Fair Process, Efficiency and Online Alternative Dispute Resolution

Submitted By

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1.1. Introduction:

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 paper argues that when Alternative Dispute Resolution (ADR) moves to cyberspace, particularly arbitration and mediation as the main types of ADR, the form of online alternative dispute resolution (OADR) can maximise the growth of e-commerce.

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

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

In advancing this issue, this paper will provide an analysis on the division between public law and private law and its implications on the notion of fair process. This paper will proceed to analyse the application of fair process in trade unions disputes as a case study which serves as an illustrative example of the division between public law and private law. The following part of this paper will deal the interconnected relationship between efficiency and fair process with particular reference to OADR. Finally, this paper summarises and relates the findings of the paper to each other 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 have to be analysed 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 the English law where it is well developed, appropriate, and constructive. In the United Kingdom, the encouragement of electronic commerce is a matter of public policy. The United Kingdom government is enthusiastic about developing the potential for electronic transactions, partly as a method of delivering government services, and partly as the basis for promoting competition and economic growth. It appears that there is now a strong political imperative in the UK to prompt various actions that will create trust, reliance, and confidence in doing business over the internet. The strategy of the UK government is to make the country the best place in the world for e-commerce.(1)

1.2. The Division Between Public Law and Private Law:

Normally, a public tribunal must have the power to resolve disputes only when they follow relatively formal procedures prescribed for them by the sources of their power, usually codified in rules of procedure and evidence. This is a significant aspect of the fair process of law. And given that legal analysis of private dispute resolution is based on the legal

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

framework for public dispute resolution, there is a need to translate fair process concepts into the less coercive regimes of private dispute resolution institutions in cyberspace. That said, it must be analysed whether public law framework of fairness such as administrative law framework of fairness applies to private law proceedings such as arbitral proceedings. In principle, it does not apply. However, some basics are so fundamental that they cannot be waived.(2)

There is a historical dominance of state sponsored adjudication, and hence of litigation, in the theory and practice of civil justice in the common law world. This brings about the profound entanglement of settlement and litigation. However, access to justice represents the expression of concerns about costs, delay and general inaccessibility of adjudication, and called for quicker, cheaper and more readily available judgement with procedural informality as its hallmark. Consequently, it has been argued that the contrast between state sponsored adjudication, such as court system, and private adjudication, such as arbitration, is no longer so crisp.(3)

It is important to bear in mind that private arbitration typically involves the central elements of court adjudication. For instance, arbitration procedures may be very similar to those used in litigation: the filing of statements of case; examination of witnesses and so on. Also, in arbitration, the decision is made according to law as it would be in court. In

(2) Perritt, H., "Jurisdiction and the Internet: Basic Anglo/ American Perspectives", a paper presented at the Internet Law and Policy Forum Jurisdiction: Building Confidence in a Border-less Medium, Montreal, Canada, 26th and 27th of July 1999, available online at http://www.kentlaw.edu/perritt/montreal.rev.htm, last visited on the 1st of October 2007.

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

this regard, it has been argued that a process of institutionalisation almost inevitably takes place even in the face of efforts to keep arbitration flexible, which runs contrary to one of the often-stated advantages of arbitration, i.e. procedural flexibility.(4)

Moreover, it has been argued that the role of judges in courts in resolving disputes is secondary to their function of restating important public values such as fairness and justice. Indeed, adjudication is the social process by which judges give meaning to such important public values. These public values are evident in private law, such as arbitral proceedings, since justice and fairness are universal concepts and they apply in both private and public law. However, in the public sector, these values are fully developed. Therefore, if OADR solutions, as contractual agreements, are to become acceptable by internet users and if we need to convince them to use such solutions, OADR has to be based on a principled footing, with an appropriate example provided by the public law framework of fairness.(5)

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

(4) Ibid. 217.
(5) Ibid. 25.

result, fair process has to be scaled and proportionate to the type of OADR in question.(6)

In this regard, Wade and Forsyth in their leading text on administrative law argue that in courts of law, the observation of natural justice as a well-defined concept can be taken for granted. But such value is so universal, so natural, that it is not and should not be confined to judicial power. It applies equally to powers created by contract. In administrative law, the rules which govern disputes involving the government and public authorities come before the ordinary courts, and the courts so far as possible apply ordinary law, treating public authorities as if they were private individuals with all the normal legal duties and liabilities. The great majority of proceedings by and against public authorities, therefore, can be adjudicated without making any distinction between private and official capabilities. The courts draw upon a mixed collection of remedies, some belonging to private and some to public law, in order to cover all contingencies. They are freely interchangeable.(7)

In this regard, it is imperative to recall the opinion of Lord Denning on this issue. In Regina v. Home Secretary exp. Santillo,(8) Lord Denning MR noted:

The rules of natural justice or of fairness are not cut and dried. They vary infinitely.(9)

(6) Bevan, A., *Alternative Dispute Resolution: A Lawyer's Guide to Mediation and Other Forms of Dispute Resolution*, (Sweet & Maxwell, London, 1992) 31.
(7) Wade, H. and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 436.
(8) [1981] QB 778.
(9) Ibid. 786.

To the same effect is a passage, much cited, in a speech of Lord Bridge in the House of Lords in the case of LIoyd v. McMahon.(10) Lord Bridge said:

My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates.(11)

Furthermore, it has been argued that informal justice, which implies a contractual agreement on arbitral proceedings, can extend the ambit of state control, since informal justice purports to devolve state authority on none-state institutions in order to delegate social control to private entities. From this perspective, courts apply standards of fairness in public law in order to judge fairness in a private law field.(12)

Paul Craig, a leading author on administrative law, argues that the idea that the ascription of the label "public power" leads to the application of a distinct set of procedural norms has come under strain since contracts now contain many common law and statutory constraints. In this sense, there is little doubt that private law has become subject to a greater degree of public law. There is equally little doubt that public law doctrines might be made greater use of within contract law. Public law principles should be applied to undertakings which are characterised in this manner. It must, however, be recognised that there is an ambiguity in such formulations. Although we might characterise certain norms as being public

(10) [1987] AC 702.
(11) Ibid. 711.
(12) Palmer, M., and Roberts, S., *Dispute Process*, (Butterworths, London, 1998) 32.

law norms in nature, it is by no means certain that they have always been regarded in this manner. Also, it is clear that some of these principles have been applied to a range of institutions which are not public bodies. The courts have long applied the basic norms of procedural justice, such as a right to a fair hearing, to bodies such as trade unions.(13)

The divorce of public and private law was proclaimed in categorical terms in O'Reilly v. Mackman.(14) But the impossibility of dividing public and private law is clearly illustrated by the discussion above. Wade and Forsyth, two leading authors on administrative law, have submitted to this view by saying that O'Reilly v. Mackman turned the law in the wrong direction, away from flexibility of procedure and towards rigidity reminiscent of the bad old days of the forms of action a century and a half ago.(15)

Lord Saville gave an apt warning with regards to dividing public and private law in British Steel Plc v. Customs and excise Commissioners.(16) He said:

It is now well over 100 years ago that our precedents made a great attempt to free out legal process from concentrating upon the form rather than the substance, so that the outcome of cases depend not on strict compliance with intricate procedural requirements, but rather on deciding the real dispute over the rights and obligations of the parties…For over the last decade or so there has been a stream of litigation on this subject, much of it proceeding to the House of Lords. The cases raise and depend upon the

(13) Craig, P., *Public Law and Control over Private Law*, in Taggart, M., *The Province of Administrative Law*, (Hart Publishing, Oxford, 1997) 211.
(14) [1983] 2 AC 237.
(15) Wade, H. and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 664.
(16) [1997] 2 All ER 379.

most sophisticated arguments, such as the distinction and difference between what is described as "public" as opposed to "private" law…Such litigation brings the law and our legal system into disrepute, and to my mind correctly so…The courts have to address difficult and complex questions which in my view, under a proper system, it should not be necessary even to ask, let alone answer.(17)

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

While the difference between the two systems must exist and their respective parameters recognised, this does not mean the systems do not need to coalesce. Indeed, just as public law has been able to develop by adopting private law principles and remedies, perhaps recent events have indicated that it is time for private law in certain fields to emulate the supervisory role which so far has been the hallmark of the courts' public law role.(18)

1.3. Fair Process in Trade Unions Disputes as a Case Study:

A trade union is constituted by an associations of individuals bound together by a contract of membership and the courts have jurisdiction to enforce this contract at the suit of union members. In particular, courts take the opportunity through such mechanism to impose on unions the duty to comply with public law standards of procedural fairness in exercising their decision-making power. In actual fact, trade unions are implying fairness through their contracts with members and courts expected therefore that disputes between

(17) Ibid. 387.

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

trade unions and members to be considered according to standards of fairness in public law. For example, members of trade unions cannot normally be expelled without being given a hearing, for their contracts of membership are held to include a duty to act fairly: by accepting them as members and receiving their subscriptions the trade union impliedly undertakes to treat them fairly and in accordance with the rules. Apparently, the doctrine of natural justice which embodies a fair hearing is extended beyond the sphere of administrative law to such bodies as trade unions. This doctrine found a fruitful field of application in protecting members of trade unions from unfair expulsions and other penalties where the basis for natural justice was an implied term in the contract of membership. Indeed, regardless of the union rules, the courts will require the union to apply the rules of natural justice, particularly, an opportunity of a fair hearing. In effect, therefore, trade unions are subject to the administrative law concept of the duty to act fairly, which requires a decision to be made honestly and without caprice.(19)

In Bonsor v. Musicians' Union,(20) Denning L.J. referred to trade unions' rules by saying:

If it should be found that if any of these rules is contrary to natural justice…the courts would hold them to be invalid.(21)

In Abbott v. Sullivan,(22) Denning L.J. said of trade union committees:

(19) Deakin, S., and Morris, G., *Labour Law*, (3rd edition, Butterworths, London, 2001) 841. Wade, H. and Forsyth, C., *Administrative Law*, (8th edition, Oxford University Press, Oxford, 2000) 440.
(20) [1954] Ch 485.
(21) Ibid. 494.
(22) [1952] 1 KB 198.

These bodies must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence: and any agreement or practice to the contrary would be invalid.(23)

Nevertheless, it must be noted that the most rudimentary level of legal intervention would be merely to ensure that unions obey the rules which they themselves have determined, with members having recourse to the courts if they are breached, which led to superimpose on the contract of membership public law standards of procedural fairness. This should not lead inexorably to the conclusion that all principles of a public law nature should be equally applicable to private law. There are some important considerations for bodies which are discharging public functions such as the principle of control of discretion, which includes among other things, impropriety of purpose, relevancy, reasonableness and proportionality. Such considerations were framed very much with the idea of a public body in mind and it is by no means self-evident that such considerations are equally relevant in private law. Indeed, there is no need to apply all of the procedural norms of public law to private bodies. Instead, there is a need to utilise them in the same manner as when they are applied to traditional governmental institutions.(24)

1.4. Fair Process, Efficiency and OADR:

In the context of OADR, it is important to notice that the guarantees of a fair trial and the respect for the rule of law that a private OADR can give are not the same as public authorities provide. Privatized systems and their technological

(23) Ibid. 207.

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

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

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

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

principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. These requirements are essential to any effective ADR provider. They include mainly, principles of effectiveness, fairness, independence, low cost, transparency, reliability, accessibility, trustworthiness, speediness, representation, legality (that parties must not be deprived of mandatory provisions of the law of the place where the decision-making body is established, and of the member state where he or she is normally a resident), and liberty of choice (that if the decision is to be binding on the parties and further recourse to court is excluded, they should be fully aware of this in advance and have accepted it).[25]

However, the EU Commission recommendations do not deal with the issue of the establishment of clear principles when setting up or using OADR systems. Some of these principles, such as the principle of representation, seem both overly complicated and unnecessary, and may unintentionally create difficulties for the design and functioning of OADR system. Moreover, some of these principles are contradictory. Heavy procedural guarantees promoted by the principle of legality, for instance, have direct consequences on the effectiveness promoted by the same recommendations. Therefore, the solution is to be found in the balance between these principles. Furthermore, the applicability and/or importance of some criteria will vary according to the type of ADR in question. Fair process requirements would be more stringent in a private process such as arbitration, which is entirely a creature of the arbitration agreement. Whether discovery is permitted, whether fact finding is to be utilised,

[25] EU Commission, "Recommendations on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes", (98/257/EC) O.J.L. 115, available online at http://aei.pitt.edu/1179/01/consumer_justice_gp_follow_COM_1998_198.pdf , last visited on the 1st of October 2007.

and the applicability of different rules of evidence are all matters to be defined by the parties in their arbitration agreement in order to increase efficiency of the process. However, arbitration is a form of adjudication. It is even considered to be the privatised equivalent of a court of law. Most procedural safeguards that are imposed on arbitration proceedings derive from this epistemological position. If arbitration does not grant fair process, it may run the risk of not being characterised as arbitration or not withstanding judicial review. Therefore, basic concepts of adjudicative fair process provide an appropriate basis for developing online arbitration criteria.[26]

This leads then to the further question as to the type of relationship which the arbitral process should have with the courts in order to make the process a viable instrument for effective decisions on the rights and obligations of parties wishing to settle their dispute by arbitration. In this regard, the English Arbitration Act 1996 assures a sufficient judicial support in order to avoid injustice in the arbitral proceedings. Section 45(1) of the English Arbitration Act 1996 produces the power of intervention by the courts on a point of law. It gives power, unless otherwise agreed by the parties, to the courts, on the application of a party, upon notice to the other parties, to determine any question of law arising in the course of proceedings which the court is satisfied substantially affects the rights of one or more of the parties.[27] The Act has also retained the right of appeal on a point of law from a decision of the arbitrator to the court. Section 69(1) provides that, under similar conditions, a party may appeal to the court on a

[26] Perritt, H., "Dispute Resolution in Electronic Network Communities", (1993) 38 *Villanova Law Review* 393.
[27] Section 45 (1) of the Arbitration Act 1996.

question of law arising out of an award made in the proceedings.[28]

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

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

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

[28] Ibid. Section 69 (1).

1.5. Conclusion:

OADR is both suitable and important for the development of e-commerce since it encourages people to use the internet as a medium to conduct commerce. However, it must be borne in mind that the foundations of the controversies about OADR is not the use of the internet as a medium to conduct ADR proceedings, rather the controversy has arisen by our conception, as legal scholars, of such a use. This issue does not seem to be grasped thoroughly and analysed constructively by legal scholars.

Accordingly, there is a need to transform our legal thinking with regard to the use of the internet as a medium to conduct ADR proceedings. This is very crucial at this stage of OADR development because such a transformation would envisage that one of the main challenges with OADR in general, and online arbitration, in particular, is that parties may give up some fair process rights to participate and not all may fully understand this. Such a transformation would envisage also the importance of identifying limitations for transporting established dispute resolution systems, such as arbitration, to an electronic commerce environment.

For instance, an in-person oral hearing and the opportunity to fully present a case are the best way to provide the parties with fair process rights. But that may not be practical for disputes involving relatively small amounts and/or located at a great distance from each other, such as electronic disputes. Consequently, an adequate solution may require hearings and presenting cases that can be conducted online. Indeed, compromising some degree of procedural quality in exchange for efficiency and economy would seem permissible, provided that all parties are entitled to a fair opportunity to present their case.

Also, with regard to the use of the internet as a medium to conduct ADR proceedings, the perception of creating a system that is going to offer the fair process that a court system or traditional ADR system would offer needs some revision by legal scholars. Rather than stressing the exaggerated competition between court and out-of-court dispute settlement in cyberspace, and rather than stressing the exaggerated competition between traditional offline ADR mechanisms and OADR solutions in cyberspace, legal scholars must understand that there are some conflicts between technology and existing law with respect to OADR. Those conflicts are due to the fact that elimination of all or part of usual face-to-face proceedings implies a different application of fairness in the OADR process. It must be underscored therefore that because of the interaction between electronic methods of communication and quality of justice in OADR process, fair process rights might be minimal in cyberspace.

Indeed, the respect for fair process rights in OADR is not only a legal issue. It is also a technical challenge to which an interdisciplinary body of legal scholars and Information technology experts should respond by setting flexible standards as technology could change faster than rules. Fair process can only established if information technology specialists are sufficiently integrated into the legal teams involved in dispute resolution. Many of the issues discussed in this paper are too complex for legal experts to solve. The creation of fair process therefore depends on building communication between legal experts who are able to explain the problem and information technology experts who are able to understand it.

However, the advances of technology must move cautiously forward so as not to diminish the value of fair process in OADR while increasing its efficiency. There should be a balance between fairness and effectiveness. On the one hand, if too many procedural rules were added to a program in an attempt to make it fair, the program could be too expensive and perhaps slow to be effective. On the other hand, it must be borne in mind that increasing efficiency does not necessarily increase either justice or respect for justice. As a result, OADR solutions should be considered rough justice mechanisms that emphasise fairness in terms of allowing ready access to justice.

It is crucial to avoid that access to justice is limited by doubts as to the effectiveness of the OADR process, and to ensure that facilitating internet users' access to justice, by speeding up or simplifying OADR procedures, do not deny their right in fair process. From this perspective, it becomes clear that the use of the internet to conduct ADR is useless if it does nothing to overcome a limitation, which is access to justice in cyberspace, or if it overcome the particular limitation only by creating a greater obstruction, which is diminishing the value of fair process in online ADR.

Parties must understand that while economical and expeditious resolution of cases is the principal benefit of OADR, this efficiency may come at the expense of some degree of procedural fairness. The parties are therefore deemed to accept to compromise some degree of procedural quality in exchange for faster, less expensive and more effective proceedings. This conforms to a large extent with the notion that access to justice implies that there should be pragmatic solutions to disputes that might go unresolved, and that such solutions should make economic sense. This conforms also with the notion that the ability to resolve a dispute, as

compared to dispute resolution in practice, is a very important concern in cyberspace. It is one thing that a disputant has the right to resolve a dispute in cyberspace, and it is another thing whether he or she will actually do so in practice. Indeed, barriers to actually exercise existing rights and access to legal remedies will have an apparent impact on the expansion and growth of e-commerce.