B-2-C PRE-DISPUTE ARBITRATION CLAUSES, E-COMMERCE TRUST CONSTRUCTION AND JENGA: "KEEPING EVERY COG AND WHEEL"

by

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In its pro-consumer stance the EU has reaffirmed its commitment to ban pre-dispute arbitration clauses in its new Proposals for a Directive on ADR, and a Regulation on a Common European Sales Law. This course of direction has begun despite the fact that cross border B-2-C e-commerce sales are below expectations. The EU does not need reminding building trust in e-commerce is essential. However, trust construction needs to be re-examined from the perspective of ODR if a genuine concern exists to build the right form of trust. This article adopts a multi-disciplinary approach to re-assess the legitimacy of pre-dispute arbitrations clauses in the e-B-2-C low-value/high-volume Clip-Wrap context. What is proposed is to view them from an interest-based system trust approach. Under this reframing they are regarded as strategic "imperative cogs", which are essential in building system trust. These need to work with crowdsourced consumer-centric business models to produce sustainable system trust and predictability via perceived fairness.

KEYWORDS

Pre-dispute/mandatory arbitration clauses, online dispute resolution, ADR, ODR, e-commerce, consumer trust, system trust, institutional legitimacy, crowdsourced ODR, Amazon.com

1. INTRODUCTION

> "The land is one organism. Its parts, like our own parts, compete with each other and co-operate with each other.

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> The competitions are as much a part of the inner workings as the co-operations. You can regulate them--cautiously--but not abolish them." – Aldo Leopold[1]

Jenga is a game that tests a structure's integrity and equilibrium by removing its foundations, whilst simultaneously building on top of it. This oxymoronic idiosyncrasy is not otiose, but rather is linked to an end-game – skeletal efficiency, ridding the system of the superfluous, inefficient and the unproductive. Keeping only those components that provide a necessary function, translated as having an essential symbiotic disposition when interconnected with other components, is key to future development and progress. Furthermore, the loss of unnecessary components may be an absorbable loss, can the same however be said for one that directly/indirectly influences the chassis? Concerning such, any misunderstandings or misapplications leading to intrusions for modification can alter the 'precarious state of equanimity', bringing the whole structure tumbling down.[2]

This metaphor fits perfectly with the course of direction adopted by the EU. The EU is abolishing pre-dispute arbitration clauses while at the same time wanting to construct better workings to facilitate e-B-2-C dispute resolution. This is all in the midst of lamenting for trust enhancement in e-commerce. At present the EU views pre-dispute arbitration clauses from its long-standing ideological narrative of 'consumer protectionism'. It views such clauses as tools gone rogue by businesses, stemming from the underlying state of inequality of bargaining powers. Businesses use them to have greater control in settling future disputed claims. Accordingly, in its latest proposals for a Regulation on a Common European Sales Law and a Directive on Alternative Dispute Resolution, the EU has indicated a ban with possible exceptions on pre-dispute arbitration clauses.[3] This move is highly

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1 Leopold, Aldo. Sand County Almanac, and Sketches Here and There (1st edition ed.1 New York: Oxford University Press. 1949) 152. Available at: <http://leopold.wilderness.net/aboutus/aldo.htm.> last accessed: 13/12/2012.

2 This metaphor was adopted from an online comment. Mike, 'Keeping Every Cog And Wheel', 10,000 Birds, posted 13/08/2007

Available at: <http://10000birds.com/keep-every-cog-and-wheel.htm> last accessed 29/12/12

3 Commission, 'Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR)' COM(2011) 793/2. Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes (Regulation on Consumer ADR)' C(2011) 794/2. See also Art. 84(d) of the Commission Proposal for a Regulation on Common European Sales Law COM(2011) 635 final.

problematic especially in the context of the rising popular business practise of instantaneous e-B-2-C low-value/high volume clip-wrap agreements.

Platforms like *eBay* and *Amazon*, through their own private renderings, have revolutionised how low value products are bought and sold across borders. In doing so, certain "intra-contractual" traditions, practices, and expectations are emerging forming norms that are shaping consumer and seller behaviour and the resolution of disputes.[4] These are intrinsic to the sensitive peripheral nervous system, infused in the ecological design between ODR and e-commerce. This nervous system is symbiotically inter-connected to their myriad legal/non-legal organs, which if impaired can lead to the loss of trust in them. Can proscribing pre-dispute arbitration clauses therefore be done so austerely, without considering its con-sequences on the ODR system, e-commerce, and trust?

This article re-examines the EU's Jenga policy and questions whether pre-dispute arbitration clauses should be banished to the dustbin of history, especially when the emerging framework for ODR mechanisms are still in their infancy. It will analyse the EU and US approaches, and propose a re-framing that views them as "imperative cogs" in low value/high volume transactions, contributing to overall system trust.

2. CURTAILING THE REPEAT PLAYER PHENOMENON

2.1 THE PERSISTENT PROBLEM OF "REPEAT PLAYERS" AND ACCESS TO JUSTICE

It is argued the traditional litigation system is intrinsically unbalanced as it is grounded upon a perpetual cycle of insurmountable cost and protraction.[5] For Galanter this imbalance of power stems from the deliberate choices made by the "repeat players", the "Haves".[6] Empowered by their accumulated resources, they are able to inhibit litigation and thereby subjugate the "one-shoters", the less privileged "Have-Nots".[7] This long-term power orgy of strategic repetitiveness and subjugation leads to their inevit-

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4 Schmitz, A., 'Consideration Of "Contracting Culture" In Enforcing Arbitration Provisions' (2007) Vol.81 St John's Law Review, 123-172, 148-154.

5 Bok, Derek, C., 'A Flawed System of Law Practice and Training' (1983) 33 J. Of Legal Educ. 570, 570-585

6 Galanter, Marc., 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Soc'y Rev. 95, 98-100

7 Galanter, Marc., 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Soc'y Rev. 95, 98-100

able and constant success.[8] Ameliorating patterns of technological progress have inevitability meant repeat-playing has reshaped and reconfigured itself to reflect the times.[9] Now, it is argued repeat players utilise pre-dispute arbitration clauses in contracts as personalised instruments, forcing consumer proclivity to accept peace rather than justice. As a blank canvass they are designed unilaterally to favour a business's substantive rights and aspirations.[10] In many cases they consolidate objective control via determining the Neutral, the forum, the law, and above all "preclude consumers from the alternative cost-spreading technique of class actions".[11] Click-wrap boilerplate contracts vacuum consumer choice by imposing clandestine mandatory arbitration clauses "on a take-it-or-leave-it basis", leaving no opportunity to reconsider litigation.[12] The stunted party would be less willing to face-off in a fluid system contaminated by free riders, settling for far less than the equitable.[13] This coherence of a predetermined procedural framework is a major point of contention. It not only stifles access to justice by the lack of real consent, restricts bargaining capabilities, prevents aggregate claims and approach to the courts.[14] It also destines a compromised and inconsistent procedural fairness throughout the arbitration process.

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[8] Galanter, Marc., 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Soc'y Rev. 95, 98-100

[9] Grossman, J. B., Kritzer, H. M., Macaulay, S., 'Do the "Haves" Still Come Out Ahead?' (1999) 33 Law & Soc'y Rev. 803, 809

[10] Sternlight, J. R., 'Creeping Mandatory Arbitration: Is It Just?' (2005) 57 Stan. L. Rev.1631

[11] C. F. Rickett and G. W. Telfer (Eds.), International Perspectives On Consumers' Access To Justice. (Cambridge, Cambridge University Press, 2003) 11; Schiavetta, S., 'Does the Internet Occasion New Directions in Consumer Arbitration in the EU?' (2004) 3 The Journal of Information, Law and Technology (JILT)

Available at: <http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004_3/schiavetta/> last accessed: 31/07/2012 ; Eisenberg, T., Miller, G. P., and Sherwin, E., 'Arbitration's Summer Soldiers: An Empirical Study Of Arbitration Clauses In Consumer And Non-Consumer Contracts' (Summer 2008) 41:4 University of Michigan Journal of Law Reform, 871. (Authors argue empirical studies indicate primary use of mandatory arbitration clauses by business is to prevent aggregate claims.)

[12] Alderman, Richard M., 'Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform' (2006) Journal of Texas Consumer Law 58, 59; Sternlight, J. R., 'Creeping Mandatory Arbitration: Is It Just?' (2005) 57 Stan. L. Rev.1631, 1631-1632; Schwartz, D. S., 'Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration' (1997) 33 Wis. L. Rev., 37, 72.

[13] Menkel-Meadow, C., 'Do the "Haves" come out ahead in Alternative Justice Systems: Repeat Players in ADR' (1999-2000) 15 Ohio St. J. on Disp. Resol. 19, 52-53.

[14] Drahozal, C. R., and Rutledge, P. B., 'Contract and Procedure' (Summer 2010) Vol. 94, No.1, Marq. L. Rev. pp.103-1172, 1170; Schmitz, Amy J. 'Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms' (2010) 15 Harv. Negotiation L. Rev. 115, 126; Even Sternlight admits the evidence has been anecdotal. See Sternlight, J. R., 'In Defense of Mandatory Binding Arbitration (If Imposed on the Company)' (Fall 2007) Vol. 8 Issue 1. Nevada Law Journal, pp. 82-106, 83; Sternlight, J. R. (2012) 'Tsunami: AT&T Mobility v. Concepcion Impedes Access To Justice' Vol 90 Oregon Law Review, p703.

The counter argument states the philosophical fabric of ADR/ODR is to settle disputes quickly, cheaply and efficiently as a result of a less formal and flexible system.[15] This would not only financially benefit consumers but also substantively benefit businesses. By a more proficient planning of resources based on predictable outcome of resolutions, businesses are able to re-strategise their assets. It is therefore only fair to expect to see businesses aspire in their extravagant use of pre-dispute arbitration clauses.

The notion of diffused entities influencing the legal landscape to determine system outcomes inherently implies any attempt towards a counterbalance would be an exercise in fatality. As Judge Posner alluded to in *Russell v. Acme-Evans Co* no matter what laws are adopted to spurn inequality between the parties, the end result is predetermined by "broader structures in society that work in the opposite direction".[16] This fatalistic attitude is eclipsed by the direction of EU policy which has been anything but the contrary.

2.2 THE EU PROTECTIONIST APPROACH

The omnipotent Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts robustly combats business encroachment on consumer rights in contracts.[17] Article 3(1) of the Directive obliges the need for consensual negotiated terms. So, "a contractual term which has not been individually negotiated shall be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations". Subsection (3) Annex 1(q) provides for a presumption of unfairness for terms that would "exclude or hinder the consumer's right to take legal action or exercise any other legal remedy". Moreover, Article 6(1) of the Directive establishes the mandate for Member states to purify consumer contracts from binding unfair terms.[18] The CJEU has incrementally furthered this approach by bestowing national courts with such a determinant. It held in Elisa Maria Mostaza Claro v Centrol Movil Milenium[19] the Spanish national court had the requisite right to "determine on its own motion" what constitutes an unfair arbitration agree-

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[15] Schwartz, D. S., 'If You Love Arbitration, Set it Free: How "Mandatory" Undermines Arbitration' (Fall 2007) 8 Nev. L. J. 400.

[16] Russell v. Acme-Evans Co., 51 F.3d 64, 70-71 (7th Cir. 1995);

[17] See also an influential soft law in the form of Commission Recommendation 98/257 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [1998] OJ L 115/31.

[18] C-237/02 Freiburger Kommunalbauten [2004] ECR I-3403, para. 22.

[19] C-168/05 Elisa Maria Mostaza Claro v Centrol Movil Milenium [2006] ECR I-10421

ment under the Directive. In *Asturcom Telecomunicaciones SL v Cristina Rodrı´guez Nogueira*, the CJEU mandated an inquisitorial role on the national court.[20]

These judgements allow national courts as ex officio to determine the permissibility of such clauses, even post-judgement of the arbitration proceedings. However, by giving leverage to national courts to determine the validity of such clauses on grounds of public policy, the CJEU has coronated them with an orifice of profound surgical discretion. Above all, such a move creates four problems affecting the character and future of online arbitration.

Firstly, such ascension by the national courts problematically yields arbitration to a judicial process that goes against its inherent design and resolve. Reference to arbitration over litigation has always been made on the premise of its quick, fair and efficient finality provisions. Allowing national courts to meddle in arbitral affairs assimilates the distinction between these two processes by incrementally neutralising arbitration's informal expeditious disposition.[21]

Secondly, it is difficult to fathom the logistics of applicability to a low value/high volume online environment. In the ODR environment the dynamics of e-commerce dictate the need to juggle low value/high volume transactions with the quality of process and efficiency, meshed in the labyrinth of an uncertain cross-border reality. How can such business models be under the threat of continuous ubiquitous litigation?[22] Reich argues this is entirely dependent on whether arbitration clauses are 'internal' or 'cross-border'.[23] Whittaker however explains the complexity involved in validation and determination by consumer choice.[24] Allowing consumers "the choice between regimes (national law/law of habitual residence as

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[20] Asturcom Telecomunicaciones SL v Cristina Rodrı´guez Nogueira, 6 October [2009] Case C-40/08, para 38. This inquisitorial role was further affirmed C-243/08, Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi [2009] ECR p. I-4713, para 49; and C-137/08, Pénzügyi Lízing Zrt v. Ferenc Schneider. – OJ C 13, 15.1 [2011] p. 2.

[21] Piers, M., 'Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations' (2011) Vol. 2, No. 1 Journal of International Dispute Settlement, pp. 209–230, 227-228

[22] Twigg-Flesner, C., 'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?' – A way forward for EU Consumer Contract Law' (May 2011) Vol. 7 No. 2 European Review of Contract Law, pp235-256, 253-256

[23] Norbert Reich, 'More clarity after Claro?', (2007) 1 Eur. Rev. Contract L., 41, 53-55, 60-61; See also Micklitz, H-W., Reich, N., Rott, P., Understanding EU Consumer Law (Intersentia, Antwerp, 2009), paras 7.41, 8.25

[24] Note Whittaker criticises the aspect of consumer choice generically although it stems from the provisions of the CESL. Whittaker, S., 'The Proposed 'Common European Sales Law': Legal Framework and the Agreement of the Parties' (2012) 75(4) MLR 578–605, 601-602

against the CESL)" further exacerbates the problem of fluency and predictability.[25]

Thirdly, judicialising the arbitrary process to the idiosyncratic legal scrutiny and framework of each nation state, without 'clear and common minimum grounds on which such standards should operate', introduces ODR cross-border legal uncertainty.[26] Incoherent judgments concerning similar ODR situations across borders may develop inharmonious law.[27] Finally, purging unfair terms unconnected and immaterial to the point of law debated can lead to dehydrating the potency and appeal of arbitration.[28] For example, it is assumed the inevitability of a pro-consumer result could lead businesses to take up prescriptive measures. Even so, how feasible is this especially when the incentive to conform is difficult to pin down?[29] On the contrary, it is such terms/clauses that provide the incentive in the first place.[30] Consequently, it could deter businesses from using arbitration altogether.[31]

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[25] Whittaker, S., 'The Proposed 'Common European Sales Law': Legal Framework and the Agreement of the Parties' (2012) 75(4) MLR 578–605, 601-602; Whittaker, S. 'The Optional Instrument on European Contract Law and Freedom of Contract' (2011) 7 ERCL 371; Cartwright, J., 'Choice is Good: Really?' (2011) 7 ERCL 335.

[26] Mechantaf, K., 'Balancing protection and autonomy in consumer arbitrations: an international perspective' (2012) 78(3) Arbitration, 232-246, 245-246. Mechantaf's argument to discriminate between the intellectual capacities of the consumer, to distinguish a weaker/unaware consumer from a stronger/aware one, in order to determine the applicability of the arbitration clause seems like an unquantifiable variable. This in itself would cause disharmony between the already varying states.

[27] Norbert Reich, 'More clarity after Claro?', (2007) 1 Eur. Rev. Contract L., 41, 44-49

[28] Piers, M., 'Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations' (2011) Vol. 2, No. 1 Journal of International Dispute Settlement, pp. 209–230, 227-228

[29] Although Schillig argues the loss of custom (market failure), it is difficult to fathom how adopting a 'Market for Lemons' approach would fare any better, especially when it represents the progeny of action emanating from the belief and philosophy of 'inequality of bargaining power'. See further Schillig, M., 'Inequality Of Bargaining Power Versus Market For Lemons: Legal Paradigm Change And The Court Of Justice's Jurisprudence On Directive 93/13 On Unfair Contract Terms' (2008) 33(3) E.L. Rev., 336-358,

[30] Schmitz, A., 'Consideration Of "Contracting Culture" In Enforcing Arbitration Provisions' (2007) Vol.81 St John's Law Review, 123-172, 133.

[31] Graf, B.U., and Appleton, A.E., 'ECJ CASE C 40/08 Asturcom – EU Unfair Terms Law Confirmed As A Matter Of Public Policy' (2010) Vol. 28, No. 2., ASA Bulletin, 413, 417-418.

To the contrary, Reich and Cortes argue this does not prevent other forms of cheaper finality-absent ODR mechanisms (i.e. 'voluntary ombudsman', mediation or assisted negotiation) from being utilised. See further Norbert Reich, 'More clarity after Claro?', (2007) 1 Eur. Rev. Contract L., 41, 59-61; Norbert Reich, "Negotiation and Adjudication. Class Actions and Arbitration Clauses in Consumer Contracts", ed by Fabrizio Cafaggi and Hans-W. Micklitz, New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement (Intersentia, Hague, 2009) 345-357; Cortes, P., Online Dispute Resolution for Consumers in the European Union (Routledge, London , 2011) 107-112, 198-206.

2.3 THE US LAISSEZ FAIRE APPROACH

Conversely, the US approach is all but liberal in that a presumption of validity exists for arbitration clauses. The Federal Arbitration Act allows courts to treat arbitration clauses like any other contractual clause and enforce them based on specific performance. In Southland Corp. v. Keating 'it was interpreted as a declaration of a national policy favouring arbitration that withdrew the power to require a judicial forum which the contracting parties agreed to resolve by arbitration'.[32] Since, US case law has developed in a liberal fashion.[33] Consumers have to however refer to "applicable contractual defences, such as fraud, duress, or unconscionability, to invalidate arbitration agreements".[34]

Unconscionability is a two limb defence criterion that has seen more than its fare share of cases in determining enforceability.[35] It consists of procedural and substantive unconscionability, and is seen as having a high threshold for determination.[36] The former questions the shortcomings in the actual formation of the contract itself. Once this is found, the next question is to determine whether such unconscionability is substantial. This is activated when there is an imbalance of power within the contractual terms.

In the e-commerce clip-wrap context the determination of unconscionability has been anything but coherent for the low value/high volume enterprise.[37] Above all, such incoherence can be attributable to two underlying causes. Firstly, it is the US courts that get to determine unconscionability of the arbitration terms and not the arbitrators themselves.[38] Online commercial platforms, like eBay and Amazon, have free integrated arbitration systems provided by internal mechanisms or external subsidiaries. For low value contracts it would be unfeasible to undertake an expensive enterprise

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[32] Southland Corp. v. Keating, 465 U.S. 1 (1984) 10-12.

[33] Tasker, T., and Pakcyk, D., 'Cyber-Surfing On The High Seas Of Legalese: Law And Technology Of Internet Agreements', (2008) Vol. 18 Alb. L.J. Sci. & Tech, pp 79-149, 147-148.

[34] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). See also Smith, S., 'Mandatory Arbitration Clauses In Consumer Contracts: Consumer Protection And The Circumvention Of The Judicial System' (2001) 50 DePaul L. Rev. 1191, 1236-1237.

[35] Smith, S., 'Mandatory Arbitration Clauses In Consumer Contracts: Consumer Protection And The Circumvention Of The Judicial System' (2001) 50 DePaul L. Rev. 1191, 1237-1241.

[36] Smith, S., 'Mandatory Arbitration Clauses In Consumer Contracts: Consumer Protection And The Circumvention Of The Judicial System' (2001) 50 DePaul L. Rev. 1191, 1237-1241.

[37] Tasker, T., and Pakcyk, D., 'Cyber-Surfing On The High Seas Of Legalese: Law And Technology Of Internet Agreements', (2008) Vol. 18 Alb. L.J. Sci. & Tech, pp 79-149, 147-148.

[38] Friedman, S. 2011 'Arbitration Provisions: Little Darlings and Little Monsters', 79 Fordham L. Rev. 2035, 2067. Cf. Horton, D. 'Unconscionability Wars' (2012) Vol. 106 No.1, Northwestern University Law Review, pp387-408, 394.

of accessing justice via court proceedings when is it offered for free. Secondly, the threshold of substantive unconscionability would be low for e-commerce where immediacy, efficiency, and expediency are so intrinsic to its function. Such a reality, where quick arbitration and easy refunds must be juxtaposed with the risks involved to businesses with low value cross border transactions, necessitates incentivising businesses to undergo this risk through greater control of consumer cash and its ultimate destiny i.e. chargeback schemes and withholding cash until disputes are settled. This would bring them in direct conflict with substantive unconscionability. As a result, US courts have not adjusted to this virtual paradigm shift as anticipated, even though this course of direction is nevertheless inevitable.[39]

3. REFRAMING THE DEBATE: AN INTEREST-BASED SYSTEM TRUST APPROACH

3.1 ONLINE TRUST CONSTRUCTION AS AN EMBEDDED STRATEGIC DETERMINANT: THE IMPERATIVE OF SYSTEM TRUST IN ODR

Trust is an essential, yet an elusive and difficult concept to define.[40] It is a highly complex and a multi-dimensional phenomenon, which means different things to different people.[41] The EU has repeatedly attached its importance to the future growth of e-commerce.[42] However, no surgical analysis has gone into what this concept entails. Yet, whenever consumer confidence is mentioned in EU communications it is mentioned from the parochial narrative of the consumer.[43] It is mentioned from the perception of what the

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[39] Tasker, T., and Pakcyk, D. 2008, 'Cyber-Surfing On The High Seas Of Legalese: Law And Technology Of Internet Agreements', Alb. L.J. Sci. & Tech, Vol. 18, pp 79-149; Trakman, L.E. 2007, 'Adhesion Contracts and the Twenty First Century Consumer', Berkeley Electronic Press, at 85-86. Available online at: http://law.bepress.com/unswwps/flrps/art67/, last accessed: 03/01/2013. Ponte argues for the need to give more simplified information to consumers in an accessible manner, to legitimise the existence of pre-dispute arbitration clauses in the online context. See Ponte, L. M. 2011, 'Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer "Products"', Ohio St. J. on Disp. Resol. Vol. 26, no.1, 119, 159.

[40] Ho, B. C. & Oh, K., 'An empirical study of the use of e-security seals in e-commerce' (2009) Vol. 33 (4) Online Information Review, pp655-671, 656; Its abstract character can be seen in Bruce Schneier, Liars and Outliers: Enabling The Trust That Society Needs To Thrive (Indianapolis, John Wiley & Sons, 2012) 243-249

[41] Ho, B. C. & Oh, K., 'An empirical study of the use of e-security seals in e-commerce' (2009) Vol. 33 (4) Online Information Review, pp655-671, 656.

[42] Guerra, G. A., Zizzo, D., Dutton, W. & Peltu, M., 'Economics of Trust in the Information Economy: Issues of Identity, Privacy and Security' (2003) OECD Information Security and Privacy Working Paper No. JT00142557, OII Research Report No. 1, p. 2.

consumer is thinking and feeling.[44] The question is should the EU use this type of trust, an exogenic compass of direction, as its leading narrative? If trust is multi-dimensional then why limit it to the frame of the consumer. This is especially so when e-commerce itself revolves as a system. Consumers want to trust in the system that provides for them.[45]

Conversely, trust can be taken as an embedded strategic determinant from the viewpoint of system trust. McKnight et al describe consumer confidence as a "multi-dimensional" concept, measured by the level of perceptive trust that exists in each stakeholder within the overall transaction process.[46] This "multi-disciplinary" form of trust exists in the three main transactional stakeholders, namely the consumer, the seller and the system infrastructure. Firstly, "*dispositional trust*" relates to the idiosyncrasy of the consumer, how receptive the consumer is to developing trust in sellers online. Secondly, "*interpersonal/dyadic*" trust concerns the specific interaction with the seller, whether the seller's behaviour and service is deemed trustworthy. Finally, "*system/institutional trust*" involves consumer perceptions of "*favourable conditions*" that advance online commercial activity, which exist in the inter-space between the consumer and seller.[47]

System trust itself is fashioned by three interdependent sub-constructs namely "structural assurance", "facilitating conditions" and "situational normality".[48] Structural assurance concerns consumer perceptions on the institutional framework of e-commerce that ought to provide the necessary

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[43] An example of this can be seen in: European Commission Staff Working Document, 'Bringing e-commerce benefits to consumers', SEC(2011) 1640 final, 11 January, 2012; accompanying Commission Communication, COM(2011) 942 final, 2012, p. 30.

[44] European Commission Staff Working Document, 'Bringing e-commerce benefits to consumers', SEC(2011) 1640 final, 11 January, 2012; accompanying Commission Communication, COM(2011) 942 final, 2012, p. 30.

[45] Pavlou, P.A., Tan, Y. H., and Gefen, D., 'The Transitional Role of Institutional Trust in Online Inter-organizational Relationships' (2002) Proceedings of the 36th Hawaii International Conference on System Sciences (HICSS'03). Available at: <www.citeseerx.ist.psu.edu/> last accessed: 29/04/2012. Even Schultz argues taking trust from this narrative has not been helpful. See Schultz, T., 'Online Arbitration: Binding or Non-Binding?' (2002) ADR Online Monthly, 1-22, at 4. Available at: <www.ombuds.org/center/adr2002-11-schultz.html> last accessed: 12/07/2012.

[46] D.H. McKnight, D. H., Cummings, L. L., Chervany, N. L., 'Initial Trust Formation in New Organizational Relationships' (1998) 23 (3) Academy of Management Review, pp473–490, 477-482; McKnight, D. H., Chervany, N. L., 'What Trust Means in E-Commerce Customer Relationships: An Interdisciplinary Conceptual Typology' (Winter 2001) Vol.6, No.2 International Journal of Electronic Commerce, pp35-59, 45-47; See also Tan, F., and Sutherland, P., 'Online Consumer Trust: A Multi-Dimensional Model' (2004) 40 2(3) Journal of Electronic Commerce in Organisations, 40-58,

[47] McKnight, D. H., Chervany, N. L., 'What Trust Means in E-Commerce Customer Relationships: An Interdisciplinary Conceptual Typology' (Winter 2001) Vol.6, No.2 International Journal of Electronic Commerce, 35-59, 45-47

"protective guarantees, contracts, regulations, promises, legal recourse, processes, or procedures" to support transactional success and consumer satisfaction. Pavlou et al add "facilitating conditions" as an intermediate subconstruct to develop system trust.[49] These entail 'underlying non-governance mechanisms', shared standards, relationship values, and common beliefs about behaviours and goals' in the online environment that facilitate the execution of behaviour.[50] McKnight et al close with "*situational normalcy*" as the last sub-construct which refers to perceptions of an online setting fulfilling customary and common expectations, giving the overall feeling that things are normal and as they ought to be in order for a successful exchange. Although dispositional and interpersonal trust is crucial to increase functional tranquillity, system trust is seen more if not equally as important because of its catalytic tendencies and its top-down operational management of the status quo.[51]

Consumers want efficient, effective and fair ODR mechanisms in place to facilitate their smooth experience online. The ecological design of ODR mechanisms is pertinent in providing a structural assurance to facilitate trust in the system infrastructure. The correct building blocks of the ODR mechanism are therefore essential to achieving this. What these building blocks consist of in terms of who is the "invisible hand" that controls the mechanism e.g. government, platform provider, or public; whether these building blocks encapsulate formal or informal rules and norms; and whether the intra-mechanisms of adjudication are procedurally fair, plays an essential role.[52] Furthermore, the values and norms that are produced by

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[48] Ratnasingam, P., Gefen, D., Pavlou, P.A., 'The Role of Facilitating Conditions and Institutional Trust in Electronic Marketplaces' (2005) Vol.3 No.3. Journal of Electronic Commerce in Organisations, 69-82, 69-71.

[49] Pavlou, P.A., Tan, Y. H., and Gefen, D., 'The Transitional Role of Institutional Trust in Online Interorganizational Relationships' (2002) Proceedings of the 36th Hawaii International Conference on System Sciences (HICSS'03). Available at: <www.citeseerx.ist.psu.edu/> last accessed: 29/04/2012

[50] Note the specified third sub-construct advocated by Pavlou et al is used in a business-2-business context. Nevertheless, the generality of the concept still stands in relation to business-to-consumer situations and is the one advocated. Pavlou, P.A., Tan, Y. H., and Gefen, D., 'The Transitional Role of Institutional Trust in Online Inter-Organizational Relationships' (2002) Proceedings of the 36th Hawaii International Conference on System Sciences (HICSS'03), 4. Available at: <www.citeseerx.ist.psu.edu/> last accessed: 29/04/2012. For a bare approach to understanding facilitating conditions see: Triandis, H. C., 'Values, Attitudes, and Interpersonal Behavior' In H. E. Howe, Jr. & M. M. Page (Eds.), Nebraska Symposium on Motivation, 1979: Beliefs, Attitudes, and Values (pp.195-259) (Lincoln, NE: Univ. of Nebraska Press, 1979) at 205

[51] Pennington, R., et al. 'The Role of System Trust In Business-to-Consumer Transactions' (2003) Vol. 20, No. 3 Journal of Management Information Systems, 197-226

contracting parties also facilitate in the condition of ODR mechanisms.[53] If a norm is generated by these relationships which the consumers expect and are deprived off, then this situational abnormality can be detrimental to system trust. As a result, the formations of ODR mechanisms play a crucial role within a system infrastructure and thus can substantially help the development of system trust.

3.2 MANDATORY ARBITRATION CLAUSES AS "IMPERATIVE COGS" IN E-COMMERCE

Legitimacy is a polycephalic concept.[54] It has been given different meanings by different authors in different situations.[55] However, as institutional trust in the ODR context concerns its infrastructure, it is institutional legitimacy that is sought here. Instead of viewing the legitimacy of pre-dispute arbitration clauses through the dichotomous spectacles of 'repeat player' versus 'consumer protectionism', an alternative reframing is proposed. This reframing would mean to take such clauses as an "*imperative cog*" in the ODR arbitration mechanism that directly facilitates in the building of system trust in e-commerce. If arbitration is generally regarded as an alternative to litigation because of its expediency and expeditious process, then why not expound upon this objective legitimacy by focusing on its imperative role in system trust. That does not mean to blatantly reject the dichotomous problem altogether. On the contrary, it means to tackle it from the periphery of the central issue, its imperative physical contribution as a legal contraption to system functionality and utility. This is exactly what Buchanan and Keohane's "complex standard" of legitimacy does.[56] The basis of their rationalist-utilitarian claim is that the benefits provided by the institutions or their infrastructures become the determinant of their legitimacy.[57] Working downstream, it is on this premise they seek perceptive legitimacy from the

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[52] McKnight, D. H., Chervany, N. L., 'What Trust Means in E-Commerce Customer Relationships: An Interdisciplinary Conceptual Typology' (Winter 2001) Vol.6, No.2 International Journal of Electronic Commerce, 35-59, 45-47

[53] Pavlou, P., and Gefen, D., 'Building Effective Online Marketplaces with Institution-Based Trust' (March 2004) Vol. 15 No. 1., Information Systems Research, pp. 37–59

[54] Mommers, L., 'Legitimacy And The Virtualization Of Dispute Resolution' (2005) 13 Artificial Intelligence and Law, pp207–232, 208-209.

[55] Mommers, L., 'Legitimacy And The Virtualization Of Dispute Resolution' (2005) 13 Artificial Intelligence and Law, pp207–232, 208-209.

[56] Buchanan, A., and Keohane, R. O., 'The Legitimacy of Global Governance Institutions' (2006) 20.4 Ethics and International Affairs, pp 405-437,

[57] Buchanan, A., and Keohane, R. O., 'The Legitimacy of Global Governance Institutions' (2006) 20.4 Ethics and International Affairs, pp 405-437, 405-407

people in order to witness efficient functionality of their benefits.[58] This legitimacy is therefore deserving of compliance regardless of prior consent.[59] Consent is only sought for efficient functionality.[60] That is the reason why under this construct "collapsing legitimacy into justice undermines the social function of legitimacy assessments".[61] If this understanding is transplanted into the institutional governance of ODR, arbitration clauses as "*imperative cogs*" in system trust would gain the institutional legitimacy they need. As long as they have an imperative role in system functionality they ought to be made legitimate.

Furthermore, viewing legitimacy from the panoptical prism of system trust means by default no ideological inclinations exist towards business or consumer protectionism. Rather, such a "structural assurance" would seek to facilitate a relationship based on mutual interests, the consummation of which would morph back into e-commerce as a state of equilibrium through satisfied consumers, the outcome being overall system predictability. This reframing dictates the need for each stakeholder (businesses/affiliations, consumers/affiliations, ODR providers, national/pan-national governments) to realign their interests from the perspective of trust construction. Thus, such an approach would be the antecedent to Bordone's '*interest-based*' approach, and would depend on it for functionality and the resulting framework.[62] This 'interest-based' approach is a libertarian construct focusing on co-operation rather than antagonism between the different players.[63] Any antagonism that does exist will be subservient to the overall common interest that melts the stakeholders, or its individual progeny that drives each stakeholder. This ideological spirit in the system permeates any want of behaviour. The interest-based approach advocated here however is not so liberal as to allow online-communities a free reign.[64] Rather, it implies each

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[58] Buchanan, A., and Keohane, R. O., 'The Legitimacy of Global Governance Institutions' (2006) 20.4 Ethics and International Affairs, pp 405-437, 407

[59] Buchanan, A., and Keohane, R. O., 'The Legitimacy of Global Governance Institutions' (2006) 20.4 Ethics and International Affairs, pp 405-437, 412-414

[60] Buchanan, A., and Keohane, R. O., 'The Legitimacy of Global Governance Institutions' (2006) 20.4 Ethics and International Affairs, pp 405-437, 414-416

[61] Buchanan, A., and Keohane, R. O., 'The Legitimacy of Global Governance Institutions' (2006) 20.4 Ethics and International Affairs, pp 405-437, 412

[62] Bordone, R. C., 'Electronic Online Dispute Resolution: A Systems Approach-Potential, Problems, and a Proposal' (1998) 3 Harv. Negot. L. Rev. pp175-211, 183-193.

[63] Bordone, R. C., 'Electronic Online Dispute Resolution: A Systems Approach-Potential, Problems, and a Proposal' (1998) 3 Harv. Negot. L. Rev. pp175-211, 188-190.

[64] Bordone, R. C., 'Electronic Online Dispute Resolution: A Systems Approach-Potential, Problems, and a Proposal' (1998) 3 Harv. Negot. L. Rev. pp175-211, 199-200.

stakeholder will only take the necessary steps to regulate its own trust-enhancing interests without overstepping its need. In pursuit of this, the by-product would be Berman's "jurisgeneration",[65] norm generating communities that interact within what Schmitz terms the "*intra contracting culture*"[66] that presides in between the relationships of businesses and consumers. This would contribute to overall '*juris-holism*', a term constructed to describe the uniformity of individual and random granular norm production, spawned in a rich milieu of '*topological mixing*' throughout the different organs of a (contractual) system/relationship, in between ODR and e-commerce. In sum, by channelling disputes towards *juris-holism* and thereby being a functional imperative of system trust, pre-dispute clauses gain their institutional legitimacy.

3.3 APPLYING THE INTEREST-BASED SYSTEM TRUST APPROACH TO THE REPEAT PLAYER SCENARIO

As Grossman et al concluded tackling the Repeat Player phenomenon must take "account of alterations in the legal culture and normative systems" that have evolved.[67] This means with the birth of privately formalised ODR systems (a symbiosis of ADR, e-business and technology resulting in a new paradigm of administrative and legal culture) the relationship between businesses, consumers and those that facilitate such a relationship needs to be re-examined. Yes, Hornle is agreeable in asserting technology exacerbates the problem of Repeat-Players, but this is dependent on how the problem is framed.[68] E-virtual environments are competitive in all respects including linking the most efficient and justiciable dispute resolution mechanisms to the ongoing concern of profit. As a result, "the relative advantages between and among disputants is more nuanced and dynamic than the terms *one shotter* and *repeat player* suggest", especially where the "dichotomous winner-loser paradigm" shrouding the finality of judgment is not so apparent.[69]

Repeat-Playing is a strategic characteristic formulating the disposition of a business personality. It stems from an underlying belief that determining

[65] Berman, P. S., 'Global Legal Pluralism' (2007) 80 Southern California Law Review, 1155, 1166.

[66] Schmitz, A., 'Consideration Of "Contracting Culture" In Enforcing Arbitration Provisions' (2007) Vol.81 St John's Law Review, 123-172, 148-154.

[67] Grossman, J. B., Kritzer, H. M., Macaulay, S., 'Do the "Haves" Still Come Out Ahead?' (1999) 33 Law & Soc'y Rev. 803, 808-810

[68] Hörnle, J., Cross Border Internet Dispute Resolution (CUP, Cambridge, 2009) 74-90

system outcomes is key to long term financial interests.[70] Businesses are not born with it, rather choose to adopt it. The question is what if e-business platforms, intermediaries and service providers adopt a counter strategy to "risk aversion" of litigation. A strategy that revolves around consumer interests, believing such a centric relationship would secure a similar financial future.[71] This business model would evolve into an introspective consumer-centric personality, which would form its "interest-based" philosophical underpinning, evolving into informal "contracting cultural norms"[72].[73] Commercial platforms like Amazon and eBay have long argued their position is to facilitate the relationship between businesses and consumers. Although eBay has strongly maintained a central-facilitative position, Amazon has been ostentating its consumer-centric philosophy. Both positions nevertheless advocate the need for impartiality as anything to the contrary would lead to failure of consumer trust in the system and generally online transactions.[74] Consequently, this begs the question how would such consumer-centric business models fair in reality?

3.4 INTEREST-BASED CONSUMER CENTRICITY DEFEATS REPEAT PLAYING

A good example of an Interest-Based System-Trust approach in action is Amazon's A-to-Z Buyer Guarantee, which promotes a conspicuously consumer-centric policy in ODR determining its overall personality. This policy has helped it reshape the stronger-weaker paradigm in buying and selling. Immediate buyer refunds and return of products at buyer's discretion have allowed Amazon to gain consumer loyalty. Amazon as seller al-

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[69] Grossman, J. B., Kritzer, H. M., Macaulay, S., 'Do the "Haves" Still Come Out Ahead?' (1999) 33 Law & Soc'y Rev. 809-810. Rule observes "The highest frustration came from buyers who had their case take weeks to get resolved even if they ended up winning. They were far more frustrated than buyers that got a quick decision and lost." Colin Rule, 'Presentation for Internet Bar Government 2.0'. Available at: <http://www.youtube.com/watch?v=hRyvv7eX3NI> last accessed: 21/03/2012

[70] Galanter, Marc., 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Soc'y Rev. 95, 95-100

[71] Kobayashi illustrates how different business models are introspectively unique in developing their own informal norms. However, he does not tackle it from a consumer centric narrative. See Kobayashi, I., 'Private Contracting And Business Models Of Electronic Commerce' (2004-2005) 13 U. Miami Bus. L. Rev. 161,161-172

[72] Schmitz, A., 'Consideration Of "Contracting Culture" In Enforcing Arbitration Provisions' (2007) Vol.81 St John's Law Review, 123-172, 148-154.

[73] Kobayashi, I., 'Private Contracting And Business Models Of Electronic Commerce' (2004-2005) 13 U. Miami Bus. L. Rev. 161. 161-172

[74] Rule, C., and Friedberg, L., 'The Appropriate Role of Dispute Resolution in Building Trust Online' (June 2005) Vol. 13, 2 Journal Artificial Intelligence and Law, pp 193–205, 196-198

lows consumers to keep substantially delayed, damaged and defective items.

However, through the pressures of the 'intra-contracting culture',[75] this policy has permeated to those third-party sellers who are not part of its Fulfilment programme. Traders feel compelled to adhere to the unique actions of Amazon, letting buyers keep damaged goods, while at the same time becoming part of consumers' natural expectations. This natural transition, osmosis of the third kind, trans-morphs localised parental obligations to broader communal conventions. Such clearly visible interplay between various actors pursuing their interests and inadvertently producing norms in dispute resolution is indicative of Berman's juris (norm)-generation.[76]

Accordingly, to argue Amazon's consumer-centric A-to-Z guarantee is bias and therefore impartial would be wrong. It would conform to the procedural fairness from the understanding of system predictability, as the interaction between the varying parties is doing exactly that, with the business model of consumer-centricism coming out top.[77] Amazon's integrated feedback and performance regime keeps sellers on a tight leash via the metrics with thresholds measuring prompt delivery, responsive communication, and positive feedback. If sellers attained a level below their targets, they would be put on probation, where unresponsive behaviour would mean end-game ostracism from the marketplace. Sellers must therefore show positive engagement, a synonym for soft coercion into finality. As a consequence, Amazon suffers from a lot of seller distaste. This is nevertheless not enough for them to leave and seek another platform. The financial incentives to stay and take on the consumer-centric policies are far greater.

Conversely, to counter-balance this position it could adopt a vertical-crowdsourced ODR scheme that would allow the balance to recede towards the middle, and satisfy seller ranks.[78] Crowdsourced ODR operates by "shifting the centre of arbitrary decision-making" from an internal,

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[75] Schmitz, A., 'Consideration Of "Contracting Culture" In Enforcing Arbitration Provisions' (2007) Vol.81 St John's Law Review, 123-172, 148-154.

[76] Berman, P. S., 'Global Legal Pluralism' (2007) 80 Southern California Law Review, 1155, 1166

[77] Schultz discusses the importance of system predictability over procedural fairness. See Schultz, T., 'Internet Disputes, Fairness In Arbitration and Transnationalism: A Reply To Julia Hornle' (2011) 19(2) I.J.L. & I.T. 153-163, 156-160.

[78] Herik, Jaap V., and Dimov, D., 'Towards Crowdsourced Online Dispute Resolution' (2012) Vol. 7, Issue 2, Journal of International Commercial Law and Technology, 99-111, 109-111; Dimov D., 'Croudsourced Online Dispute Reolution – The New ADR' (31st July) eQuibbly Blog. Available at: <http://equibbly.wordpress.com/author/equibblybloggy/> last accessed: 19/08/2012.

single homogenous person/group of persons to an external diverse group of people with different "ideas, knowledge, and experience", crucially directly unaffiliated with the parties involved.[79] Its vertical isotope however would retain its ultimate stakeholder position, and only allow direct-deliberation between itself and the crowd, with the ability to veto decisions under exceptional vetted circumstances. This would democratise and sanitise the arbitral procedure, further contributing to '*juris-holism*' and above all allow for, in the least, greater perceived fairness, which would enhance overall system trust.[80]

4. CONCLUSION

> "To keep every cog and wheel is the first precaution of intelligent tinkering" – Aldo Leopold[81]

E-commerce is not seeing the surplus trajectory that has been expected of it. For it to be successful it needs mechanisms that facilitate its progress. ODR is at the forefront of any needed mechanism. Consumers need to be rest assured their disputes are going to be resolved efficiently, effectively and fairly. This trust is not just limited to how they think or feel about what happens to them but rather in the apparatus they use and how these apparatus are managed. How the ODR system is designed will tangibly affect their trust in the system that resolves their disputes. The problem is the EU only tackles the issue of trust from the parochial mindset of the consumer. It does not look at this issue intrinsically from the system itself. This author advocates the need to reject accepting trust as an endogenic compass of direction by adopting personal consumer trust. Rather, it must accept it as an embedded strategic determinant in the form of system trust.

The EU's prohibitive approach on pre-dispute arbitration clauses stems from the basis of levelling the playing field for both the business and con-

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[79] Grier, David A., 'What Crowdsourcing Does To Your Business' (July 19th 2012) CROWDOPOLIS. Available at: <http://dailycrowdsource.com> last accessed: 19/08/2012.

[80] Even Rogers recognises "perceived fairness is as essential as actual fairness in establishing the legitimacy of a particular dispute resolution process". Rogers, Catherine A., 'The Arrival Of The "Have-Nots" In International Arbitration' (2007-2008) 8 Nev. L.J. 341, 355. See also DeMars, J., Nauss Exon, S., Kovach, K.K., and Rule, C., 'Virtual Virtues: Ethical Considerations for an Online Dispute Resolution (ODR) Practice' (Fall 2010) Dispute Resolution Magazine 6, 7-8.

[81] Leopold, Aldo. Sand County Almanac, and Sketches Here and There (1st edition ed.1 New York: Oxford University Press. 1949) 152. Available at: <http://leopold.wilderness.net/aboutus/aldo.htm.> last accessed: 13/12/2012.

sumer by curtailing the practice of repeat-playing. The dynamics of online commercial enterprise are however producing alternate business models and structures. Business platforms with consumer-centric personalities are attracting huge volumes of transactions. These interest-based business models have commanding incentives to work towards building trust in the overall system (platform/e-commerce). Their fabric of operations (including feedback and chargeback mechanisms) and subsequent interactions with the different stakeholders are producing norms of behaviour where finality is softly coerced from sellers in favour of consumers.

The EU must therefore look at its Jenga policy of arbitration clauses beyond the parochial blemish of 'inequality of bargaining powers'. To be careless by blacklisting them, for example in the proposal for a Directive on ADR, can determine a negative course of direction for system trust. The need exists to expound upon their utility as "*imperative cogs*" in any regulatory machinery, even if industry specific, designed to construct system trust in e-commerce.