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## The Changing Face of the World: The Growth of e-Commerce ADR in the United Kingdom and America

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### Introduction

Statistics show that consumers in both the United Kingdom and America are rapidly discovering the intricacies of on-line commerce, or "e-commerce". E-commerce is the virtual wave of the future, "possibly the fastest growing business segment that has ever existed."<sup>1</sup> "It is estimated that 63% of the on-line population will be purchasing goods and services over the Internet by 2006. Furthermore, it is perceived that the total value of e-commerce transactions around the world should reach US \$1 trillion in 2003, and over \$6 trillion in 2005."<sup>2</sup> In the wake of this immediate history, Bill Gates' prophetic words ring more loudly than ever: "*The Internet changes everything. The newest*

*innovations which we label information technologies, have begun to alter the manner in which we do business and create value, often in ways not readily foreseeable even five years ago.*"<sup>3</sup>

Change does not, however, come without cost. With the convenience and market diversity of e-commerce comes a subtle but definitive societal change. The most significant attribute of virtual commerce lies in its transcendence of spatial and geographic limitations. This very advantage carries with it a significant disadvantage in the event of a dispute. Consumers, often geographically distant from sellers, require an effective and reliable means of dispute resolution. Absent such systems, e-commerce loses its immediate appeal

as consumers find themselves at a loss, both literally and figuratively, with little recourse when dissatisfied with an on-line transaction. The operative question becomes, how can disputes involving only modest amounts of money be reconciled when the parties have never met, and reside hundreds of miles distant or across international borders?

The answer, like the transaction, is ideally found "on-line."

The American solution to the problem of e-commerce generated disputes is generally found in a proliferation of online companion "ADR" or "alternative dispute resolution" agreements whose provisions provide "alternatives" to the courthouse. The high rate of propagation of such

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Welcome to the June edition of *Computers & Law*. The articles in this edition deal with a range of issues, including how to track the geographic location of an internet address and e-commerce alternative dispute resolution (ADR). We also consider what challenges lie ahead for intellectual property law, and the Federal Court decision in *Ward Group Pty Ltd v Brodie & Stone plc* in relation to internet trade mark infringement.

In our first article, Jeffrey Wolfe examines the rise of e-commerce and how it has triggered a corresponding increase in online forms of ADR. While Wolfe's analysis is limited to the US and UK experience with online ADR, the global nature of e-commerce means that the issues raised in Wolfe's article are common to most countries and are, accordingly, informative for Australian practitioners. In particular, Wolfe provides a useful overview of the various ways a contract can be formed in an online environment, considers some examples of ADR clauses in the terms and conditions of popular websites and explains how such ADR clauses have been interpreted by the US courts. Overall, Wolfe's article provides an insightful look at the ever increasing impact e-commerce has on our lives.

In our second article, David Webber looks at the impact of the internet and other technological and political changes on intellectual property (IP) law, and the issues that this raises for copyright and patent law going

forward. Webber proposes possible solutions to alleviate the erosion in IP law's relevance and importance. For copyright, he suggests that vigilant enforcement of existing IP rights against counterfeiters, and expansion of authorised online distribution systems would best serve the interests of IP creators and the public, whilst for patents, Webber's view is that Patent Offices need to be reinvigorated. To this end, Webber suggests, amongst other things, greater funding and early publication of applications.

Nigel Carson, Director, Forensic IT at Ferrier Hodgson, provides an interesting overview of the methods that can be used to determine the geographic location of an internet entity. Carson describes how the location of potential litigants may be identified through their connection with an internet address or domain name using technologies such as WHOIS queries and trace route tools. WHOIS queries look at the allocation of internet address blocks, while trace route tools map out the individual routes or hops between the investigator's computer and the target internet address. Carson also addresses how hidden and dynamically allocated internet addresses may limit the precision of these investigations.

In our last article, Craig Smith summarises *Ward Group Pty Ltd v Brodie & Stone plc*, which concerned whether the offer of goods on websites overseas can constitute trade mark infringement in Australia. In the circumstances it was held that the

website in question did not target Australian customers and so there was no use of a trade mark sufficient to found an infringement action. Smith provides a useful outline of the practical impact of the decision for Australian trade mark owners.

Many thanks to the authors for their contributions to this edition of the journal. We also thank our editorial team, Amy Jackson, Danet Khuth, and Pam Lines. Special thanks also to Melissa Lessi for her work as editor and as part of the editorial team over the last few years.

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agreements creates a subtle, yet defined shift in society's approach to dispute resolution. Thus, American users of popular online enterprises are discovering that they are likely party to binding legal agreements requiring that they engage in one or more forms of alternative dispute resolution either *in lieu of* or as a condition precedent to going to court.

Consumerism has thus become a vehicle for societal change. By agreeing to buy on-line, consumers are agreeing to forego traditional forms of dispute resolution in favor of alternatives, often forsaking altogether the orthodoxy of time-honored dispute resolution methods. The sheer numbers of such transactions command attention, heralding the rise of non-traditional dispute resolution mechanisms whose full import is not yet understood.<sup>4</sup>

### E-Commerce and Formation of Contract

There is little question but that the Internet has become a recognized marketplace. E-commerce is, however, literally "ethereal," such that the entire transaction occurs *via* computer Internet connections, and funds are electronically transferred, as are communications regarding terms and conditions. As a result of this "instantaneous" environment users tend to "click through" the many and varied legal notices, anxious to consummate the transaction. In practice, ethereal notices are as likely to be shunned as those in the three dimensional world. This doesn't mean that these notices are any less effective.

In the face of rapid-fire web-based electronic exchanges and transactions, American courts have adapted time-honored principles of contract, addressing contract formation over the web in terms of information reasonably able to be disclosed, terms actually agreed upon, and, ultimately, whether the essential elements of contract are satisfied in what might otherwise appear to be an amorphous cybernetic "meeting of the minds."

Some observers conclude that a similar result is likely in the UK. Writing in

the April 2002, Phillip Morrison notes that like any contract, e-commerce requires a contract have "reasonably certain and definite terms."<sup>5</sup> He comments further, for example, that under Scots law contracts may be formed by any number of means, including conduct of the parties — effectively opening the door to contracts formed by "e-mail and on the World Wide Web."<sup>6</sup> In this, he notes, "there are essentially three different ways of contracting on line, namely Electronic Data Interchange, e-mail and websites."<sup>7</sup> He cautions that, like questions of web-based contract formation raised before American courts, a serious question arises as to time, place and manner of contracting when using websites in the UK.

For example, the American court in *Ticket master Corp. v. Tickets.com* specifically observed that notices "which state that anyone going beyond [the initial web page] into the interior web pages of the web site accepts certain conditions . . ." were valid, provided the notices on the home page were "in a prominent place."<sup>8</sup> In *Alexander Lee Raley v. Mark R. Michael*<sup>9</sup> a Virginia court noted that "subscribers must agree, as a condition precedent to participation in eBay marketplace, to abide by certain conditions . . . set forth in the eBay user agreement."<sup>10</sup> As one commentator observed, however, "[t]he chances that anyone actually reads these terms and understands what clicking on the 'I agree' button means are slim indeed. But it's the way of things. Your only option is not to click that button."<sup>11</sup>

Similar undertakings are finding root in the UK.

Online "reference statements" — or notices which advise the user that use of the website is subject to the owner's terms and conditions — if placed at the bottom of an on-line order form may "fail a reasonable notice requirement," especially if no hyperlink accompanies the notice.<sup>12</sup> "The most elaborate display mechanism is to create a dialogue box that forces the user to scroll through the terms and conditions and clicking "I agree" or "I have reviewed these terms" before they are allowed to move through the site."<sup>13</sup>

However, unlike traditional questions of contract formation involving the post,<sup>14</sup> or, even telephone or facsimile machines,<sup>15</sup> there is no case law in the UK addressing the question *where* web-based contacts are deemed to be formed.<sup>16</sup> This is a potentially critical inquiry, given cross-border jurisdictional variation. Nevertheless, it is clear, e-commerce is here to stay. Contracts are being negotiated, entered into and acted upon, all within the realms of cyberspace.

The American experience offers some insight into the questions thus raised.

Three "somewhat controversial methods of obtaining assent of internet users"<sup>17</sup> have emerged since the extensive use of electronic commerce. They are the so-called "shrink wrap", the "click wrap," and the "browser wrap" forms of user acceptance. The "shrink wrap" method "involves putting a message on a product telling the purchaser that any use of the product constitutes assent to specified terms."<sup>18</sup> The "shrink-wrap" method envisions purchase by the user of an actual product from a retailer, regardless of whether the transaction occurs 'live' or by mail. The so-called "click wrap" method requires that an internet user who selects a product to purchase on the internet "sees the contract terms on the computer screen, and cannot complete the purchase without clicking a box on the screen to indicate assent."<sup>19</sup> The last method — "browser wrap" — is similar to the "click wrap" in that terms of sale or access are accessible on-line, but only as a passive reference statement. That is, the "internet vendor affords the user the opportunity to look at the terms of the sale, but does not require the user to click on anything to indicate assent [to terms of sale or use] before paying for the product."<sup>20</sup> Typically, the website will present a button saying something like "Click Here for Legal Terms," but "clicking" is *not* required to download, purchase, or access.<sup>21</sup>

In the "shrink wrap" scenario the consumer is a passive participant and the seller has no actual knowledge whether the consumer has, in fact, reviewed the terms and conditions included with the product. Opening and using the product is deemed

acceptance; but this is a legal presumption based upon sale and eventual use of the product; absent any actual knowledge by the seller of the buyer's actions. Theoretically, a buyer could take a product home, never open it, never use it, and thereby never have an opportunity to physically view the enclosed "terms and conditions of sale, even if only tearing through it to reach the product itself."<sup>22</sup> A "browser wrap" transaction is similarly passive; the issue in both it and the "shrink wrap" transactions being whether the individual user/buyer has been reasonably placed on inquiry notice to look further. Unlike these transactions, the "click wrap" transaction is an "active" undertaking. The buyer/user must affirmatively acknowledge assent — that is, take some recordable action — before being able to proceed. The seller or website owner knows by virtue of the sale or access that the user has, in fact, "clicked" through to completion — and by clicking, has had an opportunity to review the terms and conditions of the sale or use — and has affirmatively manifested agreement. In considering these various methods of contract creation, the American courts have generally approved the same, but, as in the UK, find that on-line notices must be reasonably calculated to actually inform the user of the attendant terms and conditions of the transaction.

### E-Commerce and Alternative Dispute Resolution

In the UK the *Cabinet Office Performance and Innovation Unit Report on E-Commerce*, issued on September 13, 1999 and commissioned by Prime Minister Blair, "on measures of both business and consumer e-commerce use, notes that the UK lags behind North America and some EC countries."<sup>23</sup> The report contains an Action Plan with 60 discrete recommendations, with the overall goal "that, by 2002, the U.K should become the best environment in the world for electronic commerce."<sup>24</sup>

As in America, expanded Internet commerce in the UK and EU creates a need for cross-border ODR, or "on-line dispute resolution."<sup>25</sup> Such dispute resolution mechanisms must, by

definition be *alternative* to traditional methods in use before the widespread integration of e-commerce and the Internet. In the UK, alternative dispute resolution "has been seen to be a consumer friendly means of redress that has the benefits of being relatively quick, non-legalistic and cheap when compared to pursuing a complaint through the court process."<sup>26</sup>

To achieve this, the EU has undertaken an ADR plan — formation of the "European Extra-Judicial Network" — "a European Union project designed to be an important tool in the consumer adviser's kitbag when trying to resolve a client's cross border consumer complaint relating to goods and services."<sup>27</sup> The website — <http://www.eej-net.org.uk> — offers EU consumers, and specifically UK consumers an opportunity to engage in ODR in the case of an on-line dispute. The "European Extra-Judicial Network" declares:

*"We can give you advice and information on your rights as a consumer in the European Union and help you to solve problems with goods and services you have purchased in the EU."*

Among the services offered by the "European Extra-Judicial Network" is information regarding "Alternative Dispute Resolution." Specifically, the EEJ Network says that they "help people send cross border consumer complaints to a relevant ADR scheme in the trader's country" helping "U.K residents find ADR schemes in the rest of the European Union and non-U.K residents find ADR schemes in the U.K."<sup>28</sup> "The main thrust of the proposal is the setting up of a 'one-stop clearing house' in each Member State. It is anticipated that disputes over deliveries, defective products and services and other consumer interests should be dealt with by a single, one-stop national contact point or 'clearing house'. This clearing house will be entrusted with the task of providing the consumer with information and support in making a claim to the out-of-court dispute resolution system in the country where the business from which the products or services were acquired is located."<sup>29</sup> One EEJ Network link provides information to various "ADR schemes" for various consumer

activities, including complaints involving lawyers.<sup>30</sup>

How does this translate at the individual level?

One writer notes that the initial or first step for any consumer lies with the seller. When "resolving a U.K query, a consumer should be encouraged to first approach the trader or supplier to seek a resolution to their query."<sup>31</sup> The user-consumer is frequently faced with terms and conditions of sale or use which, as a result of a consummated online transaction, commonly requires agreement to some form of alternative dispute resolution as a condition of purchase or access. These terms and conditions are often bewildering to the user-consumer, who, in a rush to access information, continue in a website or consummate a purchase, "clicks" through the "fine print" to get to the "good stuff," little knowing that he has now agreed to forego a formal remedy in the event of a dispute.

Consider the following websites and their attendant "terms and conditions."

An example of the passive "browser wrap" agreement is found at the American site *Overstock.com*. That site contains the language:

"Entering the Site will constitute your acceptance of these Terms and Conditions. If you do not agree to abide by these terms, please do not enter the site."<sup>32</sup>

The user entering the website thus agrees, absent any other affirmative "click" (otherwise required if one were to become a registered member/user of *Overstock.com*), to abide by the terms and conditions of use, simply by virtue of the user's presence on the site.<sup>33</sup>

*Overstock.com* is an online seller of goods as well as an online auction, similar to the more well-known site, *eBay.com*. Once entering the site, the user agrees to "Terms and Conditions" which contain the following additional language regarding dispute resolution:

"Any dispute relating in any way to your visit to the Site or to products you purchase through the Site shall be submitted to confidential arbitration in Salt Lake City, Utah, except that, to the extent you have in any manner

violated or threatened to violate Overstock.com's intellectual property rights, Overstock.com may seek injunctive or other appropriate relief in any state or federal court in the State of Utah, and you consent to exclusive jurisdiction and venue in such courts. Arbitration under this agreement shall be conducted under the rules then prevailing of the American Arbitration Association. The Arbitrator's award shall be binding and may be entered as a judgment in any court of competent jurisdiction . . ."<sup>34</sup>

*Overstock.com* has created a broad arbitration clause as regards entry onto the site and any subsequent purchase of products from the site, *except* that it has carved out a violation of its intellectual property rights, preserving the remedies available to it through the courts.<sup>35</sup> Any other dispute is placed before an arbitrator.

Looking further, one finds similar terms in place on other, popular internet sites. An arbitration provision identical to that at *Overstock.com* is found at *Amazon.com*.<sup>36</sup> Like *Overstock.com*, *Amazon's* "Conditions of Use" kick in upon a "visit" to the site:

"By visiting Amazon.com, you agree that the laws of the state of Washington, without regard to principles of conflicts of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon.com or its affiliates."

And, like *Overstock.com*, *Amazon.com* has adopted an arbitration clause. Reciting language precisely like that found at *Overstock.com*, *Amazon.com* provides for arbitration in Seattle, Washington.

Both clauses arguably suffer from the infirmity of denial of access to a forum; with corresponding potentials for unenforceability. In part, these concerns arise because of the very nature of the on-line enterprise. With a "presence" virtually anywhere in the nation, dispute resolution is nonetheless limited to a single geographic location requiring the disputant appear personally,

notwithstanding the fact that he or she may reside literally thousands of miles distant.

By contrast, consider the American site, *eBay.com*. At the bottom of each page of the *eBay.com* website appears the following language:

"Use of this Web site constitutes acceptance of the eBay User Agreement and Privacy Policy."<sup>37</sup>

Within the User Agreement appears the additional language:

"You must read, agree with and accept all of the terms and conditions contained in this User Agreement and the Privacy Policy, which include those terms and conditions expressly set out below and those incorporated by reference, *before you may become a member of eBay* . . ."<sup>38</sup>

*eBay.com* adopts both a "browser wrap" agreement for all those who "use" the web site; and a "click wrap" agreement for those who actually become "eBay members." That is, to become an eBay member you must "click" that you agree to the User Agreement. This then binds you to a comprehensive alternative dispute resolution agreement which includes both the option to arbitrate or seek judicial resolution. *eBay.com* asserts that in the event of a dispute, its goal "is to provide you with a neutral and cost effective means of resolving the dispute quickly."<sup>39</sup> The result is a tiered dispute resolution system to resolve "any claim or controversy at law or equity that arises out of this Agreement or our services."<sup>40</sup> The would-be disputant is first asked to "contact [*eBay.com*] directly" "before resorting to these alternatives."<sup>41</sup> *eBay.com* says it will then consider "reasonable requests to resolve the dispute through alternative dispute resolution procedures, such as mediation, as an alternative to litigation."<sup>42</sup>

Thereafter, disputes are divided dependent upon the total amount of the claim. For disputes "less than \$10,000" either party *may* elect to "resolve the dispute through binding arbitration." Interestingly, *eBay.com* solves the denial-of-access problem by creatively proposing alternatives suited to its

status as a net-based enterprise.<sup>43</sup> Specifically, the agreement provides that binding arbitration *may* be conducted "by telephone, on-line and/or based solely on written submissions where no in-person appearance is required."<sup>44</sup> Litigation, in the face of an otherwise valid agreement to arbitrate, is no longer an option, so long as the dispute falls within the parameters carved out by the agreement.

Where the amount in dispute equals or exceeds \$10,000, the *eBay.com* user agreement specifies the court "in Santa Clara County, California or where the defendant is located,"<sup>45</sup> or "alternatively . . . use of other alternative forms of dispute resolution . . . to be held in Santa Clara County, California or another location mutually agreed upon by the parties."<sup>46</sup>

Now consider the UK site, *ebay.co.uk*.

Like its American counterpart, its homepage contains the advisory: "Use of this Web site constitutes acceptance of the eBay User Agreement and Privacy Policy." Review of the accompanying hyperlinked "User Agreement and Privacy Policy" reveals a broad disclaimer in the event of a dispute with another *e-bay.co.uk* member such that the user releases the site "from all claims . . . arising from or in any way connected with such right, claim or action"<sup>47</sup> Additional provisions within the Agreement reinforce this, including limitations on liability for economic loss, loss of goodwill, revenues or profits,<sup>48</sup> as well as disclaimers for loss of service,<sup>49</sup> and an indemnity from the user/member to *ebay.co.uk* for any loss occasioned by the members breach of the Agreement or violation of law.<sup>50</sup>

Most notable, however, is the dramatic difference in provisions relating to dispute resolution. Instead of the broad-reaching alternative dispute resolution mechanism employed by its sister-American site, the UK site simply provides:

"Disputes between you and eBay regarding our services may be reported to eBay Customer Support. We encourage you to report all disputes between users to your local law enforcement

body.”<sup>51</sup>

The dramatic difference between the two sites is indicative of the difference in the law between the UK and the US. Whereas the US site contains extensive on-line ADR mechanisms which bind the user/member in the event of a dispute with *eBay.com*, the UK site contains only the polite advisory that the user/member report to “Customer Support.”

Still, on-line alternative methodologies are gathering momentum in the UK “A number of service providers are now up and running. *InterSettle.co.uk*, for example, has been taking case referrals and offering a blind/open bidding service since March 2001 and has the backing of a number of firms drawn from key industries such as the legal field and insurance sector. Other sites such as *esettle.co.uk* and *wecansettle.co.uk* offer similar bidding services and are reporting a steady stream of cases . . . and *onlineresolution.com* offers mediation in addition to a whole range of other dispute resolution techniques.”<sup>52</sup>

### The ‘Net’ Effect

American courts have, as a result of the differences in law, already experienced extensive exposure to the give and take of online ADR agreements. While it is not likely that dramatic changes in UK law will result in a replication of American-style ADR contracts, the lessons are nevertheless informative.

For example, arbitration clauses have not gone unchallenged in the world of online contracts in the U.S. In *Comb v. Paypal, Inc.*,<sup>53</sup> the U.S. District Court for the Northern District of California found that *Paypal’s* online arbitration agreement was “substantively unconscionable.” First, the agreement was found unconscionable because it refused to allow its members to consolidate claims, yet requires “arbitration in accordance with the commercial arbitration rules of the American Arbitration Association” with likely “prohibitive arbitration fees” notwithstanding amounts in dispute far less than the fees required for individual commercial arbitration before the AAA.<sup>54</sup> Second, the court found *Paypal’s* forum selection clause

difficult to justify, commenting:

“The record in this case shows that *Paypal* serves millions of customers across the United States and that the amount of the average transaction through *Paypal* is less than \$55.00 . . . . *Paypal* cites no California authority holding that it is reasonable for individual consumers from throughout the country to travel to one locale to arbitrate claims involving such minimal sums. *Limiting venue to Paypal’s backyard appears to be yet one more means by which the arbitration clause serves to shield Paypal from liability instead of providing a neutral forum in which to arbitrate disputes.*”<sup>55</sup>

Compare, however, the case, *Manning v. Paypal, Inc.*, decided by the US District Court for the Middle District of Pennsylvania.<sup>56</sup> Citing the same arbitration agreement, the court never reached the question of substantive unconscionability, concerned only with “whether the dispute between the parties falls within the language of the arbitration agreement.”<sup>57</sup> The court noted that the parties do not dispute the existence of the agreement, analyzing the case in terms of the scope of the arbitration clause, and ultimately finding that:

“[T]he language at issue in the instant case is very broad. By its own terms it states that arbitration is to be applied to any controversy or claim arising out of or relating to the Agreement or the provision of services” and that “the dispute certainly falls within the provisions of the arbitration agreement.”<sup>58</sup>

Two courts construing the same agreement thus arrive at two distinctly different results; the Pennsylvania court seemingly not at all troubled by the fact that its resident would have to travel literally 2,000 miles to Palo Alto, California to resolve what appears to be an \$87.00 claim.

In *Defontes et al. v. Dell Computers Corporation*,<sup>59</sup> the Rhode Island state court construed an arbitration agreement on Dell’s internet site in the form of a “browserwrap” agreement. The court found, *inter alia*, as in

*Specht v. Netscape Communications Corp.*,<sup>58</sup> that Dell’s “hyperlink, inconspicuously located at the bottom of the webpage . . . was not sufficient to put Plaintiffs on notice of the terms and conditions of the sale of the computer.”<sup>61</sup> The browserwrap could not, therefore, “bind the parties to the arbitration agreement.”<sup>62</sup>

The court went on to analyze the actual arbitration agreement, finding, apart from its earlier determination, that even if the parties were to be found to have entered the agreement, that it was substantively unconscionable. Citing *Comb v. Paypal*,<sup>63</sup> the court observed that Dell’s retention, like *Paypal’s* contract, of the unilateral right to “amend the User Agreement without notice or negotiation” while nevertheless binding the customer to all such future amendments, produced an “illusory and therefore unenforceable” agreement.<sup>64</sup>

In spite of the high-tech environment and paperless “virtual” world of the internet, courts have continued to apply traditional contract rules to questions of contract formation and enforcement. Two cases are illustrative. In *Raley v. Michael*,<sup>65</sup> the court was faced with an action between two *eBay.com* members.<sup>66</sup> The defendant asserted that the online arbitration agreement contained in the *eBay.com* membership agreement subsumed the plaintiff’s legal action, and argued that the case must be dismissed in favor of arbitration. Examining the question carefully, the court concluded that the *eBay.com* User Agreement did *not* govern the relationship between individual members, but only between the member and *eBay.com*, the court finding that “arbitration is only required as to disputes between subscriber and *eBay*.”<sup>67</sup> The court looked to *eBay.com’s* own interpretation of the User Agreement as set out in the site’s “FAQ” (frequently asked questions):

“Q. Why is there a User Agreement?

A. The User Agreement is a legal document that spells out the relationship between you and *eBay*. It outlines the services, pricing, Privacy Policy, and the buyer and seller relationship for

listing and bidding on items in eBay's auction format."

In a similar case, *Evans v. Matlock*,<sup>68</sup> the plaintiff was the winning bidder in an eBay.com online auction for an antique Dr. Pepper dispenser. The defendant, however, sold the machine to another, and in response to the resulting legal action, contended that suit must yield to arbitration. Once again, the eBay.com User Agreement, and specifically paragraph 17 ("Arbitration") was subject to the court's scrutiny. As the court aptly observed: "A resolution of this case requires the application of contract law."<sup>69</sup> The court examined the language of the User Agreement, noting that it provides that "eBay is only a venue, and that 'we are not involved in the actual transaction between buyers and sellers.'"<sup>70</sup> The court found that the User Agreement was unambiguous and that the defendant's attempt to create an ambiguity where there was none, renders the agreement "enforceable according to its terms." "The Agreement," said the court, "cannot be construed, as insisted by appellant, to require that disputes between users must be arbitrated in San Jose, California."<sup>71</sup>

Thus, traditional rules of contract appear to hold sway despite the decidedly non-traditional environment within which such contracts are found. Still, the virtual environment creates potential for variations in legal insight, and continued demand for creative undertaking.

The "net" effect is dramatically evidenced in the staggering numbers of users engaged in internet activity. eBay, for example, is thought by some to be among the ten most successful websites. It had 34.1 million registered users in the U.S. in 2001<sup>72</sup> and "nearly 50 million people around the world" in 2002.<sup>73</sup> Other successful web sites include Citibank's financial site (*citibank.com*), with 9 million user accounts; Enron's site (*enrononline.com*) with more than 5,600 transactions daily; and Progressive insurance (*progressive.com*), selling more than \$170 million in insurance over the net in 2001.<sup>74</sup>

In the face of this continuing shift to

e-commerce, a greater number of persons in the U.S. will find themselves party to "User Agreements" or "Terms and Conditions" as a result of a virtual "click" — agreements which include, minimally, limitations of contractual liability, as well as a growing number of mandatory arbitration clauses. The proliferation of e-commerce will necessarily drive others, in other jurisdictions, to online alternatives, commonly referred to as "ODR," or "online dispute resolution."<sup>75</sup>

Will e-commerce eventually remove the courthouse or other forms of traditional dispute resolution from the mainstream equation? Not likely, but it marks a distinctive cultural shift, which, while below the everyday radar screen, is tangibly reaching into everyday lives to bind an ever-increasing number of persons to cyber-agreements about which many remain unaware.

1 Mohamed Wahab, "Globalisation And ODR: Dynamics Of Change In E-Commerce Dispute Settlement," 12 *International Journal of Law and IT* 123 (March 2004).

2 *Id.*

3 Phillip Morrison, "E-Commerce in the Construction Industry," *Construction & Engineering Law* (7.1)(7) (April 5, 2002).

4 See, Mohamed Wahab, "Globalisation And ODR: Dynamics Of Change In E-Commerce Dispute Settlement," *International Journal of Law and IT*, (IJI&IT 2004.12(123)) (March 2004).

5 Phillip Morrison, "E-Commerce in the Construction Industry," *Construction & Engineering Law* (7.1)(7) (April 5, 2002).

6 *Id.*

7 *Id.*

8 *Ticketmaster Corp. v. Tickets.Com*, 2003 U.S. Dist. LEXIS 6483 (U.S.D.C., C.D. Cal. 2003); *Remanded* 248 F.3d 1173 (9<sup>th</sup> Cir. 2001).

9 56 Va. Cir. 87, 2001 Va. Cir. LEXIS 444 (March 16, 2001).

10 *Id.*

11 Mark Tamminga, "Technology in Practice: E-Definitions: What's Shoehorned into that Software Package?" 29 ABA, Law Practice Management 18 (May 2003/June 2003).

12 Phillip Morrison, "E-Commerce in the Construction Industry," *Construction & Engineering Law* (7.1)(7) (April 5, 2002). See also "Supply of Software: Copyright and Contract Issues" 10(23) *International Journal of Law and IT* (March 2002).

13 *Id.*

14 See, *Thomson v James* (1855) 18D 1.

15 See, *Brinkbon Ltd v Stahag Stahl Un*

*Stahlwarenhandelsgesellschaft* (1983) 2 AC 34.

16 Phillip Morrison, "E-Commerce in the Construction Industry," *Construction & Engineering Law* (7.1)(7) (April 5, 2002).

17 Gregory E. Maggs, "American Law in a Time of Global Interdependence: U.S. National Reports to the XVth International Congress of Comparative Law: Section VI Regulating Electronic Commerce," 50 Am. J. Com. L. 665 (Fall, 2002).

18 *Id.*

19 *Id.*

20 *Id.*

21 "For example, the website may contain a button saying "click here for legal terms," which the purchaser may click or ignore." *Id.*

22 See, e.g., *Brower v. Gateway 2000*, 246 A.2D 246, 676 N.Y.S.2d 569, 37 U.C.C. Re. Serv.2d (Callaghan) 54. (1998). The court found valid an enclosed arbitration agreement which gave the buyer the option of returning the order-by-mail computer within the first 30 days after purchase. The court noted *Hill v. Gateway 2000*, 105 F.3d 1147.

23 Arthur Pryor, "E Commerce," *IT Law Today* 7.10(2) (November, December 1999).

24 *Id.*

25 *Id.*

26 Ruth Bamford, "E-Commerce: Introducing the European Extra-Judicial Network," *IT Law Today (ITLT 10.6(16))*, (August 2002).

27 *Id.*

28 [http://www.cci-nct.org.uk/index/using\\_your\\_rights-2/adr.htm](http://www.cci-nct.org.uk/index/using_your_rights-2/adr.htm)

29 "EC Developments -- Developments In Alternative Dispute Resolution In The EC," *Finance & Credit Law (F&CL 2.5(6))* (5 May 2000).

30 [http://www.cci-nct.org.uk/index/using\\_your\\_rights\\_2/adr.approved\\_U.K\\_adr\\_bodies/legal\\_services.htm](http://www.cci-nct.org.uk/index/using_your_rights_2/adr.approved_U.K_adr_bodies/legal_services.htm)

31 Ruth Bamford, "E-Commerce: Introducing the European Extra-Judicial Network," *IT Law Today (ITLT 10.6(16))*, (August 2002).

32 <http://faq.support.overstock.com/faq.asp?docid=11>

33 It is generally acknowledged that "access to a web site, with knowledge or presumptive knowledge of [terms of use], constitutes an enforceable contract between the site owner and the visitor, with acceptance of the site owner's terms." David M. Fritch, "Click Here for Lawsuit - Trespass to Chattels in Cyberspace," 9 J. Tech. L & Pol'y 31, 37 (June 2004).

34 Emphasis added.

35 The so-called "broad" arbitration clause sweeps all disputes between the parties into the arbitration venue and thus waives one's right to proceed before the courts as regards those disputes. Most recently, however, the US Supreme Court in *Wright v. Maritime Service Corporation*, 525 U.S. 70; 119 S.Ct. 391; 142 L.Ed.2w 361, 371 (1999) has found, as regards enforceability of statutory rights arising under Title VII and other civil

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- rights statutes in the face of a collective bargaining agreement (CBA), that the language of the CBA "must be particularly clear" in order to bring such rights under the aegis of the CBA's arbitration provisions.
- 36 <http://www.amazon.com/excc/obdios/tg/browse/-/508088/104-7645456-7984705>
- 37 <http://pages.ebay.com/services/index.html?ssPageName=h:h:serv:US>
- 38 Emphasis added. <http://pages.ebay.com/help/policies/user-agreement.html?fromFeature=My%20eBay&ssP>
- 39 eBay.com *User Agreement*, ¶ 17 <http://pages.ebay.com/help/policies/user-agreement.html>
- 40 *Id.*
- 41 *Id.*
- 42 *Id.*
- 43 *Id.* at 17.1.
- 44 *Id.*
- 45 eBay.com *User Agreement*, ¶ 17 Source: (<http://pages.ebay.com/help/policies/user-agreement.html>) at ¶ 17.2.
- 46 *Id.*
- 47 eBay.co.UK *User Agreement*, ¶ 3.5. Source: (<http://pages.ebay.co.U.K/help/policies/user-agreement.html?ssPageName=f:f:U.K>)
- 48 *Id.* at ¶ 11.
- 49 *Id.* at ¶ 10.
- 50 *Id.* at ¶ 12.
- 51 *Id.* at ¶ 15.
- 52 Bryan Clark, "ODR: The New Kid in Town," *New Law Journal (NLJ)* 152.7056(1710) (15 November 2002).
- 53 218 F.Supp. 2d 1165 (N.D. Cal. 2002).
- 54 *Id.*
- 55 *Id.* Emphasis Added.
- 56 2001 U.S. Dist. LEXIS 23410 (Case No. 01-CV-993, August 7, 2001).
- 57 *Id.*
- 58 *Id.*
- 59 2004 R.I. Super. LEXIS 32, 52 U.C.C. Rep. Serv. 2d (Callaghan) 823.
- 60 *See*, n. 19, *supra*.
- 61 *Defontes et al. v. Dell Computers Corporation*, 2004 R.I. Super. LEXIS 32, 52 U.C.C. Rep. Serv. 2d (Callaghan) 823 (2004).
- 62 *Id.*
- 63 *See*, n. 46, *supra*.
- 64 *Defontes et al. v. Dell Computers Corporation*, *supra*, n. 52.
- 65 56 Va. Cir. 87; 2001 Va. Cir. LEXIS 444 (2001).
- 66 Plaintiff is a resident of Virginia and Defendant, a resident of Utah. Plaintiff purchased an automobile through eBay, and it is this transaction which gave rise to the suit. eBay was not a named party.
- 67 *Id.*
- 68 *Interlocutory Appeal, Court of Appeals of Tennessee at Nashville* (No. M2001-02631-COA-R9-CV, filed December 23, 2002).
- 69 *Id.*
- 70 *Id.*
- 71 *Id.*
- 72 *See*, Christopher R. Heun and Alorie Gilbert, *Web Sites That Work, InformationWeek*, p. 28 (August 27, 2001).
- 73 Jerry Adler, *et al*, *The eBay Way of Life, Newsweek*, p. 50 (U.S. Edition, June 17, 2002).
- 74 Christopher R. Heun and Alorie Gilbert, *Web Sites That Work, InformationWeek*, p. 28 (August 27, 2001).
- 75 Mohamed Wahab, "Globalisation And ODR: Dynamics Of Change In E-Commerce Dispute Settlement," *International Journal of Law and IT, (IJL&IT 2004.12(123))* (March 2004).

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