

The Legitimacy of Online Alternative Dispute Resolution (ODR)

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1. Introduction

The concept of alternative dispute resolution (ADR) was not recognised by the national legislator and court from the first attempt. In fact, the court was jealously guarded their domain, watchful of encroachments on their jurisdiction. Thus, the relationship between the court and the ADR was a hostile one. In that, the court was looking to the ADR as a private dispute settlement mechanisms created to usurp the jurisdiction of the court.¹ Therefore, the court was not ready to accept the concept of the ADR. The question this article addresses is what is the legitimacy of the ADR? In other words, under what policy did the national legislator and court recognise the ADR as private dispute settlement mechanisms? And how can the legitimacy of the ADR support the online alternative dispute resolution (ODR)? This question will be answered from the perspective of the developed and developing countries. The former countries will be exemplified by England and the latter countries will be exemplified by Jordan.

2. What is the legitimacy of the ADR?

The age in which Common Law had been grown clearly in England was dated in the middle ages, from the reign of Edward I until 1485.² In this period, Merchants were known as men who carried out international transactions by travelling from fair to fair over all Europe.³ The Courts of the fair and market were known as the only courts for such trade's disputes in this age.⁴ Later, however, royal courts were dominated the commercial trade disputes.⁵ Foreign traders who came to England were not protected by these courts as these courts would not enforce judgements if one of its parties was a foreigner.⁶ Regarding the ADR, it was not, as we have said, recognised by the court as the court was looking to the ADR as a private dispute settlement mechanisms created to usurp the jurisdiction of the court.

However, this attitude of English courts against the ADR had changed gradually over a long time ago under the pressure of commercial community. For example, the roots of arbitration, as one of the ADR, are traced in the early time in England, long before king's courts. Shakespeare referred to it, for he wrote: "The end crowns all, and that common arbitrator, time, will one day end it."⁷ By the fifteenth century, developments in dispute resolution methods were witnessed. At this time, Arbitration was known as a means to resolve commercial disputes. As an evidence of this development, an award was found in the Rolls of the Mayor's Court of the City of London in 1424.⁸ Consequently, the attitude of the legislator and the court had changed under the pressure from the commercial community to recognise the ADR in which the disputants want privacy, confidentiality and finality in the settlement of their disputes, and the judicial intervention in the ADR process or in the review of the ADR's outcome should be in exceptional circumstances.⁹

¹ See generally with respect to arbitration, Goode, Sir Roy. "The role of the Lex Loci Arbitri in international commercial arbitration" in Rose Francis D. *Lex Mercatoria: essays on international commercial law in honour of Francis Reynolds*. LLP professional publishing, 2000. PP 245-268.

²-Kiralffy, A. K. R. *Potter's Historical Introduction to English Law and its Institutions*. 4th edition. London. Sweet & Maxwell Limited.1962. P 30.

³- Kiralfy, A. K. R. *Potter's Historical Introduction to English Law and its Institutions*. Op.Cit. P 35.

⁴- Kiralfy, A. K. R. *Potter's Historical Introduction to English Law and its Institutions*. Op.Cit. P 35.

⁵-Ibid. p 35.

⁶-Tweeddale, Andrew & Tweeddal, Keren. *A Practical Approach to Arbitration Law*. 1st edition. Great Britain. Blakstone Press Limited. 1999. P 2.

⁷-Troilus and Cressida, Cited in Paris, John. *The Law and Practice of Arbitrations*. 1st Ed. Great Britain. George Grodwin Limited. 1974. P 2.

⁸- Lord Waddington, Parker . *The history and development of Commercial Arbitration*. 5th Series. Jerusalem. The Magnes Press. January 1959. P 8.

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Thus, the *parties' autonomy* to choose to go to the ADR is the legitimacy behind the recognition of the ADR by the national legislator and court. This fact is emphasised, for example, by English Arbitration Act 1996 for once the parties agreed to go to arbitration, the court should respect their autonomy and ensure the finality of arbitral award.¹⁰ Moreover, it is approved in *Aoot Kalmneft v. Glencore International A.G and others*,¹¹ when Colman J. held that the policy of Arbitration Act 1996 is to preserve the parties' autonomy and ensure the finality of awards in arbitration. On the other hand with respect to Jordanian law, it was basically based on the Medjella Al- Adlieah, which is the Ottoman Law.¹² In addition to this law, the Palestinian Arbitration Act 1923, and the Arbitral Proceedings Act 1935 were the law that dealing with the ADR (Arbitration). Subsequently, the debate about accepting or refusing the ADR had not took place in Jordan as a developing country. Such debate was found only in the developed countries as we have seen in England. The role of Jordanian legislator was to import the idea of the ADR from the developed countries. This fact was emphasised by the enactment of Arbitration Act of 1953, which was a copy of English Arbitration Act of 1950. To sum up, it has been seen in the historical development that the ADR introduced as an essential methods for further industrial and economic development and to preserve the parties' autonomy to go to the ADR.

3. How can the legitimacy of the ADR support the online alternative dispute resolution (ODR)?

In international realm, cross- border commercial transactions are normally more complex and more expansive than their national counterpart. International transactions are between trading and investment entities, such as private individuals, multinational corporations and governments.¹³ It is suggested that International sale of goods, international carriage of goods, international banking and finance, international licensing agreement, and international construction work and foreign investment are considered areas in which disputes normally arise.¹⁴ However, international transactions by virtue of the internet and globalisation are not still in the same meaning of the above transactions,¹⁵ it is named nowadays as electronic international transactions (e-commerce).¹⁶ It seen that the off-line transactions involve multi-million dollar contracts and between businessmen or investors.

Meanwhile, the on-line transactions involve small amounts and between consumers and suppliers of goods and services.¹⁷ This international electronic commerce is achievable as a result of availability of the internet twenty-four hours for any person anywhere in the world.¹⁸ Anyone can inter any supplier website while he is sitting before the internet and ordering his goods and services to be delivered to his address wherever he is living.¹⁹ In the light of this innovation, one can imagine how importance of the ADR will be for international electronic commerce. This importance has increased with the use of online dispute resolution in which the internet will replace the traditional methods for carrying on the ADR process.

Since the disputes that arise from the e-commerce transactions will out number and become more complex than its counterpart that arise from the off-line transactions. And it will involve not only between businessmen or investors, but also between consumers and suppliers of goods and services. Thus, there should be some kind of methods to resolve such kind of disputes in a speedy and efficient mechanism for the worldwide e-commerce community. The ODR, therefore, was the method which has been introduced by the e-commerce community to resolve such disputes. In fact, ODR supported by sophisticated information technology such as translation robots and intelligent software, it leads to cheaper, quicker and more convenient dispute resolution, in and out of court.

¹⁰-Department advisory committee on arbitration law Report on the arbitration Bill, paragraphs 273-283. Also, See Dicey & Morris on The Conflict of laws. General Editor: Collins, Lawrence. Editors: Hill, Jonathan .& McClean. J. D.& Morse, C. G. J. Vol.1. Thirteenth Edition. London. Sweet and Maxwell. 2000. P 595.

¹¹-[1999]3 W.L.R.811.

¹²- El-Ahdab, Abdul Hamid. Arbitration with the Arab countries. Translation of: L' arbitrage dans les pays arabes. Kluwer Law and Taxation Publishers. 1990. P 332.

¹³-Wang, Margaret. "Are alternative dispute resolution methods superior to litigation in resolving disputes in international commerce?" Arbitration International, 2000. Vol. 16. No. 2. P 189.

¹⁴-Ibid. P 189.

¹⁵-Gelinas, Fabien. "Arbitration and the challenge of globalisation." journal of international arbitration. 2000. 17(4). P118.

¹⁶-Alford, Roger P. "The Virtual world and the arbitration world." Journal of international arbitration, 2001, 18 (4). PP 449-461. For more details about the ODR and the e-commerce search these websites: www.bileta.ac.uk, www.odrnews.com, www.icfai.org/.

¹⁷-Alford, Roger P. Op. Cit. PP 449-461.

¹⁸-Ibid. P 453, the author refers to the number of internet users in the united state alone of 158.3 million users were by 2000.

¹⁹-Ibid. P 453., the author, in the margin, refers to the top ten Websites as eBay.com,

oramazon.com,travelocit.com,expedia.com,dell.com,cdnow.com,etoys.com,buy.com.barnesandnoble.com,jcpenny.com.

By using the ODR to resolve the e-commerce disputes, it avoids the inconvenience and cost of travelling of judges, witnesses, lawyers and the parties. However, ODR systems must be scrutinised as to their compatibility with the requirements of justice and accountability as technology is not a panacea.²⁰ The question which arises in this respect is can the e-commerce community impose the ODR upon the national legislator and court as what the off-line commerce community had done with respect to the ADR? All we can say at this time is that the e-commerce transactions is the main issue in the developed countries for the time being. Once the e-commerce transactions is increased and become the method to conduct business in the developed countries, the local legislator and court will be under a big pressure to adopt the ODR as means to resolve the disputes that arise from the e-commerce transactions as well as from the off-line transactions. However, it is suggested that ODR systems are still developing and it is perhaps too early to introduce framework legislation. In any case, ODR, like ADR can only operate if supported by a court system with the power to enforce settlements and with the power to counteract deliberate wrongdoing such as fraud. It is also to be expected that high value claims will continue to be litigated in the courts.²¹

4. Conclusion

It can be said from the above discussion that the recognition of the ADR was a result of the pressure of the off-line commercial transactions community. This factor will be the means by which the e-commerce community can impose the ODR. The success and the efficiency of the e-commerce in the developed countries will create such pressure in future. We can not anticipate the form and the way in which the ODR can be recognised as this needs a combination view from technology scientists and law experts. However, it is worthy to mention in this regard that courts in the western world are proposing or studying to introduce distance technologies such as video-conferencing into the court procedure. This can be considered as a motivation to say that once the legislator and the court of the developed countries recognise the ODR in the same way in which they recognised the ADR, the developing countries will spontaneously recognise the ODR, but not the vice-versa.

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²¹-Ibid.