"That's an amazing invention- but who would ever want to use one of them?"

Rutherford B Hayes, US President, after participating in a trial telephone conversation in 1876

Legal Issues in Online Dispute Resolution

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Introduction

Online Dispute Resolution (ODR) is a set of dispute resolution techniques which use information and communications technology for automating and speeding up information processing and for overcoming distances through the use of remote communications. This will usually involve an online platform on which documents (evidence and legal argument, expert opinions, etc) are uploaded, stored, organised and made accessible to the relevant parties and the neutral third party. It may also involve distance communication through web-conferencing facilities which mean that the parties and neutral third party do not need to meet in person. In addition ODR may use sophisticated knowledge management tools for legal information about the specific case or expert and legal opinion.

Many different types of ODR exist- most forms of ODR, however are based on more traditional forms of Alternative Dispute Resolution (ADR) and in particular arbitration and mediation or combinations thereof. More innovative forms are: online mock jury trials, blind bidding and automated negotiation assistance.

As to legal issues, arbitration is a form of private adjudication whereby a neutral third party, the arbitrator, chosen and paid for by the parties, makes a binding and enforceable award as to how the dispute should be resolved. The arbitrator will usually decide the case according to the authoritative standards of the applicable law, but may also apply more equitable considerations. Unlike litigation the procedure used to arrive at the award is more flexible and is usually determined by the parties. Arbitration is governed by the specific legal framework set out in the Arbitration Act 1996. The cornerstone of the legality of arbitration outside the courts is the arbitration agreement between the parties which can be made before or after the dispute has arisen and which is binding on the parties. Since the arbitration agreement has to be made in writing[1], the question arises whether an electronic contract qualifies as writing. Writing is defined in s. 5 (6) as including the agreement "being recorded by electronic means". An agreement made by electronic communication must therefore provide a sufficient record for it to be valid.

[1] Section 5 (1)

Mediation, by contrast is not necessarily based on legal arguments and is a voluntary process which is not binding until the parties have reached agreement. It is therefore not based on a legal framework as such.

Mediation Directive and "Without Prejudice"

The main form of regulation of mediation is the Mediation Directive 2008/52/EC, implemented by the Cross-Border Mediation (EU Directive) Regulations 2011/1133 and provisions in the Civil Procedure Rules encouraging mediation.[2]

The Directive applies to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator[3], in civil and commercial law. The Directive does not make mediation mandatory in any way, but it also does not prevent Member States from making mediation mandatory.[4] Although the purpose of the Directive is to encourage mediation[5], it only applies to cross-border disputes.[6] That is why many EU Member States, but not the UK, have extended its implementation to domestic matters. The Directive encourages voluntary Codes of Conduct for mediators and training.[7] The Directive also states that Member States should provide for consent orders unless national law does not allow for their enforceability.[8] It provides for the "without prejudice" nature of mediation, preventing Member States from compelling any information arising out of or in connection with a mediation process to be used as evidence in court or in arbitration, except where this is necessary for overriding considerations of public policy of the Member State concerned (for example to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person) or where this evidence is needed for enforcing the agreement.[9] The Mediation Directive therefore does provide for confidentiality as such, but also allows the Member States to have stricter rules on confidentiality- in the UK this is usually provided in the institutional (or other) mediation agreement.[10] Furthermore it provides that limitation periods should be extended during the mediation period,[11] which the Regulations in England has extended by eight weeks after the end of mediation when the limitation period had expired during the . In the UK without

[2] Pre-Action Protocols and CPR r. 14(2)(e).
[3] Article 3 (a)
[4] Article 4 (2)
[5] Article 1 (1)
[6] Article 1 (2)
[7] Article 4
[8] Article 6
[9] Article 7 (1)
[10] Article 7(2)
[11] Article 8

prejudice negotiations have been recognised for a long time. There is long authority that[12] communications between litigants made without prejudice were excluded as evidence on the ground of public policy.

Cost Penalties for Refusing Mediation

Another important legal issue relevant to ODR is the question to what extent a party's unreasonable refusal to take part in ADR may have the consequence that that party, even if successful in litigation, may be unable to recover costs. The parties and their advisors are now under an obligation to consider ADR as a means of solving their dispute from the outset.[13] When assessing costs the court will take into account "the efforts made, if any, before and during the proceedings in order to try to resolve the dispute".[14] In a series of cases the courts have held that the successful party cannot recover costs, because they had unreasonably refused to consider taking part in mediation: for example in *Dunnett v Railtrack* the Court held that "if a party turns down out of hand the possibility of alternative dispute resolution when suggested by the court as part of the effective management of the case under rule 1.4 there may be uncomfortable consequences in costs".[15] In *Shirayama Shokusan v Danovo* the Court found that it had jurisdiction to order the parties to try mediation despite allegations of dishonesty made by one party against the other.[16] Disputes involving complex expert evidence are not exempted in principle from the need to consider mediation.[17]

If a claim had no prospect of success then it may indeed be reasonable for the successful defendant not to agree to the claimant's offer of pre-trial mediation and will not be penalised in recovering costs.[18] However, the High Court found that "a party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate."[19] In *Halsey v Milton Keynes NHS Trust*[20] the Court of Appeal set out some of the criteria which are used to determine when it is reasonable for a party to refuse to engage in ADR:

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[12] *Walker v Wilsher* (1889) 23 QBD 335 (CA), recently confirmed RvK [2009] EWCA Crim 1640 (CA), but does not apply to criminal proceedings

[13] CPR Rule 1.4 (2) (e) "Active case management includes encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure".

[14] CPR 44.4 (3) (a) (ii)

[15] [2002] 1 W.L.R. 2434 (CA) Para 15; see also R (on the application of Cowl) v Plymouth City Council [2002] 1 WLR 803; for a more recent case see *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch)

[16] [2004] B.L.R 207 (ChD); see also *Guinle v Kirreh* [2000] CP Rep 62 (ChD)

[17] *Burchell v Bullard* [2005] EWCA Civ 358 (CA) Para 41-43

[18] *Hurst v Leeming* [2003] 1 Lloyd's Rep 379 (ChD) or in the case of property rights which are difficult to compromise: *Allen v Jones* [2004] EWHC 1189 (QB)

[19] *Earl of Malmesbury v Strutt and Parker* [2008] EWHC 424 (QB) L. Jack.

[20] [2004] 1 W.L.R 3002 (CA)

-The nature of the dispute and its suitability for mediation, e.g. whether there is a need for a precedent on a point of law;

-The strength of a party's case;

-Whether ADR has been tried and proven to be unsuccessful previously;

-Whether the cost of mediation is disproportionate to the claim at stake;

-Whether the mediation will lead to an unacceptable delay to the trial, and finally,

-Whether mediation has no reasonable prospect of success.[21]

It furthermore held that the burden of showing that it is unreasonable to recover costs is on the person who would have to pay the costs and alleges that the other party did not engage in mediation.[22]

Mediation can be carried out using online technologies such as a web-platform and remote communications (such as web-conferencing, email, chat, instant messaging etc) and provided both parties have equal access to the technology there is no reason why the same cost penalties could apply to a refusal by a party to engage in online mediation.

Agreement to Mediate Binding?

The next legal question which arises is whether and how a clause in a contract to mediate a dispute is binding on the parties. The traditional position under English law is that an agreement to further negotiate is ill-defined and therefore not legally binding. However, more specifically with reference to mediation in *Cable & Wireless v IBM UK*[23] a pre-dispute clause in an agreement to submit disputes to mediation was enforced and the Court stayed proceedings until the parties had referred their dispute to the CEDR mediation procedures. Since the clause referred to a specific recognised procedure, the parties obligations were not uncertain and hence the clause was enforceable. For (online) mediation there is no conflict between Article 6 of the ECHR (right to a fair trial), as a settlement in mediation is voluntary and has to be agreed to by the parties, thus the parties do not lose their right to a fair trial, unless mediation would cause extraordinary delay.

Additional considerations may arise in business to consumer contracts which contain an ADR clause. If the contract is a non-negotiated standard term contract, the consumer may allege that the ADR clause is an unfair contract term, not binding on the consumer under the Unfair Contract Terms Directive 93/13/EC (the law in this area is currently being revised by the Consumer Rights Bill). The Court of Justice of the EU had to rule on this question in

[21] *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 (CA) Paras 16 et sequi
[22] Ibid, para 13
[23] [2002] 2 All E.R. (Comm) 1041

Case C-317/08 Rosaalba Alassini and held[24] that an online mediation clause is enforceable when a number of conditions are met, namely that (1) online mediation does not cause substantial delay in the process, (2) online mediation must be inexpensive for the consumer, (3) online mediation should suspend the limitation period, (4) the right to bring an action before the courts must be maintained, (5) the parties have access to online mediation on an equal and fair footing (no digital exclusion) and (6) interim measures are not excluded (such as an injunction). This case concerned the implementation of Article 34 of the Universal Service Directive 2002/22/EC, which imposes an obligation on Member States to provide ADR for certain disputes between communication service providers and their consumer-customers, including ODR and this was implemented in Italy as a mandatory mediation procedure prior to lodging a claim in court, which was challenged by consumers. An online mediation procedure for consumers therefore has to take into account that some consumers may not have access to the internet and/or are not able to use online facilities and should therefore either (i) allow an offline alternative or (ii) provide support to overcome any difficulties.

Validity of Pre-dispute Arbitration Clause in Consumer Agreement?

The question of validity of pre-dispute online arbitration clauses raises different issues and therefore it is important to distinguish between ODR procedures based on mediation and those based on arbitration. As has been pointed out above, for its validity, an arbitration clause must be in writing or provide a sufficient record. Additional requirements arise in respect of mandatory arbitration and adjudication processes (as opposed to voluntary arbitration based on an agreement) as an arbitration award is binding with res judicata effect, so that arbitration forecloses access to the courts, thus conflicting potentially with the right to a fair trial. Hence, arbitration is usually based on an agreement which the parties have voluntarily entered into. This raises questions as to the validity of an arbitration agreement to which one party is a consumer (who may not be fully aware of the nature of arbitration) and hence there are some restrictions on the validity of pre-dispute arbitration clauses in consumer agreements, particularly if they are contained in standard terms. Under EU law, the Unfair Contract Terms Directive 93/13/EC list an arbitration clause in a standard consumer contract as a potentially unfair term. The Court of Justice of the EU has held on at least two occasions that, if a pre-dispute arbitration clause is held to be unfair by the national court, the award has to be annulled, even if the consumer has failed to raise the unfair nature of the term during the arbitration proceedings, since the consumer may be unaware of his or her rights or deterred from enforcing them on account of the costs.[25]

[24] Judgment of 18. March 2010; paras 53-60

[25] C-168/05 *Mostaza Claro v Centro Movil* Judgment of 26. October 2006, Para 39 and C-40/08 *Asturcom Telecommunicaciones*

Whether an arbitration clause (or other standard contract term in a consumer contract) is unfair depends on whether it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer and contrary to good faith[26] and this depends on the precise circumstances of the case to be determined by the national courts.[27]

In England an arbitration agreement concluded with a consumer (whether pre- or post-dispute)[28] is considered to be unfair, and hence unenforceable[29], if the claim does not exceed £5000.[30] Furthermore, under English law, s.90 of the Arbitration Act 1996 stipulates that the consumer provisions apply to natural and legal persons, such as a company, that obtains goods and services for purposes outside its trade, business or profession.[31] Thus, under English law, if the amount in dispute is no more than £5,000, an arbitration clause is automatically not binding on consumers, so there is no need to apply any of the tests set out in Directive 93/13/EC, implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).

If the amount in dispute exceeds £5,000 the significant imbalance test applies on a case-by-case basis to assess whether the arbitration clause is binding on the consumer. The Annex to the Directive lists examples of unfair terms (this is a "grey" list) and under (q) "excluding or hindering the consumer's right to take legal action (…) particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions". The meaning of this example is not entirely clear but it has been interpreted by the courts as meaning that it distinguishes private (ad hoc or institutional) arbitration (which would be potentially unfair) from public, statutory forms of arbitration, such as the small claims procedure or an ombudsman procedure.[32] The Courts in England have applied the fairness test in respect to arbitration clauses by finding an arbitration clause fair, if the consumer has been professionally advised.[33]

In addition, the Directive on Consumer ADR 2013/11/EU, which transposition is expected to be completed by 9 July 2015, provides that ADR bodies that seek to be certified under the

[26] Article 3 (1) of Directive 93/13/EC
[27] *Mostaza* Para 22
[28] Arbitration Act 1996, s. 89(1): For this purpose "arbitration agreement" means an agreement to submit to arbitration present or future disputes or differences (whether or not contractual).
[29] Such an arbitration clause would not be binding on the consumer, but could be used by the consumer against a business supplier (clause is unilaterally void): Unfair Terms in Consumer Contract Regulations 1999 (SI 1999/2083), reg 8(1)
[30] Unfair Arbitration Agreements (Specified Amounts) Order 1999 (SI 1999/2167)
[31] *Heifer International v Christiansen* [2007] EWHC 3015 (TCC), paras 226, 250
[32] Landgericht Krefeld Case 6 O 186/95. Judgment of 29. April 1996 [1997] ILPr 716; *Picardi v Cuniberti* [2002] EWHC 2923 (QB), para 102; *Heifer* para 231-2 and *Mylcrist Builders Ltd v Mrs G Buck* [2008] EWHC 2172 (TCC), para 54
[33] *Allen Wilson v Buckingham* [2005] EWHC 1165 (TCC) para 43; *Westminster Building Company v Beckingham* [2004] BLR 508 (QB) para 45

new European law can only offer arbitration services to consumers if they agree to go to arbitration after the dispute arises.[34]

UNCITRAL

The UNCITRAL draft Procedural Rules envisage a three stage procedure: (i) automated/ assisted negotiation between the parties without a human neutral, which may include blind-bidding techniques (ii) mediation/conciliation and (iii) recommendation (Track II) leading to self-enforcement mechanisms (e.g. trustmarks, requiring security to posted, facilitating the payment of the awards, etc)[35] or arbitration leading to a decision which can be enforced (Track I).[36] If the dispute is not solved by negotiation within 10 calendar days the procedure will automatically move on to the next stage, the conciliation, and failing that, then the dispute will escalate to the adjudicative stage.[37]

The scope of application of the draft rules covers consumer as well as commercial disputes of low-value arising from cross-border e-commerce transactions where traditional means of dispute resolution are not viable.[38] Under these rules, businesses will also be able to submit complaints or counterclaims against consumers,[39] which may be related to feedback reviews or unpaid delivery of goods or services.

The main thrust of the UNCITRAL initiative is to establish an internationally accepted and trusted, normative framework for ODR.[40] This is an ambitious and far-reaching project which will establish a new paradigm for dispute resolution for e-commerce, in a similar way that the Uniform Dispute Resolution Procedure adopted by ICANN has changed the paradigm for disputes arising out of the conflict between domain names and trademarks.

In establishing this normative framework, UNCITRAL is drafting procedure rules which are intended to be used in conjunction the following four documents which will be attached as annexes:[41] (1) Guidelines and minimum requirements for online dispute resolution providers/platforms/administrators, (2) Guidelines and minimum requirements for neutrals, (3) Substantive legal principles for resolving disputes and (4) Cross-border enforcement

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[34] Art. 10(1).
[35] A/CN.9/WG.III/WP.124 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat: Online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms, 18-22 November 2013
[36] A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012, Paras 5 and 46
[37] Article 5 (2) draft Procedural Rules A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 28. February 2012
[38] Article 1
[39] Draft article 4(c)
[40] As to the trust argument, see further the discussion in M Philippe "Now where do we stand with online dispute resolution (ODR)?" (2010) *International Business Law Journal* 563-576, 566
[41] A/CN9/WG III/WP112 UNCITRAL Working Group III (Online Dispute Resolution) Note by the Secretariat 17 January 2014, Draft Preamble at para 23

mechanisms.[42]: To date UNCITRAL has commenced its work on the Procedural Rules for ODR but has not yet produced drafts of any of the other rules and guidelines. [43]

EU Legislation on ODR

The new EU legislation on Alternative Dispute Resolution and Online Dispute Resolution (Directive 2013/11/EU and Regulation 524/2013/EU) is currently being transposed into English law[44]. The ADR Directive imposes an obligation on the UK to ensure the provision of (online) out-of-court settlement mechanisms for all consumer complaints in all sectors (with the exception of health care services and public providers of higher education),[45] so consumers may have more adequate redress options against business without having to go to court. It applies to all contractual disputes, domestic and cross-border, where a trader is established in the EU and a consumer is a resident of the Union.[46] However, it excludes complaints handling mechanisms established by the trader, direct negotiation between the consumer and the trader, and judicial settlement. Participation by businesses in ADR will remain voluntary in most economic sectors,[47] but businesses must state which ADR procedures they take part in and when a dispute arises whether or not they participate in ADR,[48] in addition online business must carry a link to the ODR platform.[49] The ADR process must be accessible online and it must be free or low cost for the consumer.[50] Furthermore the ADR Directive establishes minimum quality standards for certified ADRs,[51] which will be monitored by a national competent authority and these ADRs will be listed in a European ODR platform administered by the European Commission from January 2016. These certified ADRs may refuse to deal with certain disputes (e.g. frivolous or vexatious), or when the consumer refused to contact first the trader, or when submitted after one year since the dispute arouse.

The ODR Regulation establishes the ODR platform which operates as portal allowing a consumer to file a dispute arising from e-commerce online; these complaints will be redirected to the online business.[52] If the business is legally or contractually obliged or willing to participate in a certified ADR body, then the business response, together with the

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[43] But see the Canadian delegation's proposal of principles for neutrals A/CN9/WGIII/WP114 of 12. March 2012

[44] https://www.gov.uk/government/consultations/alternative-dispute-resolution-for-consumers

[45] Article 2(2)

[46] Article 2(1)

[47] Examples of regulated sectors where the provision of ADR is mandatory are the financial sector, some utility providers such as gas and electricity, telecoms, etc.

[48] Article 13

[49] Article 14(1) ODR Regulation 524/2013/EU

[50] Article 8

[51] Certified ADR bodies must comply with six procedural principles: (i) expertise, independence and impartiality; (ii) transparency; (iii) effectiveness; (iv) fairness; (v) liberty; (vi) legality. Articles 6-11

[52] The ODR Regulation allows for traders to bring complaints against consumers as long as the law of the country where the consumer is a resident allows for this. The BIS has already expressed that the UK will not allow for this option, so complaints will only flow in one direction, from the consumer to the business.

complaint, will be sent to a certified ADR body. The ADR body can use a case management tool available in the ODR platform or its own technology to conduct the ADR procedure online. In any event, the final outcome must be reported back to the ODR platform.[53]

The main role of the ODR platform is thus to increase awareness of ADR processes and to provide user-friendly ODR technology with the aim of making cross-border redress more accessible to disputing parties. In so doing the platform must provide an electronic translation function supported by human intervention that will assist parties and ADR entities to exchange information. Each EU Member State must designate a contact point that will contain at least two ODR advisors, which will be most likely drawn from the national European Consumer Centres.[54] The contact points will have the function of providing parties with information about the submission of the complaint and the available ADR processes. They will also inform parties about other means of redress in cases where the dispute cannot be resolved via the platform. In the UK this contact point will focus on cross-border disputes, while some support for domestic disputes will be provided by a helpdesk, which will assist consumers and businesses to identify relevant ADR bodies.

[53] Article 10 (c)
[54] Article 7