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The Liberty of Participation in Online Alternative Dispute Resolution Schemes

HAITHAM A. HALOUSH*

Abstract

Electronic commerce is important, and perhaps, inevitable. Thus to consider the legal implications of the growth and development of electronic commerce is essential. However, the lack of suitable dispute resolution mechanisms in cyberspace will constitute a serious obstacle to the further development of electronic commerce. Bearing this in mind, this paper argues that when Alternative Dispute Resolution (ADR) moves to cyberspace, particularly arbitration and mediation as the main types of ADR, the form of online alternative dispute resolution (OADR) can maximise the growth of e-commerce.

Alternative Dispute Resolution (ADR) and the internet are two very topical issues. Online alternative dispute resolution (OADR), or ADR online, refers to the use of internet technology, wholly or partially, as a medium by which to conduct the proceedings of Alternative Dispute Resolution (ADR), in order to resolve commercial disputes which arise from the use of the internet. Those proceedings are operated by neutral private bodies under published rules of procedure.

Having said that, it is important to address mandatory OADR. This means that the parties are bound to adhere to the OADR process. Indeed, it is imperative to display what risks internet users should be willing to take with mandatory OADR schemes. This paper concludes that the issue of consent should be at the forefront of any contemplated OADR solutions. Clearly, it is unacceptable to impose mandatory OADR on internet users without their knowledge and consent. Instead, a complainant who wishes to

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avoid the mandatory nature of OADR proceeding must be able to bring the action in any court that has a jurisdiction over the dispute. Bearing this in mind, there is a strong reason to believe that mandatory OADR schemes would not be enforceable in courts, and that the entire scheme of mandatory OADR might be unworkable.

1.1. Introduction

Electronic commerce is important, and perhaps, inevitable. Thus to consider the legal implications of the growth and development of electronic commerce is essential. However, the lack of suitable dispute resolution mechanisms in cyberspace will constitute a serious obstacle to the further development of electronic commerce. Bearing this in mind, this paper argues that when Alternative Dispute Resolution (ADR) moves to cyberspace, particularly arbitration and mediation as the main types of ADR, the form of online alternative dispute resolution (OADR) can maximise the growth of e-commerce.

Alternative Dispute Resolution (ADR) and the internet are two very topical issues. Online alternative dispute resolution (OADR), or ADR online, refers to the use of internet technology, wholly or partially, as a medium by which to conduct the proceedings of Alternative Dispute Resolution (ADR), in order to resolve commercial disputes which arise from the use of the internet. Those proceedings are operated by neutral private bodies under published rules of procedure.

In the online world, OADR should not be presented as the superior alternative to the court system, making the old court system obsolete. OADR must not be conceived also as the main force driving changes in dispute settlement in cyberspace. Instead, OADR must be conceived as merely a stream contributing to the broad river of change in how dispute resolution could be managed in cyberspace. OADR is not a substitute for other methods of dispute resolution; it is one option available to the internet users. Indeed, the idea of OADR is not simply about the use of technology to resolve disputes in cyberspace, it is rather about improving choice among other alternatives.

In advancing this issue, this paper will analyse the liberty of participation in ADR. Then this paper will proceed to address the liberty of participation in OADR schemes. After that, this paper will address the ICANN policy in using mandatory OADR procedures to resolve disputes concerning General Top Level Domain Names. Then this paper will analyse

the disparity of bargaining power between consumers and merchants with its implications on consumers' consent to mandatory schemes in OADR. Finally, this paper summarises and relates the findings of the paper to each other in a coherent way which might help in the future development of OADR.

It must be noted that there will be special references to the implications of OADR upon English litigation. Such implications have to be analysed because they constitute a reference point for the assessment of the quality of justice of a given OADR provider and they provide a framework for reflecting upon the general requirements of fair process in OADR. As a result, the priority in this research is towards the implications of OADR on the United Kingdom and English litigation. The default is the English law where it is well developed, appropriate, and constructive. The United Kingdom government is enthusiastic about developing the potential for electronic transactions, partly as a method of delivering government services, and partly as the basis for promoting competition and economic growth. It appears that there is now a strong political imperative in the UK to prompt various actions that will create trust, reliance, and confidence in doing business over the internet. The strategy of the UK government is to make the country the best place in the world for e-commerce.¹

For the purpose of this paper, business to consumer (B-to-C) internet transaction disputes and internet trademark infringement disputes in the form of domain name disputes will be deployed as two case studies. Businesses to consumer and domain name dispute resolution have been a major area of activity for online ADR because of the need to build electronic commerce through increasing internet users' confidence. On the one hand, the domain name system is generated and becomes an indispensable element for electronic commerce to work properly. Electronic commerce is a source of growing demand on domain names because currently there is no effective alternative method of finding a company's internet location. Accordingly, the utility of Domain Name System (DNS) should be understood primarily within the broader context of electronic commerce and doing business on the internet. Due to the nature of the internet, the domain name is as important as the business itself, or more precisely, the domain name is the company's primary asset. For the consumer, a domain name allows an access to the internet, provides a direct link to the online business, and provides a mode of

¹ For a full account on UK government's strategy in relation to the encouragement of e-commerce, see the office of the e-Envoy, available online at <http://archive.cabinetoffice.gov.uk/e-envoy/index-content.htm>, last visited on the 1st of October 2007.

initiating transactions online. Equally, a domain name owner's interest in a domain name is that acquisition of a domain name is considered as a prerequisite step to conducting business online. As a result, firms and others, increasingly seek to have an internet presence because without a domain name, a company would be practically invisible on the internet. Customers would not know where to find the company.² On the other hand, given that a business to consumer internet transaction means in a broad sense the sale of goods and services over the internet from business entities to individuals acting in their personal capacity, uncertainty over the legal framework of B-to-C internet transaction disputes may inhibit both consumers from purchasing products or services over the internet, and companies from entering into the electronic marketplace.³

1.2. The Liberty of Participation in ADR

It is important to draw the line between the concepts of binding OADR (that the parties should be bound by the outcome of the OADR procedures) and mandatory OADR (that the parties are bound to adhere to the OADR process). The former concept is beyond the limits of this paper. This paper will address the latter concept as it is imperative to display what risks internet users should be willing to take with mandatory OADR schemes.

Traditionally, the question of the relationship between ADR and the judicial system is very important because ADR schemes should not prejudice or undermine any other means of judicial redress.⁴ Moreover, although ADR can provide appropriate solutions for many disputes, it must be recognised that even in the most ideal of worlds a certain number of disputes will still end up in courts. There are cases which are not appropriate to be adjudicated by ADR, and it may not always be in the best interest of everyone to choose to participate in ADR. For example, there may be a class action lawsuit which is liable to be more effective form of relief than the individual arbitral system. Certain harms inflicted on internet users may be small yet widespread, so that they would be impractical to pursue certain claims unless brought as a class action. Furthermore, competition between court and out-of-court dispute settlement should not be exaggerated. One of the facets of this exaggeration is

² Burk, D., "Trademarks along the Infobahn: A First Look at the Emerging Law of Cyber-Marks", (1995) 1 *Richmond Journal of Law & Technology* 9.

³ Ghemawat, P., "Distance Still Matters", (2001) 79 *Harvard Business Review* 137.

⁴ For an intensive discussion on this issue see Lord Woolf Report, "Access to Justice: Final Report", (London, 1996), available online at <http://www.dca.gov.uk/civil/final/contents.htm>, last visited on the 1st of October 2007.

the suggestion that the rule of law is at stake when parties resolve their dispute outside of the court.⁵ In this regard, Harry Edward, a leading author on ADR has said that:

We must determine whether ADR will result in an abandonment of our constitutional system in which the rule of law is created and principally enforced by legitimate branches of government.⁶

It must be pointed out that Edward's opinion is unwise, to say the least, because it is based on a sharp division between the court system and ADR. Such division is unwarranted because ADR is a set of methods that are considered alternatives to legalistic methods of dispute resolution. These alternative mechanisms are not intended to supplant court adjudication, but rather to supplement it. They can operate quite effectively in conjunction with, or in the shadow of the court system, since ADR cannot bring together unwilling parties to settle their differences, nor does it have the power to enforce the outcome of ADR proceeding, as the court do.

Accordingly, it must be clear that participation in ADR does not mean waiving the rights to recourse to the ordinary law; rather it means a general renunciation of the remedies available in law. In this regard, Professor Roy Goode argues that it is difficult to evaluate the advantages of alternative dispute resolution over other dispute resolution mechanisms, including courts, because various legal options compete with each other in a way which is rather unclear. Professor Goode concludes that no system has any innate superiority over the other.⁷

Nowadays, courts are increasingly using ADR mechanisms to settle disputes. The fact that courts provide the formal dispute resolution mechanism has not ruled out the development of links between them and the techniques of ADR. This suggests that an extra-judicial component could be grafted on to civil proceedings because ADR is viewed by many as an innovative way to

⁵ WIPO, "The Management of Internet Domain Names and Addresses: Intellectual Property issues, Final Report of the WIPO Internet Domain Name Process", 30th of April 1999, available online at <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>, last visited on the 1st of October 2007.

⁶ Edwards, H., "Alternative Dispute Resolution: Panacea or Anathema", (1986) 99 *Harvard Law Review* 668 at 672.

⁷ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1177.

improve adjudication procedures by being an alternative avenue of justice for both the defendant and the plaintiff.

It must be clear that one of the main incentives to participate in ADR schemes is that, while any change to the court system would require an adaptation of the legal procedure, alternative forms of dispute settlement emphasise the advantages of the flexible and speedy nature of their procedure. In actual fact, various countries have introduced pilot schemes whereby courts refer the parties in a dispute to alternative dispute resolution mechanisms. The growing use of alternative dispute resolution often is associated with explicit annexation of ADR procedures to well known court systems as in the case of court annexed arbitration.⁸

In *Aktien Gesellschaft v. Fortuna Co. Inc.*,⁹ it has been stated that arbitration and court system ought to be regarded as co-ordinate rather than rival. This position was strengthened in England by the introduction of the English Arbitration Act 1996 which implies that commercial arbitration should be complementary to, and not in competition with, court system.

1.3. The Liberty of Participation in OADR Schemes

In the online world, OADR should not be presented as the superior alternative to the court system, making the old court system obsolete. OADR must not be conceived also as the main force driving changes in dispute settlement in cyberspace. Instead, OADR must be conceived as merely a stream contributing to the broad river of change in how dispute resolution could be managed in cyberspace. OADR is not a substitute for other methods of dispute resolution; it is one option available to the internet users. Indeed, the idea of OADR is not simply about the use of technology to resolve disputes in cyberspace, it is rather about improving choice among other alternatives.¹⁰

⁸ Bernstein, L., "Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Court Programs", (1993) 141 *University of Pennsylvania Law Review* 2169.

⁹ [1999] 1 Lloyd's Rep. 503.

¹⁰ Tyler, M., and Bretherton, D., "Research into Online Alternative Dispute Resolution, an Exploration Report Prepared for the Department of Justice in Australia", 21st of March 2003, available online at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)-0ch+6+amended+Maximising+performance+of+system.pdf/\\$file/0ch+6+amended+Maximising+performance+of+system.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)-0ch+6+amended+Maximising+performance+of+system.pdf/$file/0ch+6+amended+Maximising+performance+of+system.pdf), last visited on the 1st of October 2007.

It must be noted that OADR and legal redress are two separate issues. Access to the latter should not be made conditional on the use or even exhaustion of the possibilities offered by the former. This would seriously undermine internet users' confidence in OADR solutions because an effective OADR scheme will be used without compulsion.

In actual fact, any comprehensive alternative to the courts should not exist in any contemplated OADR scheme. Instead, the notion of OADR should be that internet users have certain courthouse rights, but those courthouse rights may not be meaningful in small monetary amounts and/or on a cross-border level. Indeed, although courthouse rights might not be invoked, the fact that it could be invoked is important. In practical terms, internet disputes will not probably reach courts, but this theoretical assurance of the existence of the court is important.

The letter "A" in OADR, normally stands for *alternative*. It may be useful to replace "alternative", with, say, "appropriate". OADR being an appropriate dispute resolution mechanism in cyberspace does not mean that the use of OADR for immediate resolution in cyberspace should preclude other forms of dispute resolution. Subsequently, internet users who submit disputes to OADR system should not be asked to waive their legal rights, nor should they be restricted or blocked from resorting to other avenues of recourse. Thus, the basic role of the judicial process as a method of settling disputes must be reaffirmed.¹¹

It must be borne in mind that the goal of OADR process is not to create new rights, nor to accord greater protection to parties' rights in cyberspace than that which exists elsewhere. Rather, the goal is to give proper and adequate expression of parties' existing rights in the context of the medium of the internet. Indeed, OADR should not be viewed as a way to create a parallel universe for online disputes in which internet users no longer have the rights and protection afforded to them by the legal framework in their home countries.

¹¹ WIPO, "The Management of Internet Domain Names and Addresses: Intellectual Property issues, Final Report of the WIPO Internet Domain Name Process", 30th of April 1999, available online at <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>, last visited on the 1st of October 2007.

The right of access to courts to settle any type of dispute is a basic right. Therefore, one must be compelled to oppose the idea of mandatory OADR schemes. Arguably, if mandatory OADR becomes the norm for internet disputes, internet users will arguably be less willing to foray into e-commerce venue for their purchasing, knowing that their remedies are limited. Indeed the representation of OADR as the superior alternative to the court system is dangerous. It appears safe to assume that OADR should remain as an alternative, rather than a mandatory, dispute resolution mechanism in cyberspace.

The principle of legality in the EU recommendations on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes dictates that ADR bodies, while retaining the flexibility of their procedures, should comply with the mandatory law that courts would have to apply. This rule can be expressed even more simply: it is inadmissible for an ADR body to resolve a dispute in a manner diametrically opposed to the decision that a court would have made in the same case. Clearly, the principle of legality in the EU recommendations could be seriously endangered in mandatory OADR schemes. The principle of legality is attempting to ensure that the disputant has knowingly and freely chosen to elect to bind him/her to the mechanism's outcome(s). The principle of legality in the recommendations has been expressed as follows:

The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the state in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the member state in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.¹²

In this regard, it seems appropriate to recall the opinion of Ian McNeil who is one of the leading authors on arbitration law. He argues that it must be borne in mind that only court litigation can be commenced without any agreement of the other party. Arbitration, and of course other forms of

¹² EU Commission, "Recommendations on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes", (98/257/EC) O.J.L. 115, available online at http://aei.pitt.edu/1179/01/consumer_justice_gp_follow_COM_1998_198.pdf, last visited on the 1st of October 2007.

alternative dispute resolution, are available only if the parties at some stage agree that the dispute will be resolved by a third party neutral. Unarguably, without a fully informed voluntary consent, arbitration and other forms of alternative dispute resolution lose all credibility as a just alternative to litigation. He said in particular that:

Using terms such as compulsory or mandatory in such circumstances is, at best, highly confusing. At worst, it constitutes question begging; the very question at stake where such questions arise is whether whatever consent to arbitrate as has been manifested should or should not be given full contractual effect. To call arbitration compulsory or mandatory is to answer by label, not by attention to the facts and by analysis.¹³

Given that recourse to ADR is generally characterised by the predominance of a consensual approach and freedom of contract, OADR should be based on voluntary participation, and therefore not deprive the parties of their right of access to the courts. From this perspective, restricting the options of disputants to OADR only and denying access to the courts should not be permissible. As a result, an important task would be to design an OADR system in a way that has the potentiality to establish an appropriate linkage to court system, but without harming the flexibility of the process. From this perspective, it becomes clear that there should be a balance in cyberspace between the preservation of the long-tried right to seek redress through courts, and processes of alternative dispute resolution, such as arbitration, which is rooted in well-established procedures.¹⁴

1.3.1. The ICANN Policy in Using Mandatory OADR Procedures to Resolve Disputes Concerning General Top Level Domain Names

The Internet Corporation for Assigned Names and Numbers (ICANN), which is a non-profit corporation formed to assume responsibility for Internet Protocol Address (IP) space allocation, originally obtains its authority over domain names from a U.S. Department of Commerce contract to administer the root of the system (the ultimate database in which all Top Level Domains (TLDs) are registered). The ICANN Uniform Domain Name

¹³ McNeil, I., *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act*, (Little Brown & Co., Boston, 1999) 17-8.

¹⁴ WIPO, "The Management of Internet Domain Names and Addresses: Intellectual Property issues, Final Report of the WIPO Internet Domain Name Process", 30th of April 1999, available online at <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>, last visited on the 1st of October 2007.

Dispute Resolution Policy (UDRP) is incorporated as a part of the Generic Top Level Domain Names (gTLDs) registration agreement which includes (.com), (.org) and (.net). The UDRP is imposed by contract upon all of the accredited gTLDs registrars and, in turn, imposed by them upon domain name holders as a condition of the registration agreement.¹⁵

At present, the ICANN policy uses mandatory OADR procedures to resolve disputes concerning General Top Level Domain Names (gTLDs) such as com, net, and org. In order to register a domain name in any of the (gTLDs), an applicant must agree to be bound by UDRP, which utilises OADR mechanisms. Consequently, every registrant has agreed to be subject to mandatory arbitration when someone else alleges that the domain name is identical or confusingly similar to a registered trademark, the registrant has no legitimate interest in the domain name, or when it is alleged that the domain name has been registered and used in bad faith. In this regard, Article 4 (a) reads as follows:

You are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that (i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and (ii) you have no rights or legitimate interests in respect of the domain name; and (iii) your domain name has been registered and is being used in bad faith. In the administrative proceeding, the complainant must prove that each of these three elements is present.¹⁶

It was argued by ICANN that those persons, who register domain names in bad faith in abuse of intellectual property of others, would be

¹⁵ ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at <http://www.icann.org/dndr/udrp/policy.htm>, last visited on the 1st of October 2007. Before ICANN, in 1993, after a gradual increase in commercial internet activity, the National Science Foundation (NSF) subcontracted the job of registering domain names to a small company named "Network Solutions". Network Solutions registered domain names on a first-come first-served basis, just as all the internet domain names had always been allocated. For an intensive discussion on this issue see Howitt, D., "War.com: Why the Battle Over Domain Names Will Never Cease", (1997) 19 *Hastings Communications and Entertainment Law Journal* 719.

¹⁶ Article 4 (a) of ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at <http://www.icann.org/dndr/udrp/policy.htm>, last visited on the 1st of October 2007.

unlikely to choose to submit to a procedure that is cheaper and faster than litigation like UDRP.¹⁷

The argument that was put forward in order to defend the mandatory nature of the UDRP is flawed, to say the least. This is due to the following three reasons. First, by confining the scope of the procedures of UDRP to abusive registrations, the danger of innocent domain name holders acting in good faith being required to participate in the procedure is not eliminated. There are non-trademarked, yet legitimate uses of words, names and symbols. And, therefore, one must not lose sight of traditional non-commercial internet uses.¹⁸

Second, there is a perceived unfairness in the application of UDRP which favours trademark owners. As a result, there has been considerable criticism of the UDRP and calls to revise it on the basis that it reinforces a bias towards large commercial interests, namely those who already have trademarks registered.¹⁹

And third, the UDRP did not address properly the selection mechanism of the dispute resolution service provider. By all means, one party should not be allowed to choose the third party neutral. Article 6(b) reads as follows:

If neither the Complainant nor the Respondent has elected a three-member Panel (Paragraph 3 (b)(iv) and 5(b)(iv), the Provider shall appoint, within five calendar days following receipt of the response by the Provider, or the lapse of the time period for the submission thereof, a single Panelist from its list of panelists.²⁰

¹⁷ WIPO, "The Management of Internet Domain Names and Addresses: Intellectual Property issues, Final Report of the WIPO Internet Domain Name Process", 30th of April 1999, available online at <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>, last visited on the 1st of October 2007.

¹⁸ Albert, G., "Right on the Mark: Defining the Nexus Between Trademarks and Internet Domain Names", (1997) 15 *John Marshall Journal of Computer and Information Law* 277.

¹⁹ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 64. Marcelo, H., and Ajay, N., "From International Treaties to Internet Norms: The Evolution of International Trademark Disputes in the Internet Age", (2000) 21 *University of Pennsylvania Journal of International Economic Law* 556.

²⁰ Article 6 (b) of the Uniform Domain Name Dispute Resolution Policy (the

There is statistical evidence that a vague selection mechanism of the third party neutral leads to forum shopping that biases the results. Forum shopping is done by rationally selecting an OADR provider who tends to rule in the favour of the party who selects the provider or the party with the highest bargaining power. Statistics show that the two OADR providers, who obtain most cases, *WIPO Online Dispute Resolution Centre*, and the *National Arbitration Forum*, are more likely to decide in favour of the claimant. The claimants win 82.2 per cent of the time with *WIPO Online Dispute Resolution Centre* and 82.9 per cent of the time with *National Arbitration Forum*.²¹

Thus, the argument against mandatory OADR schemes must be viewed in a wider context than ICANN policy. For instance, there is a disparity of bargaining power between consumers and merchants. This would have apparent implications on consumers' consent to mandatory schemes in OADR.

1.3.2. The Disparity of Bargaining Power between Consumers and Merchants with its Implications on Consumers' Consent to Mandatory Schemes in OADR.

National laws apply in some cases irrespective of any choice made by the parties. This is likely to be found in areas such as consumer protection. Often, laws relating to consumer protection will strike out choice of law clauses, or else restrict the impact of such clauses, including dispute settlement clauses, and thus render them ineffective. This is reasonable since one distinguishing characteristic of consumer protection issues is the disparity of bargaining power between consumers and merchants. In actual fact, the disparity of bargaining power between consumers and merchants has lead legislators to prescribe special terms for consumer contracts.²² For example, Article 5 of the Rome Convention on the law applicable to contractual obligations reads as follows:

Notwithstanding the provisions of Article 3 [providing that a contract shall be governed by the law chosen by the parties], a choice of law made by

“Rules”), as approved by ICANN on the 24th of October 1999, available online at <http://www.icann.org/udrp/udrp-rules-24oct99.htm>, last visited on the 1st of October 2007.

²¹ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 111.

²² Heiskanen, V., “Dispute Resolution in International Electronic Commerce”, (1999) 16 *Journal of International Arbitration* 31.

the parties shall not have the result of depriving the consumer of the protection afforded him by the mandatory rules of the law of the country in which he has his habitual residence.²³

The disparity of bargaining power between consumers and merchants happens particularly when the reference to out-of-court dispute settlement is exclusive. That is to say the dispute can no longer be brought before the courts. In this regard, the EU Recommendations on principles applicable to the bodies responsible for out-of-court settlement of consumer disputes strongly suggests that there are legal limits on the ability of any ADR system to foreclose access to the court system by consumers. The Recommendations states that:

Use of the out-of-court alternative may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised.²⁴

Similarly, Article 3 of the European Council Directive on Unfair Terms in Consumer Contracts has expressly forbidden the contractual term that excludes or hinders the consumers' right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration. Article 3 reads as follows:

Member states may provide that clauses are presumptively unfair which excludes or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.²⁵

In actual fact Article 3 of the Directive relates to terms which are pre-established by businesses, which includes dispute settlement clauses. In

²³ Article 5 of the Rome Convention on the Law Applicable to Contractual Obligations, (80/934/EC) O.J.L. 266.

²⁴ EU Commission, "Recommendations on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes", (98/257/EC) O.J.L. 115, available online at http://aei.pitt.edu/1179/01/consumer_justice_gp_follow_COM_1998_198.pdf, last visited on the 1st of October 2007.

²⁵ Article 3 of the European Council Directive on Unfair Terms in Consumer Contracts, (93/13/EC) O.J.L. 95.

essence, Article 3 of the Directive states that by leaving the choice of dispute settlement mechanism with the consumer, businesses will avoid the risk of having an unfair contract term in their consumer contracts.²⁶

Arguably, mandatory arbitration clauses are designed to give businesses significant advantages in their disputes with consumers. Merchants may know the arbitrators, or the angles of arbitration process more than average consumers. They may have a record or other source of information on arbitrators' decisions. This superior knowledge about the general attitudes and tendencies of the arbitrator gives an advantage to the merchant. But the consumer is regarded generally as economically weaker and less experienced in legal matters than the merchant. The consumer is unlikely to have any information about the prior rulings or background of the suggested arbitrators.²⁷

The disparity of bargaining power occurs quite often when sellers unilaterally specify the terms of the sale, including dispute settlement clauses, and offering them to consumers on a "take it or leave it" basis. In fact, most pre-dispute arbitration clauses are in a standard form. When consumers form post-dispute arbitration agreements, they are likely to be mentally focused on the dispute. In contrast, when they form pre-dispute arbitration agreements, they are unlikely to be focused on the possibility of a dispute, and perhaps unaware of the existence of the arbitration clause. As a matter of fact, it is difficult to perceive pre-imposed arbitration clauses as fair clauses, when the parties do not have equal bargaining power, equal experience in arbitration, equal ability to understand the consequences of contract language, particularly the ramifications of the rights being waived, and an equal ability to insist on clauses being included or excluded in the contract.²⁸

In the online world, it is crucial that electronic commerce and OADR solutions are not be promoted at the expense of consumer protection standards because consumer protection, which generates consumer confidence, is critical for the continued growth of electronic commerce and OADR.

Article 1 (Sphere of application) of the UNCITRAL Model Law on Electronic Commerce provides:

²⁶ De Zylva, M., "Effective Means of Resolving Distance Selling Disputes", (2001) 67 *Arbitration* 236.

²⁷ Thornburg, E., "Going Private: Technology, Due Process, and Internet Dispute Resolution", (2000) 34 *University of California Law Review* 210.

²⁸ *Ibid.*

This law does not override any rule of law intended for the protection of consumers.²⁹ A similar viewpoint is adopted in the OECD Guidelines for consumer protection in the context of electronic commerce:

Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level or protection afforded in other forms of commerce.³⁰

Henry Perritt, a leading author on OADR, has argued that online consumers, due to the internet, are more powerful than offline consumers. This is due to the fact that the internet intensifies competition because it offers consumers a wide array of products and services from different sellers than they would have in geographically defined markets.³¹

Robert Bordone, another leading author on OADR, has responded to Perritt's argument by saying that Perritt's assertion is paradoxical. Electronic consumers are not always aware of the law and culture applicable in cyberspace, and are often not represented due to the low monetary value of electronic disputes in general. By contrast, electronic merchants have the greatest experience of the law and culture applicable in cyberspace, and are likely to obtain the finest representation.³²

Elisabeth Thornburg, another leading author on OADR, agreed with Gordone in his argument. She argued also that the disparity of bargaining power between consumers and merchants occurs quite often in the online environment where the contract is usually "take it or leave it" standardised form. According to Thornburg, in order to view the contract, the internet user must click on the "terms and conditions" button and only after he or she has agreed on such terms and conditions, including dispute resolution terms and conditions, the online transaction will continue. This is called click-wrap

²⁹ Article 1 of the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), available online at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html, last visited on the 1st of October 2007.

³⁰ OECD, "Consumer Protection in the Electronic Marketplace", DSTI/CP (98) 13/Final, available online at http://venus.icre.go.kr/metadata/12005_12E81082.pdf, last visited on the 1st of October 2007.

³¹ Perritt, H., "Dispute Resolution in Cyberspace: Demand for New Forms of ADR", (2000) 15 *Ohio State Journal of Dispute Resolution* 698.

³² Bordone, R., "Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal", (1998) 3 *Harvard Negotiation Law Review* 203.

agreements. Because of the electronic format, an internet user cannot cross out terms and bargain for different terms. In this case, it might be difficult to prove the consent of the parties because consent depends on the existence of choice, and if the choice is absent, the purported consent cannot be said to be voluntary.³³

Obviously, contracts which come as part of a standard form that is not subject to bargaining are called contracts of adhesion. Evidently, determining the voluntary nature of consent is the centrepiece of debates over contracts of adhesion. As a result, mandatory OADR clauses could be seen as imposed through contracts of adhesion, where actual consent by definition is absent.³⁴

1.4. Conclusion

Without doubt, the issue of consent should be at the forefront of any contemplated OADR solutions. Clearly, it is unacceptable to impose mandatory OADR on internet users without their knowledge and consent. Instead, a complainant who wishes to avoid the mandatory nature of OADR proceeding must be able to bring the action in any court that has a jurisdiction over the dispute. Bearing this in mind, there is a strong reason to believe that mandatory OADR schemes would not be enforceable in courts, and that the entire scheme of mandatory OADR might be unworkable. In the online world, OADR should not be presented as the superior alternative to the court system, making the old court system obsolete. OADR must not be conceived also as the main force driving changes in dispute settlement in cyberspace. Instead, OADR must be conceived as merely a stream contributing to the broad river of change in how dispute resolution could be managed in cyberspace. OADR is not a substitute for other methods of dispute resolution; it is one option available to the internet users. Indeed, the idea of OADR is not simply about the use of technology to resolve disputes in cyberspace, it is rather about improving choice among other alternatives.

³³ Thornburg, E., "Going Private: Technology, Due Process, and Internet Dispute Resolution", (2000) 34 *University of California Law Review* 1179.

³⁴ Rakoff, T., "Contracts of Adhesion: An Essay in Reconstruction", (1984) 96 *Harvard Law Review* 1172. Griffiths, D., "Contracting on the Internet", [1997] *European Intellectual Property Review* 4.