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ODR in .eu Domain Disputes: a Note from an Arbitrator

I. ODR – Deconstructing the Procedure

Information theory of law (or legal informatics[2]) is methodologically based on an assumption that the system of law can be seen and used as an information system[3]. In this view, the normative expressions[4] are understood as viewable forms of strict normative information (norms) while other parts of the body of law that (can) lack direct expressions (typically legal principles or recognized natural legal rules like fundamental rights[5]), are treated as unexpressed, yet objectively existing, regulatory information.

In that respect, the settlement of disputes is viewable as a simple information procedure, where input is information on facts and law, and output is information contained in the final decision. It is then a task for the applied branch of legal informatics to make all information transactions as simple and efficient as possible[6], i.e. to develop best possible means of accessing the procedure by providing parties for easy and fast tools of communication with the authoritative institutions, by giving them an opportunity to submit as easily as possible a maximum of all kinds of information that is relevant to the case, and then to make them able to the maximum possible extent to communicate with each other and with the body that is empowered to render the final decision[7]. Apart from that, it is also a task for legal informatics to develop measures and means to conveniently supply the parties with relevant information as to the applicable law, including substantive and procedural rules, case-law, doctrinal comments etc., so that they can make qualified decisions as to their legal situation and procedural options as well as to properly prepare and submit their claims[8].

From the point of view of a judge or an arbitrator, it is crucial to obtain relevant information to the case, both on facts and law, and to efficiently communicate with the parties including official serving of documents. In other words, if information service is proper, a judge or an arbitrator is able to truly conduct his or her actual work, i.e. to decide the case (instead of collecting information, chasing the parties for their statements, searching for applicable laws and precedents or wasting time by checking the

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[2] See *A. Paliwala*, A History of Legal Informatics – an Introduction, in: *A. Paliwala*, A History of Legal Informatics, Zaragoza 2010, p. 11.

[3] The development of information systems in order to counter universal disorganizing tendency, the entropy, belongs to very fundamental features of "enclaves where the life finds its home" – see *N. Wiener*, Cybernetics: Or the Control and Communication in the Animal and the Machine. Cambridge 1961, p. 13.

[4] See for example *H. Kelsen*, Pure Theory of Law, 2nd ed., transl. by M. Knight, Berkeley1967, p. 350.

[5] See for example *N. MacCormick*, An Institutional Theory of Law: New Approaches to Legal Positivism, 2nd ed., Dordrecht 1992, p. 73.

[6] Various measures of efficiency of judicial procedures are discussed in *F. Contini, R. Mohr*, Traditions, Innovations and Proposals for Measuring the Quality of Court Performance. Saarbrücken 2008.

[7] See *D. Reling*, Technology for Justice. Leiden 2009, p. 17.

[8] See for example *R. Susskind*, Legal Informatics – a personal appraisal of context and progress, in: *A. Paliwala*, A History of Legal Informatics. Zaragoza 2010, p. 119.

status of various parts of the agenda or by internal communications within a senate or a panel).

When the leading theoretician of virtual reality, *Piere Lévy*, was to describe the process of virtualization, he ended up by simply saying that virtualization is a change of formal aspects of the respective phenomena (or a change in the point of view) while the mere nature of such phenomena remains intact[9]. If this deconstruction[10] is successful, the problems generated by the resulting system are less serious than the problems that existed before and that were removed (not even resolved) by being virtualized.

If a company gets virtualized by the use of ICT, it might mean that, for example, in-person interactions are replaced with on-line exchange of information[11]. This can be done by procuring computers, network services and audio-visual equipment and by allowing people to work from home instead of going to the offices. Benefits probably include a decrease of expenses for office rents or electricity, a decrease of time wasted at unnecessary meetings or a decrease of office catering expenses. Depending on the type of the company, the downturns might be for example a loss of motivation of some employees by losing personal contact with their bosses, an increase of telecommunications costs, and a need for enhanced (and more expensive) on-line security measures etc.

If virtualization is successful, the problems that newly arise are less serious than those that have disappeared. Consequently, if virtualization brings about more problems than benefits, it goes against its primary purpose[12].

When legal informatics is given an assignment to virtualize the procedures of settlement of legal disputes, the task is primarily to choose and/or to develop such technical solutions, by which the aforementioned information processes can be made easier, more efficient, more convenient or just simply better[13]. If the implementation of ICT leads to a contrary result, i.e. if the information processes are getting complicated, less convenient, slower or less efficient, it is a clear sign of a failure[14].

[9] See *P. Lévy*, Becoming Virtual – Reality in the Digital Age. New York 2002, p. 21.

[10] See *J. Derrida*, Of Grammatology, transl. by *G. C. Spivak*, Baltimore 1997, p. 24.

[11] See *P. Lévy*, op. cit., p. 26.

[12] See *D. A. Larson*, Technology Mediated Dispute Resolution (TMDR): Opportunities and Dangers. University of Toledo Law Review, Vol. 38 (1), 2006, p. 213.

[13] See *T. M. Conley*, *S. S. Raines*, The Human Face of Online Dispute Resolution (Introduction to Special Issue), Conflict Resolution Quarterly, Vol. 23(3), 2006, p. 333.

[14] In the Czech Republic, the government massively invested into electronic measures providing people easy and efficient access to the courts (quite unreasonable amounts of money were invested into the development of official electronic mailboxes or recently of so-called "data-mailboxes"). Although these measures and their proponents became quite popular among the public, they did not bring any significant improvements to the actual performance of courts. On the contrary, having (even a duty to work with) electronic communications while keeping paper files makes it more difficult for a court to work than if everything was done solely on a paper. See for example *J. Kodl*, *V. Smejkal*, Data boxes in the Czech Republic and their security, in: Proceedings of 44th Annual 2010 IEEE International Carnahan Conference on Security Technology (ICCST), p. 52.

II. ODR and ADR in Domain Disputes

ODR can in general be understood as the implementation of ICT into existing legal dispute settlement procedures, regardless of whether we speak about courts or arbitration tribunals[15]. Depending on the level of its implementation, ODR aims to virtualize these processes in the above sense[16]. At the same time, ODR can also serve as a method for a development of qualitatively new forms of dispute resolution[17]. Thus, ODR can either be an alternative technology to standard paper/oral procedures, or it can even serve as a technology enabling the development of entirely new forms of procedures leading to the settlement of such disputes[18] that are for various reasons out of focus of traditional means[19].

It implies that ODR can, thanks to its technical advantages over standard forms of legal communication, open the possibility of creating entirely new ways, in which legal disputes can be treated[20]. Accessibility, convenience, lower transaction costs, automated case handling, automated real-time advice and assistance and many other advantages enable the creation of new legal or paralegal procedures that are able to tackle disputes, which would not be legally resolved under normal circumstances[21], or whose resolution would be extremely difficult[22]. In that sense, ODR really offers new means and techniques for alternative dispute resolution (ADR), regardless of whether we speak about arbitration, mediation, conciliation or any other methods[23]. It is to be stressed that, in this case, ADR can mean an "alternative" to court proceedings as well as an "alternative" to literarily nothing[24].

Domain disputes arise from the registration or use of internet domain names. Once a domain name is registered with respective domain authority, it becomes uniquely techni-

[15] See for example *G. Kaufmann-Kohler*, *T. Schultz*, Online dispute resolution: challenges for contemporary justice. The Hague 2004, p. 10.

[16] See *S. Cooper*/*C. Rule*/*L. F. Del Duca*, From Lex Mercatoria to Online Dispute Resolution: Lessons from History in Building Cross-Border Redress Systems. Uniform Commercial Code Law Journal, Vol. 43, 2011.

[17] See for example *T. Schultz*, *G. Kaufmann-Kohler*, *D. Langer*, *V. Bonnet*, Online Dispute Resolution: The State of the Art and the Issues. Available at SSRN: http://ssrn.com/abstract=899079.

[18] For a comprehensive view of the phenomenon of ODR as such, see *E. Katsh*, Online Dispute Resolution, in: *M. L. Moffitt*, *R. C. Bordone*, (Eds.), The Handbook of Dispute Resolution. Cambridge 2005.

[19] On the reason why there might be a disproportion between the value of the case and the anticipated costs, language differences or other general reasons why people do not want to go to courts – see for example *O. Rabinovich-Einy*, Diminishing Privacy in Dispute Resolution in the Internet Age. Virginia Journal of Law and Technology. Vol. 7(4), p. 17.

[20] See for example *L. F. Del Duca*, *C. Rule*, and *Z. Loebl*, Facilitating Expansion of Cross-Border E-Commerce-Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems - Work of the United Nations Commission on International Trade Law) (December 10, 2011). Penn State Law Legal Studies Research Paper No. 25-2011. Available at SSRN: http://ssrn.com/abstract=1970613 or http://dx.doi.org/10.2139/ssrn.1970613.

[21] See *O. Rabinovich-Einy*, Balancing The Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape. Yale Journal of Law & Technology, 2004. Available at SSRN: http://ssrn.com/abstract=905215.

[22] See *R. A. Brand*, Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project. Loyola University Chicago International Law Review, Forthcoming; U. of Pittsburgh Legal Studies Research Paper No. 2012-20. Available at SSRN: http://ssrn.com/abstract=2125214.

[23] See *N. Ebner*, E-Mediation, in: *M.S. Abdel Wahab*, *E. Katsh*, *D. Rainey*, (Eds.), Online Dispute Resolution: Theory and Practice, The Hague 2012, p. 357.

[24] See *M. Mason*, *A. H. Sherr*, Evaluation of the Small Claims Online Dispute Resolution Pilot, 2008.

Available at SSRN: http://ssrn.com/abstract=1407631 or http://dx.doi.org/10.2139/ssrn.1407631.

cally controlled by its holder – it can then be used for example to indicate a web presentation, to form a part of e-mail addresses or to act as a gateway to other places in the Internet.

Its use and in some cases even its mere registration can solely or together with the respective content interact with various rights including trademarks, service marks, company names, various protected designations, with rights arising from consumer protection, unfair competition, privacy etc[25]. The disputable potential in the registration and use of domain names is even enhanced by the fact that the use of domain names is universally combined with the fact that each registration is unique, i.e. that a particular domain name can be held by only one holder at a time. It is then not an exception if, for example, a .com registration at a U.S.-based domain authority made through a Spanish registrar contradicts with a Czech trademark, Brazilian service mark and with Saudi indecency rules at the same time. It also implies that the technical nature of domain names often causes the respective disputes to be cross-border, whereas it is not an exception that parties can be domiciled at opposite parts of the world[26]. Typical situations then include for example U.S. or European companies being harmed by domain registrations made by squatters reportedly resident in Malaysia or Singapore.

The aforementioned features of domain disputes often make it quite difficult to defend one's rights by standard procedural means[27]. It is, of course, still theoretically possible for a Polish company to sue a Chinese individual in China (or at the seat of the respective domain authority wherever the latter might be) or to try to have a prior Polish court decision recognized and enforced there. It is also possible to endlessly contemplate about the forum and law applicable (keeping in mind the global nature of the Internet) and to undertake by try/fail approach various procedural steps in different jurisdictions. However, as the only benefit in these cases is the profit and entertainment of lawyers in charge, the court procedure does not represent a practically valid option for standard cases. It is then quite obvious that on-line proceedings enabling low-cost participation from literarily any place on the planet might be a welcome alternative that is in the above sense in many cases not an alternative to court resolution, but rather an alternative to non-resolution.

Domain disputes seem quite suitable for ODR not just by their procedural features but also by their factual nature. Their primary object, a domain name, is on-line, which means that parties (most frequently it is a holder of the respective domain name and a person who has some interest in it) have in most cases at least an idea what the Internet is about. This makes it possible to implement on-line ways of official communication including serving of procedural documents without a need to fear that compulsory use of ICT would create unreasonable procedural inequalities between the parties. Moreover, the evidence in typical domain cases is either documentary or even electronic – it consists mostly of various documents proving titles to indications, documents proving previous communications or transactions between the parties, screenshots from websites etc., while personal statements like oral pleadings or witness statements are extremely rare. Substantive evidence in typical domain disputes is also provided by respective domain authorities and again consists mostly of statements and reports from domain registries that have originally electronic form and can be easily communicated on-line.

[25] See for example *A. Chander*, The New, New Property. Texas Law Review, Vol. 81(3), 2003.

[26] See for example *L. R. Helfer*, *G. B. Dinwoodie*, Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy. William & Mary Law Review, Vol. 43, 2001, p. 141.

[27] See *M. Leaffer*, Domain Names, Globalization, and Internet Governance, Indiana Journal of Global Legal Studies, Vol. 6, 1998-1999, p. 139.

Finally, domain disputes, yet often factually complicated by specific relations between the parties, by difficulties with regards to the examination of the existence of alleged rights etc., are relatively simple as to their classification. It is then possible to quite precisely define typical substantive and procedural features of the vast majority of domain disputes and to divide them into a few classes. It is also possible to name and describe relatively few typical procedural situations (e.g. unpaid fees, a change of language, interim decisions etc.) while leaving unnoticed only very insignificant and extremely rare cases.

The same applies also to forms of decisions. Apart from a dismissal of a complaint, there are only a few options of a conclusion of a case, in particular a transfer of the domain name or a cancellation of the registration.

All these aspects make it possible to develop particular procedural measures that are tailored to these typical situations and provide for more precise and more efficient case-handling and decision-making – it is then obvious that ODR can offer ideal tools for that, in particular intelligent on-line forms, semi-automated processing of information or assistance in the process of drafting of decisions.

III. ODR at .EU

When the substantive law for the European top level domain[28] was being drafted, dispute resolution formed its integral part from the very beginning. With already existing experience from generic domain disputes, i.e. from court cases as well as from cases handled by the alternative dispute resolution procedures according to the UDRP[29], there was chosen a model of statutory establishment of alternative dispute resolution procedure that would act as an elective option for the claimants. Similarly to the UDRP, the alternative dispute resolution was planned as strictly limited to the claims allowing only a petition for a transfer of a cancellation of a domain registration[30] (other claims including costs are not admissible). It then makes the whole process even simpler insofar as the scope of the substantive applicable law is in this case limited merely to the assessment of three main criteria: the existence of the claimant's rights to the respective indication, non-existence of rights of the holder of the domain name and/or bad faith of the holder of the domain name[31].

These substantive and procedural options obviously do not provide for sufficient measures to deal with specific or complex situations. It is also not necessary to know by heart all *Fuller's* principles of fairness in order to discover that this simple and limited procedure does not fully meet all criteria of a fair trial[32] (apart from formal limitations of

[28] See Regulation (EC) No. 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain and namely Commission Regulation (EC) No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration.

[29] See for example *P. Cortes*, An Analysis of the UDRP Experience: Is it Time for Reform? Computer Law and Security Report, Vol. 24(4), 2008.

[30] As provided in Art. 22(11) of the Regulation No. 874/2004: In the case of a procedure against a domain name holder, the ADR panel shall decide that the domain name shall be revoked, if it finds that the registration is speculative or abusive as defined in Article 21. The domain name shall be transferred to the complainant if the complainant applies for this domain name and satisfies the general eligibility criteria set out in Article 4 (2) (b) of Regulation (EC) No. 733/2002.

[31] See Art. 21 (1) of the Regulation No. 874/2004.

[32] See similar notice on UDRP in: *E. G. Thornburg*, Fast, Cheap & Out of Control: Lessons from the Icann Dispute Resolution Process. Journal of Small & Emerging Business Law, Vol. 7, 2001, or in: *M. A.*

claimants, it is, for example, not entirely fair if one has to invest into protecting his or her rights with no possibility of remuneration of the incurred costs)[33]. However, the aim of this alternative dispute resolution procedure is not to totally fairly resolve all possible disputable issues arising from the registration of the domain names, but just to serve as a highly efficient alternative to lengthy and complicated cross-border court procedures including endless waiting for international legal assistance, contemplations about the forum and law applicable, fears about recognition and enforcement etc. It then seems fair enough that standard court procedures are still available, moreover with a priority and with no contradictory applicability of the principle of *lis pendens* and even of *res iudicata*[34].

Substantive and procedural simplicity of a planned .eu alternative dispute resolution procedure together with the aforementioned typical features of domain disputes directly induced the development of the on-line dispute resolution platform[35]. The selected service provider for .eu domain disputes, the Czech Arbitration Court, decided to take quite a novel approach by insisting on complete on-line case handling including all communications with parties, internal communications within the tribunal, the issue of decisions etc. Consequently, the system was designed to provide not just for a communication platform that would serve as an alternative to paper proceedings, but rather for a complex space within which the dispute is initiated, handled, concluded and enforced. Therefore, we can state that .eu ADR can serve as a proper example of ODR, i.e. of a fully virtualized procedure of authoritative resolution of legal disputes.

The architecture of the .eu ODR system is based on the centrality of the file. This approach is no different from off-line dispute resolution procedures, where court files also represent the focal point of the process[36]. It is, however, very different from many other ODR initiatives, especially those in the judiciary – being often pushed by anticipated political popularity of their proponents, they often primarily focus on smooth and efficient communications between the court and the parties rather than on factual enhancement (true virtualization) of the procedure.

In the case of .eu ADR, the electronic file acts even in a broader sense than in traditional court procedures, as it contains all procedural communication between the parties and the tribunal including what is called "informal communications". If a party, for any reason, wants to talk to the arbitrator, the only approved way of doing so is through the system while such communication is recorded in the file and is accessible also by the other party. Arbitrators are then required not to use any other forms of communication with the parties, which makes the whole procedure truly transparent[37]. While some of

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Geist, Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP (August 2001).

Available at SSRN: http://ssrn.com/abstract=280630 or http://dx.doi.org/10.2139/ssrn.280630.

[33] Similarly for UDRP see *K. Komaitis*, Pandora's Box is Finally Opened: The Uniform Domain Name Dispute Resolution Process and Arbitration, International Review of Law, Computers & Technology, Vol. 19(1), 2005.

[34] As provided in Art. 21 (4) of Regulation No. 874/2004: 4. The provisions in paragraphs 1, 2 and 3 may not be invoked so as to obstruct claims under national law, and in Art. 22 (13) of Regulation No. 874/2004: The results of ADR shall be binding on the parties and the Registry unless court proceedings are initiated within 30 calendar days of the notification of the result of the ADR procedure to the parties.

[35] See the website at www.adr.eu.

[36] With all respect to judges or arbitrators, it is possible to state that a death of a judge does not make any significant difference to a case, while a death of a file means literarily a death of a case.

[37] As stated in Art. 2(j) of the .eu Alternative Dispute Resolution Rules: No Party or anyone acting on its behalf may engage in any unilateral communication with the Panel. All communications between a Party,

such informal communications might be rather of technical nature, it also makes it possible for the arbitrator to ask the case administrator (a member of the administrative staff of the court) to step in and to resolve the respective issue without a need of timely explanations of the issue.

The fact that all procedural communication is recorded in the file makes it also possible for the system to automatically track and control formal procedural requirements like submission deadlines, payment of fees etc. The development of standard procedural forms and their implementation into the system even enabled the whole procedure to be divided into the preparatory part, i.e. the phase when the file is being filled with all necessary information including submissions of the parties, documents proving fulfillment of various procedural requirements, clearance of questionable issues etc., and the decision-making part, i.e. the phase when the arbitrator is appointed[38] and the completed file is transferred to him or her. Once the decision is completed, the file is handed over back to the case administrator to check the fulfillment of formal requirements of the final decision and for official dispatch of the decision to the parties. Provided that many awards are rendered in languages different from the native languages of the arbitrators, this final formal clearance makes it also possible to do the final language check and to eventually suggest to the arbitrator some correction of typos, language corrections etc.[39]

With just theoretical exceptions, all documents are officially served to the parties within the system. Anticipated delivery of documents is attached to the moment of their inclusion into the file, while the factual delivery is assumed to take place at the moment when parties access the dispute resolution platform. E-mail notifications in this case serve only as reminders of the fact that something new has been added to the file, so there is no risk of some personal or other sensitive data being communicated through unsecured channels.

This is obviously different from paper proceedings where documents or their facsimiles are served personally, through a postal service or by couriers. Postal delivery of documents is from this point of view definitely more certain and it also still makes a difference to some people whether they receive some information in tangible form (moreover, stamped and signed) compared to receiving just an e-mail notice of the fact that some new electronic document has been uploaded somewhere on-line. However, the situation in domain disputes is slightly different because of the fact that the defendants use their e-mails at the same time as official contacts for receiving communication from the domain registries (i.e. it is a matter of their vigilance to keep these contact e-mails up to date and available) and that the claimants, when opting for the alternative dispute resolution, clearly anticipate that e-mails that they register with the ODR platform will be used for sending them notices on new procedural developments.

The fact that documents are not served but rather accessed by the parties is relatively unusual, but seems technically more reasonable compared to making copies or facsimiles of original documents and sending them physically to the parties. If the file is permanently available on-line, i.e. if parties have permanent access to original documents, there is probably no technical need to physically communicate documents to the parties any more – apart from saving time and resources it is even safer as to the content of the

on the one hand, and the Panel or the Provider on the other shall be made to a case administrator appointed by the Provider by the means and in the manner prescribed in the Provider's Supplemental ADR Rules.

[38] Quite unusually, the arbitrator is here appointed not upon the arrival of the case to the tribunal, but upon the finalization of the file. This prevents situations when arbitrators waste their time by being appointed to cases that are later declined for purely formal reasons.

[39] It is to be stressed that even the corrections of obvious typos or language omissions are never made directly by the case administrators but they are always only pointed out or suggested to the arbitrator - it is then a sole decision of the arbitrator whether to in fact correct them into the text of the award.

documents. Dispatching a notice on the fact that there are some news in the file is then sufficient in order to notify the parties of the existence of procedural developments, while permanent and protected accessibility of original procedural documents makes it easy, efficient and trustable for the parties to relevantly (or on a level of relevance of their choice) take a part in the dispute.

IV. EU ODR – Some Personal Observations

The following notes are resulting from the author's personal experience rather than from any scientific analysis or comparison. Therefore, they should be taken into account just as poorly argued immediate individual ideas and not as facts, official statements or majority opinions.

When I started to work with the .eu ODR platform, I was mostly concerned about the handling of evidence. Almost all evidence in typical domain cases is documentary and all documents are submitted to the platform electronically, meaning that the file then contains just their scanned images.

Having the experience from continental litigation culture that is sometimes referred to as the culture of formal objections, I was afraid of substantial procedural delays caused by endless objections against the authenticity of various documentary evidence followed by a need to submit original documents to the tribunal for their formal review and by other steps that are common in the case of procedural objections raised against the authenticity of documents in court proceedings. However, these concerns turned out to be completely false – besides the fact that I have neither seen nor had a reason to verify any original electronic documents throughout the years of my practice as an arbitrator (documents signed by advanced electronic signatures are still less then rare), I have not dealt with any objections against authenticity of scanned documents.

Another problematic issue in ODR systems might be their overall security. Namely, there is a need to tackle the form of identification of the parties as well as of the authentication of arbitrators and case administrators. Simple authentication by a username and a password does not seem overly robust, so the Czech Arbitration Court originally experimented with multiple authentication options. After evaluating all standard options plus some relatively extraordinary ones (like off-line plastic chess-cards with unique grids of letters and numbers), the decision has been taken to work only with prima facie relatively weak authentication by a username and a password.

The key to understanding this conclusion is not in its technical features – honestly speaking, they are truly weak – but in the combination of various factors related to the authentication. As the activities of parties and arbitrators are relatively straightforward and fit into a couple of standard procedural formats, any unusual procedural activity would become suspicious. Moreover, the system keeps comprehensive records of user activity, i.e. of access and actions on the platform, so that any irregular acting can be traced back and analyzed.

From the ergonomics point of view, any additional security measures would bring some kind of practical burden to the users of ODR systems (parties or arbitrators). Even the plastic chess cards caused some practical difficulties to the users –I lost mine just a week after having received it.

In a situation when authentication was not identified as an actual risk, burdening users by anything else but a username and a password did not seem pragmatically reasonable. Technical and ergonomic difficulties were then the main reason in the case of .eu ADR to refuse the compulsory use of advanced electronic signatures or similar means of authentication and to stick to a solution that is incomparably more comfortable. This

approach, in my personal view, turned out to be quite right, as no authentication or other security issues have been raised since the very start of the platform. While it is good for the sake of efficiency or transparency to have various aspects of the dispute settlement procedure formalized and automated, I still found it extremely useful to have a human case administrator at hand. It is good not only because some procedural situations cannot be predicted and coded into the system (i.e. that a creatively acting human element is always needed), but also because there is always somebody to informally consult with about technical or procedural matters. There is also no reason to pretend that arbitrators are those who know best all procedural and technical features of the proceedings – in fact, arbitrators gain their experience just out of very few cases compared to the amount of cases that are regularly handled by the administrators. Thus, when it comes to unusual procedural situations or technical questions, I honestly admit that I always found consultations with my case administrators mostly helpful and useful.

As to possible improvements of the system, I would personally invite namely an inclusion of a slightly better search system in the past case-law. It would also be good to have a standard procedural format for the communication within a panel in cases, yet very rare, when more than one arbitrators are appointed (now the deliberation has to be done through e-mails, Skype or similar means) or to have available some standard tools for the support of peaceful disputes settlement. Furthermore, it is still not entirely clear to me how to properly handle unsolicited informal communications containing substantive information, namely those that are spontaneously submitted after the transfer of the case to the arbitrator. Personally, I try to stick to the principle of concentration on the proceedings and to consider the moment of the transfer of the case as the moment when the panel starts its deliberation, meaning that any further substantive information is admissible only upon request of the arbitrator. However, it can be, as some of my colleagues already noted in their decisions, difficult and disproportionate to ignore unsolicited information that might have crucial relevance to the case.

V. Conclusions – ODR and New Forms of Dispute Settlement

As noted above, ODR can be approached as technology measures enabling more efficient or more convenient handling of information in dispute resolution processes as we know them. ICT is in that sense used in order to make, simply said, the existing procedures better. It can mean not just faster, cheaper or more convenient proceedings, but even the establishment of new settlement options for disputes that, despite of being theoretically admissible for some existing authoritative resolution, were for their low value or cross-border nature practically out of practical reach of any off-line proceedings[40]. The ODR in the case of .eu domain disputes serves, in my opinion and with just a couple of marginal reservations, as a perfect example of this fact.

However, virtualization of legal proceedings does not have to end by replacing paper communication by electronic means[41] or by the automation of tasks that are normally carried out by human labour[42]. ODR can truly deconstruct the nature of disputable legal

[40] See *T. Schultz*, The Roles of Dispute Settlement and ODR, in: *A. Ingen-Housz*, (ed.), ADR in Business: Practice and Issues Across Countries and cultures, Kluwer, Vol. 2, 2011, p. 135.

[41] See *P. CORTES*, Developing Online Dispute Resolution for Consumers in The EU: A Proposal for the Regulation of Accredited Providers, International Journal of Law and Information Technology, Vol. 19(1), p. 1, 2010.

[42] See *A. R. Lodder*, *J. Zeleznikow*, Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model. Harvard Negotiation Law Review, Vol. 10, 2005, p. 287.

proceedings and offer not just formally but even qualitatively new options for dispute settlement. At the moment, the development of ODR systems is, in the ideal case, a matter of cooperation between lawyers and software developers. Consequently, the resulting systems are in ideal cases working from the technical and legal point of view, i.e. they efficiently handle cases within the standard procedures. However, I believe the key to the understanding of the true potential of ODR is in the fact that the validity (legal compliance) and technical functionality of ODR are not the only aspects that might be taken into account with respect to ODR. Legal disputes are not in fact understood by the parties as only legal or technical procedures – there are emotional, intuitive or aesthetic aspects, and that is exactly what ODR might work with as well[43]. Even business cases often arise not from any pragmatic or rational grounds but from emotional or just random reasons. Vice versa, even rationally grounded disputes can be often resolved by implementing some emotional aspects. If the legal dispute resolution procedure is then able to handle these elements, it can lead either to greater probability of peaceful settlements or at least to greater probability of internalization of the results by the losing party and of their consequent voluntary implementation. In off-line proceedings, we regularly work with various measures that support the aforementioned supra-legal elements in dispute resolution and that can be used as assisting measures in reaching peaceful settlements or at least in understanding or internalization of authoritatively achieved results. For example, we can work with personal authority or a charisma of a judge or arbitrator, with the aesthetics of the court room, with timing of the hearings, etc. These measures are obviously not available in ODR, but this does not mean that ODR would have to give up the use of these supra-legal or extra-legal elements at all. There is a reason to believe that they do exist, but look a bit different[44]. The key to finding them is probably the same as the key to understanding why it is quite normal for people to say that they love their *MacBooks* or *iPads* while it is significantly less common for people to express the same kind of emotions to their *Lenovos* or *Samsungs*. If it is possible to induce positive emotions (or in general any kind of emotions) by the use of *Apple* devices, it is definitely possible to use other ICT to work with the same kinds of emotions also in ODR. Regardless of whether *Apple Inc.* is interested in investing its emotional-engineering assets into the development of ODR, I think we have a reason to believe that it would be a mistake for lawyers to leave this potential in ODR unnoticed[45].

[43] See *R. A. Friedman*, *J. M. Brett*, *C. P. Anderson*, *M. Olekalns*, N. GOATES, *C. C. Lisco*, The Positive and Negative Effects of Anger on Dispute Resolution: Evidence from Electronically Mediated Disputes. Available at SSRN: http://ssrn.com/abstract=938187.

[44] See *J. Van Veenen*, Dealing with Miscommunication, Distrust, and Emotions in Online Dispute Resolution (July 6, 2010). TISCO Working Paper Series on Access to Justice, Dispute Resolution & Conflict System Design No. 004/2010; Tilburg Law School Research Paper No. 016/2010. Available at SSRN: http://ssrn.com/abstract=1626212 or http://dx.doi.org/10.2139/ssrn.1626212.

[45] See also *D. A. Larson*, Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR. Ohio State Journal on Dispute Resolution, Vol. 21(3), p. 629, 2006. Available at SSRN: http://ssrn.com/abstract=944932.