Jurisdictional Dilemma in Online Disputes: Rethinking Traditional Approaches

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Abstract

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

This paper argues that the internet-based activities, particularly in the 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 easily.

This paper strongly advocates the use of OADR systems in the areas of e-commerce and jurisdiction in cyberspace and submits to the view that developing communication technologies have a significant role to play in providing internet users with the facilities to resolve a dispute, especially where the parties are located in different jurisdictions.

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 Alternative Dispute Resolution (ADR) in order to resolve commercial disputes that arise from the use of the internet. Those proceedings are operated by neutral private bodies under published rules of procedure.

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Legitimacy of OADR process or any other dispute resolution mechanism is not based solely on the assertion of a proper jurisdiction. 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.¹ In Daganayasi v. Minister of Immigration,² Cooke J said, "[f]airness need not be treated as confined to procedural matters."³

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. A distinction needs to be made, however, 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 since it is beyond the limits of this paper.

As a result, this paper 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 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.

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. Besides, the European Commission believes that it is beyond doubt that a fair resolution of domain name disputes requires some creativity.⁴ The notion that access to justice does not only have to mean access to courts was emphasized 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 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 perspec-

¹. WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW, 488 (8th ed. 2000).
³. Id. at 137.
tive, the European Community strives to ensure the functionality of the new electronic marketplace.\textsuperscript{6}

The EU law aims increasingly at the establishment of effective cross-border dispute settlement systems. The European Parliament stressed in its resolution of April 13, 1999, the importance to facilitate the life of the individual citizen through the settlement of cross border disputes.\textsuperscript{7} Before this resolution, 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.\textsuperscript{8}

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 with the facilities to resolve a dispute, especially where the parties are located in different jurisdictions.\textsuperscript{9}

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 that is widely recognized 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 on-line dispute resolution (ODR) services has been recognized as a form of web-based cross-border dispute resolution.”\textsuperscript{10} 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 internal 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


\textsuperscript{7} 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, 1999, O.J. (C 219/61) available at \url{http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=DOCPV&APP=PV2&SDOCTA=20&TXTLST=1&TPV=DEF&POS=1&Type_Doc=RESOL&DATE=130499&DATEF=990413&TYPEF=A4&PrgPrev=TPFE@A4%257CPRG@QUERY%257CAPP@PV2%257CFILE@BIBLIO99%257CNUMERO@133%257CYEAR@99%257CPLAGE@0&LANGUE=EN}.


by appropriate electronic means.\textsuperscript{11} 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 amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, particularly across borders.\textsuperscript{12}

Bearing in mind that the United Kingdom is a European country, and it will be affected by any European Union regulation with regard to OADR, it must be noted that there will be special references to the implications of OADR upon English litigation. Such implications have to be analyzed because they constitute a reference point for the assessment of the quality of justice of a given OADR provider, and they provide a framework for reflecting upon the general requirements of jurisdiction in OADR. As a result, the priority in this research is towards the implications of OADR on the United Kingdom and English litigation. The default is the English law where it is well developed, appropriate, and constructive. In the United Kingdom, the encouragement of electronic commerce is a matter of public policy. The 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 United Kingdom to prompt various actions that will create trust, reliance, and confidence in doing business over the internet. The strategy of the UK government is to make the country the best place in the world for e-commerce.\textsuperscript{13}

For the purpose of this paper, business to consumer (B-to-C) internet transaction disputes and internet trademark infringement disputes in the form of domain name disputes will be deployed as two case studies. Businesses to consumer and domain name dispute resolution have been a major area of activity for online ADR because of the need to build electronic commerce through increasing internet users' confidence. On the one hand, the domain name system is generated and becomes an indispensable element for electronic commerce to work properly. Electronic commerce is a source of growing demand on domain names because currently there is no effective alternative method of finding a company's internet location. Accordingly, the utility of Domain Name System (DNS) should be understood primarily within the broader context of electronic commerce and doing business on the internet. Due to the nature of the internet, the domain name is as important as the business itself, or, more precisely, the domain name is the company's primary asset. For the consumer, a domain name allows an access to the internet, provides a direct link to the online business, and provides a mode of initiating transactions online. Equally, a domain name owner's interest in a domain name is that acquisition of a domain name is considered as a prerequisite step to conducting business online. As a result, firms and others increasingly seek to have an internet presence because without a domain name, a company would be practically invisible on the internet. Customers would not know where


\textsuperscript{13} 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 at http://archive.cabinetoffice.gov.uk/e-envoy/index-content.htm.
to find the company.\textsuperscript{14} On the other hand, given that a B-to-C internet transaction means in a broad sense the sale of goods and services over the internet from business entities to individuals acting in their personal capacity, uncertainty over the legal framework of B-to-C internet transaction disputes may inhibit both consumers from purchasing products or services over the internet and companies from entering into the electronic marketplace.\textsuperscript{15}

II. 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 recognized 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 commonplace 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.\textsuperscript{16}

Third, it is clear that evasion techniques can make it difficult for a state to regulate cyberspace activities. For example, there is powerful software that 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.\textsuperscript{17}

Fourth, there is the common internet practice of "caching" copies of frequently accessed resources, a practice that is especially utilized 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 that 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 a different geographical boundary.\textsuperscript{18} And fifth, it must be recognized 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 are reassembled again. These routes may change from minute to minute. There is no centralized 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 method 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, "where the information is being sent from or to is of far less significance than what is being sent".\textsuperscript{19}

III. Applicable Law and Jurisdiction in Cyberspace

For a public tribunal to resolve a dispute, it must have jurisdiction over the dispute. This jurisdictional requirement 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 requirement is a significant aspect of the sovereignty of national states.\textsuperscript{20}

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.\textsuperscript{21}

Traditional legal doctrine treats the internet as a medium that facilitates communication and commerce between one legally significant geographical location and another. But 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.\textsuperscript{22}


\textsuperscript{19} Todd D. Leitstein, A Solution for Personal Jurisdiction on the Internet, 59 LA. L. Rev. 565, 568 (1999).


\textsuperscript{21} Goldsmith, supra note 17, at 1199.

\textsuperscript{22} Henry H. Perritt, Jr., The Internet is Changing the Public International Legal System, 88 KY. L.J. 885 (2000).
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.23

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 recognize the power of technology, while at the same time respecting traditional sovereignty. David Johnson and David Post said: "[t]he 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."24

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 hundreds 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 that prevent quick access to justice and adequate redress in such a manner that his legal rights would be emptied of any content. He or she would be forced to litigate in a legal system that 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 scenario will lead ultimately to the erosion of consumers' confidence in the internet as a commercial medium.25 In this regard, the Organisation for Economic Co-operation and Development (OECD) noticed that, "[t]he 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."26

Similarly, in domain name disputes, the application of traditional concepts of jurisdiction for resolving conflicts between trademark owners and domain name holders are often viewed as cumbersome and ineffective. There are several possibilities for jurisdiction 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 among

the interests of the domain name holder, registration authorities, and any potential complainant.\textsuperscript{27}

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. This hurdle, however, is clearly an insuperable. 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 would not be 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 conflicts. In actuality, 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 names in different jurisdictions. In consequence, the protection and enforcement of recognized territorially limited trademark rights can be jeopardized by activities originating under a domain name registration in another jurisdiction.\textsuperscript{28}

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 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. These arguments ultimately lead to a vicious circle, and they become problematic if they call into play the trademark laws of every country in which the domain name can be viewed, which means virtually every country in the world. But these national laws may differ substantively.\textsuperscript{29}

Furthermore, it must be noted that the computer to which 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 a domain name may reside on a machine operating in London, but tomorrow the operator 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


\textsuperscript{29} Goldsmith, \textit{supra} note 17, at 1199; Ducker, \textit{supra} note 27, at 511.
is somewhat inconvenient; consequently, the IP address system has been overlaid with a
more user friendly system of domain names that 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.30

But although ccTLDs normally indicate the country in which the addressee’s host com-
puter is located, no technical requirement forces a computer with a country specific do-
main 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 necessarily mean that the host computer physically
exists in the United Kingdom. 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. In many cases, though, the addresses
may be the same.31

In this regard, the World Intellectual Property Organization (WIPO) in its Final Re-
port on the Management of Internet Domain Names and Addresses emphasized that any
comprehensive solution for domain name disputes would be most effective if it recognizes
the global nature of the internet and the global presence given by a domain name
registration.32

IV. OADR as a Solution for Jurisdictional Dilemma in Cyberspace

Generally speaking, the goal of the 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 that involve parties in
different jurisdictions because ADR employs techniques that 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 ADR, is that an arbitration agreement effectively and conclusively replaces
the jurisdiction of the court.33

In England, it is easily recognized that the spirit of party autonomy is reflected through-
out the English Arbitration Act 1996. Section 1, in particular, notes that:

30. Davies, supra note 18, at 421.
31. Id.
of the WIPO Internet Domain Name Process (1999), http://www.wipo.int/export/sites/www/amc/en/docs/re-
port-final1.pdf [Hereinafter WIPO].
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.  

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 also stated that it is a procedure that has been developed to be international. 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." Consequently, the transformation of the idea of ADR to cyberspace in the form of OADR needs to emphasize 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 conceptualization of parties' consent to adjudicate disputes without dependence on the exercise of jurisdiction in a forum state. The challenging problem that 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.

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 an 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 globalization 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.

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.

35. WIPO, supra note 32.
36. FTC, supra note 26.
38. Id.
V. 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 recognize 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 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.40

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.41

The legal seat of the arbitration has always been a controversial issue in cyberspace because 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 dematerialization 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 global nature also means that geographical boundaries are irrelevant in the internet infrastructure. The dichotomy between the national and international level of internet disputes is no more than an illusion, which apparently might have serious implications on the legality of electronic arbitration venue.42

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 of the country where the arbitration took place. Article 5(l)(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

41. Sutton, supra note 40, at 75.
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.\textsuperscript{43}

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 that 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 organized 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.\textsuperscript{44}

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., a 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.

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-localization for the place of arbitration in cyberspace in order to encourage the growth of e-commerce. This approach corresponds to the essentially de-localized character of the internet and the activity conducted on it.

In actuality, 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 that de-


\textsuperscript{44} ETHAN M. KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 26 (2001).
pends on the will of the parties. It is not a physical concept that 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 ac-
cordance with the will and agreement of the parties, more than the rules of procedure 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.

A. THE LEGAL STATUS OF FLOATING ARBITRATION IN CYBERSPACE

The basic characteristic of floating or de-localized 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.45

In England, traditionally, the English law does not recognize arbitration that is uncon-
nected 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 recognize the concept of a floating arbitration.46 In Amin Rasheed Shipping Corp. v.
Kuwait Insurance Co.,47 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 they were made by reference to some system of private law which defines the
obligations assumed by the parties to the contract…”48 Lord Justice Kerr confirmed his
opinion in Bank Mellat v. Helleniki Technici SA,49 by referring to floating arbitration in
particular. He said that: “Despite suggestions to the contrary by some learned writers
under other systems, our jurisprudence does not recognize the concept of arbitral proce-
dures floating in the transnational firmament, unconnected with any municipal system of
law.”50 After four years, Lord Justice Kerr stated the same opinion in Naviera Amazonica
Peruana SA v. Compania International de Seguros del Peru.51 Equally, Lord Justice Saville

45. ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION OF CONVENTION 1958: TOWARDS A
UNIFORM JUDICIAL INTERPRETATION 29 (1981); DICEY AND MORRIS ON THE CONFLICT OF LAWS 604
(Lawrence Collins et al. eds., 13th ed. 2000); Filipe De Ly, The Place of Arbitrator in the Conflict of Law of
(1991); Jan Paulsson, Arbitration Unbound: Award Detached From the Law of its Country of Origin, 30 INT’L &
Matters, 32 INT’L & COMP. L.Q. 53 (1983); Michael M. Schneider & Christopher Kuner, Dispute Resolution
46. Goode, supra note 40, at 1185.
48. Id. at 257.
50. Id. at 309.
116.

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referred to the difficulties of applying the idea of floating arbitration in *Union of India v. Mcdonnell Douglas Corp.* Lord Justice Saville noted that:

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 judgment) 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.

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

"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 arbitration, 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 realized 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.

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

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.

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.

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53. Id. at 51.
55. Id. at 119.
58. Goode, supra note 40, at 1185.
In England, one can deduce a change in the attitude towards floating arbitration with the introduction of the English 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. Section 3 of the English 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 authorized by the parties, or determined, in the absence of any such designation, having regard to the parties’ agreement and all the relevant circumstances.

Five years after the English Arbitration Act of 1996 came into force, in *ABB Lummus Global Ltd. v. Keppel Fek Ltd.*, it was held that if the seat of arbitration is not determined in the arbitration agreement, the choice of procedural law of a particular state would be a strong indicator to choose this particular state as the seat of arbitration. In the same year, in *Omnium de traitement et de valorisation SA v. Hilmarton Ltd.*, it was held in an unequivocal terms that: “Arbitration exists in some ethereal firmament unattached to any particular national legal system.” 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. There is a difference, however, 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-localized arbitration. Given that the location of the proceeding will be of lesser importance and party autonomy will be maximized in the English Arbitration Act of 1996, and given that this would ultimately augment the parties’ autonomy to determine the place of arbitration, it has been said that the English Arbitration Act of 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 outcome 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 that, in its very existence, negates the notion of place.

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 arbitration as compared to the seat of arbitration in the offline world.


60. English Arbitration Act 1996, c. 23, § 3 (Eng.).


63. Id. at 154.

B. THE LEGAL STATUS OF FLOATING AWARDS IN CYBERSPACE

Traditionally, the place of arbitration was sought as the only criterion that 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 of 1958.65

A foreign award for the purpose of enforcement in the New York Convention of 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.66 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.67

In England, section 100(1) of the English Arbitration Act of 1996 defines a foreign award as “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.”68 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.69

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 of 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 also includes 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.70

66. Mustill, supra note 33, at 105; Redfern, supra note 59, at 364.
67. New York Convention, supra note 43, art. 1(1).
68. English Arbitration Act., supra note 60, § 100(1).

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In electronic arbitration, the controversial aspect of Article 1(1) of the New York Convention of 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 that is rendered through the internet, for the purpose of enforcement in the New York Convention of 1958, could not be viewed as foreign or as domestic. This lack of classification 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 of 1958 has become irrelevant. 71

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 that 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. 72

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 a floating or de-localized award, as the basic characteristic of floating or de-localized arbitration agreement, is that it does not owe its existence, validity, or effectiveness to a particular national law. 73

It is imperative to recall the opinion of the International Chamber of Commerce (ICC) as it 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

71. Goldsmith, supra note 17, at 1199.
72. Schneider, supra note 45, at 5; Arsic, supra note 42, at 209; Smit, supra note 45, at 643.
73. Van Den Berg, supra note 45, at 29; Collins, supra note 45, at 604.
the requirements of international trade because it claims a degree of de-localisation for the place of arbitration.74

More recently, in Minmetals Germany GmbH v. Ferco Steel Ltd.,75 it was 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 emphasizing 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.

VI. Conclusion

An adequate answer to the challenging problem of cyberspace jurisdiction can neither be a 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 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.

74. Contini, supra note 69, at 290.