

EQUALITY OF ARMS IN THE DIGITAL AGE

HAITHAM A. HALOUSH^{*}, BASEM MELHEM^{**} AND BASHAR H. MALKAWI^{***†}

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.

Accessibility to OADR schemes means that the OADR mechanism can be called upon when needed. Since ADR is a fast growing area of law, and since the internet is fast becoming ubiquitous, accessibility is one of OADR's greatest strength. However, given that OADR is conducted through electronic means, accessibility will be associated to a great extent with technology. Therefore, this article concludes that there are technological challenges that need to be overcome if there is to be a

^{*} Haitham Haloush is Assistant Professor of Commercial Law at the Hashemite University, Jordan. He holds PhD in commercial law from Leeds University, England, College of Law, and L.L.M. from Aberdeen University, Scotland, College of Law.

^{**} Basem Melhem Assistant Professor of Commercial Law at the Jordan University, Jordan. He holds PhD in Commercial Law from Leeds University, England, College of Law, and L.L.M. from Aberdeen University, Scotland, College of Law.

^{***} Bashar Malkawi is Assistant Professor of Commercial Law, Hashemite University, Jordan. He holds an S.J.D in law from the American University, Washington College of Law, and an L.L.M in International Trade law from the University of Arizona.

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swift and successful deployment of online ADR in a cross-border environment.

I 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 context of OADR, it must be pointed out that the challenge faced by online arbitration lies more in the realm of law than technology, while the challenge faced by online mediation lies more in the realm of technology than law. This is due to the less stringent legal requirements and the crucial role of the communication process in conducting mediation. As a result, as online arbitration is faced with many legal issues, and, as online mediation requires complex and sophisticated communication schemes, which are difficult and expensive to set up presently, given time, OADR will be within the ambit of legally and technically possible in the near future. Consequently, from technical standpoint, a critical examination of online mediation is beyond the limits of this paper.

Accessibility to OADR schemes means that the OADR mechanism can be called upon when needed. Since ADR is a fast growing area of law, and since the internet is fast becoming ubiquitous, accessibility is one of OADR's greatest strength. However, given that OADR is conducted through electronic means, accessibility will be associated to a great extent with technology. Therefore, there are technological challenges that need to be overcome if there is to be a swift and successful deployment of online ADR in a cross-border environment.

At the most basic level, technical standards define and limit cyberspace, and, by extending the logic, OADR proceedings. As a result, OADR providers and participants need to know and understand the information technology limits. It must be borne in mind that OADR is not dealing with technology versus human. Instead, it deals with technology amplifying human abilities. For instance, if OADR providers use too much technology and put too much emphasis on efficiency, they

risk minimising the human element in the process since the whole procedure is very sanitised and distant. This factor could lead to a decreasing acceptance of the authority of third party neutrals. Consequently, it is crucial to strike an appropriate balance between reliance on technology and reliance on people in supporting ADR.

Equally, it must be borne in mind that technology itself is not neutral. Third party neutrals will be working online where many electronic dispute resolution contexts may favour people who are more technically adept. From this perspective, technical expertise is essential in OADR as the third party neutral is not only required to use computer software and communication technology, but he/she is required to assist the parties and educate them about the process. Consequently, OADR providers need to know and understand the internet users' limits. Indeed, because technology changes so rapidly, it is reasonable to argue that not every internet user is equal. Arguably, disputants may be even more technically adept than third party neutrals. In this respect, *Square Trade* requires its mediators and arbitrators to have the technological competence to conduct the dispute resolution process effectively.¹

It should be pointed out that the success of OADR is highly related to ease of use. The more user-friendly the OADR system is designed, the more the information balance between parties will be equalised. If one party can prove that he or she was seriously disabled to participate in OADR proceedings by a lack of technological competence, he or she may have a possibility to challenge the outcome(s) of OADR and prevent its execution. Apparently, equal access to information implies equality of arms in OADR schemes. This issue will be analysed in the following part of this paper.

In advancing this issue, this paper will deal with the issue of equality of arms in OADR schemes. This paper will proceed to discuss the different levels of access to technology and its implications on the equality of arms in OADR schemes. 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. In the United Kingdom, the encouragement of electronic commerce is a matter of public policy. 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

¹ <http://www.squaretrade.com>, last visited on the 1st of October 2007.

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.²

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 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.³ 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.⁴

II EQUALITY OF ARMS IN OADR SCHEMES

In administrative law, natural justice is a well-defined concept which comprises a fundamental rule of fair process: a man's defence must always be fairly heard. The rules requiring fair hearings and fair opportunities to present a case can be traced back to medieval times, and, indeed, they were not unknown in the ancient

² 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.

³ Burk, D., "Trademarks along the Infobahn: A First Look at the Emerging Law of Cyber-Marks", (1995) 1 *Richmond Journal of Law & Technology* 9.

⁴ Ghemawat, P., "Distance Still Matters", (2001) 79 *Harvard Business Review* 137.

world.⁵ In the case of *Anisminic Ltd. v. Foreign Compensation Commission*,⁶ Lord Reid said:

Time and time again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void and that was expressly decided in *Wood v. Wood*. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.⁷

Undoubtedly, fair hearings and fair opportunities to present a case are focal points of dispute resolution. Conventional litigation includes, as a matter of fairness, a right to present evidence and to respond to evidence offered by one's opponent. The reliability of evidence is tested through the combined effects of physical presence, oath, cross examination, and observation of demeanour.⁸ In this respect, it is important to recall that Article 6 (1) of the European Convention on Human Rights (ECHR) states that:

In the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.⁹

This begs the question of whether Article 6 (1) of the ECHR applies to arbitral proceedings. In principle, it does not apply. However, some rights of it are so fundamental that they cannot be waived. That said, it must be stressed that fair hearings and fair opportunities for parties to present a case may be lacking if there is an infraction to the right of equality of arms which incorporate the idea of a fair balance between the parties. Equality of arms requires that the parties be allowed access to facilities on equal terms and have a reasonable opportunity of presenting their case under conditions which do not place them at substantial disadvantage *vis-à-vis* their opponent.¹⁰

Resolving disputes requires communication. The capacity of parties to communicate among themselves and with the third party will be decisive for the resolution of the dispute. A realistic probability for the parties to reach an agreement depends on their opportunity to participate. Lack of proper communication may jeopardise fair process, and may lead to insufficient quality of justice, and may reduce trust in the dispute resolution process.

⁵ Wade, H. and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 436.

⁶ [1969] 2 AC 171.

⁷ Ibid. 179.

⁸ Thornburg, E., "Going Private: Technology, Due Process, and Internet Dispute Resolution", (2000) 34 *University of California Law Review* 205.

⁹ Article 6(1) of the European Convention of Human Rights. Available online at <http://www.hri.org/docs/ECHR50.html>, last visited on the 1st of October 2007

¹⁰ Harris, D., O'Boyle, M., and Warbrick, C., *Law of the European Convention on Human Rights*, (Butterworths, London, 1995) 218.

No strategy for dispute resolution, however much it seeks to modernise the way in which it operates, can ignore a very basic truth, i.e., that hearing and presenting a case will continue to be effective means of examining all sides of the argument and reaching decisions about difficult and complex problems.

In an online hearing and presenting a case, one must keep in mind that transmitting documents in electronic format is one thing and pleading and presenting the case is another thing. Moreover, to the extent that a hearing and presenting a case are conducted online, signs of non-verbal communication might be lost. Furthermore, in the online context, the inexperienced or inarticulate respondent may be disadvantaged against the professionally presented case of the claimant who has a sufficient knowledge of technology.¹¹

Any strategy for using information technology in arbitration, in particular, must address the hearing process effectively in order not to deprive disputants of the chance to tell their story that is an important part of a disputants' feeling that they have been given meaningful hearing.

Given the impossibility of dividing public and private law, and given that the implications of fairness in public law proceedings such as adjudication in courts can be applied to private law proceedings such as arbitral proceedings, it must be noted that with regard to equality of arms in arbitration, Article 5(1) (b) of the New York Convention subjects an award to challenge if the: Party against whom the award is invoked...was unable to present his case.¹²

In arbitration, arbitral procedure and arbitration rules often have provisions as to the cases in which a hearing must be held. Traditionally, the settlement of disputes in arbitration is often made on the basis of a hearing, in which the parties and the decision maker participate. A hearing will be normally an oral hearing. In various situations, however, practicalities may justify dispensing with oral hearings, particularly, when it incurs added costs to the parties. For instance, it may suffice to give an opportunity to make representations in writing provided, as always, that the demands of fairness are substantially met.¹³

English law requires the arbitral tribunal to comply with rules of natural justice and an award may be challenged or enforcement resisted if it is made in breach of them.

¹¹ Thornburg, E., "Going Private: Technology, Due Process, and Internet Dispute Resolution", (2000) 34 *University of California Law Review* 205.

¹² Article 5 (1) (b) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Available online at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html, last visited on the 1st of October 2007. For a full discussion on the division between private law and public law see Woolf, H., "Public Law-Private Law: Why the Divide? A Personal View", [1986] *Public Law* 237.

¹³ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1177.

The minimum requirements are now set out in section 33 (1) (a) of the English Arbitration Act 1996.¹⁴ Section 33 (1) (a) provides that the tribunal shall:

Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.¹⁵

Although the requirements of natural justice established under the common law go further than the duty set out in section 33, the section reflects the requirement that each party must be given a fair opportunity to be heard, which is one of the basic minimum requirements of natural justice.¹⁶ In *Government of Ceylon v. Chandris*,¹⁷ Megaw L.J. stated:

It is, I apprehend, a basic principle. In arbitration as much as in litigation in the Courts, that no one with judicial responsibility may receive evidence, documentary or otherwise, from one party without the other party knowing that the evidence is being tendered and being offered an opportunity to consider it, object to it, or make submissions on it. No custom or practice may over-ride that basic principle.¹⁸

In the context of online arbitration, it depends on the rules agreed to by the parties which may include an online hearing. In actual fact, an online hearing in arbitration may be more practical than an in-person oral hearing for disputes involving relatively small amounts and/or located at a great distance from each other, such as business to consumer internet transaction disputes and domain name disputes. In actual fact, online applications may succeed with traditional forms of ADR in some sectors more than others. For example, it will not replace offline major international commercial arbitration, but in business-to-consumer cross-border disputes, there is little alternative.

A. *Different Levels of Access to Technology and its Implications on the Equality of Arms in OADR Schemes*

If one assumes that the participants may use various electronic communication tools including e-mails, online chat sessions, web-conferencing in conducting an online hearing and presenting a case, then it is important to analyse whether there are equality of arms in the online hearing and presenting the case or not.

At a basic level, since electronic disputes concern B-to-C internet transactions and domain names, assumptions can be made that the parties to the dispute have the requisite technical facilities to participate in the online resolution of the dispute.

¹⁴ Mustill M., and Boyd, S., *Commercial Arbitration*, (Butterworths, London, 2001) 191. Sutton, D., Kendall, J., and Gill, J., *Russell on Arbitration*, (Sweet & Maxwell, London, 1997) 402.

¹⁵ Section 33 (1) (a) of the English Arbitration Act 1996.

¹⁶ Mustill M., and Boyd, S., *Commercial Arbitration*, (Butterworths, London, 2001) 191. Sutton, D., Kendall, J., and Gill, J., *Russell on Arbitration*, (Sweet & Maxwell, London, 1997) 402.

¹⁷ [1963] 1 Lloyd's Rep. 214.

¹⁸ Ibid. 223.

However, such assumption is qualified by the need to recognise different levels of access to technology.

One area that may be unique in OADR, as compared to ADR, is the varied level of technical expertise and capability. There is a significant variance in online skills, connect speeds, connection costs, and software availability which can impact parties' ability to communicate. Inevitably, this will result in different levels of access to technology, and therefore, power imbalance between the parties. Indeed, technological skill and equipment that affects ability to participate can create a power imbalance.¹⁹

As a result, different levels of access to technology imply that OADR systems are necessary but not sufficient to ensure confidence in online commerce. From this perspective, it is important to remember that online ADR versus offline ADR is not an either/or proposition since OADR does not have to happen entirely online. ADR practitioners need to see that online ADR can powerfully complement existing techniques. The task for dispute resolution professionals therefore is to choose the right mix of online ADR techniques and offline ADR techniques that are appropriate to the dispute in question. This would allow OADR mechanism to be responsive and flexible as it would be too strict to exclude, for instance, sending a paper copy of the online mediation agreement or the online award or even accepting evidences provided offline in an OADR procedure.²⁰

From this perspective, a gradual transition to online system in OADR process is needed. It must be borne in mind that the use of offline technologies, such as, mail, telephones and faxes, or any other means of communication including face-to-face, might be supportive and useful to the use of internet technology, as a medium to conduct the proceedings of OADR. Indeed, the primary goal of any dispute resolution system must be to resolve the dispute by deploying the most appropriate means available. What matters most, for any conflict resolution process, is the right use of the right tools in the right context. Accordingly, the ideal ADR process would include online and offline interactions that take advantage of the strengths of each. The gradual transition to online system in OADR process is reasonable for the following five reasons.

First, given the increasing conceptual questions hidden behind the practicality of OADR solutions, it would be too ambitious to identify OADR as a comprehensive solution for internet commercial disputes. Indeed, thinking about placing a complete trust in a system, such as OADR, which is new and which has the capacity to affect valued rights of parties, particularly fair process, is irrational, to say the

¹⁹ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 78.

²⁰ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 248. Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 135.

least. Indeed, the use of offline technologies entails the possibility to adapt or modify certain rules of OADR in view of rapidly changing technologies.²¹

However, one should not overestimate the power of OADR to solve disputes. There will be some disputes, where for reasons of a long standing relationship or a complexity of legal issues, getting face-to-face will be preferred over OADR. Besides, in some cases, special arrangements may be considered in dispute settlement, such as that a particular piece of written evidence, should be faxed, mailed, or otherwise physically delivered. This is not possible in a fully automated OADR schemes. Moreover, third party neutrals may conduct on site inspections of a product or service that is the subject of a dispute. Such inspections might prove pivotal in determining whether a fault exists, and, if so, where that fault lies. Apparently, there is no cyber-equivalent of such inspections in OADR. Furthermore, it must be borne in mind that any communication over the internet, including OADR, bears the risk of the system's failure to conclude the communication properly. Therefore, OADR providers and disputants have to understand that there could be an interruption in service, which could happen during their discussion. In such circumstances, the use of offline technologies, such as, mail, telephones and faxes, or any other means of communication including face-to-face, is indispensable. And finally, in the event there is a delay in receiving a response online, the third party neutral should be empowered to telephone, fax, or use whatever other means are available to contact a participant. Equally, the parties should assume that if there has been a considerable delay in communication, they should make every effort to contact the third party neutral and determine what the problem is. In actual fact, the lack of reliable contact details of disputants in OADR is often highlighted as a major obstacle in the resolution of disputes. Therefore, the use of offline technologies might be useful in this regard.²²

Second, the gradual transition to online system in OADR process ensures impartiality as it emphasizes that all parties can participate competently in an online process. If one or more cannot, either because of lack of access to computers or lack of technological skill or even lack of typing ability, then it is advisable to have the parties participating through different means. For instance, it will always be the case that the person who types faster in real time discussions over the internet will have a real advantage. And it will always be the case that a party which has a visual or physical problem is disadvantaged in the internet setting compared to the other party. In such cases, certain individuals may exercise an undue influence online since they enjoy a marked communication, and thus tactical advantage, during

²¹ 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.

²² Goldsmith, J., "Against Cyber-Anarchy", (1998) 65 *University of Chicago Law Review* 1229.

OADR sessions. Indeed, technological skill and equipment that affects ability to participate can create a power imbalance.²³

The digital divide, that is the divide between people who use the internet, sometimes called “virtual elites”, and people who do not, is often mentioned as one of the fundamental obstacles to OADR because the full capacity of the mechanism may not be utilised by those who are uncomfortable or unfamiliar with the technology.²⁴

In this regard, Article 3 (b) (iii) of the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”) requires the complainant to specify a preferred method of communications in the proceeding. The same requirement from the respondent was stated in Article 5 (b) (iii) too. Article 3 (b) (iii) reads as follows:

The complaint shall...specify a preferred method for communications directed to the Respondent in the administrative proceeding (including person to be contacted, medium, and address information) for each of (A) electronic-only material and (B) material including hard copy.²⁵

And third, to be effective, the right of access to courts requires that a person be given personal and reasonable notice of an administrative decision that interfere with his civil rights and obligations so that he has time to challenge it. Apparently, notice means official notice. Indirect knowledge of the proceedings is not sufficient. This is reasonable since there should be a notice with a statement of reasons for the initial action giving rise to the dispute. This notion contemplates that the claimant set forth his or her position, thus defining the controversy to be resolved. Besides, this represents the defendant’s opportunity to answer the complaint and presenting legal or factual defences. Indeed, an important component of procedural fairness is the right to receive timely and meaningful notice that a claim has been asserted.²⁶

Given the impossibility of dividing public and private law, and given that the implications of fairness in public law proceedings such as adjudication in courts can be applied to private law proceedings such as arbitral proceedings, it has been stated that the duty to enforce arbitral awards does not extend to awards rendered without

²³ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 78.

²⁴ Gordon, R., “The Electronic Personality and Digital Self”, [2001] *Dispute Resolution Journal* 17.

²⁵ Article 3 (b) (iii) of the Uniform Domain Name Dispute Resolution Policy (the “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.

²⁶ Wade, H. and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 508. Friendly, H., “Some Kind of Hearing”, (1975) 123 *University of Pennsylvania Law Review* 1267. Thornburg, E., “Going Private: Technology, Due Process, and Internet Dispute Resolution”, (2000) 34 *University of California Law Review* 199.

minimal fair process protections, specifically, an appropriate notice.²⁷ In this regard, Article 5(1) (b) of the New York Convention permits refusal of enforcement if:

The party against which the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.²⁸

However, given that proper notice is an important safeguard to fair process, it is conceivable that the courts of the enforcing state in electronic arbitration may consider that the notice requirements of the New York Convention have not been complied with if notice of the proceedings was given online. For instance, it may be questionable whether the link on a web site through which access to the terms and conditions of electronic arbitration is offered may suffice to satisfy the criteria of the providing of a possibility to take notice of the terms. Similarly, a person who fails to check his or her e-mail, during an absence on vacation for example, may lose by default. Equally, given that an e-mail may bounce, merely initiating communications via an e-mail is not an adequate notice by all measures. Therefore, although the issue of proof of delivery of a transmission is technically possible since it is possible to keep a trace of the date and hour of access to the transmission, it must be pointed out that backing up electronic transmissions by traditional transmissions may be much safer and fairer.²⁹

III CONCLUSION

Given that OADR is conducted through electronic means, accessibility will be associated to a great extent with technology. Therefore, there are technological challenges that need to be overcome if there is to be a swift and successful deployment of online ADR in a cross-border environment.

The internet is a quickly changing medium where new possibilities appear daily. One must remember that the technology that we have today is not the technology we are going to have in six months or a year. Speculating on the direction of technology, especially as it relates to the internet, is a difficult and risky business. Innovation when mixed with lots of money can produce instability. In fact, one should not conclude that the internet has finished changing. On the contrary, it will, indeed it must, continue to change and evolve at the speed of the computer industry if it is to remain relevant. In this regard, Ethan Katsh, a leading author on OADR, said that:

²⁷ For a comprehensive analysis on the division between private law and public law see Woolf, H., "Public Law-Private Law: Why the Divide? A Personal View", [1986] *Public Law* 237.

²⁸ Article 5(1) (b) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Available online at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html, last visited on the 1st of October 2007

²⁹ Kessedjian, C., and Cahn, S., "Dispute Resolution Online", (1998) 32 *The International Lawyer* 977.

Cyberspace is in transition, both in terms of how populated it is and in what it is used for.³⁰

Consequently, the idea of OADR is indeed valid, but it is still ahead of its time. That is to say, although OADR has a future in cyberspace, the capabilities and use of OADR mechanisms will increase rapidly in the coming years. This is reasonable since the regulation of online economy will shape opportunities for ADR in the future and guide the development of ADR framework in cyberspace.

As internet use increases, and as the use of the internet as a medium to conduct the proceedings of ADR increases, and as the capabilities that are built into such use increases, and as our skills in such use evolve, we may find new ways of using technologies that change how we think about ADR. The increased use and application of new technologies is inevitable, and as technology advances, the accessibility and availability of ADR will advance too.

It is not secret among computer professionals that devices such as interactive digital television and advanced mobile telephony will extend the range of mechanisms for online access, including the access to OADR schemes. This may lead to more powerful dispute resolution tools that could potentially increase the power of ADR.

In this context, web-conferencing can be defined as the holding of a conference among people at remote locations by means of transmitted audio and video signals via the internet. Each participant sits before a computer equipped with a sound equipment and video camera. On their screen appear frames containing the faces of the other participants while receiving the other participants' spoken words.³¹

In actual fact, web-conferencing, with full sounds and images, is the most similar medium to actual physical meetings and, therefore, an obvious solution to the lack of face-to-face encounters in OADR.³²

However, although lower quality web-conferencing is becoming more affordable and it may be the next phase in technological development, it must be noted that there are bandwidth issues for broadcast-quality web-conferencing, which require specialised facilities. It must be clear therefore that we are not at a point where we can anticipate how web-conferencing might be employed in OADR and when it will be widely and reliably available.

At present, we should not take the extreme view as to reject OADR until technology progresses to the point where replicating face-to-face interaction is universal,

³⁰ Katsh, E., "Dispute Resolution in Cyberspace", (1996) 28 *Connecticut Law Review* 956 at 961.

³¹ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 9.

³² Katsh, E., Rifkin, J., and Gaitenby, A., "E-commerce, E-disputes, and E-dispute Resolution: In the Shadow of E-bay Law", (2000) 15 *Ohio State Journal of Dispute Resolution* 705.

accessible, and inexpensive, and, until ADR profession fundamentally reorient itself to take into account the different demands of the online community.

Besides, although there are more than ten years experience with OADR, one must acknowledge that future technological changes might render any OADR model obsolete. For example, OADR projects that were created as recently as 1999 and 2000 can now appear out of date while the technology of 1998 is obsolete. Indeed, over the three years of this research, new OADR providers came online and existing services terminated or changed significantly. This might explain why there has not been an established model for OADR solutions. In actual fact, no OADR guidelines or standards or specific regulations have emerged as a dominant code of practice within the OADR community.

In the context of OADR, it must be pointed out that the challenge faced by online arbitration lies more in the realm of law than technology, while the challenge faced by online mediation lies more in the realm of technology than law. This is due to the less stringent legal requirements and the crucial role of the communication process in conducting mediation. As a result, as online arbitration is faced with many legal issues, and, as online mediation requires complex and sophisticated communication schemes, which are difficult and expensive to set up presently, given time, OADR will be within the ambit of legally and technically possible in the near future.

Having said that, taking into account the accessibility to OADR schemes which is commonly associated with fair process that has been examined in this paper, it has been concluded that accessibility to OADR schemes can be sacrificed to some extent in order to increase efficiency of the OADR process.