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**International Private Law: an anachronic model to the solution of the  
conflict of law within cyberspace**

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**RESUMO:** Ao deixar de ser apenas uma ferramenta de comunicação e passar a ter extrema importância na vida humana, levando a uma acentuada expansão do ciberespaço e a criação de uma sociedade global em rede, a Internet passou a desempenhar, portanto, papel central em diferentes aspectos do mundo globalizado. O crescente nível de comércio na rede, aliada à sua natureza desprovida de fronteiras, trouxe um novo debate: um sistema de Direito Internacional Privado cujo cerne está na noção de fronteiras geográficas é adequado para compreender um campo que estas provavelmente não são relevantes?

Palavras-chave: Ciberespaço; Internet; Direito Internacional Privado; Lei Aplicável; Territorialidade; Jurisdição competente; ADR; ODR;

**ABSTRACT:** Nowadays, the Internet plays an essential role in different aspects of the globalized world. No longer just a communication tool, it became extremely important to human life, what led to a marked expansion of the Cyberspace and the creation a linked global society. The growing online trade levels, in line with its nature devoid of boundaries, brought up a new debate: is a system of *choice-of-law* whose core lies on the concept of geographic boundaries adequate to understand something in which they probably aren't relevant?

Key words: Cyberspace; Internet; International Private Law; Choice-of-law; Territoriality; Competent jurisdiction; ADR; OPR

## **1. Introduction**

In the past two decades, human relations have almost completely changed. It have acquired unimaginable proportions due to the advent of the global-scaled conglomeration of communication networks: the internet. Since the 1990s, it has been noticeably growing. The birth of the *World Wide Web* has reshaped every aspect of human life and has been crucial to the globalization process, in a sense that a person can easily connect to another, anywhere in the world, just as quickly and easily as if they were in the same room.

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Therefore, one might infer that internet's commercial use represents a milestone for the history of humankind. Cyberspace is no longer an ordinary space for communication. It plays a central role in the 21<sup>st</sup> Century global economy. Not only individuals, but also companies, experiencing the development of information technology's advantages, explored this bias in way that its overgrowth created a financial bubble which burst resulted in the 2001 *dot-com* crisis. Such fact has not been able to prevent, notwithstanding, the expansion of the networked society.

Such expansion has brought forth a few legal implications. Constantly, it is said that that "legal problems in cyberspace are different from those of the real world", and in fact they are. David R. Johnson and David Post<sup>2</sup> elucidate:

Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility - and legitimacy - of applying laws based on geographic boundaries. While these electronic communications play havoc with geographic boundaries, a new boundary, made up of the screens and passwords that separate the virtual world from the real world of atoms, emerges. This new boundary defines a distinct Cyberspace that needs and can create new law and Legal Institutions of its own. (Johnson; POST, 1998)

Cyberspace's expansion foments new insights on the concepts of territoriality, jurisdiction and applicable law. Accordingly, the main purpose of this article is to bring about a study on the impact of this new configuration of global relations within a legal framework. The intent is analyzing the adequacy of the current system of International Private Law, as well as the effectiveness of alternative mechanisms of conflict resolution, such as ADR - *Alternative Dispute Resolution* - and ODR - *Online Dispute Resolution* - on this new context of global transactions.

Furthermore, the sharp development of *e-commerce* – product transactions via electronic means – combined with the vast amount of content produced and disseminated in the network society, changed the complexity of the legal provisions regarding the global transactions. Another purpose of this article, therefore, is to analyze perceptions about such transactions.

## **2. Conflict of Laws and the internet: territoriality and jurisdiction**

In the "real world", each community lives under sovereign law. Geographic boundaries – "imaginary lines that divide the physical spaces", according to Johnson and Post

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<sup>2</sup> JOHNSON, David R; POST, David. Law and Borders - The Rise of Law in Cyberspace. **Stanford Law Review**, Stanford, n., P.1366-1402, May 1996.

(1996, p.1368) – are crucial to determining legal rights and responsibilities. Being the rules of law determined, as far as such borders are concerned, conflicts between the laws of these communities tend to come across. International Private Law comprehends the very core of the process through which the applicable law is defined, case to case.

Geographic boundaries make complete sense. Controlling over a restricted physical space – and everything it contains – is paramount to State sovereignty. Still in that sense, taking into consideration the fact that similar phenomena produce different results in different contexts legitimacy, also related to State sovereignty, is closely linked to the existence of borders. Jurisdiction itself defines the power of a court to examine and determine conflicts of interest. Such power entries in force within an specific territory where such jurisdiction can be applied. Without such power, a verdict is ineffective and powerless.

Thus, Internet brings out the ambiguity of the concept of territoriality, enhancing an intense debate on whether a given jurisdiction might be applicable to a legal relation built in the virtual and extraterritorial context of the Internet. Given the fact that the network is ubiquitous, borderless and global<sup>3</sup>, one can say that it challenges isolationism.

Geller (1999) analyzed the ambiguity of territoriality in terms of location and characterization of the act, i.e., pointing out not only the place wherein the action was taken, but also *if* the offense was committed where such action has occurred or where its effects took place. Therefore, Geller states that boundaries-crossing transactions, simultaneously trespassing multiple limitations in global and interactive networks, have become even more evident. Internet has accelerated this process.

Johnson and Post already conceived, in 1996, that the events in cyberspace would modify the relationship between a given phenomenon and the physical location where it takes place<sup>4</sup>. At the time of their publication, the authors stated<sup>5</sup> that:

The rise of the global computer network is destroying the link between geographical location and: (1) the *power* of Local Governments to assert control over online behavior, (2) the *effects* of online behavior Individuals on things or, (3) the *legitimacy* of a local sovereign's efforts to regulate global phenomena, and (4) the ability of physical location to *notice* of which sets of rules apply. (Johnson, POST, 1996)

About nearly two decades ago, the authors already foresaw, albeit with no precision on

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<sup>3</sup> BONE, Shawn A. Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by Gutnick v. Dow Jones & Co. **62 Wash. & Lee L.Rev.W.** 279-337. May, 2005.

<sup>4</sup> JOHNSON, David R.; POST, David. 1996 pg.1370

<sup>5</sup> Ibid., P. 1372

its proportions, what the network society would become. They anticipated that the abolition of borders would result in a deconstruction of the existing conflict-of-law system. According to Muñoz-López (2009, pg.167), there are two main reasons why the existing system cannot be applied to online transactions: (1) the international nature of cyberspace makes it inappropriate to have national legislation providing for the Internet, and (2) national legislation has always been designated under the material order<sup>6</sup>.

The Brussels Regime, for instance, has a set of rules for determining the competent jurisdiction in each State Members, in order to minimize the aforementioned ambiguity, encompassing both the location of act and the location of the effect. Its regulations, nevertheless, are not able to establish the jurisdiction of full online transactions, such as software selling.

U.S. law, in turn, establishes a criterion of "minimum contacts" to define the competent jurisdiction, in a way that it is conditioned to the number of contacts made in a particular forum. On the Internet, however, the vast majority – if not all – contacts are made through a server. Therefore, there are very few direct contacts to the business locations.

It is noticeable, therefore, if not a confirmation of Muñoz-López's argument, an empirical evidence to corroborate his findings. These laws are indeed applied to conflicts-of-law, serving the purposes linked to territoriality, although through serious difficulties when applied in cyberspace.

## 2. American and European e-commerce legislation

By using Renault's<sup>7</sup> and Czigler's<sup>8</sup> analysis about legislation over cyberspace, it is possible to build a comparative study on the subject evolution. The French author declared, by the end of the 1990s, that:

In the absence of evidence that foreign law applies, courts have traditionally applied the substantive and procedural rules of the forum. (...) Existing authorities which have delineated federal and provincial legislative jurisdiction with respect to telecommunications are not necessarily conclusive authority in respect to legislative jurisdiction to regulate the internet, which is in some respects a wholly new and unique means of communication. We can therefore expect to see in the future important constitutional litigation concerning legislative jurisdiction to regulate the internet. (RENAULT, 1998)

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<sup>6</sup> MUÑOZ-LÓPEZ, José Edgardo. Internet. International Conflict of Laws: The space of opportunities for ODR. *Revista Colombiana de Derecho Internacional*, Bogota, p.163-190, April 2009.

<sup>7</sup> RENAULT, Ogilvy. **Jurisdiction and the Internet; Are the Traditional Rules Enough? Jurisdiction and the Internet; Are the Traditional Rules Enough?**

<sup>8</sup> CZIGLER, Tamás Dezső. **Choice-of-Law in the Internet Age - US and European Rules**

The Hungarian author's work, in turn, makes the case for an evolution on the matter, although not with the appropriate profoundness. In the United States, despite some theoretical currents which do not dedicate any special attention to the network society, arguing that "Internet conflict were incorporated into other subjects since they do not differ from other kinds of conflicts"<sup>9</sup>, the issue has been widely discussed at the *Restatement (Second) of Conflict of Laws* and *Governmental Interest Analysis*. In Europe, efforts to unify and harmonize the European Union have brought significant improvement to part of the problem.

In spite of all the differences, the United States' and Europe's approach to the subject have something in common: in both, very few specific laws are applied on *e-commerce*, so that the terms on the subject are their general definitions in consumer law and contract law. Regarding the law applicable to contracts, there are few divergences. In both cases, the law chosen by the parties shall be applied on *e-commerce* contracts by default.

In the European Union, the essence of an *e-commerce* contract is the concept of "characteristic performance"<sup>10</sup>, found in Article 4.1, paragraph 2, of the Rome Convention:

[...] The 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.

This approach appears to be deliberately vague and, thus, it is not suitable for *e-commerce*. Accordingly, the difficulty on defining the location of a company, enlisted in many registered domains in several jurisdictions and accessible throughout the world, would turn this device ineffective.

The private international law system in the U.S. is also flawed; it lacks clarity in certain rules and consists of different coexisting approaches, much because of the autonomy of their states. Moreover, U.S. courts tend to apply national laws when they find them applicable, not when it is appointed by indirect rules. The case *Twentieth Century Fox Corp. vs. iCrave TV*<sup>11</sup>, in which the American studio won the fight to enforce U.S. copyright law against the Canadian movie streaming service, which was able to broadcast it legally, demonstrates this fact.

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<sup>9</sup> LITTLE, Laura E. **International Choice of Law Governance**. apud BRILMAYER, Lea; GOLDSMITH, Jack; O'CONNOR, Erin O'hara. **Conflict of Laws**.

<sup>10</sup> MUNÓZ-LOPEZ, pg 173

<sup>11</sup> Ibid. Pg.174

It is clear, therefore, that the U.S. jurisdiction is proven to be less stable than the European one, although both of them do not cover all aspects of *e-commerce*. By ignoring the nature devoid of boundaries of the Internet, the International Private Law of these countries are also unsuitable for arranging the transactions occurred in cyberspace, since they are held up by the geographical boundaries and therefore are not able to meet the needs of predictability to define the applicable law.

### **3. Alternative mechanisms for conflict resolution on the Internet**

Conflicts in cyberspace have specific characteristics, thanks to the distinct nature of the network society. Those conflicts are expected to keep rising vigorously along with the increasing online transactions. The inadequacy of the International Private Law system when applied to a field in which territoriality has no (or little) relevance, coupled with inability (and unwillingness) to keep track of new technologies and legal processes, gives way to a precedent on the use of alternative mechanisms – *online* (ODR) and *offline* (ADR) – for dispute resolution.

Faster and more flexible than the traditional system, the does not automatically apply laws. Therefore, mediators do not implement default rules to solve conflicts. Parties resolve conflicts with each other through trading, based on the principle of party autonomy and using adjudication procedure as the sole international commercial arbitration. Accordingly, the parties may set jurisdiction in their electronic contract by themselves. Parties are free to choose which country's laws, public international law or *lex mercatoria* they find suitable. When they do so, courts and tribunals abide by the choice. This method ensures the certainty and predictability, solving not only the question of jurisdiction, but the applicable law as well.

In case the parties have not defined a place for the arbitration, the arbitrator is entitled to define it, and if there is no procedure law defined, the law chosen by the arbitrator shall be the one. The option for arbitration is due to the preference of the parties to participate in a negotiation than face trial in court.

The major limitations in this kind of conflict resolution are: (1) the expenditure of time, and (2) the high costs<sup>12</sup>. This situation means that, even with all the benefits, the practicality and price cuts are more attractive to traditional parts, causing resistance to the traditional ADR.

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<sup>12</sup> To rely on an arbitrator in your trading involves many expenses. Entry fees in arbitration cost over thousands of dollars. In addition, there are costs with trading rooms, the fees of the arbitrator, among others, which together exceed US\$40,000.

Muñoz-López thus proposes that the ideal way to reduce the costs in traditional ADR is to execute their processes under the same scope of its conflicts: in cyberspace. If, according to the author, the ADR solves the main issues of Private International Law in cyberspace (jurisdiction and applicable law), the ODR, on the other hand, modifies some of the traditional methods of ADR, such as arbitration and mediation, keeping the same advantages and reducing their operational costs:

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 the power imbalance. Rather than avoid disputes because of high cost or long distances, Consumers and enterprises 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. (MUÑOZ-LOPEZ, 2009. P.188)

Through online mediation and arbitration, the two main problems of ADR are attenuated: the cost and time. The creation of online institutions for this purpose reduces the cost by near 75%. The fact that it does not require facilities, in addition to representing a significant amount of this reduction, is also crucial for saving time. The author concludes his article by stating:

ODR goes beyond as it not only solves the problem of the conflict of laws process but also is successful in reducing costs and time consumption for business disputants. Computer technology massive spread of information is free of amounts further lowering access barriers to mediation and arbitration cases. ODR is not just specialized flexible 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. (2009, p.189)

Reduction in expenses, therefore, not only solves the high cost problem while maintaining the benefits of alternative dispute resolution, but also allows the inclusion of the individual in the process, whereas before this process was practically restricted to companies, given the exorbitant costs it took.

## **5. Conclusion**

Considering that communications, in a global scale of communication networks, cross territorial borders and creates a new domain for human activity, the enforcement of laws based on geographical boundaries will not cover all aspects of the transactions in this field.

The rules for Private International Law, closely related to physical and geographical borders, are not capable of dealing with issues that do not comprehend these attributes.

To analyze *e-commerce* at the two countries where the subject is more advanced allows us to observe the inadequacy of the current system of International Private Law regarding cyberspace. In the European case, even with the benefit of the integration process, law does not cover the whole network.

Therefore, alternative ways to regulate online transactions are mandatory. ADR provides alternative ways of dealing with *e-commerce*. The mechanism can be used to avoid law conflicts, since it is able to solve the issues of jurisdiction and applicable law. However, the high cost and slow pace eventually halt the popularization of the measure. The ODR, on the other hand, works with the objective to stabilize, adapting principles of the ADR to the online context, reducing costs and maintaining the benefits.

Facing such situation, several options arise: a reconfiguration of International Private Law, alternative forms of regulation or even the creation of a specific law to regulate the Internet. The deconstruction of International Private Law nowadays, nonetheless, is inevitable.

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