

IT LAW – A CHALLENGE OF DISPUTE RESOLUTION

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IT law or cyber law or internet law, is evolving in giant steps. On its way, it has many challenges to meet and a lot of burdens to cope with. Being a part of international law, it is though specific in its nature, mode of implementation and protection. While the classic international law deals with classic state territories, state jurisdictions, with a clear distinction between national laws, the IT law is uncertain about the state jurisdiction, earthbound borders, rules and proceedings regarding any dispute arising on internet.

However, with a fast development of information technology, the number of legal contracts and businesses on internet rises, requiring the fast response by legal order in terms of regulating and protecting it.

From the time internet emerged, each entity operating on internet provided for its own rules. With the IT becoming more complex and demanding so were the rules. We therefore say that internet is ***self-regulated***, with no visible interference by state, apart from criminal activities control.

Some authors even call the internet private legal order where stateless justice¹ apply. Justice usually needs a state, which is a supreme authority, having the monopoly of violence, or the legitimate use of physical force. But speaking in internet terms, self-regulation has evolved, with the state interference being mainly excluded.

The form of entering into online contracts gets simplified, mainly requiring just a mouse click by 'I agree' or 'I accept'. The quantity of such legal interactions increases. It is often simpler and more convenient to purchase goods via internet, e-commerce blumishes. Parallelly to Single Market, the European Commission, the Juncker's Commission, has started to boost a Digital Single Market in 2015, which would provide growth of digital economy. Its aim is to provide the EU citizens equal online access to goods and services, making a parallel world to a conventional or a non-digital one. The Commission has just, on 25 May 2016, presented a package of measures in that regard with the objectives of advancing EU data protection rules,

¹ See Ortolani Pietro, The Three Challenges of Stateless Justice, Journal of International Dispute Settlement, 2016, 0, 1-32, Oxford, p. 6

reform of telecoms rules, copyright, simplifying consumer rules for online purchases, providing the same online content and services regardless of EU country, etc.

However, what happens if a dispute arises from an online legal interaction. Which court is in charge? In which state? Under what fees?

The law has always provided for a procedural protection of obligations entered into by various types of contracts. The usual protection belongs to courts. Court proceedings may sometimes be time-consuming, fairly expensive fees, and are usually non-voluntary for at least one party to the proceedings. That usually brings the use of multi-level proceedings, recourse to remedies and ends in compulsory enforcement proceedings.

With the development of trade, especially of trade which crossed the state borders, there emerged a system of solving disputes before a non-judicial bodies, arbitration. Arbitration became a convenient way of solving disputes arising from contracts that involve a cross border element. The very important segment, which was not present in conventional court proceedings, is voluntariness of parties which agree even prior to any dispute that might arise, about an arbitration body which would be in charge, in case a dispute happens. The arbitration became institutionalised, like the Paris ICC Arbitration, New York International Arbitration Center, etc.. However, many forms remain non-institutionalised, which include impartial experts in the area of dispute, who with the help of parties, and implementing various forms of mediation and arbitration, aim to resolve the issue. This way of settling cases became very well accepted, as the parties voluntarily agree to arbitration rules and therefore enforcement of any such decision becomes more acceptable to parties and usually deprived of a compulsory element. So not many arbitration awards face compulsory enforcement by courts, which is otherwise provided by the New York Convention².

However, with the emergence of online trade, there also came a question of solving any such dispute that might arise from online trade, whether the subject of such trade are goods or services. It is more natural for parties who enter into their contract online, to solve the dispute online.

In February 2016 the European Commission has launched an Online Dispute Resolution Platform (ODR)³ in order to provide for the structured and institutionalized recourse to resolving legal disputes arising on internet. It is designed to bring together the alternative dispute resolution (ADR) entities by member states, which fulfill certain quality conditions, provided in the Directive on consumer ADR.⁴

² The Convention on the Recognition of Enforcement of Foreign Arbitral Awards, 1958

³ <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN>

⁴ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

The European Parliament and the Council of the EU have adopted two key documents in respect of online dispute resolution (2013), i.e. the Directive on alternative dispute resolution for consumer disputes and Regulation on online dispute resolution for consumer disputes.⁵

The parties to the proceedings are a consumer, being a natural person, acting for purposes which are outside his trade, business, craft or profession, and resident in the Union, and a trader, a natural or legal person, privately or publicly owned acting for purposes relating to his trade, business, craft or profession.

The fees of the proceedings are supposed to be minimal or none. The length of proceedings should not exceed 90 days. Comparing to court proceedings, which are often lengthy and costly, this makes a good alternative.

Each trader is obliged to make visible the link to ODR platform, informing and enabling thus the consumers to initiate the proceedings in case of dispute.

The online dispute proceedings are to be led by key principles⁶ that ADR must fulfil including expertise, independence and impartiality, transparency including listing of ADR entities, natural persons in charge of ADR, the average length of ADR procedure, the legal effect of the outcome of ADR procedure including penalties for non-compliance, the enforceability of the ADR decision, if relevant. ADR proceedings must be effective, available and accessible with duration of up to 90 days except in highly complex disputes.

But the question which arises after every dispute is solved, is the enforcement of its outcome.

While the EU has just recently put forward the ODR platform, creating common principles of procedure for alternative dispute resolution entities joining the platform, there are already some good examples of self-regulated dispute resolution bodies. Some of the most successful models include Pay Pal, CyberSettle, and Domain dispute resolution-UDRP.

CyberSettle, the world's first online claim settlement company which was launched in late 90's and patented in 2001, invented the 'double-blind bid' dispute resolution process, which includes two parties each making three offers and three demands in dispute resolution, in separate 'blind' submissions. The CyberSettle automatically chooses the closest middle solution. PayPal profiled a system of chargeback, upon the complaint by the customer to his credit card issuer, in case, for example, of not receiving the ordered goods. PayPal holds the funds until the issue is resolved. UDRP (Uniform Domain-Name Resolution Policy) was designed to protect Trademarks from registering the same or similar domain names by non-owners of Trademarks, or cybersquatting.

⁵ Regulation (EU) no 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

⁶ Directive on consumer ADR

The common ingredient of these success stories is that the above ODR bodies themselves provided for an efficient system of enforcement, i.e. the self-enforcement. The ***self-enforcement*** is considered to be the simplest and best way of enforcing a decision arising from an online dispute. Self-enforcement is possible with the support of technology.

Another good incentive for enforcement is a ***trust*** the trader enjoys in the digital market. The impairment of the trust in the trader, would automatically scale down his position in the digital market. If a trader holds a Trustmark, as a guarantee of his quality, losing it for not complying with an online dispute resolution decision, would put him in a disadvantaged position, and would certainly make him obey the decision.

Moreover, disclosure of list of traders not complying with ADR/ODR decision might be detrimental to their reputation, which speaking of online traders, plays very important role in getting trust from the consumers in digital market. Furthermore, social networking on internet enable the information to spread fast, which as a result may lead to a drop of trader rating.

The ***trust*** is, speaking of online business, of utmost importance. Digital market is more sensitive and depending upon acceptance by the public than regular market. It responds quicker and any flaw is easily transmitted via internet. It lacks the physical assessment and therefore it is more reliable on written information. The market rules will certainly define that it is better for a trader to comply with the ODR decision, than to get an unfavourable reputation. E-commerce and e-business relies significantly on trust that it has built towards the customers. A customer is much more careful when entering an online shopping site than entering a real shopping mall.

It is still early to have a case-law resulting from running of the ODR platform, as it has just been released in February 2016. However the move by the European Commission to bring the self-regulation and self-enforcement under certain unified rules, shall certainly bring results. The platform is currently applicable in EU member states, except for Croatia, Luxemburg, Poland, Romania and Spain. The remaining 23 member states reported to the Commission a wide list of ADR bodies, which may operate under different names, ombudsman, mediator, arbitrator, etc. This is a huge step in moving from the conventional court system, in cases that originated in online interactions. That gives another unified form to the online legal order that has been creating spontaneously and hectically from the time the internet spread as a tool. The European Commission, representing the key governing functions of the EU, made a move towards bringing online system of running businesses, especially B2C, more secure and more convenient for the consumers.

The enforcement of ADR decision should therefore not be uncertainty of online dispute resolution proceedings. In that regard, it should be stressed that a milestone judgment of the European Court of Human Rights, *Hornsby v. Greece* (1997), provided that it would be 'illusory of a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party'. Accordingly, all procedural guarantees would be purposeless without protecting for the implementation of the result of the proceedings.

Although the ODR proceedings are not judicial proceedings, often being left without state control, amounting thus to stateless justice as referred to above, it would be unimaginable that the decision ending the online dispute resolution, remains with no effect in praxis. It would make the whole concept of online dispute resolution useless and deprived of its advantages, such as availability, fast resolution, small or no fees, and would eventually bring parties to the court, with all the shortcomings when online disputes are at stake, such as long proceedings, high fees, time-consuming, duty of appearing of parties in person, but with a certain enforcement. Accordingly, in order for the online dispute resolution to endure and evolve, as a breakthrough in IT law, the enforcement of its outcome, must not be compromised.