

# Using Online Arbitration in E-Commerce Disputes

## A Study on B2B, B2C and C2C Disputes

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### Abstract

*This article provides a thorough analysis of the use of online arbitration in online disputes. It first defines online arbitration and provides a categorization of its different kinds. It then establishes which category of online arbitration is more suitable for e-commerce disputes considering the nature of the disputes, the relation between the parties and the parties' access to technology. It concludes that using binding or non-binding online arbitration depends on the existence of trust between the parties. It then goes on to analyse the extent to which online arbitration can be held on the Internet without using offline mechanisms, and concludes that this is dependent on the nature of the transaction, the parties' access to technology and the enforcement mechanisms.*

**Keywords:** online arbitration, e-commerce disputes, electronic market exchange.

## 1 Online Arbitration: A Definition

### 1.1 Introduction

To define online arbitration accurately, it is helpful to look closely at the component elements of traditional arbitration from which it evolved. Naturally, there is much commonality across the two forms, but also relevant differences in the detail of component elements of both. Moreover, some component elements may not be shared at all, belonging uniquely to just one form of arbitration. A study of the component elements of both forms is therefore necessary to provide a definition of online arbitration.

### 1.2 Online Arbitration and Elements of Traditional Arbitration

Arbitration elements often vary in different legal systems and thus hamper attempts to provide an accurate and singular definition, which applies everywhere. Nonetheless, some elements of arbitration are broadly similar in the

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majority of legal systems. By considering the varying definitions of arbitration, the common elements of arbitration may be revealed. Numerous definitions exist, but perhaps the following are of most use to us:

Two or more parties, faced with a dispute which they cannot resolve for themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course... it will not be settled by a compromise, but by a decision.<sup>1</sup>

Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their power from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.<sup>2</sup>

Born presents a definition of arbitration that draws from the definitions above. He defines arbitration as:

a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedure affording the parties an opportunity to be heard.<sup>3</sup>

From the foregoing definitions it may be concluded that for a process to be recognized as arbitration, it should comprise the following elements:

- 1 Mutual consent to submit to arbitration
- 2 An independent decision maker, a choice of arbitrators and a neutral decision
- 3 Due process
- 4 A binding decision

### 1.2.1 Mutual Consent to Submit to Arbitration

Mutual consent is considered one of the fundamental principles of traditional arbitration and is crucial to the legitimization of the arbitration process.<sup>4</sup> In arbitration agreements, due consideration, valid offer and acceptance and intention to create legal obligations should exist.<sup>5</sup> It is a well-established ruling that the

- 1 Redfern *et al.*, *Law and Practice of International Commercial Arbitration*, 4th edn, Sweet and Maxwell, London, 2004, p. 1-03 *et seq.*
- 2 R. David, *Arbitration in International Trade*, Kluwer Law and Taxation Publishers, Deventer, 1985, p. 5.
- 3 G. Born, *International Commercial Arbitration*, Vol. 1, 3rd edn, Kluwer Law International, The Hague, 2009, p. 217.
- 4 J. Byrnes & E. Pollman, 'Arbitration, Consent and Contractual Theory: The Implications of *EEOC v. Waffle House*', *Harvard Negotiation Law Review*, Vol. 8, 2003, p. 290.
- 5 K. Jeremy, 'Untipping the Scales: Using State Contracts Law to Protect At-will Employees From Unfair Arbitration Agreements', *UMKC Law Review*, Vol. 74, 2005, p. 299.

parties should not be forced to arbitrate unless they have freely agreed to that particular mode of dispute settlement.<sup>6</sup>

Nevertheless, entering into an online (or non-traditional) arbitration agreement may not always be consensual. In some circumstances, the participants may not have truly consented to the arbitration clause, and entering into an arbitration agreement may have been forced indirectly. Some commentators have gone even further and stated that in many situations, the freely consenting party is a legal fiction.<sup>7</sup>

For example, lack of genuine choice may lead to non-existence of consent to arbitrate online or offline. Such lack of choice may be evident where there is a monopoly of power or a pre-dispute arbitration clause in Business to Consumers (B2C) agreements. In such cases, the weaker party has to choose between entering into an arbitration agreement and forgoing contracting.<sup>8</sup> Owing to the power imbalance in such cases, the parties may have been indirectly forced to enter into an arbitration agreement.

The question here is whether non-existence of consent to arbitrate would invalidate the arbitration clause.

Some academics argue that where there is a lack of choice to enter an arbitration agreement, it is more desirable to accept that consent to arbitrate does not exist, but that other requirements such as fairness may reasonably have replaced consent.<sup>9</sup> Thus, it may not be very productive to place emphasis on the existence of true consent in arbitration agreements. Rather than focus on contract formation, the fairness of the process should be insisted upon.<sup>10</sup>

In conclusion, where there is a power imbalance between parties, the weaker party may not truly have consented to arbitrate; however, the non-existence of consent may not invalidate the online arbitration agreement if some other requirements such as inexpensive arbitral procedure and fairness of such procedure have replaced consent.

6 M Domke, 'Commercial Arbitration', *New York University Annual Survey of American Law*, 1973, p. 291.

7 J. Mayer & T. Seitz, 'Recognizing and Understanding Consent Issues in Arbitration', *Michigan Journal of Business*, Vol. 79, 2000, p. 505.

8 G. Kaufmann-Kohler & T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*, Kluwer Law International, The Hague, 2004, p. 169. An appropriate example of power monopolization may be Internet Corporation for Assigned Names and Numbers (ICANN). ICANN is the ultimate regulator of the domain-name, which has imposed a requirement on each domain-name registrar to incorporate the UDRP into their contracts with their customers. The UDRP is a Quasi Arbitration procedure, designed to solve disputes between a trademark owner and a domain name registrant. Since any domain-name registrar, regardless of where it is based, is regulated by ICANN, the domain-name demander is forced to accept the arbitration clause or forgo registering the domain-name.

9 Kaufmann-Kohler & Schultz, 2004, p. 30.

10 Alan Rau and Edward Sherman question "whether it is really productive to worry too much about the existence of true 'consent' to arbitration". They argue that rather than focusing on contract formation, the law should "place the highest priority on regulating the arbitration process itself". A. Rau & E. Sherman, 'Arbitration in Contracts of Adhesion', Vol. 6, 1994 (September) (unpublished manuscript, on file with the Hofstra Law Review), cited from S. Ware, 'Employment Arbitration and Voluntary Consent', *Hofstra Law Review*, Vol. 25, 1996, p. 83.

### 1.2.2 Choice of Arbitrators

Arbitrators in traditional arbitration are not government representatives.<sup>11</sup> They are not state judges, and they are funded by private means.<sup>12</sup> Decision makers in arbitration are usually chosen by the parties or on behalf of them.<sup>13</sup>

In arbitration, the arbitrators chosen by, or on behalf of, the parties should be independent and impartial.<sup>14</sup> The term independence is defined as

one which measures the relationship between the arbitrator and the parties personal, social, and financial relation. The closer the relation in any of these spheres, the less 'independent' the arbitrator is from the party.<sup>15</sup>

The independence of the arbitrator can be determined prior to holding arbitration, and it is an objective test to establish whether or not the arbitrator can arbitrate between the parties independently and with courage to displease.<sup>16</sup>

Impartiality is a subjective notion referring to the absence of bias in the person of the arbitrator resulting from a privileged relationship with the matter to be decided.<sup>17</sup>

Independence and impartiality are pivotal elements of any arbitration definition. This is because arbitration is an adjudicatory process. Arbitrators cannot be parties' representatives, and they have to remain impartial and independent; otherwise they cannot adjudicate between the parties with 'full legal authority'.<sup>18</sup>

In a definition of online arbitration, independence and impartiality of the arbitrators should be considered two of the main characteristics of such a definition. In any arbitration process, strict compliance with procedural principles is

- 11 G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 3rd edn, Kluwer Law Arbitration, the Netherlands, 1999, p. 2.
- 12 See M. Moses, *The Principles and Practice of International Commercial Arbitration*, 2nd edn, Cambridge University Press, Cambridge, 2008.
- 13 The power to choose the decision maker is one of the main differences between arbitration and litigation. In litigation the judges are imposed on the parties, while in arbitration the arbitrators are chosen by or on behalf of the parties. N. Witkin, 'Consensus Arbitration: A Negotiation-Based Decision-Making Process for Arbitrators', *Negotiation Journal*, Vol. 26, 2010, p. 310.
- 14 Kaufmann-Kohler & Schultz, 2004, p. 31.
- 15 S. Donahey, 'The Independence and the Neutrality of Arbitrators', *Journal of International Arbitration*, Vol. 4, 1992, p. 32.
- 16 Lalive defines independence as follows: "Independence implies the courage to displease. The absence of any desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator", P. Lalive, *Conclusions in the Arbitral Process and the Independence of Arbitrators*, ICC publishing, Paris, 1991, p. 121, cited in P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd edn, Sweet and Maxwell, London, 2010, p. 184. For more discussion on the matter of impartiality and independence refer to, A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn, Sweet and Maxwell, London, 2004, para. 4-52 *et seq*; S. Donohay, 'The Independence and the Neutrality of Arbitrators', *Journal of International Arbitration*, Vol. 4, 1992, p. 32.
- 17 J. Poudret & S. Besson, *Comparative Law of International Arbitration*, 2nd edn, Sweet and Maxwell, London, 2007, p. 348.
- 18 C. Jarroson, 'Les frontieres de l'arbitrage', *Revue de l'Arbitrage*, Vol. 1, 2001, pp. 19-20, cited from Kaufmann-Kohler & Schultz, 2004, p. 32.

required.<sup>19</sup> Independence and impartiality is so central to the process that online arbitration cannot be characterized as true arbitration without the independence and impartiality of arbitrators – and such elements should not be compromised unless agreed to by both parties.<sup>20</sup>

### 1.2.3 Due Process

Due process is necessarily a vital component of any arbitration definition since a procedure that lacks due process may not be recognized as arbitration.<sup>21</sup> Due process in arbitration relates to the right to be heard, the right to adversary proceedings and the right to be treated equally.<sup>22</sup>

In online arbitration, however, full compliance with all requirements of due process may adversely impact upon the cost effectiveness and speed of the online arbitration process.<sup>23</sup> Speed and cost effectiveness are two of the advantages<sup>24</sup> that make online arbitration a more desirable means of dispute resolution than litigation or traditional arbitration.

While due process is an essential element of online arbitration, keeping the process affordable and speedy are also important factors. Thus, while due process is considered a vital element for any definition of online arbitration, the degree of compliance might be a variable.<sup>25</sup> Some ‘short cuts’ might be taken to keep the process from stalling and costs from rising. Some academics argue that due process is a flexible principle<sup>26</sup> and the degree of required due process may vary depending upon the case or the category of cases, and that the arbitration tribunal or institution may adjust the degree of compliance commensurate with the nature of disputes.<sup>27</sup>

19 One of the procedural principles of arbitration is to appoint independent and impartial arbitrators. Complying with such a principle is very important when the parties’ consent to online arbitration is affected. Kaufmann and Schultz argue that where there is no consent other requirements such as fairness may have replaced consent to arbitrate online. In such situations, it is paramount to strictly comply with procedural principles. Kaufmann-Kohler & Schultz, 2004, p. 31.

20 Redfern & Hunter, 2004, p. 199.

21 E. Gaillard & J. Savage (Eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, The Hague, 1999, p. 1638.

22 T. Schultz, *Information Technology and Arbitration – A Practitioner’s Guide*, Vol. 21, Kluwer Law International, Alphen aan den Rijn, 2006, p. 108.

23 A limited due process is in favour of the parties in some cases, especially when more process raises costs to the point that parties who deserve to win on the merits cannot get access to adjudication and thus lose. Therefore, limited due process that may provide full access to justice is better than a full adjudicatory process that may be a barrier for the parties to have access to justice. S. Ware, ‘Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in the UDRP’, *Journal of Small and Emerging Business Law*, Vol. 6, 2002, p. 179.

24 Kaufmann-Kohler & Schultz, 2004, p. 32; Ware, 2002, p. 179.

25 Kaufmann-Kohler & Schultz, 2004, p. 32.

26 W. Park, ‘Procedural Evolution’, in W. Park (Ed.), *Arbitration of International Business Disputes: Studies in Law and Practice*, 2nd edn, Oxford University Press, Oxford, 2005, p. 51.

27 Kaufmann-Kohler & Schultz, 2004, p. 32.

#### 1.2.4 *Binding Decision*

Binding decision, in traditional arbitration, is one of the most important elements determining whether the proceedings constitute arbitration. By agreeing on arbitration, parties give arbitrators a judicial role<sup>28</sup> to adjudicate between them, and to issue an award that is as effective as a court's decision.<sup>29</sup> The binding decision distinguishes arbitration from other dispute resolution procedures,<sup>30</sup> and it is the purpose of such process.<sup>31</sup>

Decisions in online arbitration may not always be binding,<sup>32</sup> and in such process the arbitration award may be non-binding for either of the parties, or it may be unilaterally binding.

Where an online arbitration award does not bind either of the parties, the process cannot be recognized as true arbitration since the decision is unlike a judgment and the arbitrator does not have a judicial role.<sup>33</sup>

Where the binding nature of arbitration depends upon one of the parties' intentions, the process may be true arbitration if the party admits that the award has a binding effect after the award's issuance. Some legal systems explicitly allow the parties to agree that the arbitration awards have a different effect, *i.e.* be conditionally binding.<sup>34</sup> In other judicial systems, conditionally binding arbitration may be recognized as true arbitration if the procedural standards applicable to arbitration have been met.<sup>35</sup>

#### 1.2.5 *The Exclusive Feature of Online Arbitration*

Online arbitration proceeding is either conducted totally online by online means of communication or partly online by a combination of online and offline means. In totally online arbitration the entire process is conducted online by the use of email, video conferencing and Web-based communications. Partly online arbitration is conducted using a combination of the above-mentioned communication means and offline features such as live in-person hearings and use of fax and post for the submission of evidence, communication between the arbitrators and deliberation of the award.

28 Gaillard & Savage, 1999, p. 12.

29 Poudret & Besson, 2007, p. 348.

30 Redfern & Hunter, 2004, p. 10, para. 1-16.

31 *Id.*, 10-01.

32 Kaufmann-Kohler & Schultz, 2004, pp. 33-54.

33 *Parisi v. Netlerning inc.*, 139 F. Supp. 2d 745-751 (E.D.Va. 2001); *Dluhos v. Strasberg*, 321 F.3d 365 C.A.3 (NJ 2003) (in both cases it was established that non-binding arbitration does not constitute arbitration under the Federal Arbitration Act).

34 Section 58 (1) of the UK arbitration law 1996 states that "unless otherwise agreed by the parties an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any person claiming through or under them." As this is a non-mandatory provision, the parties may agree that an award should have a different effect. Harris *et al.*, *The Arbitration Act 1996: A Commentary*, 3rd edn, Blackwell Publishing, Oxford, 2003, p. 279.

35 G. Kaufmann-Kohler, 'Online Dispute Resolution and Its Significance for International Commercial Arbitration', in G. Asken (Ed.), *Global Reflections on International Commerce and Dispute Resolution*, ICC Publishing, Paris, 2005, p. 443.

### 1.3 *The Definition of Online Arbitration*

Having given consideration to the elements as discussed above, online arbitration is defined as follows:

Online arbitration is a process by which parties may consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, to render a binding, non-binding or unilaterally binding award, issuing a decision resolving a dispute in accordance with neutral procedure that includes due process in accordance with the parties' agreement or arbitration tribunal decision. The online arbitration process may be conducted entirely online or partly online by the use of information technology.<sup>36</sup>

Therefore, online arbitration may be categorized as:

- Binding online arbitration
- Non-binding online arbitration
- Unilaterally binding online arbitration
- Partly online binding arbitration
- Partly online unilaterally binding arbitration
- Partly online non-binding arbitration

## 2 **The Use of Different Types of Online Arbitration in Commercial Disputes**

### 2.1 *Introduction*

In order to effectively utilize the different types of online arbitration in transactional disputes, it is important to consider whether the dispute has arisen in an online or offline environment, as well as to take into account the other characteristics of the dispute.<sup>37</sup> In this section, the use of online arbitration in online environments will be discussed by considering disputes that may arise from Business to Business (B2B), Business to Consumer (B2C) and Consumer to Consumer (C2C) transactions. Consideration is also given to the relevant forms of online arbitration available.

As stated in the previous section, the division between types of online arbitration is based upon the extent to which technology is used in an online arbitration procedure, and also whether the outcome of arbitration is binding, non-binding or unilaterally binding.

36 Wahab divides Online Dispute Resolution schemes into: (1) simple technology-assisted scheme, (2) Use of cutting-edge technology and (3) technology-facilitated guarantees. He then asserts that e-arbitration belongs to category number one, which the author in this article regards as partly online arbitration. Totally online arbitration in this article more belongs to category no. 2. M.S. Abdel Wahab, 'ODR and E-Arbitration, Trends and Challenges', in M.S. Abdel Wahab, E. Katsh & D. Rainey (Eds.), *Online Dispute Resolution Theory and Practice*, Eleven International Publishing, The Hague, the Netherlands, p. 402.

37 T. Palfrey & T. Romer, 'Warranties, Performance, and the Resolution of Buyer-Seller Disputes', *The Bell Journal of Economics*, Vol. 14, 1983, p. 98.

By examining the details of transactions occurring, and by considering the characteristics of the specific dispute, we may reach a conclusion as to how best online arbitration may be used to resolve such disputes.

## 2.2 *Online Disputes and Online Arbitration*

Online disputes may arise from the involvement of parties in electronic commerce (e-commerce). E-commerce covers

a wide range of activities, from selling books to consumers to selling container loads of supplies to factories across the globe. Companies are selling everything from physical goods, to services, to digital products delivered over the Internet.<sup>38</sup>

Transactions that take place over the Internet are not constrained by national borders, and may take place much faster and cheaper than offline transactions. It follows that disputes arising from such transactions require a commensurately cheap, speedy and accessible dispute resolution system that can adapt to the virtual environment. It is generally agreed that<sup>39</sup> traditional arbitration is not well suited to such a task, and also that conflicts arising online should be resolved online. Practitioners and scholars believe that it has become increasingly necessary to design more efficient mechanisms for resolving online disputes.<sup>40</sup> Online arbitration may be one such mechanism capable of resolving online disputes in a timely and cost-effective manner utilizing modern virtual communication channels.

The use of different forms of online arbitration in resolving disputes arising from different sectors of electronic commerce (mainly B2B, B2C and C2C) will be studied in this section.

### 2.2.1 *Business to Business Transactions (B2B)*

B2B e-commerce is broadly defined as “sharing business information, maintaining business relationships and conducting business transactions by means of telecommunication networks.”<sup>41</sup> While such a definition applies to all B2B transactions that utilize modern telecommunication, B2B transactions discussed in this section relate specifically to “the secure trading of goods, information, and services among businesses through the use of Internet technologies.”<sup>42</sup>

38 C. Schulz & J. Baumgartner, ‘Don’t Panic! Do E-commerce: A Beginner’s Guide to European Law Affecting E-Commerce’, European Commission’s Electronic Commerce Team—Information Society Directorate General, 2001, p. 5. Retrieved on 26 May 2013 from <[www.internetpolicy.net/e-commerce/dontpanic.pdf](http://www.internetpolicy.net/e-commerce/dontpanic.pdf)>.

39 W. Slate, ‘Online Dispute Resolution: Click Here to Settle Your Dispute’, *Dispute Resolution Journal*, Vol. 56, 2002, p. 8.

40 D. Girsberger & D. Schramm, ‘Cyber-Arbitration’, *European Business Organization Law Review*, Vol. 3, 2002, p. 605.

41 V. Zwass, ‘Electronic Commerce: Structures and Issues’, *International Journal of Software Quality*, Vol. 1, 1996, p. 3.

42 P. Barnes-Vieyra & C. Claycomb, ‘Business-to-Business E-Commerce: Models and Managerial Decisions’, *Business Horizons*, Vol. 44, No. 3, 2001, p. 8, 13.

B2B transactions may involve a host of online commercial transactions, from the simple submission of electronic purchase orders to a vendor, participation in market exchange programs with suppliers, responding to requests for quotes and proposals for the distribution of software and other products and services to business customers via the Internet.<sup>43</sup>

From the above definition it can be seen that B2B transactions may take place at both simple and complicated levels. At the simple level, a business offers its goods and services via its corporation website, and another business accepts the offer and enters into a contract for the sale and delivery of goods or services on the website.<sup>44</sup> In such transactions the parties deal with each other directly and without the involvement of any intermediary.

The complicated level includes an independent e-market place, which is established as an intermediary to facilitate the purchase of products and/or services by multiple buyers from multiple suppliers.<sup>45</sup>

The increased use of complicated levels of B2B has resulted in the growth of intermediaries, and “[t]he growth of the B2B middleware market reflects the increasing specialization and complexity of B2B commerce and the intensifying focus on reducing cost by improving the efficiency of key processes.”<sup>46</sup> This is significant since the efficiencies resulting from such an environment will lead to higher growth rates.<sup>47</sup>

B2B e-commerce facilitates B2B transactions and provides a borderless environment for the parties in which any business anywhere in the world is able to conduct B2B transactions regardless of where it is located. Established and trusted systems would encourage developing countries (which are often the manufacturing workplace) to participate more than ever in such transactions.<sup>48</sup>

The higher growth rate of B2B transactions, the participation of developing countries in such transactions and their international nature require an efficient, cost-effective and borderless means of dispute resolution that can adapt to the particular features of such disputes. Such means may be provided by the use of different types of online arbitration, which will be analysed in the following sections.

43 L. Ponte & D. Cavenagh, *Cyber Justice, Online Dispute Resolution for E-Commerce*, Prentice Hall Publishing, Upper Saddle River, 2004, p. 2.

44 Slate, 2002, p. 11.

45 ‘Final Report and Recommendations of the American Bar Association’s Task Force on Electronic Commerce and Alternative Dispute Resolution, Addressing Disputes in Electronic Commerce’, 2002, p. 7.

46 See <[www.marketresearch.com/IDC-v2477/Worldwide-Business-Middleware-Vendor-Shares-2552177/#toc](http://www.marketresearch.com/IDC-v2477/Worldwide-Business-Middleware-Vendor-Shares-2552177/#toc)>.

47 M. Warkentin, *Business to Business Electronic Commerce: Challenges and Solutions*, Idea Group Publishing, London, 2002, p. 3.

48 See <[www.businessweek.com/2000/00\\_21/b3682236.htm](http://www.businessweek.com/2000/00_21/b3682236.htm)>.

### 2.2.2 Online Arbitration and B2B Disputes

B2B disputes are appropriate candidates for online arbitration because of their higher value and savvy participants.<sup>49</sup>

Online arbitration, in comparison with traditional arbitration, provides a more speedy and cost-effective dispute resolution system. Online arbitration clauses are enforceable in B2B disputes,<sup>50</sup> because the process focuses on evidentiary submissions, and provides parties with the opportunity to present their cases and obtain a substantive determination on their claims. Moreover, binding online arbitration provides the finality necessary for quick access to remedies.<sup>51</sup>

To determine the type of online arbitration that is best suited to resolving a particular dispute, a division between complicated B2B and simple B2B transactions is necessary. The nature of the dispute itself may borrow from the simple versus complicated distinction of transactions and be similarly categorized. It is also necessary to establish whether online arbitration will be carried out totally or partly online, and whether it will be binding or non-binding by carefully considering the parties' access to technology, the role of intermediaries and the parties' relationship.<sup>52</sup> The degrees of existence of such elements will vary between complicated and simple B2B disputes. By considering such elements, the use of different types of online arbitration in such disputes will be analysed.

#### 2.2.2.1 Online Arbitration and Complicated B2B Disputes

Complicated B2B disputes may arise from the involvement of businesses in transactions that are facilitated by electronic market places (e-markets).

E-market places are virtual technology-enabled trading intermediaries that facilitate the exchange of information, goods, services and payment among multiple buyers and sellers across companies.<sup>53</sup>

E-markets are borderless in nature and offer a greater selection of goods and services, reducing the economic obstacles for buyers in meeting, exchanging information and completing transactions. As a consequence, the use of the electronic B2B market place has become a strategically important tool for marketing and growth. In an economic downturn, using such techniques is crucial since a "company's marketing mix must provide sales-ready results using less expensive channels". In addition, businesses may even face extinction if they fail to utilize such tools as "new social buying habits and readily available online information shift purchase power from corporations to communities." Keeping ahead of (or at

49 C. Rule, *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, 1st edn, Jossey-Bass, San Francisco, 2002, p. 12.

50 United Nations Conference on Trade and Development, 'Chapter 7: Online Dispute Resolution: E-commerce and Beyond', in *E-Commerce and Development Report 2003*, United Nations Conference on Trade and Development, Geneva, 2003, p. 177.

51 A. Schulz, 'Drive-Thru Arbitration in the Digital Age: Empowering Consumers Through Binding ODR', *Baylor Law Review*, Vol. 62, 2010, p. 193.

52 Ponte & Cavenagh 2004, p. 2.

53 V. Zwass, 'Electronic Commerce and Organizational Innovation: Aspects and Opportunities', *International Journal of Electronic Commerce*, Vol. 7, 2003, p. 37; J. Hörnle, *Cross Border Internet Dispute Resolution*, Cambridge University Press, Cambridge, 2009, p. 186.

least abreast with) the crowd is key indeed in the modern age. The necessity of turning to online digital marketing techniques and the consequent growth of online marketing exchanges inevitably lead to an increase in complicated B2B disputes.

Speedy, cost-effective, online and borderless transactions require speedy, cost-effective and online dispute resolution systems. Online arbitration may provide such a system, and parties to disputes are increasingly eager to use it to resolve their disputes. Moreover, the expanding e-market place may play an important role in persuading parties to use online arbitration.<sup>54</sup>

#### 2.2.2.2 Partly Online Arbitration and Totally Online Arbitration in Complicated Online B2B Disputes

With totally online arbitration, entering into an arbitration agreement, the arbitration process and the issuance of award take place by solely online means, while with partly online arbitration, some of the process may take place by offline means. The use of totally online arbitration has been challenged by some commentators as it may not be possible to provide an in-person hearing, and parties may not have equal access to the necessary technology. Moreover, it may be impractical to use online means alone to resolve complex issues, and, furthermore, online arbitration awards may not be enforceable in court.<sup>55</sup>

This may not apply in all complicated B2B disputes. To decide whether arbitration should be totally online or partly online, rather than focus on the complexity of the dispute, the complexity of the transaction and the characteristics of the dispute can be considered as decisive factors.

The parties to B2B e-market are regularly involved in complicated transactions reliant on high-technology systems, and, therefore, rarely will the parties be without the necessary tools to seek redress from totally online arbitration. Moreover, arbitration is known as a less complex communication process than other dispute resolution methods. Arbitration proceedings may be based on a document-only process (in which all the communication exchanges, such as the pleadings and evidence, are communicated electronically) requiring no direct human or face-to-face interaction. In this instance, fairly simple software may be used for the process. In addition, online arbitration software is getting more powerful (although rather slowly), with software being developed to more effectively carry out efficient online hearings and resolve multiparty and multi-issue disputes. These developments further enhance the likelihood of catering for an ever-greater range and number of disputes to be effectively and efficiently resolved entirely online.<sup>56</sup>

54 W. Slate, 'Challenges and Opportunities for Dispute Resolution in the Era of Electronic Commerce', International Conference on Dispute Resolution in Electronic Commerce, 2000, available from <[www.wipo.int/amc/en/events/conferences/2000/presentations/slate.html](http://www.wipo.int/amc/en/events/conferences/2000/presentations/slate.html)>.

55 M. Philippe, 'Where Is Everyone Going with Online Dispute Resolution (ODR)?', *IBLJ/RDAI*, Vol. 13, 2002, p. 169.

56 E. Katsh, 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace', *Lex Electronica*, Vol. 10, 2006, p. 7.

With regard to enforcement of online arbitration awards, referring to court in case of a non-compliance with the award may not be necessary because of the role of e-markets and intermediaries in such B2B transactions. Most make provision in their contracts for the parties to resolve their dispute by an online arbitration service.<sup>57</sup> To ensure compliance with the award they also introduce an escrow system, or they themselves act as an escrow. In an escrow system, the money is delivered to a third party rather than directly to the seller. In the event that a dispute arises, the money will be held in the escrow until the arbitrator has resolved the dispute, and the proper recipient will be remedied in accordance with the award.<sup>58</sup>

The other incentive for use of totally online arbitration in complicated B2B disputes is the cost effectiveness of such a method. B2B e-market places normally pay the bill for the online arbitration service, and neither the buyers nor the sellers fund the online arbitrator.<sup>59</sup> It is therefore unlikely that parties to the dispute, especially a cross-border one, would seek more expensive means of redress such as court, traditional arbitration or partly online arbitration.

However, the use of partly online arbitration in complicated B2B disputes cannot be ruled out. In some instances, the tribunal or the parties may require the use of offline means for carrying out the process; for example, it may be necessary to conduct an in-person hearing. Carrying out arbitration partly online normally depends on the parties' agreement, the importance of the issue at stake, the value of the claims, the complexity of the issues involved and the means of enforcing the award.<sup>60</sup>

In conclusion, the use of totally online arbitration may be possible when the parties have maximized the use of online technology to facilitate the transactions, have been involved in complicated online transactions such as engagement in an e-market place and when a third party can implement the awards. Nevertheless, partly online arbitration may be used where the parties require such a process, or where the tribunal decides to use offline means in online arbitration.

### 2.2.2.3 Binding and Non-Binding Arbitration

Determining the degree of formality of a dispute resolution system and the emphasis on accompanying protective measurements depends mainly upon the

57 For a case study of B2B dispute resolution, online exchange and escrow system refer to: Rule, 2002, pp. 131-132.

58 Escrow is a legal arrangement (and most commonly a payment arrangement) whereby money is delivered to a third party (called an escrow agent) to be held in trust ('in escrow') pending the fulfilment of condition(s) in a contract, whereupon the escrow agent will deliver the payment to the proper recipient. Typically, escrow is used when the Buyer and Seller are unknown to each other. In an international trade context, after the Buyer and Seller have agreed to the transaction, the buyer puts the payment in escrow by paying the escrow agent, which both parties have agreed to use. The seller sends the shipment, and upon acceptance by the buyer, the escrow agent releases the payment to the seller. <[http://resources.alibaba.com/article/44/Popular\\_payment\\_methods\\_in\\_international\\_trading.htm](http://resources.alibaba.com/article/44/Popular_payment_methods_in_international_trading.htm)>.

59 Rule, 2002, p. 127.

60 Hörnle, 2009, p. 134.

level of trust between the parties.<sup>61</sup> Where there is lack of trust, parties rely on a dispute resolution system to intervene if things go wrong, namely a more formal and protective dispute resolution system that can substitute trust. Conversely, where there is a higher level of trust between parties, the dispute resolution system may be somewhat less formal and protective.

Since the level of formality and protection differs in binding and non-binding arbitration (in the sense that the former is more formal and protective than the latter),<sup>62</sup> establishing the appropriate form of arbitration to be used depends upon the level of trust between the disputants. Thus it is necessary to establish what we mean by the word 'trust' and whether it exists between parties engaged in complicated B2B transactions.

Trust reflects technical competency and fiduciary obligation, and it is based on predictability, past behaviour, dependability and fairness.<sup>63</sup> Such trust may exist in parties to complicated B2B transactions as parties may have an established relationship and have been doing business with each other for a long time. In such instances, the use of non-binding arbitration may be appropriate as buyers and sellers in B2B transactions are repeat players and have an incentive to participate in good faith, so they do not jeopardize their future desirability as a transaction partner. Repeat players are also more likely to self-enforce the award. In addition, it is difficult for businesses to disappear, since they have a legal identity, established markets and partnerships, and sizeable physical location.<sup>64</sup> Consequently, they are aware that non-compliance with an arbitration award may not be a sensible solution, even if it is technically unenforceable. As a result, parties may comply with awards that are issued in such B2B disputes more readily than in other disputes. This has been proven in EDI B2B contracting, where the parties in disputes with an established relationship have sought redress from arbitration and have achieved a solution by compromising with none of the arbitral awards being challenged in court.<sup>65</sup>

Indeed, there are instances when parties participate in B2B e-market transactions and do not have an established relationship, with little or no prior interaction with each other. Because trust may not exist between the parties, the role of intermediaries is crucial as they normally establish a legal infrastructure by instituting and enforcing fair rules, procedures and outcomes and, if necessary, provide recourse for buyers to deal with a seller's opportunistic behaviour. E-market

61 Rule, 2002, p. 127. Sullivan *et al.*, 'Relationship Between Conflict Resolution Approaches and Trust — A Cross Cultural Study', *The Academy of Management Journal*, Vol. 24, No. 4, 1981, p. 803.

62 Breger *et al.*, *Federal Administrative Dispute Resolution Deskbook*, American Bar Association, USA, 2001, p. 260; Rule, 2002, p. 127 as the parties in non-binding arbitration have a control both on the process and on the outcome, it is less formal and flexible than binding arbitration. R. Hensler, 'A Glass Half Full a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation', *Texas Law Review*, Vol. 73, 1995, pp. 1587, 1594.

63 F. Jeffries & R. Reed, 'Trust and Adaptation in Relational Contracting', *The Academy of Management Review*, Vol. 25, 2000, pp. 873, 875.

64 Rule, 2002, p. 126.

65 J. Winn, *The Impact of XML on Contract Law and Contract Litigation*, XML Conference & Exposition, Atlanta, 2005.

places may refer the parties to a more formal and protective means of redress such as binding arbitration.<sup>66</sup>

The intermediary or the escrow service may enforce the awards that are issued by the online arbitration provider. The escrow system holds the money until the arbitration award has been issued, then it remedies the appropriate recipient according to the award; consequently, in case of non-compliance with the award, parties do not have to refer to court to enforce it.

#### 2.2.2.4 Online Arbitration and Simple B2B Disputes

Simple B2B disputes may arise mainly from transactions that are facilitated by corporations' websites. Such transactions involve a corporation that offers its goods and services for sale over the Internet and a buyer entering into a contract for the sale and delivery of goods or services – either online or offline.<sup>67</sup>

The probability of disputes arising from simple B2B transactions may be higher because there is no intermediary to facilitate and monitor such transactions. Also, individual websites normally lack important standards for presentation of product and services, transaction templates and field definitions used to provide information for specific products and services.<sup>68</sup> In the following sections the use of different types of online arbitration for resolving such disputes will be considered.

#### 2.2.2.5 Partly Online Arbitration and Totally Online Arbitration in Online Simple B2B Disputes

Consideration for the use of totally or partly online arbitration in online simple B2B disputes may be based on two factors: First, the parties' access to technology, and second, the existence of an established relationship between the parties.

Simple B2B transactions may face problems such as lack of access to new and up-to-date technology capable of facilitating online arbitration. Access to technology varies from case to case, and in simple B2B transactions it cannot be assumed that parties have access to the necessary software and technological tools.

The fact that parties may be trading online is not a good guide since they may have carried out the transaction by the use of simple and unsophisticated means. For example, parties to simple B2B transactions may be Small and Medium Size Enterprises (SMEs). As SMEs may not have the necessary access to technology, they may not normally participate in electronic market places on a large scale, and may conduct some business online by establishing a simple website<sup>69</sup> or ordering

66 P. Pavlou & D. Gefen, 'Building Effective Online Marketplaces With Institution-Based Trust', *Information Systems Research*, Vol. 15, 2004, p. 44.

67 Slate, 2002, p. 11.

68 D.W. Embley *et al.*, 'Conceptual-model-based Data Extraction from Multiple-record Web Pages', *Data and Knowledge Engineering*, Vol. 31, 1999, p. 227.

69 Those SMEs that have overcome these barriers and started along the road to online business often remain reluctant to move into the electronic marketplace environment. The evidence for this is being increasingly reported in the business press. R. Stockdale & C. Standing, 'Benefits and Barriers of Electronic Marketplace Participation: An SME Perspective', *The Journal of Enterprise Information Management*, Vol. 17, 2004, p. 304.

from an individual website. Parties lacking the necessary technology to effectively participate in online arbitration may therefore have to resort to the use of offline or only partly online means.

Moreover, in simple B2B transactions, no e-market place is involved to act as an escrow or to refer the parties to an escrow system. If the parties have not had dealings with each other prior to the transaction, a more effective dispute resolution system that can issue a binding award, which is recognizable and enforceable by court, is needed. In order to give such an award all chances of being recognized, the award cannot be sent to the parties in an electronic format, and should be posted to the parties.<sup>70</sup> Thus, to ensure that arbitration awards are recognized and enforceable, arbitration may be carried out partly online.<sup>71</sup>

#### 2.2.2.6 Binding and Non-Binding Arbitration

As stated in the previous section, trust between the parties is an important factor in deciding whether to have binding or non-binding forms of arbitration. Parties to simple B2B transactions may have an established and long-term relationship, and they may know each other prior to contracting, or they may already have a network of contract.

If the parties to a simple B2B dispute have an established relationship and have been consistently doing business for a long time, non-binding arbitration may be applicable, and the non-binding decision may be enforced to maintain good faith and future transactions and the business relationship.

In simple B2B transactions, the parties' relationship may be based on exchange contracts, and it may not exceed the moment of exchange.<sup>72</sup> In such transactions, parties may require binding arbitration. As the intermediaries have no role, or only a limited role, in these kinds of disputes, the intermediaries cannot enforce the awards, and parties are obliged to enforce the award through court. Therefore, it is essential for the arbitration to be partly online.

Nevertheless, if the transaction is simply a one-off transaction and the parties do not have a long-term business relationship, it is very important to have a binding means of dispute resolution in order to obtain the trust and confidence of both parties.

Therefore, two kinds of online arbitration can be used in simple B2B disputes: one is the partly online binding arbitration in disputes where parties require a means of redress that provides enforceable awards; the other is the

70 Philippe, 2002, p. 176.

71 A good example of partly online arbitration is applied by Netcase. Netcase was applied by ICC, which was an online arbitration provider for B2B disputes solely. Netcase is an online arbitration tool for the parties to post, read and respond to messages in their case space. Documents are exchanged through the NETCASE and stored in a system that enables the parties and the arbitrators to hold hearings without having to carry documents. NETCASE also provides partly online arbitration for the parties that do not have access to the necessary means of electronic facilities and also parties that do not wish to hold the arbitration totally online. For the reason of enforcement, even if the parties consent to totally online arbitration, the award will be issued on hard copies, and the copies will be sent to the parties. Philippe, 2002, p. 196.

72 J. Frick, *Arbitration and Complex International Contracts*, Kluwer Law International, The Hague, 2001, p. 28.

totally or partly (whichever the parties request) online non-binding arbitration for resolving the dispute between parties that have a long-term business relationship with each other.

It may be said that an established relationship, either offline or online, can help non-binding arbitration to be enforced by parties voluntarily. Moreover, the parties' access to technology and their engagement in technology is one of the important factors in providing totally online arbitration. Partly online arbitration may be more used in simple B2B disputes because the parties may not have access to the necessary technology and also because a binding arbitration may be necessary where the parties have no established relationship and the awards cannot be enforced by means other than court.

### 2.2.3 *Business to Consumers Transactions (B2C)*

B2C is a rapidly growing sector of traditional retail shopping that is facilitated by online technology. It is necessary to add to this definition that online B2C transactions have revolutionized aspects of traditional retail shopping. As a result of the unique borderless nature of cyberspace, B2C transactions are no longer constrained by national borders, and B2C transactions now take place internationally more frequently and in greater numbers than ever before.<sup>73</sup>

In 2009, it was predicted that by the end of 2014 more than around 3 billion, or one-third of the world's population, would use the Internet.<sup>74</sup> The growth in the population of Internet users will have a direct effect on the growth of online consumer numbers and, accordingly, the growth of online B2C commerce and thus online B2C disputes.<sup>75</sup>

#### 2.2.3.1 Online Arbitration and B2C Disputes

With the growth of B2Cdisputes, the need for an efficient dispute resolution system is evident as conventional means of redress (such as seeking redress from

73 Ponte & Cavenagh, 2004, p. 2.

74 ITU Press Release, 'ITU Releases 2014 ICT Figures Mobile-Broadband Penetration Approaching 32 per cent', 2014. Retrieved on 25 June 2014 from <[www.itu.int/net/pressoffice/press\\_releases/2014/23.aspx](http://www.itu.int/net/pressoffice/press_releases/2014/23.aspx)>.

75 It was estimated that online retail and travel in Western Europe would reach €129 billion in 2009, and is projected to grow to €203 billion by 2014. The European eCommerce market, which includes the EU-17 – Austria, Belgium, Switzerland, Germany, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden and the UK – will grow at a Compound Annual Growth Rate (CAGR) of 8% over the six-year forecast period. Can be found at: <[www.forrester.com/rb/Research/western\\_european\\_online\\_retail\\_and\\_travel\\_forecast%2C/q/id/44603/t/2](http://www.forrester.com/rb/Research/western_european_online_retail_and_travel_forecast%2C/q/id/44603/t/2)> (accessed 28 Feb 2014).

court) are clearly ill-suited to catering for online transactions, and often prove unsatisfactory even in traditional B2C transactions.<sup>76</sup>

When compared with B2B disputes, it is more challenging to find a means of redress that is efficient and trusted by both consumers and businesses in cyberspace. The Internet has been largely responsible for the creation of B2C commerce; therefore, it may not be possible to resolve the disputes that may arise out of such transactions via offline means.<sup>77</sup>

Providing a system that can resolve B2C disputes and protect consumers in cyberspace can be achieved only by considering the special features of cyberspace. For instance, cross-border B2C transactions can take place more cost effectively and easily and on a much larger scale than in traditional B2C transactions. Additionally, B2C transactions occur in a virtual world without any kind of direct observation or human contact, and in a virtual world the consumer may not necessarily know where and to whom a complaint should be submitted.

Taking account of these features alone, it is clear that an efficient means of redress cannot be achieved via conventional means and that B2C disputes thus require a means of redress that is more suited and adaptable to the particular features of the dispute.<sup>78</sup>

Online arbitration may be an appropriate instrument to replace more conventional means of redress in online B2C disputes. Online arbitration may be more adaptable to the particular features of B2C disputes, residing as it does in the virtual world. But determining which type of online arbitration is most suitable for B2C disputes is a controversial matter that has given rise to much debate. Perhaps the main controversy is that online arbitration may face legal barriers,

76 This was confirmed by a white paper provided by The Council of Better Business Bureaus (BBB). BBB reported that: “[...]our experience in the North America is that consumers do not utilize their rights to judicial redress for most problems they encounter in the marketplace. There are many reasons for this: the high cost of litigation; the inaccessibility of attorneys; the frequent small dollar value to high emotional and convenience value disputes; varying education levels; fear; and the weakness of their strictly ‘legal’ positions and remedies compared to the perceived harms or inconveniences suffered. These barriers, coupled with others uniquely attributable to international transactions, surely are all increased significantly with respect to disputes arising cross borders.”

The Better Business Bureau, ‘Protecting Consumers in Cross-Border Transactions: A Comprehensive Model for Alternative Dispute Resolution’, 2003, p. 3.

Why do e-commerce customers not turn to the courts? Clearly, even conventional “high street” consumer disputes are rarely if ever litigated, due to (i) consumer ignorance and apathy as to legal remedies, (ii) the typically low cost of the items in dispute and (iii) the high cost of access to legal advice and judicial resolution. European Parliament briefing note, L. Edwards & C. Wilson, ‘Redress & Alternative Dispute Resolution in Cross-Border E-Commerce Transactions (IP/A/IMCO/IC/2006-206),’ DG Internal Policies of the Union, Policy Department Economic and Scientific Policy, 2007, p. 3. Retrieved from <[www.europarl.europa.eu/comparl/imco/studies/0701\\_crossborder\\_ecom\\_en.pdf](http://www.europarl.europa.eu/comparl/imco/studies/0701_crossborder_ecom_en.pdf)>.

77 “Rather than being just another medium for international B2C commerce to utilize, the Internet itself has been largely responsible for the creation of this sector of commerce,” K. Stewart & J. Matthews, ‘Online Arbitration of Cross-Border, Business to Consumer Disputes’, *University of Miami Law Review*, Vol. 56, 2002, p. 1113.

78 J. Hörnle, ‘Online Dispute Resolution in Business to Consumer E-commerce Transactions’, *Journal of Information, Law and Technology*, Vol. 2, 2002, p. 3.

especially in borderless transactions between countries with widely differing retail laws. In To establish which type of online arbitration may be most effective, the use of binding, non-binding and unilaterally binding arbitration will be considered first, and later on in this chapter, whether online arbitration should be totally or partly online will be discussed.

### 2.2.3.2 Binding Arbitration

Arbitration may provide the consumer with a fair means of redress in an environment where having access to traditional means of redress is not only burdensome and inefficient but also likely to be largely unworkable. However, there may be some restrictions on the use of binding arbitration in B2C transactions.

The imbalance between businesses and consumers and the use of arbitration clauses in bad faith by businesses have created a negative atmosphere with regard to the use of binding arbitration in B2C disputes. Consumers are deemed to be in a weak position in B2C contracts as they are not involved in the process of crafting the contractual terms and conditions, and therefore may be unaware of the binding arbitration clause and its effect on their legal rights. Moreover, businesses may designate an arbitration tribunal that may not be neutral.

However, this does not mean that consumer arbitration is unworkable. It may be that the use of binding arbitration in consumer contracts may be restricted by some conditions. For example, in Europe, by the unfair Terms Directive, Member States are required to invalidate any unfair terms (such as a term requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions) that have not been individually negotiated, are contrary to the requirements of good faith and cause a significant imbalance in the parties' rights and obligations [...] to the detriment of consumers.<sup>79</sup>

Pre-dispute online binding arbitration clauses under EU law may not be invalid. Online arbitration can provide a means of redress, especially for cross-border disputes, that is inexpensive and accessible. Thus, it may be argued that online arbitration can balance B2C relations in such a way that the consumer is not the weaker party in transactions,<sup>80</sup> and it may not cause a significant imbalance in the parties' rights and obligations. However, mandatory national consumer protection laws may have a stricter approach; for example in the UK, if the amount of dispute is not more than £5000, pre-dispute and post-dispute binding arbitration clauses are automatically considered to be unfair without considering any additional conditions.<sup>81</sup> If the dispute amount exceeds £5000, the arbitration clause

79 Council Directive 93/13/EEC on unfair terms in consumer contracts, 1993, Official Journal L 095, Art. [3A], Index Q.

80 For further information on the power of technology in balancing the playing field refer to: O. Rabinovich-Einy, 'Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape,' *Yale Journal of Law and Technology*, Vol. 6, 2003, p. 1; G. Kaufmann-Kohler & T. Schultz, *Online Dispute Resolution Challenge for Contemporary Justice*, Kluwer Law International, the Netherlands, 2004, p. 75.

81 English Arbitration Act 1996, § 91(1); Unfair Arbitration Agreements Order 1999(SI 1999/2167) Reg. 1.

may not be automatically invalid, and tests provided in the Directive will apply to ascertain whether arbitration is binding on the consumer or not.

Different national consumer protection laws may lead to the conclusion that binding online arbitration cannot be used in B2C online disputes; however, the mandatory rule of non-acceptance of binding arbitration in B2C disputes was established prior to the development of e-commerce, and the terms and usages in traditional mandatory rules are hardly applicable online. As a result, these mandatory rules cannot be applied to all consumer contracts, including online performance. It is suggested that a more updated interpretation has to be provided to remove the additional barrier when applying mandatory rules in e-commerce contracts<sup>82</sup>; moreover, such mandatory rules may not be applicable if they do not lead to an appropriate and reasonable result.<sup>83</sup>

In online B2C disputes, applying restrictions on binding arbitration may not be reasonable as online arbitration is not only a practical alternative, but in some cases the only viable binding dispute resolution.<sup>84</sup> Obliging consumers to resort to court for online disputes may not be protective as traditional courts may be unable to provide a cheap and timely solution to disputes and in distant disputes, the judgment may not be easily enforceable.

Considering the equity of consumers and businesses in an online environment, a binding arbitration clause may be more in favour of the consumers than against them providing that the online arbitration process is inexpensive and accessible. Courts may favour enforcement of online arbitration awards over traditional consumer arbitration agreements owing to online arbitration cost saving speed, and protection for opening consumers' access to remedies.<sup>85</sup> Therefore, to provide more efficient consumer redress for cross-border disputes, instead of engaging in conventional national consumer protection laws, providing a fair and effective online arbitration may be insisted upon, and it may be assured that there is strict compliance with due process requirements in the arbitration process.<sup>86</sup>

82 S. Tang, *Electronic Consumer Contracts in the Conflict of Laws*, Hart Publishing, Oxford, 2009, p. 197.

83 Kaufmann-Kohler & Schultz, 2004, p. 175.

84 Hörnle, 2009, p. 186.

85 A. Schmitz, 'Drive-Thru' Arbitration in the Digital Age: Empowering Consumers Through Regulated ODR', *Baylor Law Review*, Vol. 62, 2010, pp. 178, 212.

86 ODR guidelines of the ABA, the ICC and the GBDe envision a global network providing the consumer with easy access to a fair and effective dispute resolution procedure at low cost. Each of these guidelines recommends that ODR systems should proceed on the basis of codes of conduct and equity, and instead of engaging in an ultimately cumbersome conflict of (consumer protection) laws, ADR dispute resolution officers may decide on equity and/or on the basis of codes of conduct. This flexibility as regards the grounds for ADR decisions provides an opportunity for the development of high standards of consumer protection worldwide. 'Alternative Dispute Resolution Guidelines Agreement Reached Between Consumers International and the Global Business Dialogue on Electronic Commerce,' 2003, Retrieved on 15 May 2013 from <[www.gbde.org/pubs/ADR\\_Guideline.pdf](http://www.gbde.org/pubs/ADR_Guideline.pdf)>.

### 2.2.3.3 An Enforceable Award Notwithstanding Conventional Barriers

With different approaches towards consumer protection laws there is still uncertainty whether arbitration can be binding on the consumers or not. Binding decisions that can be enforced on both consumers and businesses may be required in an online environment; however, binding arbitration awards may not be enforceable in online cross-border disputes with very different approaches towards consumer protection. There is an intense debate about consumer means of redress in an online environment, and it is believed that the consumer protection framework needs to be re-examined in relation to online dispute resolution and redress. Consumers' rights to dispute resolution and redress – especially in cross-border disputes – are complicated by many factors such as jurisdiction, costs, accessibility and convenience.

Considering the difficulties that may be created by the involvement of the state authority and the probability of non-enforcement of the arbitration award under national consumer protection law, other means of generating enforcement of the arbitration award may be used.

Where online arbitration is privatized and the power of enforcing the award is distributed between the online arbitration providers, intermediaries and payment services who are engaged in B2C disputes, the enforcement of arbitral award may not face the conventional barriers that were previously discussed.<sup>87</sup>

PayPal could be a very good example of such distributed authority. PayPal can make a final decision in disputes. The resolution system that is used in PayPal is not online arbitration<sup>88</sup> as the awards may not be enforced like a judgment, but the role that PayPal plays in disputes is the role of arbitrator. PayPal can make a final decision, and for this it uses a form of document-only arbitration. Moreover,

87 If the arbitration award is not enforceable like a judgment but is enforceable by other means, there may arise issues about the nature of arbitration, and the process may not be recognized as true arbitration. However, in the future, the approach to the use of online arbitration in B2C commerce may be changed, and such awards may be recognized as judgments.

88 C. Rule, Personal Conversation at the Online Dispute Resolution Conference, Vienna, 29-31 March 2010. Although this mechanism is not, strictly speaking, a dispute resolution mechanism, in effect it puts the credit card issuer and PayPal in a position of a third party neutral arbitrating a dispute between the consumer and the business. Hörnle, 2002, p. 5.

acting as an escrow system, it has the power to enforce the arbitral award without having to seek enforcement from court.<sup>89</sup>

The massive participation of consumers in cross-border e-commerce transactions may eventually lead to the emergence of transnational rules on consumer protection and usages applicable to consumer transactions. The usage of transnational rules may lead to acceptance of the use of online arbitration for pre-dispute B2C arbitration agreement and binding online arbitration. Furthermore, the usage of PayPal and credit card companies that are able to enforce the award may prevent the actual application of different consumer protection laws in B2C disputes.

#### 2.2.3.4 Non-Binding and Unilaterally Binding Arbitration

An arbitration decision that is not binding on either of the parties and may not be enforced by any intermediary may be popular as the procedure is mainly based on co-operation. Non-binding online arbitration procedures allow the consumer to retain some control over the resolution process, because they can withdraw from the procedure at any time and they are not obligated to adhere to either the advice or the decision of the third party. Moreover, the business may comply with the award voluntarily, either for its reputation or because of the existence of class actions for damages.<sup>90</sup>

The benefits of a non-binding online arbitration in B2C disputes is undeniable; however, non-binding arbitration in B2C contracts may not work successfully. Contractual parties may be more willing to enforce the agreement reached by themselves, instead of complying with solutions made by the third party.<sup>91</sup> Many do not like the uncertainty that surrounds the outcome. Of course, deci-

89 User Agreement of PayPal Service, Art. 13.6 "Once a Dispute has been escalated to a Claim, PayPal will make a final decision in favour of the buyer or the seller. You may be asked to provide receipts, third party evaluations, police reports, or any other information or documents reasonably required by PayPal to investigate the Claim. PayPal retains full discretion to make a final decision in favour of the buyer or the seller based on any criteria PayPal deems appropriate. In the event that PayPal makes a final decision in favour of the buyer or seller, each party must comply with PayPal's decision. PayPal may require the buyer to post an item that the buyer claims is Significantly Not as Described back to the seller (at the buyer's expense), and PayPal may require a seller to accept the item back and refund the buyer the full purchase price plus original shipping costs. If a seller refuses to accept the item, PayPal may award the Claim in favour of the buyer, provided the buyer has provided satisfactory evidence to PayPal that the item was sent to the seller. In the event a seller loses a Claim, the seller will not receive a refund on his or her PayPal or eBay fees associated with the transaction. If you lose a Significantly Not as Described Claim because the item you sold is counterfeit, you will be required to provide a full refund to the buyer and you will not receive the item back (it may be destroyed)" <[https://cms.paypal.com/uk/cgi-bin/marketingweb?cmd=\\_render-content&content\\_ID=ua/UserAgreement\\_full&locale.x=en\\_GB#13](https://cms.paypal.com/uk/cgi-bin/marketingweb?cmd=_render-content&content_ID=ua/UserAgreement_full&locale.x=en_GB#13)>.

90 The existence of collective actions for damages to deal with small claims might be an incentive for businesses to settle claims even if low values are at stake for individual consumers. If a party does not want to give in on anything, only binding procedures – binding arbitration procedures, small claims procedures, collective actions for damages and procedures for injunctions – can end the dispute. <[http://ec.europa.eu/consumers/redress/reports\\_studies/comparative\\_report\\_en.pdf](http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf)>.

91 Tang, 2009, p. 157.

sions made during non-binding determinative ADR procedures can either be issued later or be turned into a contractual agreement, but this does not achieve certainty at the outset. Moreover, it only serves to lengthen the process, and hence it is often considered to be more effective to use binding procedures from the outset.<sup>92</sup>

Thus, unilaterally binding arbitration would work better than non-binding arbitration. Unilaterally binding arbitration is an arbitration process in which only one of the parties is bound by the arbitration award. In B2C disputes, in a unilaterally binding arbitration, only the business is bound by the award, and the award is non-binding for the consumer.

The advantage of unilaterally binding arbitration is that businesses normally abide by the award and in case of non-compliance the consumer can resort to court or it may be enforced automatically by an intermediary (online payment service).<sup>93</sup> In B2C e-commerce, unilaterally binding arbitration may be enforced on the business by escrow services; judgment funds; transaction insurance mechanisms and privileged links with credit card issuers.<sup>94</sup>

Nevertheless, when the consumers are not satisfied with the unilaterally binding arbitration award (even if it is in their favour) they do normally seek redress from court, especially in cross-border disputes. A unilaterally binding arbitration does not really give the consumers the option to seek redress from court, as the option is not very feasible, especially in international disputes.<sup>95</sup> Therefore, the option may not give the consumer a real cognitive closure.<sup>96</sup> Seeking redress from court for a consumer is not an option, as Katsh states: "Like Heraclitus at the river, we address the Internet aware that courts are ill suited to fix its flow."<sup>97</sup>

92 S. Schiavetta, 'Does the Internet Occasion New Directions in Consumer Arbitration in the EU?' *Journal of Information, Law & Technology*, Vol. 3, 2004, p. 16.

The parties' willingness to reach a solution is a must for the use of non-binding arbitration. Only if both parties have some willingness to reach a solution acceptable to them do direct negotiation, mediation procedures and non-binding arbitration have a chance. <[http://ec.europa.eu/consumers/redress/reports\\_studies/comparative\\_report\\_en.pdf](http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf)>.

93 Tang, 2009, p. 157.

94 T. Schultz, 'Online Arbitration: Binding or Non-Binding?' *ADR Online Monthly*, 2002.

95 The Study Centre for Consumer Law, 'An Analysis and Evaluation of Alternative Means of Consumer Redress Other Than Redress Through Ordinary Judicial Proceedings,' 2009, p. 6, Available from <[http://ec.europa.eu/consumers/redress/reports\\_studies/comparative\\_report\\_en.pdf](http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf)>.

96 Schultz suggests that where ODR processes provide unsatisfactory privatized justice, an *Online appeal process* run by the state would be appropriate. Even though most EC ADR clauses do allow recourse to the courts, the same problems arise that consumers are as unlikely to litigate on 'appeal' as at first instance. T. Schultz, 'Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust?' *North Carolina Journal of Law & Technology*, Vol. 6, 2004, p. 71.

97 E. Katsh, L. Owterweil & N. Sondheimer, 'Process Technology for Achieving Government Online Dispute Resolution,' Proceedings of the 2004 Annual National Conference on Digital Government Research, 2004, p. 11.

### 2.2.3.5 Partly Online and Totally Online Arbitration

In B2C online transactions the use of totally online arbitration might not cause a problem in respect of accessibility of technology. The use of online dispute resolutions normally does not need very complex skills, and if the consumers were able to order from the Internet, they might be normally capable of participating in totally online arbitration. As long as complex technological tools, which may have a detrimental effect on the consumer's due process rights, have not been used, arbitration can be carried out totally online. However, it should be noted that if the award can be enforced only through court, to avoid non-recognition of the award, it should be sent to the party by offline means.

### 2.2.4 Consumers to Consumers Transactions (C2C)

The consumer to consumer (C2C) electronic commerce relates to electronic retailing between consumer-merchants and consumer-purchasers.<sup>98</sup> C2C transactions can take place through personal websites, online auctions and classified advertisement platforms.<sup>99</sup>

Consumers have begun to sell a vast array of goods in virtual auctions and consignment marketplaces. In these markets typically, the consumers are casual sellers.<sup>100</sup> The Internet has helped C2C transactions to grow, by removing the constraints in terms of distance and time, and has provided opportunities for individuals to make deals with lots of others.<sup>101</sup>

Owing to the nature of the C2C market place, disputes may arise more often than by any other method of retail of goods. A player who participates in a C2C online transaction may have an incentive to cheat on others, because of the anonymity and ease of entry and exit from the transaction. Consumers order goods from an unknown consumer-merchant who is not an established business, and the consumer-merchant has to trust that he will receive the payment by an unknown buyer.<sup>102</sup> On the one hand, a buyer may take goods from a seller without paying for them. On the other hand, a seller may get a payment from a buyer without sending the goods to him or her.<sup>103</sup>

The use of online arbitration, as a means of redress, may be a feasible option in low-value C2C disputes, which may happen nationally or internationally. Particularly with respect to C2C disputes, processing dispute resolutions under the same means employed by the parties to consummate their transaction will level

98 L. Ponte & D. Cavenagh, *Cyber Justice, Online Dispute Resolution for E-Commerce*, Prentice Hall Publishing, Upper Saddle River, 2004, p. 235.

99 See <[www.Oecd.Org/Dataoecd/32/10/45061590.Pdf](http://www.Oecd.Org/Dataoecd/32/10/45061590.Pdf)>.

100 Ponte & Cavenagh, 2004, p. 3; Y. Toshizumiohta, 'Modeling Reputation Management System on Online C2C Market', *Computational & Mathematical Organization Theory*, Vol. 10, 2004, p. 166.

101 Toshizumiohta, 2004, p. 167.

102 A. González, 'Consumer Models of E-commerce, eBay Law: The Legal Implications of the C2C Electronic Commerce Model,' *Computer Law & Security Report*, Vol. 19, No. 6, 2003, p. 469.

103 Toshizumiohta, 2004, p. 166.

the playing field because both parties will necessarily have access to the essential tools needed for online arbitration.<sup>104</sup>

#### 2.2.4.1 Online Arbitration and C2C Disputes

Clearly, it is in the interests of all parties to have access to a fair means of redress. Like online B2C transactions, online C2C transactions are a relatively new phenomenon created by the Internet, and a simple, efficient and readily accessible system is vital to generate confidence and deal with any dispute in a fair and even-handed manner.

Online arbitration, particularly in low-value C2C disputes, allows parties to resolve disputes online with neither holding an advantage over the other. Using the same means to resolve the dispute as used during the transaction is important since both parties will have access to the technology required for the online arbitration procedure.

#### 2.2.4.2 Online Binding Arbitration

In C2C disputes, online binding arbitration may be a suitable tool, since in anonymous cross-border environments, parties may not have any incentive to cooperate and comply with the award.<sup>105</sup> For example, the consumer-merchants are not repeat players and thus do not have concerns about losing their business, because they do not have an established business. Therefore, a binding means of redress is necessary for award execution. However, it is still debatable as to whether online arbitration awards can be binding on consumer-buyers in C2C disputes.

As mentioned in the B2C section, a pre-dispute binding arbitration clause (and a post-dispute arbitration clause in some circumstances) may face restrictions, and a binding arbitration award in B2C transactions might not be valid under different consumer protection laws owing to the imbalance and unequal bargaining power between the parties. Binding arbitration clauses raise concerns that the contractual relationships will shift power away from consumers. The fear is that a fair arbitration process may not be held in such transactions since businesses may choose arbitrators who have other incentives to rule against the consumers rather than remain neutral and restrict themselves to considering the facts in the case.<sup>106</sup>

In C2C disputes the situation may be different. In C2C transactions, the consumer-merchant is not a seller, because he is not “acting for purposes relating to his trade, business or profession”,<sup>107</sup> and he is acting for “the purposes which are

104 I. Colón-Fung, ‘Protecting the New Face of Entrepreneurship: Online Appropriate Dispute Resolution and International Consumer-to-Consumer Online Transactions,’ *Fordham Journal of Corporate & Financial Law*, Vol. 12, 2007, p. 250.

105 *Id.*, p. 256.

106 L. Hang, ‘Online Dispute Resolution Systems: The Future of Cyberspace Law,’ *Santa Clara Law Review*, Vol. 41, 2000, p. 861.

107 Art. 2(C), Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts 93/13/EC.

outside his trade, business or profession".<sup>108</sup> Hence, it may be said that the consumer-merchant falls under the legal definition of consumer and the inequality between the parties, in C2C transactions, may not exist at the same level as it exists in B2C disputes. As a result, consumer protection laws may not regulate such transactions. Moreover, in these kinds of transactions the '*caveat emptor*'<sup>109</sup> applies. '*Caveat emptor*' means 'let a purchaser exercise proper caution' when purchasing goods, but it does not nullify the responsibility of the seller to disclose anything that the consumer should know about the product or service being offered.<sup>110</sup>

If mandatory rules of consumer protection do not apply in C2C transactions, binding arbitration clauses may be acceptable in such disputes, and the award may be enforced by courts in case of non-compliance. However, in cross-border disputes the fact that parties have to enforce the award in their home country through court does not make online arbitration a very appealing method. C2C transactions are normally very low value, and the parties may not be willing to go through the difficulty of enforcing an electronic arbitration award.<sup>111</sup>

To enforce an arbitration award without resorting to court, other means may be used. This could be the use of online payment services and auction websites. For example, eBay, as both B2C and C2C intermediary, has purchased PayPal, and, as mentioned earlier, PayPal is in the position of a third party, neutrally arbitrating a dispute between the consumer and the business. PayPal's decision is final and binding, and it keeps the money for 45 days after the dispute arises to allow resolution and also to enforce the decision that has been made.

#### 2.2.4.3 The Non-Binding and Unilaterally Binding Arbitration

In unilaterally binding arbitration, arbitration is binding on the stronger party, leaving the weaker party free to decide whether to litigate or to arbitrate. In C2C

108 Art. 2(B), Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts 93/13/EC.

109 The Latin maxim provided in its entirety: "Caveat Emptor, qui ignorare non debuit quod jus alienum emit" ("Let a purchaser who ought not to be ignorant of the amount and the interest which he is about to buy, exercise proper caution"). H. Broome, *A Selection of Legal Maxims*, 10th edn, The Lawbook Exchange, 1939, p. 528, cited in D.K. McGee, 'Potential Liability for Misrepresentations in Residential Real Estate Transactions: Let the Broker Beware,' *Fordham Urban Law Journal*, Vol. 16, 1988, pp. 127, 129.

110 For instance, the C2C transactions do not fall under the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts 93/13/EC, according to Art. 1(1) of this directive. Art. 1(1) reads as "The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer." See also C. Drahzoal & R. Friel, 'Consumer Arbitration in the European Union and the United States,' *North Carolina Journal of International Law and Commercial Regulation*, Vol. 28, 2002, p. 363.

111 As was noted in the B2C section, consumers normally do not even go to court for conventional high-street consumer disputes, and therefore even if the arbitration award were enforceable, consumers would not enforce the award, especially in C2C disputes where the value of the dispute is normally very low. Edwards & Wilson, 2007. The Council of Better Business Bureau, 'Protecting Consumers in Cross-Border Transactions Comprehensive Model for Alternative Dispute Resolution,' 2003, p. 3.

disputes deciding whether the consumer-merchant is the stronger party may be difficult as the consumer-merchant is not a business.

Unilaterally binding arbitration might be considered unfair on the consumer-merchant, depending on who has provided the terms and whether it significantly disadvantages one party, contrary to good faith and fair dealing.<sup>112</sup> In C2C e-commerce, unilaterally binding arbitration may be imposed by the auction website on the seller, or it may be imposed by the consumer. In both cases, controversy may arise as to whether it is fair to bind only the consumer-merchant by the award. In a situation where the consumer-merchant wishes to file a complaint against the consumer-buyer, the only means of redress available may be online arbitration. But it may be argued that if the consumer-buyer is not obliged to comply with the award, the consumer-merchant may be left without remedy, and that is clearly unfair on the consumer-merchant.

Use of non-binding arbitration may be problematic mostly because of the parties' anonymity. The consumer-merchant may not have any incentives in cooperating with the consumer, and vice versa, and a non-binding arbitration may therefore be largely ineffective.

When C2C transactions are facilitated by intermediaries, such as auction websites, the use of non-binding arbitration with a feedback system may persuade the regular consumer-merchant and the consumer-buyer to comply with the award voluntarily to avoid negative feedback. However, the feedback system may be far less efficacious in persuading one-off sellers and buyers to comply with the award.

#### 2.2.4.4 Partly Online and Totally Online Arbitration

Totally online arbitration may be used in C2C disputes, are normally low value and the issues at stake are simple. The arbitration in such disputes is usually based on document-only process, and there may be no need to use complicated technology. Moreover, the parties' access to technology may not be of concern if they have participated in such transactions. Use of online auction websites may facilitate the enforcement of awards, and thus there may be no need to resort to court. However, in circumstances where no auction website and online payment intermediary are involved, partly online arbitration may be used to ensure that online arbitration award is enforceable by court.

112 Draft Common Frame Reference (DCFR), Art. II, 9:404: "Meaning of 'unfair' in contracts between non-business parties: In a contract between parties neither of whom is a business, a term is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and significantly disadvantages the other party, contrary to good faith and fair dealing."