

**Online Alternative Dispute Resolution as a Solution to Cross-Border
Electronic Commercial Disputes**

Haitham A. Haloush

BA in Law, Jerash University, Jordan

L.L.M. in Commercial Law, Aberdeen University, UK

Submitted in accordance with the requirements for the degree of Doctor of Philosophy

**The University of Leeds
Department of Law
Cyber-Law Research Unit**

October 2003

**The candidate confirms that the work submitted is his own and that appropriate credit
has been given wherever reference has been made to the work of others**

**This copy has been supplied on the understanding that it is copyright material and that
no quotation from the thesis may be published without proper acknowledgement**

Acknowledgement

The author would like to thank the persons who helped one way or another in the writing of this thesis. I would like to thank my sponsors, Al-Hashimate University in Jordan and Arab Student Aid International in the United States, for offering me the scholarship to undertake this research. I would like to thank all the respondents to the survey that have been conducted for the purpose of this research. Many thanks for my colleagues and friends at the Law Department at Leeds University, past and present. Many thanks also for the staff at Brotherton library. I am truly obliged to my family for their constant support, both financially and emotionally. And finally, above all, I am greatly indebted to Professor Clive Walker and Dr. David Wall, my supervisors, for their invaluable input during the writing of this thesis.

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 maximise the growth of e-commerce.

However, in analysing OADR, one must contemplate primarily the value of fair process which OADR solutions are subject to, and the value of efficiency which OADR solutions are seen to achieve. From this perspective, a big challenge for traditional dispute resolution processes, such as ADR, will be to adapt to the internet and capitalise on the new possibilities it presents. Another big challenge will be to maintain the integrity and meaning of dispute resolution processes as they move online. But perhaps the greatest challenge will be to design an Online Alternative Dispute Resolution system which represents an effort at balancing, on the one hand, the need to provide effective mechanisms that increase access to justice, without which there seems little point in introducing the system, and, on the other hand, the need to provide just and fair administration of OADR processes without which the OADR outcome(s) will be cast in doubt.

This thesis concludes that OADR is a valid proposition and perhaps the preferred system for resolving disputes that inevitably arise in e-commerce, particularly, B-to-C internet transactions disputes and domain names disputes. This is due to the fact that OADR protects internet users' interests while not harming the interest of the Information Technology (IT) industry and, most importantly, not hindering the flourishing of electronic commerce.

That said, a number of legal and technical issues need to be addressed if there is to be a swift and successful deployment of OADR mechanisms in a cross-border environment. Legal issues do not constitute insurmountable obstacles to a successful

operation of such schemes, but some uncertainties remain due to technological limitations. Indeed the growth of OADR is tied to the development of technology.

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.

Table of contents

Acknowledgement	ii
Abstract	iii
Contents	v

Chapter One: Introduction

1.1. An overview of OADR	1
1.2. Business to Consumer Internet Transaction Disputes and Domain Name Disputes as Two Case Studies	14
1.3. Dispute resolution landscape in cyberspace	21
1.3.1. Online Credit Card Charge Back System	21
1.3.2. Online Consumer Complaints System	22
1.3.3. Online Feedback Rating System	23
1.3.4. Online Courts	25
1.4. Objectives and Structure of the Thesis	27
1.5. Methodology of the Thesis	33

Chapter Two: Internet Infrastructure and OADR

2.1. Introduction	37
2.2. The Regulatory Structure of the Internet	38
2.3. The Regulatory Structure of ADR	41
2.4. The Regulatory Structure of OADR	42
2.5. Special Technical-Legal Needs in Electronic Disputes and OADR	44
2.5.1. The Relationship between Trademarks and Domain Names	48
2.5.2. The Conceptualisation of the Term “Use” of a Domain Name	54
2.5.3. The Existence of “Bad Faith” in Domain Name Disputes	56
2.5.4. Non-commercial Uses of Domain Names	59
2.5.5. The Content of the Web Site	61
2.5.6. Domain Names and Search Engines on the Internet	63
2.5.7. Reverse Domain Name Hijacking	64
2.6. Conclusion	65

Chapter Three: Internet Characteristics and OADR

3.1.	Introduction	66
3.2.	Internet Characteristics	66
3.3.	Internet Characteristics and ADR	70
3.4.	Internet Characteristics and Mediation	72
3.4.1.	Voluntary Nature of Electronic Mediation	73
3.4.2.	Virtual Nature of Electronic Mediation	76
3.5.	Internet Characteristics and Arbitration	79
3.6.	Internet Characteristics and Third Party Neutrals	82
3.6.1.	Third Party Neutrals and Online Mediation-Arbitration	85
3.6.2.	Third Party Neutrals and the Use of Software	86
3.7.	Conclusion	87

Chapter Four: Applicable Law, Jurisdiction and OADR

4.1.	Introduction	90
4.2.	The Internet's Cross-Border Nature from a Technical Standpoint	91
4.3.	Applicable Law and Jurisdiction in Cyberspace	93
4.4.	OADR as a Solution for Jurisdictional Dilemma in Cyberspace	97
4.5.	The Seat of Arbitration in Cyberspace	99
4.5.1.	The Legal Status of Floating Arbitration in Cyberspace	103
4.5.2.	The Legal Status of Floating Awards in Cyberspace	107
4.6.	Conclusion	110

Chapter Five: Fair Process, efficiency and OADR

5.1.	Introduction	112
5.2.	The Independence of OADR Schemes	122
5.3.	The Transparency of OADR Schemes	125
5.3.1.	Online Sellers' Role of Providing Meaningful Information about OADR	127
5.3.2.	OADR Providers' Role of Providing Meaningful Information about OADR	129
5.3.2.1.	The Availability of Meaningful Information about the Third Party Neutrals	131

5.3.2.2. The Availability of Meaningful Information about OADR Outcome(s)	132
5.4. Accessibility to OADR Schemes	134
5.4.1. Equality of Arms in OADR Schemes	136
5.4.1.1. Different Levels of Access to Technology and its Implications on the Equality of Arms in OADR Schemes	140
5.5. Cost Allocation in OADR Schemes	145
5.6. Data Protection in OADR Proceedings	156
5.7. The Authenticity of OADR Proceedings	161
5.7.1. Electronic Arbitration Agreement and Electronic Arbitration Award	164
5.7.2. Signatures in OADR Proceedings	168
5.8. Customs in OADR Schemes	171
5.8.1. Cultural Differences in OADR Schemes	174
5.8.2. Linguistic Differences in OADR Schemes	177
5.9. The Liberty of Participation in OADR Schemes	179
5.10. Conclusion	191

Chapter Six: Enforcement, Recognition and Compliance with OADR

Outcome(s)

6.1. Introduction	195
6.2. Online Codes of Conduct as an Enforcement Tool of OADR Outcome(s)	197
6.3. Online Disconnection as an Enforcement Tool of OADR Outcome(s)	200
6.3.1. The Role of Internet Service Providers and Domain Name Registration Authorities in the Online Disconnection Model as an Enforcement Tool of OADR Outcome(s)	202
6.4. The Role of the Court System in the Enforcement of OADR Outcome(s)	208
6.5. Conclusion	216

Chapter Seven: Conclusions and Note Concerning Further Research

7.1. Conclusions	217
7.2. Note Concerning Further Research	226
Appendix 1: The Assessed OADR Institutions	228
Appendix 2: The Statements of the Survey	231
Appendix 3: The Web Page of the Survey	236
Bibliography and List of Cases	237

Chapter One: Introduction

1.1. An overview of OADR

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.

On the one hand, ADR process is a method for out-of-court resolution of conflict through the intervention of neutral third parties. The leading English text on ADR defines it as a:

Range of procedures that serve as alternative to litigation through the courts for resolution of disputes, generally involving the intercession and assistance of neutral and impartial third.¹

Roy Goode, a leading writer on commercial law, argues that the essence of successful practice in litigation generally is the art of persuasion. Therefore, parties must be encouraged to take alternatives that might be advantageous to them, by making available suitable opportunities for an out-of-court settlement.²

The Organisation for Economic Co-operation and Development (OECD) issued its *Guidelines on Consumer Protection in the Context of Electronic Commerce*. It encourages businesses, consumer representatives and governments:

To work together to continue to provide consumers with the option of alternative dispute resolution mechanisms that provide effective resolution of the dispute in a fair and timely manner and without undue cost or burden to the consumer.³

¹ Brown, H., and Marriott, A., *ADR Principles and Practice*, (2nd edition, Sweet & Maxwell, London, 1999) 17-014.

² Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1140.

³ OECD, "Consumer Protection in the Electronic Marketplace", DSTI/CP (98) 13 Final, available online at

<[http://www.oelis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/\\$FILE/12E81082.DOC](http://www.oelis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/$FILE/12E81082.DOC)>, last visited on the 1st of October 2003.

In various countries, there continues to be pressure for more radical change to reduce the cost and delay of litigation and shorten the length of trials. These changes contemplate the use of ADR to settle disputes. Indeed, since ADR proceedings are adaptable to suit the needs of the parties and the nature of the dispute, ADR is increasingly popular in commercial dispute resolution.

It is clear that ADR initiatives have been especially evident in Europe where cross-border disputes are common. The idea of creating a single or internal market without borders in Europe has encouraged the application of ADR solutions, because ADR has the capability of transcending trade barriers, and equally, to ensure an equality of access for consumers and businesses alike to justice.⁴ The notion that access to justice does not only have to mean access to courts was emphasised by the EU Commission on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. In these recommendations, “consumer access to justice” was defined as:

The opportunity to exercise one’s rights in practice, not access to justice in the stricter sense, i.e. to the courts.⁵

In the UK, Lord Woolf issued a report in 1996 called “Access to Justice”.⁶ The thrust of the report is on access to improved, cheaper, expeditious, and fairer means of resolving disputes. This means, so far as is practicable, dealing with cases in ways which are proportionate to the amount involved, the importance, the complexity, and the financial position of each party, by allotting to such cases an appropriate share of the court’s resources. In effect, however, Lord Woolf proposed fundamental and radical changes to the way litigation should be conducted. His diagnosis is that civil justice is in crisis because, among other things, it takes too long and costs too much

⁴ EU Commission, “Working Document on the Creation of a European Extra Judicial Network (EEJ-NET)”, SEC (2000) 405, available online at <http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just06_en.pdf>, last visited on the 1st of October 2003.

⁵ EU Commission, “Recommendations on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes”, (98/257/EC) O.J.L. 115, available online at <http://www.cmvm.pt/english_pages/apoio_ao_investidor/31998h0257.pdf>, last visited on the 1st of October 2003.

⁶ Lord Woolf Report, “Access to Justice: Final Report”, (London, 1996), available online at <<http://www.dca.gov.uk/civil/final/contents.htm>>, last visited on the 1st of October 2003.

money.⁷ High costs and delay involved in civil litigation are of the utmost importance to the parties. They may prevent an action ever being brought and they will always be a factor in the risk of litigation.⁸ High costs and delay in courts raise a whole range of complicating factors, such as, questions of court and judicial efficiency, the adequacy of existing levels of government financing and court resources or the more difficult issue of the ability of courts and judges to do better with existing inadequate resources. Lord Woolf was genuinely concerned with combating cost and delay in the court system.⁹

With regards to costs in civil procedures, it was one of the earliest conclusions of Lord Woolf's inquiry into the civil litigation system in his Interim Report that:

Excessive costs deter people from making or defending claims...the problem of disproportionate cost occurs throughout the system. It is most acute in smaller cases where the costs of litigation, for one side alone, frequently equal or exceed the value of what is at issue.¹⁰

With regards to delay in civil procedures, it has been argued that delay could prove to be extremely frustrating to the parties, particularly to the plaintiff who might feel that delay amounted to a denial of justice.¹¹ Lord Woolf in his Interim Report has noticed that:

There are four areas in which delay or a lengthy timescale is a matter of concern. (1) The time taken to progress a case from the initial claim to a final hearing. (2) The time taken to reach settlement. (3) Delay in obtaining a hearing date. (4) The time taken by the hearing itself.¹²

⁷ Watson, G., *From an Adversarial to a Managed System of Litigation: A Comparative Critique of Lord Woolf's Interim Report*, in Smith, R., *Achieving Civil Justice*, (Legal Action Group, London, 1996) 63.

⁸ Bailey, S., Ching, J., Gunn, M., and Ormerod, D., *Smith, Bailey & Gunn on the Modern English Legal System*, (4th edition, Sweet & Maxwell, London, 2002) 636.

⁹ Watson, G., *From an Adversarial to a Managed System of Litigation: A Comparative Critique of Lord Woolf's Interim Report*, in Smith, R., *Achieving Civil Justice*, (Legal Action Group, London, 1996) 68.

¹⁰ Lord Woolf Report, "Access to Justice: Interim Report", (London, 1995), Paragraph 19, Section 3, available online at <<http://www.dca.gov.uk/civil/interim/woolf.htm>>, last visited on the 1st of October 2003.

¹¹ Bailey, S., Ching, J., Gunn, M., and Ormerod, D., *Smith, Bailey & Gunn on the Modern English Legal System*, (4th edition, Sweet & Maxwell, London, 2002) 671.

¹² Lord Woolf Report, "Access to Justice: Interim Report", (London, 1995), Paragraph 4, Section 3, available online at <<http://www.dca.gov.uk/civil/interim/woolf.htm>>, last visited on the 1st of October 2003.

In order to combat delay and high cost in civil proceedings, among other things, Lord Woolf discussed ADR at some length and made various suggestions as how it might be used to combat delay and high cost in civil process. Lord Woolf encouraged the use of ADR if the court considers it appropriate and to facilitate such use. In this regard, it has been argued that this is reasonable since courts need to focus heavily on techniques to increase the disposition of cases without a trial. This might be possible by considering the relationships of courts to other social and legal institutions such as mediation and arbitration.¹³

Clearly, Lord Woolf suggested that the objectives of case management in court system are to encourage early settlement, and diversion, where appropriate, to alternative forms of dispute resolution.¹⁴ He stated clearly in his Interim Report:

The philosophy of litigation should be primarily to encourage early settlement of disputes¹⁵

In paragraph 8 of section I of his Final Report, Lord Woolf said:

If my recommendations are implemented the landscape of civil litigation will be fundamentally different from what it is now.¹⁶

In Paragraph 9 of section I of his Final Report, Lord Woolf added:

The new landscape will have the following features.

Litigation will be avoided wherever possible.

(a) People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available.

(b) Information on sources of alternative dispute resolution (ADR) will be provided at all civil courts.

(c) Legal aid funding will be available for pre litigation resolution and ADR.¹⁷

¹³ Watson, G., *From an Adversarial to a Managed System of Litigation: A Comparative Critique of Lord Woolf's Interim Report*, in Smith, R., *Achieving Civil Justice*, (Legal Action Group, London, 1996) 68.

¹⁴ Meadow, C., *Will Managed Care Give us Access to Justice*, in Smith, R., *Achieving Civil Justice*, (Legal Action Group, London, 1996) 96.

¹⁵ Lord Woolf Report, "Access to Justice: Interim Report", (London, 1995), Paragraph 5, Section 1, available online at <<http://www.dca.gov.uk/civil/interim/woolf.htm>>, last visited on the 1st of October 2003.

¹⁶ Lord Woolf Report, "Access to Justice: Final Report", (London, 1996), Paragraph 8, Section 2, available online at <<http://www.dca.gov.uk/civil/final/contents.htm>>, last visited on the 1st of October 2003.

¹⁷ Ibid. Paragraph 9, Section 1.

Lord Woolf said in the same paragraph:

The court will encourage the use of ADR...and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.¹⁸

To the same effect, at paragraph 18 of section 1 of his Final report, Lord Woolf said:

The new procedures I propose will emphasise the importance of ADR through the court's ability to take into account whether parties have unreasonably rejected the possibility of ADR or have behaved unreasonably in the course of ADR.¹⁹

Lord Woolf concluded that the attitudes to litigation were a major factor in creating delay and high costs in civil procedures.²⁰ In actual fact, Lord Woolf sought to reduce the culture of “adversarialism” and hopes that increased co-operation between the parties will reduce the delay and high cost of civil justice. Litigants often devalue or cannot hear the validity of claims made by opponents, simply because they are opponents. As a result, it is often helpfully corrected by a third party neutral who can explore the validity of claims detached from their proponents. But efforts to instruct co-operative behaviour are often distorted or manipulated by judges who seek to remain adversarial and who have a very robust legal culture to support them. Thus, judges must be taught to think about handling cases differently, particularly, by contemplating the use of ADR. Only when they are successful at this, Lord Woolf recommendations become more collaborative and co-operative.

However, some commentators argue that Lord Woolf did not do enough to require or attach ADR-consciousness to the courts in his bid for procedural reform in civil justice, and, therefore, if Lord Woolf’s proposals are to have any success, the courts and the legal profession must be more actively engaged in various ADR and settlement procedures.²¹

¹⁸ Lord Woolf Report, “Access to Justice: Final Report”, (London, 1996), Paragraph 8, Section 2, available online at <<http://www.dca.gov.uk/civil/final/contents.htm>>, last visited on the 1st of October 2003.

¹⁹ Ibid. Paragraph 18, section 1.

²⁰ Bailey, S., Ching, J., Gunn, M., and Ormerod, D., *Smith, Bailey & Gunn on the Modern English Legal System*, (4th edition, Sweet & Maxwell, London, 2002) 637.

²¹ Meadow, C., *Will Managed Care Give us Access to Justice*, in Smith, R., *Achieving Civil Justice*, (Legal Action Group, London, 1996) 100.

Judges will clearly have to learn about their roles with regards to ADR and the substance of their recommendations in this context. They will have to understand the difference between various processes, such as arbitration and mediation, if they are to advise parties on diverting cases to appropriate forms of dispute resolution. However, judges may be helping to manage cases or divert to ADR without fully understanding what they are doing. Different forms of ADR are quite varied in terms of party control, third party neutral functions and the possible structure and content of outcome(s). The various ADR processes are often frightening to traditional judges because they are so various, informal, not rule-bound and fraught with interpersonal conflict and psychological, as well as legal, issues.²²

Besides, judges will be recommending litigants to ADR services which might be outside the existing court structure. If there are to be no court-supported ADR programmes, the associated costs of the diversion of cases to appropriate dispute resolution should be considered because this might create a form of classed justice where some will be able to pay for some alternatives but others will not. Such diversion is itself time-consuming and has some costs and it might become just another bureaucratic step or layer on the way to more fees. If not used effectively, it will not provide the cost and delay reduction Lord Woolf contemplates. That said, there is no doubt that Lord Woolf encouraged the use of ADR in the civil proceedings.²³

On the other hand, the internet is an international network of interconnected computers, or it can be very simply described as the network of networks. On October 24, 1995, the Federal Networking Council (FNC) unanimously passed a resolution defining the term "internet". This definition was developed in consultation with members of the internet and intellectual property rights communities. In this definition, internet is refers to:

²² Meadow, C., *Will Managed Care Give us Access to Justice*, in Smith, R., *Achieving Civil Justice*, (Legal Action Group, London, 1996) 97.

²³ Ibid. 98.

The global information system that is logically linked together by a globally unique address space based on the Internet Protocol (IP) and is able to support communications using the Transmission Control Protocol (TCP).²⁴

The advent of the internet has introduced an unprecedented simplicity of communication on a global level. But whilst the internet and electronic commerce have many qualities that internet users find attractive, they also have properties that facilitate fraud and unacceptable practices, and, therefore, make prosecution or consumer protection difficult. In this regard, the OECD has noted that:

The internet's anonymity, mobility, and global reach, all worked to substantially increase the potential for harm because the identity and the actual physical location of the people behind it will generally be very hard to track.²⁵

However, a key concept of the internet is that it was not designed for just one application, but as a general infrastructure on which new applications could be conceived. Although technological predictions are precarious, it seems likely that the technology will continue to develop in scope and sophistication, and will play an important role in resolving the legal quandaries presented by the internet.²⁶

The use of technology to conduct ADR proceedings, in the form of OADR, is of particular importance in this regard as shall be argued in this thesis. The problem created by one of the greatest technological innovations of our time, i.e. the internet can be best addressed by fusing it with one our time's greatest legal-interpersonal process innovation, i.e. Alternative Dispute Resolution.

Internet-based activities, particularly in commercial context, have added a new dimension to both potential disputes and dispute resolution tools. Out of court dispute resolution mechanisms, in particular, are becoming more important than ever as the internet allows small transactions across jurisdictional borders to take place very

²⁴ WIPO, "The Management of Internet Names and Addresses: Intellectual property issues, Final Report of the WIPO Internet Domain Name Process", 30th of April 1999, available online at <<http://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

²⁵ OECD, "Consumer Protection in the Electronic Marketplace", DSTI/CP (98) 13 Final, available online at <[http://www.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/\\$FILE/12E81082.DOC](http://www.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/$FILE/12E81082.DOC)>, last visited on the 1st of October 2003.

²⁶ Goldsmith, J., "Against Cyber-Anarchy", (1998) 65 *University of Chicago Law Review* 1228.

easily. Indeed, 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, with internet characteristics, and with internet infrastructure.

There are five points that must be made clear in the above-mentioned definition of OADR.

First, the term OADR does not refer to the type of conflict, but rather to the means by which the procedure is carried out, thus making the term potentially misleading. In actual fact, OADR raises the question, to what extent the internet is used in the resolution of the dispute itself. Two approaches are conceivable. (I) OADR proceedings might make partial use of the internet, such as, allowing certain documents to be submitted online. (II) OADR proceedings might themselves take place wholly online. The present study concentrates on OADR mechanisms which make use of electronic networks, either partially or entirely, to resolve disputes.

Second, there are various types of ADR and systems for out-of-court settlement of disputes. These types differ greatly as regards their structure, operation and implementation. But the critical differences across the ADR spectrum are at the level of formality and the amount of control the parties have over process and substantive outcome against the role of the neutral in facilitating or deciding the outcome. These significant differences between ADR mechanisms are obviously important to bear in mind when choosing which process is appropriate for the dispute under consideration. That said, for the purpose of this thesis, OADR will refer to online mediation and online arbitration. Therefore, the general term, OADR, will be used rather than the specific terms of online mediation or online arbitration. The purpose is to draw conclusions relevant for all OADR types. Similarly, the term “third party neutral” will be used to describe the person who undertakes to resolve the dispute. The reason for using this term is to maintain an objective stance and to side step the need to use the word “arbitrator” or “mediator” which might imply reference to that particular mode of dispute resolution rather than simply to the person who is exercising that mechanism. However, where necessary definitions will be given and delimitation will be made.

Third, it is important to remind the reader of the fact that although some OADR providers seem more developed than others, all are really first attempts. The first experiments in online out-of-court dispute settlement were made during 1996-1997. This experimental stage included initiatives such as *Virtual Magistrate*²⁷, *Online Ombudsmen Office*²⁸, and *E-resolution*.²⁹ The OADR industry is currently in a state of flux and some providers will ultimately fail, as is natural in any new marketplace. Also, the practice of OADR is divided in the meantime. Some OADR providers attempt to automate alternative dispute resolution, and some employ technology as a mere tool to assist persons trying to use traditional ADR techniques. Some OADR providers are offered only to disputants in a particular market, such as online auctions, others are available only to subscribers, such as trust mark subscribers, while still others are available to any disputing parties. Some OADR providers are focused on a particular dispute arena, while others are willing to intervene in almost any dispute. And some OADR web sites are non-profit in nature, while others are highly commercial.

Fourth, this thesis is about OADR, and, therefore, ADR, which is by its very nature such a broad topic, will not be discussed in general terms except for useful aspects to draw comparisons. Indeed, there is no space in this thesis for comparisons between OADR and ADR. However, the lessons drawn from ADR will inform our understanding of OADR because ADR literature and practice has certainly improved the quality of justice of these offline forms of dispute resolution. As Colin Rule, one of the leading writers on OADR has put it:

The lessons learnt in ADR over the years about the importance of impartiality, how to effectively move parties towards resolution, about the importance of listening and transparency, and the challenge of managing power imbalances all are central to effective ODR practice.³⁰

And fifth, there will be special references to the implications of OADR upon American and English litigation. Such implications have to be analysed because they

²⁷ <<http://www.vmag.org/>>, last visited on the 1st of October 2003.

²⁸ <<http://www.ombuds.org/>>, last visited on the 1st of October 2003.

²⁹ <<http://www.eresolution.ca/>>, last visited on the 1st of October 2003.

³⁰ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 13.

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. However, 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.

As regards the United States of America, the encouragement of electronic commerce is a matter of public policy in the United States. Section 2 (b) of the U.S. Anti Cyber-squatting Consumer Protection Act (the ACPA) states:

Congress finds that the unauthorised registration or use of trademarks as internet domain names or other identifiers of online locations (commonly known as cyber-squatting)... impairs electronic commerce, which is important to the economy of the United States.³¹

Moreover, the internet was largely developed in the United States, so many of the debates currently taking places in the UK and elsewhere have already been rehearsed. The Internet Corporation for Assigned Names and Numbers (ICANN), which is a non-profit corporation formed to assume responsibility for Internet Protocol Address (IP) space allocation, originally obtains its authority over domain names from a U.S. Department of Commerce contract to administer the root of the system (the ultimate database in which all Top Level Domains (TLDs) are registered).³² The ICANN Uniform Domain Name Dispute Resolution Policy (UDRP) is incorporated as a part of the Generic Top Level Domain Names (gTLDs) registration agreement which includes (.com), (.org) and (.net).³³ The UDRP is imposed by contract upon all of the accredited gTLDs registrars and, in turn, imposed by them upon domain name holders as a condition of the registration agreement. Clearly, the UDRP incorporates a great

³¹ Section 2 (b) of the U.S. Anti Cyber-squatting Consumer Protection Act (ACPA), Public Law No. 106-113 (1999).

³² Howitt, D., "War.com: Why the Battle Over Domain Names Will Never Cease", (1997) 19 *Hastings Communications and Entertainment Law Journal* 719.

³³ ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at <<http://www.icann.org/dndr/udrp/policy.htm>>, last visited on the 1st of October 2003. Before ICANN, in 1993, after a gradual increase in commercial internet activity, the National Science Foundation (NSF) subcontracted the job of registering domain names to a small company named "Network Solutions". Network Solutions registered domain names on a first-come first-served basis, just as all the internet domain names had always been allocated.

deal of U.S. trademark law in its guidelines for distinguishing between those registrations which are abusive and those which are legitimate.³⁴

Furthermore, promoting the creation of new dispute settlement mechanisms with an online application was identified as a priority to encourage electronic commerce by the Federal Trade Commission in the United States.³⁵

Obviously, the first experiments in OADR were made in the US, and, not surprisingly, ICANN itself deploys OADR mechanisms. Indeed, the UDRP, which sets forth the terms and conditions in connection with a dispute over the registration and use of an internet domain name, utilises OADR schemes.³⁶

As regards the UK, the encouragement of electronic commerce is a matter of public policy too. The UK 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 like that of the United States to make the country the best place in the world for e-commerce.³⁷

Since the United Kingdom is a European country, and it will be affected by any European Union regulation with regard to OADR, The EU regulatory initiatives in that respect will be discussed. The EU Directive of Electronic Commerce³⁸ and the

³⁴ Howitt, D., "War.com: Why the Battle Over Domain Names Will Never Cease", (1997) 19 *Hastings Communications and Entertainment Law Journal* 719.

³⁵ US Federal Trade Commission, "Workshop on Alternative Dispute Resolution for Consumer Transactions in a Borderless Online Market place", 6th and 7th of June 2000, available online at <<http://www.ftc.gov/bcp/altdisresolution/index.htm>>, last visited on the 1st of October 2003.

³⁶ Article 4 of ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at <<http://www.icann.org/dndr/udrp/policy.htm>>, last visited on the 1st of October 2003.

³⁷ 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://www.e-envoy.gov.uk>>, last visited on the 1st of October 2003.

³⁸ Directive of the European Parliament and of the Council on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market, (2000/31/EC) O.J.L. 178.

EU recommendations on principles applicable to the bodies responsible for out-of-court settlement of consumer disputes³⁹ are of particular importance in this regard.

One of the primary goals of the European Community is the promotion of cross-national trade and the facilitation of the free movement of goods and services in the European internal market. From this perspective, the European Community strives to ensure the functionality of the new electronic marketplace.⁴⁰

The EU law aims increasingly at the establishment of effective cross-border dispute settlement systems. The European Parliament stressed in its resolution of 13th April 1999 the importance to facilitate the life of the individual citizen through the settlement of cross border disputes.⁴¹ Before this, in its Green Paper on “Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market”, the European Commission set out a number of proposals aimed at resolving cross-border disputes. The aspects mentioned in the proposals included, in particular, the simplified settlement of disputes.⁴²

The European Commission has strongly advocated the use of OADR systems. European policy initiatives in the areas of e-commerce, jurisdiction and consumer protection in cyberspace have discussed ADR and pointed particularly to the importance of the internet as a dispute resolution tool. Special emphasis is placed upon the innovative use of information technologies in implementing ADR schemes. In the same context, the EU Commission has submitted to the view that developing communication technologies have a significant role to play in providing internet users

³⁹ EU Commission, “Recommendations on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes”, (98/257/EC) O.J.L. 115, available online at <http://www.cmvm.pt/english_pages/apoio_ao_investidor/31998h0257.pdf>, last visited on the 1st of October 2003.

⁴⁰ Noll, J., “European Community and E-commerce: Fostering Consumer Confidence”, (2002) 9 *Electronic Communications Law Review* 207.

⁴¹ European Parliament, “Resolution on the Draft Action Plan of the Council and Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice”, Document 13844/98-C4/0692/98-98/0923 (CNS) A4-0133/99, minutes of 13th of April 1999, available online at <http://www.europarl.eu.int/dg2/co14/PDF/ELCJ/projrap/Bontempi/Bontempi_en.pdf>, last visited on the 1st of October 2003.

⁴² EU Commission, “Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market”, COM 576 (1993) Final, available online at <<http://europa.eu.int/scadplus/leg/en/lvb/l32023.htm>>, last visited on the 1st of October 2003.

with the facilities to resolve a dispute, especially where the parties are located in different jurisdictions.⁴³

Promoting the creation of new dispute settlement mechanisms with an online application was identified as a priority by the European Commission. In the European Commission's Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, it was indicated that one of the main reasons for the growing interest in ADR is that it has become a political priority which is widely recognised by EU institutions, and specifically asserted in the context of the information society. It addresses OADR, in particular, in the following terms:

The role of new online dispute resolution (ODR) services has been recognised as a form of web-based cross-border dispute resolution.⁴⁴

Article 52 of the EU Directive of Electronic Commerce, states that member states' legislation should allow appropriate technological means for efficient out-of-court dispute settlement systems. More precisely, it was stated that:

The effective exercise of the freedoms of the Internet Market makes it necessary to guarantee victims effective access to means of settling disputes...Member states should examine the need to provide access to judicial procedures by appropriate electronic means.⁴⁵

In Article 51, the above-mentioned Directive requires member states, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels. The result of this

⁴³ EU Commission, "Widening Consumer Access to Justice", COM (2001) 161 Final, available online at <http://130.104.105.148/Bede/EBED412001/com2001_0161en01.pdf>, last visited on the 1st of October 2003. See generally the European Commission's E-confidence Forum, available online at <<http://econfidence.jrc.it/>>, last visited on the 1st of October 2003.

⁴⁴ EU Commission, "Green Paper on Alternative Dispute Resolution in Civil and Commercial Law", COM (2002) 196 Final, available online at <http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf>, last visited on the 1st of October 2003.

⁴⁵ Article 52 of the Directive of the European Parliament and of the Council on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market, (2000/31/EC) O.J.L. 178.

amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, particularly across borders.⁴⁶

That said, it must be pointed out that because of the global nature of internet disputes and OADR solutions, it is not possible to take a purely English or American view. Account must be taken of developments on a world wide basis. As a result, there will be references to international treaties and conventions that might affect the use and implementation of OADR. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is of particular importance in this regard.

Besides, there will be a number of references to the arbitral decisions of ICANN. In this regard, it is important to recall that the World Intellectual Property Organisation (WIPO), in its Final Report on the Management of Internet Domain Names and Addresses, identified that one of the advantages of the arbitration procedures of ICANN is the fact that it is conducted to a large extent online.⁴⁷

1.2. Business to Consumer Internet Transaction Disputes and Domain Name Disputes as Two Case Studies

For the purpose of this thesis, 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.

It must be noted here that domain names are generated by electronic commerce and domain name disputes are a form of business-to-business electronic commerce disputes. However, the distinction between business-to-business (B-to-B) and business-to-consumer (B-to-C) electronic commerce is vital, since both segments are

⁴⁶ Article 51 of the Directive of the European Parliament and of the Council on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market, (2000/31/EC) O.J.L. 178.

⁴⁷ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

driven by different factors and face a number of completely different barriers. A critical discussion of business-to-business electronic commerce in general and other forms of internet commercial disputes are beyond the limits of this thesis. This is not to suggest that the internet does not affect B-to-B transactions, on the contrary, the internet has an apparent impact on B-to-B transactions through the globalisation of B-to-B transactions across borders. But in B-to-B electronic commerce, there is a need for more formal dispute settlement mechanisms because there are generally large monetary amounts at stake. This is not the case with B-to-C internet transaction disputes.

Besides, the domain name system is an indispensable element for e-commerce to work properly. By the same token, the domain name system itself, and its implication for trademark laws, would not have been possible without the advent of the internet. This is not the case in other cross-border B-to-B transactions, which existed before the advent of the internet.

As regards B-to-C internet transaction disputes, 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. 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. B-to-C internet transaction disputes are related to goods or services not received, late delivery, goods which delivered deviate from description, and defective goods. In fact, there are three common categories of B-to-C internet transaction disputes: "I did not do it, I did not get it, and I do not want it." The third category could be called "quality disputes", and they are the most difficult disputes to be resolved mainly because of the vagueness of online items' features. In addition to these three main categories, consumers experience difficulty in obtaining refunds or rights of return, being unaware of hidden costs, and misrepresentations regarding the product offered.⁴⁸

⁴⁸ Ghemawat, P., "Distance Still Matters", (2001) 79 *Harvard Business Review* 137. Wilikens, M., Vahrenwald, A., and Morris, P., "Out-of-Court Dispute Settlement Systems for E-Commerce, Report of an Exploratory Study", available online at <<http://dsa-isis.jrc.it/ADR/report.html>>, last visited on the 1st of October 2003.

According to a survey, which was supported by the European Commission, 18.1 per cent of the goods ordered never arrived, and of the goods that did arrive, 7 per cent were either damaged or late.⁴⁹

The uncertainty in B-to-C internet transaction disputes can be attributed to the following three main reasons.

First, traditionally, disputes involving consumer protection are rarely international, but the arrivals of the internet and electronic commerce have changed this parameter fundamentally. Outside cyberspace, ordinary consumers do not usually enter international agreements. By contrast, in cyberspace, they engage in small or medium transactions which they would usually not have entered in the offline world.⁵⁰ As the OECD has recognised:

Business-to-consumer transactions are increasingly concluded on the internet as a matter of course, but consumer protection laws are numerous and they may differ considerably at the national level.⁵¹

Second, low entry barriers to the internet, as a global marketplace, will affect parties' ability to litigate potential disputes in B-to-C internet transactions, as these kinds of transactions are usually characterised by the fact that goods and services have low economic value compared to the cost of seeking judicial settlement.

Third, distance transactions, including B-to-C transactions, are traditionally characterised by the fact, that one party will have to perform prior to the other which makes the transaction risky, especially, for the party that has to perform in advance. Typically, this party will be the buyer. The new challenge which was introduced by the advent of the internet is the relative ease and reach of fraudulent activities when conducted online. For example, telemarketing scams are similar to online fraud.

⁴⁹ Warentest, S., "Electronic Commerce in Europe", 1st of September 1999, available online at <http://europa.eu.int/comm/dgs/health_consumer/library/surveys/sur11_en.pdf>, last visited on the 1st of October 2003.

⁵⁰ Lessig, L., *Code and Other Laws of Cyberspace*, (Basic Books, New York, 1999) 197.

⁵¹ OECD, "Consumer Protection in the Electronic Marketplace", DSTI/CP (98) 13 Final, available online at [http://www.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/\\$FILE/12E81082.DOC](http://www.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/$FILE/12E81082.DOC)>, last visited on the 1st of October 2003.

Before the victims discover the fraud, the fraudster unplugs the telephones and moves to another location to begin a new scam.⁵² Obviously, moving to another location, i.e. another web site, is much easier online.

In the bricks and mortar world, a consumer usually has the ability to inspect a product before purchasing it, while in the world of online transactions, the critical difference is that a consumer cannot, and instead has to rely on the merchant's photos or descriptions of the product. However, reliance on the electronic merchant's photos or descriptions might not be sufficient because setting up an online shop, i.e. the web site, which reaches a global market without setting up a distribution network, incurs very low starting and operating costs. And before people realise that they have become victims of fraud, the shop might have closed down and re-opened under a different name and design. The transitory nature of online businesses allows closing up operations and setting up new schemes quite easily. In fact, given the internet's low barriers to entry, participation by many individuals and small enterprises that are denied participation in traditional markets is much easier. And because of the relatively low start-up costs, an online merchant may be an inexperienced, undercapitalised business person whose operation may collapse even before the merchandise is sent.⁵³

If there is an action for fraud, the plaintiff is required to state the circumstances constituting fraud with particularity. This means that the plaintiff must identify the time, place and content of the fraud. These requirements are difficult to be fulfilled in the online context because the consumer will often lack information or documentation regarding the transaction and the merchant's conduct. This is due to the fact the data exchange between an e-merchant and his customer often constitutes the only evidence for the performance and conclusion of the transaction. Apparently, later modifications of electronic information about the sender, the content of the message, the time and date of sending and reception may occur and be difficult to trace. In fact, sophisticated ways exist to make it virtually impossible to trace data on the World Wide Web back

⁵² Smythe, H., "Fighting Telemarketing Scams", (1994) 17 *Hastings Communications & Entrecroisement Law Journal* 351.

⁵³ Froomkin, M., "The Essential Role of Trusted Third Parties in Electronic Commerce", (1996) 75 *Oregon Law Review* 68.

to its point of origin. Thus, although the consumer was clearly defrauded on the internet, he or she might have a hard time proving the case.⁵⁴ Apparently, when ADR moves to cyberspace, the form of online OADR can maximise the growth of B-to-C internet transactions and e-commerce in general.

On the other hand, advances in technology and the phenomenal growth of the internet as a commercial medium have brought about a new set of concerns and challenges in the realm of IP.⁵⁵ The creation and dissemination of information has become a prevalent economic activity, and the protection of these ideas by way of IP rights is essential to the future development of the virtual marketplace. Without such protection, the market risks destruction and collapse.⁵⁶ Indeed, with computers and communication equipment becoming commonplace in the home, intellectual property rights holders are now concerned with the proliferation of the infringements of their rights on the internet.⁵⁷

In the realm of trademarks, as the use of the internet for commercial purposes has increased exponentially, the value of internet trademarks in the form of domain names have increased at incredible rates. Indeed, the increasing commercialisation of the internet has focused attention on domain names.⁵⁸

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 because the shape of trademark law will greatly affect the

⁵⁴ Rothchild, J., "Protecting the Digital Consumer: the Limits of Cyberspace Utopianism", (1999) 74 *Indiana Law Journal* 927.

⁵⁵ Sutherland, K., "Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses", (1996) 9 *Harvard Journal of Law & Technology* 483. Samuelson, P., and Davis, R., "The Digital Dilemma: A Perspective on the Intellectual Property in the Information Age", a paper presented at the 28th Annual Telecommunications Policy Research Conference, the paper is available online at <<http://www.sims.berkeley.edu/~pam/papers/digdilsyn.pdf>>, last visited on the 1st of October 2003.

⁵⁶ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 217. Gibson, C., "Arbitration in Intellectual Property Disputes", (1997) 8 *California International Practitioner* 1.

⁵⁷ Sutherland, K., "Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses", (1996) 9 *Harvard Journal of Law & Technology* 483.

⁵⁸ Burk, D., "Trademarks along the Infobahn: A First Look at the Emerging Law of Cyber-Marks", (1995) 1 *Richmond Journal of Law & Technology* 9.

progress of electronic commerce. 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. Through electronic commerce, trademarks will travel across the globe more cheaply than ever before. 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.⁵⁹

Most domain name conflicts occur over the ".com" Top Level Domains (TLDs), because the majority of companies on the internet are there for commercial reasons.⁶⁰

Dan Burk, one of the leading writers on domain name disputes, considers the Domain Name System (DNS) as:

An electronic equivalent to the Panama and Suez canals because vendors can ship goods along these electronic waterways. Without an internet address, i.e., a domain name, one cannot sail at all and furthermore, the loss of a well-established address could sink an e-commerce armada.⁶¹

Back in 1993 and 1994, few had any idea that the internet was going to become the engine of electronic commerce within the next few years. However, some believed that the internet would be an important business tool some day, and the domain names would be valuable commodities. Some of them, like "Amazon.com" registered their names as domain names because they planned to do business over the internet, but others registered a number of domain names that they believed someone would someday pay money to own. For example, "Panavision", the movie camera company, went to Network Solutions, an American domain name registry, to register the domain name "Panavision.com", and discovered it already belonged to Mr. Dennis Toeppen.

⁵⁹ Burk, D., "Trademarks along the Infobahn: A First Look at the Emerging Law of Cyber-Marks", (1995) 1 *Richmond Journal of Law & Technology* 9.

⁶⁰ Domain name statistics are maintained by "Netnames.com" at <<http://www.netnames.com>>, last visited on the 1st of October 2003.

⁶¹ Burk, D., "Trademarks along the Infobahn: A First Look at the Emerging Law of Cyber-Marks", (1995) 1 *Richmond Journal of Law & Technology* 9 at 11.

Mr. Toeppen was willing to convey the domain name to Panavision for \$13,000. Such practice has been termed as “Cyber-squatting”, to describe the deliberate, bad faith, abusive registration of a domain name in violation of rights in trademarks.⁶²

In this regard, Section 2 (b) of the U.S. Anti Cyber-squatting Consumer Protection Act (the ACPA) states:

Congress finds that the unauthorised registration or use of trademarks as internet domain names or other identifiers of online locations (commonly known as cyber-squatting)... impairs electronic commerce, which is important to the economy of the United States.⁶³

Ironically, a low-entry barrier system that was developed to provide for fast and easy registration of domain names, thereby encouraging rapid growth of the internet, has in itself become a threat to the existence of many well-known trademarks because it challenges the ability of trademark owners to effectively enforce their rights.⁶⁴

Professor Froomkin, one of the leading writers on domain names, has noted that of the 1.9 million new domain name registrations in 1999, about 67,000 allegedly infringed a trademark.⁶⁵

Apparently, when ADR moves to cyberspace, the form of online OADR can maximise the growth of domain names system and e-commerce in general.

⁶² Sutherland, K., “Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses”, (1996) 9 *Harvard J of Law & Technology* 483. For an instructive discussion on cyber squatting practice see, WIPO, “The Management of Internet Names and Addresses: Intellectual Property Issues, Final Report of the WIPO Internet Domain Name Process”, 30th of April 1999, available online at <<http://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

⁶³ Section 2 (b) of the U.S. Anti Cyber-squatting Consumer Protection Act (ACPA), Public Law No. 106-113 (1999).

⁶⁴ WIPO, “The Management of Internet Names and Addresses: Intellectual Property Issues, Final Report of the WIPO Internet Domain Name Process”, 30th of April 1999, available online at <<http://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

⁶⁵ Froomkin, M., “A Commentary on WIPO’s Final Report on the Management of Internet Names and Addresses: Intellectual Property Issues”, available online at <<http://www.law.miami.edu/~amf/commentary.htm>>, last visited on the 1st of October 2003.

1.3. Dispute resolution landscape in cyberspace

It is important to emphasise that other alternatives to resolve electronic disputes, such as, online credit card charge back system, online consumer complaints system, online feedback rating system, and online courts should continue to be explored. Some of these mechanisms may form a strategic alliance with OADR to provide internet users with further settlement options when parties fail to settle a dispute through OADR. However, a critical discussion of other alternatives to resolve disputes in the online environment is beyond the limits of this thesis. So that it was decided not to examine them here. This is not because such mechanisms are not valid and important. Rather, they present legal questions which are fundamentally different from legal questions in OADR. However, it might be useful to provide a brief analysis of each mechanism because they constitute by far the most extensive variety of dispute resolution mechanisms in cyberspace.

1.3.1. Online Credit Card Charge Back System

Credit cards are by far the prevailing payment method in electronic commerce. The credit card industry, through its charge back procedures, presents one model of how a private sector dispute resolution system can enhance confidence on the internet. Under charge back arrangement, the credit card issuer has to deal with the dispute, and if it concludes that the card holder claims are right, it has to credit the consumer's account with the disputed amount of money and charge the transaction back to the merchant. In fact, credit card charge back is a form of guarantee scheme that involves the return of a transaction from the issuer of the card, used by a consumer, to the financial institution that purchased the transaction from the merchant.⁶⁶

The charge back system affords internet users cheap redress because no dispute resolution fees are involved. But the main benefit of the charge back system is that it provides an incentive for the merchant to exercise greater care in online transactions. In charge back system, the ultimate risk of the online transaction is shifted to the merchant. In essence, the charge back system mitigates the risk of prior performance by the buyer. This risk is one of the main reasons of consumers' vulnerability in

⁶⁶ Kaufman, J., "Clash of the Titans: Regulating the Competition Between Established and Emerging Electronic Payment Systems", (1999) 14 *Berkeley Technology Law Journal* 687.

distance transactions, particularly in electronic distance transactions. Consumers' ability to reverse payments is a crucial issue in the context of effective enforcement of the consumers' rights and the enhancement of consumers' confidence in the online context. Charge back in effect does nothing else than shifting the burden of having to take legal action in the event of an online dispute from the buyer who is the weak party to the merchant who is the strong party. And therefore, the charge back system gives consumers leverage with merchants, against whom they have claims. Although some argue that there is the risk of misuse of charge back mechanisms by consumers, this risk seems manageable. In any event, a charge back would not preclude the merchant from contesting the consumer's allegations with the card issuer, or even in courts.⁶⁷

However, charge back system is a contractual right and obligation between the financial institution that issues the card and the financial institution that accepts the card. Therefore, they give no direct rights to card holders to pursue the remedies available in the system.⁶⁸

Apparently, OADR providers can make a contract with a credit card company according to which the right to charge back is determined by the outcome of the OADR procedure. In other words, the cardholder is allowed to charge back the trader if the OADR panel has decided so.

1.3.2. Online Consumer Complaints System

Good customer service is central to consumer confidence and e-commerce profitability. Therefore, individual electronic commerce companies that frequently generate disputes may develop internal dispute resolution capacity. It is likely that these internal dispute resolution processes are very informal as these services are rooted in good commercial sense.

⁶⁷ Perritt, H., "The Internet is Changing the Public International Legal System", (2000) 88 *Kentucky Law Journal* 885. Rothcild, J., "Protecting the Digital Consumer: the Limits of Cyberspace Utopianism", (1999) 74 *Indiana Law Journal* 977.

⁶⁸ Froomkin, M., "The Essential Role of Trusted Third Parties in Electronic Commerce", (1996) 75 *Oregon Law Review* 75.

Private enterprises generally prefer unilateral decision making and other attributes of autonomy to any form of third party dispute resolution. However, online consumer complaints system can form a strategic alliance with OADR to provide internet users with further settlement options when parties fail to settle a dispute through OADR.

That said, it must be pointed out that there are certain drawbacks in the online consumer complaints system. The vastly different approaches taken by one merchant, as compared with another, will result in a lack of consistency and predictability in the whole process. Moreover, small and medium sized enterprises (SME's) lack the infrastructure, the budget, or the experience to handle consumer complaints properly. Besides, fruitful communication is obstructed through the problems consumers have in formulating their complaints clearly, especially in foreign languages.⁶⁹

1.3.3. Online Feedback Rating System

One of the main factors that often separate the failures from successes in e-commerce is the degree to which the online company pays attention to feedback from its customers.⁷⁰ There are some web sites that maintain blacklists of disreputable online merchants based on buyers' feedback so as to assist future buyers in avoiding merchants with a bad record.⁷¹

The online feedback rating system is a practice commonly applied in online auction web sites. Clearly, the auction area of the World Wide Web booms. The online auction sector of cyberspace economy is predicted to grow from three billion dollars today to twelve billion dollars in 2004.⁷² By far, E-Bay is the most popular online auction web site. It has around 4,000,000 items for sale and about half a million transactions a week.⁷³

⁶⁹ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 109.

⁷⁰ Ibid. 78

⁷¹ <<http://thecomplaintstation.com>>, last visited on the 1st of October 2003 and <<http://www.planetfeedback.com/consumer/>>, last visited on the 1st of October 2003.

⁷² Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 4.

⁷³ <<http://www.ebay.com>>, last visited on the 1st of October 2003.

After any transaction is completed, buyers and sellers can post feedback as to the conduct of the buyer or seller. If someone posts a negative feedback, it will stay on the buyer's or seller's record. It is therefore very important to online auction web site users to acquire a positive feedback rating if they wish to remain active. Checking on a seller's feedback rating is probably the first step any user takes before considering whether to bid on an item or not.

Obviously, online auction sites customers have a strong incentive to use OADR services since it is an important way where they can get negative feedback on them removed from the online auction website where it will influence future transactions. Besides, if both buyer and seller agree that someone has been unfairly flamed or negatively rated, then as part of the settlement agreement, they can agree to remove the negative rating.⁷⁴

However, there are certain drawbacks in online feedback rating system. Since it is impossible to decide whether the post is right or wrong, feedback mechanisms are not very effective and could even be very detrimental because people's reputation are at stake. Indeed, one has to question in practical terms fairness, safety from challenge, and effectiveness of online feedback rating system. Reputation is a valuable asset for merchants, particularly, when engaging in e-commerce. The potential loss associated with a damaged reputation in the electronic marketplace combined with the inability to manipulate one's own reputation is great. Consequently, in the online context, having a negative reputation has a much greater impact than having a positive reputation. Moreover, past behaviour by itself is not a trustworthy indication of future behaviour. A merchant might always have complied in the past but find at one point that the benefits from breaching obligations exceed the loss of future gains. Furthermore, the damage of merchant's reputation does not help the consumer who generated the information about the merchant's untrustworthiness in the first place. And finally, for those companies who have just entered the internet global

⁷⁴ Tyler, M., and Bretherton, D., "Research Into Online Alternative Dispute Resolution, an Exploration Report Prepared for the Department of Justice in Australia", 21st of March 2003, available online at <[http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/\\$file/Reseach_ADR_Exploration_Report_03.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/$file/Reseach_ADR_Exploration_Report_03.pdf)>, last visited on the 1st of October 2003.

marketplace, there is no past behaviour that is necessary for consumers to build trust.⁷⁵

1.3.4. Online Courts

This thesis is about OADR, and, therefore, judicial trials, which are by their very nature such a broad topic, will not be discussed in general terms except for useful aspects to draw comparisons. Indeed, there is no space in this thesis for comparisons between OADR and judicial trials. A critical discussion of online courts is also beyond the limits of this thesis. So there is no space for comparisons between offline courts and online courts. This is not because the idea of online courts is not deemed to be valid and important; rather, it presents legal questions which are fundamentally different from those involving a third party neutral who issues a recommendation or an arbitral award. For instance, an interesting question for the future will be whether online courts could solve the problem of jurisdiction since they bound to no specific territory. Besides, in terms of enforcement, one has to think in a different way because there is different kind of electronic document to be enforced at an international setting; namely, the electronic judgement.

That said, it must be pointed out that OADR outcome(s) could be more easily recognised by online courts as the line between private online dispute resolution mechanisms, such as OADR, and public online dispute resolution mechanisms, such as online courts, will increasingly become blurred.

In an unexplored area like internet disputes settlement, while processes for different forms of alternative dispute resolution are not new and in some cases, such as arbitration, rooted in well-established procedures, the use of the internet as a vehicle to conduct these processes is novel. This observation is not confined to private dispute resolution mechanisms since dispute resolution is not confined to the private sector.

Within a few years, almost everyone in developed societies will enjoy easy access to a much enhanced internet. This will be the natural first port of call for all sorts of entertainment, information, guidance, and services. The civil justice system will not be immune in an era where a rich body of technologies are transforming our lives

⁷⁵ Noll, J., "European Community and E-commerce: Fostering Consumer Confidence", (2002) 9 *Electronic Communications Law Review* 211.

rapidly and so must surely adapt. Nothing in principle prevents pleading, discovery, and trial functions in the court system to be accomplished through an electronic network.⁷⁶

For example, the US Federal Rules of Civil Procedure now expressly provide for the use of web-conferencing for oral testimony.⁷⁷ Similarly, in civil trials, the rules of civil procedures in England and Wales allow for the use of web-conferencing.⁷⁸

Richard Susskind, one of the leading writers on law and IT, believes that IT and the internet will fundamentally, irreversibly, and comprehensively, transform legal practice and the administration of justice. He stated clearly that:

It is vital to bear in mind that we are currently at the beginning of an evolutionary path which will lead in due course to an inevitably highly automated court system, under which the administration of cases will flow from start to finish in a largely automated environment, with human intervention only for judicial decision making and management decision making.⁷⁹

However, it has been argued that there are important cultural and psychological associations connected with physical court buildings because they embody particular values expressed in jurisprudence and civic life. Indeed, symbolisms of law contribute to the respect which the citizen has for the authority of the courts. In cyberspace, this particular cultural and psychological aspect may be lost. For instance, by standing in a physical court, instead of participating online, a party may be more aware of the gravity of the situation. This will have an apparent impact on the perception of courts in general.⁸⁰

Besides, although IT is now attracting far more attention across the justice systems of the globe than ever before, it is still doubtful that decision makers in the public sector

⁷⁶ Perritt, H., "Dispute Resolution in Electronic Network Communities", (1993) 38 *Villanova Law Review* 394.

⁷⁷ U.S. Fed. R. Civ. P. 43 (3).

⁷⁸ CPR Part 32, rule 32 (2).

⁷⁹ Susskind, R., *Transforming the Law, Essays on Technology, Justice and the Legal Marketplace*, (Oxford University Press, Oxford, 2000) 240.

⁸⁰ Bermant, G., "Courting the Virtual: Federal Courts in an Age of Complete Interconnectedness", [1999] *Ohio Northern University Law Review* 528.

have grasped just how fundamentally and rapidly the administration of justice might be transformed through technology in the next five to ten years.⁸¹

As a result, online courtrooms probably will not replace physical courtrooms. Instead, a mixture of physical and online courts is more likely. From this perspective, it is important to emphasise that online courts should continue to be explored.

At present, there are a few projects of online courts that are worth mentioning. For instance, the UK has launched a service, since May 2002, called the Money Claim Online Pilot.⁸² Another pilot project is the cyber court of the state of Michigan.⁸³ A critical discussion of these initiatives is beyond the limits of this thesis. However, there is still a long way to go as this would require an understanding of the court environment, the judicial function, and the technological options.

1.4. Objectives and Structure of the Thesis

OADR raises a whole set of complex questions. Do we need an OADR system? Does it address a problem that really needs solving? And does it do so in a way that is likely to be successful? In response, one must emphasise that electronic commerce is important, and perhaps, inevitable. Thus to consider the legal implications of the growth and development of electronic commerce is essential. The following brief background on the internet, e-commerce and globalisation is essential to a discussion of the issues and responses that are emerging in the field of OADR.

Globalisation has affected the world's economics, popular cultures and languages. Globalisation is truly with us. The internet and its applications have been augmenting the globalisation process and they have turned out to be one of the most powerful forces shaping globalisation. The internet is more than just a tool, but rather a large force that is driving the globalisation system where the world has become increasingly an interwoven place. For the past few years, the emergence and development of the internet, as one of the most powerful forces shaping globalisation, has made changes

⁸¹ Susskind, R., *Transforming the Law, Essays on Technology, Justice and the Legal Marketplace*, (Oxford University Press, Oxford, 2000) 257.

⁸² <<http://www.courtservice.gov.uk/mcol/index.htm>>, last visited on the 1st of October 2003.

⁸³ <<http://www.michigancybercourt.net>>, last visited on the 1st of October 2003.

to the life of millions of people world wide. The rate of development is extraordinary. Even today, no one can predict with certainty where the internet will take us. One of the areas where the internet has had a particular impact is commerce. Internet users are making purchases and entering into contracts electronically, often meeting, negotiating and completing transactions with little or no face-to-face contact and without the exchange of paper-based documents and hand-written signatures. Electronic commerce will inevitably grow and might become the key to the future trading system. In commerce, there is a general tendency toward the globalisation of trade practices. The shifts taken by many countries towards market economies and the advance of modern technology have created an increasingly global world economy. Electronic commerce has greatly accelerated the convergence of national and regional market forces towards a truly global economy.⁸⁴

Electronic commerce (e-commerce) has been described as a general term applied to the use of computer and telecommunications technologies in a way based on the processing and transmission of digitised data, including text, sound and visual images that are transmitted over open networks, such as the internet, to support trading in goods and services which involve both organisations and individuals.⁸⁵

People have been engaging in business transactions for a long time. Electronic commerce is only the most recent in a long tradition of business transactions across borders. Never before, however, concerns about confidence have been subject to so much discussion. Currently, the level of internet users' trust is far too low to allow electronic commerce to deliver its potential. Many e-commerce endeavours failed not because they were not required or there was no market for them but because they were unable to generate confidence and trust in the people. Merely having an online presence will not ensure success. Beyond any doubt, one of the reasons why profits in

⁸⁴ Slate, W., "Challenges and Opportunities for Dispute Resolution in the Era of Electronic Commerce", a paper presented at WIPO Conference on Dispute resolution in Electronic Commerce, Geneva, 6th and 7th of November 2000, available online at <<http://arbiter.wipo.int/events/conferences/2000/presentations/slate.html>>, last visited on the 1st of October 2003. Fortier, L., "International Commercial Arbitration and E-commerce", a paper presented at WIPO Conference on Dispute resolution in Electronic Commerce, Geneva, 6th and 7th of November 2000, available online at <<http://arbiter.wipo.int/events/conferences/2000/presentations/fortier.html>>, last visited on the 1st of October 2003.

⁸⁵ Brown, H., and Marriott, A., *ADR principles and practice*, (2nd edition, London, Sweet & Maxwell, 1999) 17-008.

e-commerce have so far fallen short of initial expectations is that internet users still lack confidence in this relatively new form of trade.⁸⁶

It is conceived that building trust online is more difficult than offline. Personal contact is a key factor for establishing trust in conventional trade, but in the online world, such factor is missing. In actual fact, what distinguishes e-commerce from that of a physical and traditional commercial framework is the overwhelming expansiveness of technology which enables information to travel instantaneously and events to occur simultaneously in virtual space.⁸⁷

Besides, in a platform like the internet, there is always the problem of lacking initial trust in online businesses. Major corporations with a market reputation may be able to rely on their brand name, but Small and Medium Sized Enterprises (SMEs) that do not have a known brand name, will have to rely on their credibility. A natural consequence is the tendency for internet users to gravitate toward brand-name companies to the loss of SMEs, who are frequently believed to play a crucial role in the further development of electronic commerce. Ultimately, the whole idea of the internet making possible a highly diverse market where large companies, SMEs, or individuals can be both a buyer and a seller might be endangered.⁸⁸ Unfortunately, this issue is overlooked by the OECD since it has stated that:

The internet has made it easier for both SME's and individuals to enter the marketplace, as they need neither physical shops nor sales offices.⁸⁹

Colin Rule, a leading author on OADR, argues that the existing lack of e-confidence in e-commerce can be attributed mainly to the fact that traditional bases for trust and reliance are no longer effective in the electronic marketplace as the internet allows small transactions across jurisdictional borders to take place very easily. Besides,

⁸⁶ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 92.

⁸⁷ Bordone, R., "Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal", (1998) 3 *Harvard Negotiation Law Review* 176.

⁸⁸ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 100.

⁸⁹ OECD, "Business-to-Consumer Electronic Commerce: Survey of Status and Issues", OECD/GD (97), available online at <[http://www.ois.oecd.org/olis/1997doc.nsf/LinkTo/OCDE-GD\(97\)219](http://www.ois.oecd.org/olis/1997doc.nsf/LinkTo/OCDE-GD(97)219)>, last visited on the 1st of October 2003.

when trades can be practised in a manner that is unrelated to the physical location of the participants, traditional legal structures will either delay the development of this practice or, more likely, be superseded by new structures that better fit the phenomenon in question. As the law stands today, it is clear that internet commercial potentiality could be constrained as the relevance and effectiveness of traditional legal structures are limited due particularly to the transcendent nature of internet transactions. This would certainly not enhance internet users' confidence in international electronic commerce and would strongly induce merchants to restrict the geographic scope of their offers. This, in turn, would limit competition and internet users' choice. Consequently, new institutions must emerge to enhance trust and reliance; otherwise the achievement of the full potential of e-commerce seems endangered.⁹⁰

New ways of transacting and interacting online emerges. However, cyberspace should not only facilitate the offer of goods or services globally, but it should also offer global redress that decreases the risks which derive from the existing legal uncertainty in cyberspace. As a result, an efficient dispute settlement mechanism in cyberspace is a prerequisite for building trust in the online environment during the expansion of electronic commerce. Indeed, the lack of a suitable dispute resolution mechanism in cyberspace will constitute a serious obstacle to the further development of electronic commerce. At present, there is no systematic method for resolving disputes within cyberspace. Thus developing an international framework for dispute resolution in cyberspace is a key to the long-term growth of e-commerce.

Globalisation has contributed directly to the rapid and broad growth of alternative dispute resolution, and particularly, international arbitration. As many businesses have become inherently international, they have sought more effective and efficient means of resolving disputes without having to utilise national litigation systems that are often expensive and slow, and may be rife with national bias and political considerations. Even the supremacy of national law in international economic relations began to be

⁹⁰ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 4.

questioned. Equally, the essence of globalisation driven by advances of technology is that innovation replaces tradition.⁹¹

Bearing this in mind, this thesis argues that when alternative dispute resolution (ADR) takes place in 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 since it is appropriate to the medium.

But OADR only works in certain circumstances. Fairness and efficiency must be perceived as two bases in order for OADR to work properly. On the one hand, fairness is a recurrent issue either offline or online due to the inequality of access to legal resources. However, since perfect justice is never attained either online or offline, it is imperative to explore the possibilities of a different application of fairness in cyberspace. Therefore, the contemplation of just and fair, but rough, rather than perfect dispute resolution mechanisms could be the future of cyber-dispute settlements. On the other hand, efficiency is correlated to the swiftness and wideness of justice in a cyber context. Therefore, our re-definition of effectiveness, as legal scholars, that take into account the peculiarities and particularities and most importantly, the limitations of cyberspace, should be a profound factor in dealing with the whole issue of cyber disputes. It must be noted clearly that efficiency in this respect must not suggest disrespect of the fair process of law because the notion of fairness in cyberspace contemplates an appropriate balance between efficient solutions and the rule of law.

In analysing OADR, one must contemplate primarily the value of fair process which OADR solutions are subject to, and the value of efficiency which OADR solutions are seen to achieve. A big challenge for traditional dispute resolution processes, such as Alternative Dispute Resolution, will be to adapt to the internet and capitalise on the new possibilities it presents. Another big challenge will be to maintain the integrity

⁹¹ Leahy, E., and Bianchi, C., "The Changing Face of International Arbitration", (2000) 17 *Journal of International Arbitration* 19. Slate, W., "Challenges and Opportunities for Dispute Resolution in the Era of Electronic Commerce", a paper presented at WIPO Conference on Dispute Resolution in Electronic Commerce, Geneva, 6th and 7th of November 2000, available online at <<http://arbiter.wipo.int/events/conferences/2000/presentations/slate.html>>, last visited on the 1st of October 2003.

and meaning of dispute resolution processes as they move online. But perhaps the greatest challenge will be to design online alternative dispute resolution system which represents an effort at balancing, on the one hand, the need to provide effective mechanisms that increase access to justice, without which there seems little point in introducing the system, while, on the other hand, providing just and fair administration of OADR processes without which the OADR outcome(s) will be cast in doubt.

Finally, as the internet or the network of the networks grows, it will increasingly be perceived as both, a place for disputes, and a tool for resolving disputes. Intensive literature has been written on the former perception, while the latter perception has not yet received as much attention from legal scholars. For example, although a fair amount of work has been invested in attempts to develop an understanding of the mechanics and validity of electronic contracting and the digital authentication of electronic signatures, less attention has been paid to the troubling area of dispute resolution. Thus, it is imperative to explore the possibilities of using the internet as a tool for resolving disputes in the form of online alternative dispute resolution (OADR). The issue of OADR has not been fully researched in a comprehensive fashion before from technical and legal standpoints since OADR is a newly developed area. This thesis represents a first comprehensive attempt to examine the issues arising in this difficult and important subject. It is hoped that the following objectives will be achieved in this thesis:

- 1) To explain and understand how the internet facilitates e-commerce, and how it relates to alternative dispute resolution practice, and how to leverage new technologies for dispute resolution into the World Wide Web since technical and legal challenges are increasingly becoming inseparable in cyberspace.
- 2) To consider the feasibility of using OADR for disputes that originate online. There are challenges and also opportunities for OADR. It is hoped that this thesis will contribute to overcoming the challenges and building upon the opportunities.
- 3) To consider critically whether OADR systems can help to define the reasonable rights and duties of cyber disputants and meet desired values, including efficiency and fair process. It is hoped that this thesis will contribute to an effective and just

resolution of the diverse problems facing the effective and just deployment of OADR systems.

In order to examine OADR in depth, this thesis is divided into seven chapters. Chapter one presents the definition of OADR and the need for an OADR system as an important element in the growth of e-commerce. It presents also the reasons why this study has been carried out and the methodology deployed to achieve the objectives of the thesis. Chapter two discusses internet infrastructure and its implication for the feasibility of OADR system. Chapter three examines internet characteristics and its implications for the viability of OADR system. Chapter four studies the legitimacy of OADR jurisdiction. Chapter five explores the fairness and effectiveness of the OADR process. Fairness and effectiveness imply numerous issues. They are categorised along the following lines: the independence of OADR schemes, the transparency of OADR schemes, accessibility to OADR schemes, cost allocation in OADR schemes, data protection in OADR proceedings, the authenticity of OADR proceedings, customs in OADR schemes and the liberty of participation in OADR schemes. Chapter six studies the enforcement of OADR outcomes. Finally, chapter seven summarises and relates the findings of the thesis to each other in a coherent way which might help in the future development of OADR.

1.5. Methodology of the Thesis

This thesis is based upon library-based research. A comprehensive literature review of research on OADR will be provided, although readers should keep in mind that there is presently very little legislation, case law, or academic commentary dealing directly with OADR issues. They should keep in mind also that the issue of OADR, by its very nature, compels as broad and comprehensive an analysis as possible. They should keep in mind also that the position of OADR may change with the evolution of technologies, practices, and experiences. In this regard, Benjamin Davis, a leading author on OADR, wrote that:

As online dispute resolution grows and evolves, further review of its progress will inevitably command our utmost attention.⁹²

⁹² Davis, B., "The New Thing: Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers", (2000) 17 *Journal of International Arbitration* 115 at 117.

Due to its technical and evolving nature, most of the materials, articles, papers discussing OADR are accessible on the World Wide Web. All electronic resources listed in the thesis are current as of 1st of October 2003. It is acknowledged that although web links cited within this thesis will quickly become dated, readers are advised that the root address may still contain useful services.

In addition to the literature survey, an assessment of 19 OADR providers' web sites has been conducted. Data gathered from OADR providers who are dealing with domain name disputes and B-to-C internet disputes by utilising online mediation and online arbitration techniques. These web sites were identified through internet search engines and the literature review.

But as it is the case with e-commerce generally, there are many OADR providers ceasing or beginning activity. Apparently, a difficult investment environment for internet related companies saw the end of some of the entrepreneurial initiatives in OADR. Moreover, the author must point out that due to linguistic problems, the accessibility of OADR providers who provide their service in a foreign language (other than English) was not possible. A list of web sites assessed is included as appendix 1.

Furthermore, the thesis is informed by an Attitude Survey conducted with academics and practitioners involved in OADR in order to gather their opinions. Attitude Surveys measure the degree of favourability towards the subjects in question. The Likert method has been utilised in the survey, which involves the selection of a set of attitude statements, to which subjects were asked to indicate their agreement or disagreement to each statement along a five-point scale, ranging from "strongly agree" to "strongly disagree".⁹³

For the purpose of the survey, academics and practitioners involved in OADR, which must remain anonymous, have been identified from library and online research. They have also been identified also through their participation in specialised forums on OADR such as, the US Trade Commission Workshop on Alternative Dispute

⁹³ Burns, R., *Introduction to Research Methods*, (4th edition, SAGE Publications, London, 2000) 555.

Resolution for Consumer Transactions in a Borderless Online Market place, June 2000,⁹⁴ the Joint Conference of the OECD, HCOFIL and ICC on Building Trust in the Online Environment: Business to Consumer Dispute Resolution, The Hague, the Netherlands, 12th December 2000,⁹⁵ and the UNECE Forum on Online Dispute Resolution, Geneva, 30th June and 1st July 2003.⁹⁶ They have been identified also through their participation in specialised online forums on OADR, which the author had participated in. Those specialised forums are:

- <http://www.e-arbitration-t.com/>
- <http://www.odrnews.com>
- <http://www.ombuds.org/cyberweek2003/>

As far as the writer is aware, this is the first attempt to conduct a comprehensive survey on OADR as it covers the overall impact of OADR, the fairness of OADR process, the effectiveness of OADR process, and the enforcement of OADR outcome(s).

Every attempt was made to distribute the survey. It has been sent to a sample of twenty four academics and practitioners. Amongst them, eight answered the survey. Half of which are OADR practitioners and the other half are OADR academics. While most respondents stated that OADR is a difficult subject for research, they expressed their support and interest in the project. For those who did not answer, the survey has been re-sent to them for three times. No answers were received. Also, the survey has been posted on the internet at the web site of the “ODRnews.com”, a specialised online journal dealing with online ADR issues.⁹⁷

The survey has been conducted after two years of doing research on OADR. At that point, the writer was able to decide on what constitutes by far the most controversial and delicate issues related to AODR in order to canvass the opinions of academics and practitioners on these issues.

⁹⁴ <<http://www.ftc.gov/bcp/altdisresolution/index.htm>>, last visited on the 1st of October 2003.

⁹⁵ <http://www.cptech.org/ecom/hague/OECD_Hague_ADR_Agenda10-24-00.pdf>, last visited on the 1st of October 2003.

⁹⁶ <<http://www.umass.edu/legal/unece2003.doc>>, last visited on the 1st of October 2003.

⁹⁷ The survey can be found at <http://www.ODRnews.com/2003_01_19_archive.htm>, last visited on the 1st of October 2003 (see appendix 3).

Since the thesis focuses on technical and legal issues of OADR, this survey is useful in two main aspects which constitute the main themes behind the survey.

First, given that experience of using new technology for ADR is growing, the survey facilitates a critical consideration of the practicality of OADR solution. Apparently, the uncertainty in OADR is to a great extent over the practical achievability of introducing a new scheme such as OADR. Therefore, the survey is very important at this stage of OADR's development.

Consequently, the analysis of the thesis would not depend only on academic speculation, but it would be tested and adjusted by the experience of actual practice in OADR field. A purely theoretical perspective may not do best justice to the development of a healthy OADR practice.

Second, the survey will draw upon theoretical knowledge on OADR to interpret what is seen in practice which would allow the identification of the common features that may relate to success in the OADR field. Therefore, the survey will explain the OADR in light of the theoretical framework that evolves during the research itself and test some of the hypothesis offered in this thesis.

The main findings of the survey suggest that OADR systems cannot be purely developed in theory, but by testing them in practice by a step by step basis. And, OADR may very well be working in practice so that it deserves a chance and time to prove itself.

That said, it must be pointed out that monitoring any activity in cyberspace, including OADR, is often not an easy task because of the evolving nature of cyberspace and OADR. However, attitude surveys probably provide a realistic picture to ground the inductive reasoning which might lead to the development of OADR practice.

Chapter Two: Internet Infrastructure and OADR

2.1. Introduction

In the current phase of relative ambiguity in cyberspace, questions of who, where and when may not be implicitly and immediately clear. Therefore, it seems important for any OADR system to ensure that both the special operation aspects of the system and the particular features of cyberspace be taken into account. In essence, OADR should try to examine the e-conflict as well as the cyberspace community involved in the dispute, in order to come up with answers that respond as much as possible to the needs of each party.⁹⁸

The context, in particular, is always an important factor in any dispute settlement. Context can influence the approach of the neutral; shape the expectations of the parties, the timing of settlement, the perceived urgency of resolution, the consequences of and available alternatives to failure, and even the form of dispute resolution. Moreover, context implicitly feeds neutrals information about the extent or nature of the injury as well as how the dispute is perceived by those involved. Indeed, disputes and dispute resolution do not occur in a vacuum. In most disputes, the value of contextual information derives from knowing where a dispute occurred, when it occurred, and who was involved. Virtually any dispute, if examined closely, will reveal fruitful tactics for facilitating a resolution.⁹⁹

From this perspective, this chapter will study the regulatory structure of the internet, the regulatory structure of ADR, the regulatory structure of OADR, and the special technical-legal needs in electronic disputes, in order to analyse why the internet, as a medium to conduct business, creates disputes, and, why the internet, as a medium to conduct ADR in the form of OADR, can be utilised to resolve such disputes, which would result ultimately in a major boost to electronic commerce.

⁹⁸ Reidenberg, J., "Lex Informatica: The Formulation of Information Policy Rules Through Technology", (1998) 76 *Texas Law Review* 553. Lessig, L., "Reading the Constitution in Cyberspace", (1996) 45 *Emory Law Journal* 895. Katsh, E., "The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace", available online at <<http://mantle.sbs.umass.edu/vmag/katsh.htm>>, last visited on the 1st of October 2003.

⁹⁹ Sander F., and Goldberg, S., "Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure", (1994) 10 *Negotiation Journal* 49.

2.2. The Regulatory Structure of the Internet

The issue of the governance of the internet is beyond the limits of this thesis. Therefore, it was decided not to examine it here. However, it might be useful to provide a brief analysis.¹⁰⁰

Governments may allocate rule-making functions to those who best understand a complex phenomenon and who have an interest in assuring its growth. This can be achieved by self-regulation, which refers to standards, codes of conduct, procedures, rules that are implemented on by groups or individuals on a voluntary basis. Its principles and rules function on the basis of equity, or other rules agreed by the parties. It ensures desired behaviour within a specific group, under specific circumstances.¹⁰¹

The nature of the internet's infrastructure invites many aspects of self regulation, and may be this is one of the most predominant features of the internet. The internet invites these forms of self-regulation, as state-based lawmakers struggle to extend their jurisdiction over conduct occurring through the internet that has effects within their territory. The internet is viewed as a private activity which is inevitably cross-border. Sovereign effort to control cyberspace becomes increasingly irrelevant. As a result, governments are co-operating with self-regulatory bodies in order to accommodate the practicality of cyberspace and e-commerce.¹⁰²

In its Global Action Plan for Electronic Commerce, the International Chamber of Commerce (ICC) stressed the importance of the establishment of self-regulatory schemes.¹⁰³ And the OECD states some fundamental principles that should shape the policies that govern e-commerce, the first of which reads:

¹⁰⁰ For an instructive discussion on the governance of the internet, see Saxby, S., *The Roles of Government in National/International Internet Administration*, in Akdeniz, Y., Walker, C., and Wall, D., *The Internet, Law and Society*, (Pearson Education Limited, London, 2000) 27.

¹⁰¹ Johnson, D., and Post, D., "Law and Borders: The Rise of Law in Cyberspace", (1996) 48 *Stanford Law Review* 1367.

¹⁰² Ibid.

¹⁰³ ICC, "Global Action Plan for Electronic Commerce: Prepared by Business with Recommendations for Governments", 1st of October 1999, available online at <<http://www.giic.org/focus/ecommerce/agbecplan.pdf>>, last visited on the 1st of October 2003.

The development of electronic commerce should be led primarily by the private sector in response to market forces.¹⁰⁴

Whenever a private regulatory regime is constituted, its scope and relationship with state-based institutions must be defined. Besides, how much should local authorities defer to a self-regulating activity that reaches beyond the physical boundaries of their sovereignty must be defined. Such definitions should give precedence to effective self regulation by governments wherever possible, and avoid any problems of regulatory overlap. As a result, there is a need for negotiated rulemaking process in the online context, by which, governments can promote private sector to incorporate self-regulatory initiatives in their infrastructure, commit to the support of such initiatives, and increase their visibility, but not actually prescribing what online businesses ought to do.¹⁰⁵

One of the facets in such a structure is the need to persuade governments to keep a respectful distance, though being supportive, in order to ensure the credibility of the structure. Governmental interference in internet dispute settlement must contemplate that governments should not run the internet, rather their role is to facilitate the co-ordination and management of internet policy making, which should be vested in self regulatory bodies. Such an approach is reasonable as governmental regulation of internet disputes is feared to be too constraining for the development of electronic commerce and will create uncertainties in developing future internet policies.¹⁰⁶

The administration of internet commercial disputes resolution requires a determination of the appropriate balance between government intervention and self-regulation. Such balance must visualise a diminished role for traditional sovereign bodies in resolving disputes in cyberspace on the one hand, and capitalises on the potential that the internet and e-commerce are capable of offering to those sovereigns on the other hand. Unarguably, any uncoordinated regulation of the internet endangers

¹⁰⁴ OECD, "The Progress Report on the OECD Action Plan for Electronic Commerce", SG/EC (99), available online at <http://www.bmck.com/ecommerce/Tax/1999%20Paris%20Meeting-Progress%20Report.pdf>, last visited on the 1st of October 2003.

¹⁰⁵ Johnson, D., and Post, D., "Law and Borders: The Rise of Law in Cyberspace", (1996) 48 *Stanford Law Review* 1367.

¹⁰⁶ *Ibid.*

the continued growth and usefulness of this medium. However, it is submitted that there are difficulties, but not deadlocks, in determining this relationship when the subject matter of the self regulation involve diverse interests and wide geographic scope such as the internet and the highly dynamic nature of e-commerce.¹⁰⁷

Finally, it must be noticed that online business, internet users, and governments have different interests in building trust in the online environment. Reconciling these different interests and motivations is an important first step in providing trust in the online sphere. Online Businesses want to generate more profits by making internet users feel safer online, and by preserving the e-business' reputation as a good place to shop. Internet users want trustworthy, cheap, and effective redress options. Governments are challenged to strike the right balance between the desirability of economic growth based on emerging network technologies and the necessity to provide their citizens with effective and consistent protection. Governments need to ensure that emerging e-businesses are imposed with undue burdens, and that disputes do not damage overall confidence in e-commerce, and that businesses engaging in deceptive activity on the web can be separated from those businesses which are merely disorganised and inefficient. Governments also want to be relieved of both the financial burden of effectively handling a mass of small disputes and any political burden of having those disputes go unresolved.¹⁰⁸

The jurisdictional dilemmas on the internet are caused by both, over-inclusiveness and under-inclusiveness of the internet. Over-inclusiveness exposes internet users to unpredictable liability in different jurisdictions, while under-inclusiveness presents political problems because countries' laws cannot be enforced effectively through the internet, and therefore, activities on the internet will escape control.¹⁰⁹

¹⁰⁷ Johnson, D., and Post, D., "Law and Borders: The Rise of Law in Cyberspace", (1996) 48 *Stanford Law Review* 1367.

¹⁰⁸ Perritt, H., "Jurisdiction and the Internet: Basic Anglo/ American Perspectives", a paper presented at the Internet Law and Policy Forum Jurisdiction: Building Confidence in a Border-less Medium, Montreal, Canada, 26th and 27th of July 1999, available online at http://www.ilpf.org/events/jurisdiction2/presentations/perritt_pr/, last visited on the 1st of October 2003.

¹⁰⁹ Ibid.

2.3. The Regulatory Structure of ADR

ADR is a process which is designed to meet the needs and interests of the persons who use it. ADR is a commercially oriented product that flourishes on the basis of market forces. To avoid fading away, the popularity of these products depends on whether the demands of customers are satisfied.¹¹⁰

The European Commission's Green Paper on ADR mentioned that ADR recognises the value of the establishment of self-regulatory standards because it is based on parties' consent to adjudicate disputes. Indeed, the parties' agreement is one of the essential and most sensitive stages of the procedure.¹¹¹

In arbitration in particular, the main function of the agreement to arbitrate is to show that the parties have consented to their dispute being resolved by this process. The jurisdiction of an arbitral tribunal must derive from the consent of the parties in terms which make it clear that the process constitute arbitration, and thus without the agreement of the parties there can be no valid arbitration.¹¹²

Although the arbitrator's award is separated from the parties' consent, the choice of the arbitrator to adjudicate the dispute is based on their consent. Parties generally select arbitration for its privacy, its cost, its finality and the ability to have adjudication by a person of their choice. Therefore, the arbitrator's authority has its source in the parties' consent. This makes manifest two important aspects of commercial arbitration, which has been important in international commercial arbitration. First, the fundamental nature of arbitration is that it is an extension of a contractual agreement whereby parties resolve to leave the determination of their rights and obligations to a third person, i.e., the arbitrator. Second, since arbitration is

¹¹⁰ Hong Lin Yu, "Five Years on: A Review of the English Arbitration Act 1996", (2002) 19 *Journal of International Arbitration* 224.

¹¹¹ EU Commission, "Green Paper on Alternative Dispute Resolution in Civil and Commercial Law", COM (2002) 196 final, available online at <http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf>, last visited on the 1st of October 2003.

¹¹² Redfern, A., and Hunter, M., *Law and Practice of International Commercial Arbitration*, (3rd edition, Sweet & Maxwell, London, 1999) 6.

a private, not a governmental process, the state does not compel parties to participate and does not confer jurisdiction on arbitrators in the absence of parties' consent.¹¹³

Nevertheless, natural justice is concerned with the exercise of power; that is to say, with acts or orders which produce legal results and in some way alter someone's legal position to his disadvantage. Evidently, the absence of any risk of liability increases the likelihood of an irresponsible third party neutral. Accordingly, there is the perceived need for some form of judicial control of the arbitral system to ensure that proceedings are conducted fairly.¹¹⁴

From this perspective, it becomes clear that as international arbitration grows in popularity, arbitral regimes have had to deal with the inevitable consequences of arbitrator misconduct. For example, if the condition of arbitrator's impartiality is breached, by acting partially or even in a bad faith, or if the arbitrator revealed confidential information and thus violating privacy policy, or if parties agreed on a particular amount of money to be settled, but the money was not received, the parties must have legal rights to dispute the arbitrator's liability, either during the dispute or even after it was settled.¹¹⁵

Paolo Contini, a leading author on the New York Convention, has said in this regard that:

It will be admitted that the increase of arbitration might endanger state jurisdiction and the high ideals of impartial justice, if legislative and judicial measures for the remedy of abuses were not provided.¹¹⁶

2.4. The Regulatory Structure of OADR

The need for judicial control in OADR is evident because accountability in cyberspace is important in order to establish confidence among internet users that

¹¹³ Domke, M., *Domke on Commercial Arbitration*, (Wilmette Ill, Callaghan, 1999) 578.

¹¹⁴ Wade, H., and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000), 540. Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1196.

¹¹⁵ Leahy, E., and Bianchi, C., "The Changing Face of International Arbitration", (2000) 17 *Journal of International Arbitration* 56.

¹¹⁶ Paolo Contini, "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", (1959) 8 *American Journal of Comparative Law* 283 at 284.

when they have been misled or deceived about the use of OADR mechanisms, there will be a remedy. As the field of OADR grows, it is important that internet users are not offered substandard OADR services due to the spill-over effect that poor service will have on the credibility of all OADR systems. Unfortunately, at present there is no such a guarantee. Instead, there is an obvious trend to regulate the legal aspects of OADR agreements to the advantage of the OADR providers by releasing them from any potential liability of a breach of their duty.¹¹⁷

For instance, the *Internet Neutral*, an OADR provider, states that neither internet neutral nor its mediators shall be liable to any party for act or omission relating to mediation under The Internet Neutral Mediation Rules.¹¹⁸

Similarly, participants in the *Virtual Magistrate*, an OADR provider, agree by virtue of their participation to waive any claim against the *Virtual Magistrate* arbitration program for any liability as a result of the proceedings.¹¹⁹

Equally, Article 3 (b) (xiv) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") reads as follows:

Complainant agrees that its claims and remedies concerning the registration of the domain name, the dispute, the dispute's resolution shall be solely against the domain-name holder and waives all such claims and remedies against (a) the dispute resolution provider and panellists, except in the case of deliberate wrongdoing, (b) the registrar, (c) the registry administrator, and (d) the Internet Corporation for Assigned Names and Numbers, as well as their directors, officers, employees, and agents.¹²⁰

That said, it is imperative to understand the opportunities and constraints of governmental interference in OADR schemes, which is by all means an important factor for the success of such schemes.

¹¹⁷ Gibbons, L., "Private Law, Public Justice: Another Look at Privacy, Arbitration, and Global E-Commerce", (2000) 15 *Ohio State Journal of Dispute Resolution* 785.

¹¹⁸ <<http://www.internetneutral.com>>, last visited on the 1st of October 2003.

¹¹⁹ <<http://www.vmag.org/>>, last visited on the 1st of October 2003.

¹²⁰ Article 3 (b) (xiv) 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 2003.

Governments can accredit, supervise, and encourage the development of private OADR mechanisms, by eliminating legal obstacles to the effective use of OADR mechanisms, and by being a conduit for all information that is required to support the development of OADR, but not regulating such systems. In this regard, respondent eight in the survey that has been undertaken for the purpose of this thesis noted that:

Governments have a number of important roles, such as, promoting, endorsing, funding, promulgating, and using OADR.¹²¹

More importantly, governments can ensure the elimination of any unfair or deceptive OADR practices by functioning as supervisory bodies where the parties, neutrals, and OADR providers could be permitted to refer complaints, disputes, and outcomes about fraudulent or deceptive OADR practices to governmental law enforcement agencies. Besides, recourse to national courts in the course of OADR may be helpful to solve a difficulty, e.g. if there is a serious violation of the principles of OADR impartiality and independence.¹²²

In short, the self-regulatory structure in OADR offers the advantages of great flexibility, cost-effectiveness, quick, and decentralisation, while tying OADR schemes to governmental backup tools in order to enhance legitimacy and political acceptability.

2.5. Special Technical-Legal Needs in Electronic Disputes and OADR

Electronic disputes involve technical issues that require an expert in the field who is more equipped to adapt to the diverse evolving technological and social nature of cyberspace and its evolving commercial practice. Frequently, the legal issues require the development of an understanding of the underlying technology involved. This is reasonable since there is always an interconnection between conflict creation and conflict resolution. This is evident in internet disputes since it is very difficult to examine legal issues on the internet without some understanding of the basic

¹²¹ OADR academic eight.

¹²² Goldsmith, J., "Against Cyber-Anarchy", (1998) 65 *University of Chicago Law Review* 1199. Bick, J., "Why Should the Internet Be Any Different", (1998) 19 *Pace Law Review* 41. Lessig, L., "The Zones of Cyberspace", (1996) 48 *Stanford Law Review* 1402. Trachtman, J., "Cyberspace, Sovereignty, Jurisdiction, and Modernism", (1998) 5 *Indiana Journal of Global Legal Studies* 561.

technology of the internet. Persons unfamiliar with the technology may be incapable of perceiving the nuances of the claim which are essential to an appropriate resolution of the dispute. Indeed, understanding the origins of the problem, i.e. technical complexity of the internet, helps ensure that proposed solutions are matched to the problem.¹²³

In the physical world, it is conceived that ADR is deeply contextual and, when situated in different environments, it will perform different tasks. This implies that when the neutral belongs to the same institution or culture as the disputants, they may come to the ADR process with many common understandings of context. In other words, there is a background to the dispute that does not have to be articulated by either the disputants or the third party neutral since it is grounded in shared assumptions and perceptions.¹²⁴

In cyberspace, environments are created by software and hardware architectures. Neutrals who lack a sense of context and sensitivity to that environment, out of which the dispute emerged, might originate unfair decisions. Indeed in situations where the context is familiar, such as when a neutral is using online tools, the neutral will probably feel quite familiar and assume a role that largely parallels the role of a traditional alternative dispute resolution neutral. Such a specialist can be invaluable in keeping the dispute resolution process on-track and maximising the potential for an enforceable determination.¹²⁵

Whilst this can be easily offered by OADR, it is not always possible or feasible to request an expert's opinion in court litigation. This is due to the following four main reasons.

¹²³ Davies, L., and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law* 416.

¹²⁴ 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. Katsh, E., "The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace", available online at <<http://mantle.sbs.umass.edu/vmag/katsh.htm>>, last visited on the 1st of October 200.

¹²⁵ Gibson, C., "Arbitration in Intellectual Property Disputes", (1997) 8 *California International Practitioner* 1.

First, a flexible and evolving structure, such as OADR, will accommodate new schemes and make use of new technological methods supporting redress mechanisms on the internet, more than courts can do. This is evident in OADR schemes as it is more consistent with the technical nature of the internet because both of them are dependent on the use of the technology. This conforms to a large extent with the notion that in the online context, where technologies and processes are still in their development stages, a level of flexibility may be a great asset. OADR fits well with cyberspace values of flexibility and innovation and thus seems an appropriate choice of dealing with online disputes.

Second, while ADR systems are flexible and creative in finding solutions for e-disputes, there is a lack of flexibility and creativity in finding solutions that satisfy the parties in court systems. In other words, while the courts may offer only limited remedies in resolving disputes, particularly, where these remedies are prescribed by law or regulations, settlements using OADR can often be fashioned that are more individualistic and flexible than legal doctrine may allow. This is of particular importance in a technical-legal setting such as internet disputes.¹²⁶

Third, given that OADR is regarded as a mechanism that can resolve questions which are not always legal, parties can select from a large number of third party neutrals who have extensive legal and practical experience in the specific legal and factual issues in electronic dispute, and who are better-equipped than judges to resolve technical and legal aspects of internet disputes. A major attraction of arbitration procedure is the scope to nominate non-legally qualified persons to adjudicate in areas within their specialist knowledge or skill. Apparently, using a panel of diverse arbitrators can provide a better balance of expertise, and may provide an additional advantage in technical cases by covering many of the issues likely to arise in formulating appropriate resolution of the case.¹²⁷

¹²⁶ 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.

¹²⁷ Blackman, S., and McNeill, R., "ADR in Commercial Intellectual Property Disputes", (1998) 47 *American University Law Review* 1717.

And fourth, the costs of expert opinions in court system are high in internet disputes because modern technologies are characterised by increasingly complex products and services. By contrast, ADR mechanisms often develop as a response to the particular requirements and characteristics of an individual sector. Thus an ADR tribunal can be composed of people with specialised knowledge and skills related to the dispute, and this, in turn, may reduce the need for expert opinion on complex matters, and help to streamline the dispute resolution process by affording the parties greater control over expenditures of time, effort, and money.¹²⁸

This chapter will emphasise, in particular, the special technical-legal needs of domain name disputes and their relationship with OADR. However, one must be careful in studying domain name disputes and their relationship with OADR because they present a number of special characteristics, both legal and technical. Thus, the analysis of domain names characteristics is important in order to demonstrate that OADR protects internet users' interests while not harming the interest of the Information Technology (IT) industry and, most importantly, not hindering the flourishing of electronic commerce.

This is not to suggest that there are no special technical-legal needs in B-to-C internet transaction disputes. On the contrary, the internet has an apparent impact on B-to-C transaction disputes through the globalisation of individual consumer transactions across borders. However, the special technical-legal needs in B-to-C internet transaction disputes are not as evident as the special technical-legal needs in domain name disputes. This is built on the assumption that the domain name system itself, and its implication for trademark laws, would not have been possible without the advent of the internet.

Domain names characteristics will be analysed in the following parts of this chapter. They are respectively, the relationship between trademarks and domain names, the conceptualisation of the term "use" of a domain name, the existence of bad faith in domain name disputes, non-commercial uses of domain names, the content of the web

¹²⁸ Blackman, S., and McNeill, R., "ADR in Commercial Intellectual Property Disputes", (1998) 47 *American University Law Review* 1717.

site, domain names and search engines on the internet, and reverse domain name hijacking.

2.5.1. The Relationship between Trademarks and Domain Names

Given the increasing commercialisation of the internet, organisations frequently seek the registration of a domain name which creates an obvious link with their trademarks in real life activities. However, the interoperability between trademarks and domain names is a complex issue. This complexity is based mainly on the assumption that domain name space is and should be an extension of trademark space. This assumption is both unwarranted and unwise. In order to show the weakness of the above-mentioned assumption that domain name space is and should be an extension of trademark space, it is useful to define both trademarks and domain names.

A trademark is a word or symbol which acts to identify a product so as to distinguish it from other products provided by others. The law related to trademarks was developed to resolve disputes between competing businesses where one business adopts and uses a trademark that is identical or confusingly similar to that of another. This law is found both in statutes and in the common law action of passing off.¹²⁹

In basic tenets of trademark law, there are two types of infringement; infringement that causes a likelihood of confusion, and infringement that dilutes the value of a trademark. As regards the former, the issue is not whether the marks themselves would be confused to each other, but rather whether the use of a similar mark will cause consumers to confuse the source of the goods. As a result, in traditional trademark context, to find a likelihood of confusion, courts look at set of factors such as the similarity of products for which the name is used, the strength of the complainant's mark, and actual confusion. As regards the latter, trademark dilution is defined as the lessening of the capacity of a famous mark to identify and distinguish goods, and thus impair the value of the trademark, even if the use of a mark does not produce a likelihood of confusion. In other words, trademark dilution permits the

¹²⁹ Murray, A., "A Distinct Lack of Goodwill", [1997] *European Intellectual Property Review* 345. Carty, H., "Passing off at the Crossroads", [1996] *European Intellectual Property Review* 629. Carty, H., "Dilution and Passing off: Cause for Concern", (1996) 112 *Law Quarterly Review* 636. loundy, D., "A Primer on Trademark Law and Internet Addresses", (1997) 15 *John Marshall Journal of Computer and Information Law* 475.

owner of a unique trademark to block someone's actions regardless of whether the owner and other party are in competition with each other or that the actions give rise to confusion or not. Instead, the purpose of the dilution statutes is to protect a famous trademark from damage caused by the use of the mark in non-competing endeavours. So the trademark owners do not have to show that infringers' action was actually caused marketplace confusion. In general, in deciding whether the mark is distinctive or famous, there are non-exclusive factors that should be taken into account, such as, the duration and extent of use of the mark in connection with the goods, the duration and extent of advertising and publicity of the mark, the degree of the recognition of the mark in the trading areas and channels of trade, and the nature and extent of use of the same or similar marks by third parties.¹³⁰

Dilution may take one of two forms, blurring or tarnishment. Dilution by blurring involves using a strong mark for unrelated purposes until it is no longer a strong mark or until it ceases to possess its power to attribute goods to their source. This will result ultimately in whittling away of an established trademark's selling power. Dilution by tarnishment occurs when a famous mark is linked to poor quality products, or otherwise displayed in a derogatory manner, which leads to hurt the reputation of the owner of the trademark.¹³¹

But, in order to understand what is meant by domain names, one must define domain names within the context of the World Wide Web, the internet, and the Internet Protocol (IP). From a technical standpoint, the Web, the internet, the IP, and domain names are different conceptions. The Web is a multimedia portion of the internet. It is important to notice that the web is not a component network of the internet at all, but a service provided over the internet. The pages of a web are most often written in a format, like a word processing format, that can be read by browsers such as Netscape or Internet Explorer. The most common format is called Hypertext Mark-up Language (HTML), which includes the ability to build in links to other pages or services within a page. The web uses a specific protocol, the hypertext transfer protocol (HTTP), to transfer documents written in HTML. The web is made up of individual "sites" each of which may contain text, graphics etc. Internet Protocol (IP) addresses are

¹³⁰ Murray, A., "A Distinct Lack of Goodwill", [1997] *European Intellectual Property Review* 345.

¹³¹ *Ibid.*

represented as strings of digits divided into parts or fields. For example: 124.33.45.112. But using these numerical strings is somewhat inconvenient; consequently, the IP address system has been overlaid with a more user friendly system of domain names which serve as identifiers of the web sites.¹³²

From those two definitions of a trademark and a domain name, one can notice that both trademarks and domain names share the same legitimacy of existence, i.e., to allow merchants to establish reputations, protect their goodwill from fraud and confusion, and ensure that consumers can identify the actual source of the merchant's products. However, the delivery of such tasks leads to substantial differences between a trademark and a domain name.

Since trademarks are names designated to identify the source and affiliation of goods, they are not used to locate goods. But domain names, due to the technical nature of the internet, are inherently used to both identify and locate goods. Domain names are partly functional (a computer user's address on the internet and the vehicle which enables a user to locate other internet users) and partly an indication of the origins of goods. Therefore, the application of trademark law to domain names, with their dual nature, might be problematic. It appears that the possibility of confusion, or more precisely, the standard of confusion, between trademarks and domain names is much higher on the internet than traditional trademarks confusion. As a result, the criterion of confusion, which is applied in trademark disputes, cannot be applied effectively in domain names disputes.

For instance, the interoperability of the dilution and likelihood of confusion of trademarks on the internet should be underlined clearly. In *Hasbro, Inc. v. Internet Entertainment Group, Ltd.*,¹³³ the operator of an adult entertainment web site registered the domain name "candyland.com". The court granted a preliminary injunction claiming that the adult-oriented web site was likely to dilute the value of the trademark which is owned by Hasbro, the maker of the "Candy land" children's board game. This was perceived as diluting the wholesome nature of the name and

¹³² Davies, L., and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law* 421.

¹³³ *Hasbro, Inc. v. Internet Entertainment Group Ltd.*, C 96-130 WD, 1996 U.S. Dist. LEXIS. 11626.

causing irreparable harm to Hasbro, notwithstanding the fact that an average consumer would not be confused into thinking that he or she would buy a child's board game from a cyber-sex web site, and therefore leaving the web site as soon as they realise that this web site is not the particular web site that they are looking for.

Besides, there are some limitations on the resolution of domain name disputes. In *Pitman Training Ltd and Another v. Nominet UK and Another*,¹³⁴ the Pitman publishing company was established in 1849. In 1985 the various divisions of the business were sold. The defendant acquired the publishing business, and the plaintiff acquired the training business. An agreement was reached at that time providing for the continued use of the Pitman name by the new users. In 1996, a request was submitted by the defendant to "Nominet UK", the organisation which administers the "UK" domain name system, seeking the registration of the "pitman.co.uk". The plaintiff made a totally independent request for the allocation of the same domain name. Applying "first come, first served" rule, "Nominet UK" allocated the domain name to the defendant. The High Court held that the plaintiff had not demonstrated a reasonable prospect of succeeding in its action because relief in such action can only be granted in support of some viable cause of action, however convenient the grant of that relief might appear to be.

Clearly, this happens when "the first-come, first-served" internet domain name registration policy collided with trademark law; simply the domain registrant does not own the disputed trademark, but he or she got there first.¹³⁵

Furthermore, domain name disputes are not viewed only as an infringement of an existing registered trademark, domain name disputes could exist where two or more companies, each with legitimate claims to the name, want to use the name in their domain names. With different categories of goods in the trademark register, the same name may have been allocated to a number of persons. The existence of many national trademark regimes is likely to result in further duplication. But, due to technical constraint on the domain name system, only one trademark owner can own a

¹³⁴ [1997] FSR 797.

¹³⁵ Litman, J., "The DNS Wars: Trademarks and the Internet Domain Name System", (2000) 4 *Journal of Small & Emerging Business Law* 149.

domain name which corresponds to his or her trademark. In actual fact, given that the internet is a large marketplace without boundaries of any kind, where geographical boundaries and different lines of business are combined together in one marketplace, it has been conceived that companies in different line of business (non-competing class of products) and different geographical locations, whose trademarks did not formerly conflict, now have to fight over a single domain name.¹³⁶

In theory, a domain name registration could be held by a person who owns an identical trademark in one country, while there is another party with an identical trademark registered in another country. Each of the parties might bring a successful action in its own jurisdiction. The problem arises because the Domain Name System (DNS) gives rise to registrations that result in a global presence, while trademark rights traditionally gives rise to rights that are exercisable only within the territory concerned. There is an intersection of a global medium, such as the internet, with historical, territorially based system that emanate from the sovereign authority of the territory, such as trademark system.¹³⁷

Even in the same jurisdiction, solutions for domain name disputes might be difficult. For example, if there is a Leeds lock company and Leeds computer store, under the current internet naming system, neither one will be able to block the other from using the word "Leeds" as a web domain name in the commercial top level domain name "com". At the same time, one of them will not be able to include its trademark in its domain name, since there can be only one "Leeds.com".

The same applies to well-known trademarks, such as "Thrifty". It is permissible to use the name thrifty for a car rental company, a drug store, and a gasoline station at the same time, because the three businesses are so different that consumers are not likely to be confused by the same name. However, the car rental company is presently using the domain name "Thrifty.com".

¹³⁶ Howitt, D., "War.com: Why the Battle Over Domain Names Will Never Cease", (1997) 19 *Hastings Communications and Entertainment Law Journal* 733. Davies, L., and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law* 424.

¹³⁷ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

And finally, there might be a domain name consisting of the initials of the name of a corporation that is well-known in one country, while there is another corporation with the same initials to its name that is well-known in another country. In some cases, domain names were registered to other companies who shared an acronym or a name with a more well-known counterpart, and therefore shared a legitimate claim to the name.¹³⁸

The following example might illustrate this point. The domain name “aba.com” is registered to the American Bankers Association, “aba.org” to the American Birding Association, and “aba.net” to a company called “Ansaback” which provides electronic mail services. All appear *bona fide* organisations, but there is no room left for the perhaps better known American Bar Association whose web site has to use the less intuitive domain name “abanet.net”.

That said, it becomes clear that the numerous instances of abusive domain name registration will definitely result in internet users’ confusion and an undermining of public trust in the internet. However, given that there are widely divergent levels of technical comprehension of domain names, the complexity of technical nature of domain name disputes can be handled and controlled through OADR because third party neutrals’ expertise could be useful in dealing with certain aspects of the legal-technical setting of domain name disputes.

It appears safe to presume that the third party neutrals in domain name disputes should understand that one of their primary tasks is to analyse carefully the relationship between trademarks and domain names. Many arbitrators, for example, are intimately familiar with domain name disputes, and, thus, bringing a greater level of expertise than would be evident in a court of law. This expertise will enhance a deep understanding of the peculiarities and particularities of domain name disputes, and ultimately result in more fair and just decisions. OADR in general, and e-mediation in particular, as a process of facilitating negotiations between parties,

¹³⁸ Weiswasser, G., “Domain Names, the Internet, and Trademarks: Infringement in Cyberspace”, (1997) 13 *Santa Clara Computer & High Technology Law Journal* 151.

would be an attractive way of resolving domain name disputes because those disputes require some creativity in finding solutions.¹³⁹

The European Commission believes that it is beyond doubt that a fair resolution of domain name disputes requires some creativity.¹⁴⁰ Similarly, WIPO in its final report on the Management of Internet Domain Names and Addresses suggests that a gateway internet page shared by the disputants could be an agreed solution in certain domain name disputes which involve intractable legal issues, provided that there are serious interests on each side to resolve the dispute in such a way.¹⁴¹ By all means, it is not irrational to think of measures which allow coexistence of domain names, while providing internet users with the information to distinguish between the owners of the similar names on the internet. This represents a viable and useful way of reducing conflicts on the internet. For example, <http://www.scrabble.com> is a web site which provides a gateway to the “Milton Bradley Scrabble” home page if the internet user indicates that he or she is a resident of the United States, or to the “Spear’s Games/Mattel Scrabble” home page if she or he indicates that she or he resides somewhere else.¹⁴²

2.5.2. The Conceptualisation of the Term “Use” of a Domain Name.

The crystallisation of what constitutes “use” of a domain name on the internet is a perplexing issue. In order to be an infringement, the domain name owner must create confusion by promoting the confusingly similar domain name. Accordingly, mere registration of a domain name as an internet address, without further promoting or advertising, is not infringement. As a result, many uses of a domain name on the internet would not give rise to trademark rights. However, this contradicts one of the primary purposes of trademark laws, which are sought on one hand, to eliminate deceitful practices in commerce that involve the misuse of trademarks, and on the

¹³⁹ Blackman, S., and McNeill, R., “ADR in Commercial Intellectual Property Disputes”, (1998) 47 *American University Law Review* 1720.

¹⁴⁰ EU Commission, “Commission Working Document on the Creation of a European Extra Judicial Network (EEJ-NET)”, SEC (2000) 405, available online at <http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just06_en.pdf>, last visited on the 1st of October 2003.

¹⁴¹ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

¹⁴² <<http://www.scrabble.com>>, last visited on the 1st of October 2003.

other hand, sought to eliminate other forms of misrepresentations which do not involve any use of what technically be called a trademark. In *British Telecommunications Plc., Virgin Enterprises Ltd., J Sainsbury Plc., Marks & Spencer Plc., and Ladbroke Group Plc. v. One in a Million and Others*,¹⁴³ commonly known as “One in a million” case, a slew of domain names were registered with the U.S. registry (NSI), such as “marksandspencer.com”, “bt.org”, “virgin.org”, “britishtelecom.net”. The court stressed that mere registration of a domain name was not, in itself, passing off or infringement of a trademark, rather it was a pattern of activity that amounted to a threat of passing off because it was a deliberate practice, with a clear intent, to deceive people as to the origin of the domain.

In an ICANN case, *Telstra Corporation Limited v. Nuclear Marshmallows*,¹⁴⁴ a company called “Nuclear Marshmallows” registered the domain name “telstra.org”, but did not use it for any purpose. Another company called “Telstra” already had a registered trademark for “telstra”. It was stated that Nuclear Marshmallows had used the name in bad faith simply by not using it. In this case, it has been emphasised that:

The concept of domain name being used in bad faith is not limited to positive action; inaction is within the concept.¹⁴⁵

A similar conclusion was reached in *Maritz, Inc., v. CyberGold, Inc.* case.¹⁴⁶ The court held that although the defendant’s web site was not operational yet, plaintiff’s claim was not necessarily premature. In the court’s opinion, the defendant was doing business by merely giving information about the upcoming services.

The analysis of the above-mentioned cases might suggest that there is a need to differentiate between domain name warehousing and domain name speculation in order to decide on what constitute “use” of a domain name on the internet. While domain name speculation is the business of registering infringing domain names, most likely, for sale to others, domain name warehousing is not necessarily a misuse.

¹⁴³ [1998] FSR 265.

¹⁴⁴ *Telstra Corporation Limited v. Nuclear Marshmallows*, ICANN Case No. D2000-003, available online at <<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0003.html>>, last visited on the 1st of October 2003.

¹⁴⁵ Ibid.

¹⁴⁶ *Maritz, Inc., v. CyberGold, Inc.*, 947 F. Supp. 1328 (E. D. Mo.1996).

Domain name warehousing takes place when firms acquire domains with the same name as a trademark they have registered for some valid reasons, even though they have no intention of using the domain. They may do so in order to prevent someone else from using it and causing customer confusion. Sometimes, a firm may register a domain name before registering a trademark as part of a process of preparing a new campaign. Actually, some retailers began their online operation by putting up non-transactional sites to provide company and product information, possibly to generate interest.

As a result, it is imperative that any decision that may be made by an OADR provider upon a dispute over what constitutes a “use” of a domain name should consider the following factors collectively (a) the existence of registration of both a trademark and a domain name (b) the existence of factors which lead to confusion (c) an interchangeable analysis of the existence of registration, and the existence of factors which lead to confusion.

2.5.3. The Existence of Bad Faith in Domain Name Disputes.

Bad faith in a trademark dispute is the intention to create confusion in order to exploit the goodwill connected with a trademark. In *British Telecommunications Plc., Virgin Enterprises Ltd., J Sainsbury Plc., Marks & Spencer Plc., and Ladbroke Group Plc. v. One in a Million and Others*,¹⁴⁷ the court indicated that the court should consider the intention of the defendant to appropriate the goodwill of another or enable others to do so.

However, the articulation of what constitute bad faith in domain name disputes is a difficult task. For example, in *Sporty's Farm LLC v. Sportsman's Market, Inc.*,¹⁴⁸ the U.S. District Court found that defendant's operation of the “sportys.com” web site was unlikely to cause confusion, but diluted plaintiff's registered mark. The court held, however, that the defendant's dilution was not wilful. But surprisingly, the Second Circuit held that defendant's actions showed bad faith intent to profit.

¹⁴⁷ [1998] FSR 265.

¹⁴⁸ *Sporty's Farm LLC v. Sportsman's Market, Inc.*, 202 F. 3d 489 (2d Cir. 2000).

Similarly, WIPO's Final Report on the Management of Internet Domain Names and Addresses proposes that every registrant should be required to make:

A representation that, to the best of the applicant's knowledge and belief, neither the registration of the domain name nor the manner in which it is to be directly or indirectly used infringes the intellectual property rights of another party.¹⁴⁹

In a typical domain name dispute, however, if A and B both have registered the same trademark in different sectors of business and/or different jurisdictions, and both of them are aware of the other's registration of the trademark, only A can register a domain name that reflects his or her trademark on the internet. This is due to technical constraint on the domain name system where only one trademark owner can own a domain name which corresponds to his or her mark. Accordingly, it is virtually impossible that A can give a good faith representation that a contemplated domain name, which reflects his legitimate right to reflect his own trademark as a presence on the internet, and at the same time, prevent B from registering his mark on the internet, does not directly or indirectly infringe the intellectual property rights of B.

Equally, the UDRP provides in paragraph 4(a) that a complainant must assert that the domain name has been registered and used in bad faith.¹⁵⁰ Paragraph 4(b) of the UDRP, provides for evidence of the registration and use of a domain name in bad faith, such as, circumstances indicating that the registration or acquisition of the domain name was primarily for the purpose of selling or renting the domain name registration to the complainant, who is the owner of the trademark, or to a competitor of the complainant, for valuable consideration, or that the registration of the domain name was to prevent the complainant from reflecting the mark in a corresponding domain name, or to disrupt the business of a competitor, or for the mere intention of attracting internet users for commercial gain to a particular web site by creating a

¹⁴⁹ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

¹⁵⁰ Paragraph 4 (a) of ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at <<http://www.icann.org/dndr/udrp/policy.htm>>, last visited on the 1st of October 2003.

likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of goods or services.¹⁵¹

These measures, nevertheless, do not provide structural criteria to what might suffice to rebut that showing by the defendant. For example, if a plaintiff submits evidence that the registrant offers to sell a disputed domain name for a particular consideration; this is sufficient evidence to a case of abusive registration. But the defendant may show that the offer was in response to a request from the plaintiff. In fact, it is hard to see how it could be bad faith to respond to a solicitation of a bid, especially, if there is a dispute between the parties and the offer was part of a settlement. In the WIPO case, *Gordon Sumner and p/k/a Sting v. Michael Urvan*,¹⁵² the panel remarked that the complainant tendered evidence that the respondent had offered to sell the domain name to him. The respondent countered that such offer was only made in response to a solicitation from the complainant. Accordingly, the panellist concluding that merely responding to an offer of sale did not constitute evidence of bad faith as required by section 4(b) (i) of the UDRP.

This is duplicated by the fact that dealing with a multitude of registrations of a well-known trademark, with the availability of a plethora of variations and deceptively similar marks, makes detection and monitoring of bad faith in the infringement of a well-known trademark a daunting challenge. The variations on domain names are virtually endless. For example, even if <http://www.mcdonalds.com> web site is registered to McDonalds Corp., the well known company, another unaffiliated party in, say, Italy could register <http://www.mcdonalds.it> web site, as its domain name.

Also, there are cases where an extremely minor variation or a misspelling can cause a huge damage to a well-known trademark. This makes detection and monitoring of bad faith in the infringement of a well-known trademark a daunting challenge. For example, the <http://www.intel.com> web site, where the (I) and (E) are transposed,

¹⁵¹ Paragraph 4 (b) of ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at <http://www.icann.org/dndr/udrp/policy.htm>, last visited on the 1st of October 2003.

¹⁵² *Gordon Sumner, p/k/a Sting v. Michael Urvan*, ICANN Case No.2000-0596, available online at <http://internetlegi.hypermart.net/sting.htm>, last visited on the 1st of October 2003.

could become <http://www.entil.com>, which can cause a huge damage to “INTEL”, the well known trademark in the field of technology and computers.

And finally, a domain name could be a logical choice for the domain name holder, but it coincidentally could be very similar to, or actually someone else’s existing trademark. This could be called an unintentional overlap of names. For example, in *French Connection Limited v. Antony Toolseeram Sutton*,¹⁵³ the plaintiff could not establish passing off against a defendant who had registered the domain “fcuk.co.uk”. The defendant established that “fcuk” is a well-known term in internet circles (as a term used to avoid censors) and had this meaning long before the plaintiff adopted it. The court found that the defendant’s argument was a creditable defence to the charge of intentional passing off.

As a result, it appears safe to presume that OADR providers should understand that one of their primary tasks in domain name disputes is to determine adequately the good faith of a registrant because although bad faith clauses are designed to give the parties flexibility, they often cause problems due to its uncertainty.

2.5.4. Non-commercial Uses of Domain Names

In any commercial dispute setting, a definition of the boundary between unfair and unjustified misappropriation of another’s property, either tangible, intangible, or intellectual property, on the one hand, and fair use or justified non-commercial use, on the other hand, is very important. As a result, consideration needs to be given to the way in which the distinction between commercial and non-commercial use of a domain name is conceptualised. This distinction must accommodate the diverse nature of the internet users. One must not lose sight of traditional non-commercial internet uses because the internet is not exclusively a medium of commerce.¹⁵⁴

The assumption that the internet is an exclusive medium of commerce might open the door to an overall unjust result in domain names dispute resolution. Any overzealous implementation of measures proposed for the protection of intellectual property may

¹⁵³ The High Court of Justice, Chancery Division, 12/2/99, unreported.

¹⁵⁴ Albert, G., “Right on the Mark: Defining the Nexus Between Trademarks and Internet Domain Names”, (1997) 15 *John Marshall Journal of Computer and Information Law* 277.

result in significant limitations on other important rights and interests on the internet.¹⁵⁵

Conflicts can arise between trademark holders, and persons with indisputably legitimate interest in a mark, although this legitimacy is not deriving from a trademark right in a commercial sense. These are non-trademarked, yet legitimate uses of words, names and symbols. In the ICANN case, *Bruce Springsteen v. Jeff Burgar and Bruce Springsteen Club*,¹⁵⁶ the panel observed:

The internet is an instrument for purveying information, comment, and opinion on a wide range of issues and topics. It is a valuable source of information in many fields, and any attempt to curtail its use should be strongly discouraged.¹⁵⁷

There are domain name registrations which are justified by legitimate free speech rights. However, although fundamental free speech interests, including parody and criticism of famous corporations, are stated in WIPO's Final Report on the Management of Internet Domain Names and Addresses,¹⁵⁸ UDRP in 4 (c) (iii), states that a legitimate non-commercial use of a domain name will be denied protection if the registrant has an intent to tarnish the complainant's trademark.¹⁵⁹ It does not appear, therefore, that the UDRP gives an adequate weight to free speech interests.¹⁶⁰

¹⁵⁵ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

¹⁵⁶ *Bruce Springsteen v. Jeff Burgar and Bruce Springsteen Club*, ICANN case No.D2000-1532, available online at <<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1532.html>>, last visited on the 1st of October 2003.

¹⁵⁷ Ibid.

¹⁵⁸ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

¹⁵⁹ Article 4 (c) (iii) of ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at <<http://www.icann.org/dndr/udrp/policy.htm>>, last visited on the 1st of October 2003.

¹⁶⁰ There are many cases decided under the UDRP which address the problem of freedom of speech and trademark owner rights. See for example, *Bandon Dunes L.P. v. DefaultData.com*, ICANN Case No. D2000-0431, available online at <<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0431.html>>, last visited on the 1st of October 2003. *Wal-Mart Stores Inc. v. Walsucks and Walmarket Puerto Rico*, ICANN Case No. D2000-0477, available online at <<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0477.html>>, last visited on the 1st of October 2003. *Hunton & Williams v. American Distribution Systems Inc.*, ICANN Case No. D2000-0501, available online at <<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0501.html>>, last visited on the 1st of October 2003.

Without a doubt, the use of the conception of tarnishment is not appropriate, since it raises freedom of speech concerns that non-commercial users are entitled to. It seems clear that a web site designed to attack a company's labour practices or its environment record might be considered to show intent to tarnish a mark. Moreover, there are various meanings of tarnishment. Sometimes even gentle criticism of corporations such as comparative price and quality advertisement has been held to be tarnishment. Furthermore, the articulation of a concept such as "international tarnishment" seems to be broad enough to reach parody sites such as the "RoadKills-R-Us" (available online at <http://www.rru.com>), and criticism sites such as [Mcspotlight.org](http://www.mcspotlight.org) (available online at <http://www.mcspotlight.org>).

Suppose that an online company called "verizon.com" registered the domain name "verizonsucks.com", as a precautionary tactic. However, a hacker registered "verizonreallysucks.com". Because the intent of the registrant of the latter domain name is to ridicule the newly formed company and not to make a profit, one can argue that the bad faith intent to profit has not been crystallised. It might be said accordingly that (trademarksucks.com) domain names, for example, may be protected as free speech because of their communicative content, while (trademark.com) domain names, which serve merely as source identifiers, are unprotected as free speech platforms.

In view of the inter-relationship between domain names as commercial indicators, and domain names as freedom of speech platforms, it is imperative that OADR providers expand their field of vision to understand the human rights implications of the domain naming system, and in particular freedom of speech and expression. From this perspective, it appears safe to presume that OADR providers must understand that one of their primary tasks in domain name disputes is to determine adequately whether disputants are interested in free expression, or they are in the business of acquiring domain names which might prove valuable to business enterprises, and selling such domain names to the business for a profit.

2.5.5. The Content of the Web Site

The ways in which HTTP protocol and HTML language operate allow a user to construct pages which can refer to or include material from other sites. There are

many cases where a web site plucks an image as a trademark from another web site and incorporates the image into its own web page. If an author of a web page includes a link to materials protected by a trademark, which allows the browser to access these materials, then this author may be held responsible for trademark infringement. In fact, the effect is the same regardless of whether the web page author incorporates the materials directly into his web page, or whether he configures his web page so that whenever it is accessed, the page automatically downloads and incorporates the infringed materials. This practice can be even more complicated by “inlining”, which is a form of hypertext mark-up language in which the creator of a web page can embed other content by using a textual reference describing where on the network the infringed material is located. This creates an extension to trademark problems and can be a major source of confusion on the internet because if there is a disputed domain name, the trademark holder cannot sue all web sites that have a hyperlink, deliberately or not, to lead customers to the disputed domain name.¹⁶¹

For example, in *Playboy Enters v. Frena*,¹⁶² the defendant’s subscription computer bulletin board service distributed unauthorised copies of plaintiff’s copyrighted photographs bearing Playboy’s registered trademark. After analysing the distinctiveness of Playboy’s mark and the likelihood of confusion created by Frena’s (the defendant) use of the mark, the court found that the defendant had infringed Playboy’s registered trademark.

Consequently, a strong argument in favour of infringement could be made if the infringed mark is being used prominently on the internet homepage content, rather than just in the internet address. It appears safe to presume therefore that OADR providers should understand that one of their primary tasks in domain name disputes is to concentrate on whether or not there is a likelihood of trademark confusion concerning the actual contents of the web site, rather than the domain name itself.

¹⁶¹ Davies, L., and Reed, C., “The Trouble with Bits: First Steps in Internet Law”, [1996] *Journal of Business Law* 421.

¹⁶² *Playboy Enters v. Frena*, 839 F. Supp. 1559 (M. D. Fla. 1993).

2.5.6. Domain Names and Search Engines on the Internet

Ironically, while simply putting up a web site does not mean that many people will visit it, the way that various internet search engines work enhance the likelihood that even the most obscure web sites can find viewers. For example, when an internet user searches for the word “delta”, the famous “Delta Airlines” web site may not appear on the first page on an “Alta Vista” search report.

The problem of search engines on the internet was not resolved by the addition of Top Level Domains (TLDs) extensions to domain names, such as (.com), (.uk), because these TLDs are insufficient to avoid internet users’ confusion. A trademark infringement occurred when search engines on the internet pointed to a particular web site, notwithstanding the existence of TLDs. For example, in theory, both the Austin Intellectual Property Law Association (AIPLA) and the American Intellectual Property Law Association (AIPLA), can register both “aipla.com” and “aipla.org”.

Besides, the use of upper case letters and a period to separate a domain name into two parts, in order to differentiate between two domain names, is insufficient to avoid confusion, since a search engine would treat the two domain names indifferently, i.e. notwithstanding the upper case letters and separated periods.

Even if a disclaimer has been put up at a web site, it would not reduce the chances of confusion and deception of internet users, since a disclaimer might confuse the search engine itself and cause the web site to be shown as a “hit” which the “internet surfer” would then visit.¹⁶³

Therefore, it appears safe to presume therefore that OADR providers should understand that one of their primary tasks in domain name disputes is to concentrate on the confusion that might arise from search engines.

¹⁶³ Litman, J., “The DNS Wars: Trademarks and the Internet Domain Name System”, (2000) 4 *Journal of Small & Emerging Business Law* 164. Hamilton, G., “Trademarks on the Internet: Confusion, Collusion or Dilution”, (1996) 4 *Texas Intellectual Property Law Journal* 4.

2.5.7. Reverse Domain Name Hijacking

Domain name disputes are not related only to the appropriation of a well-known trademark from real space, but the appropriation of a cyber trademark with or without formal mark registration. This practice is called “reverse domain name hijacking”.¹⁶⁴

In reverse domain name hijacking, the owner of a trademark intimidates the legitimate holder of a domain name to surrender his or her domain name after the investment of considerable amount of time and money and human creativity into his or her internet-related businesses.

Unfortunately, UDRP wording did not eliminate the practice of reverse domain name hijacking. For example, Article 4 (c) (ii) has indicated by implication that trademark owner is always called “complainant”, notwithstanding the fact that domain name holder could be a complainant for a reverse domain name hijacking.¹⁶⁵ Moreover, UDRP stated in Article 6 that the domain name holder shall not name ICANN as a party in any domain name dispute proceeding, but it does not mention the same action done by the trademark holder.¹⁶⁶

Instead of defining a balanced public policy, the UDRP increases the rights of trademark holders at the expense of domain name holders. This raises a fairness issue in domain name disputes context; namely, this preferable treatment of the trademark owners at the expense of domain name holders on the assumption that all domain name holders are cyber-squatters.

However, the UDRP should be more cautious and more balanced as it might unfairly expose domain name holders acting in good faith to costs in responding to complaints brought against them. Those costs may be so burdensome that internet users give up domains rather than defend themselves. There is a need to provide more justice in this context by balancing the interests of both disputants; trademark owners, domain name

¹⁶⁴ Litman, J., “Breakfast with Batman: The Public Interest in the Advertising Age”, (1999) 108 *Yale Law Journal* 1717.

¹⁶⁵ Article 4 (c) (ii) of ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at

<<http://www.icann.org/dndr/udrp/policy.htm>>, last visited on the 1st of October 2003.

¹⁶⁶ *Ibid.* Article 6.

holders. Indeed the broader view of doing business on the internet implies the protection of all stakeholders. Therefore, it appears safe to presume therefore that OADR providers should understand that one of their primary tasks in domain name disputes is to concentrate on reverse domain name hijacking.¹⁶⁷

2.6. Conclusion

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 infrastructure. But only the prudent deployment of OADR can build trust and create confidence in the online marketplace, and, therefore, encourage the growth of electronic commerce. Such prudent deployment of OADR must contemplate the relationship between internet infrastructure and ADR mechanisms since they are interconnected with each other and with internet disputes to a large extent. Indeed, the interoperability of both a technical and legal level in OADR should not be underestimated. Both technical and legal levels come with its own conception of analysing OADR, each is useful in unravelling the complexities encountered, and each should be kept in mind when evaluating OADR schemes.

From this perspective, one can argue given the international, decentralised, and technical nature of the internet, the online ADR model will be international, decentralised, and technical in nature. Consequently, it is natural that alternative dispute resolution mechanisms are experiencing a renaissance on the internet, in the form of online alternative dispute resolution. This is because ADR recognises the value of the establishment of self-regulatory standards on the internet which itself invites many aspects of self regulation.

Equally, ADR is attentive to the cyberspace that it tries, not only to regulate, but also to render more efficient. The main similarities between ADR and cyberspace are informality, openness, and high degree of innovation. Therefore, the growth of ADR mechanisms on the internet must be viewed as an expression of the need for swifter justice in cyberspace.

¹⁶⁷ Litman, J., "Breakfast with Batman: The Public Interest in the Advertising Age", (1999) 108 *Yale Law Journal* 1717. Litman, J., "The DNS Wars: Trademarks and the Internet Domain Name System", (2000) 4 *Journal of Small & Emerging Business Law* 164.

Chapter Three: Internet Characteristics and OADR

3.1. Introduction

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 chapter 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, and to analyse the constraints and opportunities when one intervenes at a distance, and to study the role and function of the World Wide Web in such process. So, the main methods of OADR, which are online mediation and online arbitration will be presented here in order to analyse how far traditional ADR methods 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. After that, the role of online technology in the improvement of the role of third party neutrals in OADR will be presented in order to analyse 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.

3.2. Internet Characteristics

There is a strong reason to believe that the differences between the internet and prior communication technology are so 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 telephone or telegraph or 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.¹⁶⁸

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 variety of goods and services, and this is unprecedented. 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 unprecedented opportunity to increase, significantly, the possibility for individuals and companies to transact easily 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.¹⁶⁹

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. Indeed, 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.¹⁷⁰ In this regard, Ethan Katsh, a leading writer on OADR, has noticed that:

¹⁶⁸ Goldsmith, J., "Against Cyber-Anarchy", (1998) 65 *University of Chicago Law Review* 1199.

¹⁶⁹ Heiskanen, V., "Dispute Resolution in International Electronic Commerce", (1999) 16 *Journal of International Arbitration* 32.

¹⁷⁰ Dueker, K., "Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses", (1996) 9 *Harvard Journal of Law & Technology* 483. Lessig, L., "The Zones of Cyberspace", (1996) 48 *Stanford Law Review* 1403.

Cyberspace is more than a data network...it is a community unto itself.¹⁷¹

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 with other individuals in ways that allow expertise and creativity to be applied at a distance. Groups can establish online corporate entities, tightly control participation in, 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, and virtually 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.¹⁷²

Second, unlike the mass media era in which one-to-many form of communication predominated, the potential of the many-to-many form of communication is created by digital technology. Therefore, network communities allow for greater decentralisation.¹⁷³

In cyberspace, communication transcends time, space and physical reality. The internet has effectively changed the users' assumptions about both time and space, duration and distance. Accordingly, the internet is not simply a new channel of communication.¹⁷⁴

¹⁷¹ Katsh, E., *Law in a Digital World*, (Oxford University Press, New York, 1995) 14.

¹⁷² Perritt, H., "The Internet is Changing the Public International Legal System", (2000) 88 *Kentucky Law Journal* 885.

¹⁷³ Ibid.

¹⁷⁴ Katsh, E., "Dispute Resolution in Cyberspace", (1996) 28 *Connecticut Law Review* 961. Bordone, R., "Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal", (1998) 3 *Harvard Negotiation Law Review* 175.

Besides, the internet facilitates the storage, retrieval, review, comparison, annotation, classification, and reuse of information more than other communication mediums.¹⁷⁵

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 labelled 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.¹⁷⁶

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 electronic mails (e-mails), 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

¹⁷⁵ Cona, F., "Focus on Cyberlaw: Applications of Online Systems in Alternative Dispute Resolution", (1997) 45 *Buffalo Law Review* 975.

¹⁷⁶ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 47. Tyler, M., and Bretherton, D., "Research into Online Alternative Dispute Resolution, an Exploration Report Prepared for the Department of Justice in Australia", 21st of March 2003, available online at <[http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/\\$file/Reseach_ADR_Exploration_Report_03.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/$file/Reseach_ADR_Exploration_Report_03.pdf)>, last visited on the 1st of October 2003.

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 in quality as being in the same room, but it will bring many of the same benefits.¹⁷⁷

3.3. 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 later, 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. Indeed, the online ADR process does not differ very much from the offline process, except for the fact that other form of communication, i.e. the internet, is used than in face-to-face procedures. In actual fact, 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.¹⁷⁸

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 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 by taking

¹⁷⁷ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 136. Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 45.

¹⁷⁸ Katsh, E., and Rifkin, J., *Op. Cit.* 93.

advantage of these new tools to streamline trade transactions. This conversion between ADR and new technologies, such as the internet, is sought to be the backbone of online ADR. Indeed, online ADR is not just a virtual reverberation of ADR; it rather evolves ADR through the deployment of computer networks and software applications and the utilisation of communication technology.¹⁷⁹

While the characteristics of the space in which parties meet are not very important for ADR to be successful, the nature and design of virtual space in which online ADR occurs is extraordinary 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.¹⁸⁰

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 together. This requires online neutrals to adapt their communication skills from face-to-face interaction to screen-to-screen interaction.¹⁸¹

As a result, 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 maximise the power of technology, 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

¹⁷⁹ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 93.

¹⁸⁰ *Ibid.* 32.

¹⁸¹ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 13.

existing offline ADR mechanisms. This is reasonable as the line between ADR and online ADR will increasingly become blurred.¹⁸²

At this stage, it seems appropriate to discuss separately internet characteristics and mediation, internet characteristics and arbitration, and internet characteristics and third party neutrals.

3.4. Internet Characteristics and Mediation

Mediation can be described in various ways. One of the best descriptions of mediation 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, identifies the issues in dispute, gathers facts, develops options, considers alternatives, and assists in finding a voluntary solution that is satisfactory to both parties. Indeed, 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 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. Much of the power of mediators resides in their control over the process of communication. Mediators are extremely sensitive to communication. Mediation also is a process in which how communication is structured between the parties, and between the parties and the mediator, is often the basis for agreements reached by the parties. Indeed, mediation is a back and forth process of communication seeking a mutually acceptable resolution.¹⁸³

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

¹⁸² Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 301.

¹⁸³ Katsh, E. and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 119. Schultz, T., Kaufmann-Kohler, G., and Langer, D., "Online Dispute Resolution: The State of the Art and the Issues", E-commerce Research Project at the University of Geneva, available online at <<http://www.online-adr.org/reports/TheBlueBook-2001.pdf>>, last visited on the 1st of October 2003.

becomes blurred and confusing. Indeed, with unclear goals and unspoken assumptions, the development of meaningful qualifications and standards in mediation is difficult to envision.¹⁸⁴

Consequently, the very characteristic of mediation, which are considered to be the weaknesses of mediation in the offline world, namely, the voluntary nature of the process, and the very characteristic of mediation, which are considered to be the weaknesses of mediation in the online world, namely, the virtual nature of the process must be analysed carefully.

3.4.1. 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. The OADR provider then appoints a mediator, if the parties cannot agree among themselves. 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 in accordance with which the dispute is decided in mediation. Instead, mediation 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 on which they are to submit. The parties agree on the procedure, and they are at all times in control of the timetable, the agenda, and ultimately the outcome.

Then, 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 as the parties attempt to settle the dispute. The participants are asked to propose solutions to

¹⁸⁴ Bush, R., "Efficiency and Protection or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation", (1989) 41 *Florida Law Review* 253.

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.

In principle, both parties can abandon the procedure at any stage without giving reasons and this will apparently bring the conciliation phase to an end. In other words, neither party is bound to reach agreement through the mediation process. Mediators may terminate mediation if requested by one or both of the parties. Mediators may terminate mediation also if in their opinion, the process is likely to prejudice one or both of the parties; one or both of the parties is using the process inappropriately; one of the parties is delaying the process to the detriment of the other party; and if it appears that a party is not acting in good faith. For example, in "*internetneutral.com*, an OADR provider, the mediator has the discretion to terminate the mediation, when in his or her judgement; further mediation will not resolve the dispute.¹⁸⁵

By all means, 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 as it may discourage parties from attempting it in the fear that time will be wasted during which other dispute resolution mechanisms could have been proceeding. Consequently, the possibility of non-participation in mediation can be high. From this perspective, it has been argued that the conception of mediation as a voluntary and an informal process is viewed as presenting 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.¹⁸⁶

¹⁸⁵ <<http://internetneutral.com>>, last visited on the 1st of October 2003.

¹⁸⁶ Bordone, R., "Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal", (1998) 3 *Harvard Negotiation Law Review* 179.

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.¹⁸⁷

In this regard, it was recommended in the "WIPO Final Report on the Management of Internet Domain Names and Addresses" that it would not be desirable to incorporate voluntary process such as mediation as part of a dispute resolution policy for domain name disputes.¹⁸⁸

That said, it must be stressed that although mediation is a voluntary and an informal process, it is structured. The mediation process does not develop in a legal vacuum since 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 in the process. Besides, mediation always takes place in the shadow of the law. This means that mediation takes place with the parties being aware that the law, looming in the background, is a force that should enter into any calculations of how one develops and pursues a strategy for resolution. This means also that mediation participants should take the law into consideration when setting out a strategy in the mediation procedures. Clearly, mediators take into consideration the substantive law in helping to mediate the issues. And most importantly, if 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 for its existence in the legal order upon some law rendering it valid and effective.¹⁸⁹

Besides, self-determination is a fundamental principle of mediation. Self-determination is the right of parties in mediation to make their own voluntary and

¹⁸⁷ <<http://www.squaretrade.com>>, last visited on the 1st of October 2003.

¹⁸⁸ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

¹⁸⁹ Bush, R., "Efficiency and Protection or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation", (1989) 41 *Florida Law Review* 253. 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. Mnookin, R., and Kornhauser, L., "Bargaining in the Shadow of the Law: The Case of Divorce", (1979) 88 *Yale Law Journal* 950. Cooter, R., Marks, S., and Mnookin, R., "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour", (1982) 11 *Journal of Legal Studies* 225.

non-coerced decisions regarding the possible resolution of any issue in dispute. 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. Structures allocating more control and autonomy to the parties, such as mediation, will increase the likelihood that any agreement reached is based on parties' consent and their relevant interests. From this perspective, being less formal than other methods of dispute settlement, mediation better lends itself to the internet with its decentralised and technical nature as a network of the networks because 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.¹⁹⁰

The idea of enhancing the role of participants in dispute resolution in cyberspace is particularly true in certain online settings that focus on creating communities of buyers and sellers, such as auction web sites. In auctions web sites, where buyers and sellers are strangers to each other with uncertain identities or reputations, and where online auction sites assume no responsibility for any problems that may arise between buyers and sellers, which result in a high risk environment in the extreme, mediation may create a more real level of trust. In actual fact, as much as mediation can provide a platform to reach a mutually acceptable outcome by the parties in an auction web site, it can guarantee the auction web site users to keep on using the web site in the future.¹⁹¹

3.4.2. Virtual Nature of Electronic Mediation

Noticeably, interaction among the parties and the mediator may make the difference between whether mediation is successful or not as it provides indications on the degree of trust, the willingness to reach an agreement, and the parties' genuine concerns and interests. Expert mediators are famous for reducing stress and conflict during the mediation sessions through the use of light-hearted quips and jokes. Along

¹⁹⁰ Post, D., "Governing Cyberspace", (1997) 43 *Wayne Law Review* 155.

¹⁹¹ 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.

this line the calm and steady demeanour of experienced neutrals represents the bountiful soil from which successful settlements grow.¹⁹²

But all of these traits often fall flat in the online environment because the ability of human beings to communicate clearly and effectively 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.¹⁹³

The absence of facial expressions, gestures, and other non-verbal bodily clues can work against the development of trust in online communications because such absence develops void communication, which is quickly filled by psychological doubts and fears projected towards those with whom they are in contact. Reduced communication clues give greater role 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 patronising and offensive. As a result, parties engaged in online communications appear to be more willing to engage in risky interpersonal behaviour, such as threats, and may adopt a more aversive emotional style. 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.¹⁹⁴

¹⁹² Schultz, T., Kaufmann-Kohler, G., and Langer, D., "Online Dispute Resolution: The State of the Art and the Issues", E-commerce Research Project at the University of Geneva, available online at <<http://www.online-adr.org/reports/TheBlueBook-2001.pdf>>, last visited on the 1st of October 2003.

Granat, R., "Creating an Environment For Mediating Disputes on the Internet", a working paper for the NCAIR Conference on Online Dispute Resolution, Washington DC, 22nd of May 1996, available online at <<http://mantle.sbs.umass.edu/vmag/granat.htm>>, last visited on the 1st of October 2003.

¹⁹³ Gold, L., "Influencing Unconscious Influences: The Healing Dimension of Mediation", (1993) 11 *Mediation Quarterly* 55.

¹⁹⁴ Gordon, R., "The Electronic Personality and Digital Self", [2001] *Dispute Resolution Journal* 17. Bargh, J., "Beyond Simple Truths: The Human-Internet Interaction", (2002) 58 *Journal of Social Issues* 3. Thompson, L., and Nadler, J., "Negotiating via Information Technology: Theory and Application", (2002) 58 *Journal of Social Issues* 109.

Although such clues may be missing in electronic mediation, and although these traditional clues are not easily transferred over the internet, 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. Therefore, the internet has the capability to give both parties to the dispute a confidential tool that is available twenty four hours a day, seven days a week, which 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 presence. Instead, they are forced to focus on the substantive issues on the screen. This will reduce the tension level between the parties.¹⁹⁵

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, breach 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.¹⁹⁶

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

¹⁹⁵ Davis, B., "The First International Competition for Online Dispute Resolution: Is This Big, Different and New", (2002) 19 *Journal of International Arbitration* 389.

¹⁹⁶ Ibid.

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 or 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.¹⁹⁷

Online communication may well change ingrained conflict dynamics including dominance and intimidation as 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, ineffectiveness during face-to-face meetings.¹⁹⁸

3.5. 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 in respect of the dispute submitted to arbitration. 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). Apparently, the fact that the parties agree to be legally bound by the arbitrator's award distinguishes arbitration from mediation.¹⁹⁹

¹⁹⁷ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 259. Granat, R., "Creating an Environment for Mediating Disputes on the Internet", a working paper for the NCAIR Conference on Online Dispute Resolution, Washington DC, 22nd of May 1996, available online at <<http://mantle.sbs.umass.edu/vmag/granat.htm>>, last visited on the 1st of October 2003. Tyler, M., and Bretherton, D., "Research into Online Alternative Dispute Resolution, an Exploration Report Prepared for the Department of Justice in Australia", 21st of March 2003, available online at <[http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/\\$file/Reseach_ADR_Exploration_Report_03.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/$file/Reseach_ADR_Exploration_Report_03.pdf)>, last visited on the 1st of October 2003.

¹⁹⁸ Rule, C., Op. Cit. 260.

¹⁹⁹ Rau, A., "Contracting Out of the Arbitration Act", (1997) 8 *American Review of International Arbitration* 239.

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 law 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 can provide also for one or multiple arbitrators, provide for rules of evidence before the arbitrator, allow or preclude discovery, define the nature of pleading, define the nature of hearing, and 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 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 harmonisation of enforcement across jurisdictions. And 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 recognise and enforce arbitration agreements and awards, subject to limited exceptions.²⁰⁰

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 need of its users, as these have changed 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 Arbitration Act 1996. MP John Taylor (the Minister for Competition and Consumer Affairs) said:

²⁰⁰ Born, G., *International Commercial Arbitration in the United States: Commentary and Materials*, (Kluwer Law and Taxation Publishers, Deventer, 1994) 18.

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.²⁰¹

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

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.²⁰²

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. The OADR provider then appoints an arbiter, if the parties cannot agree among themselves. 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.²⁰³

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

²⁰¹ House of Commons, Parliamentary Debates, Sixth Series, Volume 279, 10th of June 1996, (the Statutory Office, London, 1996) 86.

²⁰² Ibid. 88.

²⁰³ Donahey, S., "Current Developments in Online Dispute Resolution", (1999) 16 *Journal of International Arbitration* 124.

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.²⁰⁴

That said, it must be recognised that the unavailability of appropriate communication means in arbitration implicates that if the relevant arguments and evidences cannot be adduced by appropriate means, then the process runs the risk of violating fair process.²⁰⁵ This is the position taken by *E-resolution*, an OADR provider, which stated in Article 16 that although rules of arbitration procedures were based on the United Nations Commission on International Trade Law “UNCITRAL” Arbitration Rules and the International Chamber of Commerce “ICC” Arbitration Rules, they were modified to take into account the special nature of electronic arbitration.²⁰⁶

3.6. 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.²⁰⁷

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 demeanours. Apparently, 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.

²⁰⁴ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 119.

²⁰⁵ Redfern, A., and Hunter, M., *Law and Practice of International Commercial Arbitration*, (3rd edition, Sweet & Maxwell, London, 1999) 311. It must be noted here that fair process and OADR will be discussed thoroughly in chapter 5.

²⁰⁶ <<http://www.eresolution.ca>>, last visited on the 1st of October 2003.

²⁰⁷ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 8.

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 cognisant 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.²⁰⁸

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 neutral must be cognisant of this reality, and learn to control information flow. If such issue is not managed carefully, excessive time between communications can have an intensifying effect where parties become less likely to achieve resolution.²⁰⁹

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 because 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.²¹⁰

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, diagrams can be utilised in OADR proceeding. This could amount to the facilitation of the whole process as it allows otherwise static images to

²⁰⁸ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 82.

²⁰⁹ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 141. Bargh, J., "Beyond Simple Truths: The Human-Internet Interaction", (2002) 58 *Journal of Social Issues* 3. Thompson, L., and Nadler, J., "Negotiating via Information Technology: Theory and Application", (2002) 58 *Journal of Social Issues* 109.

²¹⁰ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 71. Davis, B., "The First International Competition for Online Dispute Resolution: Is This Big, Different and New", (2002) 19 *Journal of International Arbitration* 383.

be manipulated in various ways for emphasis or persuasive effect. A certain portion of a diagram, which is an otherwise static exhibit, can be highlighted, zoomed in upon, or emphasised through colours, 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.²¹¹

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.²¹²

Besides, 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, which results in easy and centralised 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 colour, 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 provide a dynamic outcome, which connect the

²¹¹ Katsh, E., *Law in a Digital World*, (Oxford University Press, New York, 1995) 125.

²¹² Galves, F., “Where the Not-So-Wild-Things Are”, (2000) 13 *Harvard Journal of Law & Technology* 178.

parties to each other, and if desired, through hyper textual documents, to other people and to other source of information in ways that are difficult to imagine with papers.²¹³

3.6.1. Third Party Neutrals and Online Mediation-Arbitration

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, med-arb system integrates the interest-based approach of mediation, with the power-based role of arbitration.²¹⁴

However, the neutral’s role in such arrangements should be considered carefully and in a balanced way because under hybrid regimes decision-making process becomes complex and may stall the resolution. Therefore, such role should not be confined to persuading the parties to reach an agreement, as a mediator does, nor it should be confined to impose 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 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 as he or she needs to strike the right balance between two processes, one is built on a voluntary nature, i.e. mediation while the other is built on a binding nature, i.e. arbitration. This is doubled by a conceived big difference between application of fairness when arbitration is

²¹³ Susskind, R., *Transforming the Law, Essays on Technology, Justice and the Legal Marketplace*, (Oxford University Press, Oxford, 2000) 138. Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 260. Hardy, S., “Online Mediation: Internet Dispute Resolution”, (1998) 9 *Australian Dispute Resolution Journal* 216.

²¹⁴ Newman, P., “Mediation-Arbitration (Med-Arb): Can it Work Legally”, (1994) 60 *Arbitration* 173. Bordone, R., “Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal”, (1998) 3 *Harvard Negotiation Law Review* 177.

involved and application of fairness when mediation is the process. Such a task is not easy by all 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 arbitration stage. From this perspective, 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 because of the nature of disclosures and the interaction that takes place in the mediation, unless the parties agree to use the mediator as an arbitrator.

If the internet is utilised in mediation-arbitration, it is called online mediation-arbitration or online med-arb. Unfortunately, the neutral's role in online med-arb is not conceptualised 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.²¹⁵

In substance, this means that the mediator no longer mediates, but steps into the role of arbitrator, however, *SquareTrade* failed to notice that.

3.6.2. Third Party Neutrals and the Use of Software

Adequate software could be necessary, indeed indispensable, element for online interactions to be successful. Software is the ingredient that provides the electronic medium with its architecture and functionality. And it is software that allows the existence of effective dispute resolution systems online. From this perspective, OADR

²¹⁵ <<http://www.squaretrade.com>>, last visited on the 1st of October 2003.

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. As a result, 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 analysed in terms of its ability to translate the dispute resolution process to a particular medium, i.e., the internet.²¹⁶

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 giving the floor to a party to speak uninterrupted, caucusing, or looking for consensus evaluation on key issues. From this perspective, 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 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.²¹⁷

In the meantime, there is some powerful software, which has sophisticated information processing capabilities that may be utilised by online third party neutrals. For instance, there is "OneAccord" software that enhances the ability of parties and neutrals to interact online, and allows parties and neutrals to identify interests and assess priorities in disputes. Then, the software calculates resolutions that may provide each side with more than they themselves might be able to negotiate.²¹⁸

3.7. 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 so are likely to exert a massive influence on the development of ADR since it is essentially a complex process of information management,

²¹⁶ 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.

²¹⁷ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 242.

²¹⁸ <<http://www.oneaccordinc.com>>, last visited on the 1st of October 2003.

information processing, and communication. Consequently, ADR will be subject to technological limitations as well as advances.

The internet can have an apparent impact on ADR in two quite different ways. First, it can be used to automate existing practices. Second, it can be used to innovate and 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.

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. But 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 must be pointed 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.

Chapter Four: Applicable Law, jurisdiction and OADR

4.1. Introduction

Legitimacy of OADR process or any other dispute resolution mechanism is not based on the assertion of a proper jurisdiction solely. Instead, it is based on other factors such as fairness of the process. Likewise, “acting fairly” is a phrase of such wide implications that it extends beyond the sphere of procedures, and, therefore, it includes the assertion of a proper jurisdiction.²¹⁹ In *Daganayasi v. Minister of Immigration*,²²⁰ Cook J said:

Fairness need not be treated as confined to procedural matters.²²¹

In this regard, the indication of explicit and authenticated consent can be seen as an expression of the assertion of a proper jurisdiction to resolve a dispute, while the ability to secure such consent during the process of dispute settlement can be seen as an aspect of fair process.

From this perspective, one can argue that the assertion of a proper jurisdiction and the fairness of the procedures in OADR, are quite inseparable issues with regard to the legitimacy of the process. However, a distinction needs to be made between OADR jurisdiction and its implication for the legitimacy of the process, and fairness in OADR and its implication on the legitimacy of the process. It has been decided to leave the latter issue to be dealt with separately in chapter five.

As a result, this chapter will define applicable law and jurisdiction in cyberspace and its implications for the legitimacy of OADR solutions from a technical and legalistic point of view. Then, the most promising conditions of OADR with regard to jurisdiction will be identified. Such conditions are sought to be best suited to the unique characteristics of cyberspace as a commercial marketplace and the expectations of those who are engaged in various commercial online activities. And

²¹⁹ Wade, H., and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 488.

²²⁰ [1980] 2 NZLR 130.

²²¹ *Ibid.* 137.

finally, in order to demonstrate the feasibility of OADR, the controversial issues of the seat of arbitration in cyberspace, legal status of floating arbitration, and legal status of floating awards will be examined.

4.2. The Internet's Cross-Border Nature from a Technical Standpoint

Any discussion of the applicable law and jurisdiction in cyberspace invites a thorough analysis of the internet's cross-border nature from a technical standpoint because the method(s) by which technology delivers online communication and interaction will ultimately have an effect on the impact of the law. In order to understand the internet's cross-border nature from a technical standpoint and its implication on the applicable law and jurisdiction in cyberspace, the following five points must be clear.

First, it must be recognised that the internet is not a top-down structure. Each computer connected to the internet acts autonomously and is regulated only by its own system administrator.

Second, in cyberspace architecture, conditioning access on consent to a governing legal regime may be possible, though expensive, at the entry point of a web site. However, it is common place to click on a hypertext link, which is a link that appears on a web page to another web site, and be greeted by a message that conditions further access by consent to another legal regime. This process might become confusing since there are consents to different legal regimes.²²²

Third, it is clear that evasion techniques can make it difficult for a state to regulate cyberspace activities.²²³ For example "Telnet" software allows a computer user to log into a remote computer over the internet. Once connected to the foreign computer, the user can perform any internet function as though he or she were logged on to a local terminal at the foreign computer location.²²⁴

²²² Johnson, D., and Post, D., "Law and Borders: The Rise of Law in Cyberspace", (1996) 48 *Stanford Law Review* 1395.

²²³ Goldsmith, J., "Against Cyber-Anarchy", (1998) 65 *University of Chicago Law Review* 1221.

²²⁴ <<http://www.rad.com/networks/1997/telnet/index.htm>>, last visited on the 1st of October 2003.

Fourth, there is the common internet practice of “caching” copies of frequently accessed resources, a practice which is especially utilised by Internet Service Providers (ISP). Caching consists of a procedure whereby copies of work are stored at local servers in order to enhance the performance and speed of access to digital networks. Rather than having to access a distant server, caching works on the principle that speed of access will be enhanced if access is given to a server which is less distant. Such caching not only has advantages in that individuals get quicker access to information but also improves the ability of the internet as a whole to handle more usage. For example, if an internet user in Leeds browses a web page in California, a computer somewhere in Europe may keep a copy of the page for the benefit of others that access the same information. Thus, internet users may be accessing materials at a particular site, while in fact they are accessing copies of those materials located on a different machine in different geographical boundary.²²⁵

And fifth, it must be recognised that the internet is engineered to work on the basis of logical, not geographical indications. Each computer in the network communicates with the others by employing machine-language conventions known as the Internet Protocol (IP). IP works by providing functions to break up a piece of digital data into discrete packets of bits and then transport these packets across any combination of networks to their destination. Packets may follow any of a number of different routes from computer to computer until they reach their final destination where they reassembled again. These routes may change from minute to minute. There is no centralised control of the packet routing. Each server in the network assesses whether to temporarily hold packets or send them on, so that maximum use is made of the available carrying capacity at any given time. This means that the cost and speed of message transmission on the internet is independent of physical location, and, most importantly, the internet users are unaware where the accessed resources are in fact physically located. In this regard, the information is being sent from or to is of far less significance than what is being sent.²²⁶

²²⁵ Chissick, M., and Kelman, A., *Electronic Commerce Law and Practice*, (3rd edition, Sweet & Maxwell, London, 2002) 321. Burk, D., “Jurisdiction in a World Without Borders”, (1997) 1 *Virginia Journal of Law & Technology* 3. Davies, L., and Reed, C., “The Trouble with Bits: First Steps in Internet Law”, [1996] *Journal of Business Law* 426.

²²⁶ Johnson, D., and Post, D., “Law and Borders: The Rise of Law in Cyberspace”, (1996) 48 *Stanford Law Review* 1370. Leitstein, T., “A Solution for Personal Jurisdiction on the Internet”, (1999) 59 *Louisiana Law Review* 565.

4.3. Applicable Law and Jurisdiction in Cyberspace

For a public tribunal to resolve a dispute, it must have jurisdiction over the dispute. This includes that the decision maker has been assigned responsibility to adjudicate the dispute, and that the parties to be bound by the decision have some contact with the government giving power to the tribunal. This is a significant aspect of the sovereignty of national states.²²⁷

The advent of the internet, however, has caused jurisdictional confusion as several jurisdictions will have a legitimate claim and legitimate interest to apply their law. Indeed the choice of any geographical contact or any particular national law will be arbitrary in cyberspace.²²⁸

Traditional legal doctrine treats the internet as a medium that facilitates communication and commerce between one legally significant geographical location and another. However, trying to tie the laws of any particular territorial sovereign to interactions and transactions on the internet is a daunting challenge because the nature of the internet is inherently international.²²⁹

The confusion arises when national law, which has traditionally been understood primarily in geographical terms, applies to a phenomenon, such as the internet, that appears to resist geographical orientation.²³⁰

Two leading authors on law and jurisdiction in cyberspace have submitted to the view that the internet causes problems because there is a need to recognise the power of technology, while at the same time respecting traditional sovereignty. David Johnson and David Post said:

²²⁷ Perritt, H., "Electronic Dispute Resolution", a paper presented at NCAIR conference, Washington DC, 22nd of May 1996, available online at <<http://mantle.sbs.umass.edu/vmag/PERRITT.HTM>>, last visited on the 1st of October 2003.

²²⁸ Goldsmith, J., "Against Cyber-Anarchy", (1998) 65 *University of Chicago Law Review* 1199.

²²⁹ Perritt, H., "The Internet is Changing the Public International Legal System", (2000) 88 *Kentucky Law Journal* 885.

²³⁰ Burk, D., "Jurisdiction in a World Without Borders", (1997) 1 *Virginia Journal of Law & Technology* 1. Perritt, H., "Jurisdiction and the Internet: Basic Anglo/ American Perspectives", a paper presented at the Internet Law and Policy Forum Jurisdiction: Building Confidence in a Border-less Medium", Montreal, Canada, 26th and 27th of July 1999, available online at <http://www.ilpf.org/events/jurisdiction2/presentations/perritt_pr/>, last visited on the 1st of October 2003.

The rise of global computer network is destroying the link between geographical location and...the ability of physical location to give notice of which sets of rules apply. The net thus radically subverts the system of rule making based on borders between physical spaces.²³¹

For example, in B-to-C internet commercial transactions there are two paradigms to solve disputes. One is the country of destination approach, where the consumer should have the protection of the laws of his or her residence. The other is the country of origin approach, where the appropriate law should be that where the merchant is located. The former approach obviously imposes tremendous burdens on the growth of electronic commerce, since it implies that online businesses would have to comply with the laws of hundred of jurisdictions around the world. At the same time, the latter approach makes it very difficult for any country to ensure that its consumers have appropriate protection. In e-commerce, there is always the concern about allowing an e-business to choose the competent court itself prior to the conclusion of the contract and merely seeking the consumer's acceptance. The consumer will find many difficulties which prevent quick access to justice and adequate redress in such a manner that his legal rights would be emptied out of any content. He or she would be forced to litigate in a legal system which is strange to him and whose procedural and substantive laws are unfamiliar. It would also be the case that the counterpart is better prepared for litigation and has stronger economic resources than those of the consumer. At last, the consumer would renounce his claim to rights. This will lead ultimately to the erosion of consumers' confidence in the internet as a commercial medium.²³² In this regard, the OECD noticed that:

The global network environment challenges the abilities of the traditional geographically based jurisdictional structures to adequately address issues related to consumer protection in the context of electronic commerce.²³³

Similarly, in domain name disputes, the application of traditional concepts of jurisdiction for resolving conflicts between trademark owners and domain name

²³¹ Johnson, D., and Post, D., "Law and Borders: The Rise of Law in Cyberspace", (1996) 48 *Stanford Law Review* 1367 at 1371.

²³² Tarruella, A., "Cross-Border Disputes on Online Consumer Contracts in the European Union, the Brussels Convention, the Brussels Regulation and the Role of Alternative Dispute Resolution Systems", (2001) 2 *Journal of Network Industries* 235.

²³³ OECD, "Consumer Protection in the Electronic Marketplace", DSTI/CP (98) 13/Final, available online at

<[http://www.oelis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/\\$FILE/12E81082.DOC](http://www.oelis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/$FILE/12E81082.DOC)>, last visited on the 1st of October 2003.

holders are often viewed as cumbersome and ineffective. There are several possibilities in this respect, such as, the country of the domicile of the domain name holder, the country of the domicile of the trademark owner, and the country where the registration authority was located. Nevertheless, none of those possibilities can strike the right balance between the interests of domain name holder, registration authorities, and any potential complainant.²³⁴

It has been suggested that the structure of the internet is such that there is no meaningful way to avoid contact with a given jurisdiction except to stay off the internet altogether. Consequently, the only solution for companies wishing to secure their trademarks on the internet is to register in every country and jurisdiction. However, this is clearly an insuperable hurdle. The impracticability of such a suggestion is duplicated by the fact that there is no global registration scheme for trademarks. There is no international protection for trademarks because it was believed that geographical boundaries and different lines of business will not combined together in one marketplace. Obviously, the internet, as one large marketplace without boundaries of any kind, is breaking down many of the barriers that in the past reduced the number of trademark conflict. In actual fact, where the nature of the internet means that each name may potentially apply around the world, there is, in turn, increasing potential for conflict between users of the same or similar name in different jurisdictions. In consequence, the protection and enforcement of recognised territorially limited trademark rights can be jeopardised by activities originating under a domain name registration in another jurisdiction.²³⁵

Moreover, the practice of domain name registration itself is not the same as intentional distribution to any particular jurisdiction. Instead, it is a distribution to all jurisdictions simultaneously. Due to the technical nature of the internet, the trademark on the internet may pass through or even simultaneously exist in different

²³⁴ Sutherlin, K., "Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses", (1996) 9 *Harvard Journal of Law & Technology* 511.

²³⁵ Burk, D., "Jurisdiction in a World Without Borders", (1997) 1 *Virginia Journal of Law & Technology* 3. Sanders, K., "Some Frequently Asked Questions about the 1994 UK Trade Marks Act", [1995] *European Intellectual Property Review* 67. Howitt, D., "War.com: Why the Battle Over Domain Names Will Never Cease", (1997) 19 *Hastings Communications & Entertainment Law Journal* 725. Davies, L., and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law* 419. Gibson, C., "Arbitration in Intellectual Property Disputes", (1997) 8 *California International Practitioner* 1.

jurisdictions. In fact, if one country objects to the use of a trademark on the web that conflicts with a locally registered trademark, the argument could be that the mark has not been used inside the country at all, but only on the World Wide Web. The counter-argument could be that the “Web” itself, entertains virtually every country’s jurisdiction in the world. This ultimately, leads to a vicious circle. This becomes problematic if it calls into play the trademark laws of every country in which the domain name can be viewed, and this means virtually every country in the world. But these national laws may differ substantively.²³⁶

Furthermore, it must be noted that the computer where a domain name was initially assigned may move in physical space without any movement in the logical domain name space of the internet. Domain names are fully portable and can be transferred to a new computer if the domain name holder moves. For example, today the operator of a domain name may reside on a machine operating in London, but tomorrow he or she may transfer its operation to a host machine in Tokyo. The transfer need not even physical movement, and more importantly, it will be completely invisible to internet users because when they seek access to that domain name, the request will be routed to that location on the network, without reference to its physical location.

And finally, the Internet Protocol (IP) addresses are represented as strings of digits divided into parts or fields, for example, 124.33.45.112. But using these numerical strings is somewhat inconvenient; consequently, the IP address system has been overlaid with a more user friendly system of domain names which serve as identifiers of the web sites. It must be noted however that although the computers connected to the internet do have addresses, these addresses locate the computers on the network, and not in real space. For example, every country that has an internet connection has a two letter top level domain name registry, such as, (UK) for United Kingdom. These are called Country Code Top Level Domain Names (ccTLDs). The 249 (ccTLDs) are administrated on a country-by-country basis.²³⁷

²³⁶ Goldsmith, J., “Against Cyber-Anarchy”, (1998) 65 *University of Chicago Law Review* 1199.
Sutherland, K., “Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses”, (1996) 9 *Harvard Journal of Law & Technology* 511.

²³⁷ Davies, L., and Reed, C., “The Trouble with Bits: First Steps in Internet Law”, [1996] *Journal of Business Law* 421.

But although (ccTLDs) normally indicate the country in which the addressee's host computer is located, no technical requirement forces a computer with a country specific domain to be located in that particular country. Therefore, it is important to notice that a domain name does not automatically refer to the country in which the address resides. For example, (business.co.uk) does not mean necessarily that it exists physically in the UK. Actually, where an applicant has had to provide an address when registering a domain name, the address is usually that of a contact, rather than the actual physical address of any computer or network. However, in many cases, the addresses may be the same.²³⁸

In this regard, the WIPO in its Final Report on the Management of Internet Domain Names and Addresses emphasised that any comprehensive solution for domain name disputes would be most effective if it recognises the global nature of the internet and the global presence given by a domain name registration.²³⁹

4.4. OADR as a solution for jurisdictional dilemma in cyberspace

Generally speaking, the goal of ADR system, as a consensual dispute resolution mechanism, is the resolution of disputes that arise from interactions and transactions with multiple jurisdictional contacts in a manner that is shaped by the parties, that is neutral and efficient, and that involves minimal intervention of national law and national courts. ADR can be successfully applied to electronic commercial disputes which involve parties in different jurisdictions because ADR employs techniques which can be applied regardless of the procedural or substantial jurisdictional framework. Electronic cross-border disputes can be processed in ADR without the need to reconcile different legal systems because ADR provides procedural flexibility more than litigation, though, principally, it may apply a national law that is adopted by national legislation. One of the strengths of arbitration, as a form of Alternative Dispute Resolution, is that an arbitration agreement effectively and conclusively replaces the jurisdiction of the court.²⁴⁰

²³⁸ Davies, L., and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law* 421.

²³⁹ WIPO, "The Management of Internet Names and Addresses: Intellectual Property Issues, Final Report of the WIPO Internet Domain Name Process", 30th of April 1999, available online at <<http://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

²⁴⁰ Mustill, M., and Boyd, S., *Commercial Arbitration*, (Butterworths, London, 2001) 76.

In England, it is easily recognised that the spirit of party autonomy is reflected throughout the Arbitration Act 1996. Section 1, in particular, reads as follows:

The provisions of this part are founded on the following principles, and shall be construed accordingly. (a) The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) In matters governed by this part the court should not intervene except as provided by this part.²⁴¹

In this regard, WIPO has noticed that arbitration provides a single procedure for resolving multi-jurisdictional disputes without recourse to several different national court actions. The WIPO stated also that it is a procedure that has been developed to be international.²⁴² Similarly, the OECD has noted that:

ADR has the potentiality to provide an adequate vehicle which can enhance parties' access to justice because it ensures that an international framework is established to protect internet users at the same level as in other forms of commerce.²⁴³

Consequently, the transformation of the idea of ADR to cyberspace in the form of OADR needs to emphasise the consensual nature of OADR systems. From this perspective, the online jurisdictional challenge posed by the advent of the internet could be addressed by OADR through the conceptualisation of parties' consent to adjudicate disputes, without dependence on the exercise of jurisdiction in a forum state. The challenging problem which is presented by the law that should be applied in resolving the merits of cyberspace disputes could be viewed as a global, moving target jurisdiction, to be decided through OADR, on a case by case basis, by parties interested in resolving the dispute.²⁴⁴

²⁴¹ Section 1 of the Arbitration Act 1996.

²⁴² WIPO, "The Management of Internet Names and Addresses: Intellectual Property Issues, Final Report of the WIPO Internet Domain Name Process", 30th of April 1999, available online at <<http://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

²⁴³ OECD, "Consumer Protection in the Electronic Marketplace" DSTI/CP (98) 13/Final, available online at

<[http://www.oilis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/\\$FILE/12E81082.DOC](http://www.oilis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/$FILE/12E81082.DOC)>, last visited on the 1st of October 2003.

²⁴⁴ Perritt, H., "Dispute Resolution in Electronic Network Communities", (1993) 38 *Villanova Law Review* 359.

Seating the dispute resolution body in cyberspace in the form of OADR allows the parties in a trans-border conflict to circumvent the issue of determining which court should hear the case. In the same way, OADR can solve the issue of the applicable law for these trans-border disputes. Moreover, such approach will not dismantle one of the most important aspects of the internet, namely, the ability to transcend geographical boundaries. By the same token, it takes the globalisation of exchange in cyberspace into account by demonstrating flexibility. Indeed, by not specifying any national regulation in their rules of procedure, online ADR demonstrates flexibility since it places the importance not on the laws of public authorities, but on the law of the parties.²⁴⁵

In *Virtual Magistrate*, an OADR provider, if parties did not agree on the applicable law to their dispute, neutrals are not bound to automatically apply the law of a given jurisdiction. Rather, they must take into consideration the circumstances of each case, the parties' views on the applicable legal principles and remedies, as well as the potential effects of the dispute if it were to be transferred to the courts.²⁴⁶ Similarly, Article 17 (1) of *E-resolution*, another OADR provider, reads as follows:

The parties may determine the rules of national law that the arbitration tribunal will apply to the substance of the conflict. If there is no such determination, the arbitration tribunal shall choose the national law with which the conflict has the closest links.²⁴⁷

4.5. The seat of arbitration in cyberspace

The seat of arbitration means the place agreed, expressly or by implication, as that whose law is to govern the constitution of the arbitral tribunal and the conduct of arbitration. Although some arbitration rules recognise that some hearings, meeting of arbitrators, or even the actual signature or publication of award may not occur in the place of arbitration, almost invariably the place of hearing will be the legal seat of the arbitration because it is scarcely possible to divorce the arbitration proceedings, including the arbitration hearing, from the law of the place where the arbitration proceedings are conducted. The place of arbitration is of great importance since it is

²⁴⁵ Perritt, H., "Dispute Resolution in Electronic Network Communities", (1993) 38 *Villanova Law Review* 359.

²⁴⁶ <<http://www.vmag.org/>>, last visited on the 1st of October 2003.

²⁴⁷ <<http://www.eresolution.ca/>>, last visited on the 1st of October 2003.

the point of connection to the law governing arbitral proceedings. The place of arbitration also determines which court will have jurisdiction for assistance during the arbitral procedure and which court will have jurisdiction to set aside the award.²⁴⁸

Traditionally, various legal and factual factors influence the choice of the seat of arbitration, such as, the suitability of the law of the place of arbitration, whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the state where the arbitration takes place and the state or states where the award may have to be enforced, convenience of the parties and arbitrators, including the travel distances, location of the subject-matter in dispute, and proximity of evidence.²⁴⁹

The legal seat of the arbitration has been always a controversial issue in cyberspace because the virtual arbitration has no geographical location. Dematerialization of information amounts to only one aspect of the technological revolution that we are going through. Another aspect is the de-materialisation of physical places. It should be stressed that the internet as a whole is technically constructed to be independent of any place. Given the inherently global nature of the internet due to its technical infrastructure, the internet does not map neatly onto the jurisdiction of any existing sovereign entity. This means that the geographical boundaries are irrelevant in the internet infrastructure. The dichotomy between national and international level of internet disputes is no more than an illusion. Apparently, this might have serious implications on the legality of electronic arbitration venue.²⁵⁰

For instance, difficulties may arise when it has to be determined whether the arbitral procedure, according the New York Convention 1958, was in accordance with the law

²⁴⁸ Sutton, D., Kendall, J., and Gill, J., *Russell on Arbitration*, (Sweet & Maxwell, London, 1997) 74. Mustill M. and Boyd, S., *Commercial Arbitration*, (Butterworths, London, 2001) 258. Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1185. Domke, M., *Domke on Commercial Arbitration*, (Wilmette Ill, Callaghan, 1999) 575. Park, W., "The Lex Loci Arbitri and International Commercial Arbitration", (1983) 32 *International & Comparative Law Quarterly* 21. Park, W., "Judicial Controls in the Arbitral Process", (1989) 5 *Arbitration International* 230. Park, W., "Private Adjudicators and the Public Interest: the Expanding Scope of International Arbitration", (1986) 12 *Brooklyn Journal of International Law* 629.

²⁴⁹ Sutton, D., Kendall, J., and Gill, J., Op. Cit. 75.

²⁵⁰ Arsic, J., "International Commercial Arbitration on the Internet: Has the Future Come Too Early", (1997) 14 *Journal of International Arbitration* 209. Davies, L. and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law* 424.

of the country where the arbitration took place. Article 5 (1) (d) of the New York Convention 1958 reads as follows:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that...the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.²⁵¹

Indeed, when electronic arbitration, like the cyberspace itself, has no geographical location, then the recurrent question would be: where is the seat of arbitration in electronic arbitration?

Given the classical position of the place or seat of arbitration which presupposes territories and borders, electronic arbitration will be confronted with difficulties. Accordingly, the traditional notion of the seat of arbitration must shift in cyberspace in order to accommodate the reality of electronic arbitration where the process is everywhere and nowhere at the same time.

The internet, in essence, allows many different forms of communication and interaction to be structured and organised on a web site in a way that gives us something novel: virtual places and virtual processes. Indeed, physical space, including legal space, becomes less geographically bounded in our information technology age.²⁵²

It can be said also that part of the attraction of arbitration, traditionally, is that it moves dispute resolution from an identifiable place, i.e., courtroom, to any place. The growth of arbitration represents a move away from a fixed place and formal process. Arbitration is less concerned with the symbolism that a particular place might represent.

²⁵¹ Article 5 (1) (d) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

²⁵² Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 26.

By designating cyberspace as a virtual location for dispute resolution, electronic arbitration is simply extending this trend further. From this perspective, if it is possible to consider the arbitration not as a building or physical place but as a set of processes oriented around the resolution of disputes, then the setting of cyber arbitration as an internet web site or as a virtual service in the online marketplace, in order to resolve internet disputes, should be desirable. The parties to an electronic dispute would be amenable to settle their differences that emanated from cyberspace in cyberspace itself without any need for convening in a specific location for in-person hearings.

Indeed, it is reasonable to claim a degree of de-localisation for the place of arbitration in cyberspace in order to encourage the growth of e-commerce. This approach corresponds to the essentially de-localised character of the internet and the activity conducted on it.

In actual fact, one should ask: if it is assumed that arbitration does require consideration by third party neutrals, does it follow that the presentation of information, the analysis of the information and the response must be focused on a physical location? Might it not be that sound arbitration could be undertaken by the emerging communication technologies? Or is a dedicated physical location a strict necessity for the delivery of arbitration? In summary, one should ask: is arbitration a place or a service?

In this respect, one can argue that the physical location in arbitration is not as important to most people as the confidence that their dispute is being addressed by an appropriate and impartial person. Moreover, the seat of arbitration is a purely legal concept which depends on the will of the parties. It is not a physical concept which depends on the place where the hearings took place or the place where the award was signed. The seat of arbitration as a legal concept serves as the factor connecting the arbitration to a specific legal system and is independent of the place where the proceedings physically take place. As a result, the orientation of the seat of the arbitration in cyberspace should be in accordance with the will and agreement of the parties, more than the rules of procedures laid down in the law of the country where

an award was made or sought to be enforced. At this point, it seems appropriate to discuss floating arbitration and floating awards in the context of cyberspace.

4.5.1. The Legal Status of Floating Arbitration in Cyberspace

The basic characteristic of floating or de-localised arbitration is that it does not owe its existence, validity, or effectiveness to a particular national law. Instead, it enables the parties not to subject their agreement to any procedural rules of any country or to the rules of conflict of laws, or to substantive rules of any particular legal system.²⁵³

In England, traditionally, the English law does not recognise arbitration that is unconnected with any municipal system of law, in which the procedure is left entirely within the control of the parties and the arbitrators. In other words, traditionally, English law does not recognise the concept of a floating arbitration.²⁵⁴ In *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.*,²⁵⁵ Lord Justice Kerr stated in general terms that:

Contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless were made by reference to some system of private law which defines the obligations assumed by the parties to the contract.²⁵⁶

Lord Justice Kerr confirmed his opinion in *Bank Mellat v. Helleniki Technici SA*,²⁵⁷ by referring to floating arbitration in particular. He said:

²⁵³ Van Den Berg, A., *The New York Arbitration Convention 1958: Towards a Uniform Judicial Interpretation*, (Kluwer Law and Taxation Publishers, London, 1981) 29. Collins, L., *Dicey and Morris on the Conflict of Laws*, (13th edition, Sweet & Maxwell, London, 2000) 604. Smit, H., "A-national Arbitration", (1989) 63 *Tulane Law Review* 627. Schneider, M., and Kuner, C., "Dispute Resolution in International Electronic Commerce", (1997) 14 *Journal of International Arbitration* 5. Paulson, J., "Arbitration Unbound: Award Detached From the Law of its Country of Origin", (1981) 30 *International & Comparative Law Quarterly* 358. Paulson, J., "De-localisation of International Commercial Arbitration: When and Why It Matters", (1983) 32 *International & Comparative Law Quarterly* 53. Dely, F., "The Place of Arbitrator in the Conflict of Law of International Commercial Arbitration: An Exercise in Arbitration Planning", (1991) 12 *North Western Journal of International Law and Business* 48.

²⁵⁴ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1185.

²⁵⁵ [1983] 3 WLR 249.

²⁵⁶ *Ibid.* 257.

²⁵⁷ [1984] QB 301.

Despite suggestions to the contrary by some learned writers, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.²⁵⁸

After four years, Lord Justice Kerr stated the same opinion in *Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru*.²⁵⁹ Equally, Lord Justice Saville referred to the difficulties of applying the idea of floating arbitration in *Union of India v. McDonnell Douglas Corp.*²⁶⁰ He said:

It is clear from the authorities cited above that English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, but against this is the undoubted fact that such an agreement is calculated to give rise to great difficulties and complexities, as Lord Justice Kerr observed in the *Amazonica* decision. For example (and this is the proviso to which I referred earlier in this judgement) it seems to me that the jurisdiction of the English Court under the Arbitration Acts over an arbitration in this country cannot be excluded by an agreement between the parties to apply the laws of another country, or indeed by any other means unless such is sanctioned by those Acts themselves.²⁶¹

Lord Justice Mustill rejected the delocalisation theory once again in 1994 in *Coppee-Lavalin S.A./N.V. v. Ken-Ren Chemicals and Fertilizers Ltd.*²⁶² He denied any possibility of the development of the delocalisation theory by saying:

Transnationalism is a theoretical ideal which posits that international arbitration, at least as regards certain types of contractual disputes conducted under the auspices of an arbitral institution, is a self-contained juridical system, by its very nature separate from national systems of law, and indeed antithetical to them. If the ideal is fully realised national courts will not feature in the law and practice of international arbitration at all and differences between national laws will become irrelevant...My Lords, I think it unnecessary to enter into the controversy over transnationalism which has been a feature of the past two decades, and would indeed not have mentioned the term if it had not been pressed in argument.²⁶³

²⁵⁸ [1984] QB 309.

²⁵⁹ [1988] 1 Lloyd's Rep. 116.

²⁶⁰ [1993] 2 Lloyd's Rep. 50.

²⁶¹ Ibid. 57.

²⁶² [1994] 2 Lloyd's Rep. 115.

²⁶³ Ibid. 119.

In recent years however, it becomes clear that the theory of de-localisation in arbitration, in the form of floating arbitration, does not imply eliminating all localisation, rather it strongly reducing the role of arbitration in approving localisation. More specifically, the theory of de-localisation in arbitration conceives localisation as a fact not as a restriction.²⁶⁴

It becomes obvious that there is a break-down of national particularism under the effect of the UNCITRAL Model Law on commercial arbitration. The UNCITRAL Model Law itself has induced certain authors to declare that it is a victory for the theory of de-localisation.²⁶⁵

In this regard, Roy Goode notes that the de-localisation theory has gained ground steadily in international commercial arbitration, particularly, with the introduction of the UNCITRAL Model Law.²⁶⁶

In England, one can deduce a change in the attitude towards floating arbitration with the introduction of the Arbitration Act 1996 which is based on the UNCITRAL Model. In section 3, for example, the Act establishes the concept of a law of the seat of arbitration that is not directly related to the forum; rather it is determined by various factors. The rules of arbitral procedure were among these various factors.²⁶⁷

Section 3 of the Arbitration Act reads as follows:

In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated (a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.²⁶⁸

²⁶⁴ Schackleton, S., "Global Warming: Milder Still in England", (2000) 3 *International Arbitration Law Review* 74.

²⁶⁵ Thieffry, C., and Thieffry, P., "Negotiating Settlement of Dispute Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes", (1990) 45 *Business Lawyer* 577.

²⁶⁶ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1185.

²⁶⁷ Mustill, M., and Boyd, S., *Commercial Arbitration*, (Butterworths, London, 2001) 305. Redfern, A., and Hunter, M., *Law and Practice of International Commercial Arbitration*, (3rd edition, Sweet & Maxwell, London, 1999) 71.

²⁶⁸ Section 3 of the Arbitration Act 1996.

Five years after the Arbitration Act 1996 came into force, in *ABB Lummus Global Ltd. v. Keppel Fek Ltd.*,²⁶⁹ it was held that if the seat of arbitration is not determined in the arbitration agreement, the choice of law of a particular state as the procedural law would be a strong indicator to choose this particular state as the seat of arbitration. At the same year, in *Omnium de traitement et de valorisation SA v. Hilmarton Ltd.*,²⁷⁰ it was held in an unequivocal terms that:

Arbitration exists in some ethereal firmament unattached to any particular national legal system.²⁷¹

At present, as the discussion above has demonstrated, there is a division in English judges' opinions with regards to floating arbitration. The majority of opinions are against the idea of floating arbitration. However, there is a difference between what the law is and what the law should be. Evidently, party autonomy and freedom of choice in arbitration is now a dominant factor in English law. Apparently, this new trend in arbitration in England gives succour to the school of de-localised arbitration. Given that the location of the proceeding will be of lesser importance and party autonomy will be maximised in the Arbitration Act 1996, and given that this would ultimately augment the parties' autonomy to determine the place of arbitration, it has been said that the Arbitration Act 1996 demonstrates that the autonomy of the parties to determine the place of arbitration is not affected by the fact that the procedure may take place online. This is reasonable because the idea that arbitration should to a greater or lesser extent be in some way connected to the place where it is held is not suitable for something like the internet which, in its very existence, negates the notion of place.²⁷²

From this perspective, for an online dispute, a "web site of the case in question" would be established where all case files and submissions by the parties are stored therein. The "web site of the case in question" might become a core concept in online

²⁶⁹ [1999] 2 Lloyd's Rep. 24.

²⁷⁰ [1999] 2 All E.R. (Comm) 146.

²⁷¹ Ibid. 154.

²⁷² Nottage, L., "The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View From the Periphery", (2000) 16 *Arbitration International* 55. Arsic, J., "International Commercial Arbitration on the Internet: Has the Future Come Too Early", (1997) 14 *Journal of International Arbitration* 221.

arbitration as compared to the seat of arbitration in the offline world. In this regard, *E-resolution*, an online arbitration provider, implemented as part of its procedures “the web site of the case in question”. Article 15 of *E-resolution* reads as follows:

(1) As soon as the secretariat accepts the application for arbitration, in conformity with Article 4(3), it shall transmit a secret code to each of the parties, providing them with access to the site of the case in question. (2) All documents, reports, exhibits, facts, and information that one party wishes to present as evidence must be filed in the site of the case in question.²⁷³

4.5.2. The Legal Status of Floating Awards in Cyberspace

Traditionally, the place of arbitration is sought to be the only criterion which determined whether an arbitral award is a domestic or a foreign award. On that basis, it has been argued that while the territorial criterion is clear, the law governing the arbitral procedure, for instance, is vague, susceptible to different interpretations, and would not give the business world any certainty as to which awards would be covered by the New York convention 1958.²⁷⁴

A foreign award for the purpose of enforcement in the New York Convention 1958 is defined in Article 1(1) as an award which is made in a country other than the country where the recognition and enforcement is sought to be, i.e., not domestic awards. Arguably, Article 1(1) is one of the most controversial clauses in the convention due to the undefined concept of the domestic award.²⁷⁵ Article 1 (1) reads as follows:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.²⁷⁶

²⁷³ <<http://www.eresolution.ca>>, last visited on the 1st of October 2003.

²⁷⁴ Van Den Berg, A., “Non-Domestic Arbitral Awards Under the 1958 New York Convention”, (1986) 2 *Arbitration International* 191.

²⁷⁵ Mustill, M. and Stewart, B., *Commercial Arbitration*, (2nd edition, Butterworths, London, 2001) 105. Redfern, A., and Hunter, M., *Law and Practice of International Commercial Arbitration*, (3rd edition, Sweet & Maxwell, London, 1999) 364.

²⁷⁶ Article 1 (1) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

In England, section 100 (1) of the Arbitration Act 1996 defines a foreign award as follows:

An award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.²⁷⁷

But the nationality of an arbitral award might depend on the law governing the arbitral procedure. Indeed, an arbitral award rendered in London under German law could be considered to be a domestic award in Germany, and an award rendered in Paris under a foreign law could be considered a foreign award in France.²⁷⁸

Moreover, the exclusive dependence on territorial criterion to determine whether an arbitral award is a foreign award is unreasonable because if a domestic award shows a relationship to any international features, it could be considered as a foreign award according to the New York Convention 1958. For instance, it is clear that non-domestic awards include awards issued in a signatory country other than that in which the award is being enforced, where at least one of the parties is foreign. It includes also awards made between two residents in a signatory country other than that in which the award is being enforced, provided the relationship of the parties involves performance abroad or has some other reasonable relationship with a foreign country. Furthermore, when arbitration takes place by correspondence, it may be impossible to establish where an arbitral award has been rendered, thus, making Article 1(1) even more vague.²⁷⁹

In electronic arbitration, the controversial aspect of Article 1(1) of the New York Convention 1958, due to the undefined concept of the domestic award, is duplicated. As mentioned above, the choice of any geographical contact or any particular national law will be arbitrary in cyberspace. Thus, an electronic award which is rendered through the internet, for the purpose of enforcement in New York Convention 1958

²⁷⁷ Section 100 (1) of the Arbitration Act.

²⁷⁸ Contini, P., "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", (1959) 8 *American Journal of Comparative Law* 292.

²⁷⁹ Leahy, E., and Bianchi, C., "The Changing Face of International Arbitration", (2000) 17 *Journal of International Arbitration* 31.

could not be viewed as foreign or as domestic. This inevitably renders the status of an award completely irrelevant. Consequently, the difference between a foreign award and a domestic award in the New York Convention 1958 has become irrelevant.²⁸⁰

In electronic arbitration, the argument would be that the award has not been issued inside the country at all, but only on the World Wide Web, therefore, the award is foreign. The counter-argument would be that the "Web" itself, encompasses virtually every country's jurisdiction in the world, therefore, the award is domestic. Any country can object to the use of arbitration on the internet on the assumption that it would be difficult to identify foreign and domestic awards. This ultimately, leads to a vicious circle.

As a result, the place of arbitration should not be the only criterion to decide the nationality of an electronic award. Instead of the inadequacy of any territorial criterion to establish whether an award is domestic or foreign on the internet, the law governing the electronic arbitral procedures might be considered as the main criterion. That is to say, an electronic award which is rendered through the internet under English law, for example, would be considered domestic for the purpose of the award's enforcement in London, and foreign for the purpose of the award's enforcement in Berlin or Paris. From this perspective, the proper question to be asked is not whether the electronic award is domestic or foreign, but whether it should receive appropriate recognition and enforcement under the applicable law that is determined by the parties.²⁸¹

Consequently, the concept of a floating award can be introduced to accommodate the reality of a virtual award. A floating award is based on the idea that parties can agree to detach the award from the ambit of any national law. The basic characteristic of floating or de-localised award, as the basic characteristic of floating or de-localised

²⁸⁰ Goldsmith, J., "Against Cyber-Anarchy", (1998) 65 *University of Chicago Law Review* 1199.

²⁸¹ Schneider, M., and Kuner, C., "Dispute Resolution in International Electronic Commerce", (1997) 14 *Journal of International Arbitration* 5. Arsic, J., "International Commercial Arbitration on the Internet: Has the Future Come Too Early", (1997) 14 *Journal of International Arbitration* 209. Smit, H., "A-national Arbitration", (1989) 63 *Tulane Law Review* 643.

arbitration agreement, is that it does not owe its existence, validity, or effectiveness to a particular national law.²⁸²

It is imperative to recall the opinion of the International Chamber of Commerce (ICC) as regards the main defect in the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, namely, the condition that, to be enforced, an arbitral award must be strictly in accordance with the rules of procedure laid down in the law of the country where arbitration took place. Instead, the ICC advocated the idea of an international award, i.e., an award completely independent of national laws, and suggested that arbitral awards based on the will of the parties should be automatically enforceable. Actually the ICC stated clearly that, as a condition for enforcement, the composition of the arbitral authority and the arbitral procedure must be in accordance with the agreement of the parties. The ICC believed that the idea of an international award was crucial to meet the requirements of international trade because it claims a degree of de-localisation for the place of arbitration.²⁸³

More recently, in *Minmetals Germany GmbH v. Ferco Steel Ltd.*,²⁸⁴ it has been held that there is a new trend in international commercial arbitration philosophy where no parties are foreign or all of them are, and, where an award rendered abroad that misapplies English law, for instance, such an award is surely no less an attack on the purity of English legal norms than when it is introduced to England for enforcement. This new trend aims at discouraging territorial links by emphasising the fact that international commercial arbitration would be incomplete if it did not achieve uniform treatment of all awards irrespective of their place of origin.

4.6. Conclusion

An adequate answer to the challenging problem of cyberspace jurisdiction can neither be simple nor a standard one. No single authority can assume sovereignty over cyberspace. The choice of any geographical contact or any particular national law will

²⁸² Van Den Berg, A., *The New York Arbitration Convention 1958: Towards a Uniform Judicial Interpretation*, (Kluwer Law and Taxation Publishers, London, 1981) 29. Collins, L., *Dicey and Morris on the Conflict of Laws*, (13th edition, Sweet & Maxwell, London, 2000) 604.

²⁸³ Contini, P., "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", (1959) 8 *American Journal of Comparative Law* 290.

²⁸⁴ [1999] C.L.C. 659.

be arbitrary in cyberspace because several jurisdictions have a legitimate claim to apply their law.

Since no state has the sole power to set the rules or standards or to say how they are applied in cyberspace, it has been submitted that substantial effective rules for dispute settlement can be agreed to by the parties in the form of ADR since it offers private, rather than sovereign solutions. The idea of out-of-court dispute settlement is not new, and OADR is only the most recent in a long tradition of ADR. As a result, OADR is a legitimate solution for disputes in cyberspace where parties' consent plays a fundamental role in the assertion of a proper jurisdiction.

Chapter Five: Fair Process, efficiency and OADR

5.1. Introduction

Considerations of efficiency in private dispute resolution mechanisms should be carefully weighed against fair process. Although efficiency is served by minimising the role of the law in private dispute resolution mechanisms, the rhetoric of privatisation of dispute resolution should be treated with utmost caution. From this perspective, there is a need to analyse the value of efficiency which OADR mechanisms are seen to achieve, and the value of fair process which OADR policy is subject to, in order to strike the right balance between both values. Fair process in the event of disputes and effective dispute resolution are prerequisites to realising the commercial potential of the internet amongst its users and they are crucial to people's acceptance of electronic commerce. Accordingly, efficiency of OADR must take into account the peculiarities and particularities and most importantly, the limitations of cyberspace. Those considerations should be a profound actor in dealing with the whole issue of cyber disputes. Equally, fair process provides a conceptual framework for evaluating the legitimacy of any dispute resolution mechanism, and, therefore, it is perhaps the most serious obstacle that needs to be overcome before OADR becomes a viable solution.

Normally, a public tribunal must have the power to resolve disputes only when they follow relatively formal procedures prescribed for them by the sources of their power, usually codified in rules of procedure and evidence. This is a significant aspect of the fair process of law. And given that legal analysis of private dispute resolution is based on the legal framework for public dispute resolution, there is a need to translate fair process concepts into the less coercive regimes of private dispute resolution institutions in cyberspace. That said, it must be analysed whether public law framework of fairness such as administrative law framework of fairness applies to private law proceedings such as arbitral proceedings. In principle, it does not apply. However, some basics are so fundamental that they cannot be waived.²⁸⁵

²⁸⁵ Perritt, H., "Electronic Dispute Resolution", a paper presented at NCAIR conference, Washington DC, 22nd of May 1996, available online at <<http://mantle.sbs.umass.edu/vmag/PERRITT.HTM>>, last visited on the 1st of October 2003.

There is a historical dominance of state sponsored adjudication, and hence of litigation, in the theory and practice of civil justice in the common law world. This brings about the profound entanglement of settlement and litigation. However, access to justice represents the expression of concerns about costs, delay and general inaccessibility of adjudication, and called for quicker, cheaper and more readily available judgement with procedural informality as its hallmark. Consequently, it has been argued that the contrast between state sponsored adjudication, such as court system, and private adjudication, such as arbitration, is no longer so crisp.²⁸⁶

It is important to bear in mind that private arbitration typically involves the central elements of court adjudication. For instance, arbitration procedures may be very similar to those used in litigation: the filing of statements of case; examination of witnesses and so on. Also, in arbitration, the decision is made according to law as it would be in court. In this regard, it has been argued that a process of institutionalisation almost inevitably takes place even in the face of efforts to keep arbitration flexible, which runs contrary to one of the often-stated advantages of arbitration, i.e. procedural flexibility.²⁸⁷

Moreover, it has been argued that the role of judges in courts in resolving disputes is secondary to their function of restating important public values such as fairness and justice. Indeed, adjudication is the social process by which judges give meaning to such important public values. These public values are evident in private law, such as arbitral proceedings, since justice and fairness are universal concepts and they apply in both private and public law. However, in the public sector, these values are fully developed. Therefore, if OADR solutions, as contractual agreements, are to become acceptable by internet users and if we need to convince them to use such solutions, OADR has to be based on a principled footing, with an appropriate example provided by the public law framework of fairness.²⁸⁸

In this regard, Wade and Forsyth in their leading text on administrative law argue that in courts of law, the observation of natural justice as a well-defined concept can be

²⁸⁶ Palmer, M., and Roberts, S., *Dispute Process*, (Butterworths, London, 1998) 212.

²⁸⁷ *Ibid.* 217.

²⁸⁸ *Ibid.* 25.

taken for granted. But such value is so universal, so natural, that it is not and should not be confined to judicial power. It applies equally to powers created by contract. In administrative law, the rules which govern disputes involving the government and public authorities come before the ordinary courts, and the courts so far as possible apply ordinary law, treating public authorities as if they were private individuals with all the normal legal duties and liabilities. The great majority of proceedings by and against public authorities, therefore, can be adjudicated without making any distinction between private and official capabilities. The courts draw upon a mixed collection of remedies, some belonging to private and some to public law, in order to cover all contingencies. They are freely interchangeable.²⁸⁹

In this regard, it is imperative to recall the opinion of Lord Denning on this issue. In *Regina v. Home Secretary exp. Santillo*,²⁹⁰ Lord Denning MR noted:

The rules of natural justice or of fairness are not cut and dried. They vary infinitely.²⁹¹

To the same effect is a passage, much cited, in a speech of Lord Bridge in the House of Lords in the case of *Lloyd v. McMahon*.²⁹² Lord Bridge said:

My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates.²⁹³

Furthermore, it has been argued that informal justice, which implies a contractual agreement on arbitral proceedings, can extend the ambit of state control, since informal justice purports to devolve state authority on none-state institutions in order

²⁸⁹ Wade, H. and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 436.

²⁹⁰ [1981] QB 778.

²⁹¹ *Ibid.* 786.

²⁹² [1987] AC 702.

²⁹³ *Ibid.* 711.

to delegate social control to private entities. From this perspective, courts apply standards of fairness in public law in order to judge fairness in a private law field.²⁹⁴

Paul Craig, a leading author on administrative law, argues that the idea that the ascription of the label “public power” leads to the application of a distinct set of procedural norms has come under strain since contracts now contain many common law and statutory constraints. In this sense, there is little doubt that private law has become subject to a greater degree of public law. There is equally little doubt that public law doctrines might be made greater use of within contract law. Public law principles should be applied to undertakings which are characterised in this manner. It must, however, be recognised that there is an ambiguity in such formulations. Although we might characterise certain norms as being public law norms in nature, it is by no means certain that they have always been regarded in this manner. Also, it is clear that some of these principles have been applied to a range of institutions which are not public bodies. The courts have long applied the basic norms of procedural justice, such as a right to a fair hearing, to bodies such as trade unions.²⁹⁵

A trade union is constituted by an associations of individuals bound together by a contract of membership and the courts have jurisdiction to enforce this contract at the suit of union members. In particular, courts take the opportunity through such mechanism to impose on unions the duty to comply with public law standards of procedural fairness in exercising their decision-making power. In actual fact, trade unions are implying fairness through their contracts with members and courts expected therefore that disputes between trade unions and members to be considered according to standards of fairness in public law. For example, members of trade unions cannot normally be expelled without being given a hearing, for their contracts of membership are held to include a duty to act fairly: by accepting them as members and receiving their subscriptions the trade union impliedly undertakes to treat them fairly and in accordance with the rules. Apparently, the doctrine of natural justice which embodies a fair hearing is extended beyond the sphere of administrative law to such bodies as trade unions. This doctrine found a fruitful field of application in

²⁹⁴ Palmer, M., and Roberts, S., *Dispute Process*, (Butterworths, London, 1998) 32.

²⁹⁵ Craig, P., *Public Law and Control over Private Law*, in Taggart, M., *The Province of Administrative Law*, (Hart Publishing, Oxford, 1997) 211.

protecting members of trade unions from unfair expulsions and other penalties where the basis for natural justice was an implied term in the contract of membership. Indeed, regardless of the union rules, the courts will require the union to apply the rules of natural justice, particularly, an opportunity of a fair hearing. In effect, therefore, trade unions are subject to the administrative law concept of the duty to act fairly, which requires a decision to be made honestly and without caprice.²⁹⁶

In *Bonsor v. Musicians' Union*,²⁹⁷ Denning L.J. referred to trade unions' rules by saying:

If it should be found that if any of these rules is contrary to natural justice...the courts would hold them to be invalid.²⁹⁸

In *Abbott v. Sullivan*,²⁹⁹ Denning L.J. said of trade union committees:

These bodies must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence: and any agreement or practice to the contrary would be invalid.³⁰⁰

Nevertheless, it must be noted that the most rudimentary level of legal intervention would be merely to ensure that unions obey the rules which they themselves have determined, with members having recourse to the courts if they are breached, which led to superimpose on the contract of membership public law standards of procedural fairness. This should not lead inexorably to the conclusion that all principles of a public law nature should be equally applicable to private law. There are some important considerations for bodies which are discharging public functions such as the principle of control of discretion, which includes among other things, impropriety of purpose, relevancy, reasonableness and proportionality. Such considerations were framed very much with the idea of a public body in mind and it is by no means self-evident that such considerations are equally relevant in private law. Indeed, there is no

²⁹⁶ Deakin, S., and Morris, G., *Labour Law*, (3rd edition, Butterworths, London, 2001) 841. Wade, H. and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 440.

²⁹⁷ [1954] Ch 485.

²⁹⁸ *Ibid.* 494.

²⁹⁹ [1952] 1 KB 198.

³⁰⁰ *Ibid.* 207.

need to apply all of the procedural norms of public law to private bodies. Instead, there is a need to utilise them in the same manner as when they are applied to traditional governmental institutions.³⁰¹

The divorce of public and private law was proclaimed in categorical terms in *O'Reilly v. Mackman*.³⁰² But the impossibility of dividing public and private law is clearly illustrated by the discussion above. Wade and Forsyth, two leading authors on administrative law, have submitted to this view by saying that *O'Reilly v. Mackman* turned the law in the wrong direction, away from flexibility of procedure and towards rigidity reminiscent of the bad old days of the forms of action a century and a half ago.³⁰³

Lord Saville gave an apt warning with regards to dividing public and private law in *British Steel Plc v. Customs and excise Commissioners*.³⁰⁴ He said:

It is now well over 100 years ago that our precedents made a great attempt to free out legal process from concentrating upon the form rather than the substance, so that the outcome of cases depend not on strict compliance with intricate procedural requirements, but rather on deciding the real dispute over the rights and obligations of the parties...For over the last decade or so there has been a stream of litigation on this subject, much of it proceeding to the House of Lords. The cases raise and depend upon the most sophisticated arguments, such as the distinction and difference between what is described as "public" as opposed to "private" law...Such litigation brings the law and our legal system into disrepute, and to my mind correctly so...The courts have to address difficult and complex questions which in my view, under a proper system, it should not be necessary even to ask, let alone answer.³⁰⁵

And finally, it is important to recall the opinion of the Rt. Hon. Sir Harry Woolf on the divide between public and private law. He said:

While the difference between the two systems must exist and their respective parameters recognised, this does not mean the systems do not need to

³⁰¹ Deakin, S., and Morris, G., *Labour Law*, (3rd edition, Butterworths, London, 2001) 847. Craig, P., *Public Law and Control Over Private Law*, in Taggart, M., *The Province of Administrative Law*, (Hart Publishing, Oxford, 1997) 212.

³⁰² [1983] 2 AC 237.

³⁰³ Wade, H. and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 664.

³⁰⁴ [1997] 2 All ER 379.

³⁰⁵ *Ibid.* 387.

coalesce. Indeed, just as public law has been able to develop by adopting private law principles and remedies, perhaps recent events have indicated that it is time for private law in certain fields to emulate the supervisory role which so far has been the hallmark of the courts' public law role.³⁰⁶

In the context of OADR, it is important to notice that the guarantees of a fair trial and the respect for the rule of law that a private OADR can give are not the same as public authorities provide. Privatised systems and their technological extensions will have several consequences for fair process because they can be designed to eliminate certain procedures that designers deem too expensive or too disadvantageous. Changes to these procedural devices are not mere matters of economic efficiency since these procedural rules affect substantive outcomes. This issue is of paramount importance since OADR solutions might make it possible to exclude strict application of the legal rules. For example, one of the fundamental characteristics and advantages of electronic communication is speed. Speed implies simplified procedures and less formalism. But it implies also that OADR might go beyond minimum legal standards and possibly jeopardy fair process. Apparently, the observance of strict fair process in OADR could have a negative impact on the swiftness of the service, and thus sacrifice one of the major assets of OADR, namely, efficiency.

Fairness implies that OADR must have structure, rules, and procedures that ensure that all parties' rights are protected, and that every aspect of the mechanism operates with regard to the parties' rights to fair process. This is necessary to create an environment of trust. However, rules can be designed to promote desired outcomes, such as, shifting procedural advantage to certain powerful players. For instance, OADR systems can result in granting trademark owners protection they would not be granted under trademark law, or granting sellers rights to impose terms they could not impose under consumer protection law. Therefore, the extent of the privatisation of dispute resolution systems in the form of OADR should be critically examined because privatisation in and of itself does not necessarily advantage either party.

It is important to notice that the EU Commission addressed some of the essential requirements for successful out-of-court dispute settlement in its recommendations on

³⁰⁶ Woolf, H., "Public Law-Private Law: Why the Divide? A Personal View", [1986] *Public Law* 237 at 259.

principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. These requirements are essential to any effective ADR provider. They include mainly, principles of effectiveness, fairness, independence, low cost, transparency, reliability, accessibility, trustworthiness, speediness, representation, legality (that parties must not be deprived of mandatory provisions of the law of the place where the decision-making body is established, and of the member state where he or she is normally a resident), and liberty of choice (that if the decision is to be binding on the parties and further recourse to court is excluded, they should be fully aware of this in advance and have accepted it).³⁰⁷

However, the EU Commission recommendations do not deal with the issue of the establishment of clear principles when setting up or using OADR systems. Some of these principles, such as the principle of representation, seem both overly complicated and unnecessary, and may unintentionally create difficulties for the design and functioning of OADR system. Moreover, some of these principles are contradictory. Heavy procedural guarantees promoted by the principle of legality, for instance, have direct consequences on the effectiveness promoted by the same recommendations. Therefore, the solution is to be found in the balance between these principles. Furthermore, the applicability and/or importance of some criteria will vary according to the type of ADR in question. Fair process requirements would be more stringent in a private process such as arbitration, which is entirely a creature of the arbitration agreement. Whether discovery is permitted, whether fact finding is to be utilised, and the applicability of different rules of evidence are all matters to be defined by the parties in their arbitration agreement in order to increase efficiency of the process. However, arbitration is a form of adjudication. It is even considered to be the privatised equivalent of a court of law. Most procedural safeguards that are imposed on arbitration proceedings derive from this epistemological position. If arbitration does not grant fair process, it may run the risk of not being characterised as arbitration

³⁰⁷ EU Commission, "Recommendations on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes", (98/257/EC) O.J.L. 115, available online at <http://www.cmvm.pt/english_pages/apoio_ao_investidor/31998h0257.pdf>, last visited on the 1st of October 2003.

or not withstanding judicial review. Therefore, basic concepts of adjudicative fair process provide an appropriate basis for developing online arbitration criteria.³⁰⁸

This leads then to the further question as to the type of relationship which the arbitral process should have with the courts in order to make the process a viable instrument for effective decisions on the rights and obligations of parties wishing to settle their dispute by arbitration. In this regard, the Arbitration Act 1996 assures a sufficient judicial support in order to avoid injustice in the arbitral proceedings. Section 45(1) of the Arbitration Act 1996 produces the power of intervention by the courts on a point of law. It gives power, unless otherwise agreed by the parties, to the courts, on the application of a party, upon notice to the other parties, to determine any question of law arising in the course of proceedings which the court is satisfied substantially affects the rights of one or more of the parties.³⁰⁹ The Act has also retained the right of appeal on a point of law from a decision of the arbitrator to the court. Section 69(1) provides that, under similar conditions, a party may appeal to the court on a question of law arising out of an award made in the proceedings.³¹⁰

In contrast, common notions of fair process are not as evident in mediation as they are in arbitration. Thus, fair process requirement is not subject to strict or stringent rules. In mediation, the third party neutral works in a more informal environment with the parties to achieve an acceptable settlement. But confidentiality of communication, in particular, is more important in the context of mediation than arbitration in order to be effective. It must be stressed also that the independence of the third party neutral and the parties' right to be heard, i.e., their right to present their case and evidence and due comment on their opponent's case and evidence, are very important factors in both arbitration and mediation. As a result, fair process has to be scaled and proportionate to the type of OADR in question.³¹¹

³⁰⁸ Perritt, H., "Dispute Resolution in Electronic Network Communities", (1993) 38 *Villanova Law Review* 393. Perritt, H., "Electronic Dispute Resolution", a paper presented at NCAIR conference, Washington DC, 22nd of May 1996, available online at <<http://mantle.sbs.umass.edu/vmag/PERRITT.HTM>>, last visited on the 1st of October 2003.

³⁰⁹ Section 45 (1) of the Arbitration Act 1996.

³¹⁰ Ibid. Section 69 (1).

³¹¹ Bevan, A., *Alternative Dispute Resolution: A Lawyer's Guide to Mediation and Other Forms of Dispute Resolution*, (Sweet & Maxwell, London, 1992) 31.

Therefore, one can argue that the translation of the EU Commission recommendations to OADR, word by word, would be a daunting challenge. Consequently, such translation must not suggest that all requirements must be present in order for fair process to be satisfied in OADR; rather, it suggests that these requirements should be viewed as a list of elements or a kind of menu. Selections from the menu depend upon a pragmatic balancing of the efficacy of a particular element from the menu, as compared to other elements, in improving fairness in OADR.

That said, this chapter examines how much of the elements commonly associated with fair process can or should be transposed to OADR. It examines also whether it is realistic to demand that extensive standards of fair process in OADR must be observed or not.

The weights given to the fair process factors in OADR will vary because there is no objective way to measure those factors or to ascertain whether there is a sufficient amount of each in OADR process. This is due to the fact that those factors are generally not independent of each other. If the level of one factor is changed, the level of some other factor may be affected. Raising one factor a lot may lower another factor a little, so there is a trade-off. Accordingly, one has to weigh efficiency factors against fair process elements in providing adequate means of OADR.

There are eight elements of fair process which are of strategic importance in any OADR scheme. They are respectively, the independence of OADR schemes, the transparency of OADR schemes, accessibility to OADR schemes, cost allocation in OADR schemes, data protection in OADR proceedings, the authenticity of OADR proceedings, customs in OADR schemes and the liberty of participation in OADR schemes

Although these various factors are separate and identifiable, they tend to agglomerate together in producing a good system of OADR. This chapter will analyse these factors respectively in order to determine the importance of each factor in the OADR process.

5.2. The Independence of OADR Schemes

An unbiased dispute resolution neutral is one of the most fundamental elements in fair process analysis. This means being and being seen as unbiased toward parties to a dispute, toward their interests, and toward the options they present for settlement. This is a concept at the very heart of civil justice. In fact, the rules requiring unbiased adjudicators can be traced back to medieval times, and, indeed, they were not unknown in the ancient world.³¹²

The role of a third party neutral in ADR is a sensitive and privileged one as it requires parties to place very considerable trust in the individual with regard to neutrality. Therefore, ADR procedural rules should allow for parties participation in the appointment of the third party neutral. The parties are free to make a choice amongst the bodies responsible for out-of-court dispute settlement as they think appropriate. Those bodies in turn, in order to offer a reasonable service to the parties selecting out-of-court dispute settlement, establish their own requirements and procedures concerning the selection of neutrals. However, the issue of the allowance for parties' participation in the appointment of the third party neutral is a delicate area of law.³¹³

It is of the essence of natural justice that it should be observed generally in the exercise of discretionary power. The mere fact that the discretion conferred is wide is no reason for weakening this principle. In fact, all discretionary powers have limits of some kind, and whether these limits are widely or narrowly drawn, the discretion ought to be exercised fairly, just as it must also be exercised reasonably. As a result, in an arbitration context, the discretion of the arbitral tribunal in organising the proceedings should be limited by observing natural justice, arbitration rules, provisions agreed to by the parties, and the law applicable to the arbitral procedure.³¹⁴

³¹² Wade, H. and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 439.

³¹³ Vahrenwald, A., "Out-of-Court Dispute Settlement Systems for E-commerce, Report on Legal Issues, Part III: The Protection of the Recipient", available online at <http://dsa-isis.jrc.it/ADR/Part_III.doc>, last visited on the 1st of October 2003.

³¹⁴ Wade, H., and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 525.

The Arbitration Act 1996 does not impose any requirements as to the discretionary power of arbitrators and the qualifications required of them. For example, section 19 of the Arbitration Act 1996 states that:

In deciding whether to exercise, and in considering how to exercise, any of its powers under section 16 (procedure for appointment of arbitrators) or section 18 (failure of appointment procedure), the court shall have due regard to any agreement of the parties as to the qualifications required of the arbitrators.³¹⁵

However, arbitration proceeds on the footing that the presence of bias means that the tribunal is improperly constituted, so that it has no power to determine the case; and accordingly, its decision must be void and a nullity. As a result, whether the arbitrator can go beyond the role that the parties have entrusted to him or her or not, is a delicate question. More specifically, there is always the question of the scope of the arbitrator's role. To the extent that the arbitrator goes beyond his or her remit, the award will be set aside.³¹⁶

In the online context, as for any other ADR process, the quality of OADR will depend crucially on the independence of the neutrals involved. The importance of independent OADR schemes and unbiased dispute resolution neutrals that possess sufficient knowledge and skills to perform their duties responsibly should not be underestimated. OADR is neither credible nor effective unless it is conducted by individuals who are truly independent with respect to the disputing parties in order to avoid imbalance in OADR process.³¹⁷

Thus, the selection of neutrals, which treat the parties as if they were on equal footing, is one of the most important process elements in a system of OADR. This is a key element of creating perception that the OADR process is fair. Ultimately, this will promote internet users confidence in the whole process and enhance the integrity of the OADR program, which is in turn central for building up confidence in e-commerce.

³¹⁵ Section 19 of the Arbitration Act 1996.

³¹⁶ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1182.

³¹⁷ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 239.

In this regard, Article 7 of the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”) reads as follows:

A panelist shall be impartial and independent and shall have, before accepting appointment, disclosed to the provider any circumstances giving rise to justifiable doubt as to the panelist’s impartiality or independence. If, at any stage during the proceeding, new circumstances arise that could give rise to justifiable doubt as to the impartiality or independence of the panelist, the panelist shall promptly disclose such circumstances to the provider. In such event, the provider shall have the discretion to appoint substitute panellists.³¹⁸

All the respondents in the survey that has been undertaken for the purpose of this thesis believe that although OADR providers are given positions which ensure the operation of the system, OADR independence must be guaranteed by adequate arrangements. Half of the respondents are OADR academics and the other half are OADR practitioners. OADR academics and OADR practitioners agree on this issue which suggests that a theoretical perspective based on academics’ views, and practical experience and knowledge, which can be deduced from practitioners’ views, confirm that OADR independence must be guaranteed by adequate arrangements.³¹⁹

Thus, OADR procedures can be designed in a way that gives active and dynamic role to neutrals in cyberspace. Such role will ensure that the disputants receive an equitable resolution to their dispute. This active and dynamic role, however, should not run the risk of being perceived as failing to fulfil the obligation of independence.³²⁰

One challenge for OADR practitioners is that it may be harder for them to practice neutrality through online communications because it may be harder to ascertain how the parties are interpreting their messages and written communications. That is why it

³¹⁸ Article 7 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 2003.

³¹⁹ OADR practitioner one, OADR practitioner two, OADR academic three, OADR practitioner four, OADR academic five, OADR practitioner six, OADR academic seven, and OADR academic eight.

³²⁰ Benyekhlef, K., Trudel, P., and Gautrais, V., “Some Reflections on Conflicts Management in Cyberspace”, available online at <http://www.disputes.net/cyberweek2000/ohiostate/cyberjusENGLISH.htm>, last visited on the 1st of October 2003.

is important for the online neutral to check with the parties during the process about their interpretation of and reaction to the communications they send and receive.³²¹

For example, in arbitration, it is submitted that the arbitrator must not engage in any *ex parte* communications with the parties regarding the merits of the case during the course of the proceedings. In online arbitration, *ex parte* communications may be conducted more easily than offline. Thus, in order to guarantee fair process and to induce confidence, strict rules on *ex parte* communications have to be adopted.³²²

5.3. The Transparency of OADR Schemes

Transparency of dispute resolution process is one of the most fundamental elements in fair process analysis. The parties must be given as much information as possible before they submit to the dispute resolution process, in order to ensure that the parties to a dispute have a meaningful opportunity to present their case and to participate in the process. Therefore, the procedures to be followed in the dispute resolution process must allow all the parties concerned to present their viewpoint before the responsible body and to hear the arguments and facts put forward by the other party. Moreover, dispute resolution process should function according to published rules of procedure that describe unambiguously all relevant elements necessary to enable disputants seeking redress to take fully informed decisions.

The transparency of procedure will aid in the process itself by helping to guide the expectations of the parties. This is necessary also to assess the independence of the dispute resolution process. It is also valuable in assessing the quality of the decisions and to ensure that there is a certain degree of consistency.

It is not only that fairness is important, but it is the actual perception of fairness that must be considered. Such an indication is necessary according to the principle of

³²¹ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 158.

³²² Redfern, A., and Hunter, M., *Law and Practice of International Commercial Arbitration*, (3rd edition, Sweet & Maxwell, London, 1999) 217. Davis, B., "The First International Competition for Online Dispute Resolution: Is This Big, Different and New", (2002) 19 *Journal of International Arbitration* 389.

transparency established in the EU recommendations on principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.³²³

All the respondents in the survey that has been undertaken for the purpose of this thesis believe that when ADR is carried out through the internet in the form of OADR, where there is a lack of face-to-face interaction, and where there is relatively little knowledge on the part of internet users about OADR, parties may give up some fair process rights to participate, and not all may fully understand this matter, and, therefore, effective OADR mechanism must be as transparent as possible. Half of the respondents are OADR academics and the other half are OADR practitioners. OADR academics and OADR practitioners agree on this issue which suggests that a theoretical perspective based on academics' views, and practical experience and knowledge, which can be deduced from practitioners' views, confirm that effective OADR mechanism must be as transparent as possible.³²⁴

Humans are conditioned to be sensitive in face-to-face communication and looking for details and nuances so that they can understand what is really going on. OADR providers need to account for that aspect of human interaction and provide information to fill that need of the disputants.³²⁵

If there are disclosures concerning the rights and remedies that an internet user loses by submitting to OADR, as well as the potential advantages, parties will have a clear understanding of what will be expected of them and what they can expect of the process. Indeed, educated and aware internet users can benefit from using OADR to rapidly and economically resolve electronic disputes.

³²³ EU Commission, "Recommendations on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes", (98/257/EC) O.J.L. 115, available online at <http://www.cmvm.pt/english_pages/apoio_ao_investidor/31998h0257.pdf>, last visited on the 1st of October 2003.

³²⁴ OADR practitioner one, OADR practitioner two, OADR academic three, OADR practitioner four, OADR academic five, OADR practitioner six, OADR academic seven, and OADR academic eight.

³²⁵ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 250.

In order to encourage the growth of e-commerce, the transparency in OADR proceedings and the availability of meaningful information about OADR is a task that should be taken jointly by both online sellers and OADR providers.

5.3.1. Online Sellers' Role of Providing Meaningful Information about OADR

Electronic commerce allows for the business to provide a dispute resolution mechanism along with the goods and services offered in what can be called a one stop shop. This might inspire more confidence in the customer than the abstract idea of possible redress in court. However, in an online environment, some fear that online sellers may impose OADR through clauses buried in electronic documents containing much other information, terms and conditions. Such clauses could be drafted by using terminology which the average internet user does not understand, or they might be so long that internet users do not have the time or desire to read them thoroughly. Sometimes the terms and conditions are segmented and placed in various places on the web site. Some e-commerce sites place their terms and conditions intentionally in white type against a black blue background on the computer screen. Most probably, it would be difficult to read them, especially if they are in small letters. Even the print out of them will be illegible. Some e-commerce sites place intentionally a button on the computer screen which is non-descriptive. For example, a button that says: "submit/proceed", will make it hard to an internet user to understand the consequences of clicking at that button.³²⁶

Because of the current practice of the placement of the OADR option on an electronic company web site, and the phrasing of the terms and conditions of such option, one cannot actually say that the average internet user understands his or her rights. This lack of understanding will have an apparent impact upon his or her fair process rights.

One of the consequences of such lack of understanding is that an OADR clause might be imposed on an online buyer without his or her consent. This might raise a problem relates to the way in which internet users' consent to OADR is obtained.

³²⁶ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 254.

It must be emphasised that internet users must be aware of the consequences of choosing to buy online, and this includes that they have to actively choose participation in OADR mechanisms, understand in an unambiguous way the purpose of the underlying dispute resolution mechanisms and their respective rules, rather than having it as a hidden consequence of transacting business online. Unarguably, the EU principle of liberty, regarding OADR schemes, is attempting to ensure that the disputant has knowingly and freely chosen to elect to bind him/herself to the mechanism's outcome(s). This approach is legitimate since it emphasise explicit and authenticated consent as a sufficient safeguard to OADR fair process.³²⁷

Given that one of the differences between the online and offline worlds is that pre-contractual information in the former is likely to be in much closer proximity to contractual information in the latter, both in time and space, online merchants that participate in OADR systems should be required to clearly and conspicuously disclose information and provide explanations of how those systems operate. In other words, online merchants should provide an easy-to-find and understandable notice of how a customer can successfully and meaningfully contact the OADR provider to expeditiously resolve disputes related to a transaction, including a link to the OADR provider web site, or a link to the organisation that awarded a trust mark, which deployed OADR, to the merchant. Moreover, there is a need to simplify terms and conditions on e-commerce web sites in a way that improve placement of OADR dispute resolution options within these terms and conditions. For instance, if a link was contained on the seller's homepage, it should be placed on the front pages on the web site containing the seller's offer. Furthermore, OADR terms should be downloadable and printable, with regard to the possibility of providing evidence about their content, since the mere granting of an access to view the terms will not be sufficient to constitute the possibility to take notice. In fact, it is a common practice that many web sites change their web pages constantly. Then in some instances, there

³²⁷ EU Commission, "Recommendations on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes", (98/257/EC) O.J.L. 115, available online at <http://www.cmvm.pt/english_pages/apoio_ao_investidor/31998h0257.pdf>, last visited on the 1st of October 2003.

is the possibility that their dispute resolution policies had actually changed between the time of the sale and the time of the complaint.³²⁸

5.3.2. OADR providers' role of providing meaningful information about OADR

Because of the current practice of the placement of the OADR option on an OADR provider web site, and the phrasing of the terms and conditions of such option, one cannot actually say that the average internet user understands his or her rights. This lack of understanding will have an apparent impact upon his or her fair process rights.

The provision of meaningful information accurately and in a clear way for all the participants should be a cornerstone in any OADR program. OADR providers may inform the parties how the OADR procedures will be conducted, what they will be required to do, when they will be required to do it, the documentation that the parties are expected to produce, the time limit within which they must produce it, who the third party neutral will be and how he or she will be appointed, what the powers of the neutral are, and what remedies may be granted by the neutral.

OADR rules should be written in plain intelligible language to facilitate comprehension by parties. Moreover, obligations on parties should be formulated in terms as clear and precise as possible to avoid disputes arising over interpretation in the event of a breach of the OADR rules. Furthermore, parties' agreement to participate in online proceedings should be reduced to writing so that there is a clear record of their understanding of the process.³²⁹

OADR web site materials must go to great length to explain procedures in layman's terms, and provide advice for those who have not previously participated in OADR procedures. OADR providers may demonstrate how parties can complete their online complaint, digital evidences, scans, digital photos, and files of any sort. Features such as "learn more" or "frequently asked questions" encourage participation. Devoting time and resources to ease the learning curve of new users is essential to successful

³²⁸ Vahrenwald, A., "Out-of-Court Dispute Settlement Systems for E-commerce, Report on Legal Issues, Part II: The Protection of the Recipient", available online at <http://dsa-isis.jrc.it/ADR/Part_II.doc>, last visited on the 1st of October 2003.

³²⁹ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 231.

OADR implementations. One of the things every third party neutral needs to do at the beginning of an OADR process is to orient the parties and to educate them about how effectively use the tools being set in front of them. While in face-to-face process usually the parties do not require instructions about how to speak to each other or how to ask or interact privately with the third party neutral, understanding the technology is a basic education that needs to happen in OADR process to make sure that the parties know how to get around the technology being used.³³⁰

In this regard, Ethan Katsh and Janet Rifkin, two leading authors on OADR argue that a principal challenge in OADR is to find or design software that handles effectively online communication and yet does not have a high learning curve for users. If the third party neutral or one of the disputants is unable to use the software, OADR process will not work optimally.³³¹

The internet itself, as an information-based tool, can be utilised. Information Technology has made it possible for disputants to be more informed. Internet users can ask questions and have information on OADR providers and services in an easier way than the offline world. This kind of data is very informative as it enables prospective OADR neutrals to understand the framework of internet disputes. Also it enables the OADR provider to inform users about the frequency and common outcomes of a given situation, and therefore enable users to make reasoned and informed decisions. This will lead ultimately to establish methods that encourage the widespread use of OADR programs, and this will result in providing incentives for disputants to participate in OADR programs.

That said, it must be pointed out that full disclosure in OADR needs to cover not only the process, but also the rights and obligations of the third party neutrals and OADR outcome(s). This would ensure that the parties are treated with equality and fairness and would ensure also that OADR providers are competent and impartial. The absence of transparency in this respect may adversely affect the rights of the parties.

³³⁰ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 235.

³³¹ Katsh, E. and Rifkin, J., "Online Dispute Resolution: Resolving Conflicts in Cyberspace", (Jossey-Bass, San Francisco, 2001) 14.

The availability of meaningful information about the third party neutrals and the availability of meaningful information about OADR outcome(s) will be discussed in the following parts of the chapter.

5.3.2.1. *The Availability of Meaningful Information about the Third Party Neutrals*

OADR programs should not only define the scope, rules, and procedures of the process, but most importantly, it should define how all of these would be governed by neutrals. Therefore, the availability of meaningful information about the third party neutrals is of particular importance in OADR.

One of the main aspects of such information about the third party neutrals is their selection mechanism. The selection mechanism should be as clear and transparent as possible. Concerns always arise as to the selection mechanism of mediators and arbitrators in ADR proceedings. Given the additional internet burdens of distance and anonymity in OADR proceedings, these concerns can be magnified.

When ICANN set up a new process for resolving disputes involving domain names by utilising OADR, it also set up a framework of accrediting dispute resolution providers to resolve disputes. For example, *E-resolution*, *National Arbitration Forum*, *CPR Institute for Dispute Resolution*, *The Asian Domain Name Dispute Resolution Centre (ADNDRC)* and *WIPO*, were accredited by ICANN to arbitrate domain name disputes.³³²

Also, according to Article 6(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), each OADR provider must maintain and publish a publicly available list of panellists and their qualifications.³³³

³³² A list of approved providers is available online at <http://www.icann.org/udrp/approved-providers.htm>, last visited on the 1st of October 2003.

³³³ Article 6 (a) 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

However, neither the framework of accrediting dispute resolution providers to resolve disputes neither Article 6(a) of (the “Rules”) address the selection mechanism of neutrals.

Some OADR providers, such as *E-resolution*, have disclosed their selection methodology clearly.³³⁴ But this is not always the case. Some OADR providers do not disclose how their neutrals are chosen. *SquareTrade*, for example, stresses only that it thoroughly screens, trains, and evaluate its mediators on an ongoing basis to ensure that they have and maintain the necessary skills.³³⁵ Similarly, *onlinemediators* states only that it sets up standards for its mediators which require that they operate according to the Model Standards of Practice for Mediators of the American Bar Association.³³⁶ None of them, however, discloses any information about their selection methodology.

5.3.2.2. *The Availability of Meaningful Information about OADR Outcome(s)*

The availability of meaningful information about OADR outcome(s) is of particular importance, at least in the sense that the outcome(s) must be disclosed albeit with the identities of the parties concealed. Unless there is sufficient transparency through the publication of the results, it is impossible to check the quality and impartiality of online arbitrators. This might have an impact on the fairness since the publication of online arbitration outcome(s) helps not only to assure fairness in fact, but, perhaps as importantly, to promote the appearance of fairness.³³⁷

With published opinions leading to more uniform application of the law, parties can better anticipate the consequences and repercussions of their actions and plan accordingly. Indeed, much of the value in the doctrine of the rule of law lies in predictability. Social and economic stability, as well as respect for law, require that parties have the ability to know the likely legal consequences of what they do in advance, at the time they act. From this perspective, it has been argued that while

³³⁴ <<http://www.eresolution.ca>>, last visited on the 1st of October 2003.

³³⁵ <<http://squaretrade.com>>, last visited on the 1st of October 2003.

³³⁶ <<http://www.onlinemediators.com>>, last visited on the 1st of October 2003.

³³⁷ Rau, A., “Integrity in Private Judging”, (1997) 38 *South Texas Law Review* 527.

arbitration proves to have a degree of flexibility that does not exist in judicial mechanisms, predictability is of great importance.³³⁸

Unless online arbitration results are published, at least in redacted form, the person who uses the system only once has no way of finding out what the law is. By and large, it will be the domain name holder or the e-consumer who will be the single shot player. By contrast, the repeat player, who will be the trademark holder or the e-seller, will have repeated experience of dispute resolution, and therefore may gain an unjustified advantage. Indeed, online arbitration must face the challenge of establishing commercial certainty in an otherwise undefined and very rapidly developing technical, legal and commercial environment, such as e-commerce. As a result, at the end of the process, it would be desirable that all determinations resulting from OADR process be made publicly available by being posted on the OADR provider's web site.

In the *Virtual Magistrate*, an OADR provider, it was stated that the process itself remains confidential until the award is rendered. At that point, decisions are generally made public on the World Wide Web.³³⁹ Similarly, in *E-resolution*, an OADR provider, according to Article 23(6), once a decision is reached, a full opinion is published on the web site. In the event of an opposition by any of the parties, *E-resolution* may propose to the parties that the award be redacted of identifying characteristics and then posted.³⁴⁰ Equally, *SquareTrade*, an OADR provider, notifies users that information about their dispute may be retained in order to be published.³⁴¹

That said, it must be pointed out that many other OADR providers have not implemented publication of results and there is no legal obligation on them to do so. However, a legal basis for such obligation can be found in Article 17(3) of the Electronic Commerce Directive which provides:

³³⁸ Leahy, E., and Bianchi, C., "The Changing Face of International Arbitration", (2000) 17 *Journal of International Arbitration* 51. Gibbons, L., "Private Law, Public Justice: Another Look at Privacy, Arbitration, and Global E-Commerce", (2000) 15 *Ohio State Journal of Dispute Resolution* 785.

³³⁹ <<http://www.vmag.org/>>, last visited on the 1st of October 2003.

³⁴⁰ <<http://www.eresolution.ca/>>, last visited on the 1st of October 2003.

³⁴¹ <<http://squaretrade.com/>>, last visited on the 1st of October 2003.

Member states shall encourage bodies responsible for out-of-court dispute settlement to inform the commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages, or customs relating to electronic commerce.³⁴²

Another legal basis for such obligation can be found in Article 16(b) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), which provides that except if the panel determines otherwise, all OADR providers which operate under UDRP should publish a full decision on a publicly accessible web site. The Article reads as follows:

Except if the Panel determines otherwise (see Paragraph 4(I) of the Policy), the Provider shall publish the full decision and the date of its implementation on a publicly accessible web site. In any event, the portion of any decision determining a complaint to have been brought in bad faith (see Paragraph 15(e) of these Rules) shall be published.³⁴³

One of the main reasons for the success of the UDRP is certainly the overall transparency of the procedure. ICANN is to be commended for its policy of making most decisions freely available at its web site. The ICANN decisions tend to set out the allegations of the parties and describe the supporting documents.³⁴⁴

5.4. Accessibility to OADR Schemes.

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.

³⁴² Article 17 (3) of the Directive of the European Parliament and of the Council on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market, (2000/31/EC) O.J.L 178.

³⁴³ Article 16 (b) of the Rules for 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 2003.

³⁴⁴ <<http://www.icann.org>>, last visited on the 1st of October 2003.

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.³⁴⁵

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 parts of the chapter.

³⁴⁵ <<http://www.squaretrade.com>>, last visited on the 1st of October 2003.

5.4.1. 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 world.³⁴⁶ In the case of *Anisminic Ltd. v. Foreign Compensation Commission*,³⁴⁷ 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.³⁴⁸

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.³⁴⁹ 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.³⁵⁰

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

³⁴⁶ Wade, H. and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 436.

³⁴⁷ [1969] 2 AC 171.

³⁴⁸ Ibid. 179.

³⁴⁹ Thornburg, E., "Going Private: Technology, Due Process, and Internet Dispute Resolution", (2000)

³⁴ *University of California Law Review* 205.

³⁵⁰ Article 6(1) of the European Convention of Human Rights.

their case under conditions which do not place them at substantial disadvantage *vis-à-vis* their opponent.³⁵¹

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.

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.³⁵²

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.

³⁵¹ Harris, D., O'Boyle, M., and Warbrick, C., *Law of the European Convention on Human Rights*, (Butterworths, London, 1995) 218.

³⁵² Thornburg, E., "Going Private: Technology, Due Process, and Internet Dispute Resolution", (2000) 34 *University of California Law Review* 205. Schultz, T., Kaufmann-Kohler, G., and Langer, D., "Online Dispute Resolution: The State of the Art and the Issues", E-commerce Research Project at the University of Geneva, available online at <<http://www.online-adr.org/reports/TheBlueBook-2001.pdf>>, last visited on the 1st of October 2003.

Given the impossibility of dividing public and private law clearly illustrated by the discussion above, 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.³⁵³

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.³⁵⁴

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. The minimum requirements are now set out in section 33 (1) (a) of the Arbitration Act 1996.³⁵⁵ 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.³⁵⁶

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

³⁵³ Article 5 (1) (b) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

³⁵⁴ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1177.

³⁵⁵ 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.

³⁵⁶ Section 33 (1) (a) of the Arbitration Act 1996.

minimum requirements of natural justice.³⁵⁷ In *Government of Ceylon v. Chandris*,³⁵⁸ 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.³⁵⁹

In the context of online arbitration, half of the respondents in the survey that has been undertaken for the purpose of this thesis believe that arbitration depends on the rules agreed to by the parties which may include an online hearing. The other half of the respondents were undecided on this issue. Half of the respondents who stated their opinions on this issue are OADR academics and the other half are OADR practitioners. OADR academics and OADR practitioners agree on this issue which suggests that a theoretical perspective based on academics' views, and practical experience and knowledge, which can be deduced from practitioners' views, support an online hearing in arbitration.³⁶⁰

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 this regard, respondent eight in the survey that has been undertaken for the purpose of this thesis pointed out that:

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.³⁶¹

³⁵⁷ 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.

³⁵⁸ [1963] 1 Lloyd's Rep. 214.

³⁵⁹ Ibid. 223.

³⁶⁰ OADR practitioner one, OADR practitioner four, OADR academic five, and OADR academic eight.

³⁶¹ OADR academic eight.

5.4.1.1. *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. 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.³⁶²

Some OADR providers, such as *Mediate-net*, require completing and submitting an electronic form, which includes questions about the efficiency of disputants' computers, such as modem speed, in order to conduct the OADR proceedings more successfully.³⁶³ Other OADR providers, such as *InternetNeutral*, have stated that they will reasonably adapt to the computer, internet, and software resources available to the parties.³⁶⁴ Other OADR providers, such as *Eneutral*, suggest names of providers of web-conferencing if parties do not have their own facilities.³⁶⁵

³⁶² Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 78.

³⁶³ <<http://www.mediate-net.org>>, last visited on the 1st of October 2003.

³⁶⁴ <<http://www.internetneutral.com>>, last visited on the 1st of October 2003.

³⁶⁵ <<http://www.eneutral.com>>, last visited on the 1st of October 2003.

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.³⁶⁶ In this regard, respondent three in the survey that has been undertaken for the purpose of this thesis noted that:

The use of new technologies such as the internet will not replace traditional forms of ADR, but it will be just an additional tool.³⁶⁷

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. In this regard, respondent one in the survey that has been undertaken for the purpose of this thesis said:

I am very optimistic about the future of Online Alternative Dispute Resolution, but I believe its utility will come from hybrid applications that marry face-to-face and online interactions.³⁶⁸

³⁶⁶ 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.

³⁶⁷ OADR academic three.

³⁶⁸ OADR practitioner one.

Some OADR providers address the fact that transition to online systems will be gradual. *Webdispute.com*, an OADR provider, provides parties with three separate forums for resolving disputes; e-mail hearing, telephone hearing, and in-person hearing.³⁶⁹ Similarly, the arbitral tribunal in *E-resolution*, an OADR provider, at its discretion or at the request of a party, authorised a hearing at a physical location.³⁷⁰ Equally, *OnlineResolution*, an OADR provider, focuses on a hybrid methods where face-to-face is combined with online tools to create a much more efficient overall process. *OnlineResolution* states clearly that:

A mediator could meet face to face with two geographically separated disputants for an initial meeting, then, move the discussion into an online environment for joint problem solving and agreement sharing, then, reconvenes face to face to get final buy in.³⁷¹

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 least. Indeed, the use of offline technologies entails the possibility to adapt or modify certain rules of OADR in view of rapidly changing technologies.³⁷²

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.

³⁶⁹ <<http://www.webdispute.com>>, last visited on the 1st of October 2003.

³⁷⁰ <<http://www.eresolution.ca>>, last visited on the 1st of October 2003.

³⁷¹ <<http://www.onlineresolution.com>>, last visited on the 1st of October 2003.

³⁷² 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

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.³⁷³

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 OADR sessions. Indeed, technological skill and equipment that affects ability to participate can create a power imbalance.³⁷⁴

³⁷³ Goldsmith, J., "Against Cyber-Anarchy", (1998) 65 *University of Chicago Law Review* 1229.

³⁷⁴ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 78.

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.³⁷⁵

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.³⁷⁶

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.³⁷⁷

Given the impossibility of dividing public and private law clearly illustrated by the discussion above, 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

³⁷⁵ Gordon, R., “The Electronic Personality and Digital Self”, [2001] *Dispute Resolution Journal* 17.

³⁷⁶ Article 3 (b) (iii) of the Rules for 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 2003.

³⁷⁷ 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.

not extend to awards rendered without minimal fair process protections, specifically, an appropriate notice. 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.³⁷⁸

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.³⁷⁹

5.5. Cost allocation in OADR schemes

Access to justice implies that when people do need help, there are effective solutions that are proportionate to the issues at stake. This might be problematic in cyberspace because internet disputes can be characterised as high volume/ low value disputes. Indeed, the possibility of small transactions is what makes the internet such an interesting medium for electronic commerce.³⁸⁰

³⁷⁸ Article 5(1) (b) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

³⁷⁹ Kessedjian, C., and Cahn, S., "Dispute Resolution Online", (1998) 32 *The International Lawyer* 977.

³⁸⁰ Perritt, H., "Dispute Resolution in Cyberspace: Demand for New Forms of ADR", (2000) 15 *Ohio State Journal of Dispute Resolution* 700.

The majority of the respondents in the survey that has been undertaken for the purpose of this thesis have indicated that courts are often an economically unreasonable medium to solve disputes arising out of cyberspace because the cost of court proceedings is likely to equal or exceed the amount of money at issue. The rest of the respondents were undecided on this issue. Some respondents who stated their opinions on this issue are OADR academics which suggest that a theoretical perspective based on academics' views confirms that courts are often an economically unreasonable medium to solve disputes arising out of cyberspace. But the majority of the respondents who stated their opinions on this issue are OADR practitioners who agree that courts are often an economically unreasonable medium to solve disputes arising out of cyberspace, which suggests that practical experience and knowledge, which can be deduced from practitioners' views, confirm the inadequacy of the court system in dealing with cyber disputes. However, it is important to bear in mind that by supporting such view, i.e. the inadequacy of the court system in dealing with cyber disputes, OADR practitioners will ensure the success of their OADR projects and their ability to generate income and profit.³⁸¹

As a general rule, a rational plaintiff will bring suit if and only if the expected judgement exceeds expected litigation costs. This poses the known problem of the "meritorious small claim defeated by the litigation expense threshold". This problem becomes clear in B-to-C internet transactions because those kinds of transactions are usually characterised by the fact that goods and services have low economic value compared to the cost of seeking judicial settlement, particularly in online auction disputes which concern small-ticket items. In fact, international private litigation over small value internet transactions generally does not make practical or economic sense. The following example might illustrate this point; if a European consumer is thinking of bringing a claim against an online U.S. merchant in a B-to-C internet transaction dispute, it would normally choose to bring suit in Europe, because under the European cost allocation system, the losing party would have to reimburse the winning party's litigation cost. But, in general, under the American rules, each party has to bear its own litigation costs. As a result, the consumer cannot bring a suit in the U.S., because it will have to bear its own litigation costs, which will typically exceed the expected

³⁸¹ OADR practitioner two, OADR academic three, OADR practitioner four, OADR practitioner six, and OADR academic eight.

judgement. However, the expected judgement will most likely not be enforceable in the U.S. because, in practice, the vast majority of online merchants' terms of use will establish an exclusive jurisdiction of the courts at the merchant's principal place of business, which is the U.S. in our example. And thus it will not be possible to bring suit in Europe too.³⁸²

The problem of meritorious small claims defeated by the litigation expense threshold is also clear on the trademark infringement on the internet. In this regard, WIPO has noted that there is a considerable disjunction between the cost of obtaining a domain name registration, which is relatively cheap, and the economic value of the damage that can be done as a result of such a registration, and the cost of remedying the situation through litigation.³⁸³

Cyber squatting cases, which is the term most frequently used to describe the deliberate, bad faith, abusive registration of a domain name in violation of rights in trademarks, typically end up costing trademark holders thousands of dollars in legal fees, thus, encouraging such practice since it is more likely that a famous mark holder will ransom its good name from the cyber-squatter, instead of litigating its rights in courts throughout the world. In this regard, Section 2 (b) of the U.S. Anti Cyber-squatting Consumer Protection Act (the ACPA) states:

Congress finds that the unauthorised registration or use of trademarks as internet domain names or other identifiers of online locations (commonly known as cyber-squatting)... impairs electronic commerce, which is important to the economy of the United States.³⁸⁴

WIPO, in its Final Report on the Management of Internet Domain Names and Addresses, has cited a study commissioned by the Association of European Trademark Owners, which found that 85 percent of those participating in the study

³⁸² Landes, W., "An Economic Analysis of the Courts", (1971) 14 *Journal of Law & Economics* 61. Gould, J., "The Economics of Legal Conflicts", (1973) 2 *Journal of Legal Studies* 279. Shavell, S., "Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of the Legal Costs", (1982) 11 *Journal of Legal Studies* 55.

³⁸³ WIPO, "The Management of Internet Names and Addresses: Intellectual Property Issues, Final Report of the WIPO Internet Domain Name Process", 30th of April 1999, available online at <<http://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

³⁸⁴ Section 2 (b) of the U.S. Anti Cyber-squatting Consumer Protection Act (ACPA), Public Law No. 106-113 (1999).

had experienced trademark infringement on the internet. 60 percent had negotiated for the purchase of their domain name through informal means.³⁸⁵ However, the purchase of a domain name through informal means is not always possible. There are firms conducting online auctions for the sale of attractive domain names, where domain names can be worth a lot of money.³⁸⁶

That said, OADR might be tried where the costs of litigation are likely to be wholly disproportionate to the amount at stake. Indeed, cost efficiency is undoubtedly one of the main incentives for OADR.

From this perspective, OADR system should not cost more than the value of the dispute at stake because the cost efficiencies will be a key to the viability of OADR mechanisms to work consistently and with quality. However, although cost should be a primary threshold issue of fairness in OADR, it must be clear that there is always the question of the “trade-off” between costs and maintaining fairness. Obviously, a system can have an elaborate procedure that is perceived to be very fair but very expensive and that is where there may be some “trade-off”. There is a real tension in terms of designing OADR procedural rules that ensure fairness while ensure cost-effectiveness at the same time.

In the current phase of OADR, the funding of the provider seems to be one of the major problems as regards independence and viability. Therefore, as in other areas of justice, great care needs to be taken to find effective funding of OADR since OADR mechanism must be adequately funded at a level sufficient to ensure that it is capable of fully meeting its obligations to the parties. Allocating costs to the parties is the most common way to fund the OADR process, and it is an important control mechanism in relation to the OADR procedures, and it has a clear implication on the independence of the OADR mechanism. There are three main approaches to allocate costs in OADR.

³⁸⁵ WIPO, “The Management of Internet Names and Addresses: Intellectual Property Issues, Final Report of the WIPO Internet Domain Name Process”, 30th of April 1999), available online at <<http://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

³⁸⁶ <<http://www.part.to/index.html>>, last visited on the 1st of October 2003, <<http://www.greatdomains.com>>, last visited on the 1st of October 2003.

First, OADR procedures might be available at a moderate cost because parties should have as low a barrier to entry with the dispute resolution process as possible in order to give them an incentive to participate. The idea of a moderate cost in OADR might be flawed because groundless actions, or actions designed to harass a party, would be encouraged. Moreover, charging parties adequate money to make a claim can make them feel that they have a stake in the outcome(s) of the process, so they will take the process more seriously. In actual fact, the cost pressures on disputants will imply that efficiency and impartiality of systems can improve. Furthermore, the moderate fee policy does not provide a filter for claims which more closely resemble complaints. This situation does not in any way approach good business practice for an OADR provider. And finally, OADR ventures face the same challenges of delivering a service at a profit that are faced by internet start-ups generally. Providing dispute resolution services, like providing any online services, requires investment and resources, something that is not easy to obtain. Obviously, there are costs related to system operation, administration, and fees for neutrals that cannot be neglected. Many OADR service providers have extremely limited resources. Their current equipment may be extremely basic. They may be unable to invest in new technology, even if long term gains outweighed short term costs. As a result, with moderate fees, the OADR provider might be inclined to economise on the quality of the programme. Clearly, one can expect that more for-profit OADR ventures will bring resources, skill, and creativity to the electronic marketplace of disputes.³⁸⁷ In this regard, respondent six in the survey that has been undertaken for the purpose of this thesis noted:

One of the hot issues for OADR in the following years is sustainability and the difficulty to launch an e-commerce service.³⁸⁸

Second, given that the internet has the beauty of lowering entrances into the market to almost nothing, there could be an additional small cost that can be built into the business plan for OADR schemes. Ultimately, resolving potential disputes could be viewed as part of the cost of doing business. Even though online buyers and sellers benefit substantially from having access to the system, it seems right that traders

³⁸⁷ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 276.

³⁸⁸ OADR practitioner six.

should underwrite the cost of OADR as they derive the greatest cost benefit from it. The benefits for a trader are delivered in terms of management time required to be dedicated to dispute handling. Moreover, such model will benefit e-sellers by increasing the credibility of their marketplaces because buyers are more comfortable, knowing that a viable redress is available to them. This will ultimately increase sales. Furthermore, the fact that goodwill is maintained between the trader and the customer can increase customer satisfaction and loyalty. The benefits of doing so are not only savings but profits from future sales by preserving customer satisfaction and loyalty.³⁸⁹

In this scenario, an e-commerce web site that is willing to pay to provide dispute resolution services to its users can enter into an affiliate relationship with an OADR provider. Under this model, the relationship is institutional, so disputants have to pay minimal costs to utilise the OADR process. Some OADR providers, such as *NovaForum*³⁹⁰ and *Webassured*,³⁹¹ apply this model. The *Better Business Bureau (BBB)* online reliability programme, which is the largest trust mark program on the internet, applies this model also, but with slight modification. The costs are not paid for by the individual business that a complaint has been filed against, but by all of the businesses that are members in the BBB program.³⁹²

However, the big question that comes to mind is the interrelationship between independence and cost in OADR. In cases where vested interests, such as business subscribers to OADR schemes, provide funding, services must be carefully designed so as to maximise independence and maintain impartiality. As a result, there should be in place mechanisms to establish impartiality and independence of OADR service providers as long as their systems are funded by businesses. The establishment of these mechanisms in practical terms is not feasible, so, this practise may not be the most appropriate approach in OADR proceedings.

³⁸⁹ De Zylva, M., "Effective Means of Resolving Distance Selling Disputes", (2001) 67 *Arbitration* 234.

³⁹⁰ <<http://www.novaForum.com>>, last visited on the 1st of October 2003.

³⁹¹ <<http://www.webassured.com>>, last visited on the 1st of October 2003.

³⁹² <<http://www.bbbonline.org>>, last visited on the 1st of October 2003.

Some respondents in the survey that has been undertaken for the purpose of this thesis believe that internet users' participation in the payment of OADR costs could be minimal, so the e-business will bear the cost. The majority of the respondents were undecided on this issue. All the respondents who stated their opinions on this issue are OADR academics which suggests that a theoretical perspective based on academics' views confirms that internet users' participation in the payment of OADR costs could be minimal, so the e-business will bear the cost.³⁹³ In this regard, respondent seven in the survey that has been undertaken for the purpose of this thesis, who is an OADR academic, noted:

Merchant's payment of OADR services can be useful provided that it does not impact impartial OADR services.³⁹⁴

And third, the online third party neutrals might be allowed to decide on the allocation of the ultimate OADR costs among the parties after consideration of all circumstances. In this model, the complainant could be required to pay the initial administration fees and any anticipated expenses, but, the third party neutral should have the discretion to decide on the allocation of the ultimate OADR costs among the parties after consideration of all circumstances of the case. For example, the neutral may decide that the online trader should refund the cost of OADR proceedings if the consumer prevails. Equally, this discretion can guarantee that abusive registrants of domain names will be increasingly wary of a potential loss. This position with regard to cost allocation in OADR was adopted by WIPO in its Final Report on the Management of Internet Domain Names and Addresses.³⁹⁵

That said, it must be stressed that in this approach, where third party neutrals can be allowed to decide on the allocation of the ultimate OADR costs among the parties after consideration of all circumstances, the anticipated costs in should not be high. Online dispute resolution services are cost-efficient as compared to offline litigation and traditional alternative dispute resolution systems because they are conducted online. Characteristics of online systems, such as paperless processes and easy

³⁹³ OADR academic five, OADR academic seven, and OADR academic eight.

³⁹⁴ OADR academic seven.

³⁹⁵ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

availability of the parties and third party neutrals without incurring travelling and accommodation expenses should enable lower costs in comparison with traditional offline resolution methods. It is likely that the costs will even decrease with the evolution of technology.

Such approach appears to possess more credibility than the previous two approaches. However, one must be careful with the assumption that OADR is cost efficient. OADR is not inevitably a low cost option, but it may offer cost savings in many cases. In other words, while face-to-face meetings include the cost of a venue and travel costs, OADR costs include line rental, software and equipment costs. Besides, as technology costs changes rapidly, the calculus of providing OADR changes rapidly too.

In this regard, half of the respondents of the survey that has been undertaken for the purpose of this thesis believe that, overall, early claims about cost savings should not be overstated for OADR. The other half of the respondents were undecided on this issue. Among the respondents who stated their opinions on this issue there is only one OADR practitioner which suggests that practical experience and knowledge, which can be deduced from practitioners' views, confirm that early claims about cost savings should not be overstated for OADR. But the rest of the respondents who stated their opinions on this issue are OADR academics, and not OADR practitioners, which suggests that a theoretical perspective based on academics' views confirms that early claims about cost savings should not be overstated for OADR. However, it is important to bear in mind that OADR practitioners would be reluctant to submit to the view that early claims about cost savings should not be overstated for OADR because such view might affect the success of their OADR projects and their ability to generate income and profit.³⁹⁶ Respondent eight of the survey that has been undertaken for the purpose of this thesis, who is an OADR academic, said:

Claiming on your insurance might be cheaper than OADR. Deciding to do nothing is often cheaper. Arbitration can be more expensive than going to the small claims court because you have to pay the arbitrator too. Again, it depends.³⁹⁷

³⁹⁶ OADR practitioner one, OADR academic five, OADR academic seven, and OADR academic eight.

³⁹⁷ OADR academic eight.

Moreover, in an online environment, loss of time often causes loss of opportunities and persons involved in electronic commerce or any type of online relationship will wish to resolve problems in the fastest possible way. Indeed, responses to internet disputes must reflect the speed at which the internet operates. For example, because of the speed at which trademark rights can be infringed over the internet, where transmissions can reach the other side of the globe in seconds, remedies that take months or years to develop will not offer viable solutions. This factor, in turn, compounds the difficulties faced by traditional authorities in offering adequate dispute resolution mechanisms.³⁹⁸ Consequently, given OADR is conducted online, it would be considerably faster than adjudication and traditional alternative dispute resolution systems, and, therefore, parties capture value through the speedy resolution of their claims. The majority of the respondents in the survey that has been undertaken for the purpose of this thesis have reached the same conclusion. The rest of the respondents were undecided on this issue. Some respondents who stated their opinions on this issue are OADR academics which suggest that a theoretical perspective based on academics' views confirms that parties capture value through the speedy resolution of their claims. But the majority of the respondents who stated their opinions on this issue are OADR practitioners which suggest that their opinions are based on their practical knowledge and experience that parties capture value through the speedy resolution of their claims. However, it is important to bear in mind that OADR practitioners put emphasise on speedy resolution of cyber disputes through OADR in order to enhance the trustworthiness of the OADR system which will ultimately generates income and profit to OADR practitioners.³⁹⁹

Furthermore, given the fact that internet disputes have the tendency to consume a great deal of time and effort due to their technical nature, OADR has the ability to provide a focused and limited procedure more than the court system. OADR allows the parties to prescribe, in the agreement, time limits on each of the various phases of

³⁹⁸ Bordone, R., "Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal", (1998) 3 *Harvard Negotiation Law Review* 180. Johnson, D., "Dispute Resolution in Cyberspace", (1994) 136 *New Jersey Law Journal* 10.

³⁹⁹ OADR practitioner one, OADR practitioner two, OADR academic three, OADR practitioner four, OADR practitioner six, OADR academic seven, and OADR academic eight.

the proceedings. Even more, it has been conceived that OADR can be accelerated if parties consent.⁴⁰⁰

Article 14 (a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), which utilises OADR, has indicated that if a requested party, duly invited to produce evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it. Article 14 (a) reads as follows:

In the event that a party, in the absence of special circumstances, does not comply with any of the time periods established by these rules or the panel, the panel shall proceed to a decision on the complaint.⁴⁰¹

Actually, one of the paramount considerations of ICANN, which utilises OADR, can be summarised as facilitating a time efficient and cost effective dispute resolution mechanism. According to Article 3 (a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), either party can initiate OADR proceedings at any time, which is more analogous to online users’ behaviour patterns. Correspondingly, the resolution of the dispute will be quicker. The Article reads as follows:

Any person or entity may initiate an administrative proceeding by submitting a complaint in accordance with the Policy and these Rules to any Provider approved by ICANN. (Due to capacity constraints or for other reasons, a Provider's ability to accept complaints may be suspended at times. In that event, the Provider shall refuse the submission. The person or entity may submit the complaint to another Provider.⁴⁰²

Also, Article 10 (c) has indicated unequivocally that OADR proceeding must be expeditious, and therefore the panels must not, absent the establishment of extraordinary circumstances, permit the parties to create a protracted proceeding. The Article reads as follows:

⁴⁰⁰ Blackman, S., and McNeill, R., “ADR in Commercial Intellectual Property Disputes”, (1998) 47 *American University Law Review* 1722.

⁴⁰¹ Article 14 (a) 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 2003.

⁴⁰² Ibid. Article 3 (a)

The Panel shall ensure that the administrative proceeding takes place with due expedition. It may, at the request of a Party or on its own motion, extend, in exceptional cases, a period of time fixed by these Rules or by the Panel.⁴⁰³

In the *WIPO Online Dispute Resolution Centre*, an OADR provider, it has been noticed that the time from the appointment of the panel in the *World Wrestling Federation Entertainment v. Michael Bosman*,⁴⁰⁴ to the issuance of the decision, was 16 days. Similarly, in *E-resolution*, a decision is usually reached within 45 to 60 days.⁴⁰⁵ Equally, *SquareTrade* settles most disputes within 10 to 14 days.⁴⁰⁶ All of which are incomparable to the time required to take a case to a court judgement or even to ADR.

However, one must be careful with the assumption that OADR is time efficient. Although OADR system should handle complaints in an expeditious manner, there should be reasonable time limits set for considering disputes, rendering decisions, and complying with decisions. If the parties were asked to submit or share documents or other evidence, there should be reasonable time limits set for that process too. In other words, although an OADR program must meet user expectations under internet time frames, care must be given to ensure that there is adequate time allowed to permit reasonable efforts to settle the dispute and to allow full participation by the parties.

Indeed, in searching for ways to speed the resolution of disputes in OADR, it must be kept in mind that appropriate solutions can only be devised if they take into account other factors which are themselves quite time and cost intensive, particularly, fairness of procedures and the protection of parties' rights to be heard properly.

It must be borne in mind also that delays in communication in OADR, by design or through management, may make it impossible to meet the time target for a decision in all cases. Consequently, it was stated in *Virtual Magistrate*, an OADR provider, that

⁴⁰³ Article 10 (c) 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 2003.

⁴⁰⁴ *World Wrestling Federation Entertainment v. Michael Bosman*, ICANN Case No. D99-0001, available online at <<http://arbiter.wipo.int/domains/decisions/html/1999/d1999-0001.html>>, last visited on the 1st of October 2003.

⁴⁰⁵ <<http://www.eresolution.ca>>, last visited on the 1st of October 2003.

⁴⁰⁶ <<http://www.squaretrade.com>>, last visited on the 1st of October 2003.

when necessary or appropriate to maintain fairness, the time limit may be extended by the neutral with or without the agreement of the parties. But by all means, when an OADR provider fails to meet the time limit for the rendering of an award, it must provide a written explanation for the delay.⁴⁰⁷

5.6. Data Protection in OADR proceedings

Data protection generally plays an important role in out-of-court dispute settlement processes. The parties may prefer to keep the content of the out-of-court dispute settlement proceedings confidential, or to have a report on the case published by reference to the result only. This implies greater control from the participant side on how his or her data will be utilised. Indeed, to the extent that ADR enables the settlement of private disputes and no adverse public interests are involved, ADR should allow for secrecy and confidentiality. It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Similarly, the courts have been very supportive of the confidentiality of mediation discussions.⁴⁰⁸

In mediation, the importance of confidentiality is often stressed as there is an intrinsic need for this. In order to achieve satisfactory results, mediation has to take place in a context in which the parties can communicate openly, without fear that their statements may be used against them outside the mediation.⁴⁰⁹ In this regard, respondent eight in the survey that has been undertaken for the purpose of this thesis said:

In mediation, the parties might prefer to make offers without prejudice to their rights and entitlements at arbitration or before the courts.⁴¹⁰

Whatever the advantages and attractions of OADR, data protection is a key issue to the development of the infrastructures located on the network of the networks (the

⁴⁰⁷ <<http://www.vmag.org/>>, last visited on the 1st of October 2003.

⁴⁰⁸ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1178.

⁴⁰⁹ Bevan, A., *Alternative Dispute Resolution: A Lawyer's Guide to Mediation and Other Forms of Dispute Resolution*, (Sweet & Maxwell, London, 1992) 31.

⁴¹⁰ OADR academic eight.

internet). It is beyond doubt, therefore, that online facilities which secure data protection must be used to conduct OADR proceedings.⁴¹¹

Generally speaking, the use of online facilities to conduct commerce causes some hesitancy because electronic commerce has raised the issue of online data protection. Indeed, there is considerable confusion about the use and effectiveness of online data protection. This issue has potentially conflicting implications in terms of striving for anonymity on one side and assurance of identity on the other. Put it simply, there may be uncertainty about whether people are who they say they are. In cyberspace, it is possible for one to assume many identities (pseudonyms), and to change one's identity by pressing a few keys, or to have no identity (anonymity).⁴¹² In this regard, the OECD has noted:

The internet's anonymity, mobility, and global reach, all worked to substantially increase the potential for harm because the identity and the actual physical location of the people behind it will generally be very hard to track.⁴¹³

It must be borne in mind that from an internet infrastructure stance, technology will not provide internet users with sufficient online data protection as the underlying technology that is used in the internet is inherently insecure with regard to data protection. The reason for this is that the emphasis placed on the design of the internet was on flexibility and durability, and not on data protection.⁴¹⁴

In a physical setting in ADR, most communications are oral and any written documents that do exist only circulate in a very small group of people. Moreover, any papers or notes kept by the neutral can be disposed of after the dispute is resolved. Furthermore, one might take steps to assure that there is only one copy of something

⁴¹¹ Davies, L., and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law* 423.

⁴¹² Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 81. Katsh, E., "The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace", available online at <<http://mantle.sbs.umass.edu/vmag/katsh.htm>>, last visited on the 1st of October 2003.

⁴¹³ OECD, "Consumer Protection in the Electronic Marketplace" DSTI/CP (98) 13/Final, available online at <[http://www.oilis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/\\$FILE/12E81082.DOC](http://www.oilis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/$FILE/12E81082.DOC)>, last visited on the 1st of October 2003.

⁴¹⁴ Davies, L., and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law* 423.

or that all existing copies of something are retrieved. The parties can therefore, from the context alone assume that sensible information is not communicated to third persons. In the online environment, however, the process of communication is such that it is sometimes difficult to even know when or how many copies are made.⁴¹⁵

That said, it should be pointed out that no communication method can provide for absolute data protection. This statement holds equally true for online as for offline communication in the sense that physical mail can be intercepted. But in the online world, such assessment might prove to be difficult due to the fast developments in data protection technology and the concomitant fast development in hacking technology.

The OECD has stated that it is no secret among computer professionals that any technical measure that can be used regarding data protection can be circumvented by another technology.⁴¹⁶ In this context, respondent eight in the survey that has been undertaken for the purpose of this thesis said:

Data privacy is not critical, and most participants are sophisticated enough to understand that its importance varies according to context. For example, it is not critical to a claimant that the respondent should not know their e-mail address, particularly, if they have already dealt online. Data protection and commercial privacy from third parties, hackers, and spammers will certainly give participants more confidence, but they are not critical.⁴¹⁷

Data protection is always a question of risk management which requires a careful assessment and balancing of risks with costs of implementing adequate level of data protection and complexity and user-friendliness. It goes without saying that making data in OADR systems totally protected would be expensive and this would adversely affect the cost-effectiveness of the OADR mechanism. As a result, the data protection in OADR systems should be designed in a manner which is proportional to the risk of

⁴¹⁵ Burk, D., "Jurisdiction in a World Without Borders", (1997) 1 *Virginia Journal of Law & Technology* 3.

⁴¹⁶ OECD, "Consumer Protection in the Electronic Marketplace", DSTI/CP (98) 13 Final, available online at [http://www.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/\\$FILE/12E81082.DOC](http://www.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/$FILE/12E81082.DOC), last visited on the 1st of October 2003.

⁴¹⁷ OADR academic eight.

disclosure.⁴¹⁸ In this regard, Article 17(1) of the EU Data Protection Directive states clearly that:

Data controllers must implement appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosures or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of data protected.⁴¹⁹

At present, many OADR providers state that the data provided by the parties is secured, but very few specify how they will guarantee such security. For example, *E-mediator*, an OADR provider, has indicated that there should be a clear notice that all electronic communications generated from OADR shall not be permitted to be distributed to a non-participant at any time without the express permission of all participants. In the event of an inadvertent distribution, all affected participants should be promptly notified.⁴²⁰ Also, *Onlinemediators*, another OADR provider, has emphasised the importance of online data protection in particular by stating that the mediator shall only disclose specific offers and ideas from one participant to another as the mediator is expressly authorised to share. If it is unclear whether a mediator is authorised to share information, the mediator shall request this permission from a participant and only share information with the other participant as is authorised.⁴²¹ However, neither “E-mediator” nor “Onlinemediators” make any warranties as to the security of information passing through their web site.

If an OADR provider states that the collected information is treated confidentially, this does not necessarily imply that it cannot be transmitted or accessed accidentally by third parties. It is also easy to make mistakes using technology. For example, an online neutral could accidentally send a copy of an e-mail message to a third party

⁴¹⁸ De Zylva, M., “Business Process Models and Technical Requirements for Online Dispute Resolution”, a paper presented at the European Commission workshop, Ispra, Italy, 8th and 9th of March 2001.

⁴¹⁹ Article 17 of the EU Data Protection Directive (95/46/EC) O.J.L. 281.

⁴²⁰ <<http://www.consensusmediation.co.uk>>, last visited on the 1st of October 2003.

⁴²¹ <<http://www.onlinemediators.com>>, last visited on the 1st of October 2003.

who is unconnected to the case.⁴²² In this regard, the *Online Ombuds Office*, an OADR provider, states clearly that:

The Online Ombuds Office cannot and does not make any promise as to the security or privacy afforded to information while it is in transit over the internet, and users are hereby advised that the internet is not a secure network. Once the information is under the control of the Online Ombuds Office, we will make reasonable efforts to maintain the integrity of the information, including maintaining access to the information and, where agreed, confidentiality of the information, under the terms of the agreement.⁴²³

The majority of the respondents in the survey that has been undertaken for the purpose of this thesis believe that the promise of confidentiality, a core principle in dispute resolution practices, is challenged by the very nature of online technologies where information can be accessed despite the assurances of the OADR providers. The rest of the respondents were undecided on this issue. Some respondents who stated their opinions on this issue are OADR academics which suggest that a theoretical perspective based on academics' views confirms that the promise of confidentiality, a core principle in dispute resolution practices, is challenged by the very nature of online technologies where information can be accessed despite the assurances of the OADR providers. But the majority of the respondents who stated their opinions on this issue are OADR practitioners, which suggest that their opinions are based on their practical knowledge and experience with the issue of confidentiality in OADR schemes.⁴²⁴

It must be stressed that technological developments are likely to improve levels of data protection, both in relation to e-commerce and to OADR process, and thus enhancing trust, however, one must admit that advances in such technologies may only allayed the concern of data protection. In other words, the time may never come when internet users can be guaranteed against the unscrupulous access or alteration of

⁴²² Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 160.

⁴²³ <<http://www.ombuds.org>>, last visited on the 1st of October 2003.

⁴²⁴ OADR practitioner one, OADR practitioner two, OADR practitioner four, OADR academic five, OADR practitioner six, and OADR academic eight.

their data provided online in any form or shape.⁴²⁵ In this regard, Article 18 of *E-resolution*, an OADR provider, indicates that:

Computerised documents filed by the parties must be accompanied by reliable guarantees, the sufficiency of which shall be determined by the arbitral tribunal. Such guarantees of sufficient reliability must include a systematic document input by a responsible person, the establishment of reasonable data protection measures, and a reasonable maintenance of the operating system. But all of these guarantees are not to be considered a minimum data protection standard.⁴²⁶

From this perspective, it is essential for OADR providers to be highly sensitive to the online data protection problem and must recognise that the risks of lack of security with regard to data protection are implied in the technology they use, and, therefore, they must take the necessary measures to reduce such risks to an acceptable minimum. They need also to consider the data protection aspect of using online technology, and to take the appropriate preventative steps, and to determine the suitability of the mode of communication used, and obtain suitable professional advice, and bear in mind that all communications must keep track of the sender, origin, content of the message, time and date of sending, and receipt of the notice. In this regard, respondent seven in the survey that has been undertaken for the purpose of this thesis noted:

Data protection is important for all online activities, but governments and consumers should be aware of the track record of merchants to aid consumer choice and to inform government fraud actions.⁴²⁷

5.7. The authenticity of OADR proceedings

Electronic authentication can be understood to encompass any method of verifying some piece of information in an electronic environment, such as, the countless pieces of information that someone may want to be able to confirm in the electronic world and the identity of the author of a text or sender of a digital message.⁴²⁸

⁴²⁵ Brown, H., and Marriott, A., *ADR principles and practice*, (2nd edition, Sweet & Maxwell, London, 1999) 17-014.

⁴²⁶ <<http://www.eresolution.ca>>, last visited on the 1st of October 2003.

⁴²⁷ OADR academic seven.

⁴²⁸ Carblanc, A., "Privacy Protection and Redress in the Online Environment: Fostering Effective ADR", a paper presented at the 22nd International Conference on Privacy and Personal Data Protection, Venice, Italy, 28th and 30th of September 2000.

In the current phase of cyberspace development, there is relative ambiguity because cyberspace is an environment in which copying is easier but guaranteeing the authenticity of messages is harder. This is due to the fact that communication takes place through constant copying in cyberspace. In order to transfer data over the internet, there are numerous temporary copies made along the way. Indeed, all basic computer functions, and therefore all computer-mediated communication, rely on reproducing information in some manner or another. This is inherent to the nature of the internet. This ultimately does not guarantee complete authenticity.⁴²⁹

However, in order to be consistent with fair process rights, OADR process must guarantee the non-repudiation and integrity of the information transferred during the proceedings in order to ensure that the contents of a record have not been altered, and to ensure that a file or program has been entirely transmitted, and to ensure that a data is really the data that it is claimed to be. Moreover, the OADR provider must be convinced of the identity of the author of the messages that are sent during the procedures and the parties must ensure that the third party neutral is sanctioned for his or her function in the process. For instance, one party may alter the submissions of the other party before they reach the online third party neutral, or perhaps, impersonate the other party or the third party neutral and make submissions in his place. Furthermore, OADR providers must protect their site storage system (database and web server) as well as each individual record and its related data against intrusions, virus infections, or disk crashes. Indeed it is not only necessary to ensure that messages are protected while being transmitted over the internet, it is equally important to ensure that they are sent to and from a trusted computer base. Information must be stored using a technology which permits long-lasting compatibility and which excludes any serious risk of manipulation of the stored data. Besides, when gathering evidence from electronic repositories, OADR providers must ascertain that the contents of the repository have remained unchanged while they were stored, and whether or not they were entirely transmitted, and that the information regarding evidence that has been sent to the OADR provider has been protected

⁴²⁹ Chissick, M., and Kelman, A., *Electronic Commerce Law and Practice*, (3rd edition, Sweet & Maxwell, London, 2002) 321. Burk, D., "Jurisdiction in a World Without Borders", (1997) 1 *Virginia Journal of Law & Technology* 3. Davies, L., and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law* 426.

against third parties. And finally, after the dispute resolution procedures, the outcome(s) have to be notified to the parties without them being able to repudiate the notification. The question arises of who should send an electronic award to the authority in charge of recognition and enforcement. If it is to be sent by a certain party, there is a risk of manipulation because the document has been in his own electronic storage. All of these issues are essential for the legitimacy and legal effectiveness of OADR because if a party has its own submissions manipulated, OADR proceedings no longer constitute a fair trial.⁴³⁰

From this perspective, it is important to provide an electronic authentication which guarantees the validity of virtual agreements, that is, not only the contractual clauses defining recourse to OADR, but also the contracts in which the parties decide to submit an existing dispute to OADR. Indeed, electronic authentication will enhance trustworthiness in the OADR process in general and electronic arbitration in particular, where the authenticity of the electronic agreement, the authenticity of the electronic award, and the use of electronic signatures are evidently recurrent issues.

The history of the requirements of form for documentary transactions (primarily writing and signatures) suggests that the main reason why the law required them was for authentication purposes. These requirements become necessary when a degree of formality is desired in a specific operation that is seen as important, such as, arbitration. Indeed, because the award modifies rights and obligations of the parties, and even may alter their property, the degree of reliability required should be the highest.⁴³¹

While national arbitration laws have features that are specific to each country, there is one area on which there seems to be unanimous agreement, namely, the arbitration agreement, the award, and the signature must be in a written form. Written forms are usually seen as formal forms. That explains why there are many national and international arbitration rules that impose writing. This might be one explanation, but there is another possible explanation too. Historically, the integration of new

⁴³⁰ Brown, H., and Marriott, A., *ADR principles and practice*, (2nd edition, Sweet & Maxwell, London, 1999) 17-014. Reed, C., "Legally Binding Electronic Documents: Digital Signatures and Authentication", (2001) 35 *International Lawyer* 89.

⁴³¹ Reed, C., Op. Cit. 90.

technologies for arbitration produced difficulties concerning the formulation of such documents. This is due to the fact that written form of communication was the usual technique for preparing arbitration documents before the advent of other forms of communication, such as faxes. Therefore, many of the said rules about written forms of arbitration agreements and awards and signatures were drawn up when there was not really any other mode of communication.⁴³²

The rules about written forms of arbitration agreements and awards and signatures becomes particularly obvious with the advent of the internet because one may argue that electronic arbitration is not arbitration in the sense of the New York Convention 1958 because the Convention contains certain requirements, such as evidence in writing of an arbitral award and an agreement to arbitrate, which are difficult to be achieved in electronic arbitration. In other words, the result of the electronic arbitration procedure is not an executorial writ as defined by the New York Convention 1958 and thus it may be a source of legal uncertainty. In this respect, Article 4(1) of the New York Convention 1958 states clearly:

To obtain the recognition and enforcement mentioned in the preceding Article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement referred to in Article II, or a duly certified copy thereof.⁴³³

The following parts of this chapter will deal separately with the issue of electronic arbitration agreement and electronic arbitration award on the one hand, and the issue of signatures in OADR proceedings on the other hand.

5.7.1. Electronic Arbitration Agreement and Electronic Arbitration Award

Insisting on a degree of formality and fixation on paper would inevitably impede the development of electronic arbitration. As a result, the requirement that the arbitration agreement and arbitration award must be in writing needs to be revised in cyberspace. This requires an adoption of a broad vision of the notion of writing by the inclusion of computerised documents in the category of writings.

⁴³² Van Den Berg, A., *The New York Arbitration Convention 1958: Towards a Uniform Judicial Interpretation*, (Kluwer Law and Taxation Publishers, London, 1981) 250.

⁴³³ Article 4 (1) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

As we have seen before, in electronic arbitration, the problem of the restrictive approach that views written forms as formal forms is based on the fact that any electronic document is just a copy, and this bears all the legal consequences of relying on a copy. Accordingly, it can be said that the problem of original documents as compared to copies is presenting a major problem in electronic arbitration.

It is useful to remind the reader that this problem is not unique to electronic arbitration since the legal framework governing the validity of electronic contracts in general is not fully developed throughout the world. Nevertheless, although one must confess that the notion of writing in contracts generally and arbitration in particular is viewed with a certain restriction, the adoption of a broad vision of the notion of writing by the inclusion of computerised documents in the category of writings is not very difficult to be established.

Recent rules concerning arbitration and electronic commerce enable us to observe that there has been an attenuation of the requirements for writings at national, European, and international level. At a national level, the Arbitration Act 1996 permits the use of electronic documents. Section 5 of the Act gives an expanding meaning of agreement in writing by providing that an agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties or by a third party. This means that an electronic agreement to arbitrate will be regarded as being an agreement in writing. The way writing is defined in the Act has such a wide scope that electronic media can easily be incorporated into the concept of writing. Apparently, there is a degree of apparent modernity in the Act in favour of admitting alternative forms of writing.⁴³⁴ Section 5 of the Act reads as follows:

(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions "agreement", "agree" and "agreed" shall be construed accordingly. (2) there is an agreement in writing (a) if the agreement is made in writing (whether or not it is signed by the parties), (b) if the agreement is made by exchange in communications in writing or (c) if the agreement is evidenced in writing (3) where the parties agree otherwise than in writing by reference to terms which

⁴³⁴ Mustill, M., and Boyd, S., *Commercial Arbitration*, (Butterworths, London, 2001) 260. Harris, B., Planterose, R., and Tecks, J., *The Arbitration Act 1996: A Commentary*, (Blackwell science Limited, London, 1996) 59.

are in writing, they make an agreement in writing (4) an agreement is evidenced in writing if an agreement is made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement (5) an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement other than in writing is alleged by one party against the other party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged (6) reference in this part to anything being written or in writing includes its being recorded by any means.⁴³⁵

At a European level, Article 9(1) of the EU Electronic Commerce Directive dictates that:

Member states shall ensure that their legal system allows contracts to be concluded by electronic means. Member states shall in particular ensure that the legal requirements applicable to contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of being made by electronic means.⁴³⁶

More specifically, the wording of Article 17(1) of the EU Electronic Commerce Directive may result in changes to member state law removing legal uncertainties on electronic arbitration. Article 17 (1) reads as follows:

Member states law shall not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.⁴³⁷

At an international level, Article 8 of the UNCITRAL Model Law on Electronic Commerce states that where the law requires information to be presented or retained in its original form, that requirement is met by a data message, if there exists a reliable assurance as to the integrity of the information from the time when it was first generated, in its final form, as a data message, and where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented. Apparently, the Article states the criteria for assessing integrity and the standard of reliability. The Article reads as follows:

⁴³⁵ Section 5(6) of the Arbitration Act 1996.

⁴³⁶ Article 9 (1) of the Directive of the European Parliament and of the Council on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market, (2000/31/EC) O.J.L. 178.

⁴³⁷ Ibid. Article 17 (1).

(a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and (b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.⁴³⁸

Similarly, Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration stated that a decisive element in writing is visual perception and physical reproducibility. Obviously, this is true only if the electronic agreement or the electronic award are not just displayed on the screen, but can be permanently stored or printed out. The Article reads as follows:

The arbitration agreement shall be in writing. "Writing" includes any form that provides a tangible record of the agreement or is otherwise accessible as a data message so as to be useable for subsequent reference.⁴³⁹

Equally, Article 3 (2) of the International Chamber of Commerce Rules of Conciliation and Arbitration implicitly enables the complainant to use electronic means to file its complaint before the International Chamber of Commerce. The Article recognises the potential problem created by the form requirement if such a requirement is narrowly interpreted. The Article widens and clarifies the definition of written form by stating the following:

All notifications or communications from the secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provide a record of the sending thereof.⁴⁴⁰

In actual fact, given that contracts can be made electronically, formal contracts are not in contradiction with electronic contracts since both of them are based on the consent

⁴³⁸ Article 8 of the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), available online at <<http://www.un.or.at/uncitral/en-index.htm>>, last visited on the 1st of October 2003.

⁴³⁹ Articles 7(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985), available online at

<<http://www.uncitral.org/en-index.htm>>, last visited on the 1st of October 2003.

⁴⁴⁰ Article 3 (2) of the International Chamber of Commerce Rules of Conciliation and Arbitration, available online at <<http://www.iccwbo.org/court/english/arbitration/rules.asp>>, last visited on the 1st of October 2003.

of parties. The necessary logical result would be that formal arbitration is not in contradiction with electronic arbitration since both of them are based on the consent of parties.⁴⁴¹

The traditional means of expressing consent to arbitrate is through a written arbitration agreement or an arbitration provision in a broader contractual document. Nevertheless, there is little doubt that consent to arbitrate, if sufficiently explicit, can be expressed entirely through electronic means, i.e., through the clicking of a button indicating consent, or if the e-arbitration agreement concluded with a statement, such as, "Please type your first and last name in the space provided if you intend to submit your dispute to final and binding arbitration". In both situations, it would be a clear indication of parties' consent to arbitrate.

Any form for agreement to arbitrate should not be as important as the proof of the consent of the parties is sufficient. This means that in effect there has been a triumph of substance over form because as long as there is an evidence of an agreement to arbitrate, the form in which the agreement is recorded is immaterial.

That said, from a practical perspective, online arbitration may not constitute a very large obstacle since it can still result in a paper agreement and a paper award. It is probably not that burdensome if the online arbitrator sends a paper version of the electronic agreement and electronic award to the parties.⁴⁴²

5.7.2. Signatures in OADR Proceedings

Electronic signatures are codes that are embedded in a message that can be employed to verify that a message was sent by someone in order to ensure confidentiality, integrity, authentication, and non-repudiation. In this context, an electronic signature can play an important part since it guarantees the recipient that the message he or she received can come from only one person, and that no one other than the signatory has access to the digital signature without the signatory's consent or negligence, and that

⁴⁴¹ Redfern, A., and Hunter, M., *Law and Practice of International Commercial Arbitration*, (3rd edition, Sweet & Maxwell, London, 1999) 142.

⁴⁴² Arsic, J., "International Commercial Arbitration on the Internet: Has the Future Come Too Early", (1997) 14 *Journal of International Arbitration* 217. Schneider, M., and Kuner, C., "Dispute Resolution in International Electronic Commerce", (1997) 14 *Journal of International Arbitration* 24.

the signatory has actually sent exactly the message received (i.e. that there has been no forgery in the course of transmission).⁴⁴³

Traditionally, signature is an indispensable element in both the arbitration agreement between the parties and the award by the arbitrator(s). In this regard, Ven Den Berg, one of the leading authors on New York Convention, has said:

The authentication of a document is the formality by which the signature thereon is attested to be genuine.⁴⁴⁴

At present, although there is a trend towards greater computer support in the arbitration proceedings, paperless systems are still hampered by established rules that require manually signed paper forms. However, modern digital communications has become such a widespread method of transmitting documents that a written signature requirement is now meaningless.

In contrast with writings, signatures present relatively few difficulties and therefore they are better fitted to new technologies than writing. This is due to the following two reasons. First, generally, signatures are not directly related to the paper medium. Signatures' foundations, mainly authentication and the expression of consent, already existed before paper became the traditional way to conduct business. Second, as compared to the authenticity of the electronic award and the electronic agreement, the notion of signing is not viewed with a certain restriction. For example, Article 7 (1) of the UNCITRAL Model Law on Electronic Commerce provides that a data message meets the legal requirement of signature if:

A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and 2) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in light of all the circumstances, including any relevant agreement.⁴⁴⁵

⁴⁴³ Froomkin, M., "The Essential Role of Trusted Third Parties in Electronic Commerce", (1996) 75 *Oregon Law Review* 51.

⁴⁴⁴ Van Den Berg, A., *The New York Arbitration Convention 1958: Towards a Uniform Judicial Interpretation*, (Kluwer Law and Taxation Publishers, London, 1981) 251.

⁴⁴⁵ Article 7 (1) of the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), available online at <<http://www.uncitral.org/en-index.htm>>, last visited on the 1st of October 2003.

Remarkably, the EU Directive on Digital Signatures has provided an adequate tool to achieve online security by stating that digital signatures and digital records have the same legal validity as written documents. Apparently, the intention behind the Directive is to promote user trust and confidence in authentication devices. Article 5 (2) of the Directive provides, as a general rule, that a signature shall not be denied legal effect, validity, or enforceability solely because it is in electronic form. Article 5 (2) reads as follows:

Member states shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form, or not based upon a qualified certificate, or not based upon a qualified certificate issued by an accredited certification service provider, or not created by a secure signature-creation service.⁴⁴⁶

In England, section 7 of the Electronic Communications Act 2000 implemented the Electronic Signatures Directive. Article 7 (1) of the Electronic Communications Act 2000 provides that:

In any legal proceedings, an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data...shall be admissible in evidence in relation to any question as the authenticity of the communication or data or as to the integrity of the communication or data.⁴⁴⁷

Article 2(2) of the New York Convention 1958 requires that any arbitration agreement must be included in a contract duly signed or contained in an exchange of letters or telegrams. The Article reads as follows:

The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.⁴⁴⁸

The exchange of telegrams was added in 1958 to make sure that arbitration could be agreed upon by using the most modern means of communication. The term "telegram" could be interpreted to include other modern means of

⁴⁴⁶ Article 5 (2) of the Directive of the European Parliament and of the Council on a Community Framework for Electronic Signatures (99/93/EC) O.J.L. 13.

⁴⁴⁷ Section 7 (1) of the Electronic Communications Act 2000.

⁴⁴⁸ Article 2 (2) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

telecommunications. Web site communications can be seen as the modern functional equivalent of traditional telegrams. Indeed in electronic arbitration, an exchange of information certainly occurs in an arbitration web site, which can be equated to an exchange of telegrams, and which is enough to find the parties' consent, provided that the portion of the offer containing "submit" or "transmit" or "accept" function clearly and conspicuously referred to the existence of an arbitration clause. Indeed, a flexible interpretation of the New York Convention 1958 would lead to the conclusion that online arbitration agreements are to be enforced under the convention.⁴⁴⁹

That said, from a practical perspective, online arbitration may not constitute a very large obstacle since it can still result in a paper signature. It is probably not that burdensome if the online arbitrator sends a paper version of the electronic agreement and electronic award to the parties in order to sign them.⁴⁵⁰

5.8. Customs in OADR Schemes

Any space is not simply a physical location but a cultural environment with embedded norms, values and customs. Customs, in particular, whatever their source and however they had been transformed could bind. In this regard, David Campbell and Sol Picciotto, two leading authors on commercial law, argue that the law must not be seen as:

Fixed rules directly governing behaviour, but as involving uncertain and contested processes of interpretation in the application of principles of fairness and justice, mediated by specialist professionals, but also interacting with and influenced by informal normative expectations and social practice of relevant social groups and communities.⁴⁵¹

In the same context, Roy Goode, a leading author on commercial law, advised that:

⁴⁴⁹ Schellekens, M., "Online Arbitration and E-commerce", (2002) 9 *Electronic Communications Law Review* 120. Hill, R., "Online Arbitration: Issues and Solutions", (1999) 15 *International Arbitration* 199.

⁴⁵⁰ Arsic, J., "International Commercial Arbitration on the Internet: Has the Future Come Too Early", (1997) 14 *Journal of International Arbitration* 217. Schneider, M., and Kuner, C., "Dispute Resolution in International Electronic Commerce", (1997) 14 *Journal of International Arbitration* 24.

⁴⁵¹ Campbell, D., and Picciotto, S., "Exploring the Interaction between Law and Economics: The Limits of Formalism", (1998) 18 *Legal Studies* 251 at 259.

The law should be brought into harmony with the legitimate needs of commerce by wholly fashioning the law to the needs of market interest.⁴⁵²

Generally speaking, arbitration is an area of law in which trade practice and community customs come into play as standards of legal conduct. It is important to notice here that English arbitration law, for instance, is not codified, and the bulk of English arbitration law consists of principles and rules developed by the common law, together with mercantile and arbitral usage. As a general rule, in England, only the legislator and state appointed courts make, find or declare law, and, therefore, arbitrators must strictly apply English law and may not, in principle, create law. But the question which has occasioned much debate is the management of situations that demand legal innovations, such as reference to common rule of practice in a given trade in a foreign country, by an arbitrator sitting in England.⁴⁵³

An interesting development happened in the introduction of Arbitration Act 1996, which is the acceptance of arbitrators who create law or depart from decided English authority. In essence, the Arbitration Act 1996 provides that, although successful commercial arbitration occurs in a context where arbitrators are bound to a known set of rules, this is not always the case for arbitration to be successful.⁴⁵⁴ In this regard, section 46 (1) (b) of the Act provides:

The arbitral tribunal shall decide the dispute if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.⁴⁵⁵

It has been argued that this section can be construed in favour of the notion of amiable composition because it means that the parties want their dispute decided not under a recognised system of law but under what are often referred to as equity clauses, which are not uncommon in international commercial contracts.⁴⁵⁶

⁴⁵² Goode, R., *Commercial Law in the Next Millennium*, (Sweet & Maxwell, London, 1998) 57.

⁴⁵³ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1181.

⁴⁵⁴ Mustill, M., and Boyd, S., *Commercial Arbitration*, (Butterworths, London, 2001) 326. Harris, B., Planterose, R., and Tecks, J., *The Arbitration Act 1996: A Commentary*, (Blackwell science Limited, London, 1996) 185. Merkin, R., *Arbitration Act 1996: An Annotated Guide*, (LLP Limited, London, 1996) 75.

⁴⁵⁵ Section 46 (1) (b) of the Arbitration Act 1996.

⁴⁵⁶ Hong Lin Yu, "Five Years on: A Review of the English Arbitration Act 1996", (2002) 19 *Journal of International Arbitration* 223.

Arbitrators, in fact, need not apply the law at all. Empirical studies have long demonstrated that arbitrators often do not apply the law. Instead, arbitrators apply the unwritten trade custom applicable in a particular community.⁴⁵⁷

Lord Justice Mustill has argued that if arbitration agreement appears insufficiently explicit to furnish a direct statement of the parties' rights, duties, powers, and liberties, then the arbitrators will construe it and fill the gaps in it by recourse to their own knowledge of how commerce works in practice, and of how commercial men in the relevant field express themselves. Lord Justice Mustill said in particular:

What is important is that the arbitrator keeps constantly in mind that he is concerned with international commerce, with all the breadth of horizon, flexibility, and practicability of approach which that demands.⁴⁵⁸

In the online world, cyberspace is viewed as a culture with values, norms, customs, and expectations about acquiring, exchanging, using, and processing information. Customs, in particular, are developing in cyberspace as they might in any community, and rapid growth in computer communications suggests that there may be a great many such customs before long. Although customs in cyberspace differ from those we experience in the real world, since they have developed within virtual communities, they can play a vital role as an authoritative source of law in cyberspace.⁴⁵⁹

Bearing this in mind, online third party neutrals can evaluate cases on the basis of norms and customs in cyberspace. It is expected ultimately that OADR practices will function in the shadow of internet customs and norms. It is even argued that if online third party neutrals are not familiar with cyberspace, this, in turn, will undermine the legitimacy of the OADR system.⁴⁶⁰

OADR is a response to the disputes that are taking place online and it is also a use of recourses that are becoming available in cyberspace. Its nature, therefore, will reflect

⁴⁵⁷ Thornburg, E., "Going Private: Technology, Due Process, and Internet Dispute Resolution", (2000) 34 *University of California Law Review* 216.

⁴⁵⁸ Mustill, M., *The New Lex Mercatoria: The First Twenty-Five Years*, in Marten, B., and Brownlie, I., *Liber Amicorum for the Rt. Hon. Lord Wilberforce*, (Clarendon Press, Oxford, 1987) 182.

⁴⁵⁹ Hardy, I., "The Proper Legal Regime for Cyberspace", (1994) 55 *University of Pittsburgh Law Review* 1010.

⁴⁶⁰ Bordone, R., "Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal", (1998) 3 *Harvard Negotiation Law Review* 203.

various qualities and features of the online environment. By reflecting developing customs in cyberspace and accounting for both the nature of the internet, and the evolving technology, without stifling either one, OADR will prove to be a valuable tool for dispute settlement in cyberspace.⁴⁶¹ In this regard, Article 17(2) of *E-resolution*, an OADR provider, has provided that, in all cases, the arbitral tribunal is to take into account prevailing cyberspace practices.⁴⁶²

In the context of cyberspace customs, cultural differences in OADR schemes and linguistic differences in OADR schemes are two important issues that need to be analysed. The following parts of the chapter will deal with these two issues respectively.

5.8.1. Cultural Differences in OADR Schemes

A basic principle of dispute resolution theory is that people bring their cultural assumptions as a naturalistic mindset applied to any dispute resolution process. These assumptions are beliefs about the nature of life, relationships, justice, and conflict. However, in any dispute resolution process, divergent cultural assumptions about conflict may cause one or both disputants to experience a sense of discomfort, uneasiness, or misunderstanding, and even offence, allowing tensions to further escalate and so causing the failure of the dispute resolution process. For instance, in individualistic societies, conflict is seen as a necessary result of individuals establishing their place in society. A complaint is seen as a legitimate act. Therefore, individuals are prepared to voice their complaints. By contrast, in collectivist societies authorities are respected and individuals are used to subordinate their needs to those of the group. In such a society, the consumer, for instance, may view a merchant as the more powerful person against whom a complaint would be futile.⁴⁶³

⁴⁶¹ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 19. Casey, E., "ADR in Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation", (1996) 12 *Ohio State Journal of Dispute Resolution* 193.

⁴⁶² <<http://www.eresolution.ca>>, last visited on the 1st of October 2003.

⁴⁶³ Femenia, N., "ODR and the Global Management of Customers' Complaints: How Could ODR Techniques Be Responsive to Different Social and Cultural Environments", a paper presented at the Joint Conference of the OECD, HCOPIIL and ICC, the Hague, the Netherlands, 12th of December 2000.

This cultural difference is intensified on the internet due to its global nature. It has been stated that if geographical borders no longer exist in cyberspace, they would be replaced by cultural frontiers. Indeed, behind computer screens, there are people of all nationalities, all ethnic cultural groups, social classes and professions, of all religions and political convictions, of all ages and life-styles. This illustrates how challenging the global online environment in its sociological dimension. From this perspective, in a platform for electronic commerce, like the internet, differences in cultures can quickly lead to misunderstandings and disputes.⁴⁶⁴

Such cultural differences will indubitably affect the use and implementation of OADR. Thus, treating cross-border cultural issues will be an enormous challenge for the construction of an effective OADR programs. In this regard, it has been argued that the truly ground-breaking work in OADR will be in finding ways to address cultural differences and to foster understanding across the cultural barriers.⁴⁶⁵

From this perspective, one can argue that one of the main duties of the online third party neutrals is to bridge cultural differences and facilitate communication between the parties. As a result, given the global and open nature of the internet, online third party neutrals should give due respect to all potential customers whatever their race, nationality, gender, age, sexual orientation or religious belief.

OADR providers should address and seek appropriate solutions to the possibility of significant cultural differences between disputants. Such differences can undermine the dispute resolution process if not properly understood and taken into account. Significantly, it is the knowledge of disputants, as much as it is the knowledge about OADR techniques that might guarantee a workable OADR system.

Nevertheless, the majority of the respondents in the survey that has been undertaken for the purpose of this thesis believe that at present, only few OADR providers have given sufficient attention to the problem of cultural differences. The rest of the

⁴⁶⁴ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 235.

⁴⁶⁵ Schneider, M., and Kuner, C., "Dispute Resolution in International Electronic Commerce", (1997) 14 *Journal of International Arbitration* 11.

respondents were undecided on this issue. Some respondents who stated their opinions on this issue are OADR academics which suggest that a theoretical perspective based on academics' views confirms that cultural differences have not been addressed adequately in OADR schemes. But the majority of the respondents who stated their opinions on this issue are OADR practitioners, which suggest that their opinions are based on their practical experience and knowledge of the lack of sufficient attention to the problem of cultural differences in OADR schemes.⁴⁶⁶

In actual fact, an OADR system has the potential to be one of the first truly international systems organised to manage cultural differences while providing a global dispute resolution mechanism. One measure that can be taken to accomplish this goal is to ensure that OADR officers appointed to deal with cross-cultural disputes understand both cultures. However, the accomplishment of this task might not be easy due partly to the fact that physical cues may be missing in OADR process. Face to face contact makes people willing to share information because most people feel they can trust what they see on the other side's face. Moreover, lack of immediacy and different time zones promote weaker connection and perhaps less interactivity. Consequently, the human imagination has to provide the missing elements of the interaction. From this perspective, it has been argued that OADR neutrals should spend time in building rapport between parties.⁴⁶⁷

Nevertheless, the majority of the respondents in the survey that has been undertaken for the purpose of this thesis show that many of the current OADR models do not put a priority on developing rapport between participants in OADR. The rest of the respondents were undecided on this issue. Some respondents who stated their opinions on this issue are OADR academics which suggest that a theoretical perspective based on academics' views confirms that there is a need to develop rapport between participants in OADR schemes. But the majority of the respondents who stated their opinions on this issue are OADR practitioners, which suggest that

⁴⁶⁶ OADR practitioner one, OADR practitioner two, OADR practitioner four, OADR academic five, OADR practitioner six, and OADR academic seven.

⁴⁶⁷ Gordon, R., "The Electronic Personality and Digital Self", [2001] *Dispute Resolution Journal* 17. Bargh, J., "Beyond Simple Truths: The Human-Internet Interaction", (2002) 58 *Journal of Social Issues* 3. Thompson, L., and Nadler, J., "Negotiating via Information Technology: Theory and Application", (2002) 58 *Journal of Social Issues* 109.

their opinions are based on their practical experience and knowledge of the need to develop rapport between participants in OADR schemes.⁴⁶⁸

5.8.2. Linguistic Differences in OADR Schemes

Cross-border disputes will invariably involve trademark owners, domain name holders, businesses and consumers with little or no knowledge of each other languages. In the context of business to consumer internet transaction disputes, if a merchant used a certain language(s) in commercial communications, it is conceived that redress procedures should be able to be conducted by the consumer in that language(s). However, it is recognised that consumers may be sufficiently familiar with a language to enter into a contract, but not to complain or to seek redress.

Without speaking another language well, or perhaps at all, a consumer from one country may be able to navigate through a well-constructed web site in another country well enough to place an online order. But it is another matter for that consumer to try and explain the complexities of his or her dissatisfaction to a third party.

Equally, in the context of domain name disputes, the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") provide that the language of the administrative proceeding should be the language of the registration agreement. Article 11 (a) reads as follows:

Unless otherwise agreed by the Parties, or specified otherwise in the Registration Agreement, the language of the administrative proceeding shall be the language of the Registration Agreement, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding.⁴⁶⁹

However, it is recognised that domain name applicants may be sufficiently familiar with a language to register a domain name, but it is another matter for them to try and

⁴⁶⁸ OADR practitioner one, OADR practitioner two, OADR practitioner four, OADR academic five, OADR practitioner six, and OADR academic seven.

⁴⁶⁹ Article 11 (a) of the Rules for 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 2003.

explain the complexities of a potential dispute over the registration of that domain name. From this perspective, OADR must be offered to disputants in the language(s) they understand.

The majority of the respondents in the survey that has been undertaken for the purpose of this thesis believe that at present, most OADR services on offer are conducted in English and only very few offer bilingual or multilingual service. The rest of the respondents were undecided on this issue. Some respondents who stated their opinions on this issue are OADR academics which suggest that a theoretical perspective based on academics' views confirms that there is a need for bilingual or multilingual services in OADR schemes. But the majority of the respondents who stated their opinions on this issue are OADR practitioners, which suggest that their opinions are based on their practical experience and knowledge of the need for bilingual or multilingual services in OADR schemes.⁴⁷⁰

One solution to the linguistic barrier in OADR schemes is the use of an interpretation services. In this regard, it is advisable to consider in the OADR system whether the interpretation will be simultaneous or consecutive. It is advisable also to consider in the OADR agreement whether the interpretation should be the responsibility of the parties or the arbitral tribunal. Clearly, although interpretation services might impair the speed and increase the costs of the OADR proceedings, this concern might be diminished because translation software will increasingly be available to overcome language barriers. Consequently, OADR system could be linked to automatic translation facilities. This will undoubtedly enhance cost-effective and timely OADR mechanisms.⁴⁷¹ In the context of domain name disputes, Article 11 (b) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") provides that:

⁴⁷⁰ OADR practitioner one, OADR practitioner two, OADR practitioner four, OADR academic five, OADR practitioner six, and OADR academic seven.

⁴⁷¹ Wilikens, M., Vahrenwald, A., and Morris, P., "Out-of-Court Dispute Settlement Systems For E-commerce, Report of an Exploratory Study", available online at <<http://dsa-isis.jrc.it/ADR/report.html>>, last visited on the 1st of October 2003.

The Panel may order that any documents submitted in languages other than the language of the administrative proceeding be accompanied by a translation in whole or in part into the language of the administrative proceeding.⁴⁷²

5.9. The Liberty of Participation in OADR Schemes

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

Traditionally, the question of the relationship between ADR and the judicial system is very important because ADR schemes should not prejudice or undermine any other means of judicial redress. Moreover, although ADR can provide appropriate solutions for many disputes, it must be recognised that even in the most ideal of worlds a certain number of disputes will still end up in courts. There are cases which are not appropriate to be adjudicated by ADR, and it may not always be in the best interest of everyone to choose to participate in ADR. For example, there may be a class action lawsuit which is liable to be more effective form of relief than the individual arbitral system. Certain harms inflicted on internet users may be small yet widespread, so that they would be impractical to pursue certain claims unless brought as a class action. Furthermore, competition between court and out-of-court dispute settlement should not be exaggerated. One of the facets of this exaggeration is the suggestion that the rule of law is at stake when parties resolve their dispute outside of the court.⁴⁷³ In this regard, Harry Edward, a leading author on ADR has said that:

We must determine whether ADR will result in an abandonment of our constitutional system in which the rule of law is created and principally enforced by legitimate branches of government.⁴⁷⁴

⁴⁷² Article 11 (b) of the Rules for 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 2003.

⁴⁷³ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

⁴⁷⁴ Edwards, H., "Alternative Dispute Resolution: Panacea or Anathema", (1986) 99 *Harvard Law Review* 668 at 672.

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

Accordingly, it must be clear that participation in ADR does not mean waiving the rights to recourse to the ordinary law; rather it means a general renunciation of the remedies available in law. In this regard, Professor Roy Goode argues that it is difficult to evaluate the advantages of alternative dispute resolution over other dispute resolution mechanisms, including courts, because various legal options compete with each other in a way which is rather unclear. Professor Goode concludes that no system has any innate superiority over the other.⁴⁷⁵

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

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

⁴⁷⁵ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1177.

often is associated with explicit annexation of ADR procedures to well known court systems as in the case of court annexed arbitration.⁴⁷⁶

In *Aktien Gesellschaft v. Fortuna Co. Inc.*,⁴⁷⁷ it has been stated that arbitration and court system ought to be regarded as co-ordinate rather than rival. This position was strengthened in England by the introduction of the Arbitration Act 1996 which implies that commercial arbitration should be complementary to, and not in competition with, court system.

In the online world, OADR should not be presented as the superior alternative to the court system, making the old court system obsolete. OADR must not be conceived also as the main force driving changes in dispute settlement in cyberspace. Instead, OADR must be conceived as merely a stream contributing to the broad river of change in how dispute resolution could be managed in cyberspace. OADR is not a substitute for other methods of dispute resolution; it is one option available to the internet users. Indeed, the idea of OADR is not simply about the use of technology to resolve disputes in cyberspace, it is rather about improving choice among other alternatives.⁴⁷⁸

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

In actual fact, any comprehensive alternative to the courts should not exist in any contemplated OADR scheme. Instead, the notion of OADR should be that internet users have certain courthouse rights, but those courthouse rights may not be meaningful in small monetary amounts and/or on a cross-border level. Indeed,

⁴⁷⁶ Bernstein, L., "Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Court Programs", (1993) 141 *University of Pennsylvania Law Review* 2169.

⁴⁷⁷ [1999] 1 Lloyd's Rep. 503.

⁴⁷⁸ Tyler, M., and Bretherton, D., "Research Into Online Alternative Dispute Resolution, an Exploration Report Prepared for the Department of Justice in Australia", 21st of March 2003, available online at <[http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/\\$file/Research_ADR_Exploration_Report_03.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/$file/Research_ADR_Exploration_Report_03.pdf)>, last visited on the 1st of October 2003.

although courthouse rights might not be invoked, the fact that it could be invoked is important. In practical terms, internet disputes will not probably reach courts, but this theoretical assurance of the existence of the court is important.

The letter “A” in OADR, is normally stands for alternative. It may be useful to replace “alternative”, with, say, “appropriate”. OADR being an appropriate dispute resolution mechanism in cyberspace does not mean that the use of OADR for immediate resolution in cyberspace should preclude other forms of dispute resolution. Subsequently, internet users who submit disputes to OADR system should not be asked to waive their legal rights, nor should they be restricted or blocked from resorting to other avenues of recourse. Thus, the basic role of the judicial process as a method of settling disputes must be reaffirmed.⁴⁷⁹

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

The right of access to courts to settle any type of dispute is a basic right. Therefore, one must be compelled to oppose the idea of mandatory OADR schemes. Arguably, if mandatory OADR becomes the norm for internet disputes, internet users will arguably be less willing to foray into e-commerce venue for their purchasing, knowing that their remedies are limited. In this regard, respondent four in the survey that has been undertaken for the purpose of this thesis noted:

The representation of OADR as the superior alternative to the court system is dangerous. It appears safe to assume that OADR should remain as an alternative, rather than a mandatory, dispute resolution mechanism in cyberspace.⁴⁸⁰

⁴⁷⁹ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

⁴⁸⁰ OADR practitioner four.

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

The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the state in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the member state in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.⁴⁸¹

In this regard, it seems appropriate to recall the opinion of Ian Macneil who is one of the leading authors on American arbitration law. He argues that it must be borne in mind that only court litigation can be commenced without any agreement of the other party. Arbitration, and of course other forms of alternative dispute resolution, are available only if the parties at some stage agree that the dispute will be resolved by a third party neutral. Unarguably, without a fully informed voluntary consent, arbitration and other forms of alternative dispute resolution lose all credibility as a just alternative to litigation. He said in particular that:

Using terms such as compulsory or mandatory in such circumstances is, at best, highly confusing. At worst, it constitutes question begging; the very question at stake where such questions arise is whether whatever consent to arbitrate as has been manifested should or should not be given full contractual

⁴⁸¹ EU Commission, "Recommendations on the Principles Applicable to the Bodies Responsible For Out-of-Court Settlement of Consumer Disputes", (98/257/EC) O.J.L. 115, available online at <http://www.cmvm.pt/english_pages/apoio_ao_investidor/31998h0257.pdf>, last visited on the 1st of October 2003.

effect. To call arbitration compulsory or mandatory is to answer by label, not by attention to the facts and by analysis.⁴⁸²

Given that recourse to ADR is generally characterised by the predominance of a consensual approach and freedom of contract, OADR should be based on voluntary participation, and therefore not deprive the parties of their right of access to the courts. From this perspective, restricting the options of disputants to OADR only and denying access to the courts should not be permissible. As a result, an important task would be to design an OADR system in a way that has the potentiality to establish an appropriate linkage to court system, but without harming the flexibility of the process. From this perspective, it becomes clear that there should be a balance in cyberspace between the preservation of the long-tried right to seek redress through courts, and processes of alternative dispute resolution, such as arbitration, which is rooted in well-established procedures.⁴⁸³

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

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

⁴⁸² Macneil, I., *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act*, (Little Brown & Co., Boston, 1999) 17-8.

⁴⁸³ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

proceeding, the complainant must prove that each of these three elements is present.⁴⁸⁴

It was argued by ICANN that those persons, who register domain names in bad faith in abuse of intellectual property of others, would be unlikely to choose to submit to a procedure that is cheaper and faster than litigation like UDRP.⁴⁸⁵

The argument that was put forward in order to defend the mandatory nature of the UDRP is flawed, to say the least. This is due to the following three reasons. First, by confining the scope of the procedures of UDRP to abusive registrations, the danger of innocent domain name holders acting in good faith being required to participate in the procedure is not eliminated. As discussed before, there are non-trademarked, yet legitimate uses of words, names and symbols. And, therefore, one must not lose sight of traditional non-commercial internet uses.⁴⁸⁶

Second, there is a perceived unfairness in the application of UDRP which favours trademark owners. As a result, there has been considerable criticism of the UDRP and calls to revise it on the basis that it reinforces a bias towards large commercial interests, namely those who already have trademarks registered.⁴⁸⁷

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

If neither the Complainant nor the Respondent has elected a three-member Panel (Paragraph 3 (b)(iv) and 5(b)(iv)), the Provider shall appoint, within five calendar days following receipt of the response by the Provider, or the lapse of

⁴⁸⁴ Article 4 (a) of ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at

<<http://www.icann.org/dndr/udrp/policy.htm>>, last visited on the 1st of October 2003.

⁴⁸⁵ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

⁴⁸⁶ Albert, G., "Right on the Mark: Defining the Nexus Between Trademarks and Internet Domain Names", (1997) 15 *John Marshall Journal of Computer and Information Law* 277.

⁴⁸⁷ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 64. Marcelo, H., and Ajay, N., "From International Treaties to Internet Norms: The Evolution of International Trademark Disputes in the Internet Age", (2000) 21 *University of Pennsylvania Journal of International Economic Law* 556.

the time period for the submission thereof, a single Panelist from its list of panelists.⁴⁸⁸

There is statistical evidence that a vague selection mechanism of the third party neutral leads to forum shopping that biases the results. Forum shopping is done by rationally selecting an OADR provider who tends to rule in the favour of the party who selects the provider or the party with the highest bargaining power. Statistics show that the two OADR providers, who obtain most cases, *WIPO Online Dispute Resolution Centre*, and the *National Arbitration Forum*, are more likely to decide in favour of the claimant. The claimants win 82.2 per cent of the time with *WIPO Online Dispute Resolution Centre* and 82.9 per cent of the time with *National Arbitration Forum*.⁴⁸⁹

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

National laws apply in some cases irrespective of any choice made by the parties. This is likely to be found in areas such as consumer protection. Often, laws relating to consumer protection will strike out choice of law clauses, or else restrict the impact of such clauses, including dispute settlement clauses, and thus render them ineffective. This is reasonable since one distinguishing characteristic of consumer protection issues is the disparity of bargaining power between consumers and merchants. In actual fact, the disparity of bargaining power between consumers and merchants has lead legislators to prescribe special terms for consumer contracts.⁴⁹⁰ For example, Article 5 of the Rome Convention on the law applicable to contractual obligations reads as follows:

⁴⁸⁸ Article 6 (b) of the Rules for 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 2003.

⁴⁸⁹ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 111.

⁴⁹⁰ Heiskanen, V., "Dispute Resolution in International Electronic Commerce", (1999) 16 *Journal of International Arbitration* 31.

Notwithstanding the provisions of Article 3 [providing that a contract shall be governed by the law chosen by the parties], a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded him by the mandatory rules of the law of the country in which he has his habitual residence.⁴⁹¹

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

Use of the out-of-court alternative may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised.⁴⁹²

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

Member states may provide that clauses are presumptively unfair which excludes or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.⁴⁹³

⁴⁹¹ Article 5 of the Rome Convention on the Law Applicable to Contractual Obligations, (80/934/EC) O.J.L. 266.

⁴⁹² EU Commission, "Recommendations on the Principles Applicable to the Bodies Responsible For Out-of-Court Settlement of Consumer Disputes", (98/257/EC) O.J.L. 115, available online at <http://www.cmvm.pt/english_pages/apoio_ao_investidor/31998h0257.pdf>, last visited on the 1st of October 2003.

⁴⁹³ Article 3 of the European Council Directive on Unfair Terms in Consumer Contracts, (93/13/EC) O.J.L. 95.

In actual fact Article 3 of the Directive relates to terms which are pre-established by businesses, which includes dispute settlement clauses. In essence, Article 3 of the Directive states that by leaving the choice of dispute settlement mechanism with the consumer, businesses will avoid the risk of having an unfair contract term in their consumer contracts.⁴⁹⁴

Arguably, mandatory arbitration clauses are designed to give businesses significant advantages in their disputes with consumers. Merchants may know the arbitrators, or the angles of arbitration process more than average consumers. They may have a record or other source of information on arbitrators' decisions. This superior knowledge about the general attitudes and tendencies of the arbitrator gives an advantage to the merchant. But the consumer is regarded generally as economically weaker and less experienced in legal matters than the merchant. The consumer is unlikely to have any information about the prior rulings or background of the suggested arbitrators.⁴⁹⁵

The disparity of bargaining power occurs quite often when sellers unilaterally specify the terms of the sale, including dispute settlement clauses, and offering them to consumers on a "take it or leave it" basis. In fact, most pre-dispute arbitration clauses are in a standard form. When consumers form post-dispute arbitration agreements, they are likely to be mentally focused on the dispute. In contrast, when they form pre-dispute arbitration agreements, they are unlikely to be focused on the possibility of a dispute, and perhaps unaware of the existence of the arbitration clause. As a matter of fact, it is difficult to perceive pre-imposed arbitration clauses as fair clauses, when the parties do not have equal bargaining power, equal experience in arbitration, equal ability to understand the consequences of contract language, particularly the ramifications of the rights being waived, and an equal ability to insist on clauses being included or excluded in the contract.⁴⁹⁶ In *Arnold v. United Companies Lending Co.*,⁴⁹⁷

⁴⁹⁴ De Zylva, M., "Effective Means of Resolving Distance Selling Disputes", (2001) 67 *Arbitration* 236.

⁴⁹⁵ Thornburg, E., "Going Private: Technology, Due Process, and Internet Dispute Resolution", (2000) 34 *University of California Law Review* 210.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Arnold v. United Companies Lending Co.*, 511 S. E. 2d 854 (W. Va. 1998).

the court has characterised mandatory pre-dispute arbitration clauses as the sort of contract that a rabbit might make with a fox.

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

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

This law does not override any rule of law intended for the protection of consumers.⁴⁹⁸

A similar viewpoint is adopted in the OECD Guidelines for consumer protection in the context of electronic commerce:

Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level or protection afforded in other forms of commerce.⁴⁹⁹

Henry Perritt, a leading author on OADR, has argued that online consumers, due to the internet, are more powerful than offline consumers. This is due to the fact that the internet intensifies competition because it offers consumers a wide array of products and services from different sellers than they would have in geographically defined markets.⁵⁰⁰

Robert Bordone, another leading author on OADR, has responded to Perritt's argument by saying that Perritt's assertion is paradoxical. Electronic consumers are not always aware of the law and culture applicable in cyberspace, and are often not

⁴⁹⁸ Article 1 of the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), available online at <<http://www.un.or.at/uncitral/en-index.htm>>, last visited on the 1st of October 2003.

⁴⁹⁹ OECD, "Consumer Protection in the Electronic Marketplace", DSTI/CP (98) 13/Final, available online at <[http://www.oilis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aca78c12566e2003ff7cb/\\$FILE/12E81082.DOC](http://www.oilis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aca78c12566e2003ff7cb/$FILE/12E81082.DOC)>, last visited on the 1st of October 2003.

⁵⁰⁰ Perritt, H., "Dispute Resolution in Cyberspace: Demand for New Forms of ADR", (2000) 15 *Ohio State Journal of Dispute Resolution* 698.

represented due to the low monetary value of electronic disputes in general. By contrast, electronic merchants have the greatest experience of the law and culture applicable in cyberspace, and are likely to obtain the finest representation.⁵⁰¹

Elisabeth Thornburg, another leading author on OADR, agreed with Gordone in his argument. She argued also that the disparity of bargaining power between consumers and merchants occurs quite often in the online environment where the contract is usually “take it or leave it” standardised form. According to Thornburg, in order to view the contract, the internet user must click on the “terms and conditions” button and only after he or she has agreed on such terms and conditions, including dispute resolution terms and conditions, the online transaction will continue. This is called click-wrap agreements. Because of the electronic format, an internet user cannot cross out terms and bargain for different terms. In this case, it might be difficult to prove the consent of the parties because consent depends on the existence of choice, and if the choice is absent, the purported consent cannot be said to be voluntary.⁵⁰²

Obviously, contracts which come as part of a standard form that is not subject to bargaining are called contracts of adhesion. Evidently, determining the voluntary nature of consent is the centrepiece of debates over contracts of adhesion. As a result, mandatory OADR clauses could be seen as imposed through contracts of adhesion, where actual consent by definition is absent.⁵⁰³

Without doubt, the issue of consent should be at the forefront of any contemplated OADR solutions. Clearly, it is unacceptable to impose mandatory OADR on internet users without their knowledge and consent. Instead, a complainant who wishes to avoid the mandatory nature of OADR proceeding must be able to bring the action in any court that has a jurisdiction over the dispute. Bearing this in mind, there is a strong reason to believe that mandatory OADR schemes would not be enforceable in courts, and that the entire scheme of mandatory OADR might be unworkable.

⁵⁰¹ Bordone, R., “Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal”, (1998) 3 *Harvard Negotiation Law Review* 203.

⁵⁰² Thornburg, E., “Going Private: Technology, Due Process, and Internet Dispute Resolution”, (2000) 34 *University of California Law Review* 1179.

⁵⁰³ Rakoff, T., “Contracts of Adhesion: An Essay in Reconstruction”, (1984) 96 *Harvard Law Review* 1172. Griffiths, D., “Contracting on the Internet”, [1997] *European Intellectual Property Review* 4.

5.10. Conclusion

OADR is both suitable and important for the development of e-commerce since it encourages people to use the internet as a medium to conduct commerce. However, it must be borne in mind that the foundations of the controversies about OADR is not the use of the internet as a medium to conduct ADR proceedings, rather the controversy has arisen by our conception, as legal scholars, of such a use. This issue does not seem to be grasped thoroughly and analysed constructively by legal scholars.

Accordingly, there is a need to transform our legal thinking with regard to the use of the internet as a medium to conduct ADR proceedings. This is very crucial at this stage of OADR development because such a transformation would envisage that one of the main challenges with OADR in general, and online arbitration, in particular, is that parties may give up some fair process rights to participate and not all may fully understand this. Such a transformation would envisage also the importance of identifying limitations for transporting established dispute resolution systems, such as arbitration, to an electronic commerce environment.

For instance, an in-person oral hearing and the opportunity to fully present a case are the best way to provide the parties with fair process rights. But that may not be practical for disputes involving relatively small amounts and/or located at a great distance from each other, such as electronic disputes. Consequently, an adequate solution may require hearings and presenting cases that can be conducted online. Indeed, compromising some degree of procedural quality in exchange for efficiency and economy would seem permissible, provided that all parties are entitled to a fair opportunity to present their case.

Also, with regard to the use of the internet as a medium to conduct ADR proceedings, the perception of creating a system that is going to offer the fair process that a court system or traditional ADR system would offer needs some revision by legal scholars. Rather than stressing the exaggerated competition between court and out-of-court dispute settlement in cyberspace, and rather than stressing the exaggerated competition between traditional offline ADR mechanisms and OADR solutions in cyberspace, legal scholars must understand that there are some conflicts between

technology and existing law with respect to OADR. Those conflicts are due to the fact that elimination of all or part of usual face-to-face proceedings implies a different application of fairness in the OADR process. It must be underscored therefore that because of the interaction between electronic methods of communication and quality of justice in OADR process, fair process rights might be minimal in cyberspace.

Indeed, the respect for fair process rights in OADR is not only a legal issue. It is also a technical challenge to which an interdisciplinary body of legal scholars and Information technology experts should respond by setting flexible standards as technology could change faster than rules. Fair process can only be established if information technology specialists are sufficiently integrated into the legal teams involved in dispute resolution. Many of the issues discussed in this chapter are too complex for legal experts to solve. The creation of fair process therefore depends on building communication between legal experts who are able to explain the problem and information technology experts who are able to understand it.

However, the advances of technology must move cautiously forward so as not to diminish the value of fair process in OADR while increasing its efficiency. There should be a balance between fairness and effectiveness. On the one hand, if too many procedural rules were added to a program in an attempt to make it fair, the program could be too expensive and perhaps slow to be effective. On the other hand, it must be borne in mind that increasing efficiency does not necessarily increase either justice or respect for justice. As a result, OADR solutions should be considered rough justice mechanisms that emphasise fairness in terms of allowing ready access to justice.

It is crucial to avoid that access to justice is limited by doubts as to the effectiveness of the OADR process, and to ensure that facilitating internet users' access to justice, by speeding up or simplifying OADR procedures, do not deny their right in fair process. From this perspective, it becomes clear that the use of the internet to conduct ADR is useless if it does nothing to overcome a limitation, which is access to justice in cyberspace, or if it overcomes the particular limitation only by creating a greater obstruction, which is diminishing the value of fair process in online ADR.

Parties must understand that while economical and expeditious resolution of cases is the principal benefit of OADR, this efficiency may come at the expense of some degree of procedural fairness. The parties are therefore deemed to accept to compromise some degree of procedural quality in exchange for faster, less expensive and more effective proceedings. This conforms to a large extent with the notion that access to justice implies that there should be pragmatic solutions to disputes that might go unresolved, and that such solutions should make economic sense. This conforms also with the notion that the ability to resolve a dispute, as compared to dispute resolution in practice, is a very important concern in cyberspace. It is one thing that a disputant has the right to resolve a dispute in cyberspace, and it is another thing whether he or she will actually do so in practice. Indeed, barriers to actually exercise existing rights and access to legal remedies will have an apparent impact on the expansion and growth of e-commerce.

Consequently, taking into account the eight elements which are commonly associated with fair process that have been examined in this chapter, it has been concluded that independence and transparency are of paramount importance, and, therefore, they cannot be sacrificed, under any circumstances, in order to increase efficiency of the OADR process.

As mentioned before, this is the position taken by all the respondents of the survey that has been undertaken for the purpose of this thesis. Half of the respondents are OADR academics and the other half are OADR practitioners. OADR academics and OADR practitioners agree on the paramount importance of independence and transparency in OADR schemes which suggests that a theoretical perspective based on academics' views, and practical experience and knowledge, which can be deduced from practitioners' views, confirm that OADR independence must be guaranteed by adequate arrangements and OADR mechanism must be as transparent as possible. With regard to independence, all the respondents believe that although OADR providers are given positions which ensure the operation of the system, OADR independence must be guaranteed by adequate arrangements. And with regard to transparency, all the respondents believe that when ADR is carried out through the internet in the form of OADR, where there is a lack of face-to-face interaction, and where there is relatively little knowledge on the part of internet users about OADR,

parties may give up some fair process rights to participate, and not all may fully understand this matter. Therefore, effective OADR mechanism must be as transparent as possible.⁵⁰⁴

But with regard to the other six elements which are commonly associated with fair process that have been examined in this chapter, one can argue that they can be sacrificed to some extent in order to increase efficiency of the OADR process. With regard to their importance to the value of fair process of OADR, they can be arranged in the following chronological order. First, cost allocation in OADR schemes. Second, data protection in OADR proceedings. Third, the authenticity of OADR proceedings. Fourth, the liberty of participation in OADR schemes. Fifth, accessibility to OADR schemes. And sixth, customs in OADR schemes.

⁵⁰⁴ OADR practitioner one, OADR practitioner two, OADR academic three, OADR practitioner four, OADR academic five, OADR practitioner six, OADR academic seven, and OADR academic eight.

Chapter Six: Enforcement, Recognition, and Compliance with OADR Outcome(s)

6.1. Introduction

With international e-commerce growing constantly, stability of expectation in both the resolution and enforcement of electronic disputes is critical. Clearly, there is no point in discussing applicable remedies to internet disputes without promoting at the same time appropriate enforcement mechanisms. From this perspective, OADR could be viewed as an exercise in futility if there is no efficient mechanism in place to enforce the outcome(s). Indeed, access to justice is only meaningful where the outcome(s) of the OADR proceedings can be enforced.

Enforcement of OADR outcome(s) poses no problem when it is in the interest of both parties to fulfil their agreement. It may be suggested therefore that OADR requires no enforcement mechanisms because its enforcement comes from the willingness of the parties to abide by it.

Enforcement of OADR agreements is somewhat artificial because the essence of OADR is that the parties agree to the solution and that in most cases this in itself gives force to the solution agreed. In actual fact, the flexibility of OADR overcomes many of the difficulties associated with enforcement. In OADR, parties can set out their relevant rules of enforcement depending on their needs and interests. Structures through which the parties reach their own resolution, such as OADR, reduce the need for complicated enforcement mechanisms. Indeed, the primary purpose of an online alternative dispute resolution model is to help disputants reach amicable, consensus building, and value creating agreements on their own without need of sanctions or enforcement.

In this respect, respondent eight in the survey that has been undertaken for the purpose of this thesis noted:

Compliance is normally achieved in ADR through consensus and the will of the parties. There is not normally any need to enforce. If there is a failure to honour a settlement, there are a lot of ways in the real world of revisiting the

matter, such as, more discussion, negotiation, mediation, arbitration, blacklisting, withdrawal of services, adverse publicity, courts, etc. It depends on the parties, the dispute, and the circumstances.⁵⁰⁵

However, the enforcement difficulties associated with global networks may suggest that enforcement can be best achieved through technological measures. In fact, where small amounts of money are involved, as it is the case in most internet disputes, and where an e-business, most probably, will have no assets within the jurisdictional reach of the internet user, providing some other means to minimise the problem of enforceability, such as technological measures, becomes pressing.

In advancing this issue, this chapter will find out whether the internet itself, without governmental back up effort, can be viewed as an effective enforcement tool in cyberspace. This will become of particular importance in the analysis of OADR enforcement because of the internet's enforcement capabilities as a medium to conduct the proceedings of ADR. Therefore, entirely new concepts regarding the enforcement of OADR outcome(s) could be effectuated within the internet itself, such as, the employment of online codes of conduct as an enforcement tool of OADR outcome(s) and the employment of online disconnection or exile of the rule breakers as enforcement tool of OADR outcome(s). This chapter will discuss these two issues separately.

However, accountability in OADR may be based around institutional arrangements and not the medium, i.e., the internet. This is particularly true in complex societies engaging in large scale exchange such as online marketplace. Without institutional constraints, the enforcement of OADR outcome(s) might pose severe problems. Besides, the enforceability of an OADR outcome(s) might be a problematic issue if procedures are not fair and do not comply with fair process.⁵⁰⁶

Consequently, where appropriate, this chapter will proceed to discuss the governmental role in OADR enforcement through its court system, since enforcement

⁵⁰⁵ OADR academic eight.

⁵⁰⁶ Johnson, D., and Post, D., "Law and Borders: The Rise of Law in Cyberspace", (1996) 48 *Stanford Law Review* 1367. Klein, B., and Leffler, K., "The Role of Market Forces in Assuring Contractual Performance", (1981) 89 *Journal of Political Economy* 615.

in OADR schemes might depend on having a contract or award that would be recognised by a court of law.

6.2. Online Codes of Conduct as an Enforcement Tool of OADR Outcome(s)

A seal or trust mark is displayed by companies or individuals that meet the standards of a code of conduct, to be awarded by respected self-regulation organisation. This organisation initially and then periodically performs quality control on the compliance with its code of conduct. In this scenario, OADR schemes are linked to the seal displayed at the trader web site, and the organisation which has awarded the seal will immediately take away the seal if a company does not comply with the outcome of OADR. This fact could be made a part of the seal company's reliability report, and made available to consumers making pre-purchase inquiries. Indeed, if disputes do occur, the connection of an OADR mechanism to a code of conduct will ensure the implementation of OADR outcome(s) because the incentive is in this case created by the possible removal of the trust mark.⁵⁰⁷

For example, the Better Business Bureau (BBB) Online Reliability Program includes over 4300 trust mark holder engaged in online commerce, encompassing almost 6000 web sites. This is the largest trust mark program on the internet. The subscribers are contractually committed to a set of standards, which require among other things that the online company must conform to BBB dispute resolution mechanisms that utilises OADR schemes. The BBB Online Reliability Program will immediately take away the seal if a company does not comply with the outcome of the OADR mechanisms.⁵⁰⁸ Similarly, the "Squaretrade" seal program commits a merchant to participate in OADR process if a problem occurs. It costs \$7.50 per month and currently attracts several thousand new members each month.⁵⁰⁹

⁵⁰⁷ Hart, C., "Online Dispute Resolution and Avoidance in Electronic Commerce", a paper presented at the Uniform Law Conference of Canada, 1st of August 1999, available online at <<http://www.law.ualberta.ca/alri/ulc/current/hart.htm>>, last visited on the 1st of October 2003.

Wilikens, M., Vahrenwald, A., and Morris, P., "Out-of-Court Dispute Settlement Systems For E-commerce, Report of an Exploratory Study", available online at <<http://dsa-isis.jrc.it/ADR/report.html>>, last visited on the 1st of October 2003.

⁵⁰⁸ <<http://www.bbbonline.org>>, last visited on the 1st of October 2003.

⁵⁰⁹ <<http://squaretrade.com>>, last visited on the 1st of October 2003.

In actual fact, legal adjudication and sanctions play an important role in the formation of trust, but it is at most a subsidiary role. Legal sanctions rarely make a significant contribution to the construction of trust and the invocation of the legal process can damage perceptions of trustworthiness. It is when trust based on reputation or course of dealing initially is absent or breaks down that legal sanctions can provide indispensable security.⁵¹⁰

Codes of conduct are multiplying rapidly on the internet in order to ensure good business practices and thus help to safeguard consumer interests and build their confidence.⁵¹¹ The majority of the respondents in the survey that has been undertaken for the purpose of this thesis believe that, by its nature, a code of conduct is a mean of preventing disputes from occurring in the first place because it could serve as a governance mechanism capable of assuring trustworthy behaviour. The rest of the respondents were undecided on this issue. Half of the respondents who stated their opinions on this issue are OADR academics and the other half are OADR practitioners. OADR academics and OADR practitioners agree on this issue which suggests that a theoretical perspective based on academics' views, and practical experience and knowledge, which can be deduced from practitioners' views, support the use of codes of conduct in OADR.⁵¹²

Article 16 of the European Directive on Electronic Commerce urges national governments to encourage the drawing up of these codes by trade, industry, professional and consumer organisations. Article 16 reads as follows:

(1) Member States and the Commission shall encourage: (a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15; (b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission; (c) the accessibility of these codes of conduct in the Community languages by electronic means; (d) the communication to the Member States and the

⁵¹⁰ Campbell, D., "Reflexivity and Welfarism in the Modern Law of Contract", (2000) 20 *Oxford Journal of Legal Studies* 485.

⁵¹¹ Noll, J., "European Community and E-commerce: Fostering Consumer Confidence", (2002) 9 *Electronic Communications Law Review* 212. Rothchild, J., "Protecting the Digital Consumer: The Limits of Cyberspace Utopianism", (1999) 74 *Indiana Law Journal* 927.

⁵¹² OADR practitioner two, OADR practitioner four, OADR academic five, OADR practitioner six, OADR academic seven, and OADR academic eight.

Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce. (2) Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1 (a).⁵¹³

That said, it must be pointed out that there are several drawbacks with codes of conduct as an enforcement tool of OADR outcome(s). Henry Perritt, a leading author on OADR, argues that online self-enforcement models that employ social pressure, such as online codes of conduct, cannot be completely successful because these mechanisms have not contemplated the lack of person-to-person contact and the scope of the electronic marketplace. Self-enforcement models that employ social pressure are likely to work only when attributes of real social communities exist. Such attributes do not exist on the internet.⁵¹⁴

Ethan Katsh, Janet Rifkin, and Alan Gaitenby, some of the leading writers on OADR, have reached the same conclusion by stating that the argument that codes of conduct in the internet that seek to implement OADR programs can amount to enforcement efforts is flawed.⁵¹⁵

The significance of the removal of the trust mark, as an incentive for the implementation of OADR outcome(s), would actually be difficult to assess because the value of a trust mark for a web site is not easy to evaluate. Besides, several online businesses might provide different seals. This may result in confusing the consumers. This is duplicated by the fact that there is no set of benchmarks by which the consumers can judge the relative merits of such initiatives. As a result, there is a risk that general acceptance of codes of conduct will be undermined by substandard codes of conduct.⁵¹⁶

⁵¹³ Article 16 of the Directive of the European Parliament and of the Council on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market, (2000/31/EC) O.J.L. 178.

⁵¹⁴ Perritt, H., "Dispute Resolution in Electronic Network Communities", (1993) 38 *Villanova Law Review* 400.

⁵¹⁵ 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.

⁵¹⁶ Noll, J., "European Community and E-commerce: Fostering Consumer Confidence", (2002) 9 *Electronic Communications Law Review* 213.

In actual fact, control is necessary in codes of conduct. It is important to create a mechanism which ensures that a seal is not artificially placed on a web site and to ensure no fraudulent reuse of the seal. However, it is not difficult, by using available technology, to imitate the appearance and behaviour of trust marks, and displaying a code subscriber's membership of a code, both by non-members and by members whose status has lapsed. Overcoming the problem of initial trust is one of the greatest barriers for merchants, especially Small and Medium Sized Enterprises (SMEs), to successfully enter the online market. Codes of conduct cannot overcome the problem of lacking initial trust in online businesses, since they usually require a merchant to be in business for a certain time before it can be considered for the reliability seal. For example, BBB Online requires a merchant to be in business for at least a year before it can be considered for the reliability seal.⁵¹⁷

6.3. Online Disconnection as an Enforcement Tool of OADR Outcome(s)

Henry Perritt, a leading author on OADR, argues that control over a valuable resource by private persons or entities can become a source of private regulation because such a private entity has the authority to exclude others from a resource and to regulate the access and use of the resource. In other words, resource control generates a self-enforcing regime. For example, the authority of ICANN over domain name holders does not derive so much from its legal status than from the control by ICANN of the resource that is valuable to the domain name holders, i.e. the access of the web pages of a domain name.⁵¹⁸

Similarly, Colin Rule, another leading author on OADR, argues that one of the reasons for the success of the ICANN Domain Name Dispute Resolution Policy (UDRP) is the fact that it is self-executing, i.e. the UDRP provides for its own mechanism for enforcement of final panel's decisions. ICANN possesses the electronic enforcement tool for decisions rendered by arbitrators due to its control of the database which converts domain names into Internet Protocol (IP) addresses. This enforceability is uniquely achievable because the parties who wish to use domain

⁵¹⁷ <<http://www.bbbonline.org>>, last visited on the 1st of October 2003.

⁵¹⁸ Perritt, H., "Towards a Hybrid Regulatory Scheme for the Internet", [2001] *University of Chicago Legal Forum* 237.

names cannot do so without accepting the terms and conditions of UDRP which utilises OADR. Indeed, given the character and the subject of domain name disputes, the possible solution of the conflict, which would be either the rejection of the complaint or the transfer of the respective domain name, can be enforced quite easily since the enforcement would be carried out by private authorities without the intervention of public authorities.⁵¹⁹

As a result, although the online disconnection as an enforcement tool of OADR outcome(s) lacks the binding force because it does not result from the command of a sovereign as it has not been enacted by Parliament or endorsed in an international convention, it has a mechanism of coercion to obtain compliance with the rules.

That said, online disconnection as an enforcement tool of OADR outcome(s) must be viewed in a wider context than ICANN policy. Generally speaking, the internet has participated largely in the globalisation of trade practices in the form of e-commerce. But it is impossible to take advantage of the context of online marketplace and the rules for participating in this marketplace to enforce compliance. For example, in a large marketplace such as E-bay, it may be important that eviction from the business of the marketplace would carry heavier economic consequences than abiding by an unfavourable decision of an OADR provider. This solution, however, would hardly work with one-shot players who are always capable of changing their online identity.⁵²⁰

Besides, there is less control and less conformity in the online world. For example, exclusion of the online world does not mean the end of the e-business. This can never be the case in an open commercial structure such as the internet. Electronic commerce is characterised by its high degree of autonomy. Online merchants can be manufacturers, marketers and distributors of their products or services at the same time. This is especially the case in regards to merchants providing services or information, which can be intangible and self-generated. Clearly, cyberspace reduces

⁵¹⁹ Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002) 208.

⁵²⁰ 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.

costs associated with the distribution of information, thus encouraging growth in information distribution activities. In actual fact, there is an inherent logic in using the internet to buy and sell such products that need never be more than digital bits. One of the unique aspects of electronic commerce is that, unlike transactions involving physical goods, delivery of digitised information products such as software, movies, music, can be accomplished entirely within the network itself. Already, the largest segment of B-to-C electronic commerce involves intangible products that can be delivered directly over the network to the consumer's computer. There are five categories encompassing the range of intangible products in this segment: entertainment, travel, newspapers and periodicals, financial service, and electronic mails. As a result, the dependency and interdependency on suppliers, distributors, trading partners, or entrance to physical trading places diminishes.⁵²¹

At this stage, it seems appropriate to discuss the role of internet service providers and domain name registration authorities in the online disconnection model as an enforcement tool of OADR outcome(s).

6.3.1. The Role of Internet Service Providers and Domain Name Registration Authorities in the Online Disconnection Model as an Enforcement Tool of OADR Outcome(s)

The history of dispute resolution in a given new territory often starts out as a right given to the owner of that territory. Internet Service Providers (ISPs) and Domain Name Registration Authorities could be perceived as the owners of cyberspace because the internet is a decentralised law making power model, where the ISPs and Domain Name Registration Authorities, rather than territorially-based states, become the essential units of governance. In effect, internet users consent via contracts with ISPs and Domain Name Registration Authorities to delegate the task of rule making to them and confer sovereignty on them. The aggregate of the choices made by ISPs and Domain Name Registration Authorities about rules to impose and internet users'

⁵²¹ Burnstein, M., "Conflicts on the Internet: Choice of Law in Transnational Cyberspace", (1996) 29 *Vanderbilt Journal of Transnational Law* 108. Hardy, I., "The Proper Legal Regime for Cyberspace", (1994) 55 *University of Pittsburgh Law Review* 1019. Garavaglia, M., "In Search of the Proper Law in Transnational Commercial Disputes", (1991) 12 *New York Law School Journal of International & Comparative Law* 29. Reidenberg, J., "Lex Informatica: the Formulation of Information Policy Rules Through Technology", (1998) 76 *Texas Law Review* 553.

ability to move into and out of these distinct rule-sets is a powerful guarantee that the resulting distribution of rules is a just one. In this scenario, the Law of the Internet emerges, not from the decision of some high territorially-based authority, but as the aggregate of the choices made by ISPs and Domain Name Registration Authorities about what rules to impose, and by internet users' ability to move into and out of these distinct rule-sets. In effect, the task of rule making is delegated by internet users to ISPs and Domain Name Registration Authorities where users can choose among these ISPs and Domain Name Registration Authorities.⁵²²

Besides, given that in very many cases where the law have to deal with large numbers of individuals, such as internet disputes, the attempt is made to require some third party to act in an intermediary category, and given that an individual wishing to obtain access to the electronic commerce world is generally required to act through the agency of an Internet Service Provider (ISP) or a Domain Name Registration Authority, it can be said that failure to comply with OADR outcomes could be a basis for those who facilitate the electronic business' sales, such as ISPs, to deny future services to that business, and for those who facilitate the electronic business' existence on the internet, such as domain name registration authorities, to place infringing domain names on hold status, which means the restraint of the use of the domain name and making it unavailable to either party, i.e., trademark owner and domain name holder, pending resolution of the dispute.⁵²³

In fact, ISPs can exile any party failing to comply with an OADR outcome(s) in domain name disputes because, in order to register a domain name with a domain name registrar, the applicant has to file an application which would state *inter alia* certain technical information about how internet traffic to that domain name will be handled. Typically this requirement is satisfied by listing an ISP who has agreed to receive internet traffic in the name of the applicant.⁵²⁴

⁵²² Johnson, D. and Post, D., "Law and Borders: the Rise of Law in Cyberspace", (1996) 48 *Stanford Law Review* 1367.

⁵²³ *Ibid.* 1371.

⁵²⁴ *Ibid.* 1379.

ISPs can also restrict access to the challenged domain name, and failure to comply with OADR outcomes could be a basis for the transfer or revocation of the domain name. Clearly, ISPs could be the enforcing arm for a third party neutral decision, through temporary suspension or, preventing the domain name holder use of the domain permanently, or even through considering the disputed web site as a not valid internet connection. Indeed, ISPs have an extremely powerful enforcement tool at their disposal. ISPs can even serve as the functional equivalent of local government enforcement agencies to ensure that sanctions against wrong-doers are carried through.⁵²⁵

In this regard, the *Virtual Magistrate*, an OADR provider, has stated that any ISP may require users to refer complaints to the *Virtual Magistrate* arbitration program, and, as an ISP, to take actions consistent with the decision of the arbitrator(s) in order to support the enforcement of the decision.⁵²⁶

Similarly, WIPO in its Final Report on the Management of Internet Domain Names and Addresses has endorsed direct enforcement of decisions by ISPs. It has provided that ISPs should take the necessary action to implement an OADR provider determination, e.g. cancellation of the domain name registration or its transfer to the trademark owner.⁵²⁷

That said, there are three points that must be made clear in this context. First, ISPs are owners or managers of systems on which information distribution activities take place. They provide the accounts, software, and other means that allow one to engage in such communicative activities. However, although they may not have any control over or involvement in these activities, they may be held liable for the action of their subscribers. ISPs face a difficult choice when their subscribers, or third parties, bring to their attention allegations of certain communications appearing on their system,

⁵²⁵ Bordone, R., "Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal", (1998) 3 *Harvard Negotiation Law Review* 206. Dunne, R., "Deterring Unauthorised Access to Computers: Controlling Behaviour in Cyberspace Through a Contractual Law Paradigm", (1994) 35 *Jurimetrics Journal* 1.

⁵²⁶ <<http://www.vmag.org/>>, last visited on the 1st of October 2003.

⁵²⁷ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

such as, trademark infringement, and therefore, exposing them to possible liability. There is a risk of liability if they leave such communication appearing on their system unmodified, i.e. do nothing, where then complainant's claim of injury turns out to be a valid claim. And there is a risk of liability if they delete such communication appearing on their system, where then complainant's claim of injury turns out to be an invalid claim. It would seem rather unjust to hold ISPs liable for any information that happened to pass through their system. The volume of internet traffic is such that no ISP could check the contents of all information without imposing a severe bottleneck on the system, and effectively halt traffic. Indeed, were such an obligation to be imposed then the internet and e-commerce would cease to expand.⁵²⁸

Equally, as domain names have become valuable properties, there has been growing conflict over the rights to these names, and over who has the rights to create them. Many of domain name disputes have involved the organisations responsible for the registration and administration of domain names, exposing them to potential liability and complicating their task of running the domain name registration process. Therefore, Domain Name Registration Authorities have devised policies in the attempt to limit their exposure in these disputes. For example, Article 3 (b) (xiv) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") states that:

Complainant agrees that its claims and remedies concerning the registration of the domain name, the dispute, or the dispute's resolution shall be solely against the domain-name holder and waives all such claims and remedies against (a) the dispute-resolution provider and panelists, except in the case of deliberate wrongdoing, (b) the registrar, (c) the registry administrator, and (d) the Internet Corporation for Assigned Names and Numbers, as well as their directors, officers, employees, and agents.⁵²⁹

Also, Article 6 of the ICANN Domain Name Dispute Resolution Policy (UDRP) states that:

We will not participate in any way in any dispute between you and any party other than us regarding the registration and use of your domain name. You shall not

⁵²⁸ Katsh, E., "Dispute Resolution in Cyberspace", (1996) 28 *Connecticut Law Review* 961. Davies, L., and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law* 428.

⁵²⁹ Article 3 (b) (xiv) of the Rules for 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 2003.

name us as a party or otherwise include us in any such proceeding. In the event that we are named as a party in any such proceeding, we reserve the right to raise any and all defences deemed appropriate, and to take any other action necessary to defend ourselves.⁵³⁰

However, Domain Name Registration Authorities' dilemma is not distinctively different from that of the ISPs. If a name is retained following a challenge from a trademark owner, there is the possibility that the trademark owner may regard the Domain Name Registration Authority as jointly liable with the domain name holder. And if the name is withdrawn following a complaint, an action may be brought by the domain name holder alleging an intentional interference with a prospective business advantage through the potential usage of the disputed domain name.⁵³¹

Second, insofar as a consensual based model of enforcement on the internet needs to obtain deference from local sovereigns, ISPs and Domain Name Registration Authorities must avoid fostering activities that threaten the vital interests of territorial governments. This is not feasible because effective enforcement regimes would be endangered when only technical standard setting is involved because linkage to state-based coercive power is needed in order to ensure fair process. For example, although ISPs can deny future service to a fraudulent electronic business, theoretically speaking, it cannot determine the legal aspect of a dispute. In the context of domain names disputes, the deployment of technical standards only would be limited to determinations of the status of the contested domain name registration through appropriate changes to the domain name database, and thus, domain name registration authorities are not concerned with the validity of trademarks infringement. As a result, domain name registration authorities should not decide by itself when to cut off a domain name, instead, such decisions should come only from competent bodies. Indeed, given that an internet domain name is the personal property of a domain name owner, there should be fair process prior to its taking or placing it on hold because

⁵³⁰ Article 6 of ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at <http://www.icann.org/dndr/udrp/policy.htm>, last visited on the 1st of October 2003.

⁵³¹ Katsh, E., "Dispute Resolution in Cyberspace", (1996) 28 *Connecticut Law Review* 961.

such practice could have disastrous consequences for successfully established e-commerce enterprises.⁵³²

And third, the emphases on the role of ISPs and Domain Name Registration Authorities, by contemplating the use of disconnection, denial or termination of access to the internet and/or domain names, will be ineffective because rule violators, due to technical nature of the internet, can find easily alternative internet access that is beyond the reach of the ISPs and Domain Name Registration Authorities. Henry Perritt, a leading author on OADR, has put it as follows:

It is as painless as calling one telephone number instead of another.⁵³³

As said earlier, the OECD has noted that:

The internet's anonymity, mobility, and global reach, all worked to substantially increase the potential for harm because the identity and the actual physical location of the people behind it will generally be very hard to track.⁵³⁴

As a result, enforcement regimes that involve only technical standard setting will not, in practical terms, deter cyber disputes, and thus, undermine the trust in OADR solutions entirely. It must be borne in mind however that although technical measures obviously cannot resolve legal issues, they can help to enforce certain rules, constraints, and responsibilities. Besides, it must be borne in mind also that although the crystallisation of such a route of technical measures of enforcement of certain rules, constraints, and responsibilities would require an extraordinary degree of co-operation which is not feasible at present, one must be careful not to dismiss the idea that this problem might be eased by some sort of technological improvement in the future.⁵³⁵

⁵³² Johnson, D., and Post, D., "Law and Borders: The Rise of Law in Cyberspace", (1996) 48 *Stanford Law Review* 1367. Froomkin, M., "The Essential Role of Trusted Third Parties in Electronic Commerce", (1996) 75 *Oregon Law Review* 71.

⁵³³ Perritt, H., "Dispute Resolution in Electronic Network Communities", (1993) 38 *Villanova Law Review* 356 at 359.

⁵³⁴ OECD, "Consumer Protection in the Electronic Marketplace", DSTI/CP (98) 13/Final, available online at [http://www.oilis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/\\$FILE/12E81082.DOC](http://www.oilis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/d3c8b98d999aea78c12566e2003ff7cb/$FILE/12E81082.DOC), last visited on the 1st of October 2003.

⁵³⁵ Brown, H., and Marriott, A., *ADR principles and practice*, (2nd edition, Sweet & Maxwell, London, 1999) 17-018.

In the meantime, it is clear that the concept of establishing a network of ISPs and Domain Name Registration Authorities and internet users who could exile any party failing to comply with an OADR outcome, as a route of enforcement, is at the present time aspirational rather than rational. What is certain at this stage is that the role of ISPs and Domain Name Registration Authorities in the online disconnection model as an enforcement tool of OADR outcome(s), without governmental back up effort, cannot be viewed as a sole guarantor to achieve accountability and bring enforcement in OADR schemes, and thus, encourage the growth of e-commerce.

6.4. The Role of the Court System in the Enforcement of OADR Outcome

Private groups are able to resolve disputes privately, but for enforcement, they usually rely on governmental effective enforcement mechanisms. For instance, the successful history of private arbitration shows that adjudication may be conducted by private entities but subject to governmental effective enforcement mechanisms, particularly, when the power of the state is sought to back up decisions by the private adjudicative bodies since arbitrators have very few coercive powers in the event of default in compliance with their orders. In fact, for the most part the arbitrators are dependent on the court's exercise of its supportive powers to secure compliance with their orders. But clearly, the quality of the processing performed by the arbitration tribunal appointed by the parties is very important with respect to admissibility of the arbitration award by national judges. Enforcement in arbitration would depend on having an award that would be recognised by a court of law. On the one hand, the recognition of an award is a shield; this means that the arbitration ruling will operate as a *res judicata* bar in subsequent national court litigation. The enforcement, on the other hand, is a sword; this means that a national court will treat the arbitration ruling as a valid judgement, for example, it would execute the judgement against the assets of a non-compliant party.⁵³⁶

In cyberspace, enforcement in courts would require the legal recognition of OADR outcome(s). OADR schemes will not be acceptable in the long run unless they are

⁵³⁶ Bordone, R., "Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal", (1998) 3 *Harvard Negotiation Law Review* 205.

backed up by governmental effective enforcement mechanism through court system because they present real protection.

Some respondents in the survey that has been undertaken for the purpose of this thesis believe that unless national courts recognise the OADR process as valid, the OADR is ineffectual and may be seen as an exercise in futility. The rest of the respondents were undecided on this issue. Among the respondents who stated their opinions on this issue there is only one OADR academic which suggests that a theoretical perspective based on academics' views confirms the importance of the courts' recognition of OADR outcome(s) in order not to be seen as an exercise in futility. But the rest of the respondents who stated their opinions on this issue are OADR practitioners, and not OADR academics, which suggest that their opinions are based on their practical knowledge and experience with the importance of courts' recognition of OADR outcome(s) in order not to be seen as an exercise in futility.⁵³⁷

The outcomes of an OADR process may constitute settlement proposals which have to be accepted by the parties, such as electronic mediation, or may be binding on the parties, such as electronic arbitration. By definition, electronic mediation is not binding and electronic arbitration is binding. As a result, one has to think in two different ways because there are two different kinds of electronic documents to be enforced; there are electronic mediation settlements and there are electronic awards. Both have to be dealt with differently in national and international settings.

In mediation, coercion plays no role whatsoever in the effort to resolve disputes. In mediation process, at no point are participants obligated to do anything against their will and the process is voluntarily from beginning to end. Mediation needs the consent of all parties in order to be binding. As a result, it has been argued that the strength of mediation is that nothing is imposed on parties which eliminate enforcement issues. The underlying theory of mediation is that parties who freely and equally come to mutually satisfactory and beneficial agreement will also be committed to carrying out the agreement. Indeed, mediation settlements are self-enforcing in the sense that the parties have agreed voluntarily to their implementation. Besides, it must be stressed

⁵³⁷ OADR practitioner two, OADR practitioner six, and OADR academic seven.

that a resolution arising out of mediation is binding to the extent that the parties want it to be. This means that the parties can agree to certain enforcement mechanisms. They can even structure their deal to minimise opportunities for non-compliance. The neutral also can facilitate the structuring of an agreement with mutual incentives aimed at maximising compliance.⁵³⁸

However, it must be borne in mind that if parties reach a settlement agreement in mediation, it can be legally binding as a contract and is enforceable in that capacity. In other words, if the parties agree to a settlement, where their consent may constitute a contract, such a settlement will, in general, be analysed as a contract. If an agreement made in mediation is breached this may give rise to another dispute which the parties may refer to mediation, arbitration, or litigation as they have agreed or as they see fit. For instance, where a party to a signed agreement of mediation fails to comply with its terms, the other party to the agreement may make a motion to a judge for judgement in the terms of the agreement, and the judge may grant judgement accordingly.⁵³⁹

In arbitration, the enforcement could be generally easier than mediation. At a national level, arbitration, as an established legal practice, is recognised by many national jurisdictions. In the context of arbitration, the court intervention in arbitrator's decision is one of the perplexed issues in arbitration because of the increased sensitivity of arbitral independence and finality. Consequently, a party's ability to invoke the jurisdiction of the court in defiance of an agreement to arbitrate is undesired.⁵⁴⁰

In England, there is a public policy in courts against reopening issues already determined by the arbitrators. The general view was since the parties had entrusted their dispute to the adjudicator of their choice on issues of both fact and law they took the chance of error and should not be allowed further bites at the cherry. Besides, courts have an interest in avoiding the business of reviewing arbitration agreements.

⁵³⁸ Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 114.

⁵³⁹ *Ibid.* 115.

⁵⁴⁰ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1178.

This goal is best accomplished by setting the precedent of upholding arbitration agreements that meet minimum standards of fair process. Generally, English courts respect arbitration agreements and see them as a way to avoid possibly unnecessary and costly litigation, and, therefore, they want to further arbitration goals of efficiency and cost effectiveness. If arbitral tribunals are too often required to resort to court upon indeterminate points of law, this practice may amount to a rehearing of the case already decided by the arbitrators and too often it necessitates the case being remitted to them for further findings of fact. This is obviously against the philosophy of arbitration which is basically to lessen the courts burden. If this practice is inevitable in certain circumstances, it is highly recommended that the use of this procedure should be severely controlled.⁵⁴¹

In the Parliamentary debate over the Arbitration Bill 1996, which became the Arbitration Act 1996, MP John Taylor (the Minister for Competition and Consumer Affairs) said, while introducing the Bill's purpose in the improvement of the Law of Arbitration in England:

We propose to curtail the ability of the court to intervene in that private arbitral process except where the assistance of the court is clearly necessary to move the arbitration forward. At the same time, we must uphold the integrity of the arbitral process by allowing access to courts where there has been or is likely to be a case of manifest injustice.⁵⁴²

In *Sanghi Polyesters Ltd. (India) v. The International Investor (KCFC) (Kuwait)*,⁵⁴³ it has been noted that the finality and confidentiality of arbitration are lost if an award comes before the court for judicial review.

Similarly, in *Danae Air Transport ASA v. Air Canada*,⁵⁴⁴ English judges have enforced arbitration despite contract provisions that set out the recourse in permissive rather than mandatory language.

⁵⁴¹ Goode, R., *Commercial Law*, (2nd edition, Penguin Books Limited, London, 1995) 1178.

⁵⁴² The House of Commons, Parliamentary Debate, Sixth Series, Volume 276, 2nd of May 1996, (the Statutory Office, London, 1996) 1308.

⁵⁴³ [2000] 1 Lloyd's Rep. 480.

⁵⁴⁴ [1999] 2 Lloyd's Rep. 105.

At an international level, the recognition and enforcement of foreign awards are regulated by New York Convention and notions of private international law. Binding arbitral awards are dealt with as if they were final judgements of a court in the envisioned state of enforcement. If litigation is commenced after arbitration has taken place it may be defended on the basis that the issues which have been arbitrated are *res Judicata*, i.e. they have already been adjudicated upon and cannot be re-opened. In actual fact, the award is even more binding than a court decree because, generally speaking, arbitration awards are open to judicial review in limited circumstances.⁵⁴⁵

In England, the Arbitration Act 1996 re-enacts previous legislation (the Arbitration Act 1975) which implemented the New York Convention by incorporating into English law the provisions for the recognition and enforcement of awards contained in the New York Convention. This gives effect to the United Kingdom's obligations under the New York Convention to which it is a party.⁵⁴⁶

The Arbitration Act 1975 gave effect in the United Kingdom to the 1958 New York Convention. Section 3(1) of the Arbitration Act 1975 provided for the enforcement of the convention awards either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950.⁵⁴⁷

Before that, part II of the Arbitration Act 1950 gave effect in the United Kingdom to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. Part II of the Arbitration Act 1950 provided for the enforcement of foreign awards either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of this Act.⁵⁴⁸

At present, part III of the Arbitration Act 1996 which consists of sections 99-104 deals with awards to which the New York Convention applies. Section 99 preserves part II of the 1950 Act, which provides for the enforcement of Awards under the

⁵⁴⁵ Redfern, A., and Hunter, M., *Law and Practice of International Commercial Arbitration*, (3rd edition, Sweet & Maxwell, London, 1999) 3.

⁵⁴⁶ Harris, B., Planterose, R., and Tecks, J., *The Arbitration Act 1996: A Commentary*, (Blackwell science Limited, London, 1996) 322.

⁵⁴⁷ Mustill, M., and Boyd, S., *Commercial Arbitration*, (2nd edition, Butterworths, London, 1989) 424.

⁵⁴⁸ *Ibid.* 425.

Geneva Convention 1927. It has no application to awards which are New York Convention awards, which must therefore be enforced under sections 100-104. Nevertheless, since nearly all parties to the Geneva Convention 1927 are now parties to the New York Convention 1958, few awards will fall to be dealt with under the provisions of Part II of the 1950 Act.⁵⁴⁹ In this regard, Article VII (2) of the New York Convention 1958 provides that the Geneva Convention only remains in force as between state parties which have not subsequently become parties to the New York Convention. The Article reads:

The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.⁵⁵⁰

Sections 100-104 of the Arbitration Act 1996 replaced provisions formerly in the Arbitration Act 1975. Sections 101 and 103 are of particular importance in part III of the Act. On the one hand, the first part of section 101 of the Arbitration Act 1996 provides that a New York Convention Award is recognised under English law as binding on the persons as between whom it was made. The rest of the section specifies how a party may either enforce such an award or rely upon it as a defence, set off or otherwise in any legal proceedings in England and Wales or Northern Ireland. Generally speaking, the enforcement can be sought directly under the section by applying for leave of the court to enforce the award in the same manner as a judgement or order of the High Court or a county court.⁵⁵¹ Section 101 reads as follows:

(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland. (2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.⁵⁵²

⁵⁴⁹ Sutton, D., Kendall, J., and Gill, J., *Russell on Arbitration*, (Sweet & Maxwell, London, 1997) 402. Merkin, R., *Arbitration Act 1996: An Annotated Guide*, (LLP Limited, London, 1996) 261.

⁵⁵⁰ Article VII (2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

⁵⁵¹ Sutton, D., Kendall, J., and Gill, J., *Russell on Arbitration*, (Sweet & Maxwell, London, 1997) 402.

⁵⁵² Section 101 of the Arbitration Act 1996.

On the other hand, the basic premise of section 103 of the Arbitration Act 1996 is that a party seeking recognition or enforcement of a New York Convention award must have its application granted unless one or more of the circumstances set out in this section apply. In such a case, the court may refuse to recognise or enforce the award.⁵⁵³ Section 103 reads as follows:

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases. (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4)); (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place; (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made. (3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.⁵⁵⁴

That said, it must be pointed out that the ICANN uses a non-binding arbitration to resolve disputes. Either party may appeal to a court of competent jurisdiction before the mandatory proceeding has commenced, after such proceeding has concluded, and during the proceedings, subject to the panel's determination as to what to do, including termination. Article 4 (k) of the ICANN Domain Name Dispute Resolution Policy (UDRP) reads as follows:

The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be cancelled or transferred, we will wait ten business days

⁵⁵³ Merkin, R., *Arbitration Act 1996: An Annotated Guide*, (LLP Limited, London, 1996) 265.

⁵⁵⁴ Section 103 of the Arbitration Act 1996.

(as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3 (b) (xiii) of the Rules of Procedure. (In general, that jurisdiction is either the location of our principal office or of your address as shown in our Whois database. (See Paragraph 1 and 3 (b) (xiii) of the Rules of Procedure for details) If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.⁵⁵⁵

Also Article 18 of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") states that:

(a) In the event of any legal proceedings initiated prior to or during an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, the Panel shall have the discretion to decide whether to suspend or terminate the administrative proceeding, or to proceed to a decision. (b) In the event that a Party initiates any legal proceedings during the pendency of an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, it shall promptly notify the Panel and the Provider.⁵⁵⁶

The non-exclusivity of ICANN policy was confirmed in *Broad Bridge v. Hypercd.com*.⁵⁵⁷ In this case, the Southern District Court of New York ruled that a trademark owner may at the same time commence arbitration proceedings under UDRP and litigation proceeding under the US trademark law.

In actual fact, according to some authors, UDRP lacks the finality of international arbitration because of its non-binding character, which is by definition, excludes recognition and enforcement under the New York Convention. This, in turn, might

⁵⁵⁵ Article 4 (k) of ICANN Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on the 24th of October 1999, available online at

<<http://www.icann.org/dndr/udrp/policy.htm>>, last visited on the 1st of October 2003.

⁵⁵⁶ Article 18 of the Rules for 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 2003.

⁵⁵⁷ *Broad Bridge v. Hypercd.com*, 106 F. Supp. 2d 505, 2000 U.S. Dist. LEXIS. 9516.

cause legal uncertainty and undermine confidence in the whole process of OADR which is utilised in UDRP, and thus, minimise the growth of e-commerce.⁵⁵⁸

6.5. Conclusion

At present, enforceability of outcome(s) is the weakest point of OADR procedures. OADR outcome(s) enforcement cannot effectively rely on either particular incentive to perform, such as online codes of conduct, or on a mechanism that allows an enforcement of the decision by private authorities, such as online disconnection. Instead, online codes of conduct and online disconnection might be viewed as two viable techniques that work at first level stages of enforcement. Consequently, given that the issue of enforcement in ADR schemes might depend on having a settlement agreement in mediation that can be legally binding as a contract, or an arbitration award that would be recognised by a court of law, it is important to recognise that in the modernisation of the ADR procedures in the form of OADR, one must take care not to diminish its legality. Consequently, ICANN may need to consider the use of binding arbitration in order to deal with domain name disputes.

⁵⁵⁸ Katsh, E. and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 108. Davis, B., "The New Thing: Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers", (2000) 17 *Journal of International Arbitration* 138. Thornburg, E., "Going Private: Technology, Due Process, and Internet Dispute Resolution", (2000) 34 *University of California Law Review* 151.

Chapter Seven: Conclusions and Note Concerning Further Research

7.1. Conclusions

OADR is a valid proposition and perhaps the preferred system for resolving disputes that inevitably arise in e-commerce, such as, B-to-C internet transactions disputes and domain names disputes. This is due to the fact that OADR protects internet users' interests while not harming the interest of the information technology industry and, most importantly, not hindering the flourishing of electronic commerce.

Generally speaking, the benefits of the use of the internet as a medium to conduct the proceedings of ADR, in the form of online ADR, in internet commercial disputes, comfortably outweigh the problems that might result from shortcomings of such a use. It should be plain, however, that the success of OADR depends upon the success of the project to more effectively deliver justice and fair process.

It is crucial that we continue to remind ourselves of the benefits that can reasonably be expected from OADR. The major benefits should be:

1. Increased efficiency and so cutting of costs
2. Better productivity and so reduction in delays
3. Improved access to justice because of the international and decentralised nature of both the internet and alternative dispute resolution. OADR will be international model that offers private rather than sovereign solutions.
4. Greater public confidence in the electronic marketplace because OADR will become an essential element for the proper functioning of e-commerce and for the enhancement of confidence in this medium.

However, 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. The use of the internet as a medium to conduct the proceedings of ADR in the form of OADR is evolving. Nevertheless, the internet is still not universally viewed as a tool that can resolve disputes by utilising ADR techniques. None of the 19 OADR providers that have been assessed for the purpose of this thesis seem to be overrun with cases.

It must be recognised that many jurisdictions may be unwilling to defer entirely to OADR mechanisms, particularly while these mechanisms are only beginning to develop. The use of OADR for the resolution of electronic commercial disputes is still evolving, and new concepts need to be further developed, assessed, and clarified. There are probably more questions than answers in the context of OADR. So far only the first steps have been taken and interesting developments lie. As a result, there is a need to allow room for a lot of experimentation, a lot of choices to develop, and time to evaluate these experiments and choices as they grow, while keeping in mind the technological developments in this field.

The acceptance of recently created OADR institutions probably requires more time to evaluate their effects. It is to be hoped that, with experience and time, confidence will be built up in the credibility of OADR mechanisms. Also, confidence in OADR solutions is likely to grow as both, OADR providers and disputants, build up their experience and expertise.

OADR is an open issue, where intensive discussions are needed. OADR has established a tenacious academic foothold in the US and Europe. Some issues, such as the need for online ADR, is no longer questioned, while other issues, which were identified in this thesis, remain at the heart of the debate. However, it must be stressed that, as far as the author is aware, OADR has not yet been put to the test by enforcement proceedings in jurisdictions where the most resistance is likely to be encountered.

In this context, one point must be clear, namely, with the small amount of capital needed to start up online companies, new online entities can become major providers of OADR services in a very short time frame. There is no need for thousands of online ADR providers to proliferate in the online marketplace because this will confuse internet users and create the fear that OADR will snowball for every little complaint which result in OADR losing its credibility. Indeed, if bad practice becomes associated with the terms used to describe the OADR field, then internet users will resist utilising any form of OADR.

Nevertheless, competition between OADR providers should not be prevented, and the ability for new mechanisms to creatively respond to technology or marketplace changes should not be limited. It must be borne in mind that the competition between various OADR providers ensures the establishment of mutual confidence between them, which will ultimately strengthen confidence in the whole process. The important thing here is to ensure that any areas of tension between competing schemes of OADR are eliminated. A healthy diversity and competition in the OADR field might result in a race to the top, which would increase internet users choice and improve the overall confidence in e-commerce.

The primary principle should be always to ensure allowance of participation by all stakeholders interested in the use and future development of the OADR. In this regard, WIPO has noted that this is in line with the dynamic nature of the technologies that underlie the expansion and development of the internet, and equally, this is in line with the dynamic and expanding nature of ADR solutions.⁵⁵⁹

Bearing this in mind, OADR needs to be treated as a sensitive plant which needs nourishment, active support, and care. Direct regulation at this early stage of its practice does not necessarily provide such support. Instead, a constructive co-operation between governments, legal communities, businesses, consumer organisations, ADR professional bodies, and information technology industry must be encouraged as it can provide legal and technical expertise in the development of OADR policies. It is hoped that this will result in meetings, conferences, workshops, held to educate internet users about the availability and effectiveness of OADR on one hand, and to build critical mass in the e-business community on the other hand, but without undermining the importance of knowledge of the underlying operation of the internet. This might enable us to build a strong feedback and evaluation system to assess areas of weakness where further modification of OADR systems is necessary. Indeed, there is a need for greater collaboration, co-ordination, and consultation in relation to the use of the internet in ADR.

⁵⁵⁹ 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://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

A marketing strategy, which aims at increasing awareness of OADR and educating parties involved in e-commerce transactions, might be useful. It is not likely that many people will take part in a process they do not know and do not understand such as OADR. Therefore, public awareness should attempt, on the one hand, to move internet users past the litigation-centred view of disputes to the broader notion that parties can work out their differences themselves and, on the other hand, to create general familiarity with and confidence in the internet architecture as a necessary basis for parties to be willing to attempt to use ADR online in the first place.

At this stage of OADR development, and given the nascent nature of electronic business, it is premature to determine whether some types of OADR, such as e-mediation or e-arbitration, are better suited for online disputes than others. This can be seen as a short-sighted approach to the issue of encouraging OADR system because imposing one type of OADR will stifle the development of other cheaper and effective options. Besides, it is hard to generalise about the suitability of certain OADR practices to the internet disputes.

Since different types of disputes demand different types of dispute resolution, OADR must not be perceived as one type of dispute resolution process. Instead, it must be perceived as a comprehensive design, with an array of processes, which will ultimately become a comprehensive OADR process in cyberspace. It is necessary to encourage a wide range of flexible solutions in the context of OADR. A "one size fits all" approach will not be appropriate to encourage diverse, innovative, flexible, and effective OADR solutions. Indeed, the internet has experienced enormous growth precisely because few restrictions have been imposed on new initiatives, such as OADR.

However, 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.

A number of legal and technical issues need to be addressed if there is to be a swift and successful deployment of OADR mechanisms in a cross-border environment. Legal issues do not constitute insurmountable obstacles to a successful operation of such schemes, but some uncertainties remain due to technological limitations. Indeed the growth of OADR is tied to the development of technology.

The OADR model should be based on a functional and well-defined legal framework which permits the operation of this mechanism in cross-border electronic commerce, and allow for the recognition and enforcement of the settlement, and correspond with the international law relating to out-of-court dispute settlement. However, it must be recognised that the differences in legal systems and the prevailing uncertainties in many of them with regard to OADR might create obstacles to such an implementation.

A coherent legal environment is required for OADR to be effective. Amendments and changes in our current laws regarding arbitration are needed. The provisions of some laws, particularly, the New York Convention 1958, were drafted well before the internet age, and present problems of interpretation in the online context which may interfere with the conduct of electronic arbitration. Consequently, there is a need to make specific provisions for the resolution of disputes by electronic means. This would require modification in two important respects. First, the requirement that the arbitration agreement be made in writing might need to be amended to accommodate cyberspace realities. Second, rules on the place of the arbitration require modification for virtual arbitration that lacks a geographical locus. Until this is accomplished, we must work within an existing rule structure that, for all its functionality and utility, is beset with certain obstacles and unnecessary limitations on the use of electronic arbitration. However, the rules should be interpreted in their true spirit so as not to discriminate against technological advances.

From this perspective, the OADR model must contemplate primarily the value of fair process which OADR solutions are subject to, and the value of efficiency which

OADR solutions are seen to achieve. Clearly, these values must be taken into account in the establishment of any practical ADR program in the electronic format. Without such, the essence of OADR is necessarily largely lost. Equally, the OADR model should be based on a functional and well-defined technical framework because rules for use of the technology are necessary to promote effective communication and prevent miscommunication of the disputants. However, it is difficult to predict the take up of new technologies or to decide whether or not it is actually possible to make reliable long-term predictions about information technology.

Richard Susskind, a leading author on information technology law, said that it is often argued that long-term planning for information technology is futile because no one can fundamentally predict what technological advances might be made many years hence. For instance, in the seventies, some might not even have predicted the personal computer, let alone the internet. Nonetheless, the impact of the entirely foreseeable consequences of today's proven technologies is of itself extremely profound.⁵⁶⁰

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:

Cyberspace is in transition, both in terms of how populated it is and in what it is used for.⁵⁶¹

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

⁵⁶⁰ Susskind, R., *Transforming the Law, Essays on Technology, Justice and the Legal Marketplace*, (Oxford University Press, Oxford, 2000) 124.

⁵⁶¹ Katsh, E., "Dispute Resolution in Cyberspace", (1996) 28 *Connecticut Law Review* 956 at 961.

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.⁵⁶²

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.⁵⁶³

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

⁵⁶² Katsh, E., and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, (Jossey-Bass, San Francisco, 2001) 9.

⁵⁶³ 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.

how web-conferencing might be employed in OADR and when it will be widely and reliably available.

In order to achieve an overall vision in OADR, the development of an information economy wherein technology is an integral part of all business, and the evolution of a community that has access to the internet, and the establishment of a world-class telecommunications infrastructure to support all aspects of the information society are crucial elements.⁵⁶⁴

Indeed, a successful OADR provider must be poised to meet a varied range of types of marketplaces, both those existing today and newly emerging, must be capable of expanding rapidly with the growth of e-commerce, and must be responsive to the needs of online participants. By doing so, the ability for OADR mechanisms to creatively respond to new technology changes should be ensured.

From this perspective, every project that emerges in the context of OADR should, on the one hand, provide a mean for settling disputes, and, on the other hand, determines the likely structure or mechanisms of OADR in the future. It is contemplated that in the very near future, the key to being the world's preferred electronic marketplace will be an OADR system for the resolution of disputes. Therefore, computer systems and communication facilities must be sufficiently performing in OADR process, and providers must watch their systems' potential and consider upgrading mechanisms. In actual fact, in the rapidly changing internet-based world, it is not possible to outline all details in advance. Instead, it is vital to be able to be flexible and refine projects as circumstances require.⁵⁶⁵

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

⁵⁶⁴ Susskind, R., *Transforming the Law, Essays on Technology, Justice and the Legal Marketplace*, (Oxford University Press, Oxford, 2000) 273.

⁵⁶⁵ *Ibid.*

Besides, although there are more than five 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.

That said, there is a basic set of conditions and principles that contribute genuinely to the success of OADR. Some of these conditions and principles may vary in intensity and nature depending on the form of the process. However, the conditions and principles which are the common denominators for all OADR systems can be categorised in two main groups, conditions pertaining to the disputants and conditions pertaining to the OADR providers.

As regards the former, disputants should have faith and trust in the process. Disputants should also act in good faith in order to ensure the success of the process for their mutual benefit. Good faith entails co-operation through communicating with each other and with the neutral third party, and avoiding manipulative techniques, and being rational and reasonable. Disputants should also be clear and precise about their claims and their expectations. If the parties are not clear and precise, this could generate series of misunderstandings, lengthen the period of dispute settlement, and amplify the conflict. All of these issues are of particular importance in an online setting such as OADR.

As regards the later, OADR providers should educate the parties to utilise information and communications technology tools that are indispensable to the service they offer. This entails easy access to the service. This entails also organising a simple OADR platform which is easy to comprehend. Besides, given that transparency and information disclosure are key elements in OADR, an OADR provider should provide adequate contact details, policy and disclaimers, services offered, stages of the process, published rules of procedure, a clear outline of costs and fees, term and

period of the process, legal consequences of the electronic settlements or electronic awards, and a clear policy with regard to third party neutrals' independence.

7.2. Note Concerning Further Research

This is not the end of the writer's research on OADR. It is the intention of the writer to set up an OADR scheme upon returning to Jordan. This will be the first OADR scheme in the world that is provided in both Arabic and English. OADR is flourishing in the United States and Europe. As far as the author is aware, the launching of an Arabic OADR web site would be the first attempt of this kind.

OADR and the internet are universal in nature, and, therefore, co-operation and exchange of ideas are needed. International comparisons between different jurisdictions, different cultures, and different internet infrastructures are needed too. Indeed, technological solutions such as OADR, by its very nature, requires co-operation across borders in order to learn how different legal systems are dealing with such solutions.

The writer believes that we should work together, both in the UK and globally, to rapidly deploy OADR systems, which can settle internet disputes swiftly and at low cost. As a result, it is the writer's intention to carry on his research on his return to Jordan. Contacts with relevant experts in OADR in the UK, Europe and the US will continue to be made.

For example, there is a large opportunity at hand to develop and promote OADR in Jordan under the Jordanian Arbitration Act. For instance, Article 10 of the Jordanian Arbitration Act, which is based upon the UNCITRAL Model Law on International Commercial Arbitration, provides that an arbitration agreement is to be considered in writing, and accordingly to constitute a valid arbitration agreement, if it is contained in a document signed by the parties or in an exchange of letters, telegrams, faxes, telexes, or other means of telecommunications which provide a record of the agreement. This implies that an arbitration agreement that is produced in electronic record shall be deemed to constitute a valid agreement.⁵⁶⁶

⁵⁶⁶ Article 10 of the Jordanian Arbitration Act (Law No. 31 of 2001).

Similarly, there is a large opportunity at hand to develop and promote OADR in Jordan under the Jordanian Electronic Transactions Act. For instance, Article 7 of the Jordanian Electronic Transactions Act, which is based upon the UNCITRAL Model Law on Electronic Commerce, establishes a legal instrument for courts to recognise all electronic records, messages, and signatures, which under the said Article establish the same legal effects produced by written documents and signature, and, therefore, electronic documents shall not be denied legal effect solely on the grounds that it is in an electronic form.⁵⁶⁷

Jordan is trying to grasp the opportunities offered by e-commerce in order to be capable to meet the challenges of globalisation. E-commerce is evolving rapidly in Jordan. From this perspective, it seems that the present arbitral institutions in Jordan will do well in providing OADR. This will be a boost for the growth of e-commerce in Jordan.

⁵⁶⁷ Article 7 of the Jordanian Electronic Transactions Act (Law No. 85 of 2001).

Appendix 1: The Assessed OADR Institutions

1. **InternetNeutral**: A US-based private business venture in operation since 1997. The institution's web site is <http://www.internetneutral.com>, last visited on the 1st of October 2003.
2. **IntelliCOURT**: A US-based private business venture runs by a company providing offline ADR. It was founded in 2000. The web site is <http://www.intellicourt.com>, last visited on the 1st of October 2003.
3. **SquareTrade**: A US-based private business venture which was created in 1999. The institution's web site is <http://www.squaretrade.com>, last visited on the 1st of October 2003.
4. **WebMediate**: A US-based private business venture launched in the autumn of 2000. The web site is <http://www.webmediate.com>, last visited on the 1st of October 2003.
5. **I-Courthouse**: A US-based private business venture in operation since November 1999. The institution's web site is <http://www.i-courthouse.com>, last visited on the 1st of October 2003.
6. **OnlineResolution**: A US-based private business venture which was created in January of 2000. The institution's web site is <http://www.onlineresolution.com>, last visited on the 1st of October 2003.
7. **SettleTheCase**: A US-based private business venture which was created in 2001. The institution's web site is <http://www.settlethecase.com>, last visited on the 1st of October 2003.
8. **WEBDispute**: A US-based private business venture that has been created in March 2000. The institution's web site is <http://www.webdispute.com>, last visited on the 1st of October 2003.
9. **Resolution Forum**: A US-based non-profit program created in 1997. The institution's web site is <http://www.resolutionforum.org>, last visited on the 1st of October 2003.
10. **Virtual Magistrate**: A US-based academic and non-profit institution. It began in May 1996 as the first online dispute resolution project. The project is no longer in operation. Its web site is <http://www.vmag.org>, last visited on the 1st of October 2003.

11. **Online Ombuds Office:** A US-based non-profit research project created in June of 1996 by the University of Massachusetts at Amherst. It was funded by the National Centre for Automated Information Research (NCAIR) and a private foundation (the Hewlett Foundation). The project is no longer in operation. Its web site is <http://www.ombuds.org>, last visited on the 1st of October 2003.
12. **The Arbitration and Mediation Centre of the World Intellectual Property Organisation (WIPO):** A dispute resolution provider approved since December 1999 by ICANN, and therefore, applying the UDRP rules. It is currently the most active provider of dispute resolution under the UDRP. Its web site is <http://arbiter.wipo.int>, last visited on the 1st of October 2003.
13. **National Arbitration Forum:** A US-based arbitration institution which provides dispute resolution services under the UDRP. It has been accredited by ICANN on December 1999. It is the second most active institution applying the UDRP, after WIPO. Its web site is <http://www.arb-forum.com>, last visited on the 1st of October 2003.
14. **CPR Institute for Dispute Resolution:** A US-based private business venture. It applies ICANN's Uniform Dispute Resolution Policy as it is a dispute resolution provider approved since December 1999 by ICANN. The web site is <http://www.cpradr.org>, last visited on the 1st of October 2003.
15. **E-resolution:** A Canadian-based private business venture. It has been proposing dispute resolution services under ICANN's UDRP for domain names since fall 1999. The web site of E-resolution is <http://www.eresolution.ca>, last visited on the 1st of October 2003.
16. **NovaForum:** A Canadian-based private business venture created in June 2000. The institution's web site is <http://www.novaforum.com>, last visited on the 1st of October 2003.
17. **E-mediator:** A UK-based private business. It was created in February 2000. The web site of the institution is <http://www.consensusmediation.co.uk>, last visited on the 1st of October 2003.
18. **TrustEnforce:** A South African based private business venture which was founded in April 2002. The web site of the institution is <http://www.trustenforce.org/>, last visited on the 1st of October 2003.

19. ECODIR (European Consumer Dispute Resolution): an online dispute resolution program promoted by the European Commission and the Irish Department of Enterprise, Trade and Deployment. It has been launched at the end of October 2001. The web site of ECODIR is <http://www.ecodir.org>, last visited on the 1st of October 2003.

Appendix 2: The Statements of the Survey

I- Overall impact of OADR

1. In terms of increasing access to justice, Alternative Dispute Resolution will be facilitated by the use of new technologies such as the internet.

Strongly Agree
Agree
Undecided
Disagree
Strongly Disagree

2. In terms of Alternative Dispute Resolution, the use of new technologies such as the internet will replace successfully traditional forms of Alternative Dispute Resolution.

Strongly Agree
Agree
Undecided
Disagree
Strongly Disagree

3. Online Alternative Dispute Resolution schemes should become mandatory.

Strongly Agree
Agree
Undecided
Disagree
Strongly Disagree

4. The Government's main role in Online Alternative Dispute Resolution schemes is to determine standards of operation.

Strongly Agree
Agree
Undecided
Disagree
Strongly Disagree

5. The Government's major role in Online Alternative Dispute Resolution schemes is to monitor standards of operation.

Strongly Agree
Agree

- Undecided**
- Disagree**
- Strongly Disagree**

6. The Government's major role in Online Alternative Dispute Resolution schemes is to maintain standards of operation.

- Strongly Agree**
- Agree**
- Undecided**
- Disagree**
- Strongly Disagree**

II- Fairness of OADR Process

7. The independence of the neutral from both disputants in electronic disputes settlement is a desirable value in the Online Alternative Dispute Resolution service.

- Strongly Agree**
- Agree**
- Undecided**
- Disagree**
- Strongly Disagree**

8. A clear and published set of procedural rules is crucial to the success of the Online Alternative Dispute Resolution process.

- Strongly Agree**
- Agree**
- Undecided**
- Disagree**
- Strongly Disagree**

9. Justice in Online Alternative Dispute Resolution can be achieved through participation in "virtual hearings" which do not require the attendance of the parties.

- Strongly Agree**
- Agree**
- Undecided**
- Disagree**
- Strongly Disagree**

III- Effectiveness of OADR process

10. Online Alternative Dispute Resolution increases cost efficiency of the resolution process.

- Strongly Agree
- Agree
- Undecided
- Disagree
- Strongly Disagree

11. Online Alternative Dispute Resolution increases the speed of the resolution process

- Strongly Agree
- Agree
- Undecided
- Disagree
- Strongly Disagree

12. It is important that the provider of the Online Alternative Dispute Resolution service has the ability to deal with cross-border transactions.

- Strongly Agree
- Agree
- Undecided
- Disagree
- Strongly Disagree

13. The expertise of the OADR provider is crucial to the success of the resolution process.

- Strongly Agree
- Agree
- Undecided
- Disagree
- Strongly Disagree

14. Appropriate levels of data protection and commercial privacy in Online Alternative Dispute Resolution process are crucial in order to ensure that participants have the confidence to use the process.

- Strongly Agree
- Agree
- Undecided

Disagree
Strongly Disagree

15. It is crucial to the success of Online Alternative Dispute Resolution process that the seller of goods/supplier of services pays all the fees related to the process.

Strongly Agree
Agree
Undecided
Disagree
Strongly Disagree

IV- Enforcement of OADR outcome(s)

16. Compliance with Online Alternative Dispute Resolution is best achieved by disbarring defaulters from displaying trust-marks of membership of resolution process.

Strongly Agree
Agree
Undecided
Disagree
Strongly Disagree

17. Compliance to Online Alternative Dispute Resolution is best achieved by the withdrawal of online services from defaulters.

Strongly Agree
Agree
Undecided
Disagree
Strongly Disagree

18. Compliance to Online Alternative Dispute Resolution is best achieved by applying available laws and legal processes to defaulters.

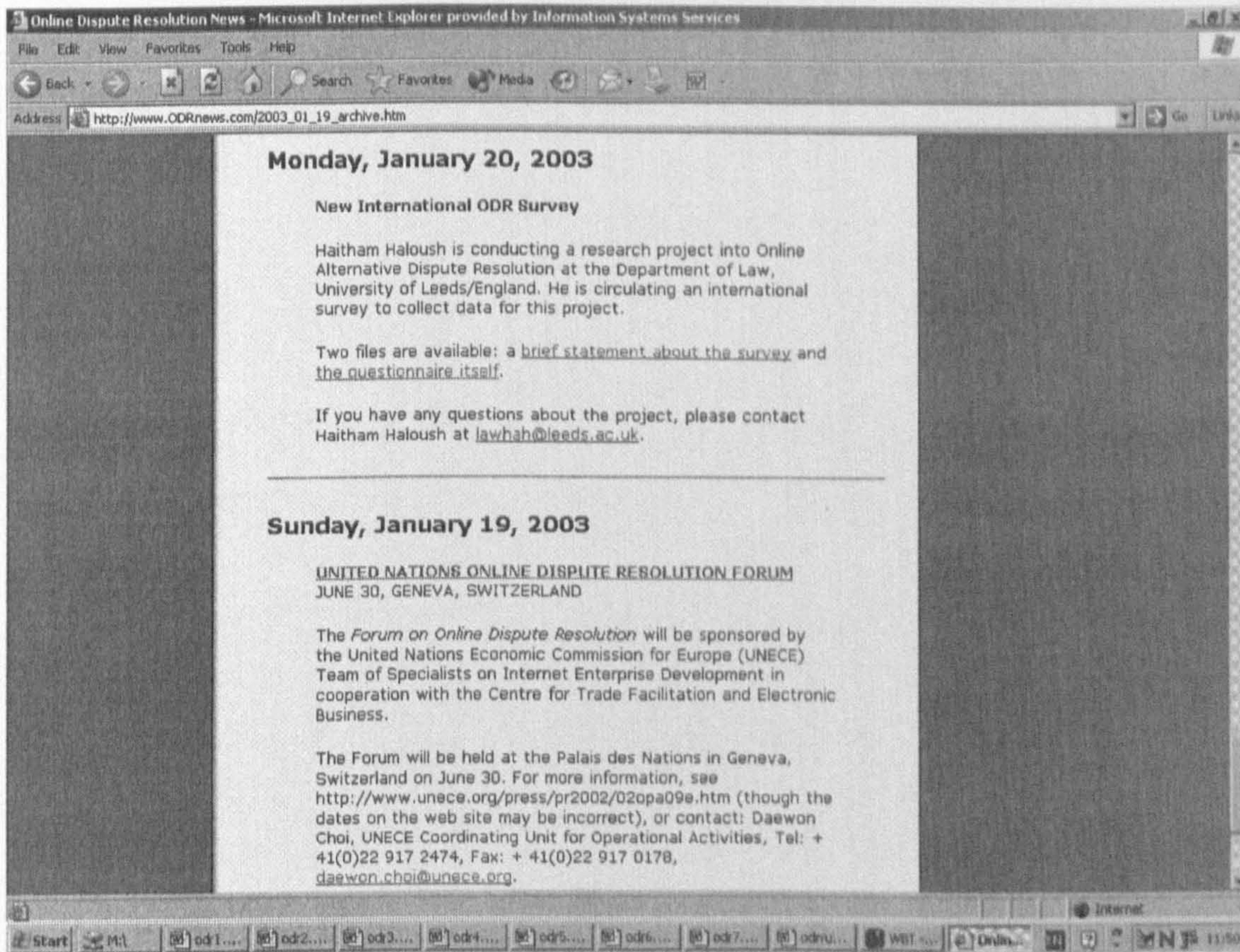
Strongly Agree
Agree
Undecided
Disagree
Strongly Disagree

V- Conclusion

19. Have you got any other comments? Please use the space below to record any further views you have with regard to Online Alternative Dispute Resolution.

20. Are there any examples or contact names you could give me which you think might be useful in my research? Please use the space below.

Appendix 3: The Web Page of the Survey



Bibliography and List of Cases

I- Books

Akdeniz, Y., Walker, C., and Wall, D., *The Internet, Law and Society*, (Pearson Education Limited, London, 2000).

Bailey, S., Ching, J., Gunn, M., and Ormerod, D., *Smith, Bailey & Gunn on the Modern English Legal System*, (4th edition, Sweet & Maxwell, London, 2002).

Bernstein, R., Tackaberry, J., and Marriott, A., *Handbook of Arbitration Practice*, (3rd edition, sweet & Maxwell, London, 1998).

Bevan, A., *Alternative Dispute Resolution: A Lawyer's Guide to Mediation and Other Forms of Dispute Resolution*, (Sweet and Maxwell, London, 1992).

Born, G., *International Commercial Arbitration in the United States: Commentary and Materials*", (Kluwer Law and Taxation Publishers, Deventer, 1994).

Brown, H. and Marriott, A., *ADR principles and practice* (2nd edition, Sweet & Maxwell, London, 1999).

Burns, R., *Introduction to Research Methods*, (Fourth edition, SAGE Publications, London, 2000).

Chissick, M., and Kelman, A., *Electronic Commerce Law and Practice*, (3rd edition, Sweet and Maxwell, London, 2002).

Collins, L., *Dicey and Morris on the Conflict of Laws*, (13th edition, Sweet & Maxwell, London, 2000).

Domke, M., *Domke on Commercial Arbitration*, (Wilmette Ill, Callaghan, 1999).

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

Goode, R., *Commercial Law in the Next Millennium*, (Sweet & Maxwell, London, 1998).

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

Harris, B., Planterose, R., and Tecks, J., *The Arbitration Act 1996: A Commentary*, (Blackwell science Limited, London, 1996).

Katsh, E., *Law in a Digital World*, (Oxford University Press, New York, 1995).

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

Lessig, L., *Code and Other Laws of Cyberspace*, (Basic Books, New York, 1999).

Macneil, I., *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act*, (Little Brown & Co., Boston, 1999).

Merkin, R., *Arbitration Act 1996: An Annotated Guide*, (LLP Limited, London, 1996).

Mustill, M. and Boyd, S., *Commercial Arbitration*, (Butterworths, London, 2001).

Mustill, M., and Boyd, S., *Commercial Arbitration*, (2nd edition, Butterworths, London, 1989).

Palmer, M. and Roberts, S., *Dispute Process*, (Butterworths, London, 1998).

Redfern, A., and Hunter, M., *Law and Practice of International Commercial Arbitration*, (3rd edition, Sweet & Maxwell, London, 1999).

Rule, C., *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass, San Francisco, 2002).

Rutherford, M., and Sims, J., *Arbitration Act 1996: A Practical Guide*, (FT Law & Tax, London, 1996).

Susskind, R., *Transforming the Law, Essays on Technology, Justice and the Legal Marketplace*, (Oxford University Press, Oxford, 2000).

Sutton, D., Kendall, J., and Gill, J., *Russell on Arbitration*, (Sweet & Maxwell, London, 1997).

Taggart, M., *The Province of Administrative Law*, (Hart Publishing, Oxford, 1997).

Van Den Berg, A., *The New York Arbitration Convention 1958: Towards a Uniform Judicial Interpretation*, (Kluwer Law and Taxation Publishers, London, 1981).

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

II- Articles

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

Arsic, J., "International Commercial Arbitration on the Internet: Has the Future Come Too Early", (1997) 14 *Journal of International Arbitration*.

Bargh, J., "Beyond Simple Truths: The Human-Internet Interaction", (2002) 58 *Journal of Social Issues*.

- Bermant, G., "Courting the Virtual: Federal Courts in an Age of Complete Interconnectedness", [1999] *Ohio Northern University Law Review*.
- Bernstein, L., "Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Court Programs", (1993) 141 *University of Pennsylvania Law Review*.
- Bick, J., "Why should the internet be Any Different" (1998) 19 *Pace Law Review*.
- Blackman, S., and McNeill, R., "ADR in Commercial Intellectual Property Disputes", (1998) 47 *American University law Review*.
- Bordone, R., "Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal", (1998) 3 *Harvard Negotiation Law Review*.
- Burk, D., "Trademarks along the Infobahn: A First Look at the Emerging Law of Cyber-Marks", (1995) 1 *Richmond Journal of Law & Technology*.
- Burk, D., "Jurisdiction in a World Without Borders", (1997) 1 *Virginia Journal of Law & Technology*.
- Burnstein, M., "Conflicts on the Internet: Choice of Law in Transnational Cyberspace", (1996) 29 *Vanderbilt Journal of Transnational Law*.
- Bush, R., "Efficiency and Protection or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation" (1989) 41 *Florida Law Review*.
- Campbell, D., "Reflexivity and Welfarism in the Modern Law of Contract", (2000) 20 *Oxford Journal of Legal Studies*.
- Campbell, D., and Picciotto, S., "Exploring the Interaction Between Law and Economics: The Limits of Formalism", (1998) 18 *Legal Studies*.

Carty, H., "Dilution and Passing off: Cause for Concern", (1996) 112 *Law Quarterly Review*.

Carty, H., "Passing off at the Crossroads", [1996] *European Intellectual Property Review*.

Casey, E., "ADR in Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation", (1996) 12 *Ohio State Journal of Dispute Resolution*.

Cooter, R., Marks, S., and Mnookin, R., "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour", (1982) 11 *Journal of Legal Studies*.

Cona, F., "Focus on Cyberlaw: Applications of Online Systems in Alternative Dispute Resolution", (1997) 45 *Buffalo Law Review*.

Contini, P., "The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", (1959) 8 *American Journal of Comparative Law*

Davis, B., "The New Thing: Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers", (2000) 17 *Journal of International Arbitration* 115.

Davis, B., "The First International Competition for Online Dispute Resolution: Is This Big, Different and New", (2002) 19 *Journal of International Arbitration*.

Davies, L., and Reed, C., "The Trouble with Bits: First Steps in Internet Law", [1996] *Journal of Business Law*.

Dely, F., "The Place of Arbitrator in the Conflict of Law of International Commercial Arbitration: An Exercise in Arbitration Planning", (1991) 12 *North western Journal of International Law and Business*.

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

Donahey, S., "Current Developments in Online Dispute Resolution", (1999) 16 *Journal of International Arbitration*.

Dueker, K., "Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses", (1996) 9 *Harvard Journal of Law & Technology*.

Dunne, R., "Deterring Unauthorised Access to Computers: Controlling Behaviour in Cyberspace Through a Contractual Law Paradigm", (1994) 35 *Jurimetrics Journal*.

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

Friendly, H., "Some Kind of Hearing", (1975) 123 *University of Pennsylvania Law Review*.

Froomkin, M., "The Essential Role of Trusted Third Parties in Electronic Commerce", (1996) 75 *Oregon Law Review*.

Galves, F., "Where the Not-So-Wild-Things Are", (2000) 13 *Harvard Journal of Law & Technology*.

Garavaglia, M., "In Search of the Proper Law in Transnational Commercial Disputes", (1991) 12 *New York Law School Journal of International & Comparative Law*.

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

Gibson, C., "Arbitration in Intellectual Property Disputes", (1997) 8 *California International Practitioner*.

Gibbons, L., "Private Law, Public Justice: Another Look at Privacy, Arbitration, and Global E-Commerce", (2000) 15 *Ohio State Journal of Dispute Resolution*.

Gold, L., "Influencing Unconscious Influences: The Healing Dimension of Mediation", (1993) 11 *Mediation Quarterly*.

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

Gordon, R., "The Electronic Personality and Digital Self", [2001] *Dispute Resolution Journal*.

Gould, J., "The Economics of Legal Conflicts", (1973) 2 *Journal of Legal Studies*.

Griffiths, D., "Contracting on the Internet", [1997] *European Intellectual Property Review*.

Hamilton, G., "Trademarks on the Internet: Confusion, Collusion or Dilution", (1996) 4 *Texas Intellectual Property Law Journal*.

Hardy, S., "Online Mediation: Internet Dispute Resolution", (1998) 9 *Australian Dispute Resolution Journal*.

Hardy, T., "The Proper Legal Regime for Cyberspace", (1994) 55 *University of Pittsburgh Law Review*.

Heiskanen, V., "Dispute Resolution in International Electronic Commerce", (1999) 16 *Journal of International Arbitration*.

Hill, R., "Online Arbitration: Issues and Solutions", (1999) 15 *International Arbitration*.

Hong Lin Yu, "Five Years on: A Review of the English Arbitration Act 1996", (2002) 19 *Journal of International Arbitration*.

Howitt, D., "War.com: Why the battle over domain names will never cease", (1997) 19 *Hastings Communications and Entertainment Law Journal*.

Johnson, D., "Dispute Resolution in Cyberspace", (1994) 136 *New Jersey Law Journal*.

Johnson, D., and Post, D., "Law and Borders: The Rise of Law in Cyberspace", (1996) 48 *Stanford Law Review*.

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

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*.

Kaufman, J., "Clash of the Titans: Regulating the Competition Between Established and Emerging Electronic Payment Systems", (1999) 14 *Berkeley Technology Law Journal*.

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

Klein, B., and Leffler, K., "The Role of Market Forces in Assuring Contractual Performance", (1981) 89 *Journal of Political Economy*.

Lessig, L., "Reading the Constitution in Cyberspace", (1996) 45 *Emory Law Journal*.

Lessig, L., "The Zones of Cyberspace", (1996) 48 *Stanford Law Review*.

Leahy, E., and Bianchi, C., "The Changing Face of International Arbitration", (2000) 17 *Journal of International Arbitration*.

- Leitstein, T., "A Solution for Personal Jurisdiction on the Internet", (1999) 59 *Louisiana Law Review*
- Litman, J., "The DNS Wars: Trademarks and the Internet Domain Name System", (2000) 4 *Journal of Small & Emerging Business Law*.
- Litman, J., "Breakfast with Batman: The Public Interest in the Advertising Age", (1999) 108 *Yale Law Journal*.
- Landes, W., "An Economic Analysis of the Courts", (1971) 14 *Journal of Law & Economics*.
- Loundy, D., "A Primer on Trademark Law and Internet Addresses", (1997) 15 *John Marshall Journal of Computer and Information Law*.
- Marcelo, H. and Ajay, N., "From International Treaties to Internet Norms: The Evolution of International Trademark Disputes In the Internet Age", (2000) 21 *University of Pennsylvania Journal of International Economic Law*.
- Mnookin, R., and Kornhauser, L., "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal*.
- Murray, A., "A Distinct Lack of Goodwill", [1997] *European Intellectual Property Review*.
- Newman P., "Mediation-Arbitration (Med-Arb): Can it Work Legally", (1994) 60 *Arbitration*.
- Noll, J., "European Community and E-commerce: Fostering Consumer Confidence", (2002) 9 *Electronic Communications Law Review*.
- Nottage, L., "The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A view from the Periphery", (2000) 16 *Arbitration International*.

Paolo Contini, "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", (1959) 8 *American Journal of Comparative Law*.

Park, W., "The Lex Loci Arbitri and International Commercial Arbitration", (1983) 32 *International & Comparative Law Quarterly*.

Park, W., "Judicial Controls in the Arbitral process", (1989) 5 *Arbitration International*.

Park, W., "Private Adjudicators and the Public Interest: the Expanding Scope of International Arbitration", (1986) 12 *Brooklyn Journal of International Law*.

Paulson, J., "Arbitration Unbound: Award Detached From the Law of its Country of Origin", (1981) 30 *International & Comparative Law Quarterly*.

Paulson, J., "De-localisation of International Commercial Arbitration: When and Why It Matters", (1983) 32 *International & Comparative Law Quarterly*.

Perritt, H., "Dispute Resolution in Electronic Network Communities", (1993) 38 *Villanova Law Review*.

Perritt, H., "The Internet is Changing the Public International Legal System", (2000) 88 *Kentucky Law Journal*.

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

Perritt, H., "Towards a Hybrid Regulatory Scheme for the Internet", [2001] *University of Chicago Legal Forum*.

Post, D., "Governing Cyberspace", (1997) 43 *Wayne Law review*.

Rakoff, T., "Contracts of Adhesion: An Essay in Reconstruction", (1984) 96 *Harvard Law Review*.

Rau, A., "Contracting Out of the Arbitration Act", (1997) 8 *American Review of International Arbitration*.

Rau, A., "Integrity in Private Judging", (1997) 38 *South Texas Law Review*.

Reed, C., "Legally Binding Electronic Documents: Digital Signatures and Authentication", (2001) 35 *International Lawyer*.

Reidenberg, J., "Lex Informatica: the Formulation of Information Policy Rules Through Technology", (1998) 76 *Texas Law Review*.

Rothchild, J., "Protecting the Digital Consumer: the Limits of Cyberspace Utopianism", (1999) 74 *Indiana Law Journal*.

Sanders, K., "Some Frequently Asked Questions About the 1994 UK Trade Marks Act", [1995] *European Intellectual Property Review*.

Sander F., and Goldberg, S., "Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure", (1994) 10 *Negotiation Journal*.

Schackleton, S., "Global Warming: Milder Still in England", (2000) 3 *International Arbitration Law Review*.

Schellekens, M., "Online Arbitration and E-commerce", (2002) 9 *Electronic Communications Law Review*.

Schneider, M., and Kuner, C., "Dispute Resolution in International Electronic Commerce", (1997) 14 *Journal of International Arbitration*.

Shavell, S., "Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of the Legal Costs", (1982) 11 *Journal of Legal Studies*.

Smit, H., "A-national Arbitration", (1989) 63 *Tulane Law Review*.

Smythe, H., "Fighting Telemarketing Scams", (1994) 17 *Hastings Communications & Entrecroisement Law Journal*.

Sutherlin, K., "Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses", (1996) 9 *Harvard Journal of Law & Technology*.

Tarruella, A., "Cross-Border Disputes on Online Consumer Contracts in the European Union, the Brussels Convention, the Brussels Regulation and the Role of Alternative Dispute Resolution Systems", (2001) 2 *Journal of Network Industries*.

Thieffry, C., and Thieffry, P., "Negotiating Settlement of Dispute Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes", (1990) 45 *Business Lawyer*.

Thompson, L., and Nadler, J., "Negotiating via Information Technology: Theory and Application", (2002) 58 *Journal of Social Issues*.

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

Trachtman, J., "Cyberspace, Sovereignty, Jurisdiction, and Modernism", (1998) 5 *Indiana Journal of Global Legal Studies*.

Van Den Berg, A., "Non-domestic Arbitral Awards Under the 1958 New York Convention", (1986) 2 *Arbitration International*.

Weiswasser, G., "Domain Names, the Internet, and Trademarks: Infringement in Cyberspace", (1997) 13 *Santa Clara Computer & High Technology Law Journal*.

Woolf, H., "Public Law-Private Law: Why the Divide? A Personal View", [1986] *Public Law*.

II- Others

Carblanc, A., “Privacy Protection and Redress in the Online Environment: Fostering Effective ADR”, a paper presented at the 22nd International Conference on Privacy and Personal Data Protection, Venice, Italy, 28-30 September, 2000.

De Zylva, M., “Business Process Models and technical requirements for Online Dispute Resolution”, a paper presented at the European Commission workshop, Ispra, Italy, 8-9 March 2001.

Fortier, L., “International Commercial Arbitration and E-commerce”, a paper presented at WIPO Conference on Dispute resolution in Electronic Commerce, Geneva, 6th and 7th of November 2000.

Froomkin, M., “A Commentary on WIPO’s Final Report on the Management of Internet Names and Addresses: Intellectual Property Issues”, available online at <http://www.law.miami.edu/~amf/commentary.htm>, last visited on the 1st of October 2003.

Granat, R., “Creating an environment for Mediating Disputes on the Internet”, a working paper for the NCAIR Conference on Online Dispute Resolution, Washington DC, 22nd of May 1996, available online at <http://mantle.sbs.umass.edu/vmag/granat.htm>, last visited on the 1st of October 2003.

Hart, C., “Online Dispute Resolution and Avoidance in Electronic Commerce”, a paper presented at the Uniform Law Conference of Canada, August 1999, available online at <http://www.law.ualberta.ca/alri/ulc/current/hart.htm>, last visited on the 1st of October 2003.

Katsh, E., “The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace”, available online at <http://mantle.sbs.umass.edu/vmag/katsh.htm>, last visited on the 1st of October 2003.

Benyekhlef, K., Trudel, P., and Gautrais, V., "Some Reflections on Conflicts Management in Cyberspace", available online at <http://www.disputes.net/cyberweek2000/ohiostate/cyberjusENGLISH.htm>, last visited on the 1st of October 2003.

Femenia, N., "ODR and the Global Management of Customers' Complaints: How Could ODR Techniques Be Responsive to Different Social and Cultural Environments", a paper presented at the Joint Conference of the OECD, HCOPIL and ICC, The Hague, the Netherlands, December 12, 2000.

Perritt, H., Electronic Dispute Resolution, a paper presented at NCAIR conference, Washington DC, 22nd of May 1996, available online at <http://mantle.sbs.umass.edu/vmag/PERRITT.HTM>, last visited on the 1st of October 2003.

Perritt, H., "Jurisdiction and the Internet: Basic Anglo/ American Perspectives", a paper presented at the Internet Law and Policy Forum Jurisdiction: Building Confidence in a Border-less Medium, Montreal, Canada, 26th and 27th of July 1999, available online at http://www.ilpf.org/events/jurisdiction2/presentations/perritt_pr/, last visited on the 1st of October 2003.

Tyler, M. and Bretherton, D., "Research into Online Alternative Dispute Resolution, an Exploration Report Prepared for the Department of Justice in Australia", 21 March 2003, available online at [http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/\\$file/Research_ADR_Exploration_Report_03.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/Online_ADR/$file/Research_ADR_Exploration_Report_03.pdf), last visited on the 1st of October 2003.

Samuelson, P., and Davis, R., "The Digital Dilemma: A Perspective on the Intellectual Property in the Information Age", a paper presented at the 28th Annual Telecommunications Policy Research Conference, the paper is available online at <http://www.sims.berkeley.edu/~pam/papers/digdilsyn.pdf>, last visited on the 1st of October 2003.

Schultz, T., Kaufmann-Kohler, G., and Langer, D., "Online Dispute Resolution: The State of the Art and the Issues", E-commerce Research Project at the University of Geneva, Geneva, 2001, available online at <http://www.online-adr.org/reports/TheBlueBook-2001.pdf>, last visited on the 1st of October 2003.

Slate, W., "Challenges and Opportunities for Dispute Resolution in the Era of Electronic Commerce", a paper presented at WIPO Conference on Dispute resolution in Electronic Commerce, Geneva, 6th and 7th of November 2000, available online at <http://arbiter.wipo.int/events/conferences/2000/presentations/slate.html>, last visited on the 1st of October 2003.

Vahrenwald, A., "Out-of-Court Dispute Settlement Systems for E-commerce, Report on Legal Issues, Part II: The Protection of the Recipient", available online at http://dsa-isis.jrc.it/ADR/Part_II.doc, last visited on the 1st of October 2003.

Vahrenwald, A., "Out-of-Court Dispute Settlement Systems for E-commerce, Report on Legal Issues, Part III: The Protection of the Recipient, available online at http://dsa-isis.jrc.it/ADR/Part_III.doc, last visited on the 1st of October 2003.

Warentest, S., "Electronic Commerce in Europe", 1st of September 1999, available online at http://europa.eu.int/comm/dgs/health_consumer/library/surveys/sur11_en.pdf, last visited on the 1st of October 2003.

Wilikens, M., Vahrenwald, A., and Morris, P., "Out-of-Court Dispute Settlement Systems for E-commerce, Report of an Exploratory study", available online at <http://dsa-isis.jrc.it/ADR/report.html>, last visited on the 1st of October 2003.

Arbitration Act 1996

Arbitration Act 1975

Arbitration Act 1950

Rules of Civil Procedures in England and Wales

House of Commons, Parliamentary Debates, sixth Series, volume 276, (the Statutory Office, London, 1996).

House of Commons, Parliamentary Debates, sixth Series, volume 279, (the Statutory Office, London, 1996).

Lord Woolf Report, “Access to Justice: Final Report”, (London, 1996), available online at <<http://www.dca.gov.uk/civil/final/contents.htm>>, last visited on the 1st of October 2003.

Lord Woolf Report, “Access to Justice: Interim Report”, (London, 1995), available online at <<http://www.dca.gov.uk/civil/interim/woolf.htm>>, last visited on the 1st of October 2003.

U.S. Anti Cyber-squatting Consumer Protection Act (ACPA), Public Law No.106-113 (1999).

US Federal Rules of Civil Procedure.

US Trade Commission, “Workshop on Alternative Dispute Resolution for Consumer Transactions in a Borderless Online Market place”, 6th and 7th of June 2000, available online at <<http://www.ftc.gov/bcp/altdisresolution/index.htm>>, last visited on the 1st of October 2003.

Jordanian Arbitration Act (Law No. 31 of 2001).

Jordanian Electronic Transactions Act (Law No. 85 of 2001).

European Parliament, “Resolution on the Draft Action Plan of the Council and Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice”, Document 13844/98-C4/0692/98-98/0923(CNS) A4-0133/99, minutes of 13/04/99, available online at http://www.europarl.eu.int/dg2/co14/PDF/ELCJ/projrap/Bontempi/Bontempi_en.pdf, last visited on the 1st of October 2003.

EU Commission, “Green Paper on Alternative Dispute Resolution in Civil and Commercial Law”, COM (2002) 196 Final, available online at http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf, last visited on the 1st of October 2003.

EU Commission, “Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market”, COM (1993) 576 Final, available online at <http://europa.eu.int/scadplus/leg/en/lvb/l32023.htm>, last visited on the 1st of October 2003.

EU Commission, “Widening Consumer Access to Justice”, COM (2001) 161 Final, available online at http://130.104.105.148/Bede/EBED412001/com2001_0161en01.pdf, last visited on the 1st of October 2003.

EU Commission, “Working Document on the Creation of a European Extra Judicial Network (EEJ-NET)”, SEC (2000) 405, available online at http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just06_en.pdf, last visited on the 1st of October 2003.

EU Commission, “Recommendations on the Principles Applicable to the Bodies Responsible For Out-of-Court Settlement of Consumer Disputes, (98/257/EC) O.J. L. 115, available online at http://www.cmvm.pt/english_pages/apoio_ao_investidor/31998h0257.pdf, last visited on the 1st of October 2003.

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

EU Data Protection Directive (95/46/EC) O.J.L. 281.

Directive of the European Parliament and of the Council on a Community Framework for Electronic Signatures (99/93/EC) O.J.L. 13.

Directive of the European Parliament and of the Council on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market, (2000/31/EC) O.J.L. 178.

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

New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards.

UNCITRAL Model Law on International Commercial Arbitration (1985), available online at <<http://www.uncitral.org/en-index.htm>>, last visited on the 1st of October 2003.

UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), available online at <<http://www.uncitral.org/en-index.htm>>, last visited on the 1st of October 2003.

OECD, "Business-to-Consumer Electronic Commerce: Survey of Status and Issues", OECD/GD (97), available online at <[http://www.ois.oecd.org/olis/1997doc.nsf/LinkTo/OCDE-GD\(97\)219](http://www.ois.oecd.org/olis/1997doc.nsf/LinkTo/OCDE-GD(97)219)>, last visited on the 1st of October 2003.

OECD, "Consumer Protection in the Electronic Marketplace", DSTI/CP (98) 13 Final, available online at

<[http://www.oelis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bcd59/d3c8b98d999aea78c12566e2003ff7cb/\\$FILE/12E81082.DOC](http://www.oelis.oecd.org/olis/1998doc.nsf/4cf568b5b90dad994125671b004bcd59/d3c8b98d999aea78c12566e2003ff7cb/$FILE/12E81082.DOC)>, last visited on the 1st of October 2003.

OECD, "The Progress Report on the OECD Action Plan for Electronic Commerce", SG/EC (99), the document is available online at

<<http://www.bmck.com/ecommerce/Tax/1999%20Paris%20Meeting-Progress%20Report.pdf>>, last visited on the 1st of October 2003.

International Chamber of Commerce Rules of Conciliation and Arbitration, available online at <<http://www.iccwbo.org/court/english/arbitration/rules.asp>>, last visited on the 1st of October 2003.

International Chamber of Commerce, "Global Action Plan for Electronic Commerce: Prepared by Business with Recommendations for Governments", 1st of October 1999, available online at <<http://www.giic.org/focus/ecommerce/agbecplan.pdf>>, last visited on the 1st of October 2003.

WIPO, "The Management of Internet Names and Addresses: Intellectual property issues, Final Report of the WIPO Internet Domain Name Process, 30th of April 1999, available online at <<http://wipo2.wipo.int/process1/report/pdf/report.pdf>>, last visited on the 1st of October 2003.

ICANN Uniform Domain Name Dispute Resolution Policy (UDRP), as approved by ICANN on October 24, 1999, available online at <<http://www.icann.org/dndr/udrp/policy.htm>>, last visited on the 1st of October 2003.

ICANN, Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), as approved by ICANN on October 24, 1999, available online at <<http://www.icann.org/udrp/udrp-rules-24oct99.htm>>, last visited on the 1st of October 2003.

IV- List of Cases

UK Cases

- ABB Lummus Global Ltd. v. Keppel Fek Ltd. [1999] 2 Lloyd's Rep. 24.
- Abbott v. Sullivan [1952] 1 KB 198.
- Aktien Gesellschaft v. Fortuna Co. Inc. [1999] 1 Lloyd's Rep. 503.
- Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1983] 3 WLR 249.
- Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 171.
- Bank Mellat v. Helleniki Technici SA [1984] QB 301.
- Bonsor v. Musicians' Union [1954] Ch 485.
- British Steel Plc v. Customs and Excise Commissioners [1997] 2 All ER 366.
- British Telecommunications Plc., Virgin Enterprises Ltd., J Sainsbury Plc., Marks & Spencer Plc., and Ladbroke Group Plc. v. One in a Million and Others [1998] FSR 265.
- Coppee-Lavalin S.A./N.V. v. Ken-Ren Chemicals and Fertilizers Ltd. [1994] 2 Lloyd's Rep. 115.
- Daganayasi v. Minister of Immigration [1980] 2 NZLR 130.
- Danae Air Transport ASA v. Air Canada [1999] 2 Lloyd's Rep. 105.
- French Connection Limited v. Antony Toolseeram Sutton, The High Court of Justice, Chancery Division, 12/2/99, unreported.
- Government of Ceylon v. Chandris [1963] 1 Lloyd's Rep. 214.
- Lloyd v. McMahon [1987] AC 702.
- Minmetals Germany GmbH v. Ferco Steel Ltd. [1999] C.L.C. 659.
- Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru [1988] 1 Lloyd's Rep. 116.
- Omnium de traitement et de valorisation SA v. Hilmarton Ltd [1999] 2 All E.R. (Comm) 146.
- O'reilly v. Mackman [1983] 2 AC 237.
- Pitman Training Ltd and Another v. Nominet UK and Another [1997] FSR 797.
- Regina v. Home Secretary exp. Santillo [1981] QB 778.
- Sanghi Polyesters Ltd. (India) v. The International Investor (KCFC) (Kuwait) [2000] 1 Lloyd's Rep. 480.
- Union of India v. McDonnell Douglas Corp. [1993] 2 Lloyd's Rep. 50.

US Cases

Arnold v. United Companies Lending Co., 511 S.E. 2d 854 (W. Va. 1998).

Broad Bridge v. Hypercd.com, 106 F. Supp. 2d 505, 2000 U.S. Dist. LEXIS. 9516.

Hasbro, Inc. v. Internet Entertainment Group Ltd., C 96-130 WD, 1996 U.S. Dist. LEXIS. 1626.

Maritz, Inc., v. CyberGold, Inc., 947 F. Supp. 1328 (E. D. Mo.1996).

Playboy Enters v. Frena, 839 F. Supp.1559 (M. D. Fla. 1993).

Sporty's Farm LLC v. Sportsman's Market, Inc., 202 F. 3d 489 (2d Cir. 2000).

The Internet Corporation for Assigned Names and Numbers (ICANN)

Cases

Bandon Dunes L.P. v. DefaultData.com, ICANN Case No. D2000-0431, available online at

<<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0431.html>>, last visited on the 1st of October 2003.

Bruce Springsteen v. Jeff Burgar and Bruce Springsteen Club, ICANN case No.D2000-1532, available online at

<<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1532.html>>, last visited on the 1st of October 2003.

Gordon Sumner and p/k/a Sting v. Michael Urvan, ICANN Case No.2000-0596, available online at

<<http://internetlegi.hypermart.net/sting.htm>>, last visited on the 1st of October 2003.

Hunton & Williams v. American Distribution Systems Inc., ICANN Case No. D2000-0501, available online at

<<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0501.html>, last visited on the 1st of October 2003.

Telstra Corporation Limited v. Nuclear Marshmallows, ICANN Case No. D2000-003, available online at

<<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0003.html>>, last visited on the 1st of October 2003.

Wal-Mart Stores Inc. v. Walsucks and Walmarket Puerto Rico, ICANN Case No. D2000-0477, available online at

<<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0477.html>>, last visited on the 1st of October 2003.

World Wrestling Federation Entertainment v. Michael Bosman, ICANN Case No. D99-0001, available online at

<<http://arbiter.wipo.int/domains/decisions/html/1999/d1999-0001.html>>, last visited on the 1st of October 2003.