 2003). www.odr.info/unece2003/pdf/Tyler.pdf.

47 Conley, note 46 above, 9.

48 To know about the fees charge for some of the most important ODR providers see Appendix A.

Perhaps the most recognized benefit of ODR mechanisms is that the disputants do not have to travel lengthy distances to negotiate. Since online disputes can arise between individuals from great distances, and even different countries, at least one of the parties will be required to travel far if they decide to rely on a traditional dispute resolution procedure.

Certainly, parties can participate in ODR from their respective business locations or residences; this may lead to reduced costs and the expenditure of less time. There is no need to rent a neutral facility to conduct the mediation and relevant documents and materials are readily available and do not have to be transported great distances.

V. CONCLUSION

We know that the main elements to consider in *choice of dispute resolution mechanisms* for E-commerce are access barriers such as costs and time, transparency of proceedings and resolutions, and increased cross-border litigation. The main access barriers (problems) to national courts are their use of inadequate private international rules, costs, long delays, rigid procedures and lack of specialization.

ADR offline can be successfully used to evade the *conflict of laws* complicated process. The jurisdiction problem is immediately solved. Certainty and predictability is achieved as parties know where, who and how their dispute will be settled.

ODR goes beyond as it not only solve the problem of the conflict of laws process but also is successful in reducing legal costs and time consumption for business disputants. Computer technology spread of massive amounts of free information is further lowering access barriers to mediation and arbitration cases. ODR is not just flexible, specialized and expeditious but also empowers the individual. ODR processes allow parties to adopt positional bargaining and problem-solving modes to solve e-commerce disputes. ODR offers more appropriate procedures for e-commerce because different (cyber) circumstances and (cyber) interests require creative procedures.

Appendix A
Cost and Time of ADR offline Procedures

ADR-offline providers	Fees and average cost	Average of delay
ICC ADR	**Appendix** **Schedule of ADR Costs** A. The party or parties filing a Request for ADR shall include with the Request a non-refundable registration fee of US$1,500 to cover the costs of processing the Request for ADR. No Request for ADR shall be processed unless accompanied by the requisite payment. B. The administrative expenses of ICC for the ADR proceedings shall be fixed at ICC's discretion depending on the tasks carried out by ICC. Such administrative expenses shall not exceed the maximum sum of US$10,000. C. The fees of the Neutral shall be calculated on the basis of the time reasonably spent by the Neutral in the ADR proceedings, at an hourly rate fixed for such proceedings by ICC in consultation with Neutral and the parties. Such hourly rate shall be reasonable in amount and shall be determined in light of the complexity of the dispute and any other relevant circumstances. The amount of reasonable expenses of the Neutral shall be fixed by ICC.	
LCIA	**Schedule of Costs** I. Registration Fee The Registration Fee referred to in Article 3 of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Rules") amounts to EUR €1,500. Arbitrators' fees are calculated according to the amount in Dispute in Euros: up to €25,000= 2,500 min/5500max, from 25,000 to 50,000= 2,500 + 2% of the amount above 25,000 min/ 5,500 +14% of the amount above 25,000 max, from 50,001 to 100,000= 3,000 + 2% of the amount above 50,000 min/ 9,000 +4% of the amount above 50,000 max…	There is no such thing as an "average" arbitration. However, if one discounts those cases which may be said to be atypically long or short (passing two years at one extreme and settling before the appointment of the Tribunal at the other) the present average duration of an LCIA arbitration is approximately 11 months.

ADR-offline providers	Fees and average cost	Average of delay
El Centro de Arbitraje de México (CAM)	Artículo 38: Depósito para cubrir los gastos del arbitraje Corresponde al Secretario General fijar el importe del depósito de fondos para cubrir los gastos de arbitraje utilizando el Arancel para el cálculo de los gastos del arbitraje que establece el Apéndice II. Según el calculador automático por un monto del litigio equivalente a $100.000 pesos mexicanos, la tasa administrativa será de un valor de $22.000 pesos mexicanos (US$2,000) y los honorarios de un árbitro serán de $48.000 pesos mexicanos (US$4,200).	
World Intellectual Property Organization (WIPO) *Arbitration Mediation*	Mediation Administrative fee is 0.10% of the value of the mediation, subject to a maximum of US$10,000. Mediators fees are US$300-US$600 per hour or US$1,500-US$3,500 per day. Administration fee for Arbitration are up to $2,5M = $2,000, from $2,5M to $10M = $10,000, over $10M = $10,000 + 0.05% to a maximum fee of $25,000. Arbitrator(s) fees for Arbitration are up to $2,5M, from $2,5M to $10M, over $10M = As agreed by the Center in consultation with the parties and the arbitrator. Indicative rate(s) $300 to $600 per hour.	

COST AND TIME OF ODR PROCEDURES

ODR providers	Fees and average cost	Average of delay
Camera Arbitrale di Milano *Online Mediation*	Fees for each party in EURO (VAT included) shall depend on the economic value of the dispute up to 500 = 25, from 501 to 1.000 = 40, from 1.001 to 5.000 = 80 from 5.001 to 10.000 =150, from 10.001 to 25.000 = 250 from 25.001 to 50.000 = 450, from 50.001 to 250.000 = 1.000, over 250.001 = 3.000.	From one to two weeks
Cibertribunal peruano *Concilation and Arbitration*	CONCILIATION The applicant US$60.00. The party invited US$60.00. The administrative expenses for the conciliation procedure depend on the amount of the controversy and the tariff table will apply. ARBITRATION Cost for Arbitration Appointment of arbitrator shall depend on the value of the dispute up to US$1,000 = 100, from 1,001 to 3,000 = 300, from 3,001 to 5,000 = 500, from 5,001 to 10,000 = 600. The administrative expenses for the arbitration procedure depend on the amount of the controversy and the tariff table will apply.	
Conflict Resolution.com Mediation	Most mediators charge between $100.00 and $300.00 per hour, divided equally between the parties. (Retired judges often charge more than $300.00 per hour).	
Mediation Arbitration Resolution Services (MARS)	Complaint Filing Fee $10.00 Complaint Response Fee without a Seal (Online Dispute Resolution Case Management Service) $10.00. Cost should a mediator/arbitrator need to become involved in a case (this fee is only incurred should you and the consumer/buyer not be able to settle the dispute on your own) $30.00. Should the mediator/arbitrator be required to settle the case and make an award in favor of the consumer/buyer, there will be a Complaint Resolution Fee of 3.00% of the award, charged to you.	

ODR providers	Fees and average cost	Average of delay
Mediation Now	The cost for online mediation, as with traditional mediation, varies from mediator to mediator, and with the complexity of the issues. In addition to the actual mediation session, mediators typically charge for their preparation time and also for any post-mediation tasks requested by the parties. There may be some cost savings associated with online mediation which might not be available with traditional mediation: • Use of physical conference and meeting space is not needed. • Since online mediation usually involves extensive written communication, the parties may be more deliberate and efficient in their communication. • Again, since there may be extensive written communication, the parties may find it easier to codify agreements reached. • The parties and the mediator do not have to travel to a central location.	
ODRWorld	FEES Currently we are having an introductory offer: Assisted Negotiation - US$15 per case for a period of 14 days Automated Negotiation – US$15 per case. If bids do not match, parties can have any number of attempts for a period of 14 days. Mediation – US$38 per case for a period of 14 days. Arbitration - US$380 – US$1,200 (depending upon the subject matter of the case). In the event parties wish to apply for extension, during the introductory period, extension will be provided for a further 14 days at the rate of US$15 for Assisted Negotiation and US$38 for Mediation.	A period of 14 days

ODR providers	Fees and average cost	Average of delay
Private Judge	Mediation Private Judge works with parties to facilitate an agreement. Fee: US$2,000 to US$5,000 per party per day. Arbitration Private Judge, after weighing the evidence and the law, renders a decision. Arbitration by international treaties. Cases billed on a project basis, based on the time and complexity of the dispute. Administration Fee: US$1,200.	A typical arbitration might last from one to ten days, but it can take longer in complex disputes.
SquareTrade *Mediation*	Standard Pricing US$29.95	
The Claim Room	For a settlement value up to and including £2,000 - £100 Over £2,000 and up to and including £5,000 - £200 Over £5,000 and up to and including £10,000 - £300 Over £10,000 - £400	
Webmediate.com	It is generally $30 to register a new matter with WebMediate. If your matter is successfully resolved through WebSettlement, the fee is 5% of all settlements under US$5,000 (not to exceed $100) and 2% of all settlements over US$5,000 (not to exceed $400), which fee is divided equally between the parties. WebMediation and WebArbitration fees are based on the time devoted by the WebMediator or WebArbitrator to the matter. Generally, the fee is US$250 per hour for these services, divided between the parties.	In general, WebMediation may be completed within 14 days In WebArbitration, the rules provide that the parties may take longer to submit their formal statements and rebuttals.

ODR providers	Fees and average cost	Average of delay
World Intellectual Property Organization (WIPO) *Arbitration Mediation*	Mediation Administrative fee is 0.10% of the value of the mediation, subject to a maximum of US$10,000. Mediators fees are US$300-US$600 per hour or US$1,500-US$3,500 per day. Registration fee for expedited Arbitration is US$1,000 and for Arbitration is US$2,000. Administration fee for expedited Arbitration are up to $2,5M = $1,000, from $2,5M to $10M = $5,000, over $10M = $5,000 + 0.05% to a maximum fee of $15,000. Arbitrator(s) fees for expedited Arbitration are up to $2,5M = $2,000, from $2,5M to $10M = $40,000, over $10M = As agreed by the Center in consultation with the parties and the arbitrator.	
The Asian Domain Name Dispute Resolution Centre (ADNDRC) Arbitration	1 to 2 domain names US$500 Presiding Panelist: US$1,000 Each Co-Panelist: US$500	57 days normal procedure

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