

Internet Characteristics and Online Alternative Dispute Resolution

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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 thesis 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 maximize the growth of e-commerce.

This paper argues that the advent of the internet has created challenges and opportunities for dispute resolution mechanisms and particularly ADR. These challenges and opportunities are interconnected inexorably with each other and with internet characteristics. This paper concludes that a number of technical issues need to be addressed if there is to be a swift and successful deployment of OADR mechanisms in a cross-border environment. Some uncertainties remain due to technological limitations. Indeed, the growth of OADR is tied to the development of technology.

1.1. Introduction

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 ADR in

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order to resolve commercial disputes that arise from the use of the internet. Neutral private bodies operate those proceedings under published rules of procedure.

OADR can be efficient in that it encourages the resolution of disputes in the environment within which the dispute arose. This might give credit to the whole process. However, inevitable questions will arise: Is there any relationship between ADR characteristics and internet characteristics? Do internet characteristics affect ADR and how? Do internet characteristics impose limited choice on ADR?

In response, this paper will explore the nature of OADR and how the novel qualities of the internet are shaping it. In order to do so, it is important to examine internet characteristics and their implications for ADR, analyze the constraints and opportunities when one intervenes at a distance, and study the role and function of the World Wide Web in such process. Therefore, the main methods of OADR—online mediation and online arbitration—will be presented here in order to analyze how far traditional ADR methods must be adapted in cyberspace so that what may not be possible to duplicate in cyberspace can be redesigned to enhance equitable dispute settlement. After that, this paper will present the role of online technology in the improvement of the role of third party neutrals in OADR in order to analyze how far traditional techniques of third party neutrals must be adapted in cyberspace, so that what may not be possible to duplicate in cyberspace can be redesigned in order to enhance equitable dispute settlement.

It must be noted that there will be special references to the implications of OADR upon English litigation. Such implications have to be analyzed because they constitute a reference point for the assessment of the quality of justice of a given OADR provider and 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 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

1.2. Internet Characteristics

There is a strong reason to believe that the differences between the internet and prior communication technology are much greater than the differences between pre-and-post telegraph technologies, which reduced communication time from weeks to minutes, or between pre-and-post telephone technology, which dramatically reduced the cost and enhanced the frequency of trans-jurisdictional communication. Indeed, the internet is more than just another communication medium like the telephone, telegraph, fax or mail. While technically forming only the most recent development in a long series of technological innovations, the internet forms a complex network that provides it with novel system characteristics, distinguishing it from other modern forms of media.²

Although other forms of modern media together display many individual features of the internet, none of them alone incorporates all of them. Generally, there are four major differences between the internet and other communication mediums.

First, the internet is inherently an easily accessible global market with an unprecedented variety of goods and services. Consumers can shop around the clock from merchants around the world. Likewise, businesses can reach customers world-wide quickly and at low cost. Global networks and electronic commerce, at high speed and low cost, are presenting an unparalleled opportunity to individuals and companies. They have the ability to transact twenty-four hours a day, seven days a week, regardless of constraints of distance, time zones, local cultures, geographic borders, and legal frameworks. For example, the numerous online auction sites that match buyers and sellers from disparate geographic locations would have been unthinkable without a vast network through which multiple parties share information and communicate in various ways to reach agreement.³

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

2. Jack Goldsmith, *Against Cyber-Anarchy*, 65 U. CHI L. REV. 1199, 1240 (1998).

3. Veijo Heiskanen, *Dispute Resolution in International Electronic Commerce*, 16 J. INT'L ARB. 32, 36 (1999).

As much as the internet is a network of networks, it is a network of relationships. And as much as the internet is a collection of technologies, it is a collection of communities. For many, the internet differs from other technological innovations in that it has, in and of itself, become a community to millions of people. The internet now has the structure that could be associated with a real society, such as, online banking, online health care, and online education. People in virtual communities exchange knowledge, conduct commerce and do just about every thing people do in real life.⁴ In this regard, Ethan Katsh, a leading writer on OADR, has noticed that:

Cyberspace is more than a data network. . .it is a community unto itself.⁵

Relatively little attention has been directed to how the internet fosters the building of business relationships. Many of the businesses that are participating in the e-commerce phenomenon are the results of individuals joining together in ways that allow expertise and creativity to be applied at a distance. Groups can establish online corporate entities, tightly control participation, and reach agreements on or modify rules more rapidly via online communication. This new global formula of business-relationships could not have flourished without the advent of the internet. As a result, business relationships are entering a new digital era in which, just as conflicts could reasonably be expected to grow as online transactions increase, conflicts can be expected to grow as online collaborations increase.

The internet gives global connectivity because information technology techniques make it possible for anyone to transmit significant quantities of information to anyone else over virtually any distance, practically instantaneously. That kind of global reach is not true with older technologies such as telephone and telegraph services. Users of older technology had to make special arrangements to extend their reach across national boundaries, but this is not the case with the internet.⁶

Second, unlike the mass media era in which one-too-many forms of communication predominated, the potential of the many-too-many

4. See Kenneth Sutherland Dueker, Note, *Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses*, 9 HARV. J. L. & TECH. 483, 484 (1996); Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1403 (1996).

5. M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* 14 (1995).

6. Henry H. Perritt, Jr., *The Internet is Changing the Public International Legal System*, 88 KY. L.J. 885, 887 (1999-2000).

forms of communication is created by digital technology. Therefore, network communities allow for greater decentralisation.⁷

In cyberspace, communication transcends time, space, and physical reality. The internet has effectively changed the users' assumptions about time and space, as well as duration and distance. Accordingly, the internet is not simply a new channel of communication.⁸

Further, the internet facilitates the storage, retrieval, review, comparison, annotation, classification, and reuse of information more than other communication mediums.⁹

The internet is the only medium that allows all elements of many types of commercial transactions to be conducted electronically. It should be noted however that such transactions could be conducted through a combination of electronic and non-electronic mediums (e.g. internet and telephone).

Third, the internet makes it possible for participants to communicate asynchronously. Asynchronous communication takes place when parties are not communicating at the same time. Asynchronous communication has the enormous advantage of 24 hour availability. A person can send an e-mail, for instance, at any time of the day to be read at the recipient's convenience. This is of particularly great value where time differences make synchronous contact difficult. Unlike communications media that tie up the entire channel in real time during transmission, the internet breaks information into discrete packets of bits that can be transmitted as capacity allows. Packets are labeled with the address of their final destination, and may follow any of a number of different routes from computer to computer until reaching their final destination, where they are reassembled by the recipient machine.¹⁰

7. *Id.*

8. See M. Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953, 961 (1996); Robert Bordone, *Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 179-81 (1998).

9. Frank A. Cona, *Focus on Cyberlaw: Applications of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 990-91 (1997).

10. See COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS 47 (2002); MELISSA CONLEY TYLER & DI BRETHERTON, RESEARCH INTO ONLINE ALTERNATIVE DISPUTE RESOLUTION: EXPLORATION REPORT PREPARED FOR THE DEPARTMENT OF JUSTICE IN AUSTRALIA(2003), http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb63494383f8da4/Reseach_ADR_Exploration_Report_03.pdf. download.

Fourth, and most importantly, although the internet may be perceived as an established tool of communication, research, and entertainment, the very characteristic of the internet which offers most potential, namely, interactive characteristics, is often not fully appreciated. Interactivity implies establishment of dialogue between the distant users through e-mail, chat conference rooms, and web forums such as audio and video conferencing. The internet makes it possible for participants to communicate interactively without being present in the same place. Indeed, the internet has changed the image of the computer as something that calculates and computes to an image of a machine that enables interaction between individuals. Although the level of interactivity online may not be able to match the level of interactivity in face-to-face encounters, the online environment can enable internet users to express themselves efficiently and appropriately. Interactive technologies may bring people together and move them from behind their computer screens to a virtual setting. It is not the same quality as being in the same room, but it will bring many of the same benefits.¹¹

1.3. *Internet Characteristics and ADR*

Although there is a difference between ADR and online ADR dispute resolution mechanisms, which is obviously the use of the internet as a medium to conduct the proceedings of the former, such difference should neither be overestimated nor underestimated.

It should not be overestimated because OADR is essentially a change in venue rather than in approach. The online ADR process does not differ very much from the offline process, except for the fact that another form of communication, i.e. the internet, is used rather than face-to-face procedures. ADR has evolved with the development of commerce, and online ADR will refine ADR rather than making any radical new departures. Online ADR would thus not represent a major shift, and the choice for the parties between online ADR and ADR would be dictated by considerations of economics and convenience, informed by the relative importance that they ascribe to face-to-face interaction.¹²

Equally, the difference between ADR and OADR should not be underestimated because the internet technology can enhance traditional ADR mechanisms. Online ADR mechanisms, through the use

11. See RULE, *supra* note 10, at 45; ETHAN KATSH, & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 136 (2001).

12. See KATSH & RIFKIN, *supra* note , at 93.

of the internet, have contemplated the lack of person-to-person contact in cyberspace and the scope of the electronic marketplace. Online ADR would make electronic trade more efficient by not only adapting dispute settlement rules to new technologies and media such as the internet, but also by taking advantage of these new tools to streamline trade transactions. This conversion between ADR and new technologies like the internet, is sought to be the backbone of online ADR. Online ADR is not just a virtual reverberation of ADR; it evolves ADR through the deployment of computer networks, software applications, and the utilization of communication technology.¹³

While the characteristics of the space in which parties meet is not very integral to the success of ADR, the nature and design of virtual space in which online ADR occurs is extraordinarily important if not critical. This is due to the fact that the nature of the online space will shape how expertise is delivered and the manner in which the parties will be able to interact. Technological applications can enhance the expertise of the third party neutral and thus do more than simply deliver the expertise of the third party neutral across the network. In this regard, it is important to recall that technological applications are metaphorically called the “fourth party” by Katsh and Rifkin, two leading authors on OADR, because they can add authority, quality, trust, and enhance the chances of the success of the process.¹⁴

Broadly speaking, computer networking does not replace other forms of human communication. Instead, it increases the range of human connectedness and the number of ways in which people are able to make contact. This requires online neutrals to adapt their communication skills from face-to-face interaction to screen-to-screen interaction.¹⁵

Although many traditional ADR systems draw their strength from face-to-face interactions, online ADR should not seek to replicate those conditions. Instead, it should use the advantages of online technology to forge a new path. This new path should focus on using the networks to maximize the power of technology, a power which may be missing in face to face encounters, instead of duplicating the richness of face-to-face environment. From this perspective, it is not surprising that a growing number of traditional ADR providers have begun to offer online ADR services to complement existing offline

13. *Id.*

14. *Id.* at 32.

15. *See* RULE, *supra* note 10, at 13.

ADR mechanisms. This is reasonable as the line between ADR and online ADR will become increasingly blurred.¹⁶

At this stage, it seems appropriate to discuss the interaction of internet characteristics with mediation, arbitration, and third party neutrals.

1.4. *Internet Characteristics and Mediation*

Mediation can be described in various ways. One of the best descriptions of mediation is that it is an extension of direct negotiations between parties to a dispute in which a neutral third party acts as intermediary to facilitate those negotiations. The neutral third party identifies the issues in dispute, gathers facts, develops options, considers alternatives, and assists in finding a voluntary solution that is satisfactory to both parties. Effective mediation entails a careful balancing act between emotive management, fact finding, issue spotting, and communication enhancement.

Currently there is very much interest in the online possibilities of mediation. Mediation cannot avoid being affected by the new IT technology because communication is central to mediation's ability to lessen tensions and reach agreement. Mediation is a process in which the mediator will have many decisions and choices to make as to how to interact online with the parties. Mediators are extremely sensitive to communication; much of the power of mediators resides in their control over the process of communication. Also, mediation as a process of how communication is structured between the parties, and between the parties and the mediator, is often the basis for agreements reached by the parties. Mediation is a back and forth process of communication seeking a mutually acceptable resolution.¹⁷

Now more than ever, there is a need to define exactly what online mediation is, before the process is so variably presented on the internet that the meaning of the word itself becomes blurred and confusing. With unclear goals and unspoken assumptions, the development of meaningful qualifications and standards in mediation is difficult to envision.¹⁸

Consequently, the very characteristics of mediation that are considered to be the weaknesses of mediation in the offline world,

16. *Id.* at 301.

17. KATSH & RIFKIN, *supra* note 11, at 119.

18. Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 256 (1989).

namely, the voluntary nature of the process, as well as the characteristics of mediation that are considered to be the weaknesses of mediation in the online world, namely, the virtual nature of the process, must be analyzed carefully.

1.4.1. *Voluntary Nature of Electronic Mediation*

The electronic mediation process typically begins when a claimant registers with an OADR provider which offers electronic mediation. In some cases, an OADR link can be placed on the electronic business web site, informing users that, by clicking on that link, they can fill out a complaint form. Then, if the parties cannot agree among themselves, the OADR provider appoints a mediator. The mediator uses the information provided by the claimant to contact the defendant and invite him or her to participate in OADR proceedings.

There is no applicable law to decide the dispute under in mediation. Instead, it is a process that is governed wholly by agreement of the parties and relies upon the good faith engagement of both parties and the mutual goal of resolution for success.

If the parties are to submit to mediation they must first agree upon the terms to which they are to submit. The parties agree on the procedure and they are at all times in control of the timetable, agenda, and ultimately, the outcome.

Next, the mediator checks the background documents presented by the participants and identifies the particular issues to be addressed. An exchange or series of exchanges occur between the parties with the intervention of the mediator, and the parties attempt to settle the dispute. The participants are asked to propose solutions to the identified issues and challenges. The proposed solutions are consolidated and synthesised by the mediator, and used to develop more concrete proposals. The participants are asked to respond to the identified proposals. At the end of the mediation, the mediator fills out a dispute closure form clarifying the outcome and any agreements reached.

Mediators may terminate mediation if requested by one or both of the parties. In principle, both parties can abandon the procedure at any stage without giving reasons and, apparently, this will bring the conciliation phase to an end. In other words, neither party is bound to reach agreement through the mediation process. Also, mediators may terminate mediation if, in their opinion, the process is likely to prejudice one or both of the parties, or if a party is using the process inappropriately, delaying the process to the detriment of the other, or appears not to be acting in good faith.

The mediator has no power to issue a decision or impose an outcome on disputing parties. In other words, decision-making authority rests with the parties over both process and substantive issues. Clearly mediation's lack of enforceability, because the mediator's decision is not binding, is a major drawback. It may discourage parties from attempting mediation in the fear that time will be wasted that could have been used for other dispute resolution mechanisms. Consequently, the possibility of non-participation in mediation can be high.

Some argue that the conception of mediation as a voluntary and an informal process presents the greatest danger of abuse by inept or unscrupulous practitioners. This is particularly true in the internet disputes settlement context. Indeed, because internet users are not physically proximate in their virtual communities, their level of commitment is likely to be low.¹⁹

Although some OADR providers, such as *Squaretrade.com*, work to encourage the defendant party to respond to a case, it does not guarantee that he or she will participate as their process of mediation is entirely voluntary.²⁰

In this regard, it was suggested in the "WIPO Final Report on the Management of Internet Domain Names and Addresses" that it would not be desirable to incorporate a voluntary process such as mediation into a dispute resolution policy for domain name disputes.²¹

That said, it is necessary to stress that although mediation is a voluntary and informal process, it is structured. The mediation process does not develop in a legal vacuum. Equity is the deciding factor in the whole process, and the parties' understanding of the legal rights and obligations, which may be conflicting, certainly plays a role. Furthermore, mediation always takes place in the shadow of the law. This means that when mediation takes place, the parties are aware that the law, looming in the background, is a force that should enter into any calculations for the pursuit and development of resolution. Also, this means that mediation participants should take the law into consideration when setting out a strategy for the mediation procedures. It is clear that mediators take the substantive law into consideration in helping to mediate the issues. Most importantly, if

19. See Bordone, *supra* note 8, at 179.

20. Square Trade Dispute Resolution: Learn More, http://www.squaretrade.com/cnt/jsp/odr/learn_odr.jsp, (last visited Apr. 15, 2008).

21. WORLD INTELLECTUAL PROPERTY ORGANIZATION, THE MANAGEMENT OF INTERNET DOMAIN NAMES AND ADDRESSES: INTELLECTUAL PROPERTY ISSUES 71 (1999), available at, <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf>.

both parties agree at the end of mediation that they want the resolution that they have crafted to be binding, they can have the mediator draft it in a formal way for them to sign. Ultimately, mediation must rely upon some law rendering it valid and effective for it to exist in the legal order.²²

Structures allocating more control and autonomy to the parties will increase the likelihood that any agreement reached is based on parties' consent and their relevant interests.²³ Self-determination, the right of parties in mediation to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute, is a fundamental principle of mediation. For this particular reason, it may be argued that mediation agreements are usually promptly implemented. The participation of the parties in formulating the resolution in mediation increases the likelihood that the parties will base agreement on their core interests and that they will adhere to the final agreement.

Due to being less formal than other methods of dispute settlement, mediation better lends itself to the internet. With the internet's decentralized and technical nature as a network of the networks, the mediation process offers participants an enhanced role to play in dispute resolution. In this context, David Post, a leading author on cyberspace, argues that our very conception of what constitutes justice in the online context could be based on an emerging non-coerced individual choice.²⁴

1.4.2. *Virtual Nature of Electronic Mediation*

Interaction among the parties and the mediator provides indications on the degree of trust, the willingness to reach an agreement, and the parties' genuine concerns and interests. This interaction may make the difference between whether mediation is successful or not. Expert mediators are famous for reducing stress and conflict during the mediation sessions through the use of light-hearted quips and jokes. Along this line the calm and steady demeanor of experienced neutrals represents the bountiful soil from which successful settlements grow.

22. See Bush, *supra* note 18; Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD 225 (1982); Ethan Katsh et al., *E-commerce, E-disputes, and E-dispute Resolution: In the Shadow of Ebay Law*, 15 OHIO ST. J. ON DISP. RESOL. 705, 707-08 (2000); Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

23. See Bush, *supra* note 18, at 258-73.

24. David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 167 (1996).

However, all of these traits often fall flat in the online environment because the ability of human beings to communicate clearly and effectively, especially conveying humor or sarcasm, with one another is diminished. This is due to lack of face-to-face encounters and absence of visual and auditory clues such as body language and tone of voice.²⁵

The absence of facial expressions, gestures, and other non-verbal cues can work against the development of trust in online communications because such absence develops voids in communication. These voids are filled quickly by psychological doubts and fears projected towards those with whom they are in contact. Reduced communication clues give greater weight to the perceiver's own goals, assumptions, and mindset in interpreting the communication. Also, the reduced communication clues of most online communications create an atmosphere of heightened ambiguity. This increased ambiguity leads to one party misconstruing the other and possibly assuming that he or she has less sinister motives. For instance, in the offline world, a given utterance can take on quite different meanings depending on whether it was said with a smile or not. This could be difficult to be interpreted online. Equally, a calming remark that is typed out online may seem patronizing and offensive. As a result, parties engaged in online communications appear to be more willing to "engage in risky interpersonal behavior,"²⁶ such as threats, and may adopt a more "aversive emotional style."²⁷ This could obviously become a real problem regarding two individuals, already not trustful towards each other, who are trying to reach an online solution to their disagreement.²⁸

Although these traditional clues are not easily transferred over the internet, and such clues may be missing in electronic mediation, the physical separation may actually benefit the parties. Physically separated parties are more likely to negotiate effectively because a large part of the emotional element involved with a face-to-face negotiation is removed. Face-to-face negotiations are fraught with issues ancillary to the actual resolution of the dispute itself. The internet has the capability to give both parties to the dispute a confidential

25. Lois Gold, *Influencing Unconscious Influences: The Healing Dimension of Mediation*, 11 *MEDIATION Q.* 55, 58.

26. Leigh Thompson, & Janice Nadler, *Negotiating via Information Technology: Theory and Application*, 58 *J. SOC. ISSUES* 109, 118 (2002).

27. *Id.*

28. *Id.*; Robert Gordon, *The Electronic Personality and Digital Self*, *DISP. RESOL. J.*, Feb.-Apr. 2001, at 8, 17; see also John Bargh, *Beyond Simple Truths: The Human-Internet Interaction*, 58 *J. SOC. ISSUES* 1, 4 (2002).

tool that is available twenty four hours a day, seven days a week, that encourages both sides to realistically evaluate their dispute in absence of personality conflicts and posturing. Indeed, because the computer screen separates the parties, they cannot focus on each other's presence. Instead, they are forced to focus on the substantive issues on the screen. This will reduce the tension level between the parties.²⁹

Moreover, participants in e-mediation do not need to respond immediately as they are compelled to do in face-to-face discussions. Participants can more thoroughly consider proposals and develop options. One's immediate response, as a participant or mediator, in face-to-face mediation is not always one's best response. In fact, most mediators purposefully break into caucus because they know the benefits of allowing each side the ability to think without the penetrating gaze of the other side, and the impact of this on reducing the imbalance of emotional power between the parties. The internet offers this opportunity more conveniently. This ultimately increases the agreement-reaching efforts.³⁰

Furthermore, disputants should be able, as much as possible, to represent themselves equally in any dispute resolution mechanism, including mediation. Providing equal access to the storytelling process is a critical part of the mediator's job. Online mediation grants both parties an equal opportunity to achieve this goal. Virtual mediation may offer an opportunity to avoid some possible biases occasioned by face-to-face mediation because online mediation has its implication on equality between disputants. For example, in offline mediation, usually there is a need to meet with one party more than the other, which is made very complex by the requirement of equal time allotted to both parties. Online meeting, however, can progress concurrently with the joint discussion in e-mediation. Such interaction is impossible in a face-to-face mediation. People who are physically attractive, articulate, well-educated, members of a dominant ethnic, racial, or gender group, or people who are more glib or persuasive than their co-disputants may find this advantage reduced in electronic mediation.³¹

29. Benjamin G. Davis et al., *The First International Competition for Online Dispute Resolution: Is This Big, Different and New*, 19 J. INT'L ARB. 379, 389 (2002).

30. *Id.*

31. See RULE, *supra* note 10, at 259; see also Richard Granat, *Creating an Environment for Mediating Disputes on the Internet* (May 22, 1996) (working paper for the NCAIR Conference on Online Dispute Resolution), available at <http://www.umass.edu/dispute/ncair/granat.htm> (last visited Apr. 15, 2008); TYLER & BRETHERTON, *supra* note 10.

Online communication may well change ingrained conflict dynamics including dominance and intimidation. It can radically improve some individual's capacity to present themselves and negotiate in the strongest possible fashion, and enable people to overcome barriers that condemn many to insecurity, ineptitude, and ineffectiveness during face-to-face meetings.³²

1.5. *Internet Characteristics and Arbitration*

Arbitration is a private adjudicatory procedure in which the arbitrator, or tribunal of arbitrators, has the power to impose a final and legally binding decision (the award) which can be enforced by the parties. The arbitration award is meant to be enforceable through coercive power if necessary. A valid arbitration award can be registered with a court and thereafter enforced like a court judgement. Although less common, there is non-binding arbitration (allowing parties to seek further redress in a court of law if a party feels a just decision has not been reached), conditionally binding arbitration (where the arbitrator's decision is binding on the business, for example, only if the consumer agrees to the decision), or partially binding arbitration (binding when accepted by one or both parties). The fact that the parties agree to be legally bound by the arbitrator's award distinguishes arbitration from mediation.³³

In an international context, arbitration takes place within a well-established international legal framework and is based on established commercial practices. International commercial arbitration system works through the interplay of three layers of legal regulation. The first layer is the private law of parties' contract as embodied in the arbitration agreement. This includes, among other things, the laws and procedures governing the arbitration, the power of arbitrator(s), the location of arbitration, and the effect of arbitration awards. Virtually every aspect of arbitration is definable in an arbitration agreement. An arbitration agreement also can provide for one or multiple arbitrators, provide the rules of evidence before the arbitrator, allow or preclude discovery, define the nature of pleading, define the nature of hearing, set time limits for party's presentation and arbitral decision, and deal with questions concerning the arbiter's competence, appointment, resignation or removal. The second layer of legal regulation is the national arbitration law. A national arbitration law

32. See RULE, *supra* note 10, at 260.

33. Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 239 (1997).

defines the scope of permissible arbitration within the country, and renders arbitration agreements within this scope valid. Most nations have generally similar national arbitration laws that ensure harmonization of enforcement across jurisdictions. Finally, the third layer of legal regulation is the international enforcement treaties. By far the most important legal instrument regulating international arbitration is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which almost every nation has signed. The Convention obligates the national courts of signatory states to recognize and enforce arbitration agreements and awards, subject to limited exceptions.³⁴

The process of arbitration is an old one. The fact that it is still in use today proves that it is a viable method of dispute resolution. But although arbitration is an old dispute resolution mechanism, it has always demanded innovation. It has always required arbitrators to be both aware of and responsive to the changing needs of its users over time. Today, the development and ubiquity of e-commerce represents a new challenge. It is interesting to recall the Parliamentary debate over the Arbitration Bill 1996, which becomes the English Arbitration Act 1996. MP John Taylor (the Minister for Competition and Consumer Affairs) said:

The Bill will also help to strengthen the competitiveness of the arbitration industry. I feel sure that as well as attracting arbitration business from companies here, the Bill will enhance the attractiveness of London as a venue for international arbitration. International arbitrations are a lucrative source of foreign earnings, but the business is highly mobile. I am confident that the Bill will do much to give London a more secure position in that competitive world and, indeed, advance London as the capital of the arbitration world.³⁵

While referring to MP John Taylor (the Minister for Competition and Consumer Affairs), MP Stuart Bell said:

In the global economy; in the age of the internet; in an age when communication spans the planet with such rapidity and sometimes, with such force; and in an age of domestic and international issues-to which the under-secretary referred-it is clear that our arbitration services need to be able to adapt.³⁶

34. GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS* 18 (1994).

35. 279 *PARL. DEB.*, H.C. (6th ser.) (1996) 86.

36. *Id.* at 88.

The electronic arbitration process begins typically when a claimant registers with an online arbitration provider, which offers electronic arbitration. In some cases, an OADR link can be placed on the electronic business web site, informing users that by clicking on that link, they can fill out a complaint form. If the parties cannot agree among themselves, the OADR provider appoints an arbiter. The arbiter uses the information provided by the claimant to contact the defendant and invite him or her to participate in OADR proceedings. Then, the parties begin the online hearing by clarifying the issue in the case, and present their evidence. After the hearing is closed, the electronic arbitrator must reach a decision and render an award within certain time limits. The final outcome of the e-arbitration process would be an award imposed by the third party.³⁷

Although arbitration is largely a process in which information is obtained and evaluated—unlike mediation, which generally involves a complicated series of interactions between neutrals and parties—arbitration is a much less complex communications process. Arbitration proceedings may be based only on the exchange of pleadings, evidence, and other written stages. The human factor may not be important in online arbitration as the face-to-face hearing may not even be necessary. Besides, whereas mediation seeks to improve communication between the parties and therefore requires sophisticated tools of communication, adequate software that allows positions to be stated and documents to be shared may provide a sufficient frame for online arbitration.³⁸

That said, it is important to recognize that, if the appropriate tools of communication in arbitration are unavailable and the relevant arguments and evidences cannot be adduced by other appropriate means, the arbitration runs the risk of violating fair process.³⁹

1.6. *Internet Characteristics and Third Party Neutrals*

In ADR, there is a flexible process of receiving and evaluating information, such as which party to meet with first, what to say to each party, and how to frame and reframe information provided to each party. Generally, the flexibility of ADR allows greater discretion in case management for the third party neutral.⁴⁰

37. M. Scott Donahey, *Current Developments in Online Dispute Resolution*, 16 J. INT'L ARB. 115, 124 (1999).

38. KATSH & RIFKIN, *supra* note 11, at 119.

39. ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 311 (1999).

40. KATSH & RIFKIN, *supra* note 11, at 8.

However, case management in online ADR is a delicate area because the online third party neutral must earn his or her authority from the parties. This is often procured through natural charisma. This trait is difficult to communicate online without seeing a person. Moreover, the third party neutral often relies on ascertaining the veracity of parties by their appearances and demeanors. Such visual clues may be absent on the internet. Furthermore, it is not unusual in ADR to reach a time when settlement is near, and the third party neutral presses on to preserve momentum. Online ADR, however, may permit the parties to disengage, rethink, and perhaps change their minds, and this may hinder settlement. Thus, online third party neutrals must be cognizant of this reality and attempt to keep the parties engaged and maintain constant communication. And finally, asynchronous online communications can cause frustration where one party is not available online.⁴¹

People tend to have an assumption that e-mails, for instance, are read soon after they are sent. When e-mailing, people tend to behave as if they are in a synchronous situation when in fact they are not. This means that any delay in responding can seem provocative. Thus, online third party neutrals must be cognizant of this reality and learn to control information flow. If such issues are not managed carefully, excessive time between communications can have an intensifying effect where parties become less likely to achieve resolution.⁴²

That said, the elimination of physical meetings will increase the third party neutral's case management abilities since he or she can take advantage of the parties' separateness to reframe and perhaps lower the tension level between parties. In OADR, such flexibility offers huge advantages to online third party neutrals, in terms of freeing them from time and space constraints. Technology could be seen as an influence on the process of communication which adds value to the third party neutral and thus does more than simply deliver the expertise of the human third party across the network.⁴³

Moreover, the opportunities for using the virtual capabilities of electronic media in law-related processes are enormous. For instance, computer facilitated charts, figures, graphs, scales, tables, and diagrams can be utilized in OADR proceedings. This could amount to the facilitation of the whole process since it allows otherwise static images to be manipulated in various ways for emphasis or persuasive

41. RULE, *supra* note 10, at 82.

42. KATSH & RIFKIN, *supra* note 11, at 141. See Bargh, *supra* note 28, at 4; Thompson, & Nadler, *supra* note 26, at 113.

43. See RULE, *supra* note 10, at 71; see also, Davis, *supra* note 29.

effect. A certain portion of a diagram, which is an otherwise static exhibit, can be highlighted, zoomed in upon, or emphasized through colors, arrows, etc. The information itself can be presented using other media as well, including video, images, sound, and animation. Thus an electronic bundle of legal documents will be more useable and more expressive than their paper counterparts.⁴⁴

Furthermore, the use of computer technology to search for specific words and phrases can make it easier for the third party neutral to find where a participant(s) is addressing a particular issue in his or her comment. The "word search" puts all of the information that has been gathered in the dispute at the fingertips of the third party neutral so that it can be used most effectively to see key obstacles to agreement and move the discussion forward.⁴⁵

Also, because submissions transmitted electronically by parties are recorded automatically by the technology, OADR allows the third party neutral to carefully document each stage of negotiation. This results in easy and centralized management of cases, and similarly allows disputants to check the status of their dispute at any point from anywhere. And whereas printed document bundles have occasional internal cross-references, which readers themselves have to pursue while reading, electronic document bundles will be linked to one another by using hypertext technology, so that users will navigate around electronic bundles as though they were single sets of information. This linkage of relevant documents to one another will enable users to browse across pleadings and evidentiary materials. Also, the use of computer technology enables users to see the language of prior drafts of a document, usually crossed out with a line and displayed in a different color, alongside the new language being suggested by the other side. This is a good example of how technology can simplify tasks that can be very complicated and aggravating in the offline world. And finally, unlike paper contracts and agreement, the ultimate electronic outcome of OADR can be a dynamic. It can connect the parties to each other and, if desired, through hyper textual documents, to other people and to other sources of information in ways that are difficult to imagine otherwise.⁴⁶

44. KATSH, *supra* note 5, at 125.

45. Fred Galves, *Where the Not-So-Wild-Things Are*, 13 HARV. J. L. & TECH. 161, 178 (2000).

46. See RICHARD E. SUSSKIND, *TRANSFORMING THE LAW, ESSAYS ON TECHNOLOGY, JUSTICE AND THE LEGAL MARKETPLACE* 138 (2000); see also RULE, *supra* note 10, at 260; S. Hardy, *Online Mediation: Internet Dispute Resolution*, 9 AUSTRALIAN DISP. RESOL. J. 216, 221 (1998).

1.6.1. *Third Party Neutrals and Online Mediation-Arbitration*

The ADR settlement process can proceed from less to more formal dispute settlement mechanisms. In this gradual approach, for disputes that cannot be resolved using mediation, the parties would be required to have their case heard by an arbitrator. Mediation, which is less hostile than arbitration, is not necessarily an alternative to arbitration but may be the first part of a two-stage process. By the same token, given that no resolution can be guaranteed in mediation, arbitration is viewed, in this context, as a backup effort to resolve disputes that parties fail to resolve in mediation. This hybrid process, which falls between mediation and arbitration, is called mediation-arbitration or “med-arb”. Accordingly, the med-arb system integrates the interest-based approach of mediation, with the power-based role of arbitration.⁴⁷

However, the neutral’s role in such arrangements should be considered carefully and in a balanced way because, under hybrid regimes, the decision-making process becomes complex and may stall the resolution. Therefore, such a role should not be confined to persuading the parties to reach an agreement, as a mediator does, nor should it be confined to imposing a settlement on the parties, as an arbitrator does, but rather to expressing a firm position concerning settlement of the dispute. In other words, such a role should facilitate dialogue between the parties to a dispute (mediation) and, if necessary, act as a legal institution called in to help those parties (arbitration).

In mediation-arbitration, the neutral’s role can be difficult. He or she needs to strike the right balance between the two processes: mediation, built on a voluntary nature, and arbitration, built on a binding nature. The need for balance is doubled by a conceived difference between application of fairness when arbitration is involved and application of fairness when mediation is the process. Such a task is not easy by any means.

Moreover, the idea of the same individual acting as both a mediator and then an arbitrator gives serious misgivings. In view of the confidential and prejudicial information during the mediation process, it is generally considered that the mediator would be compromised to then convert himself into an arbitrator to make a decision on the merits. In these circumstances many parties would not be fully open and frank with the mediator for fear of being prejudiced at the

47. Paul Newman, *Mediation-Arbitration (Med-Arb): Can it Work Legally?*, 60 *ARBITRATION* 3, 173, 174-76 (1994) See also Bordone, *supra* note 8, at 177.

arbitration stage. From this perspective, because of the nature of disclosures and the interaction that takes place in the mediation, arbitration should not be offered by the same impartial that offers mediation services. If there is an attempt to mediate a case that is unsuccessful and is then arbitrated, there should be two different neutrals unless the parties agree to use the mediator as an arbitrator.

If the internet is utilized in mediation-arbitration, it is called online mediation-arbitration or online med-arb. Unfortunately, the neutral's role in online med-arb is not conceptualized clearly by OADR providers. For example, in *SquareTrade*, an OADR provider, it has been stated that mediators try to resolve the problem through online mediation. If that does not lead to a satisfactory result, parties can ask the mediator to recommend a solution based on each parties' position and on principles of fundamental fairness.⁴⁸ In substance, this means that the mediator no longer mediates, but steps into the role of arbitrator. However, *SquareTrade* failed to notice that.

1.6.2. *Third Party Neutrals and the Use of Software*

Adequate software could be a necessary, indeed indispensable, element for online interactions to be successful. Software is the ingredient that provides the electronic medium with its architecture and functionality. It is software that allows the existence of effective dispute resolution systems online. From this perspective, OADR structure and process can be improved and enhanced like other software. It is necessary to understand that it will be the emergence of appropriate software that will allow OADR to flourish. Therefore, there is a need for further work to refine concepts of electronic discussion, and the tools for facilitating such discussions, as opposed to a general discussion without any intended concrete results. In other words, the contribution made by the software should be analyzed in terms of its ability to translate the dispute resolution process to a particular medium, i.e., the internet.⁴⁹

If third party neutrals have different tools in front of them in the form of software, then they can control the online environment. They may decide advantages lie in caucusing, giving the floor to a party to speak uninterrupted, or looking for consensus evaluation on key issues. It has been said that if an online third party neutral does not know how to manage the online platform that is used to work with

48. Square Trade Dispute Resolution: Learn More, *supra* note 20.

49. See Katsh et al., *supra* note 22, at 705, 719-20.

the parties, and if he cannot effectively use multiple online caucus spaces as compared to offline joint discussion spaces, it does not matter how well he can engage in face-to-face active listening.⁵⁰

In the meantime, there is some powerful software that has sophisticated information processing capabilities that may be utilized by online third party neutrals. Such software enhances the ability of parties and neutrals to interact online and allows parties and neutrals to identify interests and assess priorities in disputes. Then, such software calculates resolutions that may provide each side with more than they themselves might be able to negotiate.

1.7. Conclusion

The potential for the use of information technology in Alternative Dispute Resolution is considerable. Information technology might improve and even transform ADR. The internet and the World Wide Web are fundamentally changing the nature of communications and since ADR is essentially a complex process of information management, information processing, and communication—are likely to exert a massive influence on the development of ADR. Consequently, ADR will be subject to technological limitations as well as advances.

The internet can have an obvious impact on ADR in two quite different ways. First, it can be used to automate existing practices. Second, it can be used to innovate, bring about changes, and introduce new ways of working and carrying out tasks. Many of the most substantial and beneficial influences of information technology in Alternative Dispute Resolution will come from innovation rather than automation. Consequently, any limitation in OADR is not inherent in the internet itself as a tool, but rather it is inherent in the users' ability to adapt this tool for the use of ADR in cyberspace.

The question is not so much whether to use the internet or not to conduct the proceedings of ADR, but how we can best integrate online communication strategies to support the highest level of participants' involvement and to enhance their ability to reach agreement.

When presented with a new medium such as the internet, one should not simply translate the ADR process into cyberspace. This would be wrong. Instead, OADR should deploy the logic underpinning the prevalent technology to make ADR more efficient and effective for all users in cyberspace.

50. See RULE, *supra* note 10, at 242.

In fact, OADR stems and differs from ADR at the same time. This illustrates how computer technology and distance communication can change ADR procedures. OADR can be described as a new organism that has roots in the ADR while has qualities acquired from the online environment. In one sense, OADR is simply about the use of new information management tools and communication tools. However, it is equally true that these tools change the methods by which disputes are being solved through ADR mechanisms. In short, ADR uses the opportunities provided by the internet not only to employ ADR processes in the online environment but also to enhance these processes.

All in all, the advent of the internet has created challenges and opportunities for ADR. These challenges and opportunities are interconnected inexorably with each other and with internet characteristics. When ADR moves to cyberspace in the form of OADR, it will be conditioned and determined by internet characteristics. Due to some of the characteristics of the internet, such as interactivity, OADR will be an efficient solution. But due to other characteristics of the internet, such as the lack of face-to-face contact, OADR will encounter serious problems with regard to fair process.

Consequently, it is necessary to point out that the legal status of ADR is of particular significance since that status could significantly promote or hinder the availability of online services. As technology and ADR merge, in the form of OADR, it is imperative that the values and standards of ADR serve as the guide posts for technology, rather than the reverse. This is reasonable because, although the communication channel in OADR, with its high rate of innovation and rapid pace of development of new technologies, is novel, the foundations of ADR remain the same.