

## DISPUTE RESOLUTION IN E-TRANSACTION IN PALESTINE

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### ABSTRACT

*E-transaction has become a familiar way to purchase goods and services, and there are many people or companies that prefer purchasing goods on the Internet. This new phenomenon leads to many types of disputes between the parties within the period of contracting, or in the period of enforcing contracts. There are many types of disputes that might arise between the parties in e-transactions, such as the failure to deliver the goods, submission of defective goods, failure to complete payment, and the loss of payment. All of these disputes require resolution, and the injured party can claim damages from the courts, but this might be impeded by the competency of the courts, as the parties involved might be from different countries, which makes resolution infinitely more complicated. Therefore, these disputes require suitable resolution for a new environment of e-transaction. This paper will discuss the alternative dispute resolution which enable the parties to conclude an agreement to resolve these disputes via alternative means such as arbitration and mediation. In addition, this paper seeks to clarify some methods of resolving disputes such as Alternative dispute resolution (ADR) including arbitration and mediation, and also online dispute resolution (ODR) including online Arbitration and online mediation. This study mainly used the analytical and library research to examine the main issues of Dispute resolution in e-transaction in Palestine. The laws of Palestine, the Directive 2008/11/Eu, and Directive 2013/52/EC are used in this study to clarify the legal positions on the relevant issues above. It is found from this study that the current laws in Palestine organize the arbitration as an alternative to dispute resolutions, but these laws are inadequate to regulate the other types of alternative dispute resolution, such as mediation. The parties can write the clause of arbitration by data message, and include the clause of arbitration in e-transaction contracts because the law allows electronic means of writing arbitration agreement. The arbitration decision requires the affirmance from the competent court before it becomes binding according to the Palestinian Arbitration Law. The decision of arbitration becomes binding after the court affirms it, and the parties are obliged to enforce it. The role of a mediator is different from the role of an arbitrator, because the arbitrator can decide on the solution, and the parties are obligated to implement this solution. Furthermore, in arbitration, the parties sign an agreement to resolve their dispute via arbitration, and this agreement is binding. The benefit of this paper is to propose some recommendations to develop the Palestinian laws in order to address the issues mediation besides arbitration as an alternative to resolve disputes in e-transaction contracts which will contribute in the development of e-commerce in Palestine.*

Keywords: Arbitration, Mediation, Online Arbitration, Online Mediation

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### Introduction

Palestine was governed by many nations such as Ottoman, British, Jordan, Israeli and Palestinian authority. Every nation had added a special legal system to activate their aims. In addition, every nation changed the existing legal systems to control the life in Palestine in easy way. These situations led to diverse and complex legal systems in Palestine.

Because of these situations and circumstances there are now many types and sources of law applicable in Palestine such as the Ottoman laws in transactions, English laws in civil liability cases, Jordanian laws in criminal and commercial cases, some Military Order that changed some articles in commercial law and the Palestinian laws in Constitution and consumer protection. These diverse laws are deemed to continue to apply until the Palestinian legislator introduces a new law.

In general, e-transaction has become a familiar way to purchase goods and services, and there are many people or companies that prefer purchasing goods on the Internet. This new phenomenon leads to many types of disputes between the parties within the period of contracting, or in the period of enforcing contracts.

The parties can communicate with each other through the Internet globally, and the contract is enforceable anywhere and anytime across the world through the click of a mouse. This might sow the seed of conflict, especially for parties from different nations. Disputes take the form of products delivery, enforcement of guarantees, warranties of goods, and credit card claims.<sup>1</sup> In fact, all of these disputes require suitable resolution for a new environment of e-transaction.

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<sup>1</sup> Shah, A. (2004). *Using ADR to Resolve Online Disputes*. Richmond Journal of Law & Technology. Vol, 10. Issue, 3. <http://jolt.richmond.edu/v10i3/article25.pdf>. Accessed on: 10/2/2016.

Some methods of resolving disputes will be discussed in this paper such as Alternative dispute resolution (ADR) including arbitration and mediation, and also online dispute resolution (ODR) including online Arbitration and online mediation.

### Alternative Dispute Resolution (ADR)

Article of Directive 2008/11/Eu of the European Parliament stipulates “This Directive shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.”<sup>2</sup> This directive defines the ADR as resolving the dispute between the parties outside of courts. This directive is also applicable on national or international dispute as well.

There are many advantages to ADR, such as the ability of the parties to choose the procedures, the ability of the parties to choose the mediator or an arbitrator who has experience, or who is reliable, by the parties.<sup>3</sup> However, when the disputed parties go to the courts, they do not have the ability to choose the procedures or the judge, because it is all legislated, and all individuals and companies are obliged to comply with these provisions. In addition to this, the law identifies the jurisdiction of the courts according to the type or the value of the claim, and these provisions are compulsory. ADR saves time and effort, because the disputes are solved in short amount of time compared to the courts.

### Arbitration

The Palestinian Arbitration Law No. 3/2000 defines arbitration as a way to resolve dispute between the parties by the arbitration entity to arbitrament.<sup>4</sup> In addition, The Palestinian Arbitration Law organizes the provisions of arbitration agreement in article, 5: 1. Arbitration agreement is an agreement between two parties or more for transferring all, or some disputes, which arise or may arise regarding the contractual or non-contractual legal relations. The agreement of arbitration is allowed as a clause in the contract, or as a separate contract. 2. Arbitration agreements should be written.<sup>5</sup>

Arbitration requires an agreement between the disputing parties, or it is regarded as void. Moreover, arbitration requires a written agreement between the disputing parties according to Palestinian Arbitration Law. The parties can include the arbitration clause in their contract before any dispute; for example, the parties can conclude the contract of e-transaction and add the clause of arbitration to resolve disputes, such as failure to deliver the goods, defective goods, or failure to complete payments for the goods.

However, the parties can conclude an agreement to resolve the actual dispute. This agreement is independent, and organizes the arbitration to do so. For example, the parties concluded the contract of e-transaction, and there is a dispute regarding the failure of submitting the goods or submitting defective goods. In this case, the parties can conclude the agreement to resolve this dispute via arbitration.

In addition, the Executive Regulations No.39 of 2004<sup>6</sup> for the Palestinian Arbitration Law No 3/2000 stipulates that the arbitration agreement is allowed in existence dispute, and the agreement of arbitration is allowed before any dispute that may arise as a result of completing the contract.

This means that the parties can conclude the agreement of arbitration prior to a dispute, and agree on the manner of resolving the dispute if any were to occur. This agreement is important in resolving disputes in a short amount of time, without any conflict, because when it happens, the resolution is ready, and the parties can refer it directly to the arbitrator. Furthermore, the parties can conclude the agreement of arbitration after the dispute. In fact, there are many contracts containing a clause of arbitration, which is applicable if there are any disputes between the parties when executing a contract, especially for cross-border contracts such as e-transactions. The regulations were also confirmed in writing of the arbitration agreement.

Furthermore, the Executive Regulations No.39 of 2004 for the Palestinian Arbitration Law No 3/2000 stipulates that the agreement of arbitration should be written in any of these forms: a. If it is in editor and signed by the parties. b. If it is in the form of letters and telegrams or others from the written communications methods. C. If it is in the form of information message between the parties through electronic means. 2. The agreement of arbitration should contain the subject of arbitration if the agreement of arbitration is concluded after the dispute.<sup>7</sup>

<sup>2</sup> 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. Article: 2

<sup>3</sup> Hornile, J. (2009). *Cross Border Internet Dispute Resolution*. New York: Cambridge University Press. First Published. At: 49

<sup>4</sup> The Palestinian Arbitration Law, No: 3 of 2000. Article: 1. This Law Published in Official gazette No: 33 on: 30/6/2000. Page: 5.

<sup>5</sup> The Palestinian Arbitration Law, No: 3 of 2000. Article:5/1,2

<sup>6</sup> The Decision of Ministers Council No. 39 of 2004 regarding to Executive Regulations for the Palestinian Arbitration Law No 3/2000. This Decision Published in the official gazette No: 50 on 29/8/2004. Page: 168. Article: 19

<sup>7</sup> The Decision of Ministers Council No. 39 of 2004 regarding to Executive Regulations for the Palestinian Arbitration Law No 3/2000. Article: 19

These regulations obligate the parties to write the arbitration agreements without restricting them to a specific way of writing. This means that the parties can write the arbitration agreement via traditional means. In addition, the parties can conclude the agreement of arbitration using electronic means, such as data message. Therefore, the parties can write the clause of arbitration by data message, and include the clause of arbitration in e-transaction contracts because the law allows electronic means of writing arbitration agreement.

On the other hand, the Palestinian E-Commerce Draft Law allows arbitration in e-transaction in article 67: This law applies to the claims of electronic commerce submitted to the courts and the arbitration entity, and the definitive judgment was not issued in its place.<sup>8</sup> The parties in e-transaction can resolve their dispute via arbitration, where the Palestinian e-commerce law is applicable. It allows for the arbitration in e-transaction disputes as an alternative to reach a resolution.

The Palestinian Arbitration Law clarifies the applicable law on arbitration in article 19: 1. In an international arbitration, the parties are allowed to agree to the applicable law on the subject of arbitration. However, if they did not agree, the arbitration entity is applicable to the Palestinian arbitration law. 2. If the arbitration is international and in Palestine, and the parties did not agree about an applicable law, the substantive rules are applicable, which are referred to as the rules of conflict-of-laws. The rules of transferring are inapplicable, except if it leads to the applicable provisions of Palestinian law. In all cases, the arbitration entity takes into account the applicable customs on the relation between the dispute parties.<sup>9</sup>

This law allows the parties to agree on the applicable law in international arbitration. The parties in the international contracts are from many countries, and every party requires the application of their respective nationality law as per their interest. Therefore, the parties can agree about the applicable law in relation to the law of any of the parties or the law of a third country. If the parties agree on the applicable law, the arbitration entity is obliged to apply this law. However, if the parties did not agree on the applicable law, and the arbitration is in Palestine, the arbitration entity is obliged to apply Palestinian law.

Therefore, the parties in an e-transaction can agree about arbitration as a way of resolving the disputes that might arise between them. Arbitration agreements require clarifying all issues of arbitration, such as the arbitration entity, the applicable law, and the procedures of arbitration, the place of arbitration, and the types of disputes. In fact, all of these issues are important in arbitration agreement to avoid any dispute regarding arbitration agreement, because arbitration requires an agreement between the disputing parties, otherwise, the parties are obliged to refer the dispute to court.

On the other hand, Article 47 of Palestinian Arbitration Law stipulates that the decisions of arbitration be enforceable after it is affirmed by the courts.<sup>10</sup> Therefore, the arbitration decision requires the affirmance from the competent court before it becomes binding. The decision of arbitration becomes binding after the court affirms it, and the parties are obliged to enforce it. If any party rejects the enforcement this decision, the court could compel them to comply, as they agreed to resolve it via arbitration in the first place.

## Mediation

Article 2 of Directive 2013/52/EC of the European Parliament stipulates that 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.<sup>11</sup> Therefore, mediation is a way to resolve disputes between parties who try to resolve their dispute via a mediator. The role of a mediator is to help parties resolve dispute.

There are two types of mediator roles; facilitative and evaluative mediation. In facilitative mediation, the role of a mediator is to help parties agree without making any recommendations or suggestions. On the other hand, the role of a mediator in the evaluative mediation is to make recommendations for an acceptable agreement between the parties. The mediator can make reasonable suggestions as a solution for this dispute.<sup>12</sup>

The mediators are incapable of obliging the parties to follow any recommendation or solution. Therefore, the parties are not obligated to continue the mediation to the end, and they can opt to withdraw when it suits them.<sup>13</sup>

The role of a mediator is different from the role of an arbitrator, because the arbitrator can decide on the solution, and the parties are obligated to implement this solution. Furthermore, in arbitration, the parties sign an agreement to resolve their dispute via arbitration, and this agreement is binding.

<sup>8</sup> The Palestinian E-Commerce Draft Law. Article: 67.

<sup>9</sup> Palestinian Arbitration Law No 3/2000. Article: 19

<sup>10</sup> Palestinian Arbitration Law No 3/2000. Article: 47

<sup>11</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters

<sup>12</sup> Hornile, J. At: 51

<sup>13</sup> Ibid. At: 51

In general, the laws that organize the mediation as an alternative dispute resolution in e-commerce in Palestine are unavailable until now. Therefore legislating new laws that organizes the mediation in e-commerce is important, especially for Palestine.

### Online dispute resolution (ODR)

“ODR is a broad term that encompasses many forms of alternative dispute resolution (“ADR”) that incorporate the use of the Internet, websites, email communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when participating in ODR. Rather, they might communicate solely online”.<sup>14</sup>

ODR is an alternative to resolve the disputes using electronic means, which means that the parties can use the Internet to communicate with each other’s, submit their claims and evidence, and keep up to date with the dispute through the Internet.

In fact, there are many types of disputes that might arise between the parties in e-transactions, such as the failure to deliver the goods, submission of defective goods, failure to complete payment, and the loss of payment. All of these disputes require resolution, and the injured party can claim damages from the courts, but this might be impeded by the competency of the courts, as the parties involved might be from different countries, which makes resolution infinitely more complicated. Therefore, the parties can conclude an agreement to resolve these disputes via alternative means, especially online dispute resolutions.

### Online arbitration

Online arbitration generally refers to the application of dispute resolution skills and resources over a network. In comparison, traditional arbitration proceedings are conducted entirely by e-mail.<sup>15</sup> The parties can communicate with each other in online arbitration via emails, web-based communication tools, and video conferences.<sup>16</sup>

This means that online arbitration depends on electronic means, and the arbitration began from the submission of the document and ends when a decision is made, with the parties not seeing each other in person within the period of arbitration.

The parties and arbitration can manage their files electronically, and all documents and data relating to arbitration can be electronically stored. This way, it is important to save time and efforts in returning the documents to enable the party to restore, print, and note the documents.<sup>17</sup>

Furthermore, the Executive Regulations No.39 of 2004 for the Palestinian Arbitration Law No 3/2000 stipulates that: 1. Agreement of arbitration should be written, and this agreement is written in any of these forms, and c. if it is in the form of information message between the parties through electronic means.<sup>18</sup>

This means that the arbitration agreement should be written, and electronic means are acceptable as a means to write the arbitration agreement according to Palestinian law. The parties can write the agreement of arbitration electronically, which is suitable for e-transaction that depends on the Internet.

On the other hand, the Palestinian Arbitration Law stipulates that 1. The arbitration entity is formed from one arbitrator or more by the agreement of the parties. 2. If the parties did not agree on the formation of the arbitration entity, every party selects an arbitrator, and the arbitrators select the third arbitrator, except if the parties agreed otherwise.<sup>19</sup>

In addition, the Executive Regulations No.39 of 2004 for the Palestinian Arbitration Law No 3/2000 stipulates that 1. If the parties did not agree on the formation of arbitration entity, every party selects an arbitrator, and they can select the third arbitrator if necessary. 2. If the parties did not agree on the third arbitrator, the selected arbitrators have the right to select the third arbitrator, and if they did not agree, the court appoints them according to the request from the parties or arbitration entity. The decision of the court cannot be appealed.<sup>20</sup>

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<sup>14</sup> American Bar Association. (2002). Addressing disputes In Electronic Commerce: Final Report and Recommendations of The American Bar Association’s Task Force on Electronic Commerce and Alternative Dispute Resolution.

<http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalReport102802.authcheckdam.pdf>. Accessed on: 10/2/2016. Page: 1

<sup>15</sup> Coteanu, C. At: 92

<sup>16</sup> Schultz, Th. (2002). *Online Dispute Resolution: an Overview and Selected Issues*. United Nations Economic Commission for Europe (UNECE), Forum on Online Dispute Resolution Geneva, 6-7 June 2002.

[http://www.cedires.com/index\\_bestanden/Schultz\\_2002\\_ODR.pdf](http://www.cedires.com/index_bestanden/Schultz_2002_ODR.pdf). Accessed on: 10/2/2016.

<sup>17</sup> Hornile, J. At: 82

<sup>18</sup> The Decision of Ministers Council No. 39 of 2004 regarding to Executive Regulations for the Palestinian Arbitration Law No 3/2000. Article: 19/1/c

<sup>19</sup> Palestinian Arbitration Law No 3/2000. Article: 8

<sup>20</sup> The Decision of Ministers Council No. 39 of 2004 regarding to Executive Regulations for the Palestinian Arbitration Law No 3/2000. Article: 24

The parties should select the arbitrator in the arbitration agreement, and also agree on the fact of whether they need more than two arbitrators. They can request additional arbitrator (third) from the courts should they fail to agree on a number. These articles are important for enforcing the arbitration agreement, because the entity of arbitration is the main issue in this agreement, and there is no arbitration without an agreement between the parties about the selection of the entity of arbitration.

On the other hand, the Palestinian Arbitration Law stipulates that: without inconsistency with the provisions of this law, if arbitration agreement appointed an arbitration institution, the rules of this institution organizes the procedures of arbitration, including appointing an arbitration entity, supervising it, determining the expenses and its distribution on the parties, and decide on the recuse of the arbitration entity or any of its members.<sup>21</sup>

Therefore, the parties can appoint an arbitration institution to resolve such disputes, which may arise in the course of an e-transaction. The rules of the selected arbitration institution are applicable in this case. In fact, every arbitration institution has special rules regarding the procedures of arbitration.

### Online mediation

“Online mediation is the online form of traditional mediation, in which a third neutral person tries to bring the parties to settle by using one of the styles developed for traditional mediation. The only significant difference with traditional mediation is that the parties communicate online, often using advanced communication platforms that are tailored to specific types of disputes.”<sup>22</sup>

The role of a mediator is to help the parties negotiate their disputes via electronic methods such as emails. The mediator can also use online platforms by linking the computer to the Internet and to the pages of instructions and information. This platform enables the parties to communicate in an interactive manner. It contains the technologies that enable the parties from writing about the discussion or communicating by voice or video conferencing.<sup>23</sup>

There are two types of mediation. The first one is facilitative mediation, where the role of a mediator is helping the parties communicate with each other without providing a solution. The second one is evaluative mediation, where the mediator offers his opinion according to the law, facts, and evidence being presented. He tries to find an acceptable solution, and tries to convince the disputing parties to accept this solution.<sup>24</sup>

The role of a mediator is helping the parties find an acceptable resolution for their dispute, and they cannot compel the parties to accept this resolution. The mediator reduces the disputes between the parties and look for a resolution. This resolution become binding after the mediator drafts the contract of mediation and the parties ratify it. However, the role of an arbitrator is to decide on a solution for the dispute, and the parties are obligated to accept this resolution.

Online mediation begins by filling the form of mediation on the website of the mediation’s institution. This application contains the personal information about the applicants, the subject of the dispute, and the information about the other party. When the institution receives the form, it sends a confirmation to the applicant. Then, the institution communicates with the other party, sends him a copy of mediation’s form along with a decision form, indicating whether or not they are willing to take part in the mediation. If they are unwilling, the buck stops there, and goes no further. However, if the answer is yes, then they will proceed to complete the form of mediation. After that, the institution provides the parties with the names of the mediators that can be selected. The procedure begins by sending an email to both parties with passwords, and every party can access the web and send applications. Afterwards, they discuss the reasons of the dispute, and later, the mediator writes the final agreement to be signed and ratified by the parties.<sup>25</sup>

Palestinian Laws organizes the arbitration as an alternative to dispute resolutions, but it did not cover other types of alternative dispute resolution, such as mediation. Therefore, the researcher recommends that Palestinian legislator legislate new laws or change existing ones that organizes mediation besides arbitration as an alternative to resolve disputes, especially in e-transaction contracts.

### Conclusion

The scope of discussion is primarily on alternative disputes resolution in e-transactions, and this research focuses on the arbitration and mediation. Therefore, this discussion excludes the courts resolution of disputes in e-transaction. Furthermore,

<sup>21</sup> Palestinian Arbitration Law No 3/2000. Article: 10

<sup>22</sup> European Commission's Information Society European Commission's Information Society and Media Directorate. General. (2009). EU study on the Legal analysis of a Single Market for the Information Society, New rules for a new age: Dispute resolution. [http://ec.europa.eu/information\\_society/newsroom/cf/newsletter-item-detail.cfm?item\\_id\\_7022](http://ec.europa.eu/information_society/newsroom/cf/newsletter-item-detail.cfm?item_id_7022). Accessed on: 10/2/2016. At: 13

<sup>23</sup> Hornile, J. At: 79

<sup>24</sup> Kohler, G., Schultz, Th. (2004). *Online Dispute Resolution: Challenges for Contemporary Justice*. Netherland: Kluwer Law International. At: 22

<sup>25</sup> AbÈ Al-HijÈ, Muhammad Ibrahim. (2009). *Al-Tahkim al-EliktronÈ. AmmÈn: DÈr al-ThaqÈfah*. First edition. At:36

research examines the laws in Palestine that regulate the alternative dispute resolution such the Palestinian Arbitration Law No. 3/2000 and the Executive Regulations No.39 of 2004.

In general, there are many types of disputes that might be arise between the parties in e-transactions, such as the failure to deliver the goods, submission of defective goods, failure to complete payment, and the loss of payment. All of these disputes require resolution, and the injured party can claim damages from the courts, but this might be impeded by the competency of the courts, as the parties involved might be from different countries, which makes resolution infinitely more complicated. Therefore, the parties can conclude an agreement to resolve these disputes via alternative means, especially online dispute resolutions.

The parties in e-transaction prefer the alternative dispute resolution to solve the disputes that may arise between them in enforcement of the electronic contacts. There are many benefits of alternative dispute resolution such as the ability of the parties to choose the mediator or the arbitrator who has an experience, or who is reliable, by the parties.

Arbitration is the way to resolve the disputes between the parties in e-transaction, and this way requires a written agreement between the parties. The parties can include the arbitration clause in their contract before any dispute and examine the type of disputes which will be solved by arbitration, such as failure to deliver the goods, defective goods, or failure to complete payments for the goods. However, the parties can conclude an agreement to resolve the actual dispute. This agreement is independent, and organizes the arbitration to do so.

In addition, the parties can resolve their dispute in e-commerce by the way of mediation and the role of a mediator is to help parties resolve dispute. In fact, the role of a mediator is different from the role of an arbitrator, because the arbitrator can decide on the solution, and the parties are obligated to implement this solution. Furthermore, in arbitration, the parties sign an agreement to resolve their dispute via arbitration, and this agreement is binding.

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