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Haitham A. Haloush

Bashar H. Malkawi

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The Liberty of Participation in Online Alternative Dispute Resolution Schemes

Haitham A. Haloush & Bashar H. Malkawi***

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. Accordingly, this paper argues that when Alternative Dispute Resolution (ADR), particularly arbitration and mediation, move to cyberspace, the form of Online Alternative Dispute Resolution (OADR) can maximize the growth of e-commerce.

I. INTRODUCTION

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

It is important to address mandatory OADR, which means that the parties are bound to adhere to the OADR process. Indeed, it is imperative to display what risks Internet users should be willing to take with mandatory OADR schemes. This paper concludes that the issue of consent should be at the forefront of any contemplated OADR solution. 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 an OADR proceeding must be able to bring the action in any court that has jurisdiction over the dispute. Bearing this in mind, there is strong reason to believe that mandatory OADR schemes would not be enforceable in courts, and that the entire scheme of mandatory OADR might be unworkable.

In the online world, OADR should not be presented as a superior alternative to the court system, which would render the old court system obsolete. Additionally, OADR must not be conceived as the main force driving changes in dispute settlement in cyberspace. Instead, OADR must be con-

* Haitham Haloush is Assistant Professor of Commercial Law at the Hashemite University, Jordan. He holds a PhD in commercial law from Leeds University, England, College of Law, and an L.L.M. from Aberdeen University, Scotland, College of Law. I would like to thank Professor Clive Walker for his helpful comments and research assistance.

** Bashar H. Malkawi is Assistant Professor of Law at the Hashemite University, Jordan. The author holds LL.B, Yarmouk University in 1999 an LL.M, University of Arizona College of Law in 2001 and a S.J.D, American University, Washington D.C in 2005.

ceived as merely a stream contributing to the broad river of change in how dispute resolution can be managed in cyberspace. OADR is a substitute for other methods of dispute resolution; it is one option available to 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 dispute resolution alternatives.

In advancing this issue, this paper will analyze the liberty of participation in ADR. Then it will proceed to address the liberty of participation in OADR schemes. After that, the paper will address the ICANN policy of using mandatory OADR procedures to resolve disputes concerning General Top Level Domain Names. Next, it will analyze the disparity of bargaining power between consumers and merchants, with implications on consumers' consent to mandatory schemes in OADR. Finally, the paper summarizes its findings and relates the findings to one another in a coherent way which might help in the future development of OADR.

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

For the purpose of this paper, Business to Consumer (B-to-C) Internet transaction disputes and Internet trademark infringement disputes in the form of domain name disputes will be deployed as two case studies. B-to-C and domain name dispute resolution have been a major area of activity for OADR because of the need to build e-commerce through increasing Internet users' confidence. On the one hand, the domain name system is an indispensable element for e-commerce to work properly. E-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 the Domain Name System (DNS) should be understood primarily within the broader context of e-commerce and conducting business on the Internet. Due to the nature of the Internet, the domain name is as important as

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

the business itself, or more precisely, the domain name is one of the company's primary assets. For the consumer, a domain name allows access to the Internet, provides a direct link to the online business, and provides a mode of initiating transactions online. For the business, acquisition of a domain name is considered as a prerequisite to conducting business online. As a result, firms and others increasingly seek to have an Internet presence, because without a domain name, a company would be practically invisible on the Internet; customers would not know where to find the company.² On the other hand, given that a B-to-C Internet transaction typically represents the sale of goods and services from business entities to individuals, uncertainty over the legal framework of B-to-C Internet transaction disputes may inhibit both consumers from purchasing products or services over the Internet, and companies from entering into the electronic marketplace.³

II. THE LIBERTY OF PARTICIPATION IN ADR

It is important to draw the line between the concepts of binding OADR (which binds the parties to the *outcome* of the OADR procedures) and mandatory OADR (where the parties are bound to adhere to the OADR *process*). The former concept is beyond the limits of this paper. This paper will address the latter concept in order to display which risks Internet users should be willing to take with mandatory OADR schemes.

The relationship between ADR and the judicial system is very important because ADR schemes should not prejudice or undermine any other means of judicial redress.⁴ Moreover, although ADR can provide appropriate solutions for many disputes, it must be recognized that even in the most ideal world, a certain number of disputes would still end up in courts. ADR is inappropriate for adjudicating some cases, and it may not always be in the best interest of all parties to participate in ADR. For example, under certain circumstances, a class action lawsuit may provide a more effective form of relief than the individual arbitral system. Certain harms inflicted on Internet users may be small yet widespread, making it impractical to pursue certain claims unless brought as a class action.

Furthermore, competition between in-court and out-of-court dispute settlement should not be exaggerated. One facet of this exaggeration is the suggestion that the rule of law is in jeopardy when parties resolve their dispute

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2. Dan L. Burk, *Trademarks along the Infobahn: A First Look at the Emerging Law of Cybermarks*, 1 RICH. J.L. & TECH. 1, *9 (1995).
 3. Pankaj Ghemawat, *Distance Still Matters: The Hard Reality of Global Expansion*, 79 HARV. BUS. REV. 137, 143 (2001).
 4. See Lord Woolf, *Access to Justice: Final Report* (1996), <http://www.dca.gov.uk/civil/final/contents.htm> (last visited May 21, 2008) (providing an intensive discussion on the legal implications of ADR).

outside of the court.⁵ In this regard, Harry Edward, a leading author on ADR, has said, “[w]e must determine whether ADR will result in an abandonment of our constitutional system in which the rule of law is created and principally enforced by legitimate branches of government.”⁶ Edward’s opinion is unwise, to say the least, because it is based on a sharp division between the court system and ADR. Such a division is unwarranted because non-binding ADR methods are merely 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 effectively in conjunction with or in the shadow of the court system. Since non-binding ADR cannot bring together unwilling parties to settle their differences, it does not have the power to enforce the outcome of ADR proceeding, as the courts do.

Clearly, participation in ADR does not mean waiving the rights to recourse provided by ordinary law; rather, participation in ADR serves as 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 ADR over other dispute resolution mechanisms, including courts, because various legal options compete with each other in a rather unclear way.⁷ Professor Goode concludes that no system has any innate superiority over another.⁸

Courts are increasingly using ADR mechanisms to settle disputes.⁹ The fact that courts provide a formal dispute resolution mechanism does not rule 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 many view ADR as an innovative way to improve adjudication procedures, providing an alternative avenue of justice for both the defendant and the plaintiff.¹⁰

One of the main incentives for parties to participate in ADR schemes is that alternative forms of dispute settlement emphasize the advantages of the flexible and speedy nature of their procedure rather than requiring a formal

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5. World Intellectual Prop. Org., *The Management of Internet Domain Names and Addresses: Intellectual Property Issues: Final Report of the WIPO Internet Domain Name Process*, 46 (Apr. 30, 1999), <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf> (last visited on May 21, 2008) [hereinafter *WIPO*].
 6. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 *HARV. L. REV.*, 668, 671 (1986).
 7. Roy Goode, *COMMERCIAL LAW* 1177 (2d ed., Penguin Books 1995).
 8. *Id.*
 9. See Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR In Legal Academia*, 80 *NOTRE DAME L. REV.* 681, 690-91 (2005).
 10. See Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 *TEX. L. REV.* 1587, 1591-1597 (1995).

adaptation of established legal procedure.¹¹ In fact, various countries have introduced pilot schemes whereby courts refer the parties to alternative dispute resolution mechanisms.¹² The growing use of ADR often is associated with the explicit annexation of ADR procedures by well-known court systems, as in the case of court-annexed arbitration.¹³

In *Aktien Gesellschaft v. Fortuna Co.*, the court stated that arbitration and the court system ought to be regarded as coordinate rather than rival.¹⁴ The introduction of the English Arbitration Act of 1996 strengthened this position in England, implying that commercial arbitration should be complementary to, and not in competition with, the court system.¹⁵

III. THE LIBERTY OF PARTICIPATION IN OADR SCHEMES

The idea of OADR is not simply about the use of technology to resolve disputes in cyberspace; rather, it is about improving choice among other alternatives.¹⁶ OADR and legal redress are two separate issues. Access to the latter should not be conditional on the exhaustion, or even the use, of the possibilities offered by the former. Restricted access would seriously undermine Internet users' confidence in OADR solutions because an effective OADR scheme should not be compulsory. 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 or on an international level. Although Internet users may not invoke their courthouse rights, the fact that they could invoke them is important. In practical terms, Internet disputes will probably not reach courts, but users should have this theoretical assurance of the court.

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11. See Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 424-25 (1986).
 12. Antione Cremona, *Analyzing Alternative Dispute Resolution (ADR) Mechanisms In Europe and EU Activity in The Field: The Communitarisation of Private Justice* 10-14 (Peter G. Xuerab ed., Malta University Studies Association) (2006), available at http://home.um.edu.mt/edrc/jmps_adr.PDF (discussing the ADR schemes in Germany, The United Kingdom, and Luxembourg).
 13. See, e.g., Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Court Programs*, 141 U. PA. L. REV. 2169, 2172 (1993).
 14. *Aktien Gesellschaft v. Fortuna Co.*, 1 Lloyd's Rep. 497, 503 (1999).
 15. See Arbitration Act (1996), http://www.opsi.gov.uk/Acts/acts1996/plain/ukpga_19960023_en (last visited May 21, 2008).
 16. Melissa Conley Tyler and Di Bretherton, COUNTRY EXPERIENCES OF ODR: AUSTRALIA, *Research into Online Alternative Dispute Resolution, an Exploration Report Prepared for the Department of Justice, Victoria, Australia*, 3-4 (2003), <http://www.odr.info/unece2003/pdf/tyler1.pdf> (last visited May 15, 2008).

The letter "A" in OADR normally stands for "alternative." It may be useful, however, to replace "alternative" with the term "appropriate." If OADR is an appropriate dispute resolution mechanism in cyberspace, it does not mean that the use of OADR for immediate resolution in cyberspace should preclude other forms of dispute resolution. Internet users who submit disputes to the OADR system should not have 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.¹⁷

The goal of the OADR process is not to create new rights or 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 Internet. 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.

Access to courts to settle any type of dispute is a basic right to which the idea of mandatory OADR schemes is repugnant. If mandatory OADR becomes standard for Internet disputes, Internet users will know that their remedies are limited; thus, they will more reluctantly engage in e-commerce. Indeed, the representation of OADR as the superior alternative to the court system is dangerous. OADR should remain a voluntary, rather than mandatory, dispute resolution mechanism in cyberspace.

Among the EU recommendations on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, the principle of legality dictates that ADR bodies, while retaining the flexibility of their procedures, should apply the mandatory laws that courts would otherwise have to apply.¹⁸ Accordingly, it is unacceptable 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.¹⁹ Clearly, the principle of legality in the EU recommendations could be seriously endangered in mandatory OADR schemes. The principle of legality attempts to ensure that the disputant has knowingly and freely elected to abide by the mechanism's outcome. 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 provi-

17. *WIPO*, *supra* note 5, at 49.

18. Commission of the European Communities, *Commission Recommendations on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes*, 20-21 (1998), http://aei.pitt.edu/1179/01/consumer_justice_gp_follow_COM_1998_198.pdf (last visited Oct. 1, 2007) [hereinafter Commission of the European Communities].

19. See *id.*

sions 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.²⁰

In this regard, it seems appropriate to recall the opinion of Ian Macneil, one of the leading authors on arbitration law. He argues that only court litigation can be commenced unilaterally.²¹ Arbitration and other forms of ADR are available only if the parties at some stage agree that the dispute will be resolved by a third-party neutral.²² Without fully informed and voluntary consent, arbitration and other forms of ADR lose all credibility as a just alternative to litigation. Along this line, Macneil has said:

Using terms such as compulsory or mandatory in such circumstances is, at best, highly confusing. At worst, it constitutes question begging; the very question at stake where such questions arise is whether whatever consent to arbitrate as has been manifested should or should not be given full contractual effect. To call arbitration compulsory or mandatory is to answer by label, not by attention to the facts and by analysis.²³

Given that ADR is generally characterized 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 access to the courts. From this perspective, restricting the options of disputants to only OADR, and denying access to the courts should not be permitted. As a result, an important task would be to design an OADR system in a way that has the potential to establish an appropriate linkage to the court system, but without harming the flexibility of the ADR process. Accordingly, 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 the processes of ADR, which are rooted in well-established procedures.²⁴

20. *Id.*

21. See Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT*, 17-18 (Little Brown 1994).

22. *Id.*

23. *Id.*

24. *WIPO*, *supra* note 5, at 46.

IV. THE ICANN POLICY IN USING MANDATORY OADR PROCEDURES TO RESOLVE DISPUTES CONCERNING gTLDs

The Internet Corporation for Assigned Names and Numbers (ICANN), which is the non-profit corporation responsible for Internet Protocol address (IP) space allocation, receives its authority over domain names from a U.S. Department of Commerce contract to administer the root of the system (i.e., the ultimate database in which all Top-Level Domains (TLDs) are registered).²⁵ 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.²⁶ The UDRP is imposed by contract upon all of the accredited gTLDs registrars and, in turn, the registrars impose it upon domain name holders as a condition of the registration agreement.²⁷

At present, the ICANN policy uses mandatory OADR procedures to resolve disputes concerning gTLDs such as .com, .net and .org.²⁸ In order to register a domain name in any of the gTLDs, an applicant must agree to be bound by UDRP, which utilizes OADR mechanisms.²⁹ Consequently, every registrant has agreed to be subject to a mandatory administrative proceeding 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, and the domain name has been registered and used in bad faith.³⁰ 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

25. *United States Department of Commerce Executes Contract for Technical Management of the Internet with ICANN*, Aug. 15, 2006, available at <http://www.icann.org/en/announcements/announcement-15aug06.htm>.

26. ICANN, *Uniform Domain Name Dispute Resolution Policy (UDRP)* (Oct. 24, 1999), <http://www.icann.org/dndr/udrp/policy.htm> (last visited May 19, 2008) [hereinafter ICANN, *UDRP*].

27. *Id.* Before ICANN, in 1993, after a gradual increase in commercial Internet activity, the National Science Foundation (NSF) subcontracted the job of registering domain names to a small company named "Network Solutions." Network Solutions registered domain names on a first-come, first-served basis, just as all the Internet domain names had always been allocated. For an intensive discussion on this issue see D. Howitt, *War.com: Why the Battle Over Domain Names Will Never Cease*, 19 HASTINGS COMM. & ENT. L.J. 719(1997).

28. *Id.*

29. *Id.*

30. *Id.*

rights; and (ii) you have no rights or legitimate interests in respect of the domain name; and (iii) your domain name has been registered and is being used in bad faith. In the administrative proceeding, the complainant must prove that each of these three elements is present.³¹

ICANN argued that persons who register domain names in bad faith and abuse the intellectual property rights of others would be unlikely to choose to submit to a procedure that is cheaper and faster than litigation, like UDRP.³²

The argument put forth in defense of the mandatory nature of the UDRP is flawed in three ways. First, by confining the scope of the procedures of UDRP to abusive registrations, the danger of innocent domain name holders (i.e., those acting in good faith) being required to participate in the procedure is not eliminated. There are non-trademarked, legitimate uses of words, names and symbols. Therefore, one must not lose sight of traditional non-commercial Internet uses.³³

Second, UDRP is unfair because its application favors trademark owners. As a result, many have criticized the UDRP and called to revise it on the basis that it reinforces a bias toward large commercial interests (i.e., interests that already have trademarks in registered form).³⁴ Third, the UDRP does not properly address the selection mechanism of the dispute resolution service provider. A single party should not be allowed to choose the third-party neutral. Article 6(b) reads as follows:

If neither the Complainant nor the Respondent has elected a three-member Panel (Paragraph 3 (b)(iv) and 5(b)(iv)), the Provider shall appoint, within five calendar days following receipt of the response by the Provider, or the lapse of the time period for the submission thereof, a single Panelist from its list of panelists.³⁵

Statistical evidence suggests that a vague selection mechanism of the third-party neutral leads to forum shopping, which biases the results.³⁶ A party accomplishes forum shopping by rationally selecting an OADR pro-

31. *Id.*

32. *WIPO*, *supra* note 5, at (vi).

33. G. Peter Albert, Jr., *Right on the Mark: Defining the Nexus Between Trademarks and Internet Domain Names*, 15 J. MARSHALL J. COMPUTER & INFO. L. 277, 294 (1997).

34. Ethan Katsh & Janet Rifkin, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE*, 64-65 (Jossey-Bass 2001). *See also* Marcelo Halpern & Ajay K. Mehrota, *From International Treaties to Internet Norms: The Evolution of International Trademark Disputes in the Internet Age*, 21 U. PA. J. INT'L ECON. L. 523, 556-58 (2000).

35. ICANN, *UDRP*, *supra* note 24.

36. Katsh & Rifkin, *supra* note 32, at 111.

vider who tends to rule in favor of the party selecting the provider or the party with the highest bargaining power. Statistics show that the two OADR providers who obtain the most cases, *WIPO Online Dispute Resolution Centre* and the *National Arbitration Forum*, are more likely to decide in favor of the claimant.³⁷ The claimants win 82.2 percent of the time with *WIPO Online Dispute Resolution Centre* and 82.9 percent of the time with the *National Arbitration Forum*.³⁸ Despite this evidence, the argument against mandatory OADR schemes must be viewed in a wider context than ICANN policy. As explained below, there is a disparity of bargaining power between consumers and merchants. This would have apparent implications on consumers' consent to mandatory schemes in OADR.

V. THE IMPACT OF BARGAINING POWER DISPARITY ON MANDATORY OADR SCHEMES

In areas such as consumer protection, national laws may affect parties' interests irrespective of any choice the parties have made. Often, laws relating to consumer protection will strike out or restrict choice of law and dispute settlement clauses, rendering them wholly or partially ineffective.³⁹ Such laws are reasonable because there is often a disparity in bargaining power between consumers and merchants in consumer transactions. The disparity of bargaining power between consumers and merchants has led legislators to prescribe special terms for consumer contracts.⁴⁰ For example, Article 5 of the Rome Convention on the Law Applicable to Contractual Obligations reads as follows:

Notwithstanding the provisions of Article 3 [providing that a contract shall be governed by the law chosen by the parties], a choice of law made by 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.⁴¹

Contract clauses relating to dispute resolution often reflect the disparity of bargaining power between consumers and merchants. Such clauses frequently provide for disputes to be settled exclusively out of court. In other words, a consumer has no right to bring a complaint before the court. In this

37. *Id.*

38. *Id.*

39. See John Adams, *Digital Age Standard Form Contracts Under Australian Law: "Wrap" Agreements, Exclusive Jurisdiction, and Binding Arbitration Clauses*, 13 PAC. RIM L. & POL'Y J. 503, 537-41 (2004) (discussing cases in which courts found arbitration clauses invalid).

40. Veijo Heiskanen, *Dispute Resolution in International Electronic Commerce*, 16 J. INT'L ARB. 29, 31 (1999).

41. Council Convention 80/934, art. 5, 1980 O.J. (L 266) 1, 3 (EC).

regard, the EU “Recommendations on Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes” strongly suggest that there are legal limits on the ability of any ADR system to foreclose access to the court system by consumers.⁴² The Recommendations state that “[u]se 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 materialized.”⁴³

Similarly, Article 3 of the European Council Directive on Unfair Terms in Consumer Contracts expressly limits the effectiveness of terms that businesses have pre-established, which hinder a consumer’s right to take legal action.⁴⁴ Article 3 (together with the annex) declares that a contract term is unfair if it:

[E]xclude[s] or hinder[s] 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.⁴⁵

In essence, Article 3 of the Directive states that by leaving the choice of dispute settlement mechanism with the consumer, businesses can avoid the risk of having an unfair term in their consumer contracts.⁴⁶

Arguably, mandatory arbitration clauses are designed to give businesses significant advantages in their disputes with consumers.⁴⁷ Merchants may know the arbitrators overseeing the dispute and be more familiar with the arbitration process than the average consumer.⁴⁸ For example, they may have a record or other source of information regarding an arbitrator’s past decisions.⁴⁹ Because a consumer is unlikely to have such information, the merchant is placed in the advantageous position of knowing the general attitudes and tendencies of the arbitrator.⁵⁰

42. Commission of the European Communities, *supra* note 19, at 18.

43. *Id.*

44. Council Directive 93/13, art 3, annex 1(q), 1993 O.J. (L 95) 29, 31, 34 (EC).

45. *Id.*

46. Martin Odams de Zylva, *Effective Means of Resolving Distance Selling Disputes*, 67 *ARB.* 230, 236 (2001).

47. See Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 *U.C. DAVIS L. REV.* 151, 210-11 (2000).

48. *Id.* at 210.

49. *Id.*

50. *Id.*

The disparity of bargaining power quite often allows sellers to unilaterally specify the terms of the sale, including dispute settlement clauses, and offer them to consumers on a take-it-or-leave-it basis.⁵¹ In fact, most arbitration clauses are formed prior to any dispute and are in a standard form. When consumers form contracts with merchants, they are unlikely to be focused on the possibility of a future dispute and, therefore, unlikely to notice the existence of an arbitration clause. In contrast, when consumers form post-dispute arbitration agreements, they are likely to be focused on the dispute and negotiate a fair dispute resolution clause. It is difficult to perceive pre-dispute arbitration clauses as fair, particularly 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), or an equal ability to insist that clauses be included or excluded in the contract.

In the online world, it is crucial that e-commerce and OADR solutions are not promoted at the expense of consumer protection standards because consumer protection, which generates consumer confidence, is critical for the continued growth of e-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."⁵² The OECD Guidelines, for consumer protection in the context of electronic commerce, adopt a similar viewpoint: "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."⁵³

Henry Perritt, a leading author on OADR, has argued that online consumers, as a result of the Internet, are more powerful than offline consumers.⁵⁴ This is due to the fact that the Internet intensifies competition because it "[offers] consumers a [wider] array of products and services from different sellers than they would have in geographically defined markets."⁵⁵ Robert Bordone, another leading author on OADR, has responded to Perritt's argu-

51. Henry H. Perritt, *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 698 (2000).

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

53. COMMITTEE ON CONSUMER POLICY, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CONSUMER PROTECTION IN THE MARKETPLACE (1998), <http://www.oecd.org/dataoecd/18/13/34023235.pdf> (last visited May 23, 2008).

54. See Perritt, *supra* note 47, at 699.

55. *Id.*

ment by saying that it is paradoxical.⁵⁶ Electronic consumers are not always aware of the law and culture applicable in cyberspace, and they are often not represented due to the low monetary value of electronic disputes in general.⁵⁷ By contrast, electronic merchants have the greatest experience with the law and culture applicable in cyberspace and are likely to obtain the finest representation.⁵⁸

Elizabeth Thornburg, another leading author on OADR, agreed with Bordone in his argument. She argued that the disparity of bargaining power between consumers and merchants occurs quite often in the online environment, where the contract is usually in take-it-or-leave-it standardized form.⁵⁹ 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 those of dispute resolution, will the online transaction continue.⁶⁰ Because of the electronic format, an Internet user cannot cross out terms and bargain for different terms. In such cases, 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.⁶¹

Obviously, contracts that come as part of a standard form that are not subject to bargaining are called contracts of adhesion. Evidently, determining the voluntary nature of consent is the centerpiece of debates over contracts of adhesion.⁶² As a result, mandatory OADR clauses could be seen as imposed through contracts of adhesion, where actual consent by definition is absent.⁶³

VI. CONCLUSION

Without doubt, the issue of consent should be at the forefront of any contemplated OADR solution. 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

56. See, e.g., Robert C. Bordone, *Electronic Online Dispute Resolution: Approach, Potential, Problems and a Proposal*, 3 HARV. NEGOT. L. REV. 175 (1998).

57. *Id.* at 203.

58. *Id.*

59. Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 153 (2000).

60. *Id.* (referring to these agreements as "shrinkwrap or "clickwrap").

61. *Id.* at 175-83.

62. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1180 (1984).

63. *Id.* at 1180.

the entire scheme of mandatory OADR might be unworkable. Indeed, the idea of OADR is not simply about the use of technology to resolve disputes in cyberspace; rather, it is about improving choice among other alternatives.