

Online Dispute Resolution as a Mechanism to Enhance Consumer Trust in E-commerce - How Can Saudi Arabian Law be Improved?

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Abstract

This thesis highlights the importance of online dispute resolution, and the role that consumer trust plays in e-commerce within the Saudi Arabian context.

Although a new law regulating e-commerce transactions has been recently enacted in Saudi Arabia, consumers still seem to exhibit some lack of trust in this form of commerce and face difficulties when disputes arise. Under the new e-commerce law, traditional litigation is assigned for resolving consumers' disputes and the law still lacks a convenient online procedure for resolving disputes linked to e-commerce transactions. Furthermore, the law still lacks certain features that would facilitate easy access to justice, such as procedural rights and a unified process for overcoming consumer disputes.

In a bid to develop the legal framework in Saudi Arabia and to overcome the aforementioned issues in Saudi e-commerce law, the thesis explores relevant theories of consumers' access to justice and consumer protection. Moreover, it analyses and compares different practices of online dispute resolution in different jurisdictions to suggest an ideal procedure for resolving consumer e-commerce disputes in Saudi Arabia. Drawing on the theoretical foundation and comparison of practices in some jurisdictions, the thesis suggests reforms to the Saudi legal system that would give consumers easier access to justice and proposes a unified online dispute resolution procedure. The significance of this proposal lies in its attempt to offer a way in which a consumer can gain easier access to justice and avoid complexity, which would, in turn, enhance consumers' trust in e-commerce, and ultimately foster the development of e-commerce in Saudi Arabia.

List of Abbreviations

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
CITC	Communications and Information Technology Commission
CPA	Consumer Protection Agency
CRT	British Columbia Civil Resolution Tribunal
e-business	Electronic Business
e-commerce	Electronic Commercial Transaction
e-consumer	Electronic Consumer
e-court	Electronic Court
ECL	Electronic Commerce Law
EU	European Union
ICT	Information and Communication Technology
IT	Information Technology
LOCP	Law of Civil Procedures
LOE	Law of Enforcement
MENA	Middle East and North Africa
MOC	Ministry of Commerce
ODR	Online Dispute Resolution
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States

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Chapter 1: Introduction

1.1 Background

The world has witnessed rapid development of information technology (IT) in recent decades. Among these developments, electronic commercial transactions (hereafter e-commerce) have expanded greatly in global business, providing consumers with options to enter distant, even cross-border, transactions.¹ E-commerce has been a factor contributing to worldwide economic growth. For example, UK e-commerce sales amounted to 668.9 Billion Pounds Sterling in 2019,² up from 347 Billion in 2009,³ which represents 92.76% growth. Moreover, an official report claims that e-commerce sales in Saudi Arabia achieved 29,7 Billion Saudi Riyals, which establishes Saudi Arabia as the largest e-commerce market in the Middle East and North Africa (MENA) region.⁴

However, although e-commerce is growing and is increasingly used by consumers, some barriers make consumers reluctant to buy online. The lack of trust in e-commerce, which hinders consumers from overcoming uncertainty and reducing risk in online transactions, is a considerable one.⁵ Yuthayotin argues that consumers around the world do not have enough trust in online shopping, creating an obstacle that deters them from entering into such transactions.⁶

Trust is a conviction or anticipation that the seller's word or promise can be relied upon and that the seller will not take advantage of the consumer's disadvantageous position.⁷ In the field of e-commerce, several definitions of trust are considered, as they are borrowed from multiple

¹ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer 2015) 11.

² Office for National Statistics, 'E-commerce and ICT activity: 2019' (*Office for National Statistics*, 5 February 2021)

<<https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/ecommerceandictactivity/2019>> accessed 15 February 2021.

³ Office for National Statistics, 'E-commerce and ICT activity, UK: 2011' (*Office for National Statistics*, 30 November 2012).

<<https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/ecommerceandictactivity/2012-11-30>> accessed 15 February 2021.

⁴ CITC, 'ICT Report E-Commerce in Saudi Arabia' (*The Communications and Information Technology Commission*, 14 November 2017)

<http://www.citc.gov.sa/en/reportsandstudies/Reports/Documents/CITC_ECOMMERCE_2017_ENGLISH.PDF> accessed 20 June 2018, page 25.

⁵ Enrique P Becerra and Pradeep K Korgaonkar, 'Effects of Trust Beliefs on Consumers' Online Intentions' (2011) 45(6) *European Journal of Marketing* 936, 937.

⁶ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer 2015) 23.

⁷ Abdul Abyad, 'Consumer Trust in E-Commerce' (2011) 6(3) *Middle East Journal of Business* 3, 4.

disciplines.⁸ It is defined by Lee and Turban as ‘the willingness of a consumer to be vulnerable to the actions of an Internet merchant in an Internet shopping transaction, based on the expectations that the Internet merchant will behave in certain agreeable ways, irrespective of the ability of the consumer to monitor or control the Internet merchant’.⁹ The transaction in e-commerce is different from that in traditional shopping, as it includes specific characteristics such as distance selling with an unknown seller, limited information on the products, and lack of physical inspection of the products.¹⁰ The characteristics of e-commerce transactions make consumers more vulnerable, and the unexpected behaviour of the seller may lower consumer trust in the market, making them reluctant to enter into e-commerce. For instance, a seller’s failure to provide the consumer with enough information to make appropriate purchasing decisions will affect consumer trust in the market accordingly.¹¹ In general, the lack of trust between contractual parties does impact the relationship. More specifically, when one party cannot expect certain norms in the behaviour of the other, or cannot anticipate how the other party will honour its commitments, trust is damaged. In e-commerce, this factor is more prominent as it may involve distant transactions with an unknown seller, which increases the risk of unexpected behaviour by the other party and may lead to disputes. Accordingly, from the consumers’ perspective, the mere possibility of disputes can negatively affect their trust in e-commerce even if disputes can be resolved,¹² as resolving e-commerce disputes might be inconvenient when the cost of litigation is compared with the value of the goods or services.¹³

Trust can be enhanced by, first of all, improving regulations that govern e-commerce transactions so as to prevent disputes from arising,¹⁴ secondly, by providing easier access to justice after disputes do arise so that consumers can feel confident when engaging in e-commerce, knowing that whenever disputes occur, they can be resolved in a convenient way.¹⁵ One of the methods for accessing justice and resolving consumers’ disputes is litigation.

⁸ Benoit Jeanson and John Ingham, ‘Consumer Trust in E-commerce’ in Annie Becker (ed.), *Electronic Commerce: Concepts, Methodologies, Tools, and Applications* (Information Science Reference 2008) 1267.

⁹ Matthew Lee and Efraim Turban, ‘A Trust Model for Consumer Internet Shopping’ (2001) *International Journal of Electronic Commerce* 6(1) 75, 79.

¹⁰ Differences between e-commerce transactions and traditional shopping from consumer perspectives will be discussed in detail in the following chapters.

¹¹ Peter Cartwright, ‘*Consumer Protection Rationales*,’ *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press 2001) 21.

¹² Chin Eing Ong and David Teh, ‘Redress procedures expected by consumers during a business-to-consumer e-commerce dispute’ (2016) 17(1) *Electronic Commerce Research and Applications* 150, 152.

¹³ Julia Hornle, ‘Online Dispute Resolution in Business to Consumer E-commerce Transactions’ (2002) 1(2) *Journal of Information, Law and Technology JILT* <https://warwick.ac.uk/fac/soc/law/elj/jilt/2002_2/hornle/> accessed 9 March 2021.

¹⁴ Leonard Rotman, ‘Trust, Loyalty, and E-Commerce’. in Daniel Palmer (ed.), *Ethical Issues in E-Business: Models and Frameworks* (Business Science Reference (an imprint of IGI Global) 2010) 59.

¹⁵ Pablo Cortes, *Online dispute resolution for consumers in the European Union* (London: Routledge 2012) 2.

However, traditional litigation in consumer disputes proves ineffective, because of such factors as the delays and costs involved in court procedure,¹⁶ and consumers' lack of knowledge of cross-border litigation procedures for e-commerce disputes.¹⁷ Moreover, traditional litigation may discourage consumers from entering the online market because of its potential cost compared with the relatively low value of online transactions.¹⁸ Therefore, the argument centres on whether to adopt the traditional litigation procedure that has worked for legal systems for centuries, or to find an alternative method of solving the disputes that occur on online platforms and are compatible with e-commerce characteristics such as convenient venue of dispute resolution.¹⁹

To remedy this problem, ADR venues have been created along with IT developments provided in online forms of resolution. This transformation has potentially offered convenience and easier access to justice for disputants.²⁰ These advantages of online dispute resolution have encouraged legislators to support its adoption. For instance, the European Commission has issued EU directives and regulations on Alternative Dispute Resolution (ADR) for consumer disputes,²¹ which apply to e-commerce transactions as a result of the intention to improve European consumers' access to justice.²² Furthermore, companies have also become aware of the effect ODR has in boosting consumer confidence, as they have invented innovative tools for convenient dispute resolution, including SmartSettle,²³ and other platforms provided by companies such as eBay.²⁴

In line with the global e-commerce trend, Saudi Arabia has also witnessed the emergence of e-commerce in its market. After years of e-commerce penetration in the country, the Saudi government issued the first law to regulate e-commerce transactions in 2019.²⁵ The new law of

¹⁶ Pablo Cortes, *Online dispute resolution for consumers in the European Union* (London: Routledge 2012) 2.

¹⁷ Pablo Cortes, *The Law of Consumer Redress in an Evolving Digital Market* (1st edn, Cambridge University Press 2017) 4.

¹⁸ Julia Hornle, 'Online Dispute Resolution in Business to Consumer E-commerce Transactions' (2002) 1(2) *Journal of Information, Law and Technology* JILT <https://warwick.ac.uk/fac/soc/law/elj/jilt/2002_2/hornle/> accessed 9 March 2021.

¹⁹ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (London: Routledge 2012) 2.

²⁰ Mohamed Wahab, 'Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement' (2004) 12 *International Journal of Law and Information Technology* 123, 124.

²¹ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63, and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (2013) OJ L165/1.

²² Pablo Cortes, *Online dispute resolution for consumers in the European Union* (London: Routledge 2012) 73.

²³ For more information on SmartSettle dispute resolution, see SmartSettle <<https://smartsettle.com/products/smartsettle-infinity/smartsettle-applications/>>.

²⁴ For more information on these systems, see eBay resolution centre <<https://resolutioncentre.ebay.co.uk/>>.

²⁵ Electronic Commerce Law 2019 Article 22 (Saudi Arabia).

e-commerce includes provisions that regulate the e-commerce market, seller's duties over items advertised in e-commerce, and substantive rights for Saudi consumers. However, the law contains neither any ADR procedure for e-commerce disputes, nor procedural rights for consumers with which to enforce their substantive rights.²⁶ The new law of e-commerce refers consumers to traditional litigation for solving their disputes when their rights are violated.²⁷

The aforementioned issues of Electronic Commercial Law 2019 (ECL) have actually influenced the market, as seen in an official report by the Communication and Information Technology Commission (CITC) in Saudi Arabia which maintains that consumers are uneasy and worried about e-commerce products, and that there is a need to improve the country's ECLs.²⁸ The report has also discussed one of the issues of low-quality products that face consumers of e-commerce in Saudi Arabia.²⁹ In addition, the report mentions the perception among consumers that current legislation in regard to consumer protection is inadequate and that there is a lack both of articles in the legislation to address infringement of consumer rights and of competent authorities to adjudicate consumer disputes.³⁰ The report states that 'Currently, a large proportion of consumers are uneasy about shopping online. ... consumers are understandably concerned about counterfeit and low-quality products being sold on the internet. To boost confidence, the e-commerce laws being developed should be effectively enforced.'³¹ Moreover, the report states that 'there is a strong need to show consumers how their rights are protected when buying online. Consumers also need to be informed how to utilize communication channels to report violations to authorities and consumer protection guidelines must be disseminated through multiple channels to ensure uniform understanding across all stakeholders in the e-commerce ecosystem.'³² By taking the CITC report into consideration, the suggested ODR system would help to increase consumer confidence in e-commerce.³³ This confidence would be increased as consumers would know that they could restore their rights when there was a violation during e-commerce transactions. The findings of the report can encourage legislators to include provisions that maintain consumer confidence in the market, protect consumers when their rights are violated, and provide special procedures to enforce

²⁶ Electronic Commerce Law 2019 (Saudi Arabia). For more on interpretation and application of e-commerce in Saudi Arabia see chapter 5 section 5.1.1.

²⁷ Electronic Commerce Law 2019 Article 22 (Saudi Arabia).

²⁸ CITC, 'ICT Report E-Commerce in Saudi Arabia' (*The Communications and Information Technology Commission*, 14 November 2017)

<http://www.citc.gov.sa/en/reportsandstudies/Reports/Documents/CITC_ECOMMERCE_2017_ENGLISH.PDF> accessed 9 March 2021.

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

³³ See page 9.

their substantive rights as well as to allow them easier access to justice. Notably, allowing consumers access to justice can lead to market efficiency and unrestricted competition that delivers the best choice of products at a decent price and quality. As argued by Freeman, a competitive market combined with consumer trust will produce economic growth.³⁴

The result will be a healthy environment for consumers,³⁵ which will promote the profitable economy that the Saudi Arabia aims to achieve in its Vision 2030 development program.³⁶ Therefore, from an economic perspective, it is believed that one of the most effective ways to enhance consumers' trust is to allow them access to justice, which can be achieved through ADR or in the case of e-commerce, ODR.³⁷

1.2 Significance of the Study

The movement from traditional shopping towards e-commerce cannot be ignored and has become a major challenge for businesses who still rely on physical venues to increase revenue. It has also been noticed how e-commerce became the main shopping facility in extreme crises such as the recent Covid-19 pandemic, during which companies and consumers engaged extensively in e-commerce activities. The substantial engagement in distant transactions alongside the rapid development of e-commerce would inevitably be legally challenging. E-commerce transactions are surrounded by some challenges that deter e-consumers from full adoption of e-commerce. One is the lack of trust in e-commerce transactions, based on factors including distance, lack of inspection, and unexpected behaviour by the other party to the contract. Therefore, e-commerce necessitates proper laws and regulations to create a safe environment that would prevent disputes before they arise. Additionally, e-commerce needs suitable mechanisms that are compatible with its environment and that apply the latest technology and information attainment methods to resolve disputes after they arise. This research shows that there are some factors contributing to the lack of trust in e-commerce which have been overcome by some solutions in advanced jurisdictions: namely, ODR and proper procedures enabling e-commerce consumers to enforce their substantive rights when those rights are violated. As far as the Saudi jurisdiction is concerned in relation to e-commerce and

³⁴ Jason Freeman, 'Consumer legislation and e-commerce challenges' (2015) 2(1) Italian Antitrust Review <<http://nbn.depositolegale.it/urn%3Anbn%3Ait%3Aagcm-15213>> accessed 20 March 2018.

³⁵ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer 2015) 51.

³⁶ Saudi Vision 2030 was introduced in 2016. It aims to improve the economy of the country and enable it to become a global investment powerhouse. For more on the Saudi 2030 vision, see <<https://www.vision2030.gov.sa/en/vision/crown-message>> accessed 5 March 2021.

³⁷ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer 2015) 37.

ODR, such solutions to these issues have not been implemented to enhance consumers' trust. Since e-commerce is economically rewarding but can also be legally problematic, research on e-commerce and ODR should be carried out in order to maintain e-commerce efficiency within the economy, as well as to reduce unwanted legal obstacles. Meanwhile, the existing research and legislation regarding e-commerce regulations and ODR in Saudi Arabia is not adequate. The Electronic Commerce Law (ECL) 2019,³⁸ in Saudi Arabia, has been recently enforced but lacks some core requirements for e-consumers such as procedural rights and ODR mechanisms.³⁹ The new law of e-commerce in Saudi Arabia assigned consumers some substantive rights in relation to the quality of products, termination of contracts, and return of goods. However, the new law has not given consumers any procedural rights that would help them to enforce their substantive rights. As per the new ECL, the competent court shall adjudicate all disputes related to the application of the law.⁴⁰ However, after analysis of the new law, it has been found that there are three competent authorities who can adjudicate e-commerce disputes, depending on the nature of the dispute. These issues of ambiguity and lack of procedural rights for consumers have been identified as contributors to the lack of trust in and worry about e-commerce transactions in Saudi Arabia.⁴¹

The significance of this research lies in its potential to provide suggestions to improve the e-commerce environment in Saudi Arabia regarding the aforementioned issues, especially at a time when the country is on the ambitious Vision 2030 path of progress which will inevitably involve reform in e-commerce and laws related to it.⁴² This research will suggest reforms to the Saudi e-commerce environment via establishing, installing, and integrating modifications in the domain of ECL and related dispute resolution mechanisms, as well as facilitation of procedural rights for e-consumers to allow easier access to justice and provide peace of mind. Moreover, the importance of the research lies in its intricate observations of alternative/online dispute resolution directives and regulations from the European Union (EU), as well as advanced dispute resolution mechanisms that already exist in other jurisdictions. These observations would in turn benefit the Saudi e-commerce environment when they are used as models to reform Saudi ECL and propose ODR mechanisms.

³⁸ Electronic Commerce Law 2019 (Saudi Arabia).

³⁹ See chapter 5 section 5.1.

⁴⁰ Electronic Commerce Law 2019 (Saudi Arabia).

⁴¹ For more on analysis of Electronic Commerce Law, see chapter 3 and chapter 5.

⁴² Vision 2030, 'National Transformation Program 2020' (*Vision 2030*, 25 April 2016)

<https://www.vision2030.gov.sa/sites/default/files/attachments/NTP%20English%20Public%20Document_2810.pdf> accessed 20 January 2020.

1.3 Research Gap and Contribution to Knowledge

From the review of the literature concerning ODR to enhance e-consumer trust in Saudi Arabia, it is evident that the main element discouraging consumers in Saudi Arabia from shopping online is the lack of trust; in addition, there is a lack of efficient regulation of e-commerce transactions in the country.⁴³ It has also been found that some studies highlighting issues related to redress in e-commerce have proposed a solution to these issues based on Islamic theories of redress, covering matters such as the lack of specific codified regulations to protect e-consumers and the lack of clear and efficient rights of redress, despite the Shariah law's acknowledgement of options for redress in traditional trade. For example, a study conducted by Fallatah presented a legal framework that would address consumers' needs in e-commerce in Saudi Arabia.⁴⁴ Another example of research concerning dispute resolution in Saudi Arabia is a study conducted by Almagthoi which suggests that there is a need for a clear regulation that explains ways of solving disputes through electronic platforms and looks at ODR in terms of authentication by electronic means.⁴⁵ The aforementioned examples of studies concerning Saudi Arabia in relation to e-commerce and consumers have mainly discussed consumer needs in e-commerce in the country and the need for clear regulation for solving disputes generally.

Therefore, in view of the aforementioned studies that discuss issues in the Saudi e-commerce environment and the lack of e-commerce regulation and effective dispute resolution mechanisms, it is essential to review the relevant literature concerning ODR mechanisms in other jurisdictions and to consider how effective dispute resolution mechanisms for e-commerce disputes can enhance consumers' confidence and overcome issues related to the lack of trust felt by Saudi e-commerce consumers. In this matter, some studies have reviewed consumers' e-commerce issues such as trust, unfair contractual terms and lack of market regulation and concluded by stressing the importance of building trust in e-commerce, which can be achieved by providing ODR mechanisms that can enhance consumers' access to justice.⁴⁶ As far as consumers' issues in e-commerce are concerned, some studies have

⁴³ Rayed Alghamdi, Ann Nguyen, Jeremy Nguyen and Steve Drew, 'Factors influencing e-commerce adoption by retailers in Saudi Arabia: Quantitative analysis' (2012) 3(1) *International Journal of Electronic Commerce Studies* 83, 87.

⁴⁴ Hossam Fallatah, 'Addressing the need for consumer protection in e-commerce in Saudi Arabia' (PhD thesis, University of Leeds 2017).

⁴⁵ Fatima Al Magthoi, 'Online Dispute Resolution in Saudi Legislation' (Master's Dissertation, Naïf Arab University for Security Sciences 2014).

⁴⁶ Amy Schmitz, 'Building Trust in E-commerce Through Online Dispute Resolution' (SSRN, 1 November 2015) <<https://ssrn.com/abstract=2684177>> accessed 12 April 2018.

reviewed these issues and discussed the mechanisms that enhance confidence in e-commerce.⁴⁷ It has been found that one of the mechanisms with which to overcome consumer problems and enhance their confidence in the market is the ODR for e-consumers. In order to boost their confidence in e-commerce, the advantages and disadvantages of ODR mechanisms and European small claims procedures and regulations have been highlighted⁴⁸.

In relation to the government's role, some commentators believe that its role in regulating ODR is important. But disagreement exists as to whether the government should interfere in the dispute resolution process, or whether ODR should be self-regulated by its providers. Some commentators have highlighted that the government's role is a key factor and suggests that this role should be limited to acting as a supervisor of ODR and increasing awareness of ODR procedures among its users.⁴⁹ Others have highlighted the role of government as an intermediary acting to facilitate private ordering, so as to create a positive online market for consumers through concerted attempts to reinforce the effectiveness and transparency of private ordering mechanisms, and to raise consumer awareness.⁵⁰ Furthermore, it has been suggested that the role of government should be limited to considering key concerns related to online markets and e-consumers, such as security data, protection against unfair terms and conditions, and enforcement of settlements.⁵¹

There is a gap in the literature on e-commerce and dispute resolution in Saudi Arabia, with insufficient research on the ADR mechanisms for e-commerce disputes concerning consumers in the country. Prior to this research, no study has examined the lack of procedural rights for e-commerce consumers and the need to implement ODR in order to allow easy access to justice. This gap in the literature has been reflected in deficiencies of the Saudi ECL 2019, where issues of alternative/online dispute resolution mechanisms, potential for enhancing consumer trust in e-commerce, and easy access to justice are missing.⁵² This research will contribute to the literature on e-commerce and its legal challenges in Saudi Arabia, provide analyses of the Saudi e-commerce environment, offer suggestions for reforming it, assess current dispute resolution procedures including litigation procedure, and determine whether these procedures are

⁴⁷ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (1st edn, Springer International Publishing 2015).

⁴⁸ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (Routledge, Oxon 2011).

⁴⁹ *ibid.*

⁵⁰ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (1st edn, Springer International Publishing 2015).

⁵¹ Zheng Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2nd edn, Oxford, UK: Hart Publishing 2015).

⁵² Deficiencies of ECL in Saudi Arabia, lack of dispute resolution mechanisms as well as measures to provide consumers with access to justice will be discussed in detail in chapter 5.

sufficient to enhance consumers' trust in the market and maintain their access to justice. More specifically, this research seeks to fill this gap in the literature, and for that purpose identifies the following tasks:

- 1- To analyse Saudi ECL and dispute resolution law to identify what reforms are needed
- 2- To identify specifically where an ODR mechanism needs to be adopted in Saudi Arabia in order to develop the e-commerce environment and enhance consumers' trust when buying online
- 3- To review and suggest reforms to the existing literature in the field of e-commerce, ODR and related issues, in order to improve the e-commerce environment in Saudi Arabia.

1.4 Aims and Objectives of the Research

The research primarily aims to explore the feasibility of applying ODR mechanisms to enhance consumers' confidence in e-commerce in Saudi Arabia. To achieve this aim, it is essential to study Saudi legal principles, its culture and e-commerce environment, in search of the most suitable type of ODR to integrate into the Saudi legal system without conflicting with Saudi legal traditions, culture and religion. Additionally, in order to enhance consumers' confidence in e-commerce in Saudi Arabia and decrease the number of e-commerce disputes, this research aims to discuss existing legislation, to examine the efficiency of the authorities and agencies that govern e-commerce activities, and to determine whether or not there exists any need for reform of the current laws that are relevant to ODR and e-commerce.

In order to achieve these aims, the following objectives have been set:

- 1- Analysing the Saudi legal framework, traditions, and e-commerce environment to determine the characteristics of Saudi law and to seek the most suitable ODR mechanism.
- 2- To identify any loopholes and issues in existing Saudi laws governing ODR.
- 3- To examine different ODR mechanisms practised in selected jurisdictions in the world in order to find the most suitable mechanisms to adapt to the Saudi legal system.

1.5 Scope of the Thesis

The thesis will cover issues related to consumer trust in e-commerce and how to overcome these issues by facilitating ODR and improving ECL so as to protect consumer rights from violations. The thesis will cover business-to-consumer related issues, excluding business-to-business related issues. For the purpose of the research, the thesis focuses on current obstacles that relate to consumer trust in e-commerce, such as lack of alternative/online dispute resolution to facilitate easy access to justice for e-commerce consumers in Saudi Arabia. Also, the thesis will endeavour to provide suggestions for improvement of consumer rights related to e-commerce in the country. In terms of geographical scope, the thesis will cover consumer issues related to e-commerce and dispute resolution in Saudi Arabia. Furthermore, it will highlight how these consumer issues are solved in other jurisdictions such as the United Kingdom (UK), as well as EU directives and regulations in relation to ODR, consumer rights, and e-commerce. These jurisdictions have been selected due to their advanced level in e-commerce transactions and will be used as a model for guidance, which will benefit the Saudi Arabian e-commerce market through solving the problem of the thesis and finding the most suitable ODR for e-commerce consumers in Saudi Arabia. The thesis will also suggest reforms to the Saudi regulations in relation to e-commerce dispute resolution.

1.6 Methodology

The methodology adopted in this research follows the doctrinal approach (that is, Library based research). The research will benefit from that approach as it includes high exposure to legal doctrine which has known merits in promoting justice.⁵³ The doctrinal approach⁵⁴ examines how ODR can enhance consumer trust in e-commerce and how the relevant Saudi Arabian law can be improved in practice. This includes comprehensive collection of data, including primary sources such as regulations, laws, books, journal articles, legislative statements related to e-commerce, ODR models, consumer rights doctrines, Saudi culture, and theories of justice. Employment of the doctrinal approach by analytical and critical consideration will enable the researcher to form and refine the findings in relation to the research question.⁵⁵

⁵³ P. Ishwara Bhat, *Ideas and Methods of Legal Research* (Oxford University Press 2019) 167.

⁵⁴ For further information about doctrinal methodology, see: Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *Deakin Law Review* 83.

⁵⁵ P. Ishwara Bhat, *Ideas and Methods of Legal Research* (Oxford University Press 2019) 158.

Moreover, this research has a comparative dimension in relation to the suggestion of ODR as well as to the improvement of e-commerce and ODR laws in Saudi Arabia. This comparative approach includes two stages. Firstly, the comparative approach will be used to scrutinise ODR models in other countries and identify different practices in Saudi Arabia in order to suggest reform with respect to the local context.⁵⁶ Secondly, the comparative approach will include observation of different systems such as those in the Saudi Arabian, UK and EU jurisdictions in the fields of dispute resolution regulation and consumer protection in order to propose a reform to current Saudi Arabian laws on ODR. To specify, the research comprises some aspects of comparative study, through examining EU Directives on Alternative Dispute Resolution for Consumer Disputes 2013 and EU regulation on ODR for Consumer Disputes. The EU jurisdiction is included because of its recent ODR platform for consumer disputes.⁵⁷ The UK jurisdiction is included because of its advancement in e-commerce⁵⁸ and ODR mechanisms⁵⁹ which can be used to improve the Saudi environment in relation to e-commerce dispute resolution. An additional motivation for the selection of Saudi, UK, and EU jurisdictions is the available access to information in these jurisdictions, which will be beneficial for the research.

1.7 Research Questions and Structure of the Thesis

In order to achieve the aims and objectives of the thesis and address the aforementioned issues related to consumer trust in e-commerce and ODR in Saudi Arabia, the following research questions have been identified:

- How can an ODR mechanism be an effective means of enhancing consumers' trust in e-commerce in Saudi Arabia?
- How does Saudi Arabian culture affect Saudi law on ODR?
- What is the current Saudi Arabian legislation and practice in relation to e-commerce and ODR? Is it successful and effective?
- What types of ODR exist? How does ODR work in other countries?

⁵⁶ *ibid.*, 272.

⁵⁷ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (2013) OJ L165/1.

⁵⁸ Office for National Statistics, 'E-commerce and ICT activity: 2016' (*Onsgovuk*, 30 November 2017) <<https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/ecommerceandictactivity/2019>> accessed 15 February 2021.

⁵⁹ ODR Mechanisms will be discussed in chapter 4 of the thesis.

- How can the laws of ADR/ODR in other jurisdictions be beneficial for the Saudi jurisdiction?
- How can the practice of ODR in other jurisdictions be adopted in Saudi Arabia, fitting into its culture and legal principles, and enhancing consumer trust in e-commerce?

For the purposes of achieving the aims and objectives of the thesis, incorporating the aforementioned research approaches, and answering the research questions, chapters have been divided as follows,

- **Chapter two**

The theoretical framework of consumers' access to justice will be presented to justify the need for adoption of ODR mechanisms and to explain the economic outcome of protecting consumer rights, enforcing consumer rights, and facilitating easy access to justice for consumers so as to enhance their confidence in e-commerce in Saudi Arabia. Since the thesis aims to explore the feasibility of applying ODR mechanisms to enhance consumers' confidence in e-commerce in Saudi Arabia, the access to justice theory will be used to justify the need to implement ODR as a means of allowing easier access to justice for consumers. Accordingly, this chapter will start by identifying the conceptual grounds of access to justice, its introduction into the legal system, and its relation to consumer issues. Moreover, different types of justice in relation to providing consumer access to justice and enhancing protection of their rights, consumer protection as a form of access to justice, the concept of protection of the weaker party, and consumer empowerment will be discussed and analysed in order to examine their suitability for increasing consumer confidence in e-commerce.

- **Chapter three**

This chapter aims to describe Saudi law with special reference to Islamic law, as most Saudi laws are derived from Islamic legal principles. The legal framework, along with cultural and traditional aspects of Saudi Arabia, will be analysed to find out whether or not it can accept adoption of an ODR mechanism within its legal system. Moreover, since the thesis aims to enhance consumer trust in e-commerce, the e-commerce environment and consumer needs in e-commerce in Saudi Arabia will be assessed to highlight the main issues. The background to dispute resolution, arbitration, and mediation, with special consideration given to electronic ODR platforms in Saudi Arabia, will be emphasised to determine the system's soundness for resolving disputes arising from e-commerce and to examine how it needs reform in practice.

- **Chapter four**

The practice of ODR in e-commerce, in addition to legislations related to ADR and ODR in the EU, will be discussed and analysed in this chapter. The advantages and disadvantages of ODR will be presented as well as how ODR differs from traditional litigation. The chapter will present different mechanisms of dispute resolution, including negotiation, mediation, arbitration, e-court systems in various countries, and online mediation providers such as eBay dispute resolution centre or SmartSettle which provide third party dispute resolution detached from governmental intervention. All these different mechanisms, along with legislation and regulation related to them, will be discussed and analysed thoroughly in order to suggest the mechanism that will best fit into the Saudi Arabian legal system and avoid conflict with its legal principles and cultural aspects.

- **Chapter five**

This chapter will analyse Saudi ECL and the different mechanisms discussed in chapter 4, giving consideration to the Saudi legal framework, culture, e-commerce environment, and dispute resolution system. Also, this chapter discusses the competent authorities for amending law and regulation in Saudi Arabia as well as the competent courts for adjudicating e-commerce disputes in accordance with ECL. By comparing the practices surrounding ODR mechanisms and laws of the selected jurisdictions that were discussed in chapter 4, it will then suggest the most suitable mechanism for the Saudi system, reform of the legal system in accordance with Saudi legal principles and culture as discussed in chapter 3 of the thesis, as well as the prospective legal and economic outcomes of adopting ODR to enhance consumers' access to justice.

- **Chapter six**

Based on the issues related to e-commerce and ODR in Saudi Arabia, this chapter will summarise the main issues and present the findings of the research. It shall address all the questions raised in the introduction to the thesis as to how an effective dispute resolution method enhances consumer trust in e-commerce. Additionally, this chapter will recommend the best legal framework for ODR in Saudi Arabia, based on the findings.

Chapter 2: Theoretical Framework of Consumers' Access to Justice

2.1 Introduction

This chapter focuses on the theoretical framework of consumers' access to justice to justify the need to adopt ODR mechanisms to deal with consumers' e-commerce issues in Saudi Arabia. Since the thesis primarily aims to explore the feasibility of applying ODR mechanisms to enhance consumers' confidence in e-commerce in the country, theories of consumers' access to justice will be analysed and justified in relation to the implementation in Saudi Arabia of ODR mechanisms for consumer disputes to enhance their confidence in e-commerce. The framework and the theories will also be presented to justify the economic outcome of consumer rights protection, enforcement of these rights, and facilitation of consumers' easy access to justice so as to raise their confidence in e-commerce. Moreover, since consumers' lack of trust in e-commerce emanates from their weaker position in e-commerce transactions, and since the thesis aims to enhance consumer confidence in e-commerce, the concept of consumer protection as a form of access to justice, together with the reasons underlying consumer protection as well as concepts of the weaker party, will be presented and discussed to see how they may contribute to achieving proper consumer confidence in e-commerce.

Accordingly, this chapter will start by identifying the conceptual grounds of access to justice, its emergence in the legal system, theories of justice and their relation to consumer issues, with reference to the need to put justice into the consumer context to support the application of ODR and the protection of consumers' rights to enhance their confidence. Moreover, in order to justify the need for implementation of ODR to achieve justice for consumers when their rights are violated, as well as to identify the appropriateness, in terms of justice, of the outcome of the dispute resolution procedure, requirements of access to justice such as the consumer's rights of effective redress and enforcement will be discussed to ensure consumers' satisfaction with redress, and to identify whether or not the redress that is offered to the consumer is appropriate.

2.2 Conceptual Grounds for Consumers' Access to Justice

Access to justice as a theory includes different meanings. This is so when it is looked at as a phrase as well as when it is looked at in terms of individual words such as 'access' and 'justice'. Justice encompasses several meanings and concepts. The next section looks at the origins of access to justice theory and defines the word 'justice' as part of access to justice theory, besides shedding light on theories related to 'justice' and 'access to justice'. Moreover, historical

approaches to access to justice will be presented and analysed in this chapter in order to establish a foundation for ODR of consumer disputes.

2.2.1 Justice theory in the consumer context

The concept of justice covers various meanings and can have different meanings in different disciplines. There are several major concepts and theories of justice, which differ from one culture or society to another.¹ Justice as a word is defined differently depending on the context. For example, it includes a linguistic meaning as well as legal and social meanings linked to the context. In the legal context, the word ‘justice’ is linked with equality, rights, and fulfilment of duties for the prevention of disputes.²

To begin with a philosophical and historic concept of justice, Aristotle linked justice with equality and described two forms of it, namely, distributive justice and corrective justice.³ These two aspects of justice interact to balance rights and duties equally between two parties, a process which Aristotle saw as leading to a fair and right allocation of rights and duties by the nation. According to Aristotle, on the one hand distributive justice would help to prevent disputes from arising since people would receive their rights equally, with the principle of equality acting as the intermediary between the two disputants. On the other hand, corrective justice would correct inequality when it arose due to unjust transactions between disputing parties creating inequality of gain and loss between them.⁴ Thus, justice would restore equality through its authority.⁵ This conceptualisation of justice by Aristotle might be seen as the ground on which other types of justice have been conceptualised. In order to reach a holistic understanding of the concept of justice, Finnis asserted that whatever concept of justice has been explained, there are three basic measures which need to be applied to define the meaning of justice regardless of how others have conceptualised it: firstly, aspects of justice, which refers to the relations between people; secondly, duty and rights between people, which refers to the fulfilment of rights and obligations to those due the rights or duties; thirdly, equality, which

¹ United Nations, ‘Social Justice in an Open World: The Role of the United Nations’ (United Nations, 20 August 2015)

<<https://www.un.org/development/desa/socialperspectiveondevelopment/2015/08/20/social-justice-in-an-open-world-the-role-of-the-united-nations/>> accessed 13 December 2019.

² Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press 2014) 8.

³ Aristotle, *Nicomachean Ethics of Aristotle* (W.D. Ross tr, Batoche Books, Kitchener, 1999) 77.

⁴ *ibid.*

⁵ *ibid.*

refers to equality between people.⁶ Therefore, other types of justice that relate to the consumer context will be introduced and explained.

- **Types of justice in the consumer context**

Since justice philosophically concerns equality, rights, and duties, its application may differ slightly when considered in a different context. This fact has generated multiple types of justice such as social justice and disruptive justice; therefore, the main types of justice related to the consumer context such as social justice, procedural justice, interactional justice, commutative justice, and retributive justice will be introduced and explained in order to reach an accurate understanding of justice, how these forms of justice could help to ensure consumer satisfaction in dispute resolution, and its relation to access to justice in the consumer context.

- **Social justice**

Social justice is concerned with right acts that form the public good in order to grant that good to everyone in a fair manner.⁷ This would occur through citizens' cooperation with each other to ensure that the institutions of society function to benefit the public. It is explained as the fair distribution of things, including healthcare, wealth, work opportunities, and access to the marketplace, across the society.⁸ So, these acts would lead to equality and solidarity between citizens and would provide equal access to liberties, rights, and opportunities for every member of a society.

Rawls's theory of social justice demands that people imagine a society 'as a fair system of cooperation over time, from one generation to the next'.⁹ He also asserts that 'the relationship of citizenship is a relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death'.¹⁰ According to Rawls's theory of social justice, 'a free market system must be set within a framework of political and legal institutions that adjust the long-run trend of economic forces so as to prevent excessive concentrations of property and wealth, especially those likely to lead to political domination'.¹¹ Accordingly, the fair distribution of rights between citizens with consideration given to economic and consumer

⁶ John Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) 161-163 in Peter Strahlendorf, 'Traditional Legal Concept from an Evolutionary Perspective' in Roger Masters and Margaret Gruter (eds), *The Sense of Justice, Biological Foundations of Law* (Sage Publications 1992) 130.

⁷ Sue McGregor, 'Conceptualizing Consumer Justice' (McGregor Monograph Series No. 201703, 2017) <https://www.consultmgregor.com/documents/publications/consumer_justice_2017.pdf> accessed 8 July 2021.

⁸ David Miller, *Principles of Social Justice* (Harvard University Press 1999) 1.

⁹ John Rawls, *Political Liberalism* (Columbia University Press 1996) 14.

¹⁰ *ibid.*, xlv.

¹¹ John Rawls, *Justice as Fairness, a Restatement* (The Belknap Press of Harvard University Press 2001) 44.

perspectives would be reflected in the lack of social justice in the market and negatively impact on consumers by denying them the power which would help them to make their voices heard for the purpose of enforcing their rights in the market.

- **Distributive justice**

The concept of distributive justice is linked with the balanced and fair division of wealth and income among citizens in a society. In addition to Aristotle's claim of distributive justice preventing disputes from arising by fair allocation of rights,¹² Fleischacker defines distributive justice as the fair allocation of goods, and argues that it has recently included the even and public division of goods between citizens to benefit the poor.¹³ This recent conceptualisation of distributive justice is seen by Fleischacker as a broader characterisation of distributive justice than that of Aristotle, for whom it meant only the equal allocation of political rights and duties.¹⁴ Accordingly, the recent development of the justice concept has led to this new understanding of distributive justice.

In the consumer and marketplace context, distributive justice is considered to depend on the fairness of the reward distributed to citizens based on their equal contribution. For example, when there is an injustice in the service the consumer has received, distributive justice will take the form of compensatory damages to the consumer.¹⁵

- **Commutative justice**

Commutative justice is linked with the fulfilment of duties such as responsibilities to another citizen.¹⁶ The fulfilment of these obligations raises the issue of commutative justice, as this type of justice regulates people's private rights in the contract, affecting the treatment of two individuals so as to provide whatever the parties to the contract are due in terms of damages or obligations.¹⁷

In the consumer context, the lack of commutative justice raises issues of unsatisfactory performance, misrepresentation and fraud, as transactions by these means would lead to lack of

¹² Aristotle, *Nicomachean Ethics of Aristotle* (W D Ross tr, Batoche Books, Kitchener, 1999) 81. For more see chapter 2 section 2.1.1.

¹³ Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard University Press 2004) 5.

¹⁴ *ibid.*

¹⁵ Jerome D Williams, 'Geraldine Rosa Henderson, Discrimination and Injustice in the Marketplace' in David Glen Mick, Simone Pettigrew, Cornelia (Connie) Pechmann, and Julie L. Ozanne (eds), *Transformative Consumer Research for Personal and Collective Well-Being* (Routledge 2012) 179.

¹⁶ William R White, 'The Natural Law and Commutative Justice' (1956) 2 *Catholic Lawyer* 31, 34.

¹⁷ *ibid.*

commitment between the contracted parties. This type of justice relates to people's dealings with each other, without the engagement of the justice authorities, as commutative justice concerns transactions between individuals. Therefore, when this type of justice is widespread in society, it encourages people to maintain justice in the society by themselves, by fulfilling their obligations and responsibilities. As far as consumer contracts are concerned, commutative justice would help the contracting parties to fulfil their duties in the contract and to render the other party their rights. Through consideration of the fulfilment of rights and duties of the contract, this would result in fairness in consumer transactions. Moreover, commutative justice is concerned with the rights of the consumer in terms of consumer privacy as related to fair exchange of consumers' information, quality and safety of consumption, through exceptions regarding use for children's consumption, and fitness for purpose of use.¹⁸

- **Procedural justice**

Procedural justice is concerned with principles of justice such as fairness and equality in decision-making and with the adoption of these principles in order to achieve a just outcome.¹⁹ In fact, it focuses on fair procedure, which is related to a fair result.²⁰ Fairness in the process of justice is perceived by justice seekers as requiring fairness not only in the outcome, but also in the process of achieving the outcome.²¹

Procedural justice stands on several principles in relation to consumer rights. The procedural justice principles comprise the following: trustworthiness, in that people regard the justice authorities as motivated to be sincere; respectful treatment during any procedure; neutrality in the process, avoiding any bias; and the voice of people to be heard in any complaint.²² In seeking a just outcome, consumers should be guaranteed certain basic elements of the abovementioned factors, to ensure that justice is honoured in the process. It is argued that disputants would take into consideration their treatment by the authority that handles their dispute during the process of it, which would guarantee some rights for disputants regardless of the outcome; that is, whether or not the decision was on their side. As Goodman-Delahunty

¹⁸ Gretchen Larsen and Rob Lawson, 'Consumer Rights: An Assessment of Justice' [2012] 112(1) *Journal of Business Ethics* 518, 524.

¹⁹ Sue McGregor, 'Conceptualizing Consumer Justice' (McGregor Monograph Series No. 201703, 2017) <https://www.consultmcgregor.com/documents/publications/consumer_justice_2017.pdf> accessed 8 July 2021.

²⁰ Vicente Martinez-tur, Jose M. Peiro, Jose Ramos and Carolina Moliner, 'Justice Perceptions as Predictors of Customer Satisfaction: The Impact of Distributive, Procedural, and Interactional Justice' (2006) 36(1) *Journal of Applied Social Psychology* 100, 103.

²¹ Gretchen Larsen and Rob Lawson, 'Consumer Rights: An Assessment of Justice' (2012) 112(1) *Journal of Business Ethics* 515, 518.

²² Jane Goodman-Delahunty, 'Four Ingredients: New Recipes for Procedural Justice in Australian Policing' (2010) 4(4) *Journal of Policy and Practice* 403, 404.

states, procedural justice stands on the basis that people should perceive the outcome of the process as fair regardless of the outcome itself.²³ For example, it requires the citizens to be heard during the justice process, transparency in decision-making so that people can understand how this outcome has been reached, respect for people's rights and dignity, and impartiality in the process of reaching an outcome.²⁴ These elements of procedural justice, in some circumstances, can be viewed by the consumer as more important than the outcome of the process.²⁵ To the consumer, this importance of the process in relation to the outcome lies in the guarantee of human interaction in communication with and treatment of the consumer, which distinguishes the evaluation of the process from that of the outcome.

- **Interactional justice**

Before pursuing redress procedures, consumers tend to seek proper treatment regarding their complaint.²⁶ The treatment should comprise respect for the complainant as well as empathy, which can be categorised as interpersonal issues for consumers.²⁷ The distinction between procedural and interactional justice is that the interactional kind is concerned with the performance rather than the process of seeking the outcome. Interactional justice varies from procedural justice as the latter is linked with the process of dispute resolution, while interactional justice concerns the manner of the authority and how it handles the dispute and complaints of the disputants rather than the process of the dispute itself.

Interactional justice stands on four governing rules: truthfulness, justification, respect, and propriety.²⁸ These rules of interactional justice have been included in two holistic dimensions. Propriety and respect have been categorised within the dimension of interpersonal justice, reflecting the level of politeness and dignity with which people are treated, and the absence of partiality in those who receive the consumer's complaint.²⁹ The second dimension, comprising truthfulness and justification, is categorised within informational justice, which concerns the benefits and honesty of the information provided to consumers during the transaction, such as justification of certain procedures.³⁰ The value of interactional justice lies in protection for the

²³ *ibid.*

²⁴ *ibid.*

²⁵ Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press 1988) 1.

²⁶ Vicente Martinez-tur, Jose M. Peiro, Jose Ramos and Carolina Moliner, 'Justice Perceptions as Predictors of Customer Satisfaction: The Impact of Distributive, Procedural, and Interactional Justice' (2006) 36(1) *Journal of Applied Social Psychology* 100, 104.

²⁷ *ibid.*

²⁸ Gretchen Larsen and Rob Lawson, 'Consumer Rights: An Assessment of Justice' (2012) 112(1) *Journal of Business Ethics* 515, 518.

²⁹ *ibid.*

³⁰ *ibid.*

consumer, as it ensures proper treatment for them in relation to the redress or dispute resolution procedure they seek when their rights are violated, by honouring principles of right treatment, and provides information regarding their complaint before enactment of a claim.

- **Retributive justice**

This form of justice concerns issues arising from wrongdoings which go beyond the lack of fulfilment of duties.³¹ Retributive justice is linked with punishment of those who wilfully cause great harm to personal interests and to the interests of the public at large.³² Consideration of retributive justice should be in proportion to the harm caused by the action and should not go above or below the proportion of the wrong.³³ Unlike commutative justice which concerns the voluntary fulfilment of duties, retributive justice is linked with harm and injury to another. Retributive justice can be considered in the consumer context: for example, when sufficient information about a product is deliberately withheld, resulting in harm to the consumer.

- **How different forms of justice relate to consumer protection and online dispute resolution**

Justice in its broader context leads to the creation of equality, fairness and fair allocation of rights and duties between people. With consideration given to the forms of justice in the consumer context, these different forms of justice concern the fair allocation of rights, fulfilment of duties, how to solve issues arising from the lack of such fulfilment, and how to reach just and fair outcomes in decision-making when complaints arise from the lack of fulfilment of duties. Consumer protection intersects with and shares some of the aims of the forms of justice. Consumer protection aims to shield consumers from harm or injury during their market transaction dealings. This aim has its roots in retributive justice, as the latter is concerned with issues arising from wrongdoing and the lack of duty fulfilment.³⁴ Moreover, distributive justice concerns the fair allocation of rights and duties between citizens. This type of justice parallels the aim of consumer protection to empower consumers when they are in a weaker position by rebalancing the power – for example, litigation and negotiation power – between consumers and businesses.

³¹ Peter Strahlendorf, 'Traditional Legal Concepts from an Evolutionary Perspective' in Roger Masters and Margaret Gruter (eds), *The Sense of Justice, Biological Foundations of Law* (Sage Publications 1992) 136.

³² *ibid.*

³³ *ibid.*

³⁴ Sue McGregor, 'Conceptualizing Consumer Justice' (McGregor Monograph Series No. 201703, 2017) <https://www.consultmcgregor.com/documents/publications/consumer_justice_2017.pdf> accessed 28 July 2022.

Online dispute resolution also relates to justice and some forms of justice. Online dispute resolution mainly aims to facilitate easier access to justice for consumers. Accordingly, allowing easier access to justice would promote fairness and equality between disputants, as merchants in violation would know that they would face consequences and thus prevent detriment to consumers.³⁵ This concept of online dispute resolution has its roots in some types of justice, as it promotes the fulfilment of duties between consumers and businesses as well as helping to punish those who wilfully cause great harm to personal interests and to the interests of the public at large.

Another concept that can be presented with the forms of justice as it shares one theme is the concept of Hesbah in Islamic law.³⁶ The concept of Hesbah in Islamic law is based on the principles of human equality, promotion of virtue and prevention of vice. These principles can be discerned in the doctrine of Hesbah, which was first practised by the Prophet Mohammad. The main duty prescribed by Hesbah is to take responsibility for observing the market to guard it against deception and to encourage justice and redress between sellers and consumers. As an example of the Prophet Mohammad's practice of Hesbah, it is narrated that on one occasion he happened to pass by a heap of eatables (corn). He thrust his hand into the heap and his fingers were moistened. He said to the owner: 'What is this?' The owner replied: 'These have been drenched by rainfall.' The Prophet remarked: 'Why did you not place this (the drenched part of the heap) over other eatables so that people could see it? He who deceives is not of me (is not my follower).'³⁷ This story of the Prophet has been used as a model and is described as the root of consumer protection in Islamic culture. Moreover, it has influenced Muslim individuals to voluntarily act as market observers in parallel with business organisations, to free the markets from deception and thus protect consumers. According to Saleh, any individual can take on the duty of observing the market and acting according to the Hesbah concept in Islamic culture.³⁸ He added that all Islamic scholars agree that Hesbah can be practised by any Muslim and that if a group of people act on this principle they will have fulfilled their duty. However, if no-one in the group practised this principle, their behaviour would be sinful.³⁹

³⁵ Sue McGregor, 'Conceptualizing Consumer Justice' (McGregor Monograph Series No. 201703, 2017) <https://www.consultmcgregor.com/documents/publications/consumer_justice_2017.pdf> accessed 28 July 2022.

³⁶ Framework of Islamic law and its role in Saudi culture will be presented and discussed in chapter 3.

³⁷ Sahih Muslim Sunnah com, 'The Book of Faith' (*Sunnahcom*, 14 November 2011) <<https://sunnah.com/muslim/1/190>> accessed 4 July 2018.

³⁸ Saleh Ozd Mair, 'The National Observance in the balance of Islamic Jurisprudence' (2012) 28(2) Damascus University Journal of Economics and Legal Sciences 649, 679.

³⁹ *ibid.*

With consideration given to different disciplines, it can be concluded that justice concerns equality, fairness, fair allocation of rights, fulfilment of duties, and prevention of harm and detriment between citizens in order to prevent disputes before they occur and to reach a fair outcome whenever disputes arise.

2.2.2 Access to justice and consumers' access to justice

The expression 'access to justice' combines two words, each leading to a different meaning. As described in the previous section, justice means equality, rights, and fulfilment of duties for the prevention of disputes.⁴⁰ However, to deliver the most valuable components of justice in order to guarantee access to it, several understandings of justice as a word, and as ways of facilitating access to its values, will be considered. This section examines the presentation of the meaning of justice in both its non-value-oriented and value-oriented forms, as well as approaches to the theory of access to justice and its emergence in the legal system.

2.2.2.1 What is meant by access to justice

As noted earlier, the term justice contains several meanings.⁴¹ However, when the term justice is added to access and considered within access to justice theory, it is viewed differently. To specify, access to justice is considered through two understandings. One is linked to the access to procedures of justice and the judicial system as a whole, such as accessing courts and dispute resolution procedures, whereas another meaning of justice considers its values in its theoretical meaning such as fairness and equality, which go beyond the conventional meaning of justice that concerns procedure and the judicial system in matters such as courts and dispute resolution venues.

The non-value meaning of justice applies when it is seen as a system of facilities that provide justice to people; that is, those facilities through which justice as a system operates to reach people who seek justice, such as courts, judges and the administrative section of the judicial system.⁴² The abovementioned concepts or forms are not those of justice as a concept; rather they provide justice to those who seek the values of justice such as fairness and equality. Therefore, one meaning of access to justice apart from its value can be understood as the structure of the judicial system; for instance, its court proceedings and its process. It does not include any values of justice such as fairness and equality, but is seen and considered as a

⁴⁰ See chapter 2 section 2.1.1.

⁴¹ See chapter 2 section 2.1.1.

⁴² Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press 2014) 6.

procedure for gaining access to justice.⁴³ However, although non-value justice does not represent the substantive meanings of justice such as fairness and equality which people seek when disputes arise, it can be seen as a process whereby disputants can access justice, such as procedural laws, access to court systems, and other facilities that improve procedural convenience.

On the other hand, the term ‘value-oriented justice’ covers material justice itself, which justice as a system is supposed to promote. Although there has been argument over the definition of justice in the legal context – as in the view of justice as a substantive justice that needs to be defined to fit each particular issue in its individual situation in order to reach the goals of justice⁴⁴ – the concept of justice may go beyond this definition, since it encompasses the equal application of rules in variable situations: for example, whether before the law (in the form of equal treatment) or after the law (in the form of court proceedings).⁴⁵ Therefore, value-oriented justice is broader than the facilities that provide justice, such as the court or the legal procedures people use in seeking justice itself; rather it is the main goal of those who seek justice. Value-oriented justice can be regarded as the whole system that has justice as its core, comprising non-value justice as a supportive component of the core: that core being the value-oriented justice which concerns the outcome of the legal process. Value-oriented justice furthers the meaning of justice and pervades sociological, political, and philosophical ideas.⁴⁶

The concept of value-oriented justice has been controversial since its earliest introduction. However, it can be described in general as the moral virtue referred to by Aristotle in the saying that justice exists when someone follows the law.⁴⁷ Moreover, it should be noted that the definition of justice in its legal context has not been arrived at in a standardised way; as per Wrška, Aristotle in his description of justice has not used only one definition, but has applied a different definition to each situation. Therefore, it can be said that, although justice is concerned with the outcome of the judicial process, enabling the disputants to achieve a fair transaction and equality of rights, the value-oriented justice which is the core of justice cannot be captured in a uniform definition.⁴⁸

⁴³ *ibid.*

⁴⁴ Allan Horwitz and Michael Wassermant, ‘Formal Rationality, Substantive Justice, and Discrimination A Study of a Juvenile Court’ (1980) 4(1) *Law and Human Behavior* 103,104.

⁴⁵ Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press 2014) 7.

⁴⁶ *ibid.*

⁴⁷ WD Ross, *Nicomachean Ethics of Aristotle* (Batoche Books 1999) 77.

⁴⁸ Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press 2014) 8.

2.2.2.2 Approaches to Access to Justice Theory

The theory of access to justice emerged in the legal system when legal scholars noted some shortcomings in the system such as limited accessibility, which prevented seekers of justice from receiving it.⁴⁹ Accordingly, improvement in access to justice started with facilitation of legal aid for those who could not afford the financial cost, as well as ensuring people's increased awareness of their rights to mitigate the lack of legal knowledge which prevented them from accessing the judicial system. It was then extended to other approaches that facilitate access to justice for those who need it, such as representation of diffuse interests.⁵⁰ The aforementioned approaches in access to justice theory will be presented and analysed in order to prepare the ground for considering improving consumer access to justice through ODR.

- **Legal aid**

The principle of providing sufficient access to justice was firstly established in western countries. The recent emergence of interest in ensuring sufficient access to justice occurred in 1965, with the basic aim of supporting needy people.⁵¹ The concept appeared in the form of provision of legal services for the poor, who lacked the knowledge to pursue their legal rights.⁵² Since a lawyer's help is essential in some legal matters, the aim of this approach was to overcome the complexity of legal litigation processes when taking civil cases to court, and to increase awareness of civil rights among citizens. Legal aid, through this approach, was provided to the needy in the form of state-funded schemes whereby the government paid the private bar to support the poor when they needed legal assistance in the litigation process.⁵³ This form of legal aid was rationalised by the lack of financial affordability of legal services on the part of the poor, as well as lack of the legal knowledge needed to protect their legal rights.⁵⁴ As per Chappelletti and Garth, the legal aid approach provided assistance to the needy and increased the awareness of rights for the poor by making lawyers available to citizens who cannot afford to pay their fees, and by creating procedures that represent collective interests and are available to all citizens regardless of affordability.⁵⁵

⁴⁹ *ibid.*

⁵⁰ Diffuse interests means the collective interest of consumers as a group. This concept will be discussed in detail in the section on Representation of diffuse interests (Class action, Collective redress, and Ombudsman)

⁵¹ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181, 196.

⁵² *ibid.*, 197.

⁵³ *ibid.*

⁵⁴ *ibid.*, 201.

⁵⁵ *ibid.*, 222.

The legal aid model is concerned with providing legal services to the poor who lack financial affordability and is not directly relevant to consumer disputes and consumers' access to justice. Nevertheless, it has been mentioned and summarised in this section as it shares at some points the aims and advantages of consumers' access to justice. The legal aid approach shares with consumer's access to justice the aim of increasing legal awareness of citizens' rights,⁵⁶ and reaches out to the poor as a class who need support, helping them to get affordable lawyers.⁵⁷ Compared with these approaches, consumers' access to justice would be enhanced by adopting the goals of the legal aid system in order to support consumers, considered as the weaker party of the contract, similarly to supporting the poor as a class in the legal aid approach.

- **Representation of diffuse interests (Class action, collective redress, and ombudsman)**

The second movement towards access to justice was accomplished through the representation of group interests, which comprises wider inclusion of groups who need legal support other than the poor. This movement tended to facilitate access to justice for groups with a collective interest by means such as collective redress,⁵⁸ rather than legal aid in disputes between two individual parties. It is described by Cappelletti and Garth as 'collective or fragmented interests such as those in clean air or consumer protection. The basic problem they present – the reason for their diffuseness – is that either no one has a right to remedy the infringement of a collective interest or the stake of any one individual in remedying the infringement is too small to induce him or her to seek enforcement action'.⁵⁹ This approach was introduced to allow those who had received improper services as a group, or damaged products as consumers, regardless of their financial ability to pursue legal action, to seek redress as a group. In contrast to the legal aid approach, the representation of diffuse interests approach, which comprises class action or collective redress, tended to enable the enforcement of collective rights of groups, irrespective of waiver of fees required for legal support or legal action, for those who cannot afford it.⁶⁰

Representation of diffuse interests will help consumers of e-commerce to gain access to justice when they encounter difficulties in seeking remedies for infringements and enforcement action. This approach has been reflected recently at the EU level. As part of the new deal for

⁵⁶ Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press 2014) 23.

⁵⁷ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181, 197.

⁵⁸ Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press 2014) 24.

⁵⁹ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181, 194.

⁶⁰ Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press 2014) 24.

consumers, the EU commission adopted a new directive on representative actions in order to protect collective interests of consumers.⁶¹ It aims to apply a mechanism for the protection of consumers' collective interest against violations of consumer law, and to assign at least one procedure embodying representative action for redress as well as injunctive measures for consumers.⁶² In addition, it aims to empower and support qualified entities financially to establish action for injunctions and redress on behalf of consumers, for the purpose of guaranteeing consumers' access to justice. The new directive also provides balanced protection for consumers and businesses against abusive collective actions, by applying the principle of 'loser pays', which ensures that the party who loses the lawsuit pays the cost of the lawsuit for the winning party.

- **Access to justice approach in its wider concept**

Adoption of the legal aid approach and the diffuse interests approach has continued since their creation, along with the search for suitable mechanisms for adopting them and tackling the new issues arising in the legal arena. The broader approach of access to justice combined the two abovementioned approaches of legal aid and diffuse interests such as collective redress and class action, which have succeeded in some ways.⁶³

The third approach came to combine the two approaches and to offer improvement through several possibilities of access to justice with or without a court procedure, and through official procedures by the government or apart from it. It has been argued in the relevant literature that some kinds of disputes between individuals, such as those involving small claims or complicated relationships, should be offered ADR mechanisms to solve their disputes.⁶⁴ When applied to consumer e-commerce contracts, this suggestion is seen to have the same features of small claims and distance selling which reinforce the need to provide consumers with access to justice, namely the inconvenience of traditional litigation for the small claims involved in

⁶¹ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (2020) OJ 2 409/1.

⁶² *ibid.*

⁶³ This success is due to the holistic approach of the combined model, which utilises the legal aid approach and the representation of diffuse interests such as collective redress, along with efforts to improving access to justice: for example, as per Cappelletti and Garth, the succession perceived in gaining judicial protection, legal aid programs making lawyers available to citizens, and introducing mechanisms to represent consumers. For more see: Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181, 222.

⁶⁴ Sarat A and Grossman J B, 'Courts and Conflict Resolution: Problems in the Mobilization of Adjudication' (1975) 69 American Political Science Review 1210, and Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181, 226.

consumer disputes, and the high cost of traditional litigation. These characteristics of consumer e-commerce contracts suggest that an ADR procedure should be offered. This concept of providing access to justice by allowing disputants to engage in an ADR process has influenced the regulatory body at EU level, which responded by enacting regulations and directives that deal with ADR and collective redress, such as the alternative dispute resolution directive and the ODR regulation and directive on collective redress,⁶⁵ which will support consumers within the EU by providing several mechanisms of access to justice.

2.2.2.3 Developments in consumers' access to justice

The first and second waves of access to justice, which aimed to provide legal aid for the poor and representation of diffuse interests, have broadly inspired an effort to include consumers in this approach. The continued development of consumers' access to justice has been strongly marked by the need to overcome some issues, such as the cost of and delay in litigation, which affect justice for individuals, with an emphasis on facilitating easier access to justice for everyone by reducing the financial unaffordability and delays faced in the traditional litigation procedure.⁶⁶ In consideration of these developments in consumers' access to justice, the next section will present general concepts of consumers' access to justice, how it emerged in the legal system, and legal approaches of the movement for consumers' access to justice.

- **Rationale of consumers' access to justice**

The movement for consumers' access to justice has aimed to overcome shortcomings in consumer disputes, such as cost and delay in the litigation procedure, which affect consumers in their disputes. Litigation power is one of the fundamental concepts that disadvantage consumers, because it justifies a business in suing the consumer in the consumer's domicile, on grounds that the business is the claimant and has good financial standing.⁶⁷ The consumers' access to justice concept tends to be called 'the power approach', which aims to rebalance the bargaining power between consumers and other parties in order to enable the consumer to face

⁶⁵ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2013) OJ L165/63, and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1, Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (2020) OJ 2 409/1.

⁶⁶ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 49.

⁶⁷ For more on this concept of consumers' access to justice, see chapter 2 section 2.3.1 on Imbalance in litigation and dispute resolution power.

any dispute they may have in the society.⁶⁸ The reason for it is that consumers are considered a diffuse interest group holding less power vis-à-vis businesses in terms of power, awareness of rights, and economic status. Therefore, consumers' access to justice has emerged to provide fair, impartial, and less time-consuming management of disputes and easier access to justice for anyone whose rights are violated. This socio-legal perspective on consumers' access to justice has witnessed the introduction of forms of mediation and settlement of consumer disputes as a consequence of the violation of their rights by opposed parties due to the lesser power of consumers compared to businesses.⁶⁹

The evolution of consumers' access to justice has emerged from an economic circumstance. Consumer transactions have increased simultaneously with global economic development, while at the same time consumers' issues are still not resolved.⁷⁰ It is also argued that consumer protection will be more challenging and complicated than it was previously, due to recent global development of communication between consumers and sellers.⁷¹ The complexity and difficulty of preserving consumers' rights could increase in view of the transformation of consumer transactions over the internet, which could lead to the emergence of technological facilities and means of overcoming technological barriers to consumers when conducting online transactions.

- **Historic emergence of consumer access to justice**

As noted in the previous section, the access to justice movement was concerned with people regardless of their type of dispute. For example, the movement includes approaches that assist litigants in criminal procedures. Besides the movement for broad access to justice, consumers' access to justice emerged in the 1970s with the need to facilitate more accessible processes, procedures, and mechanisms of justice that would allow easier access to justice for consumers.⁷² The access to justice movement alone could not fully maintain and guarantee consumers' access to justice, as the first wave did not impact on consumers' substantive interests. The emergence of the consumers' perspective within the access to justice movement tended to enable a change

⁶⁸ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 49.

⁶⁹ *ibid.*, 50.

⁷⁰ *ibid.*, 51.

⁷¹ Michael J Trebilcock, 'Rethinking Consumer Protection Policy' in Charles E F Rickett and Thomas G W Telfer (eds), *International Perspectives on Consumers' Access to Justice* (Cambridge University Press 2003) 68.

⁷² Peter Spiller, 'The Small Claims System: A Comparison of the South African Small Claims Court and the New Zealand Disputes Tribunal' (1997) 5(1) *Waikato Law Review* 35, 35.

to the values of the society in favour of greater implementation of consumer protection in law.⁷³ As a result of this emergence, along with the entrenchment of new values, legal education on rights and how to enforce them was popularised, since even some of those who knew their rights were not enforcing them.

- **Legal approaches to consumers' access to justice**

Legal approaches to consumers' access to justice comprise substantive law and procedural law. On the one hand, the substantive law involves statutory rules and regulations passed by legislative bodies which govern the way citizens perform and act in accordance with these laws. It explains crimes, penalties, and people's rights; for example, in consumer protection laws. On the other hand, procedural laws describe court procedure, rules, and due process when applying substantive laws,⁷⁴ whereby consumers maintain their rights and gain access to justice through fair judicial protection.⁷⁵

In regard to consumers' access to justice, it has been argued by consumers' advocates that their access to justice has been improved lately by procedural laws, as distinct from substantive laws, which constituted the main driving approach of consumers' access to justice in the earlier access to justice movement.⁷⁶ However, Yuthayotin argues that consumers' access to justice was achieved through substantive laws based on enhancing consumers' rights.⁷⁷ Accordingly, a transformation from procedural laws to substantive laws would be required to facilitate greater access to justice for consumers. As per Roach and Sossin, in order to maintain consumers' access to justice, there is a need to readopt consumer protection laws which would be enhanced through substantive laws.⁷⁸ While argument over the legal approaches to consumers' access to justice continues, it is worth noting that consumers' access to justice could not be provided properly without the use of both legal approaches. Consumer rights need to be enhanced through substantive laws as well as through consumers' awareness of procedures for enforcing

⁷³ Ross Cranston, 'Access to justice for consumers: A perspective from common law countries' [1979] 3(3-4) *Journal of Consumer Policy* 291, 291.

⁷⁴ Marina Pavlović, 'Access to Justice for Consumers of Telecommunications Services' (UOttawa, 2 November 2015) <<https://techlaw.uottawa.ca/news/access-justice-consumers-telecommunications-services>> accessed 29 January 2020.

⁷⁵ Joaquín Sarrión, 'Effective judicial protection in consumer protection in the ECJ's case law' (the UACES 44 Annual Conference, Cork, Ireland, September 2014) <<https://ssrn.com/abstract=2526709>>.

⁷⁶ Cristena Poncibò, 'Consumer collective redress in the European Union: The Italian case' in Annette Nordhausen, Deborah Parry, Geraint Howells, and Christian Twigg-Flesner (eds), *The yearbook of consumer law 2009* (Routledge 2009) 231.

⁷⁷ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 50.

⁷⁸ Kent Roach and Lorne Sossin, 'Access to Justice and Beyond' (2010) 60 *University of Toronto Law Journal* 373, 388.

their substantive rights. Accordingly, both legal approaches need to be maintained in order to fully utilise the principle of consumers' access to justice. According to Wrbka, procedural and substantive law are both helpful approaches to consumers' access to justice, and use of one approach should not exclude use of the other.⁷⁹ Wrbka argues that the best procedural laws will not facilitate proper access to justice for consumers if substantive law is improper, and vice versa.⁸⁰

2.2.3 How to achieve consumers' access to justice in relation to procedural justice and ODR

The movement for consumers' access to justice mainly aims at facilitating easier access to justice and overcoming obstacles that deny consumers easy access to justice, such as long duration and high cost of traditional forms of litigation. The theory of access to justice in the consumer context has established some criteria for providing consumers with satisfactory and easier access to justice: for example, a favourable venue for dispute resolution, and the effectiveness, responsiveness to consumer disputes, and enforcement of the dispute resolution procedure. The next section will present these conditions and how they can be met in relation to ODR.

With the recent development of technology, e-commerce transactions have revealed challenges to consumers in relation to their online shopping. Although e-commerce has offered consumers an alternative to traditional shopping, as they can shop wherever they are and at their convenience, e-commerce transactions pose a problem for consumers when it comes to the occurrence of disputes. This challenge can arise based on the principles of consumer transactions jurisdiction, governed by the legal rule which states that the individual should be litigated in the court of their domicile.⁸¹ In that case, e-consumers who are granted greater convenience and lower costs for online shopping as mentioned above, would instead lose convenience when a dispute arises by having to sue the seller in the latter's domicile, as well as facing higher costs through having to pay for transportation in the case of traditional litigation. Yuthayotin argues that since consumers are considered the weaker party with less knowledge, weaker bargaining power, and lower levels of legal process awareness, the principles of jurisdiction rule mentioned above which applies to consumers should be viewed differently, because if this rule is applied to consumer disputes, the consumer will have to sue

⁷⁹ Stefan Wrbka, *Consumer Access to Justice Revisited* (Cambridge University Press 2014) 28.

⁸⁰ *ibid.*

⁸¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001) OJ 2 12/1.

the seller in the latter's domicile, putting the consumer in a weaker position in terms of convenience and costs,⁸² unlike the seller who will gain more power through awareness of the legal process in the jurisdiction of the seller's domicile. The inconvenience of bringing claims would present challenges to e-consumers seeking redress from transactions in which their rights have been violated, which in turn would discourage them from seeking easy access to justice.

Another element that needs to be taken into consideration for satisfactory and easy access to justice is the effectiveness of dispute resolution. The traditional litigation process in consumers' disputes and e-commerce disputes has been criticised for its long duration and delays. As mentioned above,⁸³ the traditional litigation process does not suit the e-commerce environment due to its inconvenience and cost in comparison to ODR. This scenario of inconvenience in the dispute resolution process is likely to leave consumers with their rights ignored due to the great effort needed to have recourse to it, which might lead to injustice in relation to their rights.⁸⁴ Due to reluctance to seek redress through traditional channels, many regulations and procedures have been offered to assist consumers in defending their rights and to support them with easier methods of dispute resolution, not limited to the shorter process and financial help, but including effective due process in order to ensure that the parties to the dispute are treated in accordance with fairness and justice.⁸⁵

- **Enforcement of rights and redress**

The enforcement of consumers rights and redress is another significant element of access to justice. One of the main types of justice is distributive justice, which concerns the fairness with which the outcome of a dispute resolution process is reached.⁸⁶ This fairness in reaching an outcome could not be effective and beneficial to the consumer without the ability to enforce the outcome in accordance with the dispute resolution process. One of the main obstacles for consumers is the fact that enforcement of redress faces processes that are likely to make it inconvenient, prolonged, and costly. These obstacles to enforcement could weaken consumers'

⁸² Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 93.

⁸³ See chapter 2 section 2.1.3.

⁸⁴ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 96.

⁸⁵ Julia Hornle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 17.

⁸⁶ See chapter 2 section 2.1.1.

willingness to carry out enforcement action, which would in turn deter them from seeking redress.⁸⁷

Another main obstacle to e-commerce is the issue of consumers' lack of confidence in the market, as they fear dealing with sellers whom they have not dealt with before, or buying products that they cannot test as they could with traditional shopping methods.

As noted above, justice is concerned with fairness and equality.⁸⁸ Procedural justice refers to the process of reaching a just outcome.⁸⁹ It rests on several factors for assessing whether or not an outcome of procedural justice was pursued through fair process: for example, respectful treatment during the process, neutrality and avoidance of any bias to any party of the dispute, opportunity for the consumer's voice to be considered regarding any complaint, and the trustworthiness of the justice authority's motivation to be sincere.⁹⁰ These principles of procedural justice are important to consumers as they ensure the delivery of justice in a preferable way for consumers and for justice itself. The reason for this preferability from the consumer's perspective might lie in the opportunity to express their grievances to the justice authority and to receive respectful treatment from that authority. This is supported by Welsh's assertion that the likelihood of disputants' ability to presume that there will be a fair outcome is greater when they are treated in a procedurally just manner.⁹¹ Moreover, the reason for the importance to the justice system of the principles of procedural justice is that they also ensure the enforcement of decisions or judgements, which is important both to justice as a system and to consumers in terms of the delivery of justice to its seekers. It is argued that disputants who consider themselves treated in a fair manner during the dispute resolution process are better expected to comply with the result of that process.⁹² Therefore, the principles of procedural justice will be explained and clarified in order to achieve consumer's access to justice in relation to ODR and the abovementioned shortcomings that hinder consumers from easy access to justice.

⁸⁷ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 98.

⁸⁸ See chapter 2 section 2.1.1.

⁸⁹ See chapter 2 section 2.1.1.1 (sub-section: procedural justice).

⁹⁰ For more discussion of procedural justice principles, see chapter 2 section 2.1.1.1 (sub-section: procedural justice).

⁹¹ Nancy Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79(3) *Washington University Law Quarterly* 787, 818.

⁹² *ibid.*, 819.

- **Consumer's voice to be heard during the redress procedure**

The principle of voice presentation during the redress procedure is the most significant principle of procedural justice. Its significance comes from the fact that it is the expression of consumers themselves to the justice authority, which differentiates it from the other principles in that it centres upon consumers, whereas principles such as neutrality, respectful treatment, and transparency centre upon a third party. Therefore, consumers value the principle of their voice being heard during the redress procedure as it represents the only opportunity to present their views and concerns to the justice authority. As per Welsh, a disputant's view of procedural justice would be reliably affected by the opportunity for their voice to be heard during the dispute resolution procedure.⁹³

The disputant's perception of the fairness of an outcome of a dispute resolution procedure is strongly linked to the provision of a full opportunity to voice their concerns.⁹⁴ Allowing disputants to present their views and concerns to a justice authority has been examined in studies of process control, which have confirmed that procedures that grant opportunities for voice, evidence, and argument are seen as fairer processes than those that mute the disputants.⁹⁵ The voice principle as perceived by disputants is highly valued, as it provides them with the possibility of influencing the decision-maker, and in turn, of influencing the result of the dispute resolution procedure.⁹⁶ However, although it is a favourable condition for disputants that their voice be heard, and is an opportunity to influence the decision-maker, thus affecting the outcome as a result of their explanation of their concerns, as noted above, the presentation of voice by disputants is no less important even when they know that they cannot influence the decision-maker. This confirms the importance of the presentation of voice and concerns, and the full opportunity to be heard during the dispute resolution procedure. However, the equal opportunity to be heard during procedural justice would beg the question: what counts as a satisfactory opportunity to be heard for both parties? Some studies have dealt with the answer to this question, suggesting that disputants would consider that they had had a satisfactory opportunity to be heard if the justice authority had considered their views before making its

⁹³ *ibid.*, 821.

⁹⁴ Edgar Allan Lind, 'Procedural Justice, Disputing, and Reactions to Legal Authorities' in Austin Sarat, Marianne Constable, David Engel, Susan Lawrence and Valerie Hans (eds), *Everyday Practices and Trouble Cases* (Northwestern University Press 1998) 180.

⁹⁵ Lind Allan and Tom Tyler, *The Social Psychology of Procedural Justice* (Plenum Press New York 1988) 215.

⁹⁶ Edgar Lind, Procedural Justice, 'Disputing, and Reactions to Legal Authorities' in Austin Sarat, Marianne Constable, David Engel, Susan Lawrence and Valerie Hans (eds), *Everyday Practices and Trouble Cases* (Northwestern University Press 1998) 180.

decision,⁹⁷ and if there had been independent consideration of their views.⁹⁸ Also, an opportunity for voice might be affected by the existence of legal representation for disputants. The expressions of lawyers representing the disputant might differ from the consumer's expressions and feelings, thus possibly failing to represent the consumer's concerns accurately. Therefore, Welsh argues that the decision-maker of the justice authority should invite the disputants to voice their concerns in order to be heard directly and to be involved in the dispute resolution process.⁹⁹ This option may safeguard the disputant's opportunity for voice in the event that they are represented by lawyers in the dispute resolution process.

- **Transparent process in decision-making**

Transparency in the decision-making process during redress procedures refers to the extent to which decisions are considered in a way that is visible to the participant and to an outsider of an organisation.¹⁰⁰ The main point is not that they should be able to visualise how a decision has been reached, but rather that they should be able to understand the procedure through which it was achieved and the rationale behind that decision.¹⁰¹ Through the dispute resolution procedure, disputants tend to have a full image of the process whereby the decision is made, regardless of whether or not the outcome is in their favour. The transparency and openness with which decisions are made create the perception among disputants that the decision-making procedure is unbiased.¹⁰² Such transparency clarifies the independence of the justice authority through the disputant's vision of the whole procedure and of the motives that have driven the authority to that decision, which in turn ensures the trustworthiness of the justice authority.

The importance of transparency in the decision-making process comes from the need for better communication with citizens as to how justice is processed, in order to educate the public to the effect that decisions are considered appropriately and in a fair manner so as to reach a just outcome.¹⁰³ Correspondingly, the decision-maker during the dispute resolution process needs

⁹⁷ Tom Tyler, 'Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models' (1987) 52(2) *Journal of Personality and Social Psychology* 333, 339.

⁹⁸ Nancy Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79(3) *Washington University Law Quarterly* 787, 823.

⁹⁹ *ibid.*, 845.

¹⁰⁰ Joseph Schafer, 'The Role of Trust and Transparency in the Pursuit of Procedural and Organisational Justice' (2013) 8(2) *Journal of Policing, Intelligence and Counter Terrorism* 131, 133.

¹⁰¹ Joseph Schafer, 'The Role of Trust and Transparency in the Pursuit of Procedural and Organisational Justice' (2013) 8(2) *Journal of Policing, Intelligence and Counter Terrorism* 131, 133.

¹⁰² Kristina Murphy, 'Procedural justice and its role in promoting voluntary compliance' in Peter Drahos (ed), *Regulatory Theory: Foundations and applications* (Australian National University Press 2017) 46.

¹⁰³ Tracey L Meares and Tom R Tyler, 'Justice Sotomayor and the Jurisprudence of Procedural Justice' (2013-2014) 123 *Yale Law Journal Forum* 525, 535.

to be just and to be seen as just, factors which comprise transparency in the process and justification of decisions.¹⁰⁴

- **Neutrality in the decision-making process**

Neutrality in decision-making during the dispute resolution process comprises the consistent application to the decisions of the legal rules and the facts of the case, without personal views on the cases entering into them, thus ensuring an unbiased outcome.¹⁰⁵ This concept of neutrality in the procedure provides a fairer outcome through adherence to the law as well as through limiting the ability of decision-makers to exercise discretion that may reflect their personal views on the case.¹⁰⁶ The ability to exercise discretion in reaching a judgement allows open space for the decision-maker in terms of opinions to base decisions on, which produces variation between cases according to their circumstances. Although some variation might be desirable inasmuch as each case has different facts, the scope for decision-makers to give weight to their personal opinions on the case should be limited in order to produce unbiased judgements. Therefore, limitation of the decision-maker would indirectly exclude personal views on a case by reducing the space for discretion within which to adhere to the legal rules.

The impartiality of the decision-maker during the dispute resolution procedure would affect the disputant's satisfaction, which may affect their view on the procedure's achievement of justice. As per Welsh, an unbiased dispute resolution procedure tends to have an impact on the judgement of the procedure, as disputants are prejudiced by their observations as to the decision-maker's impartiality and attempts to achieve a just outcome.¹⁰⁷ During the dispute resolution procedure, the behaviour of the decision-maker towards disputants, which includes treating their views evenly, affects the disputants' opinions of the outcome and justice of the procedure. This means that the neutrality of the decision-maker 'acts as a filter for ... and an amplifier of' disputants' perception of the justice and the outcome of a procedure'.¹⁰⁸

The disputant's assessment of the decision-maker's behaviour takes account of lack of bias and reception of the information required to make decisions according to the rules. This neutrality in the procedure, leading to the disputant's satisfaction with the process regardless of the

¹⁰⁴ *ibid.*

¹⁰⁵ Kristina Murphy, 'Procedural justice and its role in promoting voluntary compliance' in Peter Drahos (ed), *Regulatory Theory: Foundations and applications* (Australian National University Press 2017) 46.

¹⁰⁶ Rebecca Hollander-Blumoff and Tom Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) 2011(1) *Journal of Dispute Resolution* 1, 9.

¹⁰⁷ Nancy Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' [2001] 79(3) *Washington University Law Quarterly* 787, 823.

¹⁰⁸ *ibid.*

outcome, would promote the legitimacy of the authorities' decisions between disputants by providing individuals with a neutral and trustworthy decision-maker.¹⁰⁹

However, the criteria of consumer's redress satisfaction and access to justice might be affected by some factors. Neutrality of the third party might fail due to frequent connection with a disputant. For example, e-commerce stores such as Amazon or eBay play a major role in e-commerce and have high rates of transactions. Some transactions raise disputes due to delay in delivery, damaged items, and items not being as described. Accordingly, those e-commerce stores are frequent customers of dispute resolution bodies, whereas a consumer might deal with a dispute resolution body on rare occasions. Having frequent connections with dispute resolution bodies might affect neutrality, which in turn may influence the satisfactoriness of the redress from the consumer's perspective. Therefore, ensuring the consumer's trust in the dispute resolution body should be combined with ensuring neutrality in relation to redress satisfaction. The reason for this combination is that the consumer will trust the authority when they believe it is neutral. It is argued that neutrality and trust are related as it is difficult to trust a person who is not impartial.¹¹⁰ So, when consumers trust the dispute resolution authority, they will have a perception that the decision was based on the relevant information and that a neutral third party has attempted to make a fair decision.¹¹¹

- **Respect for consumer rights and dignity**

Respectful treatment of disputants' concerns in an institution's dealings with them depends on whether they are treated in a rightful manner which respects their humanity and dignity, and whether their rights are respected under the law.¹¹² As per Murphy, when disputants are treated in a respectful way in their dealings with the justice authority, or in the authority's enforcement of the law, disputants tend to view the justice procedure as fair.¹¹³ In contrast, when disputants are treated disrespectfully, they react to the procedure negatively, expressing dissatisfaction with the authority that treated them thusly, since disputants are sensitive to the way that authorities deal with them.¹¹⁴ The reason for this sensitivity of disputants in their reaction to

¹⁰⁹ Rebecca Hollander-Blumoff and Tom Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) 2011(1) *Journal of Dispute Resolution* 1, 10.

¹¹⁰ Tom Tyler, *Why People Obey the Law* (Yale University Press 1990) 164.

¹¹¹ Nancy Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79(3) *Washington University Law Quarterly* 787, 830.

¹¹² Kristina Murphy, 'Procedural justice and its role in promoting voluntary compliance' in Peter Drahos (ed), *Regulatory Theory: Foundations and applications* (Australian National University Press 2017) 46.

¹¹³ *ibid.*

¹¹⁴ Kristina Murphy, 'The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders' (2004) 28(2) *Law and Human Behaviour* 187, 190.

disrespectful treatment by the authorities might be related to their perceptions of authority. Disputants might see themselves as contributors to the state and believe that the authority should repay them as members of the society. Conversely, when the authority's treatment lacks respect and dignity for disputants, it indirectly shows the disputants that society perceives them as inferior, which is seen as a significant issue for disputants, as they do care about their place in the society.¹¹⁵ Considering that consumers might be disputing parties during dispute resolution procedures, consumers as well as other disputants might evaluate their place in the social context, and be unwilling to be perceived as non-valuable members in other contexts. For example, in the marketplace context, a significant consumer role will grant larger access to justice than the denial of an appropriate role in the market.¹¹⁶

It is important to address the above principles of procedural justice during dispute resolution in order to maintain just process and thus to ensure consumer satisfaction with the outcome as well as the process. However, this could beg the question of what counts as respectful treatment, transparency, and voice to be heard. Each element may vary depending on the circumstances of the case or the consumer's understanding of the procedure. Although these elements vary with the circumstances of each case, there are some examples which may standardise the variation. As per Yuthayotin, facial gestures, tones of voice, and face-to-face talk may allow better treatment, which will help in reaching a solution when there is a dispute.¹¹⁷ Another element which may positively influence the consumer's satisfaction with the procedure is the perception of the consumer as a valuable member of society, which promotes broader recognition of consumers within the community.¹¹⁸ In essence, when an authority has considered the consumer respectfully, has handled the dispute impartially, has provided trustworthy rationales and has considered the individual's concerns before reaching a decision on the dispute, then the participant would view the procedure as just.¹¹⁹

¹¹⁵ Nancy Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79(3) *Washington University Law Quarterly* 787, 792.

¹¹⁶ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 103.

¹¹⁷ *ibid.*, 248.

¹¹⁸ Kristina Murphy, 'Procedural Justice and Its Role in Promoting Voluntary Compliance' in Peter Drahos (ed), *Regulatory Theory: Foundations and applications* (Australian National University Press 2017) 49.

¹¹⁹ *ibid.*, 47.

In the case of the abovementioned principles of procedural justice as applied to ODR and e-commerce transactions which offer consumers convenience, claims should relate to the place where the transaction occurred instead of to the seller's domicile, to avoid inconvenience and to ensure forms of procedural justice such as respectful treatment. Also, consumers should be able to sue the sellers at the place convenient to themselves. Hill argues that consumers should be able to establish a lawsuit against the seller in the place of the consumer's convenience or in the place of their own domicile, as this would enhance their access to justice and redress as well as offering consumer convenience, resting on the principle of respect for consumer rights.¹²⁰ In this case, ODR might be easier and more effective for consumers of e-commerce. In terms of ease for the consumer, ODR would be better for e-commerce consumers than traditional litigation, as these consumers have already made their contracts online, a location which will be easier for them to access. Moreover, in terms of cost, ODR would be already accessible to e-commerce consumers from the convenient place where they are, in comparison to the traditional litigation process which requires consumers to travel for dispute resolution.¹²¹ Since consumers are regarded as the weaker party due to limitations of bargaining power and information, they should be granted easier access to dispute resolution processes such as ODR, which offers e-commerce consumers convenience and effective redress. Facilitation of convenient dispute resolution mechanisms would allow easier access to justice and redress for consumers.¹²² Moreover, since the dispute resolution outcome may not be of a binding nature, it may require voluntary enforcement by disputants. Principles of procedural justice would ensure satisfactory access to justice and in turn ensure compliance of disputants with the outcome, effectiveness, and enforcement of the dispute resolution decision. The enforcement of these decisions can be seen as the fruit of the dispute resolution process. Without enforcement, the outcome of dispute resolution would have no effect. Therefore, in relation to consumers of e-commerce, the mechanisms for providing effective enforcement of redress at a convenient place and affordable cost, in light of the low value of these disputes, are needed to ensure the distribution of justice among justice seekers.¹²³

¹²⁰ Jonathan Hill, *Cross-Border Consumer Contracts* 221–2 (2008) (Oxford University Press 2008) 187-8.

¹²¹ For more discussion of online access to justice, see chapter 2 section 2.1.3 on Consumers' right to conduct dispute resolution in their preferred place or in their domicile.

¹²² Jonathan Hill, *Cross-Border Consumer Contracts* 221–2 (2008) (Oxford University Press 2008) 187-8.

¹²³ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 99.

2.3 Consumer Protection as a Form of Consumer's Access to Justice

This section discusses the concept of consumer protection in relation to the consumer's access to justice. Access to justice is the foundation of consumer protection, which aims to offer justice to consumers. This section deals with the very basic concepts of consumer protection, such as fairness and equality of powers and the concept of consumers' access to justice when their rights are violated. Moreover, this section presents the specific reasons behind the provision of consumer protection in e-commerce.

2.3.1 What is the concept of consumer protection and how does it support consumers in e-commerce?

The protection of consumer rights is an important element as it enhances consumer trust in the market which will in turn maximise economic growth. This protection has become highly important in e-commerce as it involves transactions with features that differ from those of traditional shopping. For instance, the channel where information on products is acquired is that of the seller's advertisement, whereas with traditional shopping the consumer can acquire product information by observation.¹²⁴ Although in some instances the consumer receives information on products through other methods such as mail, TV advertisement, and newspapers, the information included in the advertisement was designed by the seller. This feature of obtaining information from the seller's advertisement may lead to imprecise details of the product being conveyed by the seller's exaggerated and misleading advertising, which in turn may cause consumer dissatisfaction and consequent lack of trust in the market.

While misleading information may occur in traditional shopping, it would impose significant risk in e-commerce since the seller and consumer may live in different domiciles and lack direct contact and negotiation. Another feature that differentiates e-commerce from traditional shopping is that in traditional shopping payment for goods usually occurs at the same time as or after goods are delivered, and it usually includes inspection of the goods before delivery, whereas in e-commerce money is usually paid prior to the delivery without any inspection, in addition to which it cannot be completed at the same time because the collection of goods is deferred.¹²⁵ Moreover, there is an economic perspective that is related to e-commerce regarding information provided by the seller. It has been found that there are incentives for online businesses to hide information on products and services, as it is profitable to increase search

¹²⁴ Gue M, 'Protection of Consumer Right to a Fair Transaction in E-commerce' (2011 International Conference on Business and Management and Electronic Information, Guangzhou, China, June 2011).

¹²⁵ *ibid.* For more on the differences between e-commerce and traditional shopping, see chapter 4 section 4.2.1.

costs, thus complicating price comparisons among consumers and making the comparison effortful.¹²⁶ Examples are hidden prices, products that seem to be on sale but are not, and complex information provided by the seller.¹²⁷ This feature of search cost along with misleading information provided by the seller may lead to lack of trust in the market when the consumer's rights are not well maintained, a situation which calls for regulation to overcome these issues in order to increase consumer trust in the market. Therefore, this section will present some principles of consumer rights in relation to e-commerce and discuss how these protection measures could support consumers in e-commerce.

- **Concept of fairness**

One of the main principles of consumer protection is the promotion of fairness in dealings between the buyer and consumer. This principle has the potential to reduce disputes between buyer and consumer due to the presence of honesty and fairness, as well as to promote consumers' confidence in the market through the reduced possibility of unfair practices occurring there, which will in turn enhance consumers' access to justice.¹²⁸

However, although it is desirable to enhance fair dealing for consumers in order to promote confidence in the market, it is hard to determine fair practice, as it might vary from one market to another. It is argued that consumers' consideration of market practices is a crucial element, since what most consumers think about commercial practices can often be regarded as the standard on which to determine whether or not a seller's commercial practice can be categorised under the umbrella of fairness.¹²⁹ This consideration of unfair practice can take the form of standardised contracts, as such a contract being drafted by one party who might draft it in his favour without a pre-contractual negotiation process, thus creating an unfair environment for consumers,¹³⁰ regardless of its advantages to the market.¹³¹ Because of this unfair commercial practice of sellers towards consumers, some have argued for the introduction of a theory of

¹²⁶ Donald Ngwe, Kris Ferreira and Thales Teixeira, 'The Impact of Increasing Search Frictions on Online Shopping Behavior' (2019) 56 (6), *Journal of Marketing Research*, 944, 946.

¹²⁷ Glenn Ellison and Sara Ellison, 'Lessons About Markets from the Internet' (2005) 19 (2), *Journal of Economic Perspectives*, 139, 153.

¹²⁸ Ian Ramsay, *Consumer law and Policy, Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 152.

¹²⁹ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 101.

¹³⁰ *ibid.*, 82.

¹³¹ It is argued that this form of contract, such as contracts of adhesion, may bring economic benefits to the market as it reduces the costs of high numbers of consumer contracts by having a single form of contract. For more discussion of this topic, see Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 82.

assent to standard contracts, which would include the need for holistic assent to realistic terms in standard contracts, but not to unreasonable or unrealistic terms.¹³²

In order to protect consumers from unfair terms, there are measures that need to be enforced prior to the conclusion of the contract, which can be called the procedural stage, as well as a measure following the conclusion of the contract.¹³³ At the procedural stage, it is argued by Yuthayotin that this may involve raising consumers' awareness of some kinds of terms that might be unfair to them.¹³⁴ A second measure would be to specify some forms of unfair terms as unenforceable in consumer contracts.¹³⁵ This specification can be based on the norms of consumers in the market regarding some of the commercial practices which they have considered unfair, and can determine these norms as a benchmark of unfair practices.¹³⁶ The measures mentioned above can serve consumers in e-commerce better than in traditional shopping in some ways. This is because e-commerce transactions differ from those of traditional shopping, as mentioned earlier,¹³⁷ through the feature of distance selling that involves less interaction with the seller. Accordingly, there is less negotiation in comparison with traditional shopping which comprises more negotiation,¹³⁸ offering the potential for consumers to negotiate and to be aware of some of the unfair terms. Therefore, the introduction of the measures mentioned above, along with the adoption of assent to standard contracts, could positively support protection of consumers in e-commerce.¹³⁹

Fairness of dealing between consumers and sellers may relate to the concept of equality. Although the two concepts have some similarities, they also have differences. Both might have potential benefits for the consumer, as fairness concerns what consumers need in order to receive just treatment and outcome, while equality concerns equal treatment between consumer and seller before the law. Accordingly, equality of treatment between consumer and seller might look like just treatment. However, it would be unjust treatment between the consumer and business when we consider the differences between them in terms of legal knowledge and

¹³² Jean Braucher, 'New Basics: 12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products' (January 2006). Arizona Legal Studies Discussion Paper No 06-05.

<<https://ssrn.com/abstract=730907>> accessed 25 March 2020.

¹³³ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 82.

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ For more, see the previous page.

¹³⁷ See chapter 2 section 2.1.3.

¹³⁸ The comparison between e-commerce and traditional shopping was discussed earlier in chapter 2 section 2.1.3.

¹³⁹ The application and examination of these measures will be discussed in a later chapter.

financial affordability. Therefore, the concepts of fairness and equality should be perceived together in order to allow the consumer access to justice fairly and equally.

The concept of equality between individuals is not limited to consumer protection principles, but is a more general concept which is derived from human rights principles to protect individuals from infringements of their rights by governments.¹⁴⁰ Similarly, the consumer is entitled to protection from unfair commercial trading activities which result in inequality between consumers and business organisations:¹⁴¹ for example, information asymmetry and inequality of bargaining power. This means that consumer protection is derived from human rights, and consumers are entitled to full protection as a basic human right regardless of the type of the other party, which has to respect consumer rights, whether it is a business dealing with a consumer or a government dealing with its citizens. In respect of consumer equality, the consumer is recognised as the weaker party due to the lower level of awareness in a transaction compared with the seller who is often familiar with commercial transactions.¹⁴² With this form of contractual relationship, the stronger party, which is often a business organisation, can impose its will on the consumer on a ‘take it or leave it’ basis, which may result in disrespectful treatment of the consumer due to the lack of equal power.¹⁴³ The lack of equal bargaining power may result in the kind of contract of adhesion which disregards the basic consumer’s right to negotiate terms of the contract. As per Yuthayotin, conclusion of contracts seems to be straightforward when contractual parties have entered into a negotiation process and have accepted the agreement.¹⁴⁴ Therefore, in relation to consumer contracts in e-commerce, there is a need to alleviate the seller’s power and balance it with the consumer’s right to have equal bargaining power in negotiating the terms of the contract.

- **Concept of access to justice if the above rights are violated**

The function of e-commerce transactions is not like the function of traditional shopping. There are some features that differentiate the two types of consumer transaction, such as the risk of dealing with an e-commerce seller whom the consumer has not met before and with whom negotiation prior to the conclusion of the contract is limited, whereas in traditional commercial transactions, the consumer can meet and discuss the deal with the seller, and is able to go back

¹⁴⁰ Sinai Deutch, ‘Are Consumer Rights Human Rights?’ (1994) 32(3) Osgoode Hall Law Journal 537, 552.

¹⁴¹ *ibid.*

¹⁴² Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 29.

¹⁴³ Sinai Deutch, ‘Are Consumer Rights Human Rights?’ (1994) 32(3) Osgoode Hall Law Journal 537, 553.

¹⁴⁴ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 29.

to the store if he encounters something wrong with the purchased item. This difference between the two transactions creates a huge gap, in terms of risky transactions and consumers' confidence, between e-commerce and traditional transactions. It is argued by Schultz that 'when we consider engaging in a relationship, be it personal or commercial, we use points of reference or indicators of trust to assess the risks related to the relationship. For instance, when we intend to make a commercial transaction, we assess the risks of this transaction by examining the other party, the community in which the transaction is to take place, and what can be done if a problem occurs'.¹⁴⁵ Although the argument by Schultz goes back nearly fifteen years, the issue of risks associated with e-commerce activities and lack of trust remains, even with the development of technology. As Yuthayotin argues, consumers remain conservative about e-commerce as it involves risk, especially in cross-border transactions.¹⁴⁶

The rationale for this differentiation between the two types of transactions is the need to raise the issue of risk which the consumer encounters in e-commerce transactions, which is greater than the risk in traditional shopping. Whereas in traditional shopping the consumer can return to the seller and discuss any issue related to the contract of sale, in e-commerce transactions the consumer may in some instances need to travel long distances to the seller's location, if that location is known to the consumer, when further issues occur such as lack of knowledge of seller's behaviour, or limitations in negotiation. This issue of e-commerce transactions can be alleviated by enforcing consumer rights through effective dispute resolution, as this is one of the main principles of consumer rights.¹⁴⁷ When consumers are assured of access to justice when their rights are violated, their confidence in attaining their rights will be enhanced. It is argued by Cseres that consumer access to effective dispute resolution is beneficial to consumers as it decreases the likelihood of businesses violating their rights, instead causing them to adapt commercial practice in good faith so as to comply with the law and work in a consumer-friendly way.¹⁴⁸ Based on this idea of Cseres, it can be argued that adoption of the consumer right of redress to solve disputes involving e-commerce consumers would enhance their confidence in the market, and in turn be of benefit to the e-market.

¹⁴⁵ Thomas Schulz, 'Does Online Dispute Resolution Need Governmental Intervention – The Case for Architectures of Control and Trust' (2004) 6(1) *North Carolina Journal of Law & Technology* 71, 77.

¹⁴⁶ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 2.

¹⁴⁷ Gretchen Larsen and Rob Lawson, 'Consumer Rights: An Assessment of Justice' [2013] 112(3) *Journal of Business Ethics* 515, 516.

¹⁴⁸ Kati. J Cseres, 'Enforcement of Collective Consumer Interests: A Competition Law Perspective' in Willem van Boom and Marcus Loos (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (Europa Law Publishing 2007) 130.

2.3.2 Why do consumers need special care and protection in e-commerce?

E-commerce transactions differ from those in traditional shopping in several aspects.¹⁴⁹ These include lack of physical inspection of goods, uncertainty over sellers' behaviour, and the inconvenience of legal action against sellers when consumers' rights have been violated, due to many features such as cost of litigation and lack of legal knowledge. Based on these assumptions, consumers may require further protection due to the high risks they encounter when they plan to shop online. There are several reasons why consumers need special protection when conducting e-commerce transactions: for example, the shortcomings of traditional litigation procedures in light of the low cost of these transactions, as well as lack of appropriate information when making purchasing decisions. The following discussion will examine the grounds for consumers' additional protection in e-commerce transactions.

- **Lack of effective redress in traditional litigation**

Consumers as parties to the contract differ from sellers in some features. One of the main such features is the lack of sufficient knowledge of the law and of legal processes, as well as lack of resources when it comes to filing against well-organised businesses who normally have greater financial affordability.¹⁵⁰ This difference in legal knowledge between the consumer and the business would impose further difficulty when legal action against sellers is required, due to the lack of any legal requirement for litigation or dispute resolution. For consumers, there are also many other features of traditional litigation that deter them from taking legal action, such as the high cost compared to the small value of claims and the long duration of traditional litigation.¹⁵¹ In the case of effective redress for consumers in e-commerce, Gillies argues that the facilitation of ADR can offer consumer redress in the event of a dispute with the seller in e-commerce.¹⁵² The concern for consumers in relation to effectiveness of redress in traditional litigation would be more important in e-commerce because of the greater risk involved in the latter, which has different characteristics from traditional shopping, such as distance selling without inspection of the items and payment before delivery of the items. These differences between the two forms of shopping call for special care for e-consumers along with the

¹⁴⁹ See chapter 2 section 2.3.1.

¹⁵⁰ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 33.

¹⁵¹ Kati. J Cseres, 'Enforcement of Collective Consumer Interests: A Competition Law Perspective' in Willem van Boom and Marcus Loos (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (Europa Law Publishing 2007) 130.

¹⁵² Lorna Gillies, 'Adapting international private law rules for electronic consumer contracts' in Charles Rickett and Thomas Telfer (eds), *International Perspectives on Consumers' Access to Justice* (Cambridge University Press 2009) 361.

protection measures that are supplementary in traditional shopping for consumers. It can be argued that the lack of legal knowledge faced by the consumer can be overcome by offering a special dispute resolution process that addresses consumer needs in terms of the complexity of traditional litigation, while addressing market needs through speedy processes and low cost in relation to the nature of e-consumers' transactions. As per Cappelletti and Garth, there is a need for special forms of arbitration, negotiation, and mediation for solving consumer disputes, to simplify the process and overcome the issue of the lengthy process of traditional litigation.¹⁵³

- **Lack of confidence in the market**

One of the main conditions that consumers seek in their dealings, regardless of the market forum, is confidence in the market. Since many commercial transactions involve unprecedented sellers' activities which create risk and uncertainty, trust becomes essential in consumer transactions to alleviate such risk and uncertainty in the market. Confidence is the belief placed in another person, based on previous patterns, that the other party will act in a trustworthy way in future.¹⁵⁴ Since the establishment of e-commerce, the issue of trust has been one of the major obstacles to its growth, stemming from the lack of physical interaction between consumer and seller.¹⁵⁵

Trust is the conviction or anticipation that the seller's word or promise can be relied upon and that the seller will not take advantage of the consumer's disadvantageous position.¹⁵⁶ The concept of trust has been defined as 'the willingness of a consumer to be vulnerable to the actions of an Internet merchant in an Internet shopping transaction, based on the expectations that the Internet merchant will behave in certain agreeable ways, irrespective of the ability of the consumer to monitor or control the Internet merchant'.¹⁵⁷ The characteristics of e-commerce transactions makes consumers more vulnerable, and the unexpected behaviour of the seller may lower consumers' trust in the market, making them reluctant to enter into e-commerce. For example, in traditional commerce, the consumer can obtain information about the product through observation,¹⁵⁸ and stores have a physical location which gives consumers confidence

¹⁵³ Mauro Cappelletti and Bryant Garth (eds), *Access to Justice VOL I: A World Survey* (Sijthoff and Noordhoff 1978) 59.

¹⁵⁴ Juergen Noll, 'European Community & E-Commerce: Fostering Consumer Confidence' (2002) 9(3) *Electronic Communication Law Review* 207, 208.

¹⁵⁵ *ibid.*

¹⁵⁶ Concept of trust has been discussed in chapter 1.

¹⁵⁷ Matthew Lee and Efraim Turban, 'A Trust Model for Consumer Internet Shopping' (2001) *International Journal of Electronic Commerce* 6(1) 75, 79.

¹⁵⁸ Gue M, 'Protection of consumer right to a fair transaction in E-commerce' (2011 International Conference on Business and Management and Electronic Information, Guangzhou, China, June 2011).

that the seller is operating in line with laws and that the relevant authorities are aware of the seller,¹⁵⁹ whereas in e-commerce there is a lack of physical presence, and consumers obtain information about products through advertisement by the seller, with whom the consumer enters into a contract at a distance without meeting him or her, the opportunity to meet being a condition of a trustworthy relationship. Although the issue of information asymmetry may occur in both shopping venues, whether e-commerce or traditional commerce, the likelihood of information asymmetry as well as the likelihood of search cost is greater in e-commerce due to the lack of physical observation of products, so that the consumer can only obtain information on the product from the seller's description.¹⁶⁰

These differences between the two forums caused by distance selling may create lack of confidence in the e-market due to the great uncertainty that results.¹⁶¹ Uncertainty may lower consumers' confidence in e-commerce, making them reluctant to enter into such a market due to its risky environment involving unprecedented behaviour, as in the abovementioned examples. The reason for lack of confidence in the market might lie in incomplete or false information accompanying sales in the market.¹⁶² The harm of information asymmetry, which can be defined as failure to provide the consumer with enough information to make appropriate purchasing decisions,¹⁶³ might have an effect by indirectly preventing the consumer from making an appropriate decision through comparison of terms, products, and services offered by sellers. The harm can occur in two ways. The first is the way information is provided. Since the seller has more knowledge about the product, sellers may withhold information that could lead to consumer dissatisfaction, in order to reduce the likelihood of consumers not buying the product.¹⁶⁴ The second way the harm occurs is by indirectly affecting the consumer through the market's failure to maintain competitiveness for honest sellers who are willing to provide enough information to enable consumers to make appropriate purchasing decisions. When a market is filled with asymmetric or deficient information, market efficiency will be affected in

¹⁵⁹ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 35.

¹⁶⁰ *ibid.*, 27.

¹⁶¹ Juergen Noll, 'European Community & E-Commerce: Fostering Consumer Confidence' (2002) 9(3) *Electronic Communication Law Review* 207, 208.

¹⁶² Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 28.

¹⁶³ Peter Cartwright, 'Consumer Protection Rationales,' *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press 2001) 21. For more on information deficit see chapter 2 section 2.2.2.

¹⁶⁴ Ian Ramsay, *Consumer Law and Policy Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 69.

an undesirable way.¹⁶⁵ These circumstances could diminish the market efficiency and full competitiveness that e-commerce intends to achieve, leading to adverse selection which occurs when consumers cannot assess the quality of goods and can only arrive at a preference based on low price.¹⁶⁶ This produces competition in the market based on low price instead of high quality, which contributes to market failure, as high quality products will then opt-out of the market.¹⁶⁷ Therefore, these issues need to be addressed in order to achieve full competitiveness and to provide the features that e-commerce intends to deliver for e-consumers, such as protection of their rights. This issue of lack of confidence in the e-market has been the focal point in designing protection measures for e-commerce.¹⁶⁸ The factor of confidence can be enhanced by improving regulations that govern e-commerce transactions so as to prevent disputes from arising;¹⁶⁹ also, by providing easier access to justice after disputes do arise so that consumers can feel confident when engaging in e-commerce, knowing that whenever disputes occur, they can be resolved in a convenient way.¹⁷⁰ As per Carreau, allowing easier access to justice would promote fairness and equality between disputants, since violating merchants would know that they would face consequences and would therefore avoid causing detriment to consumers.¹⁷¹

- **Shielding the consumer from detriments**

Consumers enter into the market because of their interest in buying goods they are interested in. Sellers enter into the market because of their interest in making a profit. Consumers' expectations of the standard of goods that they are interested in may not be met due to economic factors stemming from the seller's economic interest in making a profit. Sellers' survival in the market depends on making a profit and therefore, in some circumstances, they lower the cost of the products or manufacture products that fall short of the quality standards acceptable to consumers.¹⁷² This issue is linked to market failure caused by information asymmetry, as

¹⁶⁵ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 28.

¹⁶⁶ Hanneke A. Luth, *Behavioural Economics in Consumer Policy, The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (Intersentia Publisher 2010) 24.

¹⁶⁷ *ibid.*

¹⁶⁸ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 35.

¹⁶⁹ Leonard Rotman, 'Trust, Loyalty, and E-Commerce' in Daniel Palmer (ed), *Ethical Issues in E-Business: Models and Frameworks* (Business Science Reference (an imprint of IGI Global) 2010) 59. For more on the issue of trust on e-commerce, see chapter 1.

¹⁷⁰ Pablo Cortes, *Online dispute resolution for consumers in the European Union* (London: Routledge 2012) 2.

¹⁷¹ Sue McGregor, 'Conceptualizing Consumer Justice' (McGregor Monograph Series No. 201703, 2017) <https://www.consultmcgregor.com/documents/publications/consumer_justice_2017.pdf> accessed 28 July 2022.

¹⁷² Sylvia Lane, 'The Rationale for Government Interventions in Seller-Consumer Relationship' (1983) 2(3) *Policy Studies Review* 419, 421.

consumers cannot assess the quality of goods and so make their choice based on the price, which leads to high quality goods opting-out of the market and low quality goods being fed into the market.¹⁷³ This interest-based concept of the seller maximising profit may not always operate to the detriment of consumers. In some circumstances, sellers may, in order to maximise their profit, utilise consumers' behavioural biases, for example by advertising discounts on products which attract consumers, even if the price is the same as it was before the products were labelled with the discount sign.¹⁷⁴

These characteristics of utilising consumer behaviour along with the economic interest in maximising the seller's profit would be detrimental to consumers in both shopping forums, whether traditional or electronic. In e-commerce, it could be easier for sellers to engage in these practices, as they can target consumers by utilising the latter's data gained from previous purchasing. Also, because of the characteristic of e-commerce transactions that the consumer only obtains information about the product from the seller's advertisements, rather than by personal observation of the product, as in traditional shopping, there is more room for sellers to utilise consumers' behaviour in the market. Therefore, addressing this gap in the regulations is necessary in order to fulfil consumer protection measures.

- **Information deficits**

Information deficit is a significant concept in consumer protection. It has been regarded as the basic element in the evolution of consumer protection.¹⁷⁵ Sufficient and appropriate information is linked to the concept of fairness and is an essential element of consumer protection.¹⁷⁶ Information deficits constitute an important factor in all consumer protection measures. The lack of appropriate information will cause harm to consumers as they will not be able to make informed choices.

The concept of information is based on three pillars which assist the consumer in making informed choices. The price of the product, its quality, and the terms and conditions of its sale are the most important types of information in enabling the consumer to make an appropriate

¹⁷³ This issue of information asymmetry was discussed in chapter 2 section 2.3.2 on Lack of confidence in the Market.

¹⁷⁴ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 31.

¹⁷⁵ Gillian Hadfield, Robert Howse and Michael Trebilcock, 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21(1) *Journal of Consumer Policy* 131, 134.

¹⁷⁶ Zain Saami, 'Regulation of E-Commerce by Contract: Is It Fair to Consumers?' [2000] 13(1) *University of West Los Angeles Law Review* 163, 167.

choice based on the information provided.¹⁷⁷ Lack of appropriate information will result in the likelihood of one party to the contract (generally the seller) having more information about the product while the consumer has less. However, due to the fact that sellers enter into the market to maximise their profit, they may be reluctant to provide information that the consumer may need to make an informed choice. Sellers are likely to provide information that supports the sale of their products while omitting information that makes their products undesirable. Some commentators have argued that sellers may be affected by incentives to hide appropriate information to gain profit.¹⁷⁸ As per Akerlof, sellers have incentives to hide some elements of information rather than others; although price is one type of information that sellers may make consumers aware of, they may hide some extra costs.¹⁷⁹

The failure to supply consumers with appropriate information is not the only type of information deficit. Even if information is provided, sellers may take advantage of their position and of consumer weaknesses that are not easy to assimilate due to their complexity.¹⁸⁰ This is described by Trebilcock and Elliot as follows: ‘Information failure occurs where a transactor either lacks information about a proposed arrangement or lacks the ability to process it ... By processing information, we refer both to the comprehension of complex legal and business facts and to the sorting and sifting of alternatives that people perform in an effort to decide which arrangement will best satisfy their utility functions. The lack of an ability to process information is in a sense a form of incapacity, as some people lack the intellectual or experiential resources needed to synthesize and make sense of financial affairs.’¹⁸¹

Based on this argument, it can be claimed that facilitation of the measures mentioned would allow just treatment for consumers, since justice is concerned with fairness and the prevention of disputes, as explained in regard to distributive justice, by enabling the introduction of procedures for delivering rights equally.¹⁸² The lack of adequate information on the product may result in consumers’ failure to make appropriate purchasing decisions, leading to adverse selections which affect the consumer’s confidence in the market.¹⁸³ Therefore, the abovementioned rationales for consumers’ protection in e-commerce, such as effective dispute

¹⁷⁷ Office of Fair Trading, *Consumer Detriments Under Conditions of Imperfect Information* (1997) 38.

¹⁷⁸ Peter Cartwright, ‘*Consumer Protection Rationales*,’ *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press 2001) 21.

¹⁷⁹ George Akerlof, ‘The Market for “lemons”: Qualitative Uncertainty and the Market Mechanism’ (1970) 84 *Quarterly Journal of Economics* 488, 488.

¹⁸⁰ Cohen Marcel, ‘Insights into Consumer Confusion’ (1999) 9(6) *Consumer Policy Review* 210, 214.

¹⁸¹ Michael Trebilcock and Steven Elliott, ‘The Scope and Limits of Legal Paternalism’ in Peter Benson (ed), *The Theory of Contract Law* (Cambridge University Press 2001) 62.

¹⁸² See chapter 2 section 2.1.1.

¹⁸³ For more on Adverse selection, see chapter 2 section 2.3.2 (on Lack of confidence in the market).

resolution, would enhance their confidence and shield them from detriment in e-commerce, while providing consumers with sufficient information would assist in the delivery of justice to them and thus enhance their access to justice in e-commerce.

2.4 Concept of the Weaker Party in Relation to Consumers and How to Empower Those Weaker Parties in Order to Increase Their Confidence

The thesis aims to enhance consumers' confidence in relation to e-commerce and to empower consumers in this regard.¹⁸⁴ Therefore, this section will present and discuss the theories underlying the concept of protection of the weaker party, the concept of consumer empowerment, and how to achieve empowerment of consumers and enhance their confidence.

2.4.1 Consumers as weaker parties and distribution of power to them

The concept of unequal power in contracts means that there is a party to a contract who has less bargaining power, which limits consumers' freedom in contracts.¹⁸⁵ To some extent this concept holds true for some types of contracts, such as mass and standard contracts, which are designed to accommodate mass consumer transactions regardless of their conditions and characteristics.¹⁸⁶ This type of contract may be inconsistent with the liberal doctrine of equality of parties that assumes a degree of equivalence between parties to a contract.¹⁸⁷ Consumers are generally considered weaker parties due to their weaker position; they are at a high risk of being denied the same negotiating power as the other parties to the contract, due to the standard contract which prevents them from negotiating its terms.¹⁸⁸

Consideration of the unequal power between consumers and businesses in negotiating terms and conditions in standard contracts reveals other types of unequal power that need to be addressed, such as litigation and dispute resolution power. Although some types of consumers' contracts are not categorised as standard contracts, and thus to some extent enable the consumer to bargain and negotiate the contract terms, there remains some inequality in terms of litigation and dispute resolution power.¹⁸⁹ Therefore, with the aim of distributing power to them, issues

¹⁸⁴ See chapter 1 (Introduction), Aims and objectives of the thesis.

¹⁸⁵ Immaculada Barral, 'Consumers and New Technologies: Information Requirements in E-Commerce and New Contracting Practices in the Internet' (2009) 27(3,4) Penn State International Law Review 609, 610.

¹⁸⁶ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 37.

¹⁸⁷ Immaculada Barral, 'Consumers and New Technologies: Information Requirements in E-Commerce and New Contracting Practices in the Internet' (2009) 27(3,4) Penn State International Law Review 609, 610.

¹⁸⁸ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 37.

¹⁸⁹ Pablo Cortes, 'Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers' (2011) 19(1) International Journal of Law and Information Technology 1, 9.

of unequal power in terms of litigation power, dispute resolution power, vulnerability in obtaining information, and vulnerability in purchasing decisions, will be discussed in the next section so as to empower consumers.

- **Imbalance in litigation and dispute resolution power**

The imbalance of power between consumers and businesses can occur in multiple scenarios. Litigation power is one of the fundamental issues for consumer disputes, because it justifies a business in suing the consumer in the consumer's domicile, on grounds that the business is the claimant and has good financial standing. This scenario may involve unjust application when applied to the consumer as claimant, because the consumer's financial capacity is not comparable to that of the business. The unjust application of the concept in the two cases lies in the lower likelihood of the consumer's bringing an action against the business, due to the former's lower financial capacity.¹⁹⁰ Also, the lower likelihood stems from further factors such as less knowledge of litigation and less experience, as businesses are repeat players while consumers are single-shooters.¹⁹¹ These obstacles facing the consumer in litigation may deprive consumers of access to justice, due to imbalance in litigation power between the two parties of the contract. Therefore, consumers may choose not to sue the business when their rights are violated, because of the difficulty they face in suing it, in terms of knowledge, solvency, and experience.¹⁹²

The imbalance of litigation power can arise in many ways. The consumer may lack knowledge of the litigation process, due process requirements, or the competent authority to approach when disputes arise, as this may vary based on the terms and conditions of the contract. Based on this scenario, consumers as single-shooters may lack the required litigation knowledge compared with businesses who are repeat players, dealing with hundreds of disputes and having enough experience to respond to the claims.¹⁹³

Another type of power imbalance between consumer and business can be envisioned in the communication between consumer and business, respectively, with the adjudicator during the litigation process. The business has a greater advantage in organising and stating its case, as it is more familiar with consumer disputes, while the consumer may lack sufficient knowledge to

¹⁹⁰ Zheng Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2nd edn, Hart Publishing 2015) 10.

¹⁹¹ *ibid.*

¹⁹² Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 142.

¹⁹³ This concept of business as repeat players and consumers as single-shooters will be explained later in this section.

support his/her case, which may raise further imbalance in litigation power between business and consumer when the latter is self-represented. As claimed by Thornburg: ‘As the consumer has the burden of proof, any weakness, or even any “tie” in terms of the weight of the written evidence will go to the seller. Further, if the arbitrator has any pro-defendant bias, the lack of live evidence may make it less likely that the consumer’s presentation can counteract that bias.’¹⁹⁴

It is also worth mentioning that the cost of dispute resolution when suing a business may cause inequality of power on the consumer’s side. As e-commerce transactions are mostly of low value, the cost of suing a business may in some instances be higher than the entire value of the disputed amount, which may cause the consumer to decide against suing the business in view of the extra costs related to the e-commerce transaction. The business, as a profitable entity, has greater advantage in this matter than the consumer and can swallow the cost of the dispute resolution, while consumers are mostly categorised as a vulnerable group who cannot financially afford the extra cost.

In addition to the cost of dispute resolution, consumers may lack the legal advice needed in pursuing dispute resolution due to the low value of the disputed amount, which makes the extra cost of seeking legal advice or legal representation in the dispute resolution process not worth paying, when weighed against the disputed amount. This imbalance may deprive the consumer from exercising the right to gain sufficient knowledge during the dispute resolution process.¹⁹⁵ In Woolf’s report on civil process in the UK, he found that one of the main issues was the high cost of obtaining civil litigation in relation to the low amounts in dispute. He argued that, in order to achieve successful litigation, ‘we must seek to achieve a more proportionate but workable system, not one which is theoretically impeccable but unaffordable’.¹⁹⁶ Woolf’s statement reinforces the imbalance created by the high litigation cost faced by consumers, as this high cost compared to the disputed amount may create barriers to litigants in disputes of low value.

Information on dispute resolution policies, conditions, and terms may further distort the power relation between the consumer and the business. Since businesses obtain consumers’ consent to the dispute resolution through consumer consent being included in the contract of sale,

¹⁹⁴ Elizabeth Thornburg, ‘Privatisation and power: dispute resolution for the Internet’ in Charles Rickett and Thomas Telfer (eds), *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press 2009) 322.

¹⁹⁵ Cristina Coteanu, *Cyber Consumer Law and Unfair Trading Practices* (Ashgate Publishing 2005) 100.

¹⁹⁶ Lord Woolf’s report, ‘Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales’ (Crown copyright 1996) 106.

businesses in some instances may not provide adequate information about the cost, location, and forum of the dispute resolution, thus waiving the consumer's right to go to court, which puts the consumer in a weaker position.¹⁹⁷

As mentioned, one cause of the imbalance of power in litigation and business is that consumers are single-shooters while businesses are repeat players who act as litigants more often. There is thus a need to rebalance the power of litigants by demanding additional requirements to maintain consumer rights during the litigation process.¹⁹⁸ Therefore, it is suggested that the power possessed by the stronger party needs to be distributed to the weaker to rebalance the power regardless of their individual statuses, in aspects such as financial affordability. The main aim is to balance the power before the law, within the key objective of access to justice.¹⁹⁹

Prior to the imbalance of power between consumers and businesses in litigation and dispute resolution, consumers might be considered vulnerable on the basis of two factors: 1: difficulty of obtaining the information needed to make appropriate purchasing decisions; and 2: possible higher risk of loss than that facing other consumers due to inappropriate purchasing decisions caused by lack of adequate information.²⁰⁰

However, this would beg the question: What should be the basis of the distribution of power between sellers and vulnerable consumers? The balancing of power in consumer protection measures might be affected by this question on the grounds that there is an inequality of bargaining power.²⁰¹ So, the following discussion will explain the rationale behind the need to distribute power to groups such as the vulnerable, poor, and disadvantaged. Being a member of one of these groups does not necessarily categorise the person as vulnerable, but it is an indication of vulnerability.²⁰²

- **Consumers' vulnerability in obtaining information**

Vulnerable consumers to whom the law wishes to distribute power due to their vulnerability are those who have difficulty in digesting information, which raises concern about the level of

¹⁹⁷ Cristina Coteanu, *Cyber Consumer Law and Unfair Trading Practices* (Ashgate Publishing 2005) 100.

¹⁹⁸ Pablo Cortes, 'Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers' [2011] 19(1) *International Journal of Law and Information Technology* 1, 9.

¹⁹⁹ Peter Cartwright, *Consumer Protection and the Criminal Law, Law, Theory, and Policy in the UK* (Cambridge University Press 2001) 28.

²⁰⁰ Ramil Burden, *Vulnerable Consumer Groups: Quantification and Analysis* (Office of Fair Trading 1998) 5.

²⁰¹ Ian Ramsay, *Consumer Law and Policy Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 176.

²⁰² Peter Cartwright, *Consumer Protection and the Criminal Law, Law, Theory, and Policy in the UK* (Cambridge University Press 2001) 29.

their ability to make appropriate purchasing decisions, and those who might bear higher risk of loss than other consumers due to lack of appropriate purchasing decisions.

Accordingly, in order to tackle the vulnerability of the abovementioned consumer category, Yuthayotin argues that there is a need to address the factors that create a group of consumers with less power.²⁰³ Examples are lack of adequate information in terms of difficulty in digesting it due to language barriers,²⁰⁴ dearth of information,²⁰⁵ and provision of too much information, which hinders the consumer from obtaining the information needed. The law should protect consumers' rights by empowering them to obtain the required information. For instance, as far as e-commerce is concerned, where there is a gap in technological knowledge between consumers and sellers, the seller may use particular procedures to gain consumer assent by controlling the method of consumer's acceptance. The seller may include the terms and conditions in the purchase click, rather than designing two fully separated clicks for reading the terms and conditions, and for acceptance of purchase. The single click which includes the terms and conditions and the acceptance would not allow the consumer to adequately consider each step.²⁰⁶ An appropriate way to close this gap and reform the situation would be to address the needs of vulnerable consumers by providing them with adequate information the lack of which deprived them of equal power. For example, lack of language communication among ethnic minorities in a nation is one form of inability to assimilate information, which would render some consumers within this category vulnerable. An appropriate remedy would be to supply to ethnic minorities, in their own language,²⁰⁷ adequate information that can be understood by consumers. Such measures for a single market serving one nation are also called market-correcting measures, which allow the targeted group to make informed decisions in line with their needs, this being a requirement of market efficiency.²⁰⁸

- **Consumers' vulnerability through making inappropriate purchasing choices**

Failure to make a good choice is an issue facing consumers in the market. This failure might be due to the consumer's difficulty in comparing between multiple choices, resulting in an

²⁰³ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 70.

²⁰⁴ Language barriers may include ordinary people's difficulty in understanding the information due to formal description of the information.

²⁰⁵ This may include lack of sufficient information to make an appropriate purchasing decision.

²⁰⁶ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 142.

²⁰⁷ Peter Cartwright, *Consumer Protection and the Criminal Law, Law, Theory, and Policy in the UK* (Cambridge University Press 2001) 29.

²⁰⁸ *ibid.*, 30.

inappropriate purchase.²⁰⁹ The reason for the inappropriateness might lie in factors such as information deficit.²¹⁰ The lack of appropriate information will cause harm to the consumers as they will not be able to make informed choices. The concept of information is based on three pillars which assist the consumer in making informed choices. The price of the product, its quality, and its terms and conditions are the most important elements of information enabling the consumer to make an informed choice.²¹¹ The lack of appropriate information would result in consumers comparing products based on the price alone, rather than on their needs, a process which may cause inappropriate purchasing decisions.²¹²

The limits on information may influence the level of competition in the market, as the terms and information are not transparent enough to enable the consumer to digest and understand them.²¹³ This ambiguity in the information provided by sellers may have an impact on the degree of consumer choice and fairness of contracts.²¹⁴ Lack of consumer choices affects the market adversely, as the existence of enough information provided to consumers will also enhance market efficiency by allowing sellers to be informed of consumers' preferred choices; this in turn will adjust the market to match consumer preferences.²¹⁵

2.4.2 Aims behind empowerment of the weaker parties and how to achieve it

The previous discussion has outlined the consumers' position in relation to their power in the market with special reference to e-commerce in terms of information obtained and provided to consumers, consumers' vulnerability, and consumers' lower bargaining power in comparison with sellers in the market. There is no doubt that consumers need to be empowered in the market to enable them to preserve their rights and obtain proper treatment, thus restoring their confidence in the market.²¹⁶ Some commentators argue that recent efforts by the EU have not yet fully restored consumers' confidence in the market.²¹⁷ There have been calls for suggestions to address consumers' weaker position and so to empower the consumer. The following section

²⁰⁹ *ibid.*

²¹⁰ See chapter 2 section 2.2.

²¹¹ Office of Fair Trading, *Consumer Detriments Under Conditions of Imperfect Information* (1997) 38. <https://webarchive.nationalarchives.gov.uk/20140402182945/http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft194.pdf> accessed 21 July 2021.

²¹² Ian Ramsay, *Consumer Law and Policy Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 67.

²¹³ For more on the harm of information asymmetry, see chapter 2 section 2.3.2: Lack of confidence in the market.

²¹⁴ Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate Publishing Limited 2007) 40.

²¹⁵ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 27.

²¹⁶ For more on consumers' confidence, see chapter 2 section 2.2.2.

²¹⁷ Stefan Wrba, *Consumer Access to Justice Revisited* (Cambridge University Press 2014) 297.

will present what is meant by consumer empowerment, followed by approaches to empowering consumers, such as intermediaries facilitation and legislative approaches.

- **Definition of consumer empowerment**

The term ‘consumer empowerment’ has been used in legal literature for the purpose of supplying legal approaches to strengthening the consumer’s position. Consumer empowerment generally relates to addressing the weaker party’s needs. More specifically, empowerment is defined as ‘entailing the process of enabling persons or groups to participate more fully as rights bearing entities within societies and states’.²¹⁸ In the context of consumer law, consumer empowerment is to be defined as an approach to enhancing consumer access to justice.²¹⁹

Although the concept of consumer empowerment differs from the concept of access to justice, it can be considered one of the forms of enhancing access to justice by virtue of some of its features. Educating consumers, improving their legal awareness, supplying them with desirable rights, and providing ways of enforcing their rights, are basic consumer empowerment approaches. Also, these approaches can be considered within categories of access to justice theory such as legal aid, legal awareness, and enforcement of rights.²²⁰ Accordingly, consumer empowerment is different from access to justice, but can be considered an approach to access to justice which shares some of the latter’s concepts. There are some features of consumer empowerment that attempt to improve consumers’ satisfaction and experience and enhance their confidence in the market on grounds of legal framework facilitation.

- **Intermediaries facilitation approach**

Intermediaries between consumers and businesses, such as lawyers, social consumer organisations, and consumer advisors, play a vital role in the facilitation of consumer access to justice, which can be visualised in the effect of the type of remedy that is offered to the consumer.²²¹ The intermediaries’ role may be demonstrated by assembling consumers’ demands and weakening or strengthening the dispute.²²² This fluctuation in strengthening or weakening the dispute was witnessed in a study conducted by Macaulay which showed that lawyers as intermediaries acted as mediators between consumers and businesses, thus reducing

²¹⁸ Reena Patel, ‘Empowerment’ in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press 2009) 374.

²¹⁹ Stefan Wrška, *Consumer Access to Justice Revisited* (Cambridge University Press 2014) 297.

²²⁰ See chapter 2 section 2.1.2.2.

²²¹ Ian Ramsay, ‘Consumer Redress and Access to Justice’ in Charles Rickett and Thomas Telfer (eds), *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press 2009) 34.

²²² *ibid.*

consumers' escalation of the dispute.²²³ In his study, lawyers did not act as aggressive intermediaries when they were representing consumers, but tended to mediate between consumers and sellers.²²⁴

The intermediaries approach as support for consumers in their disputes, which mainly aims at facilitation of access to justice, can be referred to as the facilitating intermediaries approach, which stands on basic features. The traditional responsibility of the state is to act as policy maker and carer for its citizens, which can be seen in acts such as drawing up market standards, developing market behaviour, and empowering consumers through legislation by maintaining their rights and urging sellers to conduct their businesses in a manner that preserves consumers' rights.²²⁵ Therefore, the intermediaries approach aims to supply alternative ways of supporting consumers through provision of legal information, with the support of stakeholders such as private or public consumer protection agencies, that can provide answers to consumers' complaints.²²⁶ Another form of the intermediaries approach consists of actions to prevent inappropriate business practices, thus preventing disputes from arising and helping consumers to resolve their disputes with businesses.²²⁷ For example, a consumer organisation could intervene to stop the use of unfair terms and conditions that might bring harm to consumer contracts.

Moreover, the intermediaries approach can support consumers by adopting consumers' interests when representing them in consumer policy and law-making, as the intermediaries receive consumers' feedback and incorporate consumers' issues in the policies of law-makers.²²⁸

However, this intermediaries approach, with the inclusion of lawyers as intermediaries, has raised some concerns, as lawyers might influence the consumer issues adversely by not allowing all such issues to be presented in the interest of the consumer. This concern was raised by Ramsay, who argued that lawyers might use their discretion in refining consumer disputes in ways that fail to enhance consumer access to justice, since lawyers' representation of consumers might be affected by ties with businesses, inasmuch as lawyers might fear losing

²²³ Stewart Macaulay, 'Lawyers and Consumer Protection Laws' (1979) 14(1) *Law & Society Review* 115, 117.

²²⁴ *ibid.*

²²⁵ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 264.

²²⁶ Stefan Wrška, *Consumer Access to Justice Revisited* (Cambridge University Press 2014) 299.

²²⁷ *ibid.*

²²⁸ *ibid.*, 300.

their ties with sellers by raising some consumers' issues that need to be resolved.²²⁹ It is thus questionable whether lawyers would support consumers to empower them or to dominate them.

The evidence presented by Ramsay is that, in reality, lawyers tend to control consumers when the latter face complex issues, as this will result in greater power for lawyers to turn consumers in the right direction, which might limit consumer choice. The evidence presented by Ramsay shows that the power of intermediaries of all kinds, such as lawyers, organisations, and legal counsellors, will help to design the law and support consumer protection, though it might limit consumer choice.²³⁰

- **Legislative approaches**

The legislative approach can be understood as the facilitation of laws that help in overcoming consumer problems through direct influence, unlike the intermediary approach which consists of laws and acts, but includes indirect influence in the form of intermediaries. This approach includes third party intermediaries such as the makers of national policy and law.²³¹ The third party in this regard can be defined, as in Yuthayotin's description, as 'a neutral third party who plays an integral role in the collaborative tasks of facilitating and supporting various aspects of the private ordering approach'.²³²

The framework of the legislative approach stands on the inclusion of consumer issues in procedural and substantive laws to maintain consumer protection, taking into account related consumer issues such as damage, harm, and lack of information, in order to prevent these from occurring.²³³ This can support some types of consumers such as the vulnerable consumer, who needs support that is not of direct legal interest to all consumers as a group, but rather can be facilitated by legislation.²³⁴ For example, language differences among minorities can be overcome through legislation that provides language that is easy to digest, thus filling the gap arising from vulnerable consumers' language differences, a step which can enhance their vulnerable confidence in the market. In addition to the legislative approach which is proposed by states in the form of laws and legislation, another form of legislative approach can be proposed which has a direct influence on the market, but differs from laws and legislation as it

²²⁹ Ian Ramsay, 'Consumer Redress and Access to Justice' in Charles Rickett and Thomas Telfer (eds), *International Perspectives on Consumers' Access to Justice* (Cambridge University Press 2009) 35.

²³⁰ *ibid.*

²³¹ Stefan Wrška, *Consumer Access to Justice Revisited* (Cambridge University Press 2014) 301.

²³² Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 258.

²³³ Stefan Wrška, *Consumer Access to Justice Revisited* (Cambridge University Press 2014) 301.

²³⁴ *ibid.*, 300.

includes direct interference by the state but with no direct influence on the market. As per Yuthayotin, the state, by issuing guidance in the form of legislation and laws, does not play the role of controlling the market directly; rather it acts as a provider with the help of soft power that does not interfere directly in the market by laws, but may build trust to the benefit of the market by means of guidance and advice.²³⁵ This role, which aims to enhance consumer confidence in the market, may overcome one of the greatest issues affecting the success of e-commerce, which is the problem of trust.

2.5 Conclusion

This chapter has presented the theoretical concept of consumers' access to justice. Since justice concerns equality, rights, and duties, this chapter has discussed theory of access to justice and how it relates to consumers' issues in e-commerce and ODR. Also, this chapter has considered different forms of justice theory, such as procedural, distributive, and commutative justice, in the context of consumers, to build the grounds for discussing access to justice theory in relation to consumers' ODR.

It has been found that justice is not only concerned with the judicial system, but goes beyond the conventional meaning of justice to encompass rights, duties, and equality. Access to justice affects support for consumers and the diverse interests of consumers as a group. Consumers' access to justice theory comprises two approaches, that of procedural law and that of substantive law. Both these approaches are significant elements of consumers' access to justice, since the best procedural laws would not address consumers' issues without perfect substantive laws and vice versa.

It has been observed that consumers may require additional protection when they conduct e-commerce transactions due to the uncertainty involved in these transactions, such as the possibility of risk associated with information asymmetry or of the e-commerce seller's unexpected behaviour. Moreover, consumers need to be empowered to overcome problems of inadequate information in order to make appropriate purchasing decisions as well as to overcome issues of imbalance in litigation procedure. Consumers may lack legal knowledge of complex traditional litigation procedure. These requirements of consumers' access to justice have raised the need to propose a convenient dispute resolution procedure and venue, such as ODR, that is similar to the procedure that is followed when their rights are violated. The reason

²³⁵ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 265.

consumers require ODR lies in the shortcomings, including ineffectiveness and lengthy duration, of traditional litigation for e-commerce disputes.

Accordingly, since this thesis aims to explore the feasibility of applying ODR for e-commerce disputes in Saudi Arabia, the next chapter will analyse the Saudi legal framework, traditions, and e-commerce environment to determine the characteristics of Saudi law and identify any loopholes and issues in existing Saudi laws governing ODR.

Chapter 3: Saudi Arabian Legal System Framework, Culture and E-commerce Environment with Special Reference to ODR

3.1 Introduction

This chapter presents the legal framework of the Saudi legal system, the background of dispute resolution in Saudi Arabia, and the background of commercial law in relation to dispute resolution. In addition, the chapter explores the e-commerce environment in Saudi Arabia, consumers' needs in relation to e-commerce, and consumer rights in e-commerce in the context of Saudi and Islamic law, with special reference to dispute resolution. The objective of this chapter is to analyse the traditions of the Saudi legal framework and how these factors are reflected in Saudi regulation of dispute resolution. Moreover, this chapter aims to identify any loopholes and issues in existing Saudi laws governing ODR. These objectives are set in order to propose a reform of the Saudi legal system in relation to ODR for e-commerce consumers.

Saudi Arabia is an Islamic country which adopts Shariah¹ in its legal system.² Islamic law is integrated into the country's laws and regulations. Moreover, since it is a monarchical system, the king has a strong role in enacting laws and regulations. These differences lead to variations between the Saudi legal system and other, non-Islamic legal systems. Accordingly, the first section of this chapter will present the legal framework of the Saudi legal system, the legislative authorities and the judicial system, to ensure that these factors are borne in mind when suggesting a reform of the Saudi legal system regarding ODR.

One of the main objectives of this research is to propose a reform concerning dispute resolution for e-commerce consumers in Saudi Arabia, and to provide a mechanism for dispute resolution through which consumers can receive redress when their rights are violated. Based on these objectives, the background of Saudi culture and traditions will be presented in order to explore the roots of dispute resolution among Saudi citizens, highlighting these roots in the Saudi culture as they are reflected in Saudi regulation. The cultural background will be followed by the background of dispute resolution in business law, including the background of dispute resolution regulation, arbitration and dispute resolution committees, and quasi-judicial committees within the country.

¹ Shariah can be explained as the way of life for Muslims. It includes issues of non-law and issues of strict law; for example, Islamic ethical, religious and legal stipulations. See Baderin M, 'Understanding Islamic Law in Theory and Practice' (2009) 9 *Legal Information Management* 186, 186.

² Law of Governance 1992 Article 1 (Saudi Arabia).

In addition, since the proposed ODR mechanism and reforms of dispute resolution regulations are all related to e-consumers in Saudi Arabia, the abovementioned background sections will be followed by an analysis of the e-commerce environment, including the laws and regulations related to e-commerce in the country, the new law of e-commerce, and the role of the government in the slow advancement of the e-commerce environment. This part highlights the effects of slow progress on Saudi consumers, and discusses consumers' needs in Saudi Arabia. It presents the factors that inhibit consumers from adopting e-commerce, and what they require if they are to adopt online shopping, with special reference to consumer redress in e-commerce within the country.

The last part of the chapter discusses consumer rights in e-commerce under Islamic law and Saudi regulations, in the process presenting Islamic law-based theories of consumer protection, such as information disclosure and avoidance of risk, and how these theories can be applied to protect consumers in Saudi e-commerce. Finally, it identifies consumer rights and the right of redress in Islamic law as measures that can be utilised in favour of e-consumers when suggesting a reform of Saudi regulation.

3.2 Framework of the Saudi Arabian Legal System

This section discusses the framework of the Saudi legal system along with its principles, which are based on the principles of Islamic law. The purpose of introducing this background is to clarify how Islamic law works within the Saudi system, and to propose a reform of the legal system in the country in relation to dispute resolution in e-commerce, which will respond to the need for such reform while maintaining consistency with the Saudi legal framework. The structure of the system in relation to ODR can be discussed in three sub-sections. The first explains the adoption of Islamic law in the Saudi legal system. This will be followed by an account of the influence of Islamic law in Saudi regulation and a description of the Saudi judicial system. Finally, an overview of dispute resolution in Islamic law and the Saudi legal system will be presented.

3.2.1 The adoption of Islamic law in the country

The Saudi legal system is unique compared to other legal systems, as its laws are based on Islamic law. Article 7 of The Law of Government 1992 (equivalent to constitutional law) states that the 'Government of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet, which are the ultimate sources of reference for this Law and other laws of the

State'.³ The Book of God (Qura'an) and the Sunna (Tradition of the Prophet) are the main sources of Islamic law.⁴ However, there are secondary sources and variations in the orders, depending on which Islamic school of jurisprudence is followed.⁵ For example, the Hanbali School, which Saudi laws adopt,⁶ has five sources, the first in precedence being the Sacred Texts (Qura'an and Sunna).⁷ Therefore, since the Saudi Law of Government states that the Sacred Texts are the main sources of the law in Saudi Arabia, it can be said that the word of Shariah or Islamic Law in Saudi Arabia is synonymous with law and is the equivalent of law or regulation in other jurisdictions. Islamic law might be described as a modified civil code system founded on Islamic Shariah.⁸ However, the source of Islamic law is unlike the origin of the civil law and common law. The concept of Islamic law is not related to religious and personal matters only. In fact, it is an entire way of life, designed to regulate legal and commercial activities as well.⁹ Moreover, the Saudi Basic Law of Government 1992 is a supplement to the areas that are not covered by Shariah law. It implements the governmental framework of the country and guarantees fundamental rights to citizens.¹⁰ For example, article 4 of the Basic Law of Government 1992 articulates that all people who are either citizens or residents in the kingdom are entitled to file suit on an equal basis and that the Law shall specify procedures for this purpose.¹¹

At the same time, the idea that the Saudi legal system depends solely on the Islamic system is misleading. Although it is stated in the Saudi Basic Law of Government that the Qura'an and the Sunna are the main sources of authority,¹² what this article means is that the regulatory authority must take into account the rule that laws in and of the country must meet the principles of Islamic law. Accordingly, Alsaud defined the Saudi legal system as a civil law system that

³ Law of Government 1992 Article 7 (Saudi Arabia).

⁴ Nabil Saleh, *The General Principles of Saudi Arabian and Omani Company Laws (Statutes and Shari'a)* (Namra 1981) 20.

⁵ The main four Islamic schools of jurisprudence are: the Hanafi, Maliki, Shafi'i and Hanbali schools, also called colleges or schools of law. They adopt the Qura'an and tradition of the Prophet as the main sources of the Shariah. Moreover, the differences between these schools lie in particular matters based on their interpretation of the Qura'an and the tradition of the Prophet. See Baderin M, 'Understanding Islamic Law in Theory and Practice' (2009) 9 *Legal Information Management* 186, 186.

⁶ Hossein Esmacili, 'On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System' (2009) 26(1) *Arizona Journal of International and Comparative Law* 1, 6.

⁷ Baderin M, 'Understanding Islamic Law in Theory and Practice' (2009) 9 *Legal Information Management* 186, 187.

⁸ Mohammed Al-ghamdi and Neufeld Paul, 'Saudi Arabia' in Taylor Damian (ed), *The Dispute Resolution Review* (Law Business Research Ltd, London 2017) 459.

⁹ George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 905, 906.

¹⁰ Law of Government 1992 (Saudi Arabia). For more on this concept see, A. Michael Tarazi, 'Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government' (1993) 34(1) *Harvard International Law Journal* 177, 258.

¹¹ Law of Government 1992 Article 4 (Saudi Arabia).

¹² *ibid.*, Article 7 (Saudi Arabia).

is inspired by Shariah law, but contains a strong civil law influence.¹³ In explaining this view, he argued that in every enactment of Saudi law, treaty or convention entry, the country must consider that the principles of Islamic law have not been contradicted.¹⁴ The abovementioned analysis of the legal framework of Saudi Arabia and the mode of its embeddedness in the culture and religious background of the country is presented to emphasise the flexibility of Islamic law. The development of technology, commercial transactions, and ICT can lead to the perception that they cannot be regulated under Islamic law, whereas the latter is an entire way of life, designed to regulate legal and commercial activities as well. Since technology is recently innovated and transactions emanating from it such as e-commerce and trust in e-commerce have been regulated recently in the country, Islamic law is flexible enough to develop and improve these regulations by taking the best practices and comparing these laws with other jurisdictions that do not have Islamic law as the main source of law. On that basis, royal decrees, laws and regulations in Saudi Arabia have played a significant role in codifying areas of commercial law and laws that deal with foreign investment, where these laws follow ideas of other jurisdictions such as Europe, bearing in mind that although the sources of these laws are not those of Islamic law, namely the Qura'an and the Sunna, the laws themselves are generally not in conflict with the principles of Islamic law.¹⁵ An example of this is the borrowing in the Saudi Corporation Law 1965, inspired by the Egyptian code which in turn directly emulated the French company law.¹⁶

3.2.2 Legislative authorities in Saudi Arabia

As explained in the previous section, the Shariah Law is the framework for the country's laws. In areas that have not been discussed by the Shariah, codified laws are in place, such as the Saudi Corporation Law 1965 which has been enforced by royal decree.¹⁷ Therefore, the legislative authorities that draft and enforce the legislation need to be discussed and explained.

Article 44 of the Basic Law of Government 1992 states that authorities in Saudi Arabia comprise the Judiciary, Executive and Regulatory authorities, with the king the ultimate arbiter for these bodies.¹⁸ The Council of Ministers is responsible for approving laws that are drafted

¹³ Saud Alhasan Alsaud, 'Making Sense of Judicial Remedies in Saudi Arabia an Insider View' (2016) 3(1) Indonesian Journal of International & Comparative Law 127, 128.

¹⁴ *ibid.*

¹⁵ For more on the sources of Saudi laws, see David Karl, 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know' (1991) 7(1) George Washington Journal of International Law and Economics 131, 143.

¹⁶ Abdullah Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (*Hauser Global Law School Program*, 2008) <http://www.nyulawglobal.org/globalex/Saudi_Arabia.html#_Toc200894561> accessed 29 April 2018.

¹⁷ Royal Decree No. (M/6) Dated 22/3/1385H Corresponding to (22/7/1965AD).

¹⁸ Law of Government 1992 Article 44 (Saudi Arabia).

by the consultative council, and is authorised to legislate on all international agreements and treaties.¹⁹ The role and responsibilities of the council are defined explicitly in article 19 of the Council Law 1993 as follows: it ‘shall draw up the internal, external, financial, economic, educational and defense policies as well as general affairs of the State and shall supervise their implementation. It shall also review the resolutions of the Shura Council (Consultative Council). It has the executive power and is the final authority in financial and administrative affairs of all ministries and other government institutions’.²⁰

However, although the Council of Ministers is the authority that approves Saudi laws, the consultative council exercises power in another role as it is the legislative authority that drafts laws. Article 67 of the Basic Law of Government 1992 describes the function of the consultative council as follows: ‘The regulatory authority (Consultative Council) lays down regulations and motions to meet the interests of the state or remove what is bad in its affairs, in accordance with the Islamic Shar’iah. This authority exercises its functions in accordance with this law (the Basic Law of Government) and the laws pertaining to the Council of Ministers and the law pertaining to the Consultative Council.’²¹ It can be seen from this article, which explains the function of the regulatory authority in the country, that the influence of Islamic law on the regulation, as the Basic Law, determines the main sources of the country’s law.

3.2.3 Saudi Arabian judicial system

The judicial system in Saudi Arabia is a dual judicial system containing general judiciary and administrative judiciary procedure. In general, judiciary procedure in Saudi Arabia comprises General Courts and Administrative Courts which are governed by the Law of the Board of Grievance and the Law of the Judiciary.²² The first is the main jurisdiction of Shariah courts, where Islamic law is applied, whereas cases relying on interpretation of laws other than Islamic law are governed by the Administrative courts.²³ In relation to consumer disputes, when consumer e-commerce transaction disputes are brought to Saudi courts, they will be adjudicated according to Islamic law. Courts in Saudi Arabia are bound to apply Islamic law as well as

¹⁹ Law of the Council of Ministers 1993 Articles 19, 20, 21 (Saudi Arabia). For more on the role of the Saudi Council of Ministers see Rashed Aba-namay, ‘The Recent Constitutional Reforms in Saudi Arabia’ (1993) 42(2) *The International and Comparative Law Quarterly* 295, 308.

²⁰ Law of the Council of Ministers 1993 Article 19 (Saudi Arabia).

²¹ The Law of Government 1992 Article 67 (Saudi Arabia).

²² Law of Judiciary 2007 (Saudi Arabia) and Law of Board of Grievance 2013 (Saudi Arabia).

²³ *ibid*. An example of the roles between judiciary systems is that Administrative courts adjudicating cases will refer to employment law or pension statutes, but Shariah courts do not adjudicate cases of this kind. For more see Hossein Esmacili, ‘On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System’ (2009) 26(1) *Arizona Journal of International and Comparative Law* 1, 32.

other laws. However, the court must not contradict Islamic law as per the Saudi Basic Law of Government 1992. The laws are intended to supplement Shariah rather than conflict with it.²⁴

3.2.4 Competent Authorities for Law Interpretation

Prior to the discussion of the official competent authority on legal interpretation, the approaches to such interpretation will be discussed, each of which could be cited as a legislative interpretation. There are three approaches to legal interpretation, ranging from the least powerful in effect to the strongest in effect: jurisprudential interpretation, judicial interpretation, and legislative interpretation.²⁵

Jurisprudential interpretation represents the efforts of academics and researchers to interpret the laws and explain the meaning of specific articles or words. This interpretation does not have an effect on reality as it is simply discussion outside the scope of competent authorities. However, this type of jurisprudential interpretation can have a legal effect when a decision is built on it:²⁶ for example, when an official authority such as an administrative entity or court bases its decision on this interpretation. This decision which is based on jurisprudential interpretation could have a legal effect.

The second type of interpretation is judicial interpretation. Judges in Saudi Arabia must apply Islamic law and applicable laws of the state in their judgements. Although the laws in the country must not violate Islamic law as per the Basic Law of Governance 1992,²⁷ the Law of Judiciary 2007 has further emphasised this concept to reinforce the application of Islamic laws ahead of the applicable laws. As stated in the Law of Judiciary 2007: ‘Judges shall be independent and, in the administration of justice, they shall be subject to no authority other than the provisions of Sharia and applicable laws. No one may interfere with the judiciary.’²⁸ Judicial interpretation is exercised when the judge makes a judicial effort to apply Islamic law within the specific law. The judge may interpret any matter of the law in accordance with Islamic law and apply a justification based on the approaches of Islamic law present in his reasoning on the cases brought to him.

²⁴ Law of Government 1992 (Saudi Arabia). For more on how to apply Islamic law in the Saudi judicial system see, George Sayen, ‘Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia’ (2003) 24 University of Pennsylvania Journal of International Economic Law 905, 908.

²⁵ Mohammed Almarzouqi, *Alsultah Altanthemiah fi Almamlakah Alarabia Alsaudiah* (3rd edn, Maktabat Altoubah 2018) 98.

²⁶ *ibid.*

²⁷ Law of Government article 48 1992 (Saudi Arabia).

²⁸ Judiciary Law Article 1 2007 (Saudi Arabia).

The interpretation and application of laws and Islamic law in the country may involve three contexts, as follows. First: in areas not covered by any law or legislation, the judge will refer to Islamic law to fill the gap by applying Islamic law as per article 7 of the Basic Law of Government 1992 and article 1 of the Law of Judiciary 2007. Second: in areas governed by legislation, the judge may interpret the law in accordance with Islamic law and use applicable law or legislation supported by a justification based on Islamic law. Third: in areas that are governed by legislation but in which the judge perceives a contradiction between the legislation and Islamic law, the judge may enforce Islamic law as per article 7 of the Basic Law of Governance 1992.²⁹

The third type of interpretation in the Saudi legal system is regulatory interpretation. Unlike jurisprudential and judicial interpretation, regulatory interpretation has the highest effect as it is conducted by the regulatory authority which legislated the law itself. The regulatory authority in Saudi Arabia is divided between two state authorities, the Shura Council and the Council of Ministers as per the Basic Law of Government 1992. Article 67 states: ‘The Regulatory Authority shall be concerned with the making of laws and regulations which will safeguard all interests, and remove evil from the state's affairs, according to Sharia. Its powers shall be exercised according to provisions of this Law and the Law of the Council of Ministers and the Law of the Shura Council.’³⁰

Although the abovementioned articles of the Shura Council stressed its jurisdiction over the proposal, amendment, and interpretation of laws, its resolutions within these functions would not have effect without the approval of the Council of Ministers as per article 17 of the Shura Council Law 1992.

3.2.5 Overview of dispute resolution in Islamic Law

While the Saudi legal system is based on Islamic law, of which the Qura’an and Sunna are the key sources, the main rules and processes of dispute resolution are not found in the Qura’an and Sunna. However, these two sources have been used to settle disputes that arise between people.³¹ For example, the Qura’an says that ‘Sulh is best’,³² which means that settling disputes

²⁹ Law of Government Article 7 1992 (Saudi Arabia). For more on application of national laws and Islamic law in Saudi Arabia see Frank Vogel, *Saudi Business Law in Practice: Laws and Regulations as Applied in the Courts and Judicial Committees of Saudi Arabia* (Hart Publishing 2019) 95.

³⁰ Basic Law of Government 1992 Article 67 (Saudi Arabia).

³¹ Othman Aida, ‘And Amicable Settlement is Best: Sulh and Dispute Resolution in Islamic Law’ (2007) 21(1) *Arab Law Quarterly* 64, 69.

³² Qura’an [An-Nisaa 5:128].

is preferred in all instances of conflict.³³ Islamic law does not give hard-and-fast rules for the process of settling disputes, which is the primary concern of dispute resolution regulation in other legal systems. Under Islamic law, the main objective of settling disputes is to provide disputants with suitable advice from an advisor to encourage the parties to reach a settlement.³⁴ This is reflected in article 3 of the Dispute Resolution Regulation 2013, which mentions that the main duty of a Dispute Resolution Centre is to encourage disputants to resolve their disputes amicably.³⁵ Therefore, it can be argued that there is no conflict between dispute resolution regulation and Islamic law, as it is encouraged in the latter.

Considering dispute resolution in the context of Saudi Arabia as an Islamic country, it can be noted that although Islamic law encourages the settling of disputes, as mentioned above, the country still does not have clear procedure on dispute resolution related to e-commerce disputes.³⁶ For example, e-commerce disputes are governed by the Law of Civil Procedures 2007 (LOCP).³⁷ Also, the Electronic Commerce Law 2019 (ECL) does not include provisions for settling consumer disputes outside of court litigations.³⁸ So, adopting a clear dispute resolution regulation for consumers in e-commerce disputes would be suitable for the Saudi legal system and for e-commerce as a supplement to Islamic law, since Saudi law accepts the adoption of supplementary laws in areas that are not covered by Islamic law.³⁹ The adoption of clear guidance in relation to amicable dispute resolution or mediation would succeed due to the lower cost of adjudication and arbitration in the e-commerce context. Court litigation is costly for consumer disputes, which are of lower value in general. The government of Saudi Arabia issued a Royal Decree⁴⁰ for the Law of Judicial Costs which states that the loser pays 5% as a maximum of the disputed value.⁴¹ This could place a higher burden on the consumer along with other costs of litigation such as legal representation, legal advice, and travel costs. Moreover, arbitration is less formal than court litigation but may not be suitable for consumer disputes due to the high cost compared to the value involved in consumer disputes.⁴² Therefore, the adoption of clear guidance for mediation and amicable dispute resolution related to e-commerce disputes

³³ Othman Aida, 'And Amicable Settlement is Best: Sulh and Dispute Resolution in Islamic Law' (2007) 21(1) Arab Law Quarterly 64, 69.

³⁴ Shaheer Tarin, 'Analyses of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practice' (2015) 26(1) American Review of International Arbitration 131, 5.

³⁵ Implementation Rules of Dispute Resolution Centres 2013 (Saudi Arabia).

³⁶ Mohammed Al-ghamdi and Neufeld Paul, 'Saudi Arabia' in Taylor Damian (ed), *The Dispute Resolution Review* (Law Business Research Ltd, London 2017) 459.

³⁷ Law of Civil Procedures 2007 (Saudi Arabia).

³⁸ Law of Electronic Commerce 2019 (Saudi Arabia).

³⁹ See chapter 3 section 1.

⁴⁰ Royal Decree Number (M/16) Date 7/9/2021.

⁴¹ Law of Judicial Costs 2021 (Saudi Arabia).

⁴² For more on Arbitration, see chapter 4 section 3.

might be preferable to consumers due to the lower costs involved compared to traditional litigation and arbitration.

3.3 Saudi Arabian culture and tradition

Since this thesis will discuss the ODR mechanisms that are most suitable for adoption in Saudi Arabia, the country's cultural and traditional aspects need to be introduced as they have an impact on the dispute resolution process. According to Al-Humaidhi, the technique of dispute resolution is not based on laws and legal processes alone; there are other fundamental aspects that should be borne in mind, such as religious and cultural tribal matters. This technique differs from the technique of dispute resolution that is practised internationally, as the latter is based on different factors such as laws and regulations.⁴³ For example, harmony can play a major role in the success of dispute resolution, and it is encouraged by cultural and religious principles, rather than governed by law or legal processes.⁴⁴ For this reason, the origins of Saudi Arabian culture and traditions, the established aspects of dispute resolution in Saudi Arabia, and the tribal role in spreading harmony and justice among people, will be discussed in order to identify the roots of dispute resolution principles in Saudi culture.

3.3.1 The origin of Saudi Arabian culture and traditions

The country of Saudi Arabia is located in the Arab Peninsula, the homeland of the Arabic language and people.⁴⁵ In addition, the Arab peninsula became the cradle of Islam when the Prophet Mohammad delivered his religious message in the city of Mecca, followed by his migration to the city of Medina where he established the first Islamic state. Both these cities are located in the western region of Saudi Arabia.⁴⁶ Before the creation and unification of Saudi Arabia, the towns and cities of the Arab peninsula were administered by local government; the tribal system in the districts of the peninsula was the only social unit, and the leader of the tribe enjoyed undisputed authority.⁴⁷ The main objective of the creation and unification of the country was Islamic reform, as the Arab peninsula in the eighteenth century was witnessing an era of ignorance, misguidance and heresy which was far from true to Islam.⁴⁸ Therefore, the

⁴³ Hamad Al-humaidhi, 'Sulh: Arbitration in the Arab-Islamic World' (2015) 29(1) Arab Law Quarterly 92, 92.

⁴⁴ *ibid.*

⁴⁵ Mustafa M Achoui, 'The Saudi Society: Tradition and Change' in James Georgas and others (eds) *Families Across Cultures: A 30 Nation Psychological Study* (Cambridge University Press 2006) 435.

⁴⁶ Wahbi Al-Hariri-Rifai and Mokhless Al-Hariri-Rifai, *The Heritage of the Kingdom of Saudi Arabia* (GDG Publishing 1990) 26.

⁴⁷ *ibid.*

⁴⁸ *ibid.*

Islamic theologian Mohammed bin Abdulwahab⁴⁹ joined the governor of the town of Direiyah, Mohammed bin Saud, in calling for the establishment of pure Islam and attempting to unite the disjunct tribes under one ruler.⁵⁰ Although together they succeeded in their aim of unifying the tribes and removing the non-Islamic traditions referred to above, some of the tribal beliefs have strong roots and are still seen in the present era.⁵¹

Based on the aforementioned origins of Saudi culture, it seems to have been driven by its religious background, as the call to remove the non-Islamic traditions practised by Saudi people before the unification was the ultimate motive for the creation of a single Saudi Arabia. This objective has influenced the Saudi people's beliefs and bound them firmly to the religion. In addition, since the background of the Saudi people is tribal, the tribes' customs influenced their culture in such a way as to introduce some cultural characteristics into the religion. For example, it was not until 2012 that women in Saudi Arabia were granted the possibility of representing clients in the courts. The ban on female representation was based on the cultural belief that, because of gender differences, women should not represent men in court.

Based on the characteristics of Saudi culture, it can be argued that Saudi people's customs and culture⁵² have influenced the law. Such customs and traditions cannot be ignored, as they may play the same major role in law-making as they played in unifying the country and influencing its culture. In particular, the tribal custom in relation to dispute resolution needs to be discussed as it may provide input into the choice of the most suitable mechanism for the Saudi people and indicate a path to legal reform of the Saudi ODR regulations.

3.3.2 History and perception of dispute resolution among Saudi citizens

The dispute resolution concept is not new in the Arab peninsula; its roots predate the foundation of Islam by approximately 1400 years. It had been evident in the most famous dispute resolution proceeding in the Arab peninsula: the one concluded by the Prophet Mohammad in the city of Mecca before the creation of the Saudi nation, when the heads of the tribes in Mecca disputed

⁴⁹ Mustafa M Achoui, 'The Saudi Society: Tradition and Change' in James Georgas, John Berry, Fons Vijver, Cigdam Kagitcibasi and Ype Poortinga (eds) *Families Across Cultures: A 30 Nation Psychological Study* (Cambridge University Press 2006) 435.

⁵⁰ Wahbi Al-Hariri-Rifai and Mokhless Al-Hariri-Rifai, *The Heritage of the Kingdom of Saudi Arabia* (GDG Publishing 1990) 26, and Mustafa M Achoui, 'The Saudi Society: Tradition and Change' in James Georgas, John Berry, Fons Vijver, Cigdam Kagitcibasi and Ype Poortinga (eds) *Families Across Cultures: A 30 Nation Psychological Study* (Cambridge University Press 2006) 435.

⁵¹ Hussam Fallatah, 'Addressing the need for consumer protection in e-commerce in Saudi Arabia' (PhD thesis, University of Leeds 2017) 39.

⁵² An example of this influence on dispute resolution process will be discussed in the following section 3.3.2.

the placement of the black holy stone.⁵³ Each tribal leader wanted himself and his tribe to have the honour of carrying the stone and putting it in its place.⁵⁴ The leaders of the tribes could not resolve their dispute so they turned to the Prophet Mohammad because of his honesty and trustworthiness. The Prophet took his robe and positioned the holy black stone in the middle of the robe, then asked the two leaders to each hold one side of the robe and together to carry the stone and place it in the location they had agreed on.⁵⁵

Another story that shows the importance of dispute resolution concerns the settlement of one of the biggest wars and conflicts between two Arab tribes, with many Arab incidents in the Dahis and Alghabra civil war occurring in the middle of the Arab Peninsula. The conflict ended in a settlement guided by Alharith Bin Aowf and Harm Bin Senan, who are still mentioned in Arab history because of their role as intermediaries in settling the war.⁵⁶ This story shows that Arab people see the intermediary or dispute settler as a figure deserving praise and gratitude for his role in dispute resolution, which preserves society from wars and their consequences, as shown by the praise given these two Arab tribal mediators in the Arabic literature.⁵⁷

The stories mentioned above highlight some noteworthy factors in relation to the dispute resolution process in Saudi Arabia. One is the role of the tribal leader, who plays an important part in the process. In the Mecca tribal dispute, the leaders represented each member of the tribe in the dispute process, as a matter of power within their tribe, while members of the tribe allowed their disputes to be resolved by the tribe's leaders. Another principle illustrated by this story is the role of honesty and trustworthiness in the choice of dispute settler or mediator, as the tribes of Mecca turned to someone whom they knew to possess these qualities.⁵⁸ This knowledge was based on the person's reputation, derived from his family's experience of successfully settling disputes within the tribe. Another basis for the choice of intermediary would be his religious background, as his reputation in this respect within society would confirm the divine nature of his decision.⁵⁹ After the conclusion of the proceedings, although the intermediary's decision was final, it was not enforceable, being viewed as a statement of

⁵³ Hamad Al-humaidhi, 'Sulh: Arbitration in the Arab-Islamic World' (2015) 29(1) Arab Law Quarterly 92, 94.

⁵⁴ *ibid.*, 95.

⁵⁵ *ibid.*

⁵⁶ This war occurred before the birth of Islam. For more on this subject, see Salman Aldakhel, 'Mediation and its Impact on Dispute Resolution' (2016) 6(1) Qadhaa Journal <<http://search.mandumah.com/Record/751164>> accessed 2 July 2018.

⁵⁷ *ibid.*

⁵⁸ Hamad Al-humaidhi, 'Sulh: Arbitration in the Arab-Islamic World' (2015) 29(1) Arab Law Quarterly 92, 94.

⁵⁹ *ibid.*

rights in relation to the dispute. Enforcement of the decision relied entirely on the intermediary's respectability and his reputation within the tribe or society.⁶⁰

In addition, the roots of dispute resolution and harmony in tribal customs and traditions need to be further explained. The structure of the tribe comprises its head (Shiekh) and prominent figures within it, or those who had made a vital contribution as dispute settlers in previous disagreements within the tribe, such as family or individual arguments, or disputes with other tribes.⁶¹ The youngsters in the tribe were socialised to refer their disputes to their fathers or elderly relatives for resolution, in cases of dispute between one tribe member and his family or anyone else from the same tribe. Thus, the father acted as mediator between the two parties. When the youngsters grew older, they started to refer their disputes to the older members of the family, such as uncles or cousins, so that everyone within the family was appealed to for help. However, in complex or serious matters that were difficult to resolve, they referred their disputes to the tribal leader (Shiekh) who would act as intermediary.⁶² The main purpose of the intermediary was to maintain harmony among individuals of the tribe. In some circumstances, to promote harmony the intermediary would go to the extreme of offering to bear the financial loss involved in compensation, as a means of persuading the disputants to agree to the settlement.⁶³

This process of dispute resolution among Arabian tribes in the Arab peninsula, now Saudi Arabia, differs from dispute resolution in the western world,⁶⁴ a fact which calls for special consideration when settling disputes in Arab regions, in view of the social and cultural variations involved. According to Ingen-Hous, the two forms of dispute resolution process can be distinguished as follows:

‘the East focuses on a procedure that is intuitive and informal while the West focuses on one that is cognitive and formal...While conflict resolution in the West focuses on the individual, in the East the individual is entangled within their own group or tribe’.⁶⁵

⁶⁰ *ibid.*, 98.

⁶¹ *ibid.*, 96.

⁶² Aseel Al-Ramahi, ‘Sulh: A Crucial Part of Islamic Arbitration’ (2008) LSE Legal Studies Working Paper No. 12/2008, Islamic Law and Law of the Muslim World Paper No. 08-45, <<https://ssrn.com/abstract=1153659>> accessed 7 April 2021.

⁶³ *ibid.*

⁶⁴ D. Eickelman, *The Middle East and Central Asia: An Anthropological Approach* (New York: Prentice Hall, 1997). In Hamad Al-humaidhi, ‘Sulh: Arbitration in the Arab-Islamic World’ (2015) 29(1) *Arab Law Quarterly* 92, 96.

⁶⁵ Arnaud Ingen-Hous, *ADR in Business: Practice and Issues across Countries and Cultures* (2nd edn, Kluwer International Law BV 2011) 274.

Based on the previous peculiarities of dispute resolution in Saudi Arabia, it rests with the family and the group, calling on their customs and traditions in forwarding the process of resolution. However, Al-Alshiekh claims that Saudi people do not place informal dispute resolution on the same level as a court judgement: they see the court proceedings as a religious enactment which they believe is the most influential and effective means of dispute resolution.⁶⁶ Therefore, dispute resolution by Saudi judges in court litigation will be discussed in the next section in order to explain how it is perceived by Saudi people.

3.3.3 The role of Islamic law and Saudi culture in supporting dispute resolution

As described in the previous sections, dispute resolution among Saudi people is influenced by their culture, which in turn has its origins in religion.⁶⁷ It can be argued that this influence stems from the fact that the people of Saudi Arabia live in the place where Islam began. Vogel asserts that religious aspects and traditions as well as social norms are activated in a dispute before it reaches the trial stage, and in Saudi culture disputes within any group or tribe are considered objectionable. He argues that a sense of harmony and concern for strengthening brotherhood and ties between people act as reasons to end the dispute.⁶⁸ It is therefore necessary to present the position of dispute resolution in Islamic law and discuss how that has influenced Saudi people from an Islamic perspective.

As described earlier in this chapter, there are five sources of Islamic law.⁶⁹ The first two sources are the Qura'an followed by the Sunna, which comprises the traditions and way of life of the Prophet Mohammad. The principles of urging people to settle their disputes and of spreading harmony within society have not been ignored by these two sources. For example, the Qura'an suggests that all disputes shall be settled by Sulh, which means resolution achieved with harmony, through amicable settlement between the disputing parties. This is clearly expressed in the Qura'an as: 'Settlement is best'.⁷⁰ A further Qura'anic text urges the whole society to forgive if there should be a war between two groups of the community: 'And if two factions among the believers should fight, then make settlement between the two.'⁷¹ These texts have been acknowledged by both judges and litigants to end disputes very quickly, even in court proceedings. According to Vogel, when observing Saudi Shariah courts he was often told that

⁶⁶ Mohammad Al-Alshiekh, 'Pluralism of Commercial Judicial Committees (Causes-Consequences-Solutions)' (1997) 21(3) *Huqoq Journal* 233, 255.

⁶⁷ See chapter 3 section 1 (Introduction).

⁶⁸ Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Koninklyke Brill NV 2000) 150.

⁶⁹ See chapter 3 section 1.

⁷⁰ Qura'an [An-Nisaa 5:128].

⁷¹ Qura'an [Al-Hujuraat 26:9].

most cases of civil disputes end in reconciliation, and the legal saying (Sulh is best), which is originally a Qura'anic text, was often quoted to him.⁷² Moreover, during the court proceedings he asked the court chairperson: why do the great majority of cases end in settlement? In the court chairman's reply, one reason given was that a formal judgement can cause animosity between parties, while settlement brings people together in harmony. On this basis, the Saudi judges encouraged litigants to reach settlement and if they failed to do so privately, the judge would act as intermediary to encourage the two parties to agree. While Vogel was observing the Saudi Shariah courts, he acknowledged the skills of Saudi judges when acting as intermediaries. He added that, in some circumstances, if the judge believed that the outcome of the settlement was preferable to a judgement, he would aim, sometimes even forcefully, to persuade the litigants to reach an agreement to settle their dispute amicably.⁷³ This approach of the Saudi Shariah courts is based on the Islamic source of jurisprudence and judicial art as stated by Omar (second Islamic leader after the death of Prophet Mohammad) in his message to the judge of Yemen, Abu Mosa: 'Turn away the litigant, in order that they reach sulh (settlement), because judgment creates feelings of spite among people'.⁷⁴ Omar's instruction can be said to have influenced the judiciary and Saudi culture in a positive way, as Saudi judges rely heavily on amicable resolution, by encouraging people to resolve their disputes before turning to the courts and judges. It spreads harmony between societies so that they can live in brotherhood. In addition, it reduces the number of disputes and prevents animosity arising between people, because, as Omar's message points out, judgement creates spite. This cultural aspect of dispute resolution, based on Islamic law, is reflected in the number of cases that have ended in settlement. This concept of living in a society of brotherhood is linked with the concept of harmony in society. In Saudi culture, disputes are disliked within the society due to a sense of brotherhood and harmony being needed to strengthen relations' ties. All members of the society readily involve themselves in dispute resolution due to their religious background. The Qura'anic text suggests that:

'The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy.'⁷⁵

The aforementioned practice of settlement in the Saudi context shares some aims with the concept of justice. Justice is linked with equality, fairness, and fulfilment of duties. Also,

⁷² Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Koninklyke Brill NV 2000) 154.

⁷³ *ibid.*, 155.

⁷⁴ *ibid.*, 151.

⁷⁵ Qura'an [A-hujuurat 49:10].

Aristotle linked justice with forms such as distributive justice and corrective justice. Distributive justice would help to prevent disputes from arising.⁷⁶ This is a significant relation between distributive justice and the practice of sulh and dispute settlement in the Saudi context. The prevention of disputes before they occur would in turn spread harmony between citizens and prevent animosity.

There are several ways and occasions which make amicable dispute resolution successful. An invitation for meeting and talking has been used to resolve disputes in most societies.⁷⁷ Mediation expresses ‘anti-law ideology’ by maintaining that non-adversarial ways of resolving disputes can spread more sustainable solutions.⁷⁸ Disputes and dispute resolution have been at the core of legal anthropological research since 1940. From a legal anthropological perspective, disputing is a social behaviour and is informed by the parties’ moral views about how to dispute and how to agree. One of the circumstances which make mediation work successfully is that mediation leads to a win-win resolution, while adjudication leads to a win-lose resolution. Anthropologically, this has an impact on the disputants, who would prefer mediation as they are bound by multi-stranded social relationships and would prefer to reach a compromise on their differences. Another feature of people’s preference for mediation is that the mediation process is based on the principle of voluntariness, which offers disputants free choice of an alternative to adjudication.⁷⁹ This feature causes disputants to choose mediation among other ADRs in order to select the choice that best serves their interest. However, in some circumstances, there is some power imbalance, such as that based on education, social class, and culture, which will influence parties of the disputes in their choice.⁸⁰ Therefore, although mediation and amicable dispute resolution would spread harmony and offer sustainable solutions, there are some factors that need to be considered, as it could deprive disputants of their rights, affecting their ability to reach a voluntary dispute resolution, due to imbalances between disputants.

⁷⁶ See chapter 2 section 2.2.1.

⁷⁷ Simon Roberts, *Order and Disputes: An Introduction to Legal Anthropology* (2nd edn 2013, Quid Pro Books).

⁷⁸ Marc Simon Thomas, ‘Theorizing Mediation: Lessons Learned from Legal Anthropology’ (2016) 12(1) *Utrecht Law Review* 50, 58.

⁷⁹ *ibid.*

⁸⁰ Marc Simon Thomas, ‘Access to Mediation’ (Montaigne Centre Blog, 12 June 2015)

<<https://blog.montaignecentre.com/en/access-to-mediation-marc-simon-thomas/>> accessed 18 August 2022.

3.3.4 The role of Islamic law and Saudi culture in fair dealing and protection of consumers and the weak party

Saudi people are influenced by Islamic law and literature as a result of the creation of Islam in the Arab Peninsula.⁸¹ The concept of Hesbah⁸², which is a part of Islamic culture, has been reflected in Saudi culture and legislation. Accordingly, Islamic literature supports the principle of Hesbah in the markets to combat commercial deception and protect consumers and weak parties. As mentioned above, the story of the Prophet Mohammad in the market has been adopted as a model in Muslim markets. Saudi law has embodied this principle of observing the market to protect consumers, as seen for example in Article 17 of Anti-Commercial Fraud Regulation 2009, which mentions that any person who reports a deceptive act in the market deserves a reward of 25% of the total fine that must be paid to the government for selling defective items.⁸³ This article can be described as the cultural reflection of the Hesbah concept in Islamic law which encourages consumers to observe the market while shopping and report any illegal transaction to the authority that deals with commercial deception, as suggested by the Hesbah principle.

Therefore, it can be said that dispute resolution in Saudi Arabia has its roots in Saudi culture, and thus differs from dispute resolution processes in the west. Moreover, the Saudi dispute resolution process is derived from Islamic law and culture, as can be seen in the dispute resolution practice in the courts and the way Saudi judges end disputes amicably between parties, based on Qura'anic texts and the Prophet Mohammad's practice of resolving disputes. Furthermore, the roots of protecting consumers and weak parties are found in Islamic law, as reflected in some parts of the Saudi regulation such as the Hesbah practice. Dispute resolution in Saudi Arabia is practised widely by Saudi people. Since the people are closely linked with culture and religion, amicable dispute resolution is implemented and encouraged by social norms as well as by religious teaching, as mentioned above, through the Qura'anic texts and traditions of the Prophet. Thus the dispute resolution process in Saudi Arabia varies from that in the western world, as it rests on the group and on customs, while in the west it rests on individuals and laws. Furthermore, in relation to consumer protection and weak parties, the roots of these aspects in Islamic law, such as the Prophet Mohammad's practice in the market, have been reflected in some laws within the Saudi regulation.

⁸¹ See chapter 3 section 1 (Introduction).

⁸² The concept of Hesbah is defined in chapter 2 section 2.2.1.

⁸³ Anti-Commercial Fraud Regulation 2009 (Saudi Arabia).

3.4 Background of Dispute Resolution in Business Law in Saudi Arabia

Alongside the development of the country after its unification in the early nineteenth century,⁸⁴ its economy grew with the discovery of oil in the kingdom, which led to many changes in the conduct of business and regulation of business law. After the cultural background of dispute resolution in Saudi Arabia has been reviewed, the background of dispute resolution and business law will be described and analysed, in order to suggest suitable ways of reforming the country's regulation and practice in relation to dispute resolution in e-commerce. This section will discuss the background of dispute resolution regulation, then present the background of business law. Next, it will describe the dispute resolution committees and quasi-judicial committees in relation to their dealings with business in Saudi Arabia.

3.4.1 Background of dispute resolution regulation in Saudi Arabia

Court litigation is the main venue for resolving disputes in Saudi Arabia as per its Basic Law of Governance 1992.⁸⁵ The Basic Law articulated that 'Courts are empowered to arbitrate in all disputes and crimes',⁸⁶ which clearly emphasises the rule of the judiciary in resolving disputes within the country. However, there are alternatives to court litigation. They consist primarily of either direct negotiation between disputing parties to resolve their dispute, or arbitration.

Arbitration developments in Saudi Arabia have taken place in two stages. In the first stage, a Royal Decree, No. M/46, enforced the Arbitration Law 1983 which subjected arbitration in the country to observation by courts within the Board of Grievance.⁸⁷ The Arbitration Law 1983 also required all arbitration processes to be conducted in the country's language; awards could be rejected or allowed according to the court's decision.⁸⁸ In addition, the court was responsible for the enforcement of arbitral awards and was able to consider any level of review it believed necessary to ensure that the arbitral award was compliant with Islamic law.⁸⁹

The second stage of arbitration in Saudi Arabia occurred with the issuance of the Royal Decree No M/34 which included the enforcement of the new Arbitration Law 2012,⁹⁰ and replacement of the old Arbitration Law 1983 as per Article 57 of the 2012 law.⁹¹ The main difference

⁸⁴ See chapter 3 section 1.

⁸⁵ Basic Law of Government Article 49 (1992).

⁸⁶ *ibid.*

⁸⁷ This type of court in Saudi Arabia has been explained previously in section 1 of chapter 3.

⁸⁸ Arbitration law 1983 (Saudi Arabia).

⁸⁹ *ibid.*

⁹⁰ Arbitration Law 2012 (Saudi Arabia).

⁹¹ *ibid.*

between the two laws is that the new law can be applied to international arbitration abroad if the disputing parties agree to apply it.⁹² Moreover, the new law has not changed the previous requirement that the arbitral award be Shariah compliant, and has explicitly specified judicial oversight of arbitral awards in the Saudi courts for Shariah compliance, as in the old arbitration law.⁹³ This privilege of Saudi courts to oversee arbitral awards to keep them in line with Islamic law indicates the Saudi government's interest in complying with Islamic law, since its Basic Law of Governance 1992 clearly establishes this compliance.⁹⁴ In addition, the new arbitration law is borrowed from the 1985 UNICTRAL Model Law on International Commercial Arbitration and its 2006 amendments, which puts the Saudi Arbitration Law 2012 in close alignment with international arbitration norms.⁹⁵

In relation to consumer disputes and the way to resolve these disputes, it is found that resolution of consumer disputes in Saudi Arabia by arbitration procedure is permissible. Article 2 of the Saudi Arbitration Law 2012 clearly states that the law can be applied to any contractual relationship pursuant to parties' agreement. Therefore, consumer disputes in Saudi Arabia can be resolved by arbitration as per the Saudi Arbitration Law 2012 if the consumer and the other party have agreed in the contract to use this method. Moreover, even if the consumer and seller have not stated an intention to resolve their dispute by arbitration in the contract, they can agree to do so in a separate contract. Article 9 of the Arbitration Law 2012 allows disputing parties to agree to settle their dispute by arbitration before a dispute arises, whether the arbitration agreement is mentioned in a contract or the agreement is independent.⁹⁶ Consequently, what is required of consumers who wish to resolve their dispute by arbitration is to agree with the other party that they will do so. Another requirement is that the arbitral award must be compliant with Islamic law.⁹⁷ Although this is a rule for the arbitrators to comply with, it is likely to satisfy Saudi consumers since Saudi people are influenced by Islamic law, as mentioned earlier.⁹⁸ Accordingly, consumer disputes in Saudi Arabia can be resolved by arbitration according to the Arbitration Law 2012, since this law, when excluding some matters that cannot be settled by arbitration, has not mentioned consumer disputes. However, whether consumers of e-commerce

⁹² Arbitration Law Article 3 2012 (Saudi Arabia). For more on the differences between the new and old arbitration laws in Saudi Arabia, see Mohammed Al-ghamdi and Neufeld Paul, 'Saudi Arabia' in Taylor Damian (ed), *The Dispute Resolution Review* (Law Business Research Ltd, London 2017) 459.

⁹³ Arbitration Law 2012 (Saudi Arabia).

⁹⁴ See chapter 3 section 1.

⁹⁵ Mohammed Al-ghamdi and Neufeld Paul, 'Saudi Arabia' in Taylor Damian (ed), *The Dispute Resolution Review* (Law Business Research Ltd, London 2017) 459.

⁹⁶ Arbitration Law 2012 (Saudi Arabia).

⁹⁷ See chapter 3 section 3.3.1.

⁹⁸ See chapter 3 section 2.

wish to solve their dispute by arbitration might depend on the value of the goods purchased through e-commerce compared to the cost of arbitration.

Another method of dispute resolution in Saudi Arabia is mediation. As described previously in the section on cultural background, dispute resolution is rooted in Saudi culture in the practice of tribes and the tribal leader.⁹⁹ This role was copied by one of the Shariah courts in Saudi Arabia in 2000, when a court chairman established a department for mediation in order to resolve disputes between parties if they were willing to resolve their differences amicably.¹⁰⁰ The establishment of this department followed the experience of success in resolving disputes amicably in court in advance of the judgement.¹⁰¹ The implementation rules contain guidelines for dispute resolution, announcing the establishment of dispute resolution centres in the Ministry of Justice and the courts, and asserting the main role of the centres of dispute resolution in the Ministry of Justice as centres for resolving disputes between parties.¹⁰² It has been announced by the Ministry of Justice in Saudi Arabia that 44% of the cases that were submitted to the Dispute Resolution Centres were solved amicably under the guidelines of Dispute Resolution Regulation 2013.¹⁰³ However, the types of these cases were not specified, so it is unknown whether they include consumer disputes. The guidelines include the condition that any dispute resolution must be in accordance with Islamic law.¹⁰⁴ This article, along with the abovementioned article in the arbitration law, explicitly calls for strict compliance with Islamic law. The abovementioned regulation and laws in relation to arbitration and mediation for dispute resolution in Saudi Arabia show the government's interest in resolving disputes between people amicably.¹⁰⁵ Another indication of this policy, as seen in the above discussion, is the success of mediation in the country, which was practised in one Shariah court and led to the issue of mediation regulation. However, the mediation regulation was issued by a Minister of Council Decision, unlike the Arbitration Law which was issued by Royal Decree. This difference shows the relative levels of importance of law and regulation, with less importance assigned to mediation regulation than to arbitration law. The reason for this difference might lie in the lesser formality of mediation compared to arbitration and court litigation. Another

⁹⁹ See chapter 3 section 2.

¹⁰⁰ Misfer Alqahtani, 'Settlement by Mediation and its Impact on Dispute Resolution in Saudi Arabia' (2014) 16(66) Justice Journal 193, 207.

¹⁰¹ *ibid.*

¹⁰² Implementation Rules of Dispute Resolution Centres 2014 (Saudi Arabia).

¹⁰³ Al-madina, '44% of Dispute Resolution Centres Solved Amicably' (*Al-madinacom*, 14 February 2018) <<https://www.al-madina.com/article/561204/>> accessed 26 September 2021.

¹⁰⁴ Implementation Rules of Dispute Resolution Centres 2014 (Saudi Arabia).

¹⁰⁵ As an example of the interest in mediation as a reflection of Saudi culture in Saudi Arabia, Saudi Labour Law requires mediation before starting any form of judicial process as a way of resolving disputes between employer and employee amicably as per article 220 of Saudi Labour Law. See Labour Law 2015 (Saudi Arabia).

reason might be that mediation is mostly practised by influencers in the society outside court procedure and mediation centres, with mediation as a regulation being newly issued in Saudi Arabia although it was practised earlier.

However, the Basic Law of Government states that the courts are ‘empowered to arbitrate in all disputes and crimes’, which means that the courts stand above all ways of resolving disputes. Alongside the abovementioned approaches, which are non-judicial dispute resolution methods, there are alternative approaches and exceptions to the use of the courts for resolving disputes in Saudi Arabia, by methods other than arbitration and mediation.¹⁰⁶

Saudi Arabia derives its regulation originally from Islamic law, since that law represents a way of life.¹⁰⁷ The country’s laws and regulation are evidence of this basis in Islamic law. For example, the Basic Law of Government mentions that the Qura’an and Sunna of the Prophet Mohammad are the constitution.¹⁰⁸ Moreover, the abovementioned Arbitration Law 2012 and the Mediation Regulation stipulate that arbitration or mediation must be consistent with Islamic law.¹⁰⁹ These regulations indicate that Islamic law permits regulations and laws as long as they do not contradict Islamic legal principles. On this basis, Saudi Arabia has passed many regulations and laws, affecting many aspects of life and commercial matters in particular, which in general do not violate Islamic law principles. For instance, the Commercial Court Law 1932¹¹⁰ gave the commercial court the power to resolve all matters related to commerce and business. However, this court was cancelled 24 years after its creation by the Council of Ministers Decision No. 142/1954, with no reason for the cancellation given by the government or Judicial Authority.

But although the reasons for the cancellation of the commercial court were not officially stated, they were known implicitly. It was argued that one reason, from the perspective offered, was the continuous call by the Shariah judges for the cancellation of the commercial court and the transfer of its authority to the Shariah courts. Another reason was that the cancelled court was not performing in the way specified in its regulation, as many sellers and companies went

¹⁰⁶ These approaches are exceptions which the Saudi legal authorities have authorised through an independent Royal Decree or through a Regulation, to avoid litigation before the courts in the country. For more on non-judicial dispute resolution methods, see Abdulwahid Almazroua, ‘Jurisdiction of Administrative Committees and Judicial Committees in Saudi Arabia’ (2010) 16(3) Journal of Faculty of Education 497, 512.

¹⁰⁷ See chapter 3 section 1.

¹⁰⁸ Basic Law of Government 1992 (Saudi Arabia).

¹⁰⁹ Arbitration Law 2012, Implementation Rules of Dispute Resolution Centres 2014 (Saudi Arabia).

¹¹⁰ The Commercial Court Law 1932 was considered a business law in Saudi Arabia since it governed all business matters and transactions on the bases of Islamic law. For more on analysis of Commercial Court Law 1932, see Mohammad Al-Alshiekh, ‘Pluralism of Commercial Judicial Committees (Causes-Consequences-Solutions)’ (1997) 21(3) Huqoq Journal 233, 241.

initially to the Shariah courts where cases were judged by Shariah law, rather than by the Commercial Court Law 1932, because the Shariah judges were reluctant to be subjected to the regulation in case it contained articles that were inconsistent with Islamic law.¹¹¹

3.5 The E-commerce Environment in Saudi Arabia

In order to reform the e-commerce environment and adopt a suitable ODR method in Saudi Arabia, it is necessary to identify the current issues in the e-commerce market, evaluate the statutes governing e-commerce regulation in the country, and determine whether or not there is a need to impose a law regulating the e-market. Therefore, this section presents the legal status of e-commerce in Saudi Arabia and outline what has been done previously by the government in relation to e-commerce regulation, in order to suggest suitable reforms to current legislation.

3.5.1 E-commerce Regulation in Saudi Arabia

The rapid development of e-commerce has offered consumers the option of entering into distant, even cross-border, transactions.¹¹² This development has created some obstacles that discourage people from utilising e-commerce. Lack of regulations is one of the obstacles that face consumers and impede the progress of e-commerce. Alghamdi, Drew and Alhussain clearly state in their study that within the flow of e-commerce, e-commerce regulations and consumer protection legislation have a major impact on the progress of e-commerce transactions.¹¹³ The lack of consumer protection law is significant for the development of e-commerce. Since e-commerce transactions rely heavily on consumers and businesses, consumers need protection from violation of their rights. As per Plant, lack of consumer protection regulations is an obstacle to e-commerce advancement.¹¹⁴ Therefore, it can be said that the regulation of e-commerce is a vital element in the development of the e-commerce market.

However, although e-commerce is growing very rapidly, Saudi Arabia has not developed its regulations at the same speed as e-commerce development, despite regulations being a vital element in that development. As explained above, clear regulation is an important factor in the protection of rights for all consumers and sellers. It can reduce disputes before they arise in commercial transactions, and its absence creates market uncertainty. In fact, prior to the issue

¹¹¹ *ibid.*

¹¹² Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce: a Multidimensional Analysis of Consumer Protection Mechanisms* (Springer 2015) 11.

¹¹³ Rayed Alghamdi, Steve Drew and Thamer Alhussain, 'A Conceptual Framework for the Promotion of Trust Online' (2012) 7(5) *International Journal of Business and Management* 140, 143.

¹¹⁴ Robert Plant, *Ecommerce: Formulation of Strategy* (Prentice Hall 2000).

of ECL in 2019 in Saudi Arabia,¹¹⁵ the country was lacking regulation on e-commerce due to several factors such as the missing role of government in developing e-commerce.¹¹⁶

In the case of Saudi Arabia and its regulations affecting e-commerce, the government has issued the Electronic Transactions Law 2007 which governs all such transactions.¹¹⁷ Its aim was to regulate all electronic transactions for the governmental and private sectors, thus ensuring the credibility of parties and preventing fraudulent acts between parties to electronic transactions.¹¹⁸ The law includes articles that address some issues; for example, article 14 addresses issues of electronic signature, articles 10, 11, 12 and 13 address ways of concluding electronic contracts, and the identity of parties and misuse of consumer information are addressed in article 9.¹¹⁹ However, although the law was issued in 2007 in response to the presence of e-commerce in Saudi Arabia, it has not addressed other e-consumers' issues and other consumer rights matters such as fraudulent transactions by sellers or receipt of defective goods. In a survey conducted by Aleid, Rogerson and Fairweather in 2011, consumers commented that the Electronic Transactions Law 2007 had not provided them with the protection they need in order to feel confident when purchasing online. The study concluded from the survey that this act does not meet consumers' needs.¹²⁰

Another law that can be adapted to provide consumer protection in e-commerce is the Anti-Commercial Fraud Law 2009,¹²¹ which is applicable both to traditional trading between consumers and sellers and to e-commerce, since it addresses broader issues that cover e-commerce transactions. The law defines fraudulent transactions and explains how to penalise seller frauds. It also identifies ways of considering products defective in the same way that Shariah does; for example, a fraudulent product is defined as follows:

‘a. Any product that has been altered or tampered with in any way, causing it to lose some of its material or moral value, by means of addition, reduction, manufacturing or any other means; whether in its substance, nature, kind, type, shape, components,

¹¹⁵ Electronic Commerce Law 2019 (Saudi Arabia).

¹¹⁶ Reasons for the lack of e-commerce regulation and the role of government will be discussed in section 3.4.3 of this chapter.

¹¹⁷ Electronic Transactions Law 2007 (Saudi Arabia); for more information see CITC, ‘Electronic Transactions Law’ (*Communications and Information Technology Commission*, 30 April 2007) <<http://www.citc.gov.sa/en/RulesandSystems/CITCSystem/Pages/ElectronicTransactionsLaw.aspx>> accessed 20 June 2018.

¹¹⁸ Electronic Transactions Law 2007 Article 2 (Saudi Arabia).

¹¹⁹ *ibid.*

¹²⁰ Fahad Aleid, Simon Rogerson and Ben Fairweather, ‘Factors Affecting Consumers Adoption of Ecommerce in Saudi Arabia from a Consumers Perspective’ (Proceedings of the IADIS International Conference on e-Commerce, Algarve, Portugal, June 2009) <<http://www.iadisportal.org/e-commerce-2009-proceedings>>.

¹²¹ Anti-Commercial Law 2009 (Saudi Arabia).

features, requirements, characteristics, origin or quantity in terms of weight, measure, measurement, number, capacity or caliber.

b. Any product not conforming to approved standard specifications.

c. Defective product: Any product no longer fit for utilization, use or consumption as specified by the Regulations.¹²²

In addition, the Act illustrates what can be considered approved standards specifications, defined as ‘Specifications issued by the Saudi Arabian Standards Organization or by any other local or international body and adopted by said Organization’.¹²³

This law was intended to cover all aspects of fraudulent transactions and defective products in traditional shopping. But there are items that have not been classified under these headings, such as those products which can be used by humans even when defective. The law intentionally focuses on consumable products and unintentionally excludes some others such as electronic products. The law has not been drafted to address e-commerce-related issues such as distance selling, e-commerce complaint procedures, and procedural rights for e-commerce consumers.¹²⁴ And although there are some laws which cover some areas of e-commerce in Saudi Arabia, there are no laws or sections in the abovementioned statutes that cover areas of dispute resolution in e-commerce. Even though Dispute Resolution Regulation 2013 can be adapted to cover e-commerce disputes, there is no record of e-commerce disputes that have been successfully resolved by this regulation.¹²⁵ This raises the question of how to resolve disputes arising from e-commerce in order to protect consumers. E-consumers in Saudi Arabia face complicated procedures with which to resolve their disputes if they should face any problem with an online purchase.¹²⁶ This issue is related to the conditions of traditional dispute resolution, presenting a difficulty that has still not been overcome: namely, that e-consumers need to solve their disputes online in the same way that they shop. Therefore, despite the existence of laws and regulations covering some aspects of e-commerce and traditional dispute

¹²² Anti-Commercial Fraud Law 2008 Article 1 (Saudi Arabia).

¹²³ *ibid.*

¹²⁴ Anti-commercial Fraud Law in Saudi Arabia mainly aims to address issues related to fraud in the market such as specification of market products and procedures for non-compliance with market specification. For more on the Anti-Commercial Fraud Law in Saudi Arabia, see Hussam Fallatah, ‘Addressing the need for consumer protection in e-commerce in Saudi Arabia’ (PhD thesis, University of Leeds 2017) 72.

¹²⁵ See chapter 3 section 3; the procedure for resolving disputes in the dispute resolution centres will be discussed in chapter 5.

¹²⁶ The procedure for resolving consumer disputes in commerce will be discussed in detail in chapter 5; for more on procedures of e-commerce dispute resolution see Fahad Aleid, Simon Rogerson and Ben Fairweather, ‘Factors Affecting Consumers Adoption of Ecommerce in Saudi Arabia From a Consumers Perspective’ (Proceedings of the IADIS International Conference on e-Commerce, Algarve, Portugal, June 2009) <<http://www.iadisportal.org/e-commerce-2009-proceedings>>.

resolution, there is a need to solve the problems facing e-consumers by allowing them to resolve their disputes online.

3.5.2 The need for a reliable E-commerce Law

An official report claims that Saudi Arabia's e-commerce market is the largest in the MENA region, with an estimated 7.92 billion dollars spent in 2016.¹²⁷ It is assumed that the transformation from offline shopping to e-commerce in Saudi Arabia is due to the development of technology and online payment systems, through which online shopping has increased faster than traditional shopping.¹²⁸ As this figure represents a significant favourable impact on the economy, the country aims to support e-commerce in order to achieve further economic growth with less dependency on oil income, along with an advanced place in the UNCTAD e-commerce ranking as per its 2030 Vision.¹²⁹ However, an official report by the CITC in Saudi Arabia maintains that consumers are uneasy and worried about e-commerce products and that there is thus a need to improve the country's ECLs.¹³⁰

Therefore, given this e-commerce market in Saudi Arabia and the vision of reduced dependency on oil income through increased trade opportunities, and given the absence of laws regulating e-commerce transactions, the country needs to consider issuing an ECL to remove the market's ambiguity in the area of regulation. Although there are regulations that can be applied to e-commerce, as described earlier, such as the Anti-Commercial Fraud Law and the Electronic Transactions Law, these laws are not sufficient to cover the market's issues. The current regulations in relation to e-commerce are intended to cover problems related to deception and electronic identification but do not cover e-commerce transactions involving payments and delivery issues. Makki and Chang in their study argue that most research on Saudi e-commerce emphasises the lack of government intervention in e-commerce regulation to promote the adoption and acceptance of e-commerce.¹³¹ They add that, although there is a government

¹²⁷ CITC, 'ICT Report E-Commerce in Saudi Arabia' (*The Communications and Information Technology Commission*, 14 November 2017)

<http://www.citc.gov.sa/en/reportsandstudies/Reports/Documents/CITC_ECOMMERCE_2017_ENGLISH.PDF> accessed 20 June 2018, page 25.

¹²⁸ Euromonitor international, 'Internet Retailing in Saudi Arabia' (*Euromonitor*, 1 February 2017) <<http://www.euromonitor.com/internet-retailing-in-saudi-arabia/report>> accessed 20 June 2018.

¹²⁹ CITC, 'ICT Report E-Commerce in Saudi Arabia' (*The Communications and Information Technology Commission*, 14 November 2017)

<http://www.citc.gov.sa/en/reportsandstudies/Reports/Documents/CITC_ECOMMERCE_2017_ENGLISH.PDF> accessed 09 March 2021, page 21 para 1.

¹³⁰ *ibid.*

¹³¹ Eyad Makki and L Ching Chang, 'E-Commerce in Saudi Arabia Acceptance and Implementation Difficulties' (The 2014 International Conference on e-Learning, e-Business, Enterprise Information Systems, and e-Government, Las Vegas, July 2014).

consumer protection agency (CPA), it is not actively supported and consumers do not trust this agency in traditional commercial transactions. Therefore, they will not trust it in online commercial transactions either.¹³²

3.5.3 Governmental Initiatives to Regulate E-commerce Transactions

The government's role in e-commerce is essential for facilitating the diffusion of e-commerce and business. Without this governmental engagement, the market will lack the regulatory authority to organise itself and control illegal transactions. In relation to Saudi Arabia, Alghamdi, Drew and Alkhalaf found that, although the Saudi government plays a major role and people have a tendency to rely on what issues from the government, they added that its role in regulating, facilitating and observing the e-commerce market appears to be absent, which places Saudi e-commerce behind the global volume.¹³³ The background of this issue lies in the lack of a competent e-commerce authority to regulate the market, resulting in the absence of a governmental role in the regulation of e-commerce. To seek the background of this issue, Alghamdi, Drew and Alkhalaf investigated the role of government, which is vital in regulating the market, and found it to be unorganised.¹³⁴ For example, in 2001, the Ministry of Commerce (MOC) created a permanent committee for e-commerce which includes members from different organisations in Saudi Arabia. In 2006, the committee no longer existed under the MOC, its responsibilities having been transferred to the Ministry of Communication and Information Technology,¹³⁵ so in 2006 that Ministry created a national plan for ICT in the country. The plan's vision is of 'the transformation into an information society and digital economy so as to increase productivity and provide communication and IT services for all sectors...' ¹³⁶ However, this plan does not give any details regarding e-commerce to show its current situation in the country and what future arrangements for supporting it are being considered.

This preview of the missing role of government in Saudi Arabia shows that it has neglected its function of facilitating the essential aspects of e-commerce such as regulation, a legal framework, and a government agency to control and enforce the law. Therefore, it can be argued that the government has caused the country's e-market to fall behind in the international e-commerce ratings by its inadequate adoption of e-commerce.

¹³² *ibid.*

¹³³ Rayed Alghamdi, Steve Drew and Salem Alkhalaf, 'Government Initiatives: The Missing Key for E-commerce Growth in KSA' (2011) 77(1) *World Academy of Science, Engineering and Technology* 772, 773.

¹³⁴ *ibid.*, 772.

¹³⁵ Saudi Ministry of Communication and Information Technology, 'The National Communications and Information Technology Plan' (2006).

¹³⁶ *ibid.*

Lately, in order to improve e-market regulation, in 2015 the MOC published on the ministry website an announcement of an ECL project, to seek opinions on it. The proposed law aims to:

- 1- Reinforce trust in e-commerce transactions.
- 2- Provide adequate protection for e-consumers against fraud and deception.
- 3- Develop and support e-commerce.¹³⁷

The ECL project aimed to address consumer protection issues in e-commerce, rules to deal with misleading advertising, and how to conclude an e-commerce contract. However, as of 2019 the bill had been on the Ministry website since 2015 without being implemented.

In 2019, the government took a step forward to regulate this field by issuing the Law of Electronic Commerce 2019.¹³⁸ This law was issued following a lengthy bill within the regulatory authority. Before issuance of the law of e-commerce, the Saudi e-commerce field was not regulated, which negatively affected the e-commerce boom during the introduction of the internet in the country at a time when this law was lacking.

As explained earlier in this chapter,¹³⁹ legal projects have to be transferred to the consultative council for consideration, and after approval by the consultative council they have to be transferred to the Council of Ministers for final approval.¹⁴⁰ The status of the new e-commerce law in the MOC was ‘under consideration’ without implementation for nearly four years, from 2015 until 2019.¹⁴¹ This indicates the slow movement of the government towards developing the market, alongside the insufficient effort made by the MOC and the Ministry of Communication, which are not moving in parallel with recent e-commerce developments. Therefore, although the new law is a good step towards regulating the market, more interest in this issue is needed to maintain the market’s development.

3.6 Consumers’ needs in e-commerce in Saudi Arabia

Since the previous section discussed the e-commerce environment and relevant regulations in relation to dispute resolution in Saudi Arabia, the consumers’ perspective on e-commerce in the country needs to be presented and discussed in order to identify the requirements for

¹³⁷ Ministry of Commerce and Investment, ‘E-commerce Law Project’ (*MCI*, 3 May 2015) <<https://mci.gov.sa/LawsRegulations/Projects/Pages/ec.aspx#0>> accessed 21 June 2018.

¹³⁸ Royal Decree No M\126 Date 10\7\2019 for Issuance of Electronic Commerce Law.

¹³⁹ See chapter 3 section 1.

¹⁴⁰ See chapter 3 section 1.

¹⁴¹ Ministry of Commerce and Investment, ‘E-commerce Law Project’ (*MCI*, 3 May 2015) <<https://mci.gov.sa/LawsRegulations/Projects/Pages/ec.aspx#0>> accessed 21 June 2018.

improving the Saudi e-commerce market for the consumer. The factors that inhibit consumers from shopping online will be presented. Next, the consumers' needs in the e-commerce field will be analysed, followed by consideration of consumers' redress in e-commerce in Saudi Arabia.

3.6.1 Factors inhibiting Saudi consumers from shopping online

As mentioned in the previous section, the e-commerce environment in Saudi Arabia has been recently regulated and needs development in relation to the market's regulations and infrastructure. The previous section discussed the market environment from a legal perspective and revealed the government's slow progress, which has not matched recent e-commerce developments.¹⁴² Therefore, consumers' views and needs in relation to e-commerce in Saudi Arabia must be heard and discussed in order to seek adequate reform of the Saudi e-commerce market.

Some factors that inhibit Saudi e-consumers from engaging in e-commerce include issues of trust, security, lack of regulation and lack of physical inspection, these being the most prominent factors that deter consumers from shopping online in the Saudi e-market. Although these factors may influence consumers coming from other markets, the discussion will centre on the Saudi context, as the focus of this thesis is on Saudi e-commerce and consumers.

Since e-commerce transactions involve distance, e-consumers regard trust as an important factor since they engage in transactions with parties whom they may not have dealt with before and with sellers whose behaviour is unknown. Despite the importance of this factor, there is disagreement over the definition of trust, its characteristics, outcomes and antecedents. The difficulty of defining trust is one of the reasons for and roots of this disagreement, which has been identified by Roger, Davis and Schoorman.¹⁴³ Despite the difficulty of defining trust, Eid has defined it in the Saudi e-commerce context as 'Saudi consumer willingness to rely on an exchange partner in whom one has confidence'.¹⁴⁴ This definition clearly identifies the importance of reliance on the exchange party in e-commerce to enable e-commerce transactions to succeed. Therefore, the consumer's trust in the other party in e-commerce is significant and can be described as the cornerstone of e-commerce transactions.¹⁴⁵ However, although

¹⁴² See chapter 3 section 4.

¹⁴³ Mayer Roger, James Davis and David Schoorman, 'An Integrative Model of Organizational Trust' [1995] 20(3) *Academy of Management Review* 709, 709.

¹⁴⁴ Mustafa Eid, 'Determinants of E-commerce Customer Satisfaction, Trust, And Loyalty in Saudi Arabia' [2011] 12(1) *Journal of Electronic Commerce Research* 78, 84.

¹⁴⁵ Nick Hajli, 'A Study of the Impact of Social Media on Consumers' [2014] 56(3) *International Journal of Market Research* 387, 392.

consumer trust in e-commerce is significant in these transactions, trust is still not strongly manifested by Saudi e-consumers. This lack of trust in e-sellers might influence Saudi consumers' adoption of e-commerce. It has been mentioned earlier that, according to an official CITC report, consumers are uneasy about shopping online and are understandably concerned about counterfeit and low-quality products being sold on the internet; thus there is a need to develop e-commerce laws in order to boost consumer confidence in e-commerce.¹⁴⁶ Moreover, a study of the factors that influence Saudi consumer decisions in e-commerce found that 38.6% of respondents mentioned lack of trust as the factor that most inhibited them from purchasing online, and lack of trust in e-sellers in Saudi e-commerce as the factor that most constrained consumers from online shopping.¹⁴⁷ Moreover, although trust is considered the main inhibiting factor, there are claims that other factors may have contributed to the lack of trust in the Saudi e-commerce market, such as lack of security.¹⁴⁸

The security of e-commerce transactions is a crucial element for e-consumers when shopping online. Some researchers have linked the issue of security in e-commerce to the issue of trust, since the lack of the former contributes to the lack of the latter. According to Flavian and Guinaliu, consumers' trust in e-commerce is affected by the perceived lack of security regarding data they provide to sellers and the way sellers deal with these data.¹⁴⁹ Therefore, security in e-commerce entails technical means such as storage of consumers' data and methods for keeping these data safe from utilisation by the seller or other parties without consumers' consent. In the Saudi e-commerce context, Eid has defined security as 'Saudi consumer perception of security of an e-commerce transaction'.¹⁵⁰ In the same study, Eid found a strong relationship between the perceived risk to the consumer's security in e-commerce and the lack of trust.¹⁵¹ In addition, Alghamdi, Nguyen, Drew and Nguyen found that one of the most inhibiting factors in the development of e-commerce in Saudi Arabia is the lack of secure and

¹⁴⁶ Electronic Commerce Law 2019 Article 22 (Saudi Arabia).

¹⁴⁶ CITC, 'ICT Report E-Commerce in Saudi Arabia' (*The Communications and Information Technology Commission*, 14 November 2017)

<http://www.citc.gov.sa/en/reportsandstudies/Reports/Documents/CITC_ECOMMERCE_2017_ENGLISH.PDF> accessed 9 August 2021. For more on the evidence for the consumer's lack of confidence in the market in Saudi Arabia, see chapter 1 (Introduction) page 11.

¹⁴⁷ Rayed ALGhamdi, Ann Nguyen, Jeremy Nguyen and Steve Drew, 'Factors Influencing Saudi Customers' Decisions to Purchase From Online Retailers in Saudi Arabia: A Quantitative Analysis' (International Conference e-Commerce, Rome, Italy, Jan 2011)

<https://www.researchgate.net/publication/233390910_Factors_influencing_the_decision_of_Saudi_consumers_to_purchase_from_online_retailers_Quantitative_Analysis> accessed 4 August 2018.

¹⁴⁸ *ibid.*

¹⁴⁹ Carlos Flavián and Miguel Guinaliú, 'Consumer Trust, Perceived Security and Privacy Policy: Three Basic Elements of Loyalty' (2006) 106(15) *Industrial Management & Data Systems* 601, 604.

¹⁵⁰ Mustafa Eid, 'Determinants of E-commerce Customer Satisfaction, Trust, And Loyalty in Saudi Arabia' (2011) 12(1) *Journal of Electronic Commerce Research* 78, 82.

¹⁵¹ *ibid.*

trustworthy payment methods other than credit cards, an inhibiting factor mentioned by 45% of the respondents.¹⁵² The reason for the low level of security in the Saudi e-commerce market is the absence of distance payment systems such as PayPal which operate through a third-party company dedicated to providing safe payment methods.¹⁵³ The only available option of this kind is the SADAD payment system which is dedicated to payment of government bills and bills from companies owned by the government.¹⁵⁴

Therefore, it can be argued that security and trust in e-commerce are factors related to each other. The level of security perceived by consumers has an influence on the level of trust in e-commerce. Consequently, in order to enhance consumer trust in e-commerce, there is a need to provide enough security to allow consumers to feel confident when shopping online, by providing a safe payment system such as PayPal or by dedicating the SADAD payment system to e-commerce in Saudi Arabia. In addition to the lack of safe payment systems, and prior to issuance of ECL in 2019, it is argued that the absence of e-commerce regulation contributes to the lack of security in e-commerce in Saudi Arabia.¹⁵⁵ This is another factor influencing the adoption of e-commerce by e-consumers in the country.

An additional factor that inhibits consumers from engaging in e-commerce in Saudi Arabia is the lack of physical inspection. In a study of inhibiting factors that influence Saudi consumers' e-commerce decisions, 58% of respondents mentioned this issue; in addition, factors such as lack of experience of online shopping, lack of home mailboxes, and websites' language were mentioned by respondents to the survey,¹⁵⁶ although they were less important factors than trust, regulation and lack of physical inspection.

Therefore, it can be said that, alongside the government's slow progress towards developing the e-commerce market from a legislative perspective, which was discussed in the previous section, there are other issues related to the e-market, such as lack of trust, security issues, and

¹⁵² Rayed AlGhamdi, Ann Nguyen, Jeremy Nguyen and Steve Drew, 'Factors Influencing Saudi Customers' Decisions to Purchase From Online Retailers in Saudi Arabia: A Quantitative Analysis' (International Conference e-Commerce, Rome, Italy, Jan 2011) <https://www.researchgate.net/publication/233390910_Factors_influencing_the_decision_of_Saudi_consumers_to_purchase_from_online_retailers_Quantitative_Analysis> accessed 4 August 2018.

¹⁵³ Adel Bahaddad, Rayed Alghamdi and Salem Alkhalaf, 'Adoption Factors for e-Malls in the SME Sector in Saudi Arabia' (2014) 5(4) International Journal of Computer Science and Information Technologies 5835, 5839.

¹⁵⁴ Adel Bahaddad, Steve Drew, Luke Houghtoni and Osama Alfarraj, 'Factors Attracting Online Consumers to Choose e-Malls for e-Procurement in Saudi Arabia' (2018) 12(7) Enterprise Information Systems 856, 874.

¹⁵⁵ *ibid.*, 865.

¹⁵⁶ Rayed AlGhamdi, Ann Nguyen, Jeremy Nguyen and Steve Drew, 'Factors Influencing Saudi Customers' Decisions to Purchase From Online Retailers in Saudi Arabia: A Quantitative Analysis' (International Conference e-Commerce, Rome, Italy, Jan 2011) <https://www.researchgate.net/publication/233390910_Factors_influencing_the_decision_of_Saudi_consumers_to_purchase_from_online_retailers_Quantitative_Analysis> accessed 4 August 2018.

lack of physical inspection, that are significantly mentioned by respondents. Consequently, the views and voices of consumers need to be considered in order to reform the market.

3.6.2 Consumers' needs in E-commerce in Saudi Arabia

Since there are factors inhibiting e-consumers in Saudi Arabia, there is a need to find enablers with which e-consumers can overcome these inhibiting factors. However, such enablers might be limited by the current environment of e-commerce in Saudi Arabia, as described earlier, in aspects such as the government's missing role in developing the e-commerce environment,¹⁵⁷ or by other cultural factors such as strict rules governing the behaviour of different groups.¹⁵⁸ Accordingly, the needs of e-commerce consumers in Saudi Arabia will be presented and discussed.

The infrastructure of e-commerce can be considered the most important need of e-commerce consumers, since without a basic infrastructure such as the internet, people cannot have access to e-commerce. For example, Saudi Arabia's internet communication is ranked as 37th in IT infrastructure readiness among 75 countries, as per the EIU Inclusive Internet Index.¹⁵⁹ The survey takes into consideration factors such as readiness and internet prices.¹⁶⁰ Moreover, a CITC report points to this factor as a priority in developing IT infrastructure so as to boost e-commerce in Saudi Arabia and improve its place in the UNCTAD index.¹⁶¹ This issue is a matter of concern to e-commerce consumers. The infrastructure of basic e-commerce is regarded as a key need for a large group of consumers. In a study concerning online consumers in Saudi Arabia, 75% of respondents cited this feature as an important requirement of a basic online transaction.¹⁶² Considering the report by the CITC, which is a governmental authority dealing with IT infrastructure in Saudi Arabia, alongside the aforementioned survey of infrastructure, it can be said that the e-infrastructure of e-commerce in Saudi Arabia requires further development in order to satisfy consumers' needs and achieve e-commerce diffusion.

¹⁵⁷ See chapter 3 section 4.

¹⁵⁸ Abdullah Alqahtani, Robert Goodwin and Denise de Vries, 'Cultural Factors Influencing E-commerce Usability in Saudi Arabia' (2018) 5(6) International Journal of Advanced and Applied Sciences 1, 2.

¹⁵⁹ The inclusive internet index, 'The Inclusive Internet Index Simulator' (*EIU Inclusive Internet Index*, 26 February 2018) <<https://theinclusiveinternet.eiu.com/simulator/countries/SA>> accessed 4 August 2018.

¹⁶⁰ *ibid.*

¹⁶¹ CITC, 'E-commerce in Saudi Arabia' (CITC, 2017)

<http://www.citc.gov.sa/en/reportsandstudies/Reports/Documents/CITC_ECOMMERCE_2017_ENGLISH.PDF> accessed 4 August 2018, page 21.

¹⁶² Adel Bahaddad, Steve Drew, Luke Houghtoni and Osama Alfarraj, 'Factors Attracting Online Consumers to Choose e-Malls for e-Procurement in Saudi Arabia' (2018) 12(7) Enterprise Information Systems 856, 865.

Another issue for consumers in Saudi Arabia in relation to e-commerce is the country's ineffective postal service.¹⁶³ The ineffectiveness of postal services in Saudi Arabia is due to several factors: for example, the cost of delivery compared to other countries, payment systems for delivery services and items purchased from the internet, and undeveloped home addresses in Saudi Arabia. Postal services in Saudi Arabia are expensive. The reason for the high cost might be that few companies specialise in e-commerce delivery, which makes these prices higher than average. A report on e-commerce in Saudi Arabia mentioned that the cost of delivery for items priced at under 100 Saudi Riyals is very expensive compared to the value of the item.¹⁶⁴ Another factor is the payment system for e-commerce delivery in Saudi Arabia, which is based on cash on delivery. This practice might act in the consumer's favour by reducing the risk attached to his payment. However, this system can also cause e-commerce prices to be higher than average due to the risk to the seller, should the consumer change his decision before paying.¹⁶⁵ A report on e-commerce in Saudi Arabia mentioned that cash on delivery is a significant reason for the slow progress of e-commerce in the country due to the lack of seriousness of some consumers who purchase via the internet, together with delays in transferring payment from delivery companies to e-commerce stores.¹⁶⁶ Another factor in the ineffectiveness of Saudi postal services is the existence of undeveloped home addresses. Postal service is strongly linked to e-commerce transactions as the latter depend on the consumer's address for delivery of purchased items. For example, houses in Saudi Arabia are not numbered in all areas of the country, which makes deliveries to e-commerce consumers difficult, and when there is a problem in delivering the items they will be returned to the main post office for normal collection.¹⁶⁷ The abovementioned issues were specified in the CITC report previously referred to; the report suggested that there is a need to develop postal services in Saudi Arabia in order to improve e-commerce.¹⁶⁸ Accordingly, it can be said that the postal services in Saudi Arabia are not sufficiently developed to satisfy consumers' need for an effective e-commerce market in the country. According to a survey of factors attracting e-consumers in Saudi Arabia,

¹⁶³ *ibid.*, 871.

¹⁶⁴ E commerce KSA, 'E-commerce Delivery Services in Saudi Arabia' (*Ecomsocietyorg*, 7 July 2017) <<http://www.ecomsociety.org/uploads/97435696.pdf>> accessed 28 August 2018.

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ Saleh Alfuraih, 'E-commerce and e-commerce Fraud in Saudi Arabia: A Case Study.' (2nd International Conference on Information Security and Assurance, Busan, April 2008).

¹⁶⁸ CITC, 'E-commerce in Saudi Arabia' (*CITC*, 2017)

<http://www.citc.gov.sa/en/reportsandstudies/Reports/Documents/CITC_ECOMMERCE_2017_ENGLISH.PDF> accessed 4 August 2018, page 26.

87% of respondents mentioned the postal service and delivery system as basic requirements for effective e-commerce in Saudi Arabia.¹⁶⁹

Another need of consumers in Saudi Arabia is for e-commerce to support the Arabic language. Since the official language of Saudi Arabia is Arabic, nearly 100% of Saudi people speak it,¹⁷⁰ which makes some who do not speak English reluctant to use English-language websites. Such websites can constitute an obstacle to e-commerce by restricting internet use in some countries to those who are familiar with the English language.¹⁷¹ This issue was mentioned by e-consumers who considered it important because some payment steps in e-commerce transactions appear in English even though the consumers are purchasing from an Arabic website or from local stores which operate only in Saudi Arabia.¹⁷² This drawback must be considered in further developing the market, since, as mentioned, almost 100% of the Saudi population speak the Arabic language.¹⁷³ However, the language requirement can be met by adopting Arabic for payment systems in Saudi Arabia, thereby supporting the Arabic language and providing safe payment systems which can effectively develop the adoption of e-commerce in Saudi Arabia. Moreover, the high use of computers in the country may help to disprove the claim that Saudi consumers need language support. Although methods of accessing the internet in the country may vary with age, wealth and gender, a study shows that 61.9% of respondents access the internet at home.¹⁷⁴ This percentage indicates the high usage of internet and computer literacy which may contribute to the need to develop the e-commerce market in order to meet people's requirements.

3.6.3 Consumers' redress in e-commerce in Saudi Arabia

The consumer's right to redress is a basic right, acknowledged by many legal authorities in many countries, as it provides justice to consumers.¹⁷⁵ Nevertheless, in relation to consumers'

¹⁶⁹ Adel Bahaddad, Steve Drew, Luke Houghtoni and Osama Alfarraj, 'Factors Attracting Online Consumers to Choose e-Malls for e-Procurement in Saudi Arabia' (2018) 12(7) Enterprise Information Systems 856, 871.

¹⁷⁰ Mustafa Eid, 'Determinants of E-commerce Customer Satisfaction, Trust, And Loyalty in Saudi Arabia' (2011) 12(1) Journal of Electronic Commerce Research 78, 81.

¹⁷¹ Haya Alshehri and Farid Meziane, 'Current State on Internet Growth and Usage in Saudi Arabia and its Ability to Support E-commerce Development' (2017) 5(2) Journal of Advanced Management Science <<http://usir.salford.ac.uk/43785/>> accessed 27 August 2018.

¹⁷² Adel Bahaddad, Steve Drew, Luke Houghtoni and Osama Alfarraj, 'Factors Attracting Online Consumers to Choose e-Malls for E-procurement in Saudi Arabia' (2018) 12(7) Enterprise Information System 856, 873.

¹⁷³ Mohammed Alqahtani, Ali Badi and Pam Mayhew, 'The Enablers and Disablers of E-Commerce: Consumers' Perspectives' (2012) 54(1) The Electronic Journal on Information Systems in Developing Countries 1, 2.

¹⁷⁴ Haya Alshehri and Farid Meziane, 'Current State on Internet Growth and Usage in Saudi Arabia and its Ability to Support E-commerce Development' (2017) 5(2) Journal of Advanced Management Science <<http://usir.salford.ac.uk/43785/>> accessed 27 August 2018.

¹⁷⁵ Christopher Hodges, 'European Union Legislation' (2009) 622(1) The Annals of the American Academy of Political and Social Science 78.

e-commerce needs in Saudi Arabia, there is no clear way to complain in order to gain redress. The CITC Authority, which deals with IT and technological issues in Saudi Arabia, has not acknowledged e-commerce redress matters in its abovementioned annual reports.¹⁷⁶ In addition, the Consumer Protection Association (CPA),¹⁷⁷ a governmental agency addressing consumers' issues, has not provided any guidelines or information concerning e-commerce rights or methods of consumer redress that might protect consumers in Saudi Arabia. In a study conducted by Alqarni to measure consumer redress and consumer rights satisfaction received from governmental agencies that deal with consumers, such as the CPA,¹⁷⁸ it was found that, among seven consumer rights, the right to redress was rated the worst in satisfaction received and the most violated by those governmental agencies.¹⁷⁹ In addition, the results of the study supported the concept that consumers in Saudi Arabia are treated by the government as citizens who can make complaints about services or products, not as consumers who can receive redress, as far as their consumer rights are concerned.¹⁸⁰ These findings therefore support the claim of lack of consumer redress in Saudi regulation. As mentioned earlier, Saudi Dispute Resolution regulation and ECL lack procedures for resolving consumer disputes and for providing redress for consumers when their rights are violated.¹⁸¹ The lack of consumer redress provided by the CPA is mostly cited by consumers in relation to traditional consumer transactions that were undertaken before the beginning of e-commerce, an issue which is still not addressed by a regulation in Saudi Arabia. So this issue has been present since e-commerce became active in Saudi Arabia, as until 2019 there was no e-commerce regulation, and consumer redress is still not protected even in traditional consumer selling. As per Makki and Chang, although there is a government CPA (which is not, however, actively supported), consumers do not trust this agency in traditional commercial transactions and therefore will not trust it in online

¹⁷⁶ CITC, 'CITC Annual Reports' (CITC, 2017)

<<http://www.citc.gov.sa/en/MediaCenter/Annualreport/Pages/default.aspx>> accessed 4 August 2018.

¹⁷⁷ The Consumer Protection Association is a society concerned with consumer issues. More information is available at <<https://cpa.org.sa/>> accessed 15 August 2018.

¹⁷⁸ The CPA is a Consumer Protection Agency which addresses consumer issues in Saudi Arabia.

¹⁷⁹ Seven rights of consumers mentioned in Alqarni's article are right to redress, right to be heard, right to choice, right to consumer education, right to privacy, right to safety and right to information. See Ahmed Alqarni, 'Saudi Consumers' Experiences toward the Role of the Government Agencies as Service Providers in Ensuring their Consumer Rights' (2016) 7(9) International Journal of Business and Social Science 72, 73.

¹⁸⁰ Ahmed Alqarni, 'Saudi Consumers' Experiences toward the Role of the Government Agencies as Service Providers in Ensuring their Consumer Rights' (2016) 7(9) International Journal of Business and Social Science 72, 75.

¹⁸¹ See chapter 3 section 3.3. For more on redress for consumers in Saudi Arabia, see Eyad Makki and Lin-Ching Chang, 'E-Commerce in Saudi Arabia Acceptance and Implementation Difficulties' (The 2014 International Conference on e-Learning, e-Business, Enterprise Information Systems, and e-Government, Las Vegas, July 2014). Makki and Chang in their research confirm the lack of redress provided by government for consumers in Saudi Arabia and argue that, although there is a CPA founded by the government, this agency does not provide consumer redress and therefore consumers do not trust it.

commercial transactions.¹⁸² Therefore, in relation to consumer redress in Saudi Arabia, it can be said that if consumers are still not receiving their right to redress in traditional consumer transactions and there is a consumer agency which does not protect them, this will apply also to consumers' right to redress in e-commerce, as there are no rules or guidelines for consumer redress in Saudi Arabia either for traditional shopping or for e-commerce. Although the abovementioned study was designed to measure consumer perception of governmental agencies and how their consumer rights are dealt with, it can be utilised to measure consumer needs in relation to governmental agencies in Saudi Arabia, especially where redress is concerned. Based on the cited consumers' needs and factors influencing the adoption of e-commerce, it can be said that the lack of redress in e-commerce is among the consumers' concerns, and that the availability of suitable redress will encourage consumers to engage in e-commerce transactions by decreasing risk.

3.7 E-consumer Rights in Saudi Arabia and under Islamic Law

Consumer rights in e-commerce need to be presented in relation to the above discussion of the e-commerce environment in Saudi Arabia. In particular, this thesis needs to explain consumer rights in Islamic law in order to support consumers and enhance their confidence in the market within the Saudi e-commerce environment.

Consumer rights in Saudi Arabia are inspired by Islamic law, the dominant law in the country. As mentioned earlier, there is no specific regulation in relation to consumer protection and business law.¹⁸³ However, there are theories in Islamic law that can be applied both to business transactions and to consumer protection and rights.¹⁸⁴ For purposes of this thesis, discussion of consumer rights will be divided into two sub-sections. The first sub-section discusses information disclosure, which can support consumer trust in e-commerce before disputes arise and decrease the number of e-commerce disputes, thereby overcoming the lack of physical inspection that inhibits Saudi e-consumers. The second sub-section will discuss e-consumer rights in relation to e-commerce in Saudi Arabia and will present theories such as the option of defect, the option of inspection and the option of fraud which support consumers and thus enhance their confidence in the markets.

¹⁸² Eyad Makki and Lin-Ching Chang, 'E-Commerce in Saudi Arabia Acceptance and Implementation Difficulties' (The 2014 International Conference on e-Learning, e-Business, Enterprise Information Systems, and e-Government, Las Vegas, July 2014).

¹⁸³ See chapter 3 section 4.

¹⁸⁴ Theories of consumers in Islamic law will be discussed in this section.

3.7.1 Information disclosure and avoidance of risk in Islamic law

In Islamic law, the subject matter of a contract must be known by the contractual parties to be in existence and must be described clearly in the contract.¹⁸⁵ Therefore, it is prohibited in Islam to enter into a transaction that includes an unknown subject or one not clearly described, because uncertainty is liable to cause a dispute.¹⁸⁶ This prohibition can be considered unique to Islamic law since it is decreed by the Qura'an and the Prophet Mohammad's practice, which are the main sources of Islamic law.¹⁸⁷ Accordingly, any seller must provide the consumer with adequate information about the purchased item in order to enforce the contract of sale between seller and consumer.

Adequate information on the item purchased by the consumer is a requirement of the Shariah law for the protection of consumers.¹⁸⁸ Since e-commerce involves distance transactions in which the buyer cannot see and inspect the goods, the seller is obliged to provide the necessary information and not to hide anything or cheat the consumer; otherwise the seller will be a sinner under Islamic law. This is demonstrated in Islamic literature when the Prophet Mohammad says: 'The seller and the buyer have the right to keep or to return goods as long as they have not parted, or until they part, and if both parties spoke the truth and described the defects and qualities of the goods, then they would be blessed in their transaction, and if they told lies or hid something, then the blessing of their transaction would be lost'.¹⁸⁹ This saying of the Prophet provides the grounds in Islamic law for consideration of information disclosure as a basic contractual obligation of the seller to the consumer, and for the illegality of failing to provide the consumer with adequate information.¹⁹⁰

Knowledge of the item purchased is a pivotal element in transactions under Islamic law. There are several ways of learning the specifications of the goods, either through the consumer's own inspection, or through clarification of the specifications upon concluding the contract, in order to ensure the purchaser's satisfaction. These practices are encouraged in Islamic law and if the consumer is unable to see the item or to receive adequate information, he/she has the right to cancel the contract. The reason is that the goods that were available in the Prophet Mohammad's era were not the same as the goods of the present era. Moreover, in the case of digital items that

¹⁸⁵ Wael Hallaq, *Sharia Theory, Practice, Transformation* (Cambridge University Press 2009) 239.

¹⁸⁶ *ibid.*, 243.

¹⁸⁷ For more on the sources of Islamic law, see chapter 3 section 3.2.1.

¹⁸⁸ Wael Hallaq, *Sharia Theory, Practice, Transformation* (Cambridge University Press 2009) 244.

¹⁸⁹ Muhammad Khan, *The Translation of The Meanings of Sahih Al-Bukhari* (Darussalam 1997) 171.

¹⁹⁰ Muhammed Wahidul Islam, 'Dissolution of Contract in Islamic Law' (1998) 13(4) *Arab Law Quarterly* 336, 356.

have not yet been programmed, it is difficult to provide adequate information for consumers. Therefore, there is a need to overcome this issue in Islamic law and control this area of e-commerce through regulations that ensure the provision of adequate information.

It can be said that the legal prohibition of the acts discussed is based on the risk and uncertainty that they bring to contractual transactions, since Islamic law forbids types of contractual relationship that involve risk and uncertainty. According to Wahidul Islam, Islamic law requires the dissolution of all types of risk and uncertainty in contractual transactions and relationships.¹⁹¹ Therefore, in Islamic law, uncertainty and lack of knowledge regarding the subject matter of the contract involves ontological possibilities as per Wahidul Islam, such as the existence or non-existence of the subject matter of the contract. For example, buying an unspecified pearl from the sea involves lack of knowledge and uncertainty since the pearl's quality need not be disclosed but only its existence, if the pearl needs to be ensured.¹⁹² Although this principle can be applied to all types of contracts of sale, it can also be applied to consumer contracts within e-commerce, since e-commerce involves distance transactions which hinder the consumer from inspecting the goods or being sure of their existence. Consequently, it involves lack of knowledge, which is prohibited in Islamic law.

The abovementioned theory of inspection or description encounters an obstacle when applied to e-commerce in Saudi Arabia; namely, the requirement for inspection of items that are not in the same place as the consumer. The obstacle consists of the lack of physical inspection of items purchased through e-commerce, a factor that inhibits consumers from engaging in e-commerce in Saudi Arabia as mentioned earlier,¹⁹³ as well as the lack of knowledge of the item, leading to risk and uncertainty for the Saudi consumer, which is prohibited in the Islamic law that Saudi consumers follow.¹⁹⁴ Another difficulty is the lack of knowledge of the item if the seller has failed to describe it clearly to the consumer. Accordingly, to achieve an effective and accepted reform of e-commerce in Saudi Arabia, it is necessary to employ these two elements of information disclosure and avoidance of risk and uncertainty in contractual relationships. The lack of a regulation compelling sellers to describe the item very clearly gives the seller an advantage at a time when consumers need to be empowered, as the lack of essential information leads to uncertainty, fraud and deception, which are forbidden in Islamic law besides being

¹⁹¹ *ibid.*, 346.

¹⁹² Wael Hallaq, *Sharia Theory, Practice, Transformation* (Cambridge University Press 2009) 244.

¹⁹³ See chapter 3 section 5.

¹⁹⁴ See chapter 3 section 2.

illegal under Saudi law.¹⁹⁵ In Islamic law, it is permissible to regulate an area of business that needs regulation, subject to the need to avoid any violation of the principles of Islamic law.¹⁹⁶

Therefore, it can be said that consumer rights in Islamic law are maintained under these two theories of information disclosure and avoidance of risk, as required before entering into a contractual relationship. However, this begs the question of the need for consumer rights following the conclusion of the contract session, and the way these rights can be enforced, which will be discussed next.

3.7.2 Consumer rights and rights of redress in Islamic law

Consumer rights in Islamic law emanate from the contract itself. For example, the term ‘contract’ in Islamic law covers the whole spectrum of obligations and rights between the seller and consumer.¹⁹⁷ The contract forms the whole body of rights and attendant liabilities.¹⁹⁸ After the formation of the contract and the beginning of the contractual relationship, consumer rights begin with the conclusion of the contract and can terminate the contract in order to satisfy and empower consumers. In essence, the contracting party might not perform in the way he is meant to, or might not receive the performance due to him because of the other party’s failure to honour his side of the contract. This issue is covered by Islamic law, and consumer rights start at this point, since Islamic law attempts to ensure the elimination of major risk or uncertainty,¹⁹⁹ and it is argued that the Islamic law of contract adopted a consumer protectionist theory more than ten centuries ago.²⁰⁰

Since Islam prohibits transactions that involve deception and uncertainty and forbids all fraudulent acts, on the basis of Qura’anic text and the Prophet Mohammad’s practice,²⁰¹ it consequently allows consumers to seek remedies for such transactions by enforcing their rights, such as the right to terminate the contract²⁰² and to be entitled to damages for the loss suffered.²⁰³ There are several ways to dissolve the contract in favour of the consumer, for

¹⁹⁵ Hussam Fallatah, ‘Addressing the need for consumer protection in e-commerce in Saudi Arabia’ (PhD thesis, University of Leeds 2017) 106.

¹⁹⁶ See chapter 3 section 1.

¹⁹⁷ Noor Mohammed, ‘Principles of Islamic Contract Law’ (1988) 6(1) *Journal of Law and Religion* 115, 115.

¹⁹⁸ *ibid.*, 116.

¹⁹⁹ Minor risk and uncertainty in contracts are regarded as inevitable and therefore not sufficient to invalidate contracts. See Wael Hallaq, *Sharia Theory, Practice, Transformation* (Cambridge University Press 2009) 244.

²⁰⁰ Muhammed Wahidul Islam, ‘Dissolution of Contract in Islamic Law’ (1998) 13(4) *Arab Law Quarterly* 336, 356.

²⁰¹ See chapter 3 section 2.

²⁰² Muhammed Wahidul Islam, ‘Dissolution of Contract in Islamic Law’ (1998) 13(4) *Arab Law Quarterly* 337, 365.

²⁰³ Nabil Saleh, ‘Remedies for Breach of Contract Under Islamic and Arab Laws’ (1989) 4(4) *Arab Law Quarterly* 269, 269.

reasons of breach or by enforcing the contracts' options²⁰⁴ that exist in Islamic transactions law.²⁰⁵

Because consumer rights emanate from contract in Islamic law,²⁰⁶ consumers can stipulate their options of contract under the law in order to remove risk or uncertainty, an example being the option of defect.²⁰⁷ That is, the consumer can stipulate in the contract an option to return the goods if there is a defect, and a lack of obligation to pay for the goods until he has inspected them. The binding force of the contract will be affected if the consumer finds a defect and is not satisfied. However, some, such as Alsakaker, have argued that there is no need to stipulate the option of returning the goods if there is a defect,²⁰⁸ as the consumer can enforce that right by default even if it is not stipulated in the contract. This is because the enforcement of that right is based on the consumer's lack of knowledge of the defect. Accordingly, if the consumer did not previously know or was not informed of the defect, he/she can enforce that right.

Another option under the Islamic law of contract that can be adapted to e-commerce is the option of inspection. As mentioned earlier, it is acknowledged in Islamic literature that inspection of the item is compulsory for the protection of consumers' rights.²⁰⁹ The reason for adopting the consumer's option to inspect the item is that the seller cannot describe the item as it is in reality and the consumer might consider it, on inspection, to differ from its description, which may affect the latter's consent to the purchase.²¹⁰ Therefore, Shariah law adopted the option of inspection in the contract in order to satisfy the need for consent by the contractual parties, since contracts in Islamic law are based on consent.²¹¹ However, it can be said that there is an obstacle to the exercise of this option in modern times. For example, it is difficult to apply this option in e-commerce as e-commerce transactions involve distance selling in which goods may vary from the description given by the seller, and the consumer cannot inspect the items. Based on the consumer's right of inspection in Islamic law, the consumer can stipulate an option

²⁰⁴ The right of options in Islamic law is accorded as a unilateral 'choice' to cancel or ratify a contract. If the option is to cancel, the effect is to render the situation as if the contract had never existed. See Muhammed Wahidul Islam, 'Dissolution of Contract in Islamic Law' (1998) 13(4) Arab Law Quarterly 336, 337.

²⁰⁵ Wael Hallaq, *Sharia Theory, Practice, Transformation* (Cambridge University Press 2009) 248.

²⁰⁶ See chapter 3 section 6.

²⁰⁷ Muhammed Wahidul Islam, 'Dissolution of Contract in Islamic Law' (1998) 13(4) Arab Law Quarterly 336, 337.

²⁰⁸ Abdullah Alsakaker, 'Type of Defect in which Option of Defective is Enforced' [2015] 9(1) Journal of Sharia Science 195, 279.

²⁰⁹ See chapter 3 section 6.1.

²¹⁰ Muhammed Wahidul Islam, 'Dissolution of Contract in Islamic Law' (1998) 13(4) Arab Law Quarterly 336, 337.

²¹¹ *ibid.*

of inspection in the contract of sale, so that the contract will not be legally binding until the consumer inspects the item.

In addition to the options of inspection and defect, the option of fraud can be utilised in favour of the consumer in Islamic contract law. This is defined in the Islamic legal literature as the situation in which the seller knows about the item's defect and hides it as if it does not exist.²¹² This option affects the binding force of the contract if a fraudulent act should occur during the contractual relationship, in which case the consumer can enforce the option of fraud in order to seek redress. Since e-commerce transactions involve distance selling, the likelihood of fraud may arise, which some Saudi e-consumers report as one of the factors that inhibit them from online shopping.²¹³ The option of fraud can be used by consumers in e-commerce contracts in order to enhance their confidence by preventing any loss caused by the seller's concealment of an item's defect.

The abovementioned options can be applied to contracts in the consumer's favour to remove any uncertainty or ambiguity from the contractual relationship. The right of option in Islamic law provides a choice of cancelling or ratifying a contract. For example, if the option is to cancel, the contract will be as ineffective as if it had not existed.²¹⁴ In addition to the options mentioned, the consumer has the right to have his payment returned to confirm the contract of sale. The consumer's right of redress in Islamic law is covered in this theory. For example, if the subject matter of the contract is defective, the buyer has the option to proceed with the transaction or to enforce his right to claim damages. When applying this right to Saudi e-commerce, consumers can claim damages based on this right in Islamic law.²¹⁵

However, it is argued that the current adoption of Islamic methods in relation to consumer rights in Saudi Arabia is still weak and needs to be developed.²¹⁶ In order to advance the current situation of consumer in relation to e-commerce in Saudi Arabia, there is a need to regulate and codify these areas of Islamic law that affect consumer rights so as to secure those rights in the area of e-commerce. Without clear regulation and codification of the current measures affecting

²¹² Ibn Qudamah Almqdisi, *Al-Moghni* (3rd edn, Dar Alm Al-Kutub 1997) Volume 6, p. 30.

²¹³ Fahad Aleid, Simon Rogerson and Ben Fairweather, 'Factors Affecting Consumers Adoption of Ecommerce in Saudi Arabia from a Consumers Perspective' (Proceedings of the IADIS International Conference on e-Commerce, Algarve, Portugal, June 2009) <<http://www.iadisportal.org/e-commerce-2009-proceedings>>.

²¹⁴ Muhammed Wahidul Islam, 'Dissolution of Contract in Islamic Law' (1998) 13(4) Arab Law Quarterly 336, 356.

²¹⁵ For more on redress in Islamic law, see Nabil Saleh, 'Remedies for Breach of Contract Under Islamic and Arab Laws' (1989) 4(4) Arab Law Quarterly 269, 272.

²¹⁶ Abdullah Alghafri, 'The Inadequacy of Consumer Protection in the UAE: The Need for Reform' (PhD thesis, Brunel University 2013) 164.

consumers, it will be difficult to adopt adequately those theories and rights that are based on Islamic law, a situation which will have a negative impact on consumers. The lack of regulation and codified law based on Islamic law may have a significant impact on the consumer's right of redress even though that right is protected in Islamic law by means such as options and the right to claim damages.²¹⁷ As per Morris and Aldabbagh, the most influential factors that inhibit consumers' right to redress are: the lack of any government (or other) agency whose purpose is to protect consumer rights, the absence of standards which makes it difficult for consumers to establish cases of low value, the lack of procedural rights to enforce consumer rights when their rights are violated, and Saudi consumers' reluctance to seek redress if they are dissatisfied.²¹⁸ Although the Saudi legal system is rich in rules and regulations, as mentioned previously, the area of e-commerce has only recently been regulated, while areas of business transactions and consumer rights have not yet been regulated, and the possibility of regulating these areas in keeping with Islamic law must be considered, especially in Saudi Arabia. Examples would be the Commercial Court Law 1932, the Arbitration Law 2012 and the Dispute Resolution Regulation 2013.²¹⁹

Therefore, in view of the e-commerce environment and consumers' needs in the field of e-commerce and dispute resolution, the regulatory authority in Saudi Arabia needs to consider regulating these areas of consumer rights and consumer redress in the country, using the aspects of Islamic law that can be applied in regulating them, due to Saudi society's background in Islamic law. Such an approach would enhance consumers' confidence when shopping online.

3.8 Conclusion

The global advancement of technology has encouraged consumers to move away from their traditional shopping habits towards online shopping. In Saudi Arabia, e-commerce is used frequently by consumers. However, some factors have slowed down its adoption; namely, lack of both trust and security. These two problems have been cited by Saudi consumers in relation to their adoption of e-commerce. Other factors inhibiting Saudi consumers from engaging in e-commerce include the lack of redress procedure, which is perceived as contributing to the lack of trust and security in Saudi e-commerce. Although the Saudi government is adopting laws such as the Electronic Transactions Law 2007 and the Anti-Commercial Fraud Law 2009, and lately ECL 2019, this legislation does not cover consumer issues in relation to redress and ODR

²¹⁷ See chapter 3 section 3.6.2.

²¹⁸ David Morris and Maha Al dabbagh, 'The Development of Consumer Protection in Saudi Arabia' (2004) 28(1) *International Journal of Consumer Studies* 2, 11.

²¹⁹ See chapter 3 section 3.

in e-commerce. This gap in the regulation is caused by the missing role of government and its lack of interest in adopting e-commerce. For example, e-commerce administration in Saudi Arabia is monitored by three different government administrative bodies. Consequently, this monitoring system resulted in late issuance of regulation of e-commerce and lack of redress mechanisms that impact on the Saudi e-commerce environment.

However, the lack of redress mechanisms in the Saudi e-commerce market does not indicate lack of redress and dispute resolution roots among Saudi citizens. Within Islamic history and among Saudi people, redress is an existing principle, whether as tribal dispute resolution that provides redress for those who claim damages, or the provision in Islamic law for weak parties like those mentioned in the Prophet Mohammad's practice. Therefore, the factors that support the adoption of redress mechanisms for Saudi e-consumers can be found in the background of Islamic and tribal principles, thereby demonstrating familiarity with redress and dispute resolution.

Islamic law includes measures that can be applied to the e-commerce environment to protect consumers' rights, in addition to other mechanisms, such as safe payment systems (e.g., SADAD and PayPal), improved delivery services, and advanced redress procedures to allow consumers to claim damages when their rights are violated.

Chapter 4: ODR in E-Commerce: Advanced Law and Practices in Other Countries

4.1 Introduction

ODR is an innovation in the field of dispute resolution. It consists of a merger of information and communication technologies (ICT) with traditional ADR methods such as mediation, negotiation, and arbitration.¹ This incorporation of ICT with the aforementioned forms of ADR has resulted in e-mediation, e-negotiation, and e-arbitration. Moreover, the innovation in ICT was not limited to ADR, but even extended its penetration to the litigation systems, resulting in the digitalisation of the court system and the litigation process.² The first section of this chapter discusses the concept of ODR, the advantages and disadvantages of ODR, and the court's support for the use of ADR and ODR in the UK context.

One of the main objectives of this research is to suggest a reform to the Saudi legal system in relation to dispute resolution for e-commerce consumers, and to propose a mechanism for ODR through which they can seek redress when their consumer rights are violated. The European regulations and directives such as the EU directive on alternative dispute resolution for consumer disputes 2013, and the EU regulation on ODR for consumer disputes and amending Regulation 2013 will be discussed, with special reference to consumer rights. This will be followed by analyses of related ODR mechanisms for mediation and negotiation such as the eBay dispute resolution centre and SmartSettle.

In addition, legislative comments on online arbitration will be discussed and analysed in order to examine whether online arbitration can be suitable for consumer disputes in e-commerce. This will be followed by analyses of online arbitration mechanisms such as the American Arbitration Association (AAA) and Modria in order to examine their suitability for e-commerce disputes in Saudi Arabia.

The last part of the chapter discusses the incorporation of ICT systems in the court process and court litigation, for example through the e-court. Also, it discusses the advantages of the merger of ICT with the courts and the motive for its adoption. This will be followed by analyses of existing e-courts initiatives in some jurisdictions, such as the Online Court in the UK, the British

¹ Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1 *International Comparative Jurisprudence* 76,79.

² Ethan Katsh and Orna Rabinovich-eny, *Digital Justice Technology and the Internet of Disputes* (Oxford University Press 2017) 155.

Columbia Civil Resolution Tribunal (CRT), and the Internet Court in Hangzhou, in order to examine their suitability for adoption within the Saudi legal system.

4.2 Concept of ODR

The concept of ODR does not diverge from the normal dispute resolution process; generally, the term ODR refers to the utilisation of information and communication technology (ICT) to implement the dispute resolution process.³ The only variation is that the whole process is carried out by merging the information processing powers of computers with communication through the network facilities of the internet.⁴ The main difference between the traditional dispute resolution process and ODR is that the latter takes place over the internet. When the utilisation of ICT covers the court process, this may be referred to as e-justice or e-court, while ODR commonly refers to cooperation between ADR and ICT, which indicates that ODR is the incorporation of technology in the ADR process.⁵ There is a similarity between ODR and the e-court which consists of the incorporation of ICT into that process. This also reveals a relation between ADR and the traditional court litigation process, in this case consisting of the incorporation of technology and information into the ADR and traditional court litigation procedure, so that this concept may be considered a technology-based process in which technology plays the greatest part: for example, in the electronic submission of documents and decisions.⁶ Typical ADR settles disputes by alternatives to courts, while ODR extends this development in dispute resolution by distinguishing cyberspace as the place for solving disputes and moving ADR from a physical to a virtual environment.⁷ The process includes most of the procedures that are conducted in traditional dispute resolution; for example: submission of evidence, scheduling of appointments, hearings, enforcement of binding decisions, and oral discussion.⁸

However, to consider ODR as merely incorporating ICT into traditional ADR is a misunderstanding. ODR can be more than that. For instance, automated negotiation software which lacks the intervention of human assistance and human mediation is regarded as one type

³ Julia Hornle, *Cross-border Internet Dispute Resolution* (first published 2009, Cambridge) 74.

⁴ *ibid.*

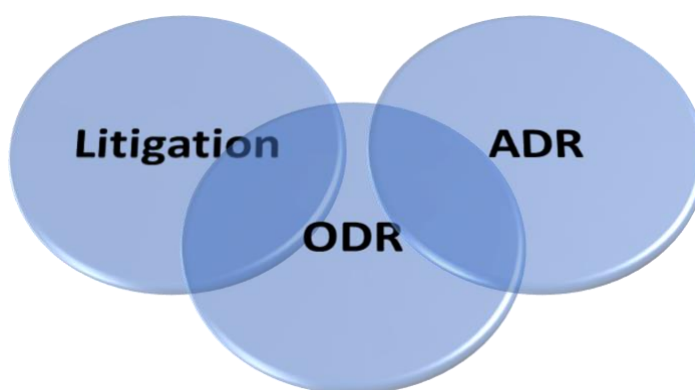
⁵ Pablo Cortes, *The Law of Consumer Redress in an Evolving Digital Market* (1st edn, Cambridge University Press 2017) 44.

⁶ Frank Fowlie, 'Online Dispute Resolution and Ombudsmanship', in M Wahab, E Katch and D Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2012) 325.

⁷ Lodder Ar and J Zelznikow, 'Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model' (2005) 10(1) *Harvard Negotiation Law Review* 287, 297.

⁸ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (first published 2011, Routledge) 53.

of ODR. Automated e-negotiation that applies computer blind-bidding negotiation is different from ADR since it lacks human intervention and cannot be applied in traditional ADR. This type of ODR is perceived when the dispute between parties centres on the value of goods. In this form, disputants submit offers and counter-offers and the automated e-negotiation system will offer a mid-point value for the consumer when the value is reduced to an agreed level between disputants.⁹ This ODR scheme neither transfers traditional ADR to the online arena nor involves humans in the procedure. Automated e-negotiation functions only online, unlike other types of ODR that can go offline and are managed by human intervention. Accordingly, there is a difference between ADR and ODR. In ODR, court litigation and ADR can be transformed into ODRs. ODR intersects with court litigation and ADR schemes. Moreover, it provides more than is provided by court litigation and ADR. For example, automated negotiation, which is only provided through ODR and without human intervention, cannot be provided in court litigation and ADR. This is illustrated in the diagram below.



The litigation circle above includes all methods of traditional litigation. The highlighted area between the litigation circle and the ODR circle illustrates the incorporation of ICT in litigation, which can be described as e-justice or e-court. It represents similarities between ODR and litigation such as e-filing, electronic submission of evidence and online hearings. The ADR circle represents types of offline out-of-court dispute resolution such as mediation, negotiation and arbitration. The highlighted area between the ADR circle and the ODR circle represents the incorporation of ICT into the same methods of traditional dispute resolution as those that

⁹ Zheng Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2nd edn, Hart Publishing 2015) 336.

employ humans in the dispute resolution procedure, such as e-negotiation, e-mediation and e-arbitration, which renders this type of ODR a form of ADR. However, the non-highlighted area in the ODR circle above represents the ODR scheme that does not function in traditional ADR and offline court, namely automated negotiation. This description of ODR clarifies the online process of dispute resolution as incorporating the traditional dispute resolution process, with the online element regarded as an advantage. This would in turn benefit e-consumers and would allow easier access to justice and the chance to seek redress over the internet. There are several factors that enable ODR to provide this convenience to e-consumers. For example, ODR is provided online, thus in the same venue as the one where consumers' rights have been violated, and where they conduct their e-commerce transactions. This means that consumers are able to access the online platforms of ODR to recover their rights. In other words, it would be easier for consumers to recover their rights over the internet than through court litigation. The internet is not only about consumers' search for goods and services available through e-commerce, but also about their access to the chance to seek redress.¹⁰

4.2.1 Advantages and disadvantages of ODR

The use of technology in ADR may have some advantages that can be favourable to e-consumers. In discussing the pros and cons of ODR, it will be regarded as a type of ADR that incorporates ICT and humans into the ADR procedure, and thus will be contrasted with offline court litigation. ODRs have the advantages of lower costs, speedy procedure and convenience. Since ODR is a speedy process in comparison with traditional litigation which raises problems of delay, it will benefit e-commerce consumers who are seeking redress by ensuring the recovery of their rights without a lengthy dispute resolution process. Moreover, the dispute resolution procedure over the internet allows submission of claims at any time by disputants and by the dispute resolution providers, whether they are arbitrators, mediators or negotiators. For example, disputants can log a case, dispute resolution providers can receive the case, and mediators can handle the case at any time. This is beneficial in resolving disputes as it shortens the dispute resolution process due to easier accessibility of claims submission compared with court litigation procedure which is only accessible during official work time.¹¹

What's more, the cost of ODR is less than that of traditional court litigation, as disputants who gain redress over the internet do not have to bear expenses such as travel, flights and

¹⁰ Amy Schmitz, 'Building Trust in Ecommerce Through Online Dispute Resolution' (2015) 15(15) Legal Studies Research Paper Series 1, 20.

¹¹ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (first published 2011, Routledge) 56.

accommodation. The costs factor is likely to have an effect when two parties of the dispute are located in different cities or countries, because of the travel aspect.¹² Another issue of cost that might arise in traditional litigation is that of legal representation. Since e-commerce disputes are mostly over objects of relatively low value, the cost of legal representation might not be worth bearing when the low value of the disputed object is compared with the cost of such representation in traditional litigation. This issue might not arise in ODR, as many ODR platforms allow consumers to seek redress without legal representation.¹³ For instance, article 8 of Directive 2013/11/EU states: ‘the parties have access to the procedure without being obliged to retain a lawyer or a legal advisor’.¹⁴ Although ODR does not require legal representation in dispute resolution and in this way can be an advantage to consumers by sparing them the extra of human and labour cost,¹⁵ it may also pose a disadvantage, as consumers may lack the legal knowledge that could be provided by legal representatives such as lawyers or legal experts. Altogether it can be said, with regard to the abovementioned advantages of ODR, that it can offer consumers an easier method for resolving disputes emerging from e-commerce and easier access to justice.¹⁶ However, although ODR has these advantages for e-consumers, there are potential difficulties encountered in the process of ODR which might discourage e-consumers from engaging in it.

Accordingly, the advocates of ODR on the basis of the abovementioned advantages have also acknowledged some challenges to its success. Hornle asserted that one of the negatives of ODR is that online communication by text instead of face-to-face communication might impact on the receiver of the text by involving negative emotions.¹⁷ She added that a lawyer has already reported some problems experienced in establishing trust between parties to ODR. This challenge might arise when ODR procedure is text-based, as this method does not involve body language and impressions exchanged between disputing parties; but that disadvantage is seen only when we do not consider the use of video in the ODR procedure, which involves impressions and body language that overcome the issues of text-based ODR procedures. This

¹² *ibid.*

¹³ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (2013) OJ L165/1.

¹⁴ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2013) OJ L165/63.

¹⁵ Julia Hornle, *Cross-border Internet Dispute Resolution* (first published 2009, Cambridge) 88.

¹⁶ Mohamed Wahab, ‘Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement’ (2004) 12 *International Journal of Law and Information Technology* 123, 129.

¹⁷ Julia Hornle, *Cross-border Internet Dispute Resolution* (first published 2009, Cambridge) 89.

turns the challenge into an advantage by allowing video conferencing to support ODR, so that body language and impressions can be conveyed between the parties to the dispute.

Another negative factor is that the online arena might present technological problems such as internet network security. Although this issue can be overcome in traditional offline ADR, it is still a challenge in relation to ODR.¹⁸ This issue might pose a further challenge in the Saudi context, since, as mentioned earlier, the Saudi Arabian Internet network lacks the security of the main internet network.¹⁹ Therefore, in the case of Saudi Arabia, ODR might create a problem for e-consumers and affect the adoption of ODR in the Saudi e-commerce environment.

Moreover, it has been noted that a challenge to ODR adoption is the lack of legal standards, there being insufficient regulations governing this process.²⁰ While there is an absence of legal standards globally for international enforcement of ODR,²¹ this is overcome in the EU Directive on Consumer ADR and the EU Regulation on Consumer ODR, which cover cross-border disputes and enforcement, with consideration of the Saudi jurisdiction where some areas of dispute resolution and business have not been regulated.²² This issue may pose an even greater challenge. Therefore, for the purpose of adopting ODR mechanisms for e-commerce in Saudi Arabia, it will first be necessary to examine legal standards such as the enforcement of dispute resolution in Saudi Arabia, which lacks ODR laws and ODR mechanisms for e-commerce.²³

However, although there are challenges to the success of ODR, they are not insurmountable. Schmitz argues that the pros of ODR exceed the cons and its use may be beneficial to businesses by enabling them to gain intelligence on problems with their products and services. These problems can be solved to the satisfaction of e-commerce consumers through use of the feedback received in the ODR process to improve the company's practice and treatment of

¹⁸ Henry Brown and Arthur Marriott, *ADR: Principles and Practice* (3rd edn, Sweet & Maxwell 2011) 593.

¹⁹ See chapter 3 section 3.5. Rayed AlGhamdi, Ann Nguyen, Jeremy Nguyen and Steve Drew, 'Factors Influencing Saudi Customers' Decisions to Purchase From Online Retailers in Saudi Arabia: A Quantitative Analysis' (International Conference e-Commerce, Rome, Italy, Jan 2011) <https://www.researchgate.net/publication/233390910_Factors_influencing_the_decision_of_Saudi_consumers_to_purchase_from_online_retailers_Quantitative_Analysis> accessed 4 August 2018.

²⁰ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (first published 2011, Routledge) 58.

²¹ *ibid.*

²² See chapter 3 section 3.1.4.

²³ The absence of ODR regulation and mechanisms for e-commerce disputes is mentioned in chapter 3 section 3.4.

consumers.²⁴ In turn, ODR can benefit these consumers by increasing satisfaction with their e-commerce purchases.

4.2.2 Court support for using ADR and ODR in the UK context

The use of alternative and ODR is supported by courts for the purpose of enhancing access to justice. For example, initiatives for ADR have been recognised by England and Wales courts and by Lord Justices.²⁵ These initiatives were aimed at settlement of disputes ahead of court litigation, for various reasons. Affordable costs of redress rather than court litigation costs constitute one of the notable purposes of ODR. Lord Justice Briggs in the Judiciary report published in 2016 (Civil Courts Structure Review by Lord Justice Briggs) recommended the launch of Online Court by 2020; one of the aims of his project is to overcome issues related to the disproportionate costs of litigation and legal representation when litigating low, medium and high level civil disputes.²⁶ This Judiciary report noted the need to establish e-courts or ODR schemes especially to avoid the inadequacy of consumer disputes in court which are inconvenient due to the high costs.²⁷ This type of dispute resolution through the use of electronic platforms might benefit e-consumers by enhancing their confidence when engaging in e-commerce, due to the easy access to justice that electronic platforms of ODR provide, as well as the authority and credibility that e-courts provide for dispute resolution. For e-consumers in Saudi Arabia, this prospect of easy access to justice can strengthen the trust which at present they lack in the Saudi e-commerce market.

In addition to the Judiciary report by Lord Justice Briggs, courts in England and Wales have acknowledged ADR as a way of settling disputes before the courts. The motive for supporting ADR stemmed from the fact that some types of disputes can be settled by ADR, in forms such as mediation, negotiation or arbitration. In *Cowl v Plymouth City Council*, Lord Woolf stressed to those involved in public law cases the need to adopt ADR, and reminded the disputing party that litigation should be the last resort.²⁸ He stated in the judgement:

²⁴ Amy Schmitz, 'Building Trust in Ecommerce Through Online Dispute Resolution' (2015) 15(15) Legal Studies Research Paper Series 1, 21.

²⁵ Lord Justice Briggs, 'Civil Courts Structure Review (CCSR): Final Report published' (*Courts and Tribunals Judiciary*, 2016) <<https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>> accessed 7 February 2019, page 14.

²⁶ *ibid.*, 115.

²⁷ Pablo Cortes, *The Law of Consumer Redress in an Evolving Digital Market, Upgrading from Alternative to Online Dispute Resolution* (first published 2017, Cambridge) 60.

²⁸ *Cowl & Ors v Plymouth City Council* [2001] EWCA Civ 1935.

‘The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and saves time, expense and stress’.²⁹

Lord Woolf further suggested that the court on its own initiative might ask the disputing party to explain in the hearing what they had done to settle their dispute before it reached the court.³⁰

This statement of Lord Woolf clearly indicates support for alternatives to court in resolving any disputes, let alone those involving low value such as arise from e-commerce, which overload the court with cases that can be settled by ADR. These low-value cases can be settled without court litigation by alternatives such as those mentioned by Lord Woolf in order to resolve consumer disputes in e-commerce and decrease the court’s caseload.

Mediation in the UK is a voluntary process; compulsory mediation is not actually a requirement in judicial procedure. However, under the Civil Procedure Rules, cost penalties can be imposed at the end of the case where parties of the dispute have behaved unreasonably during litigation.³¹ Under section 44.2.(2) of the Civil Procedure Rules, the court can make an adverse costs order if one party of the dispute has refused to participate in ADR.³² This rule has been applied in the case of *Dunnett v Railtrack*, when Lord Justice Brooke criticised Railtrack’s refusal to mediate based on their confidence that they would win the case. Lord Justice Brooke suggested the use of ADR and perceived that it could offer more than the court.³³

The use of mediation in small claims in England and Wales has witnessed significant success recently, the number of hearings in small claims having decreased from 51,046 in 2003 to 29,603 in 2013.³⁴ Small claims are those cases that take a specific civil justice track with a limit of £10,000.³⁵ Mediation has been used more frequently in this type of dispute in order to avoid a traditional litigation model whereby courts only offer a formal decision. ADR has the advantage of being able to consider more creative solutions. In the small claims dispute in

²⁹ *ibid.*, 2.

³⁰ *ibid.*

³¹ Civil Procedure Rule (United Kingdom).

³² *ibid.*, section 44.2(2).

³³ Brooke LJ in *Dunnett v Railtrack plc* [2002] 1 WLR 2434, at 14.

³⁴ Ministry of Justice ‘Quarterly Statistics’ March–October 2014 (Ministry of Justice, 2014).

³⁵ Civil Procedure Rule, Part 27, (United Kingdom).

England and Wales, the dispute will automatically be referred to small claims mediators overseen by Her Majesty's Court and Tribunal Service, based on the disputants' consent to attempt mediation.³⁶ Even when the disputants have not both consented to mediation or have both refused it, the judge can invite the parties to consider mediation when reviewing their case.³⁷ The small claims mediation scheme is without costs and accessible to disputants once their dispute has been considered as a small claim. The process is simple for parties of the dispute as mediations take place over the telephone and mediators switch conversations with each party to exchange information between disputants. When the case is settled by mediation within seven days and before the hearing is scheduled, then the cost of the hearing can be waived. This offers encouragement for disputants to resolve their dispute by mediation and allows parties of the dispute to see a direct relationship between the cost of the case and mediation.³⁸

Moreover, in regard to support for ADR by English courts, the commercial court which was founded in 1895 is known as a leader in procedural innovation and prides itself on its speed in resolving matters.³⁹ A high percentage of cases are settled before court, albeit often at a late stage when substantial costs have been incurred and several court hearings have been arranged.⁴⁰ In addition, on some occasions the court has decided to encourage disputing parties to use one of the available ADR methods, such as mediation, in order to resolve the dispute at an earlier stage of the proceedings.⁴¹ Cresswell indicated that judges would not act as mediators in the ADR process when they encourage disputing parties to use it; rather, they would 'in appropriate cases invite parties to consider whether their case, or certain issues in their case, could be resolved by means of ADR. By way of example only, ADR might be tried where the costs of litigation are likely to be wholly disproportionate to the amount at stake. The Clerk to the Commercial Court thereafter kept a list of individuals and bodies offering mediation, conciliation and other ADR services'.⁴²

³⁶ Sue Prince, 'Access to Court? "Encouraging" Consumers to use Court-Connected Mediation in Small Claims and Other Cases' in Pablo Cortes (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford 2016) 92.

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Pugh-Thomas A, 'The Commercial Court of England and Wales and Alternative Dispute Resolution' (1999) 10(1) *International Company and Commercial Law Review* 26–30.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Practice Statement, 10 December 1993 [1994] 1 WLR 14, [1994] 1 All ER 34; H. Brown & A.L. Marriott, above Note 5, at para A3-007 at 637. (as cited in Loukas A. Mistelis, 'ADR in England and Wales: A Successful Case of Public Private Partnership' in Nadja Marie Alexander, *Global Trends in Mediation* (Kluwer Law International 2006) 146.

This idea of supporting the use of ADR in UK courts is also found in the approach of judges in Saudi Arabia. Saudi judges acknowledge the use of ADR by motivating disputing parties to end their dispute amicably.⁴³ Moreover, on some occasions, the Saudi judge will act as a mediator and might forcefully persuade the parties to reach an amicable solution.⁴⁴ So, Saudi judges would extend their role as judges to that of mediators, unlike judges in the UK, who would not act as mediators as per Cresswell.⁴⁵ This extension of the Saudi judges' role might be a significant element in the success of ADR in Saudi Arabia, due to the established principles of alternative settlement in the Saudi context, as practised either by judges or through out-of-court settlement as described earlier.⁴⁶

4.3 Online Mediation

As a type of ODR, online mediation has gained attention from regulatory bodies as well as businesses. Due to its importance and advantages for e-commerce disputes, the EU has issued directives and regulations that build a framework and standards for procedures of ODR.⁴⁷ So, the next sub-section will discuss related online mediation regulations and directives in some advanced jurisdictions with reference to consumer disputes in e-commerce; this will be followed by observation of an advanced online mediation mechanism such as eBay in order to assess how its use might be beneficial in consumers' disputes in Saudi Arabia.

4.3.1 Laws by jurisdiction

Mediation is one of the alternative dispute resolution processes that can be conducted outside of court procedure. It is less formal than court procedure, and can be carried out offline and online. It has been the fastest growing dispute resolution method.⁴⁸ It can be defined as follows: 'mediation is an opportunity to resolve a dispute without resorting to formal procedures such as court. The process is usually voluntary and is facilitated by an independent third party whose role is to help the parties develop solutions in a confidential environment.'⁴⁹ The process involves an impartial mediator who helps the disputants to reach a voluntary settlement of their

⁴³ See chapter 3 section 2.

⁴⁴ Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Koninklyke Brill NV 2000) 155.

⁴⁵ Practice Statement, 10 December 1993 [1994] 1 WLR 14, [1994] 1 All ER 34; H. Brown & A.L. Marriott, above Note 5, at para A3-007 at 637 (as cited in Loukas A. Mistelis, 'ADR in England and Wales: A Successful Case of Public Private Partnership' in Nadja Marie Alexander, *Global Trends in Mediation* (Kluwer Law International 2006) 145.

⁴⁶ See chapter 3 section 2.

⁴⁷ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2013) OJ L165/63.

⁴⁸ Pablo Cortes, *Online dispute resolution for consumers in the European Union* (London: Routledge 2012) 144.

⁴⁹ John Macready, *Mediation: A Practical Guide for Lawyers* (Edinburgh University Press 2017) 5.

dispute through an agreement that defines their future commitments. It includes eight stages, starting with initiation, followed by preparation, introduction, problem statement, problem clarification, generation and evaluation of alternatives, selection of alternatives, and agreement.⁵⁰

Within mediation, parties of the dispute have the power to settle their dispute based on their agreement, and are thus able to determine the outcome themselves, rather than have it imposed by an arbitrator or judge.⁵¹ In the mediation process, the mediator mediates between two parties by asking open-ended and closed-ended questions, receiving signs from the behaviour of the parties, calming disputants, defusing tensions, and repeating this process with each party. Then, the mediator summarises and clarifies the terms of agreement reached by the disputants.⁵² Mediation as one type of ADR has been impacted by the development of technology, resulting in the movement from offline mediation to online dispute resolution which includes online mediation. There are several differences of procedure and requirements between mediation and arbitration.⁵³ In addition, there are several differences in relation to the achievement of justice. Mediation works where a voluntary settlement between disputants can be found. As discussed earlier,⁵⁴ dispute settlement (sulh) in the Saudi context is widely practised because it is widely rooted in the community,⁵⁵ while arbitration, by contrast, is a passive function which determines right or wrong.⁵⁶ This difference in function between arbitration and mediation is linked to the concept of justice, inasmuch as distributive justice helps to prevent disputes before they arise, whereas corrective justice helps to resolve disputes after they arise.⁵⁷

Since the concept of ODR has been recently founded, along with the foundation of e-commerce, the regulation of ODR is still in progress around the world due to several factors such as the lack of legal standards for the use of ODR. For example, there is an absence of legal standards globally for international enforcement of ODR, and lack of regulation of ODR and standards of ADR in Saudi Arabia.⁵⁸ Although such regulation is still in progress and under evaluation by legal scholars and policy makers, the EU has made the first notable attempt to regulate

⁵⁰ John W. Cooley, 'Arbitration vs. Mediation – Explaining the Differences' (1986) 69 *Judicature* 263, 266.

⁵¹ Neil Andrews, *Andrews on Civil Processes: Arbitration and Mediation*, vol 2 (Intersentia 2013) 8.

⁵² John W. Cooley, 'Arbitration vs. Mediation – Explaining the Differences' (1986) 69 *Judicature* 263, 267.

⁵³ Arbitration procedure and requirements will be discussed in detail in chapter 4 section 4.4.1.

⁵⁴ For more on the practice of settlement (sulh) in the context of Saudi Arabia and how it spreads harmony across society whereas adjudication can bring animosity, see chapter 3 section 3.3.3.

⁵⁵ See chapter 3 section 3.3.

⁵⁶ John W. Cooley, 'Arbitration vs. Mediation – Explaining the Differences' (1986) 69 *Judicature* 263, 264.

⁵⁷ For more on the forms of justice, see chapter 2 section 2.2.1.

⁵⁸ See Advantages and Disadvantages of ODR in chapter 4.

ODR.⁵⁹ The ADR Directive is implemented in the Alternative Dispute Resolution for Consumer Disputes (amendment) Regulation 2015 in the UK.⁶⁰ The features of the Directives on ADR will be discussed and analysed in order to find the features most suitable for enhancing Saudi regulation of ADR for e-commerce consumer disputes. The first initiative was the Directive 2013/11/EU which aimed to enhance ADR coverage and raise all consumers' awareness through registered ADR entities within member states.⁶¹ Moreover, article 11 of Directive 2013/11/EU included the foundation of ODR regulation by recognising e-commerce and unifying the ADR process within member states.⁶² A regulation specifically for ODR is Regulation 524/2013, which launched the ODR platform that provides consumers and sellers with out-of-court dispute resolution for e-commerce disputes.⁶³ The ADR directive aims to fill the gaps in the area of extra-judicial redress in the EU, such as the absence of quality standards, the low level of consumers' knowledge of ADR schemes, and the lack of ADR entities for dealing with consumer disputes.⁶⁴

In this matter of EU regulation and directives on ADR and ODR, it is worth mentioning that the legal effect of directives to member states is meant for each member state's implementation at a specific date or within a specific time frame, whereas regulation is addressed to all member states and applies directly without the need for national implementation.⁶⁵ Therefore, the issuance of ODR regulation shows the EU's interest in providing redress for consumers within the EU. This signifies the importance of ODR platforms for the success of e-commerce, as they provide easy and low-cost dispute resolution which in turn will boost trust in online trading. These motives were mentioned in the preface to the ODR regulation as being among the justifications of the regulation: 'Being able to seek easy and low-cost dispute resolution can boost consumers' and sellers' confidence in the digital Single Market'.⁶⁶

⁵⁹ Sodiq Omoola and Umar Oseni, 'Towards an Effective Legal Framework for Online Dispute Resolution in E-commerce Transactions: Trends, Traditions and Transitions' (2016) 24(1) IIUM Law Journal 259, 275.

⁶⁰ The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015.

⁶¹ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63.

⁶² *ibid.*

⁶³ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1.

⁶⁴ Pable Cortés, 'A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How to Move Forward' (2015) 35 Legal Studies 114, 116.

⁶⁵ Trevor C Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community* (1st edn, Oxford University Press 2007) 102.

⁶⁶ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1.

Moreover, the regulation indicates the need to promote the amicable resolution of disputes arising from e-commerce by encouraging consumers to contact sellers to try to solve their disputes before submitting their complaints to the ADR entity.⁶⁷

The two abovementioned features of the regulation can be applied to the Saudi Arabian regulation for several reasons. Since Saudi Arabia announced its economic vision for 2030 which aims to boost its economy by regulating the internal market and reducing its reliance on oil income,⁶⁸ the enhancement of the e-commerce market and establishment of an ODR platform for Saudi e-consumers can contribute to the progress of the Saudi market based on the same motivation as that of the EU when issuing the ODR regulation. Another reason is that amicable dispute resolution, which is one of the aims of the ADR Directive, is widely rooted in the Saudi social legal system and within Saudi culture.⁶⁹ In addition, the aims of the ADR directive in addressing the abovementioned shortcomings involving legal quality, lack of consumer awareness, and lack of ADR entities can be applied to the Saudi context and adopted to fill the gap in the legal standards of dispute resolution in Saudi regulation. This would enhance the Saudi legal system, which lacks ADR schemes and ADR entities even though amicable dispute resolution is strongly rooted in Saudi culture. Therefore, when considering adoption of the EU directive on ADR and the EU regulation on ODR in the Saudi context, it can be seen that there are similarities between the EU and Saudi Arabia in the shortcomings that can be overcome by these measures.

The directive on ADR is designed for disputes arising between consumers and sellers, with the aim of reaching amicable dispute resolution. However, some disputes are excluded from the directive, such as those in which sellers are the disputant parties, and those involving the higher education service and the health service.⁷⁰ Moreover, the directive describes the ADR entity as an adjudicative and consensual extrajudicial process created by the desire of parties to the dispute to achieve a resolution of it.⁷¹ Member states of the EU will be obliged to monitor and observe the performing of ADR entities, which will be requisite to notify the authorities of their procedures and functioning in order to comply with the legal standards of the directive. Also, member states can issue proportionate penalties for entities which do not comply with the

⁶⁷ *ibid.*

⁶⁸ See chapter 3 section 3.4.2.

⁶⁹ See chapter 3 section 3.

⁷⁰ Article 2 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63.

⁷¹ Pablo Cortes and Lodder Arno, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress' (2014) 21(1) *Maastricht Journal of European and Comparative Law* 14, 25.

directive. As per the directive, all ADR entities that decide to be associated with the ODR platform must work in accordance with its standards as follows:

- Expertise, Independence and Impartiality:⁷² Under this principle, member states are required to ensure that persons in charge of the ADR process have the necessary experience, autonomy and integrity. Moreover, member states have to ensure that ADR entities are not part of an organisation that is part of the dispute and are not linked to a hierarchical body related to any part of the dispute, in order to ensure the impartiality of the ADR entity. In addition, member states are required to ensure that the ADR entity has at its disposal a budget, separate from the disputing parties, which is sufficient to achieve its tasks. What's more, member states should urge ADR entities to offer suitable training for neutral persons in charge of the ADR process as well as monitoring trainings that are provided by different authorities.
- Transparency:⁷³ ADR entities must ensure that they provide sufficient information about the entity such as contact information, natural persons in charge of ADR, the types of rules the ADR entity may use as the foundation of dispute resolution, and the enforceability of the ADR decisions. In addition, member states must ensure that ADR entities publish annual activity reports that include information such as the number and category of disputes received, the length of the dispute resolution process, and the average compliance with and outcome of ADR decisions.
- Effectiveness:⁷⁴ Member states need to ensure that ADR entities provide accessible ADR procedures, such as online access to both parties of disputes regardless of their domicile, as well as parties' access to the ADR procedure without legal representation. Moreover, ADR entities are obliged to offer the ADR procedure free of charge or at affordable fees for consumers. In order to provide fast and effective dispute resolution, the ADR outcome must be reached within 90 days from the day on which they have received the complaint file.
- Fairness:⁷⁵ Member states shall ensure that consumers and other parties to disputes are aware of their rights and of the outcomes of the ADR procedure by informing them of the dispute's elements such as arguments, evidence documents and facts. Moreover, results of the ADR procedure and the grounds that the outcome was based on must be

⁷² Article 6 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63.

⁷³ *ibid.*, Article 7.

⁷⁴ *ibid.*, Article 8.

⁷⁵ *ibid.*, Article 9.

explicitly reported in a durable medium to dispute parties. What's more, parties to the dispute must be informed of their right to withdraw from the procedure as well as of their right to have reasonable time in which to reflect on an amicable solution.

- Liberty:⁷⁶ Member states must ensure that an agreement between the seller and consumer to solve their dispute by the ADR procedure does not prevent consumers from bringing their dispute to court if agreement is reached before the dispute arises. In addition, agreement to the ADR procedure which aims to reach a solution may have a binding effect if the parties to the dispute are informed of the nature of the ADR outcome before they agree to the procedure. However, according to the directive, sellers are excluded from this right where national laws have a binding effect on sellers.
- Legality:⁷⁷ Member states shall ensure that in situations where laws conflict, the ADR outcome should not lower the consumer's right of protection offered by the national law of the consumer's domicile.⁷⁸

The EU effort to regulate ADR has been lengthy and has gone through a few steps. It started with an initiative for protecting consumers' rights. This was followed by a move to enhance consumer awareness of ADR which grants consumers easy access to justice. Moreover, due to the development of e-commerce, the EU took the step of protecting consumer rights in e-commerce by issuing the regulation on ODR, followed by the ODR platform which signifies recognition of e-commerce and its role in the economy. Furthermore, the regulation includes standards for ADR entities, and requires member states to ensure ADR entities' compliance with them. Therefore, these directives on ADR and regulation of ODR along with its standards include aspects that can be utilised to enhance Saudi regulation of ODR for the purpose of strengthening consumer trust in e-commerce. However, since the Saudi legal system is based on the principles of Islamic law, the abovementioned features of the EU directive on ADR and regulation on ODR need to be investigated to examine their compatibility with Islamic legal principles if they are to be adopted in the country.

4.3.2 Example of ODR providers

The field of ODR has witnessed significant developments since its creation. Numerous ODR providers were initiated to examine its efficacy in resolving online disputes, while others were

⁷⁶ *ibid.*, Article 10.

⁷⁷ *ibid.*, Article 11.

⁷⁸ Pablo Cortes and Arno Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress' (2014) 21(1) *Maastricht Journal of European and Comparative Law* 14, 26.

established to resolve other conflicts, such as family disputes. According to Omoola and Oseni, in 2005, approximately 115 ODR providers were identified as dealing with various disputes, including those pertaining to family, insurance and e-commerce matters.⁷⁹ However, since the focus of this thesis is on ODRs that are instituted to resolve disputes arising from e-commerce, this section will discuss and analyse ODR providers that were initiated specifically for e-commerce purposes. Therefore, the selection of ODR examples in this section is based on their popularity in solving consumers' disputes, their relevance and their accessibility to consumers. This section will present and analyse ODR mechanisms of both negotiation and mediation since it is difficult to draw a distinction between them. The reason for this difficulty is that the software that adopts the settlement in online negotiation can be regarded as a third party which proposes the settlement, like the human mediator in online mediation who resolves the dispute online. This has also led some legal scholars to include online negotiation and online mediation within one definition, based on the third party who proposes the settlement.⁸⁰

- **EU ODR Platform for e-commerce disputes**

Directive 2013/11/EU included the foundation of ODR regulation by recognising e-commerce and unifying the ADR process within member states.⁸¹ A regulation specifically concerning ODR is Regulation 524/2013, which launched the ODR platform that provides consumers and sellers with out-of-court dispute resolution of e-commerce disputes.⁸² Moreover, the Regulation indicates the need to promote the amicable resolution of disputes arising from e-commerce by encouraging consumers to contact sellers to try to solve their disputes before submitting their complaints to the ADR entity.⁸³ The ODR platform created by the EU enables consumers to settle their disputes with sellers online without being physically present. This website makes it easier for consumers to file a complaint against the seller when they are not satisfied with their transaction. The procedure for online platform disputes resolution works in accordance with the Directive, which includes a list of procedural principles that all ADR entities must comply with in order to meet the requirements for provision of ADR services.⁸⁴

⁷⁹ Sodiq Omoola and Umar Oseni, 'Towards an Effective Legal Framework for Online Dispute Resolution in E-commerce Transactions: Trends, Traditions and Transitions' (2016) 24(1) IIUM Law Journal 259, 268.

⁸⁰ Zheng Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2nd edn, Hart Publishing 2015) 336.

⁸¹ Preface 11 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63.

⁸² Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (2013) OJ L165/1.

⁸³ *ibid.*

⁸⁴ For more, see chapter 4 section 2.1.

Accordingly, the consumer using the ODR platform has to submit an electronic complaint which will be transferred to the other party of the dispute. If the business is willing to communicate with the consumer, the consumer will be able to exchange messages, send attachments such as photos of the products, or schedule an online meeting. Parties to the dispute have to reach an agreement within 90 days.⁸⁵ During the 90 days, parties of the dispute can opt-out of direct talks at any time. The business may also propose a list of dispute resolution entities listed in the platform instead of finding a solution directly.⁸⁶ In this case, the consumer has 30 days to agree on a dispute resolution entity, or be deemed withdrawn from the case, whereupon the dispute will be closed on the platform. After the selection of an ADR entity and transferral of the complaint to that entity, the selected entity has to inform the parties that it agrees to handle their dispute and must also inform them of the rules and the cost.⁸⁷ Based on the principle of effectiveness contained in the Directive,⁸⁸ the ODR procedure handled by an ADR entity must not exceed 90 days' duration from the date of receiving the complaint.⁸⁹ After the procedure is completed, the ADR entity has to supply the parties with the outcome, mentioning the subject of the dispute and time of the procedure, and request feedback on use of the platform.⁹⁰ However, based on the principle of fairness, consumers should be offered the opportunity to reflect on an amicable solution before agreeing to a proposed settlement.⁹¹ Also, parties to the dispute should be informed of the ability to represent themselves or to seek independent advice without the need to retain a lawyer or legal advisor.⁹²

In essence, the ADR entities registered in the ODR platform must employ online communication tools to enable the entity and parties to disputes to submit the dispute and preview its status. The ODR platform will not manage the whole ADR process, but will act as a bridge between the disputing parties through which to agree on an ADR process, and will

⁸⁵ European commission, 'Online Dispute Resolution' (*European Commission*) <<https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks>> accessed 5 September 2022.

⁸⁶ European commission, 'Online Dispute Resolution' (*European Commission*) <<https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks>> accessed 5 September 2022.

⁸⁷ For more, see chapter 4 section 2.1.

⁸⁸ Article 8 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2013) OJ L165/63.

⁸⁹ *ibid.*, Article 8/E.

⁹⁰ Article C/10 of Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (2013) OJ L165/1.

⁹¹ Article 9/D of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2013) OJ L165/63.

⁹² *ibid.*, Article 9/B.

forward the dispute to an ADR entity for resolution of the dispute following agreement on the ADR process. The ODR platform contains information on ADR entities listed in the platform, including contact information, how the entity handles the dispute, the fees, the outcome of the dispute, type of disputes the entity handles, language, and grounds for refusal of the dispute. The ODR platform also includes information about consumer rights in e-commerce in relation to delivery of the products, unfair practice, guarantees and returns.⁹³ Moreover, the ODR platform lists other tools of dispute resolution such as European Consumer Centres, Dispute Resolution bodies, and national consumer bodies.⁹⁴

The strength of ODR is that the ODR platform is recognised by EU policy-makers, as Directive 2013/11/EU included the foundation of ODR regulation by recognising e-commerce and unifying the ADR process within member states.⁹⁵ The recognition of e-commerce disputes and consumer rights can benefit the Saudi legal system in relation to consumer disputes in e-commerce in several ways. It has led to the unification of procedures for filing complaints against businesses within EU member states.⁹⁶ Also, it provides easy access to the platform by allowing consumers to submit complaints in different languages, without the need for legal representation and at low cost compared to traditional litigation, especially in cross-border transactions. Moreover, the ODR Regulation and ADR Directive recognise e-commerce transactions and allow for special procedures through the ODR platform for e-commerce. The platform also includes adequate signposting to guide the consumer to the most relevant dispute resolution body. In addition, the platform includes adequate information on other dispute resolution tools in case the ADR entities listed in the ODR platform have not achieved a resolution of the dispute. It can be said that the recognition of e-commerce disputes, given the aim of the ADR Directive and ODR Regulation to enhance consumer confidence in e-commerce, should allow for improvements in the ODR procedure in line with market needs. Through the incorporation of direct communication between consumer and trader, latest reports of the EU show that 89% of complaints that reached the platform were automatically closed after the 30-day legal deadline for the business to agree to proceed to an ADR process and 1% of complaints reached an ADR entity;⁹⁷ whereas, in 2019, 83% of complaints were

⁹³ European commission, 'Online Dispute Resolution' (*European Commission*) <<https://ec.europa.eu/consumers/odr/main/?event=main.consumer.rights>> accessed 5 September 2022.

⁹⁴ *ibid.*

⁹⁵ *ibid.*, Preface 11.

⁹⁶ *ibid.*, Preface 11.

⁹⁷ European commission, 'Functioning of the European ODR Platform' (*European Commission*, December 2021) <<https://ec.europa.eu/info/sites/default/files/2021-report-final.pdf>> accessed 5 September 2022.

automatically closed and 2% of complaints reached an ADR body.⁹⁸ This shows that the incorporation of direct communication between consumer and business could be beneficial by helping to obtain a solution to consumer disputes. The aforementioned features of the ODR platform can benefit through a unitary system of dispute resolution and incorporation of direct communication for consumer disputes in e-commerce in Saudi Arabia.⁹⁹ However, the ODR procedure includes some weaknesses, such as the fact that ODR decisions are non-binding on the seller and consumer if they are unwilling to enforce the ODR procedure's outcome. Also, the ODR procedure lacks an enforceability mechanism which would require parties to the dispute to voluntarily accept the decision's binding nature.

- **eBay Dispute Resolution Centre:**

eBay was founded in September 1995¹⁰⁰ and the company has grown significantly to become one of the main internet stores. This significant development of eBay renders it globally the biggest e-commerce store, with local stores in more than 25 countries.¹⁰¹ Within eBay, more than 250 million searches are made per day,¹⁰² which will inevitably create disputes to some extent. Therefore, the number of disputes motivated eBay to take the lead in the development of ODR. Moreover, in accordance with Adam Cohen, since the first months of eBay's establishment, dispute resolution has been a component of the store's customer support in terms of stepping in and trying to solve consumer issues.¹⁰³

The characteristics of e-commerce transactions include distance and lack of knowledge of the other party. This might create a lack of trust in the marketplace due to the unknown behaviour of the other party regarding delivery of the goods or payment to the seller. Therefore, preserving consumer and seller rights is a requirement for e-commerce transactions in order to maintain trust between the two parties involved in each transaction. According to Yuthayotin, consumers worldwide do not have sufficient trust in online shopping, creating a deterrent to entering into

⁹⁸ European commission, 'Functioning of the European ODR Platform' (*European Commission*, December 2020) <https://ec.europa.eu/info/sites/default/files/odr_report_2020_clean_final.pdf> accessed 5 September 2022.

⁹⁹ Complexity of dispute resolution mechanisms for e-commerce consumer disputes will be discussed thoroughly in chapter 5.

¹⁰⁰ Rule Colin, 'Designing a Global Online Dispute Resolution System: Lessons Learned from eBay' (2017) 13(2) *University of St Thomas Law Journal* 354, 354.

¹⁰¹ Craig Smith, '85 Amazing eBay Statistics and Facts' (*DMR*, December 2018) <<http://expandedramblings.com/index.php/eBay-stats/>> accessed 20 March 2019.

¹⁰² Rule Colin, 'Designing a Global Online Dispute Resolution System: Lessons Learned from eBay' (2017) 13(2) *University of St Thomas Law Journal* 354, 345.

¹⁰³ *ibid.*, 355.

such transactions.¹⁰⁴ Consequently, trust is a key characteristic of an e-commerce transaction, which can be enhanced by various approaches: for example, employing improvements to the e-commerce marketplace regulation such as security of transaction or employing guarantee features to enhance consumer rights so as to prevent disputes before they arise.¹⁰⁵ This approach is employed within eBay's dispute resolution centre, in which the customer support employee or automated system will intervene to solve issues before a dispute arises.¹⁰⁶ For example, if the average delivery of the item was three or four days and the item has not been delivered within this time, eBay will take steps before delivery and before the consumers raise the complaint, by reassuring the buyer that delivery of the item is expected to be delayed by seven days. Accordingly, the consumer's trust in the transaction would be enhanced instead of diminished by anxiety. Therefore, eBay's policy of intervening in all matters is a method of preventing e-commerce disputes before they arise. This indirectly enhances consumer confidence in the platform should a dispute actually arise.

In terms of procedure, eBay's dispute resolution centre employs a different style of dispute resolution process that suits the platform due to its high volume of transactions and disputes. The eBay dispute resolution centre system has several stages at which to initiate the complaint, that apply to both buyers and sellers and include concepts of mediation and negotiation simultaneously. The eBay dispute resolution process begins by asking the complainant multiple questions that are generated automatically to identify the issue and ensure that the complaint falls within eBay's guarantee scheme in terms of non-delivery of an item or the item not being as specified.¹⁰⁷ Initiating the complaint will open the eBay resolution centre webpage where the consumer will be presented with two categories. The first is for buyers who want to report a problem with their purchase. For example: 1) bought an item that has not yet arrived; 2) received an item that does not match the seller's description.¹⁰⁸ The second category applies to sellers who have not received payment or who have agreed with the buyer to cancel the transaction. Below is a screenshot from eBay's resolution centre to illustrate the options for registering a complaint.¹⁰⁹

¹⁰⁴ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer 2015) 11.

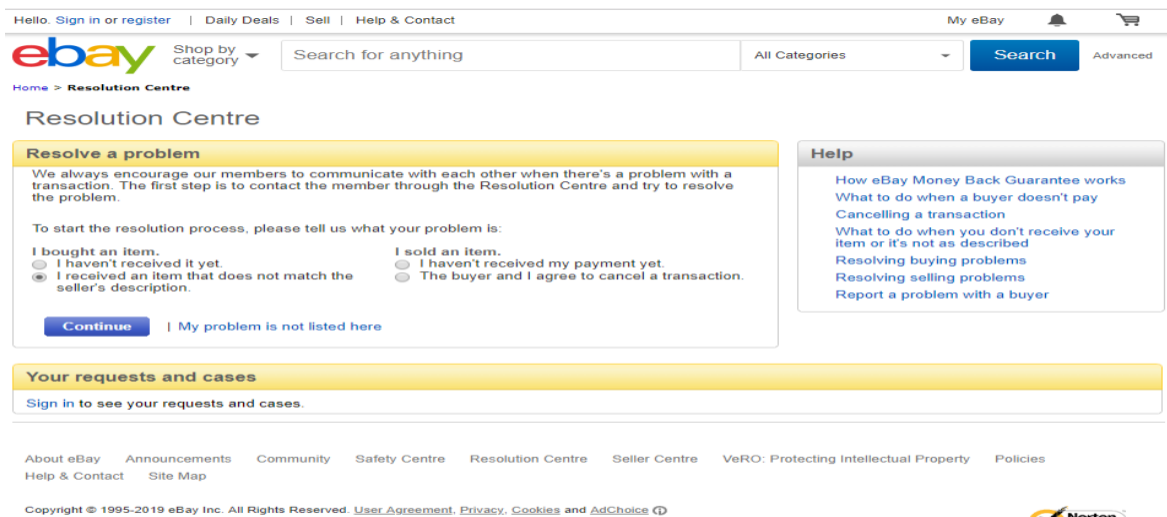
¹⁰⁵ Leonard Rotman, 'Trust, Loyalty, and E-Commerce' in Palmer Daniel (ed), *Ethical Issues in E-Business: Models and Frameworks* (Business Science Reference (an imprint of IGI Global) 2010) 59.

¹⁰⁶ Rule Colin, 'Designing a Global Online Dispute Resolution System: Lessons Learned from eBay' (2017) 13(2) *University of St Thomas Law Journal* 354, 357.

¹⁰⁷ Amy Schmitz, 'Building Trust in Ecommerce Through Online Dispute Resolution' (2015) 15(15) *Legal Studies Research Paper Series* 1, 17.

¹⁰⁸ For more information see eBay resolution centre <https://resolutioncentre.ebay.co.uk/> accessed 24 April 2019.

¹⁰⁹ *ibid.*



Buyers can use eBay’s Money Back Guarantee Scheme when they do not receive an item or receive an item that differs from the listing.¹¹⁰ Most eBay transactions are covered by this guarantee scheme when the buyer reports the problem within eBay’s stated timeline. The scheme also applies when the buyer pays for items on eBay or uses an eBay invoice and pays using one of the valid payment methods on eBay. In addition, an item paid for as a single payment, and a listed item that was paid for in a live auction using any payment method, will be covered if the buyer provides proof of payment. Furthermore, items that are collected in person will be covered as long as all the other requirements are met.¹¹¹ The complaint must be asserted after using the option of ‘Pay Now’ by the buyer after 30 days of the mentioned or expected date of delivery.¹¹² Accordingly, the dispute resolution centre will persuade the disputants to communicate through the dispute resolution centre’s messaging platform in order to reach a solution.¹¹³ Communication with the seller will be through direct contact provided by eBay to resolve the issue or ask a question about the product.¹¹⁴ This stage of the process can be considered the employment of direct negotiation between the buyer and the seller. However, if they do not reach a solution within three business days, the complaint will be escalated back to the dispute resolution centre for consideration and to determine whether the

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² Amy Schmitz, ‘Building Trust in Ecommerce Through Online Dispute Resolution’ (2015) 15(15) *Legal Studies Research Paper Series* 1, 17.

¹¹³ *ibid.*

¹¹⁴ For more information see eBay’s Resolving issues with sellers

<<https://www.ebay.co.uk/help/buying/resolving-issues-sellers/resolving-issues-sellers?id=4011>> accessed 24 April 2019.

complainant qualifies for a refund.¹¹⁵ Accordingly, the later stage can be considered a mediation process since it employs a third party to resolve a dispute.

Some matters must be considered when assessing the dispute at the eBay resolution centre; for instance, procedural matters, such as the timeframe for raising the dispute, and contractual matters, such as defective items. In terms of timeframe, the buyer can ask the resolution centre to review the request eight days after their initial contact with the seller; or, if the buyer is dissatisfied with the seller's proposed solution, eBay's resolution centre will review this request within 48 hours. If a decision is made in favour of the buyer and the item has not been received, the buyer will receive a refund through PayPal. However, if the item has been received, the resolution centre will issue a partial refund where the buyer has received an item that was not as described.¹¹⁶

In terms of contractual issues, the resolution centre will assess the dispute based on the item's description; that is, on whether it differs materially from the seller's description. For example, if the item is different to what was presented, or is a used item that the consumer bought in the belief that it was new, or is damaged, the resolution centre will treat it as not matching the listing. Moreover, items that are described as new but are found to be used, or items that have missing parts or have been damaged during shipping will be deemed not as described,¹¹⁷ as will items that cannot be used due to delayed delivery, such as football match tickets.¹¹⁸

The abovementioned process of extending remedies to buyer or seller may raise the question of compliance with or enforcement of the dispute resolution centre's decision. The enforcement of the decision can be considered the fruit that redresses the damaged party in the transaction. For example, if fruit is not picked when it has matured, it will be useless. Correspondingly, if the outcome of the dispute resolution process is not effective or enforced, it becomes valueless. Therefore, eBay's dispute resolution centre employs an enforcement measure to ensure the efficiency of its ODR outcome.¹¹⁹ For example, in some circumstances, eBay enforces its

¹¹⁵ Amy Schmitz, 'Building Trust in Ecommerce Through Online Dispute Resolution' (2015) 15(15) Legal Studies Research Paper Series 1, 17.

¹¹⁶ eBay, 'eBay Money Back Guarantee' (*eBay*) <<https://pages.ebay.co.uk/ebay-money-back-guarantee/index.html>> accessed 26 April 2019.

¹¹⁷ eBay, 'eBay Money Back Guarantee' (*eBay*) <<https://pages.ebay.co.uk/ebay-money-back-guarantee/index.html>> accessed 26 April 2019.

¹¹⁸ *ibid.*

¹¹⁹ Amy Schmitz, 'Remedy Realities in Business-to-Consumer Contracting' (2016) 58 Arizona Law Review 213 University of Missouri School of Law Legal Studies Research Paper 10/2016, Available at SSRN: <https://ssrn.com/abstract=2793506> accessed 12 April 2019.

decisions in favour of the buyer by suspending a seller's funds through PayPal.¹²⁰ This procedure may result in favourable treatment of the buyer as they do not deposit funds into the PayPal system, unlike the seller whose funds can be suspended. Therefore, this might be seen as protection of the consumer in the eBay dispute resolution centre, and hence as rebalancing the power between the consumer and seller, as consumers are asked to pay upfront. This process of rebalancing the power between consumer and seller can enhance consumer trust in the e-commerce platform since it places them in a stronger position.

The concept of rebalancing the power between consumer and seller might be seen as favourable for the consumer with no consideration to the seller's position, which may produce inequitable treatment. According to Mnookin and Lewis, the legal rights of disputants should be considered as bargaining chips that may influence the outcome of the settlement.¹²¹ This concept which is adopted by eBay is perceived as a means of enhancing consumer trust in the e-commerce platform. This is demonstrated clearly by Rule, who emphasises the focus of eBay dispute resolution on preserving a trusted environment.¹²²

- **SmartSettle:**

SmartSettle is an online platform offering online negotiation that relies on an algorithm to assist disputants in resolving their dispute via the platform, as well as offering online mediation.¹²³ These two forms of ODR are applied to a wide range of disputes by SmartSettle, such as: family, insurance, real estate, and e-commerce.¹²⁴ The platform uses basic traditional methods of negotiation and mediation but focuses on some features, such as information that was ineffective or inefficient in traditional dispute resolution, and aims to improve them.¹²⁵ This concept examined the utilisation of the technology capability in communication and calculation, and explored the dispute by a programmed rule to decide whether it could be settled.¹²⁶ The platform was designed by a computer scientist who found that building the functioning of the platform on the utilisation of technology in interest-based negotiation

¹²⁰ For more information, see eBay's policy <<https://www.ebay.com/help/policies/ebay-money-back-guarantee-policy/ebay-money-back-guarantee-policy?id=4210>> accessed 26 April 2019.

¹²¹ Robert Mnookin and Kornhauser Lewis, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *The Yale Law Journal* 950, 978.

¹²² Colin Rule, 'Designing a Global Online Dispute Resolution System: Lessons Learned from eBay' (2017) 13(2) *University of St Thomas Law Journal* 354, 357.

¹²³ Pablo Cortes, 'Can I Afford Not to Mediate – Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues' (2008) 35(1) *Rutgers Computer & Tech Law Journal* 1, 6.

¹²⁴ Smartsettle, 'SmartSettle Applications' (*SmartSettle*, N/A) <<https://smartsettle.com/products/smartsettle-infinity/smartsettle-applications/>> accessed 2 April 2019.

¹²⁵ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice Technology and the Internet of Disputes* (Oxford University Press 2017) 36.

¹²⁶ *ibid.*

increased the likelihood of reaching optimal solutions for disputant parties.¹²⁷ Moreover, the system is built on the insights provided by game-theory, which triggers disputants to provide information regarding their dispute, list their interest, and provide a value, to make a package of issues that disputants could negotiate.¹²⁸ Next, based on the parties' interests, the system will provide several package solutions that might satisfy disputants. Then, the system will provide a graphic display of the level of satisfaction each package of issues offers to the disputants based on their own stated interests.¹²⁹ .

In practice, the system will take disputants through several preparatory steps to determine their issue, interest, and value matters of the dispute, and to lead the disputing parties to reach the outcome of the negotiation process.¹³⁰ The steps are outlined below:¹³¹

- **Preparation:** The entire ODR process will be explained to disputants and they will be offered the chance to engage in orientation or training for the process. Moreover, they will be invited to engage with a facilitator to serve them during the ODR process; alternately, each party can have a facilitator. Moreover, they will be asked to agree on the SmartSettle terms and conditions.
- **Determination of Issue and Demands:** Parties at this stage are expected to identify their matter of the dispute and what they agree and disagree on, and to qualify their interest. Moreover, they will agree on the framework for negotiation of the unresolved issues. This process can be done online or face-to-face.
- **Create a Framework for Agreement:** SmartSettle adopts the concept of framework agreement, which is defined in offline negotiation as 'a document in the form of an agreement but with blank space for each term to be resolved by negotiation'¹³². Accordingly, SmartSettle allows each party to fill in a blank space to identify the issue, thereby representing the party's goodwill and creating a mutual framework.
- **Quantify Satisfaction:** At this stage, most of the negotiation parts are shared while other parts will be unshared. The shared parts represent the subjects to which all parties

¹²⁷ Orna Rabinovich-Einy and Katsh Ethan, 'Technology and the Future of Dispute Systems Design.' (2012) 17 Harvard Negotiation Law Review 151, 176.

¹²⁸ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice Technology and the Internet of Disputes* (Oxford University Press 2017) 36.

¹²⁹ *ibid.*

¹³⁰ SmartSettle, 'SmartSettle Process' (*SmartSettle*, N/A) <<https://smartsettle.com/about-us/process/>> accessed 2 April 2019.

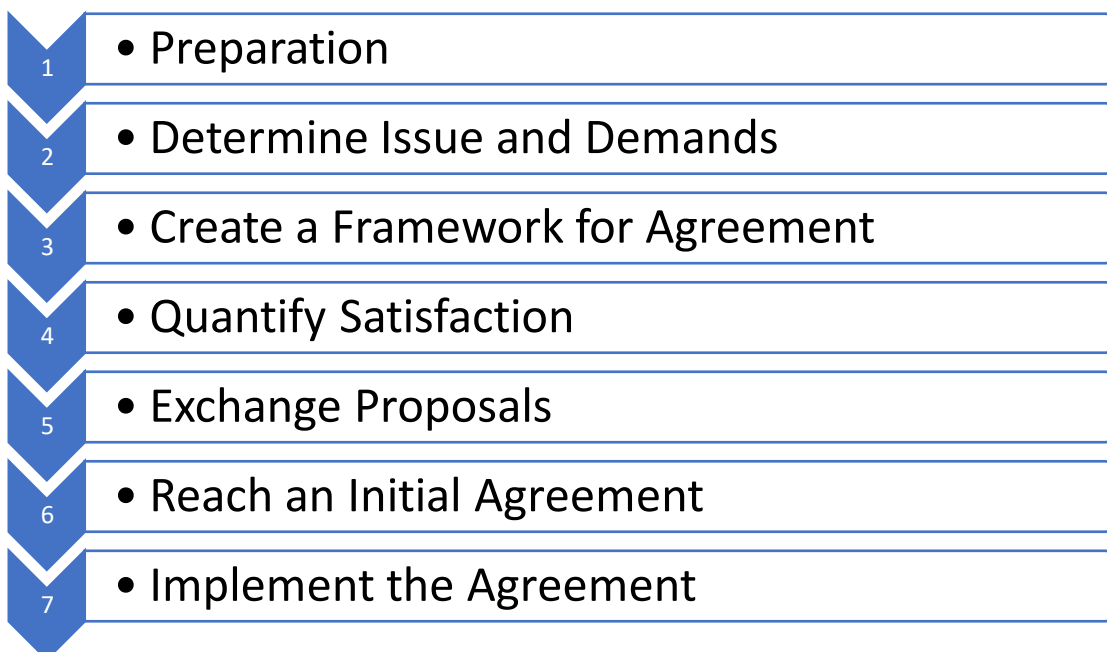
¹³¹ *ibid.*

¹³² Ernest Thiessen, Paul Miniato and Bruce Hiebert, 'ODR and eNegotiation' <https://info.smartsettle.com/wp-content/uploads/2011/03/OnlineDisputeResolution_ErnestThiessen_PaulMiniato_BruceHiebert.pdf> accessed 15 April 2021.

have agreed. The unshared parts represent the individual objectives for each party. This stage can be categorised as evaluating packages for each party. The system uses pre-programmed software that can help parties analyse and represent their own preferences.¹³³

- **Exchange Proposals:** After disputants have built the model of evaluating packages, they can progress their negotiation by the exchange of their offers. The exchange starts with the most optimistic proposal, which helps create a benchmark for the bargaining in all matters of the dispute. Disputants may proceed with the system, which will offer them counter-proposals for narrowing the bargaining ranges. Moreover, the system can offer suggestions for settlement options.
- **Reach an Initial Agreement:** At this stage, parties should consider their preference and the suggestions provided by the system. Parties can place a hidden approval if they agree with a specific package, which can lead the parties to an initial agreement.
- **Implement the Agreement:** After reaching a settlement, SmartSettle will ensure that the agreement is well-made and can be enforced accordingly. SmartSettle does not apply a drafting process or legal review to facilitate the immediate enforcement of the agreement.¹³⁴

The chart below illustrates the process of the dispute resolution offered by SmartSettle:



¹³³ *ibid.*

¹³⁴ *ibid.*

One of the main positive points mentioned above is that the system indirectly encourages the adoption of goodwill and trust among disputing parties. This might mean examining their intentions towards the ODR process, which represents their goodwill in resolving the dispute and results in mutual trust. When a disputant offers a solution and responds to the other party, this can represent expression of an interest in reaching a mutual agreement, unlike the situation when the other party ignores correspondence or offers an unrealistic solution. According to Ebner and Zeleznikow, disputants using ODR face challenges, such as trust between each other and trust in their intentions, which might be affected by the method and environment of online communication.¹³⁵ Accordingly, utilising ICT by developing communication between disputants, for example by building a framework for the agreement, can facilitate the growth of trust between disputants in order to reach a mutual, amicable agreement. Thiessen, Miniato and Hiebert argued that building a framework into an agreement is a cooperative way to enhance trust and goodwill between disputants.¹³⁶ Moreover, SmartSettle relies on an algorithm to provide the best settlement for disputants based on their demands. However, the system may face challenges since it relies on technical usage and multi-steps, which might be time-consuming for disputants and could prove difficult for non-expert users through its reliance on multi-technical steps that might be challenging to the average user. Cortes argued that users of SmartSettle might encounter complicated steps that could be time-consuming for the numerous users of business-to-consumer disputes.¹³⁷ Moreover, the abovementioned multi-technical steps on SmartSettle might weaken the consumer's position in accessing justice since such steps might be misused by experienced users. According to Tang, experienced users of e-negotiation systems might abuse the system to reap the most benefit at the expense of non-experienced users who are typically consumers.¹³⁸

4.4 Online Arbitration

ADR comprises several methods of out-of-court resolution. ADR has been developing since the emergence of ICT in legal systems.¹³⁹ As discussed previously, this emergence has resulted in innovative initiatives in ODR for consumer disputes arising from e-commerce transactions.

¹³⁵ Noam Ebner and John Zeleznikow, 'Fairness, Trust and Security in Online Dispute Resolution' (2015) 36(2) Hamline University's School of Law Journal of Public Law & Policy 143, 155

¹³⁶ Ernest Thiessen, Paul Miniato and Bruce Hiebert, 'ODR and eNegotiation' <https://info.smartsettle.com/wp-content/uploads/2011/03/OnlineDisputeResolution_ErnestThiessen_PaulMiniato_BruceHiebert.pdf> accessed 15 April 2021.

¹³⁷ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2012) 148.

¹³⁸ Zheng Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2nd edn, Hart Publishing 2015) 336.

¹³⁹ See chapter 4 section 1.

Online arbitration is one of the methods adopted for ODR. This is a technological version of traditional arbitration, whereby the arbitrator issues a legally-binding resolution at the conclusion of the process.¹⁴⁰ It is believed that it has been adopted over the internet primarily for the purpose of enhancing access to justice and boosting consumer confidence in e-commerce.¹⁴¹ However, although ODRs aim to allow consumers to seek redress, some jurisdictions restrict consumer arbitration agreements and pre-dispute arbitration clauses. Therefore, this section will present the legislative comments pertaining to consumer online arbitration, followed by an analysis of some of the online arbitration mechanisms, such as Modria and the AAA.

4.4.1 Legislative comments on online arbitration

Considering the differences in cultural backgrounds, legal systems, commercial expectations, and consumer protection regulations in international trade, disputes are unavoidable, especially with the increasing number of transactions conducted in e-commerce since its establishment. For example, one of the major areas of dispute is the failure of one party to pay the money, which might be due to inability or unwillingness to pay. Accordingly, if negotiation and mediation cannot resolve e-commerce disputes, we can examine whether an alternative form of dispute resolution, such as online arbitration, might be suitable.

Arbitration is a form of ADR that is applied to commercial disputes. It is defined as:

‘The process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law’.¹⁴²

Arbitration does not differ from other ADR mechanisms affected by the ICT revolution, such as mediation and negotiation.¹⁴³ Arbitration has been developed by the incorporation of ICT to enable it to be conducted online due to the convenience of that method. Moreover, it is slightly less formal than the traditional method of arbitration, thereby bringing accessibility to its users. Online arbitration allows the greater suitability of the internet in the dispute resolution process and does not require high training skills or ability to cope with ODR complexity, as the

¹⁴⁰ Dafna Lavi, ‘Three Is Not a Crowd: Online Mediation-Arbitration in Business to Consumer Internet Disputes’ (2016) 37(3) *University of Pennsylvania Journal of International Law* 871, 885.

¹⁴¹ Gabrielle Kaufmann-Kohler and Schultz Thomas, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004) 69.

¹⁴² *Halsbury’s Laws of England* (4th ed, Butterworths 1991), para 601, 332.

¹⁴³ See chapter 4 sections 1 and 2.

proceedings are mostly conducted in writing.¹⁴⁴ In order to adopt online arbitration for dispute resolution, email and protected communication are sufficient.¹⁴⁵ Overall, online arbitration does not differ from traditional arbitration other than by digitalising all arbitration processes to allow the arbitrator and disputants to employ the traditional method online. This is a more appropriate and speedy process than traditional arbitration. Moreover, online arbitration and traditional arbitration are unlike negotiation and mediation as they are more formal and result in a binding award.¹⁴⁶

Although arbitration appears more formal in terms of procedure than the mediation and negotiation process, the arbitration procedure demonstrates more flexibility than the court procedure which is restricted by its rigidity, by allowing arbitrators to tailor the needs of the disputants to the dispute.¹⁴⁷ Notwithstanding, the arbitration procedure requires sufficient cooperation from both sides to achieve flexibility in the process, in aspects such as cost and time savings.¹⁴⁸ As an example of the arbitration procedure's flexibility, section 33(1) of the Arbitration Act 1996 allows the tribunal to decide on all procedural and evidential matters.¹⁴⁹ However, although the law permits the use of flexible procedures that are bound by the arbitration tribunal and disputants' agreement, this flexibility has been reflected differently in practice. On the one hand, the arbitration process is similar to the procedure in complicated cases, which includes a full oral hearing, compliance with the rules of evidence submission, and appearance of experts and witnesses.¹⁵⁰ Conversely, the procedural matters are to be agreed by the tribunal and the disputants on the grounds of few documents, document-only submission, and exclusion of a hearing.¹⁵¹ Therefore, the flexibility of the arbitration procedure which offers to address the disputant's needs can be beneficial to e-commerce users. As mentioned above, the arbitration is flexible in tailoring the needs of the disputants to the dispute. In e-commerce disputes, consumers might feel confident when there is an ADR process, such as arbitration, available. The arbitration process can be adopted to allow consumers to seek redress when disputes arise from their e-commerce transactions; subsequently, this might enhance their

¹⁴⁴ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (first published 2011, Routledge) 107.

¹⁴⁵ *ibid.*

¹⁴⁶ Zheng Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2nd edn, Hart Publishing 2015) 337.

¹⁴⁷ David St John Sutton, Judith Jill and Mathew Gearing, *Russell on Arbitration* (24th edn, London: Sweet & Maxwell 2015) 5-106.

¹⁴⁸ *ibid.*

¹⁴⁹ Arbitration Act 1996 (United Kingdom).

¹⁵⁰ David St John Sutton, Judith Jill and Mathew Gearing, *Russell on Arbitration* (24th edn, London: Sweet & Maxwell 2015) 5-107.

¹⁵¹ *ibid.*, 101.

confidence in e-commerce due to the knowledge that their disputes will be resolved. However, this is subject to the legality of the process for consumer disputes.

In terms of adoption of the arbitration procedure in the online arena, the overall process might be completed online. The flexibility of arbitration offers great opportunities to adopt the procedure into an online mechanism. For example, section 33 of the Arbitration Act 1996 allows the tribunal to choose the time and venue of the arbitration procedure.¹⁵² Accordingly, this feature can be applied to online arbitration by providing it to e-commerce consumers. Since the tribunal has the authority to decide on the venue of the arbitration procedure, it can integrate the procedure through the internet in order to benefit e-commerce consumers by providing easier access to redress. This can be done by incorporating ICT into the arbitration procedure: for instance, through commencement of internet communication by email correspondence, or through video conferencing between arbitrators and disputants, rather than by the traditional arbitration method of face-to-face communication. Notification of arbitral awards can be sent by email to parties of disputes and to relevant courts for enforcement, replacing physical collection of awards and thus saving consumers' time while reducing the cost of arbitration. Moreover, in traditional arbitration, it is possible to decide on the form of written procedure of claim and defence to be used, and the submission of evidence.¹⁵³ Hence, the abovementioned features of traditional arbitration allow flexibility for the adoption of arbitration over the internet. This procedural flexibility can be seen as an advantage for consumers of e-commerce, as the arbitral tribunal can manage the case at a very early stage before the arbitration procedure starts, in order to familiarise disputants with the arbitration process.¹⁵⁴ This preliminary meeting managed by the arbitral tribunal can be arranged over the internet, which is convenient for e-commerce consumers as it takes place at the site, namely the internet, where the e-commerce dispute arose. Moreover, the flexibility of the online arbitration procedure is demonstrated when it is commenced by the claimant registering with an online arbitration entity, which in some instances provides a link to a complaint form.¹⁵⁵ The arbitration entity will select an arbitrator who will contact the defendant and invite the latter to participate in the online arbitration proceedings.¹⁵⁶ The proceedings will include an online hearing and the presentation of evidence, followed by closure of the hearing in order to render the award within the agreed

¹⁵² Arbitration Act 1996 (United Kingdom).

¹⁵³ *ibid.*

¹⁵⁴ Nigel Blackaby Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern & Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 366.

¹⁵⁵ Haitham Haloush and Bashar Malkaw, 'Internet Characteristics and Online Alternative Dispute Resolution' (2008) 13(1) *Harvard Negotiation Law Review* 327, 342.

¹⁵⁶ *ibid.*

time limit.¹⁵⁷ It can be said that this merger of ICT with the arbitration process, resulting in online arbitration, is of potential advantage to e-commerce consumers due to its convenience and lower cost compared to traditional arbitration; though it can be argued that the technical issues might pose challenges to the full success of online arbitration. It is true that most consumers who have access to e-commerce would also have access to the internet which would grant them access to justice when online arbitration is adopted. But access to the internet is not the only feature that matters for the success of online justice. For example, technical conditions such as the stability of the internet connection, software that functions on the arbitration platform, and electronic authentication of original documents would need to be achieved.

In relation to developments in arbitration and consumer disputes in e-commerce, there have been some attempts by businesses, through stipulating pre-dispute arbitration clauses, to restrict consumers from exercising their right to go to court and sue sellers. According to Merrill, when contracting with consumers, businesses may include an arbitration clause that prevents consumers from suing sellers in the courts. This will require consumers to resolve their disputes through an arbitration process as stipulated in their contract.¹⁵⁸ This pre-dispute clause prevents consumers from accessing justice in two ways. Consumers would not be able to go to the court as they had signed a contract which includes a pre-dispute arbitration clause. Another way is by preventing them from proceeding to arbitration, because traditional arbitration might be costly and unrealistic in consumer disputes, due to the value of the consumer's claim being typically less than the cost of the arbitration procedure and the award. This barrier to consumer access to justice through the pre-dispute clause would make the success of consumer arbitration unlikely due to the cost outweighing the award, thereby discouraging consumers from accessing justice and allowing sellers to avoid accountability¹⁵⁹ – quite apart from any jurisdictional issues arising from the dispute which would make the cost of the arbitration higher than the value of the consumer dispute. Notwithstanding, this pre-dispute arbitration agreement in consumer contracts is challengeable since consumers in some jurisdictions have the right to go to courts. Indeed, this right is guaranteed by their human rights under conventional agreements,¹⁶⁰ whereas in some jurisdictions the pre-dispute arbitration clause is enforceable.

¹⁵⁷ M. Scott Donahey, 'Current Developments in Online Dispute Resolution' (1999) 16(4) *Journal of International Arbitration* 115, 125.

¹⁵⁸ Jeremy B. Merrill, 'One-Third of Top Websites Restrict Customers' Right to Sue' (*The New York Times*, 23 October 2014) <<https://www.nytimes.com/2014/10/23/upshot/one-third-of-top-websites-restrict-customers-right-to-sue.html>> accessed 15 May 2019.

¹⁵⁹ Amy Schmitz, 'Building Trust in Ecommerce Through Online Dispute Resolution' (2015) 15(15) *Legal Studies Research Paper Series* 1, 5.

¹⁶⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 6.1.

This difference in applying the pre-dispute arbitration clause in consumer disputes requires detailed analysis. Therefore, online arbitration for e-commerce consumers in some jurisdictions will be discussed to examine the validity of online arbitration in e-commerce disputes under assessment.

To ensure consumer accessibility to justice, the EU issued several regulations allowing consumers to seek justice. These laws address the basic rights of EU citizens to seek judicial redress for a wide range of issues. Hence, these basic rights can be adopted to enhance consumer access to justice and their agreement to pre-dispute arbitration. Specifically, the European Convention of Human Rights articulates that ‘In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’¹⁶¹. Although this article clearly indicates the right to fair judicial hearings for consumers, it is argued that it is not an ultimate right and can be exempted if there are reasonable aims.¹⁶² The pre-dispute arbitration clause will not violate the European Convention of Human Rights if there is an advantage for parties in the dispute.¹⁶³ In other words, the protection measures mentioned in article 6.1, such as fairness and the right to a public hearing, must be safeguarded in compulsory arbitration. Conversely, in voluntarily arbitration, those rights might be waived as the agreement was made freely and under equitable powers.¹⁶⁴ In other circumstances, article 3 and Annex (q) of the Unfair Terms in Consumer Contracts Directive indicates that any contractual term that has not been negotiated between contractual parties would be regarded as unfair.¹⁶⁵ Moreover, annex (q) of the Directive mentioned that the exclusion or inhibition of consumers from proceeding with legal action, particularly by forcing consumers to solve their disputes only by arbitration, would be regarded as unfair. The reasoning behind this restriction may help to empower consumer choice in deciding their venue for justice as they typically are considered the weaker party in the contract. Accordingly, a pre-dispute arbitration clause hinders consumer choice in accessing justice.

The case in England, Wales and Northern Ireland is similar to that in the EU in relation to the restriction of pre-dispute arbitration clause, since the UK implements EU directives. These

¹⁶¹ *ibid.*

¹⁶² Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (first published 2011, Routledge) 108.

¹⁶³ *ibid.*

¹⁶⁴ *Mutu and Pechstein v Switzerland* App no 40575/10 and 67474/10 (ECtHR, 2 Oct 2018) In this case, both Mutu (footballer) and Pechstein (athletes) challenged the pre-dispute arbitration clause and challenged the impartiality of the arbitrators.

¹⁶⁵ European Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts 1993 OJ L 95/29.

restrictions are regulated under sections 89-91 of the Arbitration Act 1996.¹⁶⁶ Under article 89 of the Act, the pre-dispute clause will be considered void if certain requirements have not been met, such as negotiation of the arbitration terms before the dispute and the value of the dispute.¹⁶⁷ Moreover, article 91 of the Act mentioned that the arbitration agreement signed with a consumer will be regarded as unfair and, accordingly, unenforceable when the value of the dispute is not high;¹⁶⁸ that is, £5000 or less.¹⁶⁹ This amount was specified in the Unfair Arbitration Agreement, for the purpose of fulfilling section 91 of the Arbitration Act 1996.¹⁷⁰ This approach, which is applied in England, Wales and Northern Ireland, has led some to argue that it is a conservative approach in relation to the unenforceability of the pre-dispute arbitration clause.¹⁷¹ This conservative approach might be due to the differences in other jurisdictions, which allow the pre-dispute arbitration clauses and without a specified dispute value that automatically voids the arbitration clause when the amount of dispute is less than the abovementioned amount. Accordingly, a pre-dispute arbitration clause in consumer disputes of over £5000 will be considered fair when it is negotiated individually with the consumer as per the Arbitration Act 1996.

Although providing the consumer with the information pertaining to the pre-dispute arbitration clause individually when negotiating the contract, which will waive their right to go to court as per the Arbitration Act 1996, other concepts of unfairness must be addressed.¹⁷² The EU Directive on Unfair Terms in Consumer Contracts is a focal governing point in relation to consumer arbitration agreements within EU member states.¹⁷³ The Directive is applied to consumer contracts and clauses that are not negotiated individually by the contracting parties. It defines an unfair term as ‘A contractual term which has not been individually negotiated’.¹⁷⁴ Furthermore, article 3 of the Directive clarifies two other characteristics of the unfair term.¹⁷⁵ A contractual term results in a significant imbalance which is detrimental to the consumer, and an inconsistency with the requirement of good faith. Accordingly, when the pre-dispute arbitration clause is formed in advance of the conclusion of the contract, depriving the consumer of the ability to influence the effect of the clause, it has a negative impact on the consumer. For

¹⁶⁶ Arbitration Act 1996 (United Kingdom).

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ Amy Schmitz, ‘American Exceptionalism in Consumer Arbitration’ (2013) 10(1) *Loyola University Chicago International Law Review* 81, 98.

¹⁷⁰ The Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 2167.

¹⁷¹ Rutledge Peter and Howard Anna, ‘Arbitrating Disputes Between Companies and Individuals: Lessons from Abroad’ (2010) 65(30) *Dispute Resolution Journal* 30, 35.

¹⁷² Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993) OJ 2 95/29.

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

example, the person is prevented from going to court for redress, which is not consistent with the good faith principle and would be considered unfair and unenforceable. In such cases, where a click-wrap contract with an e-commerce consumer contains a pre-dispute arbitration clause hindering their right to go to court, and that condition has not been explicitly described in the contract, it might be regarded as void and unenforceable.

The reason for the unenforceability is that it affects the e-consumer by influencing their right to go to court and seek redress. Moreover, it impacts on the test of fairness in that the e-consumer cannot negotiate the terms of the contract individually. These two rights, fairness and the consumer's freedom to go to court, must be protected and guaranteed in accordance with the European Convention of Human Rights¹⁷⁶ and the EU Directive in Unfair Terms in Consumer Contracts¹⁷⁷ for e-consumers when applying e-arbitration to e-commerce disputes. However, although the fairness term in relation to the pre-dispute arbitration clause might render the term void and unenforceable, Cortes argues that consideration of the term's fairness will be assessed on a case-by-case basis to examine whether the consumer is bound by an arbitration clause.¹⁷⁸ Cortes added that in some cases of pre-dispute arbitration clauses, the English courts have decided that the arbitration clause is fair when the consumer has been negotiated with regarding the terms of the contract.¹⁷⁹ Accordingly, although the Arbitration Act 1996 and the Directive specified the characteristics of unfair terms in the pre-dispute arbitration clause, English courts have proven that the fairness concept may not be featured: thereby invalidating the clause when a consumer is advised of it. Moreover, this variation in the application of the unfairness concept may affect the e-commerce market when there is clarity as to the validity of pre-dispute arbitration for consumer disputes. According to Cortes, there is uncertainty in the enforcement of the pre-dispute arbitration clause for consumer disputes. This must be harmonised, especially in the field of e-commerce, which eventually will become international.¹⁸⁰

However, the situation in other jurisdictions is unlike that in the EU and England, Wales and Northern Ireland, which implemented the EU Directive on Unfair Terms in Consumer Contracts. Some jurisdictions, such as the United States (US), permit a pre-dispute arbitration clause between consumer and companies. According to Howard and Rutledge, the US law

¹⁷⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 6.1.

¹⁷⁷ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993) OJ 2 95/29.

¹⁷⁸ Pablo Cortes, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 69.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

changed following the enactment of the Federation Arbitration Act 1925,¹⁸¹ whereby pre-dispute arbitration agreements became enforceable; it received wide judicial acceptance.¹⁸² This validity of a pre-dispute arbitration clause in some areas of business was challenged by opponents to restore the bargaining position between companies and consumers. This led to a greater interest in banning the pre-dispute arbitration clause in the bill of the Fairness Arbitration Act.¹⁸³ However, it can be argued that the aforementioned statement on the full enforcement of the pre-dispute arbitration clause in the States lacks accuracy.¹⁸⁴ The US law has different standards from the EU standards, which can invalidate pre-arbitration clauses. Although in the US the pre-dispute arbitration clauses are irrevocable, valid and enforceable in most circumstances, there are some instances in which US courts may invalidate the enforceability of the pre-dispute arbitration clause.¹⁸⁵ When the pre-dispute arbitration clause is unconscionable as it is enforced by one party of the contract, it would be considered unenforceable.¹⁸⁶ This type of contract, which is based on the take-it-or-leave-it principle and does not give contracting parties equitable power to negotiate the contract agreement, might be categorised as an unconscionable contract, and thus might be void.¹⁸⁷ Another ground on which a pre-dispute arbitration clause might be unenforced is that the claims in question fall under federal statutes.¹⁸⁸ For example, this may occur when there is a clause that waives non-waivable statutory remedies; or when the cost of the arbitration is high, in which case courts may invalidate the agreement fully or partially.¹⁸⁹ Accordingly, an e-commerce contract including a term that might be considered unconscionable, such as that the business can bring the dispute to an e-arbitration platform, while the consumer cannot influence this term, would be considered unconscionable. The reason for this unconscionability is that it does not bring the contract parties to a state of equitable bargaining power, which is regarded as adhesion. These types of terms might hinder consumer access to justice, such as e-arbitration. Therefore, there is a need to adopt measures by ensuring the preclusion of unconscionable terms in e-commerce consumer contracts in order to guarantee consumer access to justice.

¹⁸¹ Federation Arbitration Act 1925 (United States).

¹⁸² Peter Rutledge and Anna Howard, 'Arbitrating Disputes Between Companies and Individuals: Lessons From Abroad' (2010) 65(30) Dispute Resolution Journal 30, 32.

¹⁸³ *ibid.*

¹⁸⁴ See notes 160 and 161.

¹⁸⁵ Christopher Drahozal and Raymond Friel, 'A Comparative View of Consumer Arbitration' (2005) 71(2) Arbitration 131, 135.

¹⁸⁶ Richard Alderman, 'Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform' (2001) 38(1) Houston Law Review 1237, 1248.

¹⁸⁷ *ibid.*, 1247.

¹⁸⁸ Christopher Drahozal and Raymond Friel, 'A Comparative View of Consumer Arbitration' (2005) 71(2) Arbitration 131, 135.

¹⁸⁹ *ibid.*

Having discussed the invalidity of the pre-dispute arbitration clause in some jurisdictions, such as the EU, UK and USA, it is worth discussing this invalidity compared with the pre-mediation agreement. They share one similarity, which is that all agreements are agreed before the dispute arises, but the arbitration agreement before the dispute is not permissible in some jurisdictions whereas the pre-mediation agreement is permissible. The reason for these differences can be categorised into two aspects. One fundamental feature is that the mediation agreement usually will not preclude the consumer's right to go to court,¹⁹⁰ whereas the pre-dispute arbitration agreement generally waives the consumer's right to go to court.¹⁹¹ Another feature of the mediation agreement in which it differs from the pre-dispute arbitration agreement is the informal nature of mediation, whereby the consumer can opt-out of the mediation process at any time. And the mediation settlement usually has no binding effects. However, in arbitration, consumers are bound by a more formal procedure, which ends with a binding arbitral award. Therefore, according to the EU directive, the pre-dispute mediation agreement might be invalidated when it waives the consumer's right to go to court, and when it is concluded before the dispute has materialised.¹⁹² Accordingly, the mediation agreement that does not meet the requirement mentioned in article 43 of the EU Directive would be considered void.

Unlike the EU, England, Wales and Northern Ireland, the Arbitration in Saudi Arabian Law allows consumer disputes to be decided in Arbitration.¹⁹³ Article 2 of the Saudi Arbitration Law 2012 permits any contractual relationship to be arbitrated in this way:

‘Without prejudice to the rules of the Islamic Sharia and the rules of the international conventions in which the Kingdom is included as one of its parties, the provisions of this law are valid for any arbitration, whatever the nature of regulatory relation of the dispute is, if the arbitration is conducted inside the Kingdom, or if it is a commercial international arbitration held abroad, and its parties agreed that it shall be subject to provisions of this law. The provisions of this law are not valid for the disputes of the personal status or the matters that cannot be reconciled’.¹⁹⁴

Accordingly, all contractual relationships which the parties of the contract have agreed to have arbitrated under the Saudi Arbitration Law will be permissible, excluding matters that cannot

¹⁹⁰ Council Directive 2013/11/EU of The European Parliament and of The Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ 2 165/63.

¹⁹¹ *ibid.*

¹⁹² *ibid.*

¹⁹³ Arbitration Law 2012 (Saudi Arabia).

¹⁹⁴ *ibid.*, Article 2.

be solved by arbitration such as those mentioned in article 2.¹⁹⁵ Moreover, the Saudi Arbitration Law 2012 allows the pre-dispute arbitration clause without any distinctions as to the contractual parties.¹⁹⁶ Article 9 of the Arbitration Law 2012 permits disputants to include a pre-dispute arbitration clause in the contract before the dispute arises, whether the arbitration agreement is mentioned in the contract or the agreement is independent.¹⁹⁷ Article 9 states that:

‘...The arbitration agreement may be earlier to the dispute, whether it is independent, self-contained, or contained in a particular contract. Also, the arbitration agreement may be later to the dispute, even if there is a suit concerning it before the competent court. In this case, the agreement shall specify the issues covered by the arbitration, or the agreement is null and void...’¹⁹⁸

Hence, the Saudi approach in relation to the arbitration of consumers’ disputes permits these disputes to be adjudicated by arbitration. Saudi law appears to be different in the context of consumer arbitration from the aforementioned approaches of the EU, England, Wales, Northern Ireland, and the US, where consumer disputes are to some extent permitted to be adjudicated by arbitration. Moreover, the Saudi Arbitration 2012 law allows a pre-dispute arbitration clause, which is not permissible in some jurisdictions, as mentioned earlier. Furthermore, the Saudi Arbitration Law permits consumer dispute arbitration after the dispute arises, without consideration of the amount of the dispute, without excluding the consumer’s right to go to court, and before or after the dispute has materialised. This difference between the Saudi jurisdiction and other jurisdictions in the context of consumer arbitration reveals the clear variation between Saudi law and the abovementioned jurisdictions. Although this feature of the Saudi Law can be seen as a privilege in that the dispute can be resolved out of court, which offers a variety of consumer dispute resolution options, the law does not mention other features that might protect consumer rights: for example, unfair terms and individual negotiation of the arbitration clause in the contract. The only requirement of the Saudi Arbitration Law 2012 is that the arbitral award must be in accordance with Islamic law, which might be regarded as a measure to protect consumer rights, examples being the aforementioned measures adopted in Islamic law to protect consumer rights, such as consumer rights and the right of redress in Islamic law.¹⁹⁹ Although these Islamic consumer rights might be perceived as different from

¹⁹⁵ Examples of disputes that cannot be solved by arbitration in Saudi Law are family disputes and criminal cases, for which the Criminal Court is the competent jurisdiction as per the Saudi Judiciary Law 2007.

¹⁹⁶ Arbitration Law 2012 Article 9 (Saudi Arabia).

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ See chapter 3 section 3.7.2.

those adopted in other jurisdictions, the measures will be applied in Saudi courts to which consumers refer their disputes. Therefore, Islamic law in relation to consumer rights and redress will be applied whether in Saudi courts or in arbitration since the arbitral award must comply with Islamic law.

4.4.2 Examples of online arbitration providers

- **Modria:**

The Modria Dispute Resolution provider was launched by Colin Rule and others after working for the eBay resolution centre from 2003 in 2011.²⁰⁰ Modria's primary aim is to provide ODR technology to ADR providers and businesses to solve disputes of low and high value, with a variety of dispute types ranging from e-commerce consumer disputes to divorce and tenant disputes.²⁰¹ The process begins with the diagnosis module, which collects relevant information from disputants and helps filter complaints.²⁰² This step is followed by the negotiation module, which reviews the issues and asks disputants to propose a settlement. It also permits the software to suggest a settlement that disputants are willing to accept. The next step is moving the dispute to the mediation module where a human mediator will be appointed to reach an amicable solution. However, if the abovementioned steps are not successful, the dispute will be taken to the arbitration stage where a human arbitrator will adjudicate. Accordingly, the three stages of dispute resolution comprising negotiation, mediation and arbitration are suitable for consumer e-commerce low value disputes. Moreover, Modria does not see itself as a mechanism for solving low value disputes for e-businesses only; it also aims to solve high value disputes as well as disagreements on complicated issues. For example, it deals with disputes ranging from a simple e-commerce dispute to more difficult issues such as patent disputes.²⁰³ This feature places Modria as a more advanced mechanism for resolving e-commerce disputes, rather than restricting itself to simple disputes, such as those covered by the eBay resolution centre:²⁰⁴ for instance, items that are not delivered or are not as described.

²⁰⁰ Barton Benjamin, 'The Lawyer's Monopoly – What Goes and What Stays' (2014) 82(6) Fordham Law Review 3067, 3075.

²⁰¹ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 52.

²⁰² Barton Benjamin, 'The Lawyer's Monopoly – What Goes and What Stays' (2014) 82(6) Fordham Law Review 3067, 3076.

²⁰³ Johnson Eric, 'Modria Wants You To Settle Your Workplace Problems (and Even Patent Disputes)' (*Allthingsd*, 24 November 2014) <<http://allthingsd.com/20121124/modria-wants-you-to-settle-your-workplace-problems-and-even-patent-disputes-online/>> accessed 29 May 2019.

²⁰⁴ See chapter 4 section 2.

As an example of Modria's support in providing ODR for e-businesses, the AAA has agreed to develop a partnership with Modria to create an ODR platform that can administer AAA's New York No Fault (NYNF) disputes.²⁰⁵ In essence, the platform is used to allow consumers to submit questions or feedback about services from which they might benefit.²⁰⁶ This platform enables the consumer to see how their complaint is addressed. The aim of this feature is to allow the consumer to understand the treatment of their complaint. If the consumer remains unsure about the service, they can submit the claim and follow the aforementioned process, which involves an arbitration stage if the complaint is not resolved by negotiation or mediation.²⁰⁷ The website manages more than 100,000 cases annually. This service comprises document management, analysis and preparation of application forms.²⁰⁸

The platform provides new hearing scheduling mechanisms that enable AAA staff to perform their process optimisation duties and develop the process.²⁰⁹ Safe online communication software will enable parties to interact directly with AAA staff and the other party in order to bring greater efficiency to the resolution process.²¹⁰ According to Rule, the platform will add some features to the case processing. For example, acceleration of the dispute process allows security and transparency interaction between parties, and provides more convenience to disputants and AAA by allowing consumers to seek redress.²¹¹

- **American Arbitration Association AAA:**

The support of Modria in providing ODR to business and ADR entities can be seen in the AAA arbitration services. As mentioned above, the AAA provides online arbitration for several types

²⁰⁵ Colin Rule, 'AAA Chooses ODR for Its Largest Volume Case Load' (2014) 1(1) International Journal of Online Dispute Resolution 97.
<https://www.elevenjournals.com/tijdschrift/ijodr/2014/1/IJODR_2014_001_001_007> accessed 15 April 2021.

²⁰⁶ Modria uses this process for taxpayer's complaints and other disputes. For more information see Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 52.

²⁰⁷ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 53.

²⁰⁸ *ibid.*

²⁰⁹ Colin Rule, 'AAA Chooses ODR for Its Largest Volume Case Load' (2014) 1(1) International Journal of Online Dispute Resolution 97.
<https://www.elevenjournals.com/tijdschrift/ijodr/2014/1/IJODR_2014_001_001_007> accessed 15 April 2021.

²¹⁰ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 53.

²¹¹ Colin Rule, 'AAA Chooses ODR for Its Largest Volume Case Load' (2014) 1(1) International Journal of Online Dispute Resolution 97.
<https://www.elevenjournals.com/tijdschrift/ijodr/2014/1/IJODR_2014_001_001_007> accessed 15 April 2021.

of disputes and handles the largest cases that are partially resolved online,²¹² such as consumer, family and tenant disputes. However, this section focuses on consumer disputes.

The online application can be filed on the AAA website.²¹³ The online application requires information such as name and email, and the type of filing: namely, arbitration or mediation. Moreover, the online application contains the requirements of the new filing, which are to complete the filing form, upload a copy of the arbitration or mediation agreement, and pay the relevant fees. Next, the requested documents must be attached to the form and sent to the AAA. Below is a screenshot from the AAA to illustrate the documents and information required for online arbitration.²¹⁴

The screenshot shows the 'FILE ONLINE' interface for the American Arbitration Association. At the top right, it says 'Welcome to File Online' and 'AMERICAN ARBITRATION ASSOCIATION'. The main heading is 'FILE ONLINE'. Below this, there are instructions: 'To file a new case, you will need to:' followed by a list: 'Complete and upload a filing form', 'Upload a copy of the arbitration or mediation agreement', 'Pay the appropriate fee', and 'Please note that all fields below are mandatory and you must attach at least one document.' There are links for 'Filing Forms' and 'AAA Rules and Fees'. The form includes input fields for 'Your Name', 'Your Phone', 'Your Email', and 'Are you filing for arbitration or mediation?'. A text area for 'Please enter any special notes or instructions below' is present. Below that is an 'Attaching Documents' section with an 'Attach' button and a table with columns 'File Name' and 'Actions'. At the bottom, there is a 'File Now' button and a footer with copyright information and social media links.

One of the requirements for the online application is to attach the filing form. There is a specific filing form for consumer disputes, entitled ‘Demand for Arbitration’, in which the applicant is required to state whether the party sending the filing documents is the consumer or the business. Moreover, the filing party is required to explain the dispute in the form, specify the monetary value and state what other relief they are seeking, such as arbitration costs or interest. The

²¹² Gabrielle Kaufmann-Kohler and Schultz Thomas, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004) 34.

²¹³ The online application is available on <<https://www.adr.org/SimpleFile/faces/SimpleFile.jsf>> accessed 31 May 2019.

²¹⁴ The online form is available on <<https://www.adr.org/SimpleFile/faces/SimpleFile.jsf>> accessed 31 May 2019.

applicant is required to complete the form and attach a copy of the contract containing the arbitration agreement.²¹⁵ Below is a copy of the filing form for a consumer arbitration demand:

Complete this form to start arbitration under an arbitration agreement in a contract.

1. Which party is sending in the filing documents? (check one) <input type="checkbox"/> Consumer <input type="checkbox"/> Business		
2. Briefly explain the dispute:		
3. Specify the amount of money in dispute, if any: \$		
4. State any other relief you are seeking: <input type="checkbox"/> Attorney Fees <input type="checkbox"/> Interest <input type="checkbox"/> Arbitration Costs <input type="checkbox"/> Other; explain:		
5. Identify the requested city and state for the hearing if an in-person hearing is held: City: _____ State: Select...		
6. Please provide contact information for both the Consumer and the Business. Attach additional sheets or forms as needed.		
Consumer:		
Name: _____		
Address: _____		
City: _____	State: Select...	Zip Code: _____
Telephone: _____	Fax: _____	
Email Address: _____		
Consumer's Representative (if known):		
Name: _____		
Firm: _____		
Address: _____		
City: _____	State: Select...	Zip Code: _____
Telephone: _____	Fax: _____	
Email Address: _____		
Business:		
Name: _____		
Address: _____		
City: _____	State: Select...	Zip Code: _____
Telephone: _____	Fax: _____	
Email Address: _____		

Business' Representative (if known):		
Name: _____		
Firm: _____		
Address: _____		
City: _____	State: Select...	Zip Code: _____
Telephone: _____	Fax: _____	
Email Address: _____		
Date: _____		

7. Send a copy of this completed form to the AAA together with:

- A clear, legible copy of the contract containing the parties' agreement to arbitrate disputes;
- The proper filing fee (filing fee information can be found in the Costs of Arbitration section of the Consumer Arbitration Rules); and
- A copy of the court order, if arbitration is court-ordered.

8. Send a copy of the completed form and any attachments to all parties and retain a copy of the form for your records.

To file by mail, send the initial filing documents and the filing fee to: AAA Case Filing Services, 1101 Laurel Oak Road, Suite 100, Voorhees, NJ 08043.

To file online, visit www.adr.org and click on **File or Access Your Case** and follow directions. To avoid the creation of duplicate filings, the AAA requests that the filing documents and payment be submitted together. When filing electronically, no hard copies are required.

Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. If you believe that you meet these requirements, you must submit a completed Affidavit for Waiver of Fees, available on our website.

The aforementioned procedure for filing a case is implemented when the arbitration agreement names the AAA. There is another procedure to be followed when the consumer and the business

²¹⁵ More information on the consumer form can be found at https://www.adr.org/sites/default/files/Consumer_Demand_for_Arbitration_Form_1.pdf accessed 31 May 2019.

do not have an arbitration agreement, or do not name AAA. In this case, the parties must send the AAA an agreement in writing, signed by both the consumer and the business, to have their case arbitrated through the AAA. The agreement must explain the dispute and list the names and addresses of the consumer and the business, identify the amount of money in dispute, indicate the location of the hearing, and state the required solution.²¹⁶ Accordingly, the parties shall send a copy of the agreement to the AAA and pay the appropriate filing fees.²¹⁷ Following submission of the arbitration agreement, a party of the dispute may request, or the AAA so decide, that the AAA hold a virtual conference with the disputants or their representatives to address issues such as selection of the arbitrators, probability of mediation resolution, and type of hearing that will be selected by the parties.²¹⁸ Furthermore, disputants can either participate in the arbitration without representation, or be represented by an advisor. The party who intends to be represented shall provide the other party and the AAA with the details of the representative a minimum of three business days in advance of the hearing.²¹⁹ The date, time and place of the arbitration hearing will be decided by the arbitrator. The hearing can be held over the telephone or in person. Disputants are required to commit to responding to suggested hearing dates, and to follow the hearing schedule suggested by the arbitrator.²²⁰

In terms of the procedure of the arbitration, AAA Consumer Arbitration Rules state that the dispute can be resolved by submission of documents as a written procedure without a physical or telephonic hearing. The written procedure applies in circumstances where the amount of the dispute does not exceed \$25,000.²²¹ In other circumstances, where the amount of the dispute is over that amount, parties of the dispute are entitled to attend a distance hearing that can take place online or via telephonic conference. When appropriate, the arbitrator will decide the type of procedure required based on the dispute as long as all disputants have the same rights to be heard and the same opportunity to present their issue.²²² The arbitrator will permit parties to submit their evidence in alternative ways such as web, internet and telephonic conference and communication.²²³ AAA Consumer Arbitration Rules state that the hearing will not exceed one

²¹⁶ American Arbitration Association, 'Consumer Arbitration Rules' Rule Number 3 (AAA, 1 September 2018) <https://www.adr.org/sites/default/files/Consumer_Rules_Web_0.pdf> accessed 2 June 2019.

²¹⁷ *ibid.*, Rule Number 4.

²¹⁸ *ibid.*, Rule Number 10.

²¹⁹ *ibid.*, Rule Number 25.

²²⁰ *ibid.*, Rule Number 26.

²²¹ *ibid.*, Rule Number 29.

²²² *ibid.*, Rule Number 32.

²²³ *ibid.*, Rule Number 32.

day. However, when a party presents a reasonable cause, the arbitrator might appoint another hearing within seven calendar days, unless parties do not waive the oral hearing.²²⁴

The arbitration award will be issued at the time of the hearing by the arbitrator, unless the disputants agree otherwise. However, if the case is a document-only procedure, the award will be issued within 14 calendar days from the date appointed by the arbitrator for receipt of the final evidence. Nevertheless, AAA may extend the deadline for the award in unusual circumstances.²²⁵ In terms of the cost of the arbitration, the AAA rules have differentiated between the cost when the claimant is the consumer and the cost when the claimant is the business. When the consumer is the claimant, the filing cost is \$200 if the type of the arbitration procedure is the written procedure, in person or telephonic hearing.²²⁶ However, according to the AAA rules, parties of the dispute may agree that the consumer pays less.²²⁷

One of the main positives of AAA is its familiarity with consumer disputes, because of which it has created specific forms and procedures for these disputes, as detailed above. Furthermore, it adopts the use of ICT technologies in which it rules in support of the submission of evidence electronically, adopts virtual conferences to examine the possibilities of mediation solutions, supports the distance hearings which can be utilised for consumer disputes in e-commerce, and facilitates document-only procedures such as the process mentioned in rule 29. Another advantage of the AAA is that it has a specific timeline within which the arbitrator is to render the award at the end of the arbitration process, and within 14 days of the final day of evidence submissions in the documents process. This ensures the delivery of justice within a reasonable period and without delay, especially for vulnerable consumers. This timeline, along with the previous provisions, can be a focal point for the purpose of enhancing consumers' access to justice by utilising one of the ADR mechanisms, such as arbitration. However, although AAA supports solutions to consumer disputes, its rules and procedures govern consumer disputes in general, and do not reveal support for consumer disputes in e-commerce. Moreover, since one of the primary characteristics of e-commerce is the low value of the transaction, a reasonable charge for the arbitration would make the procedure more convenient for e-commerce disputes. The aforementioned cost of the arbitration is \$200, which is payable by the consumer when initiating the claim. This can be perceived as a high cost when compared with the value of e-commerce disputes. This cost of arbitration and ambiguity of support in e-commerce disputes

²²⁴ *ibid.*

²²⁵ *ibid.*, Rule Number 43.

²²⁶ *ibid.*, page 33.

²²⁷ *ibid.*

might indicate that the AAA arbitration procedure is unsuitable for those disputes. Notwithstanding, the AAA rules and procedures are adopted in eBay disputes between eBay and its users or third parties within eBay. This indicates that AAA might provide resolution for e-commerce disputes,²²⁸ and AAA rules should state explicitly the possibility of e-commerce dispute adoption and reconsideration of the consumer cost of arbitration so as to render it reasonable compared with the value of e-commerce transactions.

4.5 E-courts

Recent years have witnessed considerable development of ICT in features such as speedy electronic communication, process and transformation of data, which has had a significant impact on business, personal life and public organisations. This advancement of ICT in electronic communication is nowadays regarded as a necessity of daily life. The changes caused by rapid development of ICT are currently affecting courts and civil proceedings in many countries because of the convenience and effectiveness which made its adoption in the courts inevitable.²²⁹ One example of this impact is that e-justice will inevitably become the forum for consumer redress of e-commerce transactions.²³⁰ But the introduction of ICT into the judicial system in many countries has apparently been accompanied by some reluctance to adopt it. As ICT developed, courts appeared impervious to these developments, being slow to adopt new technology and always moving cautiously in applying innovations to aspects of judicial procedure.²³¹ Notwithstanding, the situation has changed slightly in terms of courts' adoption of new technologies, which have been integrated into law offices and courtrooms. For example, databases are available online, communications between legal entities are conducted by email, and some courtroom procedures have been facilitated by electronic means of presentation such as electronic evidence.²³² However, full integration of ICT into the judicial system has not taken place in parallel with the rapid development of ICT. For instance, due to ICT development, e-commerce facilitates convenient shopping for consumers online without the need for physical

²²⁸ Ebay, 'EBay User Agreement, Arbitration Procedure' (EBay, N/A) <<https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259>> accessed 6 June 2019.

²²⁹ Masanori Kawano, 'Electronic Technology and Civil Procedure – Applicability of Electronic Technology in the Course of Civil Procedure' in Miklós Kengyel and Zoltán Nemessányi (eds), *Electronic Technology and Civil Procedure* (Springer 2012) 3.

²³⁰ *ibid.*

²³¹ Supremecourt.gov, '2014 Year-End Report on the Federal Judiciary' (Supremecourt.gov, N/A) <<https://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf>> accessed 22 July 2019.

²³² Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford Scholarship Online 2017) 154.

appearance in shops, whereas courts have not kept up with these advances by facilitating convenient processes for litigants who seek redress from e-commerce transactions.

4.5.1 Adoption of e-courts

The reason for the insufficient adoption of e-courts may lie in the intentions behind such adoption. The optimisation of the issues in court procedures in order to address the needs of e-commerce consumers has not been the goal in the adoption of e-courts. It has been noted that efforts to adopt technology in courts have stemmed rather from budgetary considerations, as technology, being cheaper than paying employees and managing employees' issues, will undercut the cost of courts run by humans.²³³ Another aim of the movement towards e-courts is to improve efficiency.²³⁴ Surprisingly, there was a focus on financial issues of cost reduction rather than on innovations that can enhance access to justice through digital applications. For example, e-consumer issues in e-commerce can be dealt with by an online court which originates from the same environment as e-commerce. The focus on the adoption of e-courts will be based on the aim of promoting easier access to litigation through the litigants' ability to seek redress online through e-courts. When the focus of the adoption of e-courts is on economic factors such as their lower cost compared to that of running traditional courts, rather than on providing litigants with easier access to courts through online channels, it may have a negative impact on online justice. As per Bindman, regardless of the economic advantages of moving to online courts, there is an increase in inequality and in barriers for a number of people who seek redress when their access to justice is already obstructed by lack of legal aid, high court fees, and reduction in court staff.²³⁵ Besides the economic advantages of adopting e-courts, there are other factors to consider, such as reduction in court fees, provision of legal support for litigants, and the convenience of the e-courts for litigants, saving them the money and time consumed by traditional litigation. These factors, when considered as additional motives besides the reduction in cost compared to that of running the cost of traditional court, may result in easier access to justice for consumers of e-commerce. Accordingly, when there is a move towards digitalisation of the court, there should be prominent consideration of matters related to advancement of access to justice for those who seek redress, for instance through breaking the barriers presented by attendance at traditional courts, rather than of matters of cost reduction.

²³³ *ibid.*, 167.

²³⁴ *ibid.*

²³⁵ Sir Geoffrey Bindman, 'Online Justice: Faster, More Efficient, More Unequal?' (2017) 167 *New Law Journal* 8.

Concern with enhancing consumer access to justice was reflected in the project of launching the e-court in the UK judicial system. At its introduction, an effort was made to consider and seek to overcome the disproportionate expenses of litigation low and medium value disputes. More interestingly, the government's effort to move into e-courts in the UK has included consideration of helping litigants personally with commercial disputes of low and medium value by investing in technology and in courts annexing ADR schemes.²³⁶ This inevitably will benefit e-commerce consumers involved in low-value disputes, who will not have to pay the cost of legal representation, which sometimes outweighs the value of their dispute. Nevertheless, the alleviation of the disproportionate costs is not limited to online courts, as the small claims procedure was also introduced to operate without legal representation, based on consumers' demands.²³⁷ This may pose a risk to e-commerce consumers similar to the shortcomings of the small claims procedure which allows litigation without legal representation, as it is still a court procedure but one that might not be accessible to relatively uneducated consumers with disputes of low to medium value.²³⁸

The movement towards digitalisation of the courts has taken place in several steps in some jurisdictions. It started with the integration of technology as case management, in which technology plays an evident role by enabling distance working outside the physical court's official working hours.²³⁹ As this partial digitalisation in courts was introduced, their internal processes were transferred from paper-based to computer-based procedures, leading to judges, lawyers and court officials relying less on paper and more on computers for dealing with court-related work.²⁴⁰ The second step in digitalisation of the court occurred during the movement towards e-government, which involves the use of IT to make the operation of government departments' processes more efficient and transparent in their dealings with citizens, thus increasing the accessibility of various governmental departments to the public.²⁴¹ The court's adoption of the electronic transformation can be seen as part of the broader movement towards e-government which includes greater access to government services. This step has been taken in many jurisdictions. This requirement is even more important in e-commerce disputes where the value of the dispute might be less than the value of travel expenses, which presents e-

²³⁶ Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015).

²³⁷ Roger Smith, 'Civil Courts Structure Review: Interim Report' (2016).

²³⁸ Pablo Cortés, 'The Digitalisation of the Judicial System: Online Tribunals and Courts' (2019) 22 *Computer and Telecommunications Law Review* 141, 142.

²³⁹ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press 2017) 155.

²⁴⁰ *ibid.*

²⁴¹ Beth Simone Noveck, 'The Future of Citizen Participation in the Electronic State' (2005) 1 *I/S: A Journal of Law and Policy* 1,4.

commerce consumers with obstacles and sources of grievance in pursuing such disputes. The third step of the movement towards digitalisation of the court is taken when technology is fully utilised to transform access to justice into online procedures, reflecting a significant development in the delivery of justice and legal services.²⁴² This incorporation of ICT in the courts can be seen as the movement towards e-justice and the delivery of justice to litigants at their convenience, enabling consumers to seek redress easily without the need to go to court physically, but in the same environment where their e-commerce transaction was conducted without the need to go to physical shops.

The recent movement towards the digitalisation of court procedure arose during the coronavirus pandemic. This development can be labelled the fourth step of the movement towards digitalisation of court litigation procedures. As the coronavirus is easily transmitted between people, some countries have imposed lockdowns that limit physical access to courts and most organisations.²⁴³ The recently imposed policy witnessed utilisation of electronic solutions such as telephonic conferencing, video conferencing, and electronic submission of documents.²⁴⁴ Although these solutions helped courts to operate during the pandemic, they also posed several challenges to courts, litigants, and justice: for example, litigants' access to the internet, logistical issues for courts in relation to virtual procedure, and litigants' interaction with judges during the hearing, which may affect their rights. However, it needs to be noted that the courts' transformation during the pandemic has been driven not by the desire to virtualise the litigation procedure, but by restrictions imposed by governments on physical access to most organisations, including courts. Based on this consideration, it can be said that courts might return to physical access to court and traditional litigation procedures once the restrictions are lifted.

Courts adopting online systems are similar in many respects to ODRs that incorporate ICT. They are similar in their incorporation of ICT and online services as well as in online mediation services offered by the courts. However, consideration of these similarities between e-courts and ODRs when adopting ICT into their systems for resolving e-commerce disputes begs the question of the possibility of the court handling dispute resolution by means such as mediation or negotiation. It is argued that public dispute resolution provided by government through e-courts offers values of interest to litigants and meets the requirements for the delivery of justice,

²⁴² Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press 2017) 155.

²⁴³ Julie Baldwin, John Eassey and Erika Brooke, 'Court Operations During COVID-19 Pandemic' (2020) (1) *American Journal of Criminal Justice* 743, 747.

²⁴⁴ *ibid.*, 749.

so that its adoption by a competent public authority for use in e-commerce disputes would be more convenient. According to Rule, 'To a large extent, government is the ideal host for dispute resolution, because government has a strong incentive to resolve disputes to keep society functioning smoothly. Government is also a good host for dispute resolution because it usually has no vested interest in the outcome of most of the matters it is in charge of deciding.'²⁴⁵

In view of the above argument, would the mediation process offered by the court offer the same results as the mediation process offered by a private mediation or negotiation process on e-commerce platforms such as eBay dispute resolution or Amazon? If e-commerce consumers can seek redress via the platform on which the transaction occurred, would they go to the court instead? Would e-courts offer the same redress through the mediation or litigation process as that offered by ODR platforms such as eBay and Amazon? Disputants who entered into a mediation process offered by the court prior to their litigation would enter this process as mediated by the judge who would adjudicate their case later. This differs from the mediation process in a private ODR, as the mediator cannot act beyond his role as mediator, whereas in the e-court mediation process managed by the judge, the judge can act either as a mediator or as a judge. This might incline the disputants towards accepting the judge's mediation resolution, because the judge will adjudicate their case later. This differs from the ODR mediation process whereby the mediator only acts as a mediator and can opt-out of the mediation without further consequences, whereas in the mediation process managed by the judge they might feel reluctant to opt-out, as the judge will adjudicate their case later and might be expected to impose the same outcome.

Therefore, it can be argued that although e-courts facilitate convenient access to litigation for e-commerce consumers, this method might restrict them from pursuing their rights, as the court mediation process could produce a different outcome to that of a private ODR, in which consumers can opt-out of the mediation process at any time.

4.5.2 Initiatives of e-courts in some jurisdictions

More recent developments in technology and its adoption in courts have displayed innovations and re-imaginings in the way courts handle disputes. The recent initiatives towards development and transformation to digitalisation of court procedures occurred before the coronavirus pandemic. As noted above, during the pandemic, most courts in some jurisdictions

²⁴⁵ Colin Rule, *Online Dispute Resolution for Business: B2B, e-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass Publishing 2002) 174.

have changed over to virtual procedures due to government restrictions on physical access to courts and most businesses.²⁴⁶ Based on this consideration, the next initiatives of e-courts will be those considered before the pandemic, as these are initiatives based on desire to transform and utilise electronic procedure.

The transformation to e-court procedure in the UK was adopted in 2015, in the report of the ODR advisory group which recommended the launch of an e-court. The court would handle disputes to the maximum value of £25,000 through online means incorporated in three stages, consisting of online evaluations, online facilitation, and online judgement.²⁴⁷ The first stage includes issue clarification, which helps disputants to understand their dispute and their opportunities for resolving the issue, by providing information on the court website and access to other facilities which explain ways to resolve the dispute before it escalates.²⁴⁸ After evaluation of the dispute, if the parties do not agree on its resolution, they will be entitled to move to the online facilitation stage, where an automated negotiation system operates, in order to reach a resolution before the third stage. In that stage, online judgement will be rendered by online means, resulting in a decision as binding and enforceable as one issued by a traditional court.²⁴⁹ The last stage includes distance methods such as online written processes, trials with telephonic hearing, and video conferencing hearings.²⁵⁰ However, in some circumstances where the previous processes are not effective, the face-to-face process will take place as a last resort.

The above-described initiative of online court in the UK shows a mixed methods approach to dispute resolution as deployed by the court, in which a negotiation process is included to enable an amicable resolution of the dispute. The other facility provided by the court is the availability of the online process which offers distance hearings by means such as video conferencing, written procedures, and telephonic hearings. The availability of these resources in the hearing would benefit the resolution of e-commerce disputes arising between a consumer and a seller who are located in different cities. However, the face-to-face hearing mentioned above, which would take place as a last resort, might not benefit e-commerce disputes when the consumer and the seller are located in different cities so that the consumer has to travel to the court. This

²⁴⁶ See chapter 4 section 4.4.1.

²⁴⁷ Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015).

²⁴⁸ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press 2017) 155.

²⁴⁹ *ibid.*

²⁵⁰ Richard Susskind, 'Online Dispute Resolution for Low Value Civil Claims' (2015)

<<https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf%0Awww.judiciary.gov.uk/reviews/online-dispute-resolution>>.

might not be convenient when these expenses are compared to the value of the dispute and might, therefore, affect consumer access to justice. As a result, the face-to-face hearing within the online court procedure could be considered a disadvantage of the whole process, as it does not differ from the traditional court process in which a face-to-face hearing takes place.

Another recent initiative in the adoption of ICT in a court system is the CRT, an administrative tribunal that handles civil disputes which can be dealt with by a court, in the Canadian context. Not very divergent from the UK online court mentioned above, the CRT has authority over disputes of a value up to Can\$25,000.²⁵¹ The claim process includes several stages. The first stage, the Solution Explorer, diagnoses the dispute and helps disputants to narrow it down, while the software provides the parties with information related to their dispute and offers appropriate solutions.²⁵² If not resolved in the first stage, the dispute, together with the information provided by disputants in that stage, will be referred back to the CRT dispute resolution tool, an automated negotiation tool provided for disputants to negotiate with, which can be turned into a tribunal order upon successful negotiation.²⁵³ The final stage is the adjudication stage which arises when the previous stages have not been successful. The procedure of the final stage takes place by online means using phone or video conferencing, and results in an adjudicatory decision having the same force as traditional court decisions.²⁵⁴ The average duration of the entire CRT process should be between sixty and ninety days. In addition, the CRT rules restrict legal representation of parties to certain circumstances in order to lower the expense of claims by parties who cannot afford the cost of legal representation.

The most recent example of the e-court concept was introduced in China through the merging of ICT communicative development with civil justice, in the form of instant electronic contacts such as WeChat, which is an instant messaging platform and e-mail communication medium. This merger was the result of China's synchronisation with e-commerce over the last two decades, which led to the adoption of e-courts and digitalisation of courts' due process, replacing the traditional face-to-face contact with distance access to justice. As an example, the proposal of the new Civil Procedure Law and People's Court Information Construction Five-year Development Plan from 2016 to 2020 resulted in the implementation of digital and

²⁵¹ Civil Resolution Tribunal, 'Civil Resolution Tribunal' <<https://civilresolutionbc.ca/about-the-crt/>> accessed 30 July 2019.

²⁵² Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press 2017) 155.

²⁵³ *ibid.*

²⁵⁴ Richard Susskind, 'Online Dispute Resolution for Low Value Civil Claims' (2015) <<https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>> accessed 21 July 2021.

technological developments in the litigation process. As a result of the development of court procedures which improve access to justice, article 87 of the Civil Procedure Law of the People's Republic of China articulates the possibility of document submission to the court by electronic means.²⁵⁵ Moreover, a platform for ODR which includes mediation services, online registration, and online trial, was launched by the Supreme People's Court in order to enhance the availability of dispute resolution, thus improving the most recent diversification of technology in dispute resolution.²⁵⁶ In addition, the Court of Internet in Hangzhou was launched in 2016 to address the need for development of the trial system to enhance the trial's efficiency and to resolve internet disputes.²⁵⁷ For example, the plaintiff must initiate the lawsuit by registering on the court website and, following plaintiff name verification, filling out the form for the claim, which will be forwarded to the court.²⁵⁸ The court will arrange pre-trial mediation which will be managed by a mediator who contacts disputants in an attempt to resolve their dispute via the internet, telephone, and videoconference.²⁵⁹ If the mediation is unsuccessful, the case will be referred to the court for adjudication after the plaintiff pays the claim fees.²⁶⁰

The Internet Court in Hangzhou has jurisdiction over disputes arising from the internet, which covers several subject matters in disputes, such as e-commerce, online shopping product liability, and internet services.²⁶¹ The court procedure uses technology to conduct most of its procedures by online means, including the mediation process, initiation of the claim, submission of documents and evidence, and adjudication. As per Wang, the court process reflects most developments in the ICT field within the judicial system, adopted to promote the incorporation of online facilities in economic society and thus facilitate judicial protection.²⁶² This advance in digitalisation of the court system will in turn allow easier application of e-commerce dispute claims to the courts, since the e-consumer normally has access to the internet inasmuch as the dispute arose at this location. Accordingly, when the court allows an online claiming process which includes mediation and adjudication, as in the Internet Court in China, it will increase consumer access to justice. This is evident from the experience of the Zhejiang

²⁵⁵ Civil Procedure Law of the People's Republic of China 2017 (China).

²⁵⁶ Fuhua Wang, 'The History and Future of Civil Judicial Case Management in China' (2018) 6 Peking University Law Journal 237, 267.

²⁵⁷ The Litigation Platform of Hangzhou Internet Court, 'The Litigation Platform of Hangzhou Internet Court' (2016) <<https://www.netcourt.gov.cn/portal/main/en/index.htm>> accessed 1 August 2019.

²⁵⁸ *ibid.*

²⁵⁹ *ibid.*

²⁶⁰ *ibid.*

²⁶¹ Fuhua Wang, 'The History and Future of Civil Judicial Case Management in China' (2018) 6 Peking University Law Journal 237, 269.

²⁶² *ibid.*, 267.

High People's Court E-commerce which received 14,502 dispute applications.²⁶³ Hence, the measure saves consumers time and expense, and increases their access to justice.

This practice of the Court of Internet in China represents a significant move towards digitalisation of court procedures and adjudication, in turn helping litigants to resolve their disputes more conveniently by allowing them to initiate a claim electronically and move onto a mediation process which will be followed by adjudication if the mediation is not successful. The aforementioned high number of applications received by the Zhejiang High People's Court E-commerce is evidence of the success of the application of technology to court systems to enhance the consumer's access to justice. However, this also raises the question of the unknown number of consumers who might not have access to the court's online application due to lack of knowledge of the electronic procedures. Thus, ignorance of the court's online procedures may hinder those people's access to justice. Accordingly, the issue of illiteracy of online court processes and legal procedure, and literacy of online procedure, needs to be addressed when applying online litigation processes to e-commerce disputes. According to Cortes, one of the main risks of the online court is that it is a court procedure at the end, which might be accessible only to those who are well aware of court procedure affecting medium and high value disputes.²⁶⁴ This issue of lack of knowledge could be reinforced by another factor, namely the aim of the online court. Since one of these aims is to provide litigation without legal representation, the access to justice of a consumer who lacks knowledge of the court process and is barred from legal representation might be hindered by those factors. Therefore, there is a need to facilitate consumer-assisting measures such as online application assistance at courts' websites or by consumer agencies before beginning the e-litigation.

4.6 Conclusion

The field of ADR has been penetrated by the global advance of technology, resulting in the incorporation of ICT and ADR. This incorporation has led to the formation of ODR which operates ADR over the internet and includes features that are not otherwise included in ADR, such as automated negotiation mechanisms. These ODR mechanisms, which include mediation, negotiation, and arbitration, have some advantages that might be beneficial to consumers engaged in e-commerce transactions. Since these transactions are based on distance deals and speedy processes, the ODR mechanisms offer distance procedures which allow consumers to

²⁶³ Chen Guomeng and Yu Zhiqiang, 'Practical Exploration and System Construction on the Court of Internet in China' (2017) 5 China Legal Science 3, 10.

²⁶⁴ Pablo Cortés, 'The Digitalisation of the Judicial System: Online Tribunals and Courts' (2019) 22 Computer and Telecommunications Law Review 141, 142.

seek redress online, while offering speedier procedures than those of court litigation. However, these advantages have faced challenges such as the security of ODR procedures which might affect the adoption of ODR by consumers and official organisations.

The adoption of ODR in relation to e-commerce disputes has been supported by a considerable number of organisations and judicial bodies. The European Parliament issued Regulation No 524/2013 on online dispute resolution for consumer disputes. Also, some cases in the UK jurisdiction have included the suggestion by judges that parties to disputes be allowed to resolve them by ADR, with court litigation treated as a last resort. In addition, in order to avoid restricting the rights of consumers to go to court to settle their disputes, some jurisdictions have issued regulations that invalidate the pre-dispute arbitration clauses for the protection of consumer rights. Some jurisdictions, moreover, have not considered that the terms that are not negotiated by parties to the contract, such as the pre-dispute arbitration clause, might be regarded as unfair and unenforceable. The reason, beyond this restriction, may lie in empowerment of consumer choice in deciding on their venue for seeking justice, as they typically are considered the weaker party in the contract. However, in the Saudi Arabian jurisdiction the Arbitration Law 2012 does not restrict the pre-dispute arbitration clauses in consumer disputes. Accordingly, all contractual relationships in which the parties of the contract have agreed to have arbitrated according to the Saudi Arbitration Law will be permissible. The only requirement of the Saudi Arbitration Law 2012 is that the arbitral award must be in accordance with Islamic law, which might be regarded as a measure designed to protect consumer rights.²⁶⁵

The abovementioned analysis of ODR mechanisms and e-court litigation processes suggests that they provide some convenience for consumers in e-commerce disputes. Therefore, these ODR and e-court litigation processes can offer great opportunities for resolving consumer disputes arising from e-commerce, especially for Saudi consumers, inasmuch as the Saudi e-commerce market lacks both redress mechanisms and e-commerce regulation for overseeing the Saudi e-commerce market and thereby avoiding disputes before they arise.

²⁶⁵ See chapter 3 section 3.6.2.

Chapter 5: ODR as a Mechanism for Enhancing Consumers' Trust in E-commerce in Saudi Arabia

5.1 Introduction

Although there were some governmental initiatives to regulate e-commerce transactions, resulting in the 2019 ECL,¹ the new law has failed to address some issues related to consumer dispute resolution procedures. Therefore, this research aims to fill the gap in relation to consumer dispute resolution in e-commerce, identifying some issues of substantive and procedural rights for consumers in e-commerce, as well as suggesting a way to improve the dispute resolution procedure for e-commerce disputes and thus to allow easier access to justice for e-commerce consumers in Saudi Arabia.

The purpose of this chapter is to provide a suggestion for improving current procedures for e-commerce disputes in Saudi Arabia. Based on this purpose, the ECL issued in 2019 in Saudi Arabia will be discussed and analysed to identify any issue related to resolution of e-commerce disputes. Moreover, the chapter looks at the ambiguity of the competent court to adjudicate e-commerce disputes and the different procedures applied to different e-commerce disputes, such as disputes related to the subject matter of the e-contract, or disputes related to delivery of goods. It also provides analyses of current ADR methods available in Saudi Arabia, such as amicable dispute resolution and arbitration, and considers how these methods can be applied to e-commerce disputes. This will be followed by a suggestion for reform of Saudi laws in relation to e-commerce disputes, based on examination of different laws and mechanisms that have been applied in some advanced jurisdictions.

5.2 How the Saudi Laws are Interpreted and Applied

This sub-section discusses the Saudi Arabian laws in detail and examines in depth how these laws, in areas such as arbitration, dispute resolution and ECL, are interpreted and applied, since, as discussed earlier, Saudi Arabian law is unique in its nature, its uniqueness being derived from its sources.²

5.2.1 Interpretation and application of the Law of Electronic Commerce 2019

Consumers face several obstacles when dealing with online e-commerce transactions, since the interactions between the consumer and the seller are conducted at a distance. Accordingly,

¹ See chapter 3 section 3.4.3.

² Background of Saudi laws, source of law and theories of Islamic laws were discussed extensively in chapter 3.

consumer protection is a broadly debated issue in e-commerce. For example, consumers cannot test products physically as they would in traditional shopping, there may be delays in the delivery of products, and there are questions concerning the security of financial transactions. These examples of consumer-related e-commerce issues could be challenging in the absence of a legal framework to regulate e-commerce transactions. Saudi Arabia has taken a step forward to regulate this field by issuing the Law of Electronic Commerce 2019.³ This law was issued following a lengthy bill within the regulatory authority. Before issuance of the law of e-commerce, the Saudi e-commerce field was not regulated, which might have negatively affected the e-commerce boom during the introduction of the internet in the country at a time when this law was lacking. It contains 26 articles, the first of which defines the consumer, e-commerce, and some related terms applicable to e-commerce.⁴ In addition, the law states the terms and conditions that must apply to providers and consumers of e-commerce services,⁵ and the sanctions for violating the provisions of the law.⁶ The law also contains articles related to the return of products,⁷ reaction to services, and the competent court for the resolution of e-commerce disputes.⁸ However, since the focus of this thesis is on ODR, the following analysis of ECL will concentrate on the articles related to that focus, including ODR, consumer trust, and suitable mechanisms for resolving e-commerce disputes.

The law defines e-commerce as ‘(a)n activity of an economic nature practiced, in whole or in part, by electronic means by the Service Provider and the Consumer, in order to sell products, or provide services, or advertise products or services, or exchange data in relation to said products or services’.⁹ Moreover, the law has defined the Consumer as ‘the person who practices E-commerce in order to obtain products or services provided by the Service Provider’.¹⁰ This definition of the consumer may encounter some obstacles when the law is applied, for several reasons. The law of e-commerce has defined the consumer as any person who deals with e-commerce, without categorising the person, which thus may include natural persons and businesses, whereas the definition of the consumer in the literature refers to a person acting outside of his/her profession. The concept of the consumer includes some features such as acting outside of one’s profession,¹¹ in comparison with other jurisdictions which have

³ Royal Decree No M\126 Date 10\7\2019 for Issuance of Electronic Commerce Law.

⁴ Electronic Commerce Law 2019 Article 1 (Saudi Arabia).

⁵ *ibid.*, Articles 6, 7, 8, 9.

⁶ *ibid.*, Article 18.

⁷ *ibid.*, Article 13.

⁸ *ibid.*, Article 22.

⁹ *ibid.*, Article 1.

¹⁰ *ibid.*

¹¹ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 37.

defined the 'Consumer' as an individual acting for purposes that are 'wholly or mainly outside that individual's trade, business, craft or profession'.¹² Also, the European Directive on Consumer Rights 2011 has defined the consumer as follows: "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession'.¹³ The Law of Electronic Commerce 2019 has not identified the features of acting outside the scope of the one's profession.

The Law includes several articles addressing consumer issues related to electronic communication. As per the Law, the service provider is obliged to offer a suitable mechanism for communication with consumers in order to correct any mistakes in communication. Article 4 of the Law clearly gives the consumer the right to rectify any mistake in electronic communication. The article states, 'If the Consumer commits an error in an Electronic Communication and the communication technology did not allow for a correction, the Consumer may notify the Service Provider of the error immediately upon becoming aware of it within the time limit set by the Regulations. This notification is then deemed to be an error-correction if the Consumer has not benefited from the Service Provider's product or otherwise derived utility from it.'¹⁴ This provision clearly requires service providers and e-businesses who offer services to consumers to provide suitable e-communication facilities enabling consumers to rectify mistakes prior to implementation of the contract. Lack of capacity for rectification from the side of the seller or the service provider might be considered violation of the Law and could create legal complications.

Although this provision appears to favour the consumer by enabling him to rectify communication mistakes, the Implementing Regulation of the MOC clarifies the time span for rectification of mistakes as being within 24 hours of the time the e-communication is sent.¹⁵ The Implementing Regulation of The MOC requires the service provider or e-business to correct the e-communication unless the consumer has benefitted from the product or derived utility from the service.¹⁶ Also, the Implementing Regulation of the MOC allows the service provider to stipulate in the contract their right to rectify a communication sent to the consumer, subject to informing the consumer of the rectification, as long as the service provider becomes aware of the mistake prior to the shipment of the product or commencement of the service.¹⁷

¹² Consumer Rights Act 2015 S2 (3) (United Kingdom).

¹³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ 2 304/64.

¹⁴ Electronic Commerce Law 2019 Article 4 (Saudi Arabia).

¹⁵ Implementing Regulation of Electronic Commerce Law (2020) Article 4 (Saudi Arabia).

¹⁶ *ibid.*

¹⁷ *ibid.*

Accordingly, the consumer has the right to either implement the contract after rectification or terminate the contract and recover all the cost.

In addition, the Law has assigned the consumer the right to terminate the contract. Article 13 of the Law has clearly established the consumer's right of contract termination within seven days after delivery of the product or from a date in the contract for provision of services, subject to non-use of the product or service.¹⁸ This right of termination of the contract cannot be exercised if the product or service was delivered in accordance with an agreed specification.¹⁹ Moreover, some products, such as software, books, and food, are excluded from the consumer's right of contract termination.²⁰ And as a result of exercising the right of contract termination, the consumer shall incur all related costs, such as that of delivery, unless agreed otherwise.²¹ Although the law excludes books from the consumer's right of return, some service providers such as Amazon permits return of these items purchased from Kindle within specified time of purchase, as a result of which return the store will block access to the digital book.

Unlike termination of the contract which results in the consumer incurring all costs, the consumer also has the right to terminate the contract and to return of all costs paid under the contract if the service provider delays delivery exceeding fifteen days from the date the contract is concluded or from the agreed date.²² This provision allows flexibility for the service provider by taking into consideration any expected delays in delivery of products. Moreover, if additional delay is expected or the service provider faces difficulty in fulfilling the terms of the contract, service provider has to inform the consumer of these difficulties or delays, and the consumer has the right to recover all costs incurred unless the delay is due to force majeure.²³ However, although the law has addressed consumer-related issues in terms of delays to the delivery, it has not addressed issues related to damage to the product and how to investigate whether it was damaged during shipment or was shipped damaged. In case it was damaged after the product was shipped, then it is the carrier's responsibility. The law of e-commerce has not addressed this issue of damaged products, nor has it addressed issues related to the shipment of e-commerce products. The responsibilities of the carrier were addressed in the Regulation of Parcels Transport 2019,²⁴ which includes a provision for guaranteeing the rights of consumers

¹⁸ Electronic Commerce Law 2019 Article 13 Clause 1 (Saudi Arabia).

¹⁹ Electronic Commerce Law 2019 Article 13 Clause 1\A (Saudi Arabia).

²⁰ Electronic Commerce Law 2019 Article 13 Clause 2 (Saudi Arabia).

²¹ Electronic Commerce Law 2019 Article 13 Clause 1 (Saudi Arabia).

²² Electronic Commerce Law 2019 Article 14 Clause 1 (Saudi Arabia).

²³ *ibid.*

²⁴ Regulation of Parcels Transportation (Saudi Arabia).

when they have their products shipped.²⁵ The carrier is responsible for compensating consumers if their products were damaged or lost.²⁶ Although this issue is addressed in the Regulation of Parcels Transportation, it may face challenges when the consumer needs to prove by whom the product was damaged. Moreover, the consumer may encounter complexities in complaining about the service provider's delivery of products, as complaints about products come under the jurisdiction of the MOC, whereas complaints about delivery come under that of the CITC.

There are several dispute resolution procedures for consumers in e-commerce in Saudi Arabia, varying according to the type of the dispute. As explained earlier, the General Courts have general jurisdiction over disputes arising from the application of the Law of Electronic Commerce 2019,²⁷ but there are exceptions to the General Court jurisdiction. Article 19 of the ECL has assigned the committee in MOC jurisdiction over imposition of sanctions related to disputes concerning violation of ECL. Article 19 of the ECL states that:

'1. One or more committees shall be formed pursuant to a decision by the Minister to consider violations of the provisions of this Law or its Regulations and to impose the penalties stipulated in Article 18 of this Law, provided the committee is composed of not less than three members, including at least a legal advisor. Committee decisions shall be issued by majority vote. The Minister shall, pursuant to a decision issued thereby, determine the committee work procedures and remuneration of its members. 2. The penalty imposed shall be proportionate with the gravity and frequency of the violation, the damage it caused to others, and the size of activity of the service provider.'²⁸

Another dispute resolution procedure available for consumer disputes in e-commerce in Saudi Arabia is related to delivery and damage of products. Disputes related to damage and delivery of products fall under the jurisdiction of another regulation. The Regulation of Parcels Transportation addressed the issues of delivery of products and retains jurisdiction over disputes related to e-commerce even after the issuance of ECL 2019.²⁹ Moreover, disputes related to delivery and damage during transportation are adjudicated by a committee under the supervision of the CITC.³⁰

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Electronic Commerce Law 2019 (Saudi Arabia).

²⁸ *ibid.*

²⁹ Regulation of Parcels Transportation (Saudi Arabia).

³⁰ *ibid.*

In relation to dispute resolution procedures available for consumer disputes in e-commerce in Saudi Arabia, the competent court shall adjudicate disputes arising from the application of the Law of Electronic Commerce 2019 as well as disputes that are not related to violation of ECL or delivery and damage of e-commerce products.³¹ For consumers, there might be a lack of clarity concerning the applicable procedure for consumer disputes in e-commerce. For example, when consumers refer their delivery dispute to the General Court, the court will receive the dispute and will issue its decision that the dispute falls outside its jurisdiction, without giving the consumer guidance as to the applicable procedure. This reluctance to give the consumer such guidance might leave consumers in a weaker position compared with businesses who are normally familiar with complex litigation procedure and the venue of the dispute. The jurisdiction of the General Court is limited to contractual relationship disputes. Application of the provisions of the law will be in accordance with Islamic law as per the law of the country.³² Since the country applies Islamic law, the applicable law when applied by the court must not conflict with Islamic law. Accordingly, the competent court, when applying article 4 of the Law, will look for its equivalent in Islamic law in order to ensure its compatibility with the latter, and to justify the outcome of the court's judgement.³³ This provision of e-communication rectification has its origin in principles of Islamic law. The equivalent of the right of communication rectification is the right of stipulation. The right of stipulation is interpreted in Islamic law as the right to stipulate a time for consideration of whether to conclude, terminate, or review the contract.³⁴ This right of consideration is lawful in Islamic law when the parties to the contract agree to offer each party time for consideration, as the Prophet Mohammad (peace be upon him) allows each party to a contract to set his condition unless this condition is illegal in Islamic law, in which case it will be unenforceable. The Prophet Mohammad (peace be upon him) said 'The Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful'.³⁵ Therefore, the court's application of the provision set by the Law of Electronic Commerce will be based on the compatibility of the provision of the law with the right of stipulation for consideration, which has a basis in Islamic law. However, according to Islamic law, this right of consideration must also contain a time limit in order to avoid detriment to the other party to the contract as a result of holding the commodity.³⁶

³¹ Electronic Commerce Law 2019 Article 22 (Saudi Arabia).

³² See chapter 3 section 3.1.4.

³³ This practice of courts is widely adopted in the country. For more, see notes number 14, 15. See, Frank Vogel, *Saudi Business Law in Practice: Laws and Regulations as Applied in the Courts and Judicial Committees of Saudi Arabia* (Hart Publishing 2019) 95.

³⁴ Sultan Alhashmi, *Electronic Commerce and Its Provisions in Islamic Law* (Dar KonuzIshbelia 2011) 159.

³⁵ Mohammed Al-albani, *Sahih Sunan Abi Dawod* (Almaarif Library 1998) 395.

³⁶ Sultan Alhashmi, *Electronic Commerce and Its Provisions in Islamic Law* (Dar KonuzIshbelia 2011) 162.

For the application of this right of return in the court, which applies Islamic law as well as national laws, the right of termination of the contract originates from two contract rights in Islamic law: the right of inspection and the right of defect. It is acknowledged in Islamic literature that inspection of the item is compulsory for the protection of consumers' rights.³⁷ The reason for including the consumer's option to inspect the item is that the seller cannot describe the item as it is in reality and the consumer might consider it, on inspection, to differ from its description, which may affect the latter's consent to the purchase.³⁸ Shariah law adopted the option of inspection in the contract in order to satisfy the need for consent by the contractual parties, since contracts in Islamic law are based on consent.³⁹ In addition, the right of defect is an option in the contract to return the goods if there is a defect, so that the party to the contract who receives the product or service will not be obliged to pay for the goods until he has inspected them.⁴⁰ The binding force of the contract will be affected if the consumer finds a defect and is not satisfied. The Law of Electronic Commerce 2019 has acknowledged these rights in order to empower consumers and to establish their rights, which originally emanate from Islamic law.⁴¹ Therefore, to apply these rights, the court will interpret the rights of contract termination in line with the rights of defect and of inspection along with the articles that have assigned the right of return to consumers. These interpretations by the court enable it to justify the judgement as being in accordance with Islamic law. As mentioned earlier, Islamic law guarantees consumer rights in relation to right of redress, right of inspection and return of the goods when they are faulty, besides which, Islamic law requires all contracting parties to disclose all information related to the subject matter of the contract to avoid risk and uncertainty.⁴² Courts in Saudi Arabia will apply the aforementioned articles of ECL in accordance with Islamic law. However, it is still questioned whether all the protection measures in ECL satisfy consumer needs in relation to the e-commerce market.

5.2.2 Competent court adjudicating disputes according to E-commerce Law

The law has included an article which assigns the competent court to adjudicate all disputes arising from the application of article 22 of the ECL 2019, which states: 'The competent court shall adjudicate disputes including claims for compensation arising from the application of the

³⁷ See chapter 3 section 6.1.

³⁸ Matlob Mahmud, 'Option of Inspection: Comparative Study Between Islamic Law and Laws' (1976) 18(1) Journal of Legal and Economic Science 483-514.

³⁹ *ibid.*

⁴⁰ Abdullah Alsakaker, 'Type of Defect in which Option of Defective is Enforced' (2015) 9(1) Journal of Sharia Science 195-287.

⁴¹ Mohammed Noor, 'Principles of Islamic Contract Law' (1988) 6(1) Journal of Law and Religion 115-130.

⁴² See chapter 3 sections 3.6.1 and 3.6.2.

provisions of the Law'.⁴³ In order to identify the competent court for adjudicating disputes arising from e-commerce, the Law of Civil Procedures (LOCP) 2013 has assigned the General Court,⁴⁴ which has general jurisdiction over disputes excluded from other courts' jurisdictions such as Commercial, Labour, and Enforcement courts, among several courts to adjudicate these types of disputes, as the Law of Judiciary states: 'General courts shall have jurisdiction to consider all lawsuits, cases, presentations and the like, which are beyond the jurisdiction of other courts...'⁴⁵ Accordingly, the General Courts will be the competent authority, based on the fact that other courts in the country, such as Commercial Courts, are specialists within specific jurisdictions. The General Courts will apply the Law of Electronic Commerce 2019 in accordance with Islamic law as per the Saudi Basic Law of Governance 1992 and the Law of Judiciary 2007.⁴⁶ Therefore, since courts in the country will apply and interpret the law in accordance with Islamic law, the following analyses will include interpretation of the articles in line with Islamic law principles, in anticipation of the expected application of the law before the General Courts.

In order to specify the jurisdiction of the General Court over e-commerce disputes in Saudi Arabia, the law contains a specific article related to the place of business and of service providers. Clause 1 of article 3 of the law states: '1-For the purposes of applying the provisions of the Law, Place of Business of the Service Provider indicates: a- For the Trader, the Place of Business is the address registered in his commercial register. b- For the Practitioner, the Place of Business is the place he determines in his electronic shop, unless otherwise proven....'⁴⁷ For registered businesses and service providers, the place of business will be as stated in the registration, whereas for unregistered service providers, the place of business will be as stated on the e-commerce platform. This place of business or practitioner is relevant to determine the jurisdiction of the court. In cases where the business or practitioner is the defendant, the place of business registration specifies the jurisdiction of the court. It is therefore the plaintiff who must sue the business in the court of the business domicile. As specified in the LOCP 2013, 'Jurisdiction shall belong to the court within whose jurisdiction the defendant's place of residence falls....'⁴⁸ However, if the user of e-commerce, whether seller or service provider,

⁴³ Electronic Commerce Law 2019 Article 22 (Saudi Arabia).

⁴⁴ The General Court in Saudi Arabia has the widest jurisdiction over disputes which are outside the jurisdiction of other courts. The General Court is one among six courts in the Saudi legal system which include: General Courts, Commercial Courts, Criminal Courts, Labour Courts, Family Courts. For more, see Law of Civil Procedures 2013 (Saudi Arabia).

⁴⁵ Civil Procedures Law 2013 Article 31 (Saudi Arabia).

⁴⁶ Discussion of how Islamic law is applied in the country is found in chapter 3 and chapter 5 section 1.1.

⁴⁷ Electronic Commerce Law 2019 Article 3 (Saudi Arabia).

⁴⁸ Civil Procedures Law 2013 Article 36 (Saudi Arabia).

does not have a place of business, the place of the business will be his legal place of residence as stated by other laws. Clause 3 of article 3 of the Law of Electronic Commerce 2019 states: ‘3- If the Practitioner is a natural person who does not have a Place of Business, the recognized Place of Business shall be his legal residence, according to the standards and conditions specified by the Regulations’.⁴⁹ The legal place of residence of a natural person when conducting a business, without specifying his legal place of business, will be referred to as his legal place of residence in accordance with the registered national address.⁵⁰ For the application of this law, article 2 states that ‘the provisions of the Law shall apply to each of the following: a- The Service Provider within the Kingdom. b- The Practitioner outside the Kingdom who offers products or services within the Kingdom through means that allow the Consumer to have access to the products or services. c- The Consumer’.⁵¹ The service provider and consumer within the Kingdom who were mentioned in clauses A and C of the previous article will have a registered place of residence, as either a service provider or a natural person as specified in article 3 of the Law.⁵² However, the law has not explained how the registration is to be established of a legal place of business or practitioner outside the Kingdom who offers services to consumers within the Kingdom. Clause 3 of article 3 of the Law states that ‘For the Practitioner, the Place of Business is the place he determines in his electronic shop, unless otherwise proven’.⁵³ Accordingly, consumers who experience disputes with practitioners outside the Kingdom will face obstacles when they need to sue those practitioners. Also, the Law has not clarified the process of registration of the legal place of those practitioners, in order to apply provisions of the Law to them. The place of registration is of importance because it simplifies the procedure for suing the business, as the defendant should be sued in its domicile under the Law of Civil Procedure 2013. The Law of Civil Procedure 2013 covers issues of businesses who are registered outside the country, whereas this issue has not been clarified in the law of e-commerce which includes transactions which are mostly of an international nature. The LOCP 2013 states that ‘...If the defendant does not have a place of residence in the Kingdom, the jurisdiction shall belong to the court within whose jurisdiction the plaintiff’s place of residence falls’.⁵⁴ For example, when a foreign company offers services or products to Saudi consumers and the company has neither a registration nor a place of residence in Saudi Arabia, the jurisdiction falls to the General Court whose jurisdiction lies within the consumer’s

⁴⁹ Electronic Commerce Law 2019 Article 3 (Saudi Arabia).

⁵⁰ Implementing Regulation of Electronic Commerce Law 2020 (Saudi Arabia) Clause 2 of Article.

⁵¹ Electronic Commerce Law 2019 Article 2 (Saudi Arabia).

⁵² Electronic Commerce Law 2019 Article 3 (Saudi Arabia).

⁵³ *ibid.*

⁵⁴ Civil Procedures Law 2013 Article 36 (Saudi Arabia).

place of residence, as per article 36 of the LOCP 2013. Although this may seem favourable to consumers, as they can sue the business in the consumer's domicile as per the LOCP, enforcement of the judgement will be complicated when the business is not registered in Saudi Arabia, in contrast with a business which is registered in Saudi Arabia. In the latter case, although the consumer has to sue the registered business in their domicile within the Saudi jurisdiction, enforcement will be easier as they can enforce the judgement by applying to the General Court, as per the Law of Enforcement (LOE) 2012.⁵⁵

The new law of e-commerce offers the consumer rights prior to and after the conclusion of the contract. The abovementioned right to withdraw, right to correct errors, and right to return because of delays may have the potential to facilitate dispute resolution in e-commerce in Saudi Arabia. However, although the new law has guaranteed some substantive rights for consumers such as these rights of return, withdrawal, and correction of errors, it lacks special procedural rights for consumers of e-commerce when and after a dispute arises. The new law refers consumers and businesses to procedures of a competent court for resolving disputes arising from application of the new ECL, but without any special procedural rights surrounding e-commerce disputes.⁵⁶ The lack of procedural rights might negatively impact consumers' access to justice as regards the manner of enforcing their substantive rights guaranteed by ECL. Guaranteeing substantive rights and disregarding consumers' procedural rights might affect enforcement of the consumers' substantive rights, as per Wrkba, who observed that empowering consumers with substantive rights will not protect the consumers unless these rights are safeguarded by procedural rights with which to enforce them.⁵⁷ Accordingly, since the new law does not prescribe special procedures, the general procedures of the LOCP 2013 is the applicable procedure as per article 31 of the law.⁵⁸ This would allow e-commerce disputes to be treated like any other disputes that are resolved by the General Court, as per the LOCP 2013. This referral to the Civil Law Procedures without special procedural rights affecting e-commerce might pose a difficulty for e-consumers as they would lose the convenience of e-commerce transactions which are entered into at the place where consumers live. In the case of procedures applied by the court, which are mainly based on the Civil Law Procedures, consumers must sue the business in their domicile or at the place where the business is registered. Also, this would create higher costs through having to pay for transportation in order to file suit against the business. As per Yuthayotin, since consumers are the weaker party with

⁵⁵ Law of Enforcement 2012 (Saudi Arabia).

⁵⁶ Electronic Commerce Law 2019 Article 22 (Saudi Arabia).

⁵⁷ Stefan Wrkba, *Consumer Access to Justice Revisited* (Cambridge University Press 2014) 28.

⁵⁸ Civil Procedures Law 2013 Article 31 (Saudi Arabia).

less knowledge of legal processes, they should be treated differently in terms of the jurisdiction rule.⁵⁹ Moreover, the consumers' access to justice movement emerged to overcome issues related to litigation power and rebalance the bargaining power between consumers and other parties in order to enable the consumer to handle any dispute they may face in the society.⁶⁰ Therefore, in the case of e-commerce transactions taking place over the internet, the new law of e-commerce should have addressed this issue by granting e-consumers special procedural rights in order to make e-commerce disputes convenient.

The inconveniences in the dispute resolution process might leave consumers with their rights ignored due to the great effort needed to enforce them, involving matters such as cost, travel, and complexity. This might lead to injustice in relation to their rights due to the reluctance to seek redress through traditional channels.⁶¹ It can be argued that these issues, including complexity, lengthy process, and lack of knowledge, that overwhelm consumers when they need their e-commerce disputes to be solved, can be bypassed by the provision of procedural rights for consumers, such as special procedures for solving their disputes. As per Cappelletti and Garth, there is a need for special forms of arbitration, negotiation, and mediation in solving consumer disputes, to simplify the process and overcome the problem of the lengthy process of traditional litigation.⁶²

Accordingly, since the new law has not allowed special procedures for e-commerce disputes, the general procedural rights of dispute resolution that exist for other disputes will also be the procedural rights for e-consumers. These rights consist of the procedures mentioned in the Law of Civil Procedure 2013 as court procedure for the traditional litigation process, in addition to the procedures mentioned in the Arbitration Law 2012,⁶³ and procedures in the Dispute Resolution Regulation 2013⁶⁴ for ADR. Therefore, the procedures for e-commerce disputes in the abovementioned law, the LOCP, the Arbitration Law, and the Dispute Resolution Regulation will be discussed and analysed to determine whether they are convenient for e-

⁵⁹ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 93.

⁶⁰ See chapter 2 section 2.1.2.3.

⁶¹ For more criticism on traditional litigation, see Consumers' right to effective and easy access to dispute resolution, chapter 2 sub-section 2.1.3.

⁶² Mauro Cappelletti and Bryant Garth (eds.), *Access to Justice VOL I: A World Survey* (Sijthoff and Noordhoff 1978) 59. For more on the lack of effective redress in traditional litigation and the need for effective dispute resolution process, see chapter 2 section 2.3.2.

⁶³ Arbitration Law 2013 (Saudi Arabia).

⁶⁴ Dispute Resolution Regulation 2013 (Saudi Arabia).

commerce disputes or whether there should be a call for suggestions to implement special procedural rights for e-commerce disputes.

Also, the Law of Electronic Commerce 2019 assigned the General Court to adjudicate disputes arising from the application of the law, but the law has not included any provision for assigning an authority to receive consumers' complaints and resolve their disputes before the court in order to enhance consumers' access to justice. The traditional litigation style may not be suitable for e-commerce disputes, as these transactions are speedy by nature whereas traditional litigation is lengthy by nature.⁶⁵ Therefore, the unification of complaint services related to e-commerce is needed to ease the procedure of consumers' complaints and enhance their access to justice.

5.2.3 Court procedures in relation to E-commerce Law

ECL has assigned the General Court for adjudicating e-commerce disputes.⁶⁶ The broad aspects of procedure are specified in the Law of Judiciary 2007,⁶⁷ and more precisely in the LOCP 2013 and its Implementing Regulation.⁶⁸ Accordingly, since ECL has not prescribed a special procedure or venue for solving consumer disputes arising from its application, the general court for this purpose will apply the procedure that is applied in all civil disputes. According to the LOCP 2013, a lawsuit can be filed by the plaintiff or his representative.⁶⁹ This provision of the law would allow e-commerce consumers to file the lawsuit without a lawyer or representative, in which case the plaintiff has to adhere to the requirement of filing the lawsuit as mentioned in article 41 in the Law of Civil Procedure. The lawsuit must include the defendant's relevant information such as name and place of residence, as well as plaintiff's place of residence.⁷⁰ On the day the case is to be considered, the litigants must appear in person or through their legal representative, who shall be eligible to act as a legal representative according to the law.⁷¹

In relation to e-commerce transactions which take place online, the Law of Civil Procedure states that the hearing shall be held in an open court unless the judge decides to hold it in a closed session.⁷² Also, the law states that argument during the hearing shall be oral, which shall

⁶⁵ For more, see comparison between online litigation and traditional litigation in chapter 4 section 1.

⁶⁶ Electronic Commerce Law 2019 Article 33 (Saudi Arabia).

⁶⁷ Law of Judiciary 2007 (Saudi Arabia).

⁶⁸ Law of Civil Procedures 2013 (Saudi Arabia).

⁶⁹ *ibid.*, Article 41.

⁷⁰ *ibid.*, Article 41\1.

⁷¹ *ibid.*, Article 49.

⁷² *ibid.*, Article 64.

not preclude the presentation of statements or evidence in written memoranda.⁷³ However, although the law permits oral arguments and submission of written memoranda, it also requires parties to the dispute to attend the hearing and submit all documents during it. The exception to the provision of hearing attendance has arisen during the coronavirus pandemic.⁷⁴ After completion of the arguments and the written submission, the court shall decide to pronounce the judgement,⁷⁵ and within 20 days from the pronouncement of the judgement, the court shall issue a decree containing a summary of the case.⁷⁶

As per the ECL 2019, the abovementioned procedure set by the LOCP 2013 is the only procedure through which to enforce consumers' rights. Accordingly, rights that are mentioned in the law of e-commerce such as the right to withdraw, the right to correct, and information rights, are limited to enforcement by the court procedure. However, the court litigation process in consumers' disputes and e-commerce disputes has been criticised for its long duration and delays. As mentioned above,⁷⁷ the traditional litigation process does not suit the e-commerce environment due to its inconvenience and cost. This scenario of inconvenience in the dispute resolution process is likely to leave consumers with their rights ignored due to the great effort needed to have recourse to it, which might lead to injustice in relation to their rights.⁷⁸ Due to reluctance to seek redress through traditional channels, many regulations and procedures have been designed to assist consumers in defending their rights and support them with easier methods of dispute resolution, including effective due process in order to ensure that the disputants are treated in accordance with principles of fairness and justice.⁷⁹

5.2.4 ADR procedure for E-commerce disputes

ECL has not included any provision for ADR for e-commerce disputes. Therefore, the general procedures for ADR, such as arbitration and amicable dispute resolution, are the only alternatives to the court litigation procedure.

In relation to e-commerce transactions which occur online, the arbitration law is silent on the procedure at the arbitration venue. Accordingly, the arbitration procedure can be conducted

⁷³ *ibid.*

⁷⁴ During the coronavirus pandemic, courts have changed over to distance submission of documents and allowed video conferencing hearing. This transformation of hearings is regulated by the Supreme Council of Judiciary No. 17388 on 5/10/1441H.

⁷⁵ Law of Civil Procedures 2013 Article 159 (Saudi Arabia).

⁷⁶ *ibid.*, Article 166.

⁷⁷ See chapter 2 section 2.1.3.

⁷⁸ Hein Kotz, 'Public Interest Litigation: A Comparative Survey' in Mauro. Cappelletti (ed), *Access to Justice and the Welfare State* (European University Institute 1981) 87.

⁷⁹ Julia Hornle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009) 17.

online as the law has not required a face-to-face arbitration hearing. This advantageous hearing process may have the potential to serve e-commerce dispute resolution, as the arbitration law is silent regarding the adequacy of online arbitration hearing processes and the about consumer disputes which relate to consumers and e-commerce online.⁸⁰ However, either the cost of arbitration may be considerably lowered to solve e-commerce disputes, as e-commerce transactions generally are of low value, or online arbitration may have greater potential to serve high goods value e-commerce transactions.

In the commercial context in Saudi Arabia, the tribunal of arbitration can apply the rules of law that are designated by parties of the dispute; also if parties of the dispute agree to authorise the tribunal to decide the dispute equitably, the tribunal can rule on the dispute in accordance with the principles of equity and justice. Moreover, the tribunal shall decide in accordance with the terms of the contract and shall take into consideration any usage of trade applicable to the dispute. However, all the abovementioned rules shall not be in conflict with Islamic law as stated in Saudi laws.⁸¹ The cost of arbitration might be costly depending on the type of the dispute. The Saudi Center for Commercial Arbitration has issued its rules on the cost and fees for the arbitration request. For example, the cost of registration of the arbitration request is 5000 Saudi Riyal for disputes under 200,000 Saudi Riyal. In addition, the cost of the arbitration tribunal is 14% of the disputed value.⁸² The Saudi Center for Commercial Arbitration offers commercial mediation services for disputants. The centre has issued rules for the mediation, which include the right of the parties of the dispute to agree on the applicable mediation rules, if they agree to mediate their dispute under the centre without designating particular rules. Also, parties of the dispute may agree on the venue of the mediation process which can take place via telephone or other electronic means.⁸³ The cost of the mediation request is 1000 Saudi Riyal and 20% of the arbitration cost. Also, the cost of mediators and travel expenses for the mediator could be added to the cost of the mediation.⁸⁴

Another ADR venue consists of the amicable dispute resolution centres. The Ministry of Justice announced the launch of dispute resolution centres in 2013 following the Council of Ministers'

⁸⁰ For more on Arbitration Law analysis, see chapter 3 section 3.

⁸¹ Arbitration Law 2012 Article 5 (Saudi Arabia).

⁸² Saudi Center for Commercial Arbitration, 'Arbitration Rules' (*Saudi Center for Commercial Arbitration*, 1 October 2021) <<https://sadr.org/awareness-publications?lang=ar>> accessed 5 September 2022.

⁸³ Saudi Center for Commercial Arbitration, 'Mediation Rules' (*Saudi Center for Commercial Arbitration*, 1 October 2021) <https://sadr.org/assets/uploads/download_file/Arbitration_Rules_2018_-_Arabic-02.pdf> accessed 5 September 2022.

⁸⁴ *ibid.*

Decision No. 103 regulating amicable dispute resolution centres.⁸⁵ In turn, this regulation was followed by the Minister of Justice's decision on the rules for implementation of the Dispute Resolution Regulation 2019,⁸⁶ which has replaced implementation regulation 2013.⁸⁷ The new regulation has allowed for the amicable dispute resolution process to be conducted online through a digital platform without requiring parties to the dispute to attend the process physically.⁸⁸ Moreover, the regulation has allowed the court to transfer the dispute to the amicable dispute resolution centres at the discretion of the court;⁸⁹ it has also allowed parties to the dispute to refer it to the amicable dispute resolution centres at their own request.⁹⁰ The appointment of the amicable dispute resolution process shall not take place more than 14 days from the time the request is deposited, unless stated otherwise by the parties to the dispute; when one party or parties is/are absent, the resolution centre has to arrange an appointment within 7 days. Moreover, when a party or parties to the dispute is/are absent for the second time, the centre must archive the request and inform the court if the request is to be transferred by the court.⁹¹ In addition, the regulation allows the arrangement of more than one appointment, not exceeding three, but the duration of the dispute resolution should not exceed 30 days from the beginning of the process, the exceptions to this provision being disputes that are subjected to longer duration by the dispute resolution centres, and disputes that are accepted for extension at the request of the mediator.⁹²

The regulation has allowed parties to the dispute to represent themselves or to be represented by a lawyer, an authorised person, or any person whom the parties of the dispute allow to attend. However, whoever attends the process must sign a non-disclosure agreement and adhere to the etiquette of the process.⁹³ Moreover, the regulation states that the resolution process ends if the disputants agree on an amicable resolution, if a dispute party is absent, as mentioned above, if a party withdraws at any stage of the process, if the arrangements of the amicable resolution

⁸⁵ Bureau of Experts at the Council of Ministers, 'The Council of Ministers Approves the Establishment of Dispute Resolution Centres' (*Boegovsa*, 13 April 2013) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/fe7f3828-c47c-4d95-a56c-a9a700f27196/1>> accessed 21 October 2020.

⁸⁶ Implementation Rules of Dispute Resolution Centres (Saudi Arabia).

⁸⁷ *ibid.*, Article 26.

⁸⁸ *ibid.*, Article 14\2.

⁸⁹ *ibid.*, Article 1A.

⁹⁰ *ibid.*, Article 1B.

⁹¹ *ibid.*, Article 14\1.

⁹² *ibid.*, Article 16\7.

⁹³ *ibid.*, Article 15.

exceed the maximum appointment time as stated above, or if the mediator perceives the unfeasibility of continuing the process.⁹⁴

The regulation states that the mediator should issue the settlement minutes, which include all the terms and conditions that the disputants have agreed on, subject to non-violation of Islamic law and other laws of the state.⁹⁵ Also, the minutes should contain other information such as the date, mediator's name, disputants' information, dispute information, and the settlement, with the signatures of the mediator and disputants, which can be replaced by digital signatures.⁹⁶ The minutes of the settlement after approval by the authorised entities are binding and constitute an enforceable document subject to the provisions on enforceable documents in the LOE 2012.⁹⁷

In relation to e-commerce disputes, the process of amicable dispute resolution centres seems simplified and permits a distance process which relates to the environment of e-commerce, allows consumers to settle their disputes by themselves or through representatives, allows a flexible hearing in terms of appointments, and requires mediators to set prompt appointments to avoid delays in the dispute resolution process. However, the dispute resolution regulation does not specify a dispute resolution process for e-commerce disputes. Therefore, the process of dispute resolution centres applies to all disputes submitted to these centres. Moreover, there are limitations applied in the regulation, as the maximum value of the dispute should not exceed more than 20,000 Saudi Riyal.⁹⁸ Disputes of value exceeding that amount cannot be referred to the dispute resolution centres as per article 2 of the Minister of Justice Decision.⁹⁹ The jurisdiction of disputes of value over 20,000 SR are subject to the jurisdiction of the General Court as per the LOCP 2013.¹⁰⁰ Another limitation that applies to all types of dispute resolution is that all court decisions, arbitral awards, and minutes of settlement are non-enforceable documents unless submitted to the enforcement departments in the General Court as per the LOE 2012. The Enforcement Law 2012 requires submission of enforceable documents to the enforcement department by the party to the dispute in whose favour the decision falls. This submission will be followed by the procedures of article 46 of the LOE 2012 such as ban of travel, suspension of financial account, or prevention of any governmental transaction.¹⁰¹

⁹⁴ *ibid.*, Article 18.

⁹⁵ *ibid.*, Article 20.

⁹⁶ *ibid.*, Article 20.

⁹⁷ Law of Enforcement Article 9 (Saudi Arabia).

⁹⁸ 20,000 Saudi Riyal is equivalent to 4000 UK Sterling Pounds.

⁹⁹ Minister of Justice Decision no 5595 Date 29/11/1440H (Saudi Arabia).

¹⁰⁰ Law of Civil Procedures Article 31 (Saudi Arabia).

¹⁰¹ Law of Enforcement Article 46 (Saudi Arabia).

Mediation and amicable dispute resolution are widely rooted in the society in Saudi Arabia.¹⁰² The new regulation of amicable dispute resolution centres has employed certain features that enable the success of dispute resolution procedures, such as duration of the dispute resolution and easy access to the procedure. One important feature that has not been employed is the fact that the effectiveness of dispute resolution has been mainly due to the role of elders and influencers in the society. This feature has not been employed in the new regulation of amicable dispute resolution centres.¹⁰³ With the development of the judicial system in the country, there have been other measures that could make mediation successful such as the cost of litigation. The latter has replaced the feature of effectiveness of elders and influencers in the society. The law of Judicial Cost 2021 stated that the judicial cost will be waived when the parties of the dispute have resolved their dispute amicably before the first hearing.¹⁰⁴ This aspect of the judicial cost would motivate disputants to resolve their dispute, as the loser would have to bear the cost of litigation.¹⁰⁵

The abovementioned procedures as applied to court hearings, ADR such as arbitration, and mediation do not contain specific requirements for consumers' disputes. Although it is permissible for consumers to settle their disputes by arbitration, and the dispute resolution regulation permits distance resolution and includes a simplified procedure which serves e-commerce, there are no specific requirements for protection of consumers during processes of arbitration and amicable dispute resolution. Moreover, in measuring the suitability of dispute resolution centres for settling e-commerce disputes, there is a lack of data on e-commerce disputes settled by these centres due to their recent establishment by a decision of the Minister of Justice.¹⁰⁶

As noted earlier, e-commerce guarantees some substantive rights such as the right to withdraw, the right to correct, and the right to reject. But the ECL has not included any procedural rights provisions for consumer disputes except for referral of consumer disputes to a competent court.¹⁰⁷ Accordingly, general procedures for dispute resolution of all dispute types also apply to e-commerce disputes. The lack of consumers' procedural rights might influence their substantive rights, as the substantive rights are enforced by consumers' procedural rights. As per Wrška, the approaches of both procedural and substantive rights support consumer

¹⁰² See chapter 3 section 3.3.2.

¹⁰³ *ibid.*

¹⁰⁴ The law of Judicial Costs 2021 Article 16/6 (Saudi Arabia).

¹⁰⁵ The cost of litigation was discussed earlier in chapter 3 section 3.2.5.

¹⁰⁶ Minister of Justice Decision no 5595 Date 29/11/1440H (Saudi Arabia).

¹⁰⁷ Electronic Commerce Law Article 22 (Saudi Arabia).

protection. However, lack of consumer procedural rights renders the strongest substantive rights unsatisfactory for consumers, as these rights will be difficult to enforce.¹⁰⁸ Therefore, it can be said that, although ECL includes consumer protection measures, it lacks special procedural rights for consumers that would enable them to enforce their substantive rights when disputes arise.

5.3 Suggestions for Reforms of Saudi Laws

This sub-section proposes suggestions for reform of the related laws, such as arbitration, dispute resolution, and ECL, by comparing the best practices of these laws in other jurisdictions as discussed in chapter 4. The analyses of the directives and regulations will be aimed at reform of Saudi laws and will not contradict Saudi laws or principles.

5.3.1 Comparative study between Saudi Laws in relation to e-commerce and dispute resolution, EU Directive on consumer ADR, and EU regulation on ODR

The previous section focused on ECL and dispute resolution procedures in relation to e-commerce disputes and court procedures regulated by the Civil Procedures Law 2013, as well as out-of-court dispute resolution procedures regulated by ADR instruments, such as the Arbitration Law 2012 and the Dispute Resolution Regulation 2019.¹⁰⁹ The new ECL guaranteed some rights for consumers of e-commerce such as the right to withdraw, the right to reject, and the right to rectify.¹¹⁰ Although the law has assigned the General Courts to resolve disputes arising from e-commerce,¹¹¹ it has failed to guarantee procedures prior to court action that indicate how rights for consumers of e-commerce could be enforced. Besides the General Court procedure, which is regulated by the Law of Civil Procedure, out-of-court procedures to enforce substantive rights in e-commerce disputes are regulated by the Arbitration Law 2012 and Dispute Resolution Regulation 2019, which have been analysed.¹¹² However, those procedures have not included a special procedure for consumers or any procedural rights for consumers of e-commerce. In order to propose a reform of Saudi law in relation to procedural rights for e-consumers, the ODR measures for e-commerce disputes in the EU will be compared to Saudi laws. This is because the EU Directive on ADR for Consumer Disputes focuses on out-of-court dispute resolution, and the Regulation on Online Dispute Resolution focuses on

¹⁰⁸ Stefan Wrzka, *Consumer Access to Justice Revisited* (Cambridge University Press 2014) 28.

¹⁰⁹ See chapter 5 section 5.1.4.

¹¹⁰ See chapter 5 section 5.1.1.

¹¹¹ Electronic Commerce Law 2019 Article 22 (Saudi Arabia).

¹¹² See chapter 5 section 5.1.4.

online solutions for e-commerce disputes.¹¹³ Also, the EU directive includes procedural rights for e-commerce consumers and provides ADR procedures, while the EU regulation on ODR provides an ODR platform specially designed for e-commerce disputes. These EU ADR and ODR procedures for e-commerce will be analysed and compared to the Saudi ECL in order to determine whether they would be suitable for filling the gaps in Saudi ECL. In addition, the EU has introduced the new deal for consumers, which aims to improve protection for e-commerce consumers in some matters such as privacy and storage of consumers' personal data.¹¹⁴ Moreover, since ADR procedures in Saudi Arabia constitute a general procedure without any special procedure for consumers or for e-commerce disputes, both the directive and the regulation will be analysed with reference to ADR in Saudi Arabia. The analyses of the EU Directive and Regulation on consumer disputes will provide a comparison to the Saudi approach in order to propose reforms to Saudi ECL in relation to consumer procedural rights and to improve e-commerce transactions.

5.3.2 EU Directive on ADR for Consumer Disputes and EU Regulation on ODR

The EU Parliament has issued the Directive on Alternative Dispute Resolution for Consumer Disputes 2013/11 to enhance ADR coverage and raise all consumers' awareness through registered ADR entities within member states.¹¹⁵ The Directive offers consumers faced with problems an alternative to traditional litigation. It concerns disputes over sales contracts arising from contractual obligations between consumer and seller.¹¹⁶ This ADR process is mainly managed by an ADR entity which intervenes between consumer and seller to propose or impose an amicable solution. Moreover, the Directive describes the ADR procedure as an adjudicative and consensual extrajudicial process created by the desire of parties to achieve a resolution of the dispute.¹¹⁷ However, some disputes are excluded from application of the Directive, such as disputes between sellers or between entities in other sectors, such as higher education and the health service.¹¹⁸ The consumer, who is defined in the Directive as a natural person acting out of his profession, craft, or business, has to lodge the complaint against a professional seller.¹¹⁹

¹¹³ ADR directive and ODR Regulation have been analysed earlier in chapter 4.

¹¹⁴ European Commission, 'A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement' (*European Commission*, 11 April 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3041> accessed 28 December 2020.

¹¹⁵ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2013) OJ L165/63.

¹¹⁶ *ibid.*, Article 2.

¹¹⁷ *ibid.*, Article 4/1, G.

¹¹⁸ *ibid.*, Article 2/2.

¹¹⁹ *ibid.*, Article 4/1, A.

E-commerce disputes fall within the jurisdiction of the Directive. However, when the dispute involves a consumer or seller established in a non-EU member state, it is excluded from the Directive's jurisdiction.

In order to raise consumers' confidence when dealing with sellers, the Directive introduces procedural rules that consumers should comply with.¹²⁰ For example, ADR entities can refuse to deal with any dispute based on the fact that the consumer did not contact the seller to solve the dispute as a first step; or that the dispute is frivolous or vexatious, has been submitted to another ADR entity, or is being considered by a court; or that the value of the dispute is under or above the specified dispute value; or that the consumer has not sent the dispute within the pre-specified time limit which should not be less than one year from the date the consumer has sent his complaint to the seller; or that the type of the dispute could negatively affect the operation of the ADR entity.¹²¹ Nevertheless, when an ADR entity is unable to consider a dispute based on its procedures, it shall provide both parties of the dispute with a justification by explaining the grounds for not accepting the dispute, within three weeks of receiving the complaint.¹²²

These standards guarantee that both the ADR entity and individuals are qualified to submit disputes to these ADR procedures following the aims of the Directive, so as to enhance both consumers' and sellers' confidence in the process. The natural persons accountable for managing ADR need to have the necessary experience, including an overall comprehension of the relevant law.¹²³ They must be independent and impartial in order to avoid conflicts of interest.¹²⁴ The ADR entities should allow accessible procedures through which consumers can submit their complaints online and offline,¹²⁵ and must provide publicly available information that explicitly describes the way ADR works.¹²⁶ Also, to improve the efficiency of the procedures, the ADR process is either free of charge or available at a nominal fee for consumers.¹²⁷ Moreover, the process should be concluded within 90 days from the date of the dispute being submitted to the ADR entity.¹²⁸ As per the Directive, member states are required to ensure that an ADR agreement between consumer and seller before a dispute arises shall not deprive consumers of the right to bring their dispute to the court. Moreover, the outcome of the

¹²⁰ *ibid.*, Article 5/4.

¹²¹ *ibid.*, Article 5/4.

¹²² *ibid.*, Article 5/4.

¹²³ *ibid.*, Article 6/1.

¹²⁴ *ibid.*, Article 6/1.

¹²⁵ *ibid.*, Article 8.

¹²⁶ *ibid.*, Article 7.

¹²⁷ *ibid.*, Article 8.

¹²⁸ *ibid.*, Article 8/E.

ADR procedure has binding force only when parties to the dispute are informed of its binding nature in advance, or when parties to the dispute have accepted the outcome. However, according to the Directive, sellers are excluded from this right where national laws have a binding effect on sellers.¹²⁹

- **EU New Deal for Consumers**

The new deal for consumers initiated by the EU aims to improve the enforcement of EU consumer law.¹³⁰ This initiative was taken to overcome infringements of consumer rights and to update EU consumer protection rules in accordance with recent market developments. More specifically, the new deal for consumers will offer greater transparency in e-commerce by letting consumers know whether they are trading with a professional business or a private seller, so that consumers can assess the transaction risk and know whether they are protected by some consumer protection rules only applicable to businesses.¹³¹ The ‘new deal’ also aims to provide transparency in online search results to reflect real paying customers’ experience and reviews.¹³² As part of the new deal for consumers, a new directive has been adopted which offers greater protection of consumers’ data.¹³³ Digital content and digital services are regularly provided by online means, such as social media platforms, whereby the consumer does not pay for the service but provides personal data. Consequently, consumers’ personal data are only covered by EU consumer rights if related to paid services, not free services. As part of the new deal for consumers, the personal data of consumers will be treated as an entity of economic value, as a result of which consideration the directive will be applied to the exchange of personal data for digital services in the same way as to the exchange of data for digital paid services.¹³⁴ The new directive applies to free digital services such as social media platforms which provide digital services to the consumer who provides personal data. Consequently, users of free digital platforms will be considered consumers, as they provide personal information of economic

¹²⁹ For more on analysis of the EU Directive on Alternative dispute Resolution, see chapter 4 section 4.3.

¹³⁰ European Commission, ‘Review of EU consumer law - New Deal for Consumers’ (*European Commission*, N/A) <https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en> accessed 28 December 2020.

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ Directive (EU) 2019/2161 of the European Parliament and of The Council of 27 November 2019, amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (2019) OJ 2 328/7.

¹³⁴ European Commission, ‘A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement’ (*European Commission*, 11 April 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3041> accessed 28 December 2020.

value, and disputes between consumers and free digital platforms will be regulated by the EU ODR platform.

Moreover, as part of the new deal for consumers, the EU commission adopted the new directive on representative actions for the protection of the collective interests of consumers.¹³⁵ The new directive requires member states to introduce a mechanism providing representative actions for the protection of consumers' collective interest against violations of consumer law, and to assign at least one procedure embodying representative action for redress as well as injunctive measures for consumers.¹³⁶ In addition, the directive on representative action aims to empower qualified entities and support them financially to establish action for injunctions and redress on behalf of consumers, for the purpose of guaranteeing consumers' access to justice. The new directive also provides balanced protection for consumers and businesses against abusive collective actions, by applying the 'loser pays' principle, which ensures that the losing party pays the cost of the successful party's lawsuit.

- **Differences and Similarities between Saudi Law in Relation to e-commerce law and dispute resolution and EU's ADR Directive and ODR Regulation**

Comparing Saudi laws on e-commerce disputes with the EU's ADR Directive and ODR Regulation, it can be seen that there are several differences between Saudi laws and the EU's ADR and ODR in relation to e-commerce. One of the differences is the lack of procedural rights affecting e-commerce disputes in Saudi law.¹³⁷ The gap in the Saudi ECL lies in the fact that the Saudi legislators have addressed neither procedural rights for the e-consumer, nor the question of a special procedure for ADR in e-commerce disputes.¹³⁸ Saudi e-consumers are left with either traditional litigation procedures¹³⁹ or the general ADR procedure, which is not designed specifically for e-commerce and consumer disputes.¹⁴⁰ In contrast, the EU ADR Directive and ODR Regulation have addressed e-commerce dispute procedures, specifying special procedures for consumers and e-commerce disputes.¹⁴¹ Also, the ODR Regulation mainly aims to enhance consumers' confidence in the market by allowing them to submit their

¹³⁵ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (2020) OJ 2 409/1.

¹³⁶ *ibid.*

¹³⁷ See chapter 5 section 1.

¹³⁸ See chapter 5 section 1.

¹³⁹ Electronic Commerce Law 2019 Article 22 (Saudi Arabia).

¹⁴⁰ See chapter 5 section 1.

¹⁴¹ Mentioned earlier in this section. For more, see chapter 4 section 2.1.

complaints through the ODR platform.¹⁴² Moreover, the EU law included the foundation of ODR to allow easier access to justice for consumers, whereas the Saudi law lacks ADR and ODR mechanisms to provide convenience for the consumer in e-commerce disputes. These features of the ODR Regulation and ADR Directive would allow consumers to overcome some difficulties with traditional litigation, as consumers lack legal awareness of traditional litigation against well-organised businesses, who are normally better able than consumers to afford the cost of dealing with complex litigation. These features of the ODR and ADR are in line with Cappelletti and Garth's call for special forms of arbitration, negotiation, and mediation for solving consumer disputes, in order to simplify the process and overcome the issue of the lengthy process of traditional litigation.¹⁴³ Another difference between Saudi law in relation to e-commerce law and dispute resolution and the EU Directive and ODR Regulation is that the latter indicated the need to promote amicable dispute resolution,¹⁴⁴ whereas the Saudi law has not indicated this feature in relation to e-commerce even though amicable dispute resolution is widely rooted in the Saudi culture.¹⁴⁵ Moreover, the discussion of the Saudi ECL and the EU's Directive and ODR Regulation reveals a difference in the definition of the consumer between the Saudi ECL and the EU Directive. This difference is based on the characteristics of the consumer in the Saudi ECL, which resulted in the inclusion of any person under the definition of consumer,¹⁴⁶ unlike the EU definition which names specific characteristics of the consumer.¹⁴⁷

Another difference between the Saudi law and the EU in relation to e-commerce and dispute resolution is related to enforcement of the dispute resolution's outcome. Although the ADR Directive and ODR Regulation address procedural rights for e-consumers, they fail to provide mechanisms for enforcing the outcome of consumer dispute resolution processes whether online or offline. The outcome of an ODR procedure is non-binding unless parties of the dispute are informed of its binding nature. Otherwise, parties to the dispute enforce the outcome on the basis of vulnerability, depending on their willingness; unlike the Saudi law which has addressed enforcement-related issues by including the outcome of any amicable dispute resolution within the enforceable documents, which allow any party to the dispute to submit the outcome to the

¹⁴² Preface of Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (2013) OJ L165/1.

¹⁴³ Mauro Cappelletti and Bryant Garth (eds.), *Access to Justice VOL I: A World Survey* (Sijthoff and Noordhoff 1978) 59.

¹⁴⁴ See chapter 4 section 4.3.1.

¹⁴⁵ See chapter 3 section 3.3.2.

¹⁴⁶ See chapter 5 section 5.2.1.

¹⁴⁷ For more on the definition of consumer, see chapter 5 section 5.3.3.

enforcement department of the General Courts.¹⁴⁸ Accordingly, outcomes of dispute resolution through rulings of dispute resolution centres are binding on the disputing parties. The consumer does not need to wait for the seller to be willing to enforce the outcome if it is in the consumer's favour, but can submit the outcome of the dispute to the enforcement department of the General Court.

Comparative analysis between the Saudi law, EU law, and US law in relation to consumer disputes arbitration shows a slight similarity between these jurisdictions in that they permit consumer arbitration.¹⁴⁹ However, there is a difference in application between these jurisdictions in relation to the application of arbitration for consumer disputes. Saudi arbitration law permits all consumer disputes to be adjudicated by arbitration, whereas English law does not permit pre-dispute arbitration unless certain requirements are met.¹⁵⁰ Also, the US law in relation to pre-dispute arbitration clauses has a similarity with the Saudi law in relation to permission for a pre-dispute arbitration clause. However, the US arbitration law includes some instances in which the pre-dispute arbitration clause can be invalidated based on unconscionability.¹⁵¹

It is also worth comparing the ADR directive, the ODR regulation, and Saudi laws on ADR in light of the principles of procedural justice in order to test them as to which regulation is best suited to offer a just procedure for e-consumers. Procedural justice is concerned with principles of justice such as fairness and equality in making decisions and achieving a just outcome.¹⁵² Also, procedural justice concerns the adoption of the two principles of fair procedure for achieving a fair result.¹⁵³ In the case of e-commerce disputes, consumers submit their complaints when disputes arise in order to seek justice. During submission of the complaint and throughout the procedure for reaching an outcome, some elements can be tested in order to identify whether the process of the complaint has applied procedural justice. Procedural justice principles comprise people's belief in the trustworthiness of the justice authority; their perception that the justice authority is motivated to be sincere; respectful treatment during the procedure; neutrality during it, avoiding any bias which affects the outcome; and people's voice

¹⁴⁸ For more on the enforcement of court verdicts, arbitral awards, and amicable dispute resolution, see chapter 5 section 1, on ADR Procedure for E-commerce Disputes.

¹⁴⁹ See chapter 4 section 4.4.1.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² Procedural justice has been discussed and explained earlier. For more, see chapter 2 section 2.1.1.1 on procedural justice.

¹⁵³ See chapter 2 section 2.1.1.1. For more on procedural justice, see Vicente Martinez-tur, Jose M. Peiro, Jose Ramos and Carolina Moliner, 'Justice Perceptions as Predictors of Customer Satisfaction: The Impact of Distributive, Procedural, and Interactional Justice' (2006) 36(1) *Journal of Applied Social Psychology* 100.

to be heard when making any complaint. In proposing legal reform of Saudi Arabian law where it lacks procedural rights, these principles should be incorporated in the law to provide procedural justice for e-consumers. Therefore, the ADR directive, the ODR regulation, Saudi ECL and ADR procedure in Saudi Arabia will be analysed in order to identify whether these laws incorporate procedural justice principles.

The ADR directive provides criteria that should be applied to ADR entities so that consumers receive a fair substantive outcome. The criteria are derived from the ADR directive and include some provisions that relate to the principles of procedural justice; for example, fairness, neutrality, and voice to be heard during the dispute. As per the directive, all ADR entities that decide to be associated with the ODR platform must work in accordance with its standards such as Expertise, Independence and Impartiality,¹⁵⁴ Transparency,¹⁵⁵ Effectiveness,¹⁵⁶ and Fairness.¹⁵⁷ Under these principles, member states are required to ensure that persons in charge of the ADR process have the necessary experience, autonomy and integrity. Moreover, member states have to ensure that ADR entities are not part of any organisation that is involved in the dispute and are not linked to a hierarchical body related to any part of the dispute, in order to ensure the impartiality of the ADR entity.¹⁵⁸ These features apply the procedural justice principle of neutrality to avoid any bias during the process. Another principle of the ADR directive that ADR entities must comply with is transparency of the procedure.¹⁵⁹ ADR entities must ensure that they provide sufficient information about themselves, such as contact information, natural persons in charge of ADR, the types of rules the ADR entity may use as the basis of dispute resolution, and the enforceability of the ADR decisions. This principle of transparency would allow consumers to identify how the outcome of the ADR entity's procedure would be reached, in turn establishing the trustworthiness of the ADR entity. Moreover, the ADR directive requires the ADR procedure to be effective.¹⁶⁰ Accordingly, ADR entities should provide accessible ADR procedures, such as online access to both parties of disputes regardless of their domicile, as well as parties' access to the ADR procedure without

¹⁵⁴ Article 6 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2013) OJ L165/63.

¹⁵⁵ *ibid.*, Article 7.

¹⁵⁶ *ibid.*, Article 8.

¹⁵⁷ *ibid.*, Article 9.

¹⁵⁸ Pablo Cortes and Arno Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress' (2014) 21(1) *Maastricht Journal of European and Comparative Law* 14–38.

¹⁵⁹ Article 7 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2013) OJ L165/63.

¹⁶⁰ *ibid.*, Article 8.

legal representation.¹⁶¹ This provision of the ADR directive is an application of the procedural justice principle of consumers' voice to be heard during the complaint, which can be perceived when the consumer is allowed an easy and accessible complaint procedure with no requirement for legal representation.

5.3.3 Suggestions for the reform of Saudi laws and mechanisms for ODR for E-commerce transactions

The Saudi ECL came into force in 2019. Apart from substantive rights for consumers in Islamic law, the new law of e-commerce is the first law to regulate the field of e-commerce and to assign rights to e-consumers. Although the new law includes some additional substantive rights for e-commerce consumers, it failed to address other important issues of consumer needs such as safe payment methods, delivery, and issues of trust to avoid occurrence of disputes before they arise,¹⁶² special procedures for e-commerce disputes, and procedural rights for e-consumers to facilitate easy dispute resolution and access to justice.¹⁶³ Therefore, after analysis of the Saudi ECL and procedural rights for consumers in Saudi Arabia, and comparison of the Saudi laws in the field of e-commerce with EU directives in relation to e-commerce ADR and ODR, suggestions for reforming the Saudi ECL and lessons that can be learned from the comparative analysis of the ODR in the EU, English law, and US law will be presented to improve the ECL in Saudi Arabia and to recommend ODR for e-commerce consumers' redress.

- **Appropriate definition of the consumer**

The Saudi ECL 2019 defines the consumer as 'the person who practices E-commerce in order to obtain products or services provided by the Service Provider'.¹⁶⁴

It does not distinguish between the unprofessional and professional 'person' who practises e-commerce. The lack of a precise definition of the consumer in Saudi law could lead to the inclusion of other persons and entities who should not be legally considered consumers. This very broad definition might include a business buying within the scope of its profession.¹⁶⁵

¹⁶¹ Pablo Cortes and Arno Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress' (2014) 21(1) Maastricht Journal of European and Comparative Law 14-38.

¹⁶² For more on evidence of lack of trust and how the ODR would increase consumer confidence, see chapter 1.

¹⁶³ Issues of the Saudi ECL was analysed in chapter 5 section 5.1.1; consumer needs in e-commerce in Saudi Arabia were discussed in chapter 3 section 3.5.2.

¹⁶⁴ Electronic Commerce Law 2019 Article 1 (Saudi Arabia).

¹⁶⁵ *ibid.* For more on the definition of consumer in Saudi ECL 2019 see chapter 5 section 1.

Although there is no unified definition of ‘consumer’ internationally,¹⁶⁶ other jurisdictions, unlike Saudi Arabia, as well as the legal academic literature, include consideration of the consumer according to the consumer’s features, such as acting outside the scope of one’s profession. For example, the EU directive on Consumer Rights 2011 has defined the consumer as follows: “‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession’.”¹⁶⁷

In legal academic literature, several criteria for a party of the contract must be considered. Gillies regards consumers as ‘natural persons, acting outside their trade or profession’.¹⁶⁸ It is suggested that for a party of the contract to be considered a consumer, Lastly, consumer transactions should apply to the sale of goods or provision of services for personal use.¹⁶⁹ When these criteria are applied, the contract between the consumer and the other party is unequal due to the lack of bargaining power between the seller and the consumer.¹⁷⁰

So, in order to improve the Saudi ECL, it is necessary to define ‘consumer’ in accordance with criteria that distinguish between consumers and businesses, avoiding the complexity that arises from applying consumer protection concepts to businesses which do not meet the same criteria as consumers. A proper definition of the consumer would protect consumers and exclude others who are protected by other laws. Also, it would help to categorise consumers as weaker parties who need protection. This categorisation would make it possible to diagnose and address consumer issues in the Saudi market such as safe payments methods, language, and questions of consumers’ trust or consumer needs in the Saudi market.¹⁷¹

- **Unified procedure for e-commerce dispute resolution**

The complexity concerning the competent authorities for handling consumers’ disputes does not provide consumers with easy access to justice. Consumer disputes related to the sale are adjudicated by competent courts,¹⁷² whereas consumer disputes related to the damage and delivery of shipments are adjudicated by CITC,¹⁷³ In addition, matters related to the application

¹⁶⁶ Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2nd edn, Hart Publishing 2009) 28.

¹⁶⁷ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (2011) OJ 2 304/64.

¹⁶⁸ Lorna Gillies, *Electronic Commerce and International Private Law: A study of Electronic Commerce Contracts* (Ashgate Publishing Limited 2008) 16.

¹⁶⁹ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 13.

¹⁷⁰ *ibid.*, 14.

¹⁷¹ See chapter 3 section 3.5.

¹⁷² Electronic Commerce Law (2019) Article 22 (Saudi Arabia).

¹⁷³ Regulation of Parcels Transportation (Saudi Arabia); for more see chapter 5 section 1, on Interpretation of e-commerce law 2019.

of ECL provisions are referred to a committee in the Ministry of Trade which is responsible for imposing penalties for violations of these provisions as per article 18.¹⁷⁴ Morris and Aldabbagh argue that the lack of any governmental (or other) agency whose purpose is to protect consumers' rights, as well as the absence of systematic enforcement of rights, significantly inhibits consumers from gaining access to justice and the right to redress.¹⁷⁵ However, instead of assigning one competent authority to protect consumers and to adjudicate consumer disputes, the Saudi legislator assigned many authorities for resolving consumer disputes. This complexity would create difficulty in consumer access to justice. Consumers lack knowledge and have less experience of dealing with the competent authorities who might resolve their disputes. For example, a special dispute resolution process might be offered that addresses consumer needs in terms of the complexity of traditional litigation, and addresses market needs in terms of speedy processes and low cost in relation to the nature of e-consumers' transactions.¹⁷⁶ As per Cappelletti and Garth, there is a need for special forms of arbitration, negotiation, and mediation for solving consumer disputes, to simplify the process and overcome the issue of the lengthy process of traditional litigation.¹⁷⁷ Therefore, it is suggested that consumers would gain easier access to justice through unification of the competent authorities for resolving disputes which arise when consumers' rights are violated.

- **Facilitating a special procedure for consumer dispute resolution**

The Saudi law of e-commerce has guaranteed substantive rights for consumers, such as the right to reject, the right to withdraw, and the right to rectify errors. Nevertheless, the law does not provide a special procedure to be followed when the consumer's substantive rights are violated. Procedures including litigation, negotiation, and ADR for consumers are as significant as the substantive rights, as they assist in enforcing consumers' substantive rights.¹⁷⁸ As per Morris and Aldabbagh, one of the factors that inhibit Saudi e-consumer from seeking redress is the absence of systematic enforcement of rights.¹⁷⁹ The only available procedure in ECL is to refer consumers to traditional litigation through competent courts for solving disputes over e-commerce transactions, with no reference to the availability of ADR options or special procedures to enforce consumers' rights, whereas consumer disputes of low value should be

¹⁷⁴ Electronic Commerce Law (2019) Article 18 (Saudi Arabia).

¹⁷⁵ David Morris and Maha Al dabbagh, 'The Development of Consumer Protection in Saudi Arabia' (2004) 28(1) International Journal of Consumer Studies 2, 13.

¹⁷⁶ See chapter 2 section 2.2.2.

¹⁷⁷ Mauro Cappelletti and Bryant Garth (eds), *Access to Justice VOL I: A World Survey* (Sijthoff and Noordhoff 1978) 59.

¹⁷⁸ For more information on the lack of procedural rights in Saudi ECL, see chapter 5 section 1.

¹⁷⁹ David Morris and Maha Al dabbagh, 'The Development of Consumer Protection in Saudi Arabia' (2004) 28(1) International Journal of Consumer Studies 2, 13.

resolved by ADR to avoid court litigation and leave the latter as a last resort.¹⁸⁰ Although consumer disputes are of a different nature which imposes the need for special care due to several factors,¹⁸¹ the legislator of the ECL has failed to provide special procedures for solving consumers' e-commerce disputes. The complexity of e-commerce consumer dispute resolution would not provide consumers with easy access to justice to enforce consumers' substantive rights. Therefore, special procedures should provide consumers with easier access to justice when their rights are violated.

- **ODR for e-commerce disputes:**

Saudi ECL lacks a dispute resolution procedure that is suitable for, and compatible with, e-commerce in terms of convenience, speed, and cost, which makes e-consumers rely on traditional litigation in order to enforce their rights.¹⁸² Cappelletti and Garth argue that there is a need for special forms of arbitration, negotiation, and mediation for solving consumer disputes, to simplify the process and overcome the issue of the lengthy process of traditional litigation.¹⁸³ The availability of a simplified procedure for consumer disputes may overcome issues that relate to the complexity of dispute resolution venues for e-commerce disputes, which inhibits consumers from exercising their right to access to justice.¹⁸⁴

Several forms of ODR can be suggested to reform Saudi ECL, which may serve the purposes of e-commerce and be consistent with Saudi cultural and legal backgrounds. Amicable dispute resolution is widely adopted in Saudi culture through Saudi customs as well as from the religious perspective. It has been noted in Saudi courts that a wide range of disputes end in amicable resolution and that Saudi judges act as mediators when they adjudicate cases.¹⁸⁵ Also, various disputes end by amicable resolution before they reach the court.¹⁸⁶ The mediator in Saudi culture plays an important role and disputants respect mediators' proposed solutions.¹⁸⁷ Studies show that amicable dispute resolution is deeply rooted in Saudi culture and Saudi citizens promote this type of dispute resolution. The roots of amicable dispute resolution

¹⁸⁰ For more on court litigation of low-value consumer disputes, see chapter 4 section 4.2.2.

¹⁸¹ See chapter 2 section 2.2.2 for the reasons why a special procedure for consumer disputes is needed.

¹⁸² For more see chapter 5 section 1 on interpretation ECL 2019.

¹⁸³ Mauro Cappelletti and Bryant Garth (eds), *Access to Justice VOL I: A World Survey* (Sijthoff and Noordhoff 1978) 59.

¹⁸⁴ See chapter 5 section 2.

¹⁸⁵ See chapter 3 section 3.2 on The Role of Islamic Law and Saudi Culture in Supporting Dispute Resolution; also see Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Koninklyke Brill NV 2000) 154.

¹⁸⁶ Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Koninklyke Brill NV 2000) 154.

¹⁸⁷ See chapter 3 section 3.2 on The Role of Islamic Law and Saudi Culture in Supporting Dispute Resolution.

originate in Islamic sources such as Qura'anic texts as well as the Prophet's Sayings which are the main sources of Islamic law.¹⁸⁸

Another dispute resolution option that can be suggested for reform of Saudi ECL is arbitration. Saudi laws on arbitration permit consumer disputes to be referred to arbitration, since arbitration law covers all types of disputes except those involving personal matters such as divorce and endowment.¹⁸⁹ Since arbitration law is flexible and does not require arbitration procedures to be conducted face-to-face, they can take place online, which may lower the cost of arbitration for the consumer and provide potential solutions to e-commerce disputes.¹⁹⁰

Analysis of online arbitration mechanisms for e-commerce disputes shows that a variety of disputes can be settled by arbitration regardless of the cost of the process.¹⁹¹ There are examples of jurisdictions that allow consumers' disputes to be solved by arbitration, by maintaining some consumer rights such as negotiation and consumers' right to go to court.¹⁹² There are also examples of online arbitration mechanisms used for low-value disputes such as e-commerce disputes: for instance, Modria Dispute Resolution,¹⁹³ which contains multiple options for dispute resolution ranging from negotiation, to mediation, to arbitration. The platform manages to solve more than 100,000 cases per year, which indicates success in solving low and high value disputes.¹⁹⁴

As the Saudi laws permit arbitration for consumer disputes as well as amicable dispute resolution as provided by ODR, it is therefore suggested that the Saudi ECL include ADR procedures for consumer disputes. Saudi Arbitration law permits consumer disputes to be settled by arbitration,¹⁹⁵ but does not specify any requirements for consumer disputes when they are settled in this way. It may be beneficial for Saudi arbitration law to adopt some protective measures that are applied in other jurisdictions, such as negotiation and maintaining the consumer's right to go court.¹⁹⁶ Moreover, models of ADR procedures like eBay, SmartSettle,

¹⁸⁸ See chapter 3 section 3.2 on The Role of Islamic Law and Saudi Culture in Supporting Dispute Resolution.

¹⁸⁹ For more information on Arbitration law in Saudi Arabia, see chapter 3 section 3.3.1 on the Background of dispute resolution regulation in Saudi Arabia, and see chapter 5 section 1.1 on ADR Procedure for E-commerce Disputes.

¹⁹⁰ See chapter 4 section 4.3.1.

¹⁹¹ See chapter 4 section 4.3.2.

¹⁹² See chapter 4 section 4.3.

¹⁹³ Modria dispute resolution was analysed as an example of dispute resolution providers for e-commerce disputes. For more, see chapter 4 section 4.3.2.

¹⁹⁴ Pablo Cortes, "Upgrading from Alternative to Online Dispute Resolution," *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 53.

¹⁹⁵ See chapter 5 section 5.4.1.

¹⁹⁶ See chapter 4 section 4.3.

and Modria will be consistent with Saudi law and Islamic law principles, and will provide consumers with alternatives to traditional litigation procedures, establish consumer procedural rights that Saudi law lacks, and unify procedures for consumer complaints in Saudi e-commerce.

It is also worth mentioning the significance of facilitation of digital procedures for formal litigation in e-commerce disputes. The advantages of digital litigation procedures may have the potential to allow easier access to justice for consumers and to resolve e-commerce disputes. E-commerce transactions are based on a distance relationship between the buyer and the consumer. Accordingly, whenever a dispute arises, they should be able to resolve their dispute in the same way as they have built their relationship. Saudi litigation procedure is based on physical access to the court but may include some electronic submission of documents.¹⁹⁷ Although some procedures were digitised due to the coronavirus pandemic, physical access to courts may be required once the restrictions that were imposed for that reason are lifted.¹⁹⁸ So there is a need to adopt a permanent digitalised procedure to allow e-commerce disputes to be settled remotely. The experience of internet courts in China has been presented earlier, revealing that the internet court has successfully received more than 14,502 dispute applications.¹⁹⁹ The court has jurisdiction over disputes arising from the internet, including e-commerce disputes. The court procedure comprises mediation and formal adjudication. These advantages of distance, convenience, and choice of dispute resolution such as mediation or formal adjudication, will save consumers time and expense. Also, it will help consumers to enforce their substantive rights, establish cases against businesses when their rights are violated, and allow easier access to justice in consumers' cases. The facilitation of special procedures will fill the procedural gap in enforcement of consumer rights in the Saudi legal system.

5.4 Conclusion

This chapter has examined issues surrounding the new ECL in Saudi Arabia issued in 2019. It has looked at advanced jurisdictions and compared the aforementioned issues related to procedure and definition of the consumer with those in the Saudi ECL. In doing so, it identifies issues related to procedures for solving consumers' disputes in e-commerce, as well as issues related to complexity of procedure, lack of special procedures for consumers, and lack of a proper definition of the consumer in the ECL which would allow consideration of other natural

¹⁹⁷ For more on Saudi litigation procedure see chapter 5 section 5.1.3.

¹⁹⁸ For more on court procedure during the coronavirus pandemic, see chapter 4 section 4.4.

¹⁹⁹ Chen Guomeng and Yu Zhiqiang, 'Practical Exploration and System Construction on the Court of Internet in China' (2017) 5 China Legal Science 3, 10.

persons to be included. As mentioned earlier in this chapter, consumers need a special dispute resolution procedure to solve their disputes: a procedure, such as ODR, that relates to the place where the dispute occurred. ECL in Saudi Arabia needs to cover issues of procedural rights for consumers to allow them to enforce the substantive rights established in ECL. Moreover, it is found that the ODR used in the EU jurisdiction is simple and covers e-commerce disputes. Accordingly, ECL in Saudi Arabia needs to adopt a mechanism similar to those of the EU, or to those mentioned earlier that provide ODR, such as eBay and Modria.

This chapter has identified the lack of procedural rights for consumers in ECL. In addition, it has discussed how procedural rights are important to consumers seeking to enforce their substantive rights. As mentioned earlier, substantive rights would have no meaning without procedures to enforce them. Moreover, this chapter has identified the complexity of the procedure governing e-commerce disputes. The complexity of the arrangement whereby different competent authorities adjudicate e-commerce disputes necessitates advanced legal knowledge, a factor which can inhibit consumers' access to justice.

In addition, this chapter has proposed suggestions for reforms to Saudi laws in relation to e-commerce disputes. It has been found that the word 'consumers' needs to be defined properly by including the characteristic of the consumer as the weaker party in need of protection. Also, it has been suggested that treatment of e-commerce disputes in Saudi Arabia can be developed by allowing a unified dispute resolution procedure to avoid complexity in resolving consumers' disputes. Moreover, a special dispute resolution process should be offered that addresses consumer needs in terms of the complexity of traditional litigation and addresses market needs in terms of speedy processes and low cost proportional to the nature of e-consumers' transactions. In addition, facilitation of ODR comprising different dispute resolution methods would allow easier access to justice. These suggestions would have the potential to develop the e-commerce environment and enhance consumers' confidence in e-commerce by facilitating access to justice, besides having the potential to develop market efficiency and create economic growth in the field of e-commerce.

Chapter 6: Conclusion

6.1 Findings of the Research

It has been found that justice is not only concerned with the judicial system; it goes beyond the conventional meaning of justice and is concerned with rights, duties, and equality. Also, it involves support for consumers and the distinct interests of consumers as a group. Consumers' access to justice theory comprises two approaches: that of procedural law and that of substantive law. Both these approaches are significant for consumers' access to justice, since the best procedural laws would not resolve consumers' issues without perfect substantive laws, and vice versa. Moreover, it has been found that consumers may lack legal knowledge of complex traditional litigation procedures and require additional protection when they engage in e-commerce transactions in light of the uncertainty risks associated with these transactions. Therefore, consumers need to be empowered to overcome information deficits and thus to make appropriate purchasing decisions, as well as to overcome issues of imbalance in the litigation procedure. In relation to e-commerce disputes, it is therefore necessary to propose a convenient dispute resolution procedure and venue, such as ODR, that resembles the same procedure whereby their rights were violated.

Since the main aim of the thesis is to explore the feasibility of applying ODR for e-commerce disputes in Saudi Arabia, the legal framework of Saudi law, and laws governing e-commerce and dispute resolution have been analysed in order to identify any issues surrounding the e-commerce environment and to determine whether current Saudi laws provide protection for consumers and allow them easy access to justice when their rights are violated. By analysis of the Saudi legal framework and background of e-commerce, it has been identified that the Saudi legal system is based on Islamic law. Some areas of law are codified whereas other areas are not. In the latter case, it is the role of the court to apply relevant laws on cases that have been brought to the court, and refer to Islamic law in the areas which are not codified. It has also been noted that authorities in Saudi Arabia comprise the Judiciary, the Executive and the Regulatory authority. The Regulatory authority is responsible for drafting, interpreting and suggesting reforms to the laws. Moreover, the Judiciary authority is responsible for adjudicating cases brought to the courts and may interpret laws and regulations in accordance with Islamic law. In addition, it has been found that dispute resolution is widely established in the country and emanates from cultural and religious sources. In recent years, since the foundation of the modern country, areas of dispute resolution have been regulated to comprise arbitration and mediation. Mediation and arbitration are found to be flexible in procedure and to permit

resolution of consumer disputes by both these alternative methods. As far as e-commerce is concerned, it has been found that the government has taken several steps to regulate the area of e-commerce transactions. Although the regulation took several years to be implemented, from 2015 when the bill of the ECL was published until 2019 when the law of e-commerce was implemented, the new law is found to address some substantive rights for consumers based on Islamic legal theories that support consumers; however, it is also found to omit fundamental factors of consumer disputes, such as procedural rights and the need for a special, flexible, and unified procedure for resolving consumer disputes in e-commerce.

In order to suggest a reform to the Saudi e-commerce market and to solve the issue of consumers' disputes in e-commerce, observation of ODR mechanisms such as online mediation and arbitration, as well as analyses of regulations and directives governing the practice of ODR were conducted. It has been found that ODR consists of the previous ADR methods, but with the added utilisation of technology. The use of technology in ADR allows faster, more convenient, and cost-effective dispute resolution. Also, it has been found that ODR has advantages for consumer disputes compared to traditional ADR. In this regard, the EU has taken the initiative by implementing the Online Dispute Resolution Regulation for Consumer Disputes (2015), which includes the formation of an online platform to solve consumer disputes within the EU. Another significant step in relation to ADR is the EU's issuance of the Directive on Alternative Dispute Resolution (2013) which creates the legal framework for an independent, impartial, transparent, effective, fast, and fair out-of-court procedure for dispute resolution between e-commerce consumers and sellers. Notably, ODR requires the Commission to operate and fund an online platform for resolving disputes arising from e-commerce. Moreover, it has been found that the creation of an ODR platform signifies the importance of ODR platforms for the success of e-commerce, as such a platform provides easy and low-cost dispute resolution, which in turn will boost trust in e-commerce. In addition, in order to avoid restricting the rights of consumers to go to court to settle their disputes, it has been found that some jurisdictions have issued regulations that invalidate the pre-dispute arbitration clauses for the protection of consumer rights. Furthermore, it has been noted that terms of pre-dispute arbitration that are not negotiated by parties to the contract might be regarded as unfair and unenforceable. This observation of unenforceability could be used in Saudi online arbitration of consumer disputes, as the latter does not require any measure of protection for consumers when they resolve their dispute by arbitration. The observation of ODR mechanisms and e-court litigation processes suggests that they provide convenience for consumers in e-commerce disputes and resemble the same e-commerce context as that in which the dispute arose.

In relation to the suggestion for reform of Saudi law in the area of e-commerce and after analysis of other jurisdictions in relation to consumer issues, it has been found that Saudi ECL has not defined consumers in accordance with their needs, including identification of the consumer as the weaker party who needs protection. This consideration comprises several characteristics such as an individual acting outside his/her trade, business, or profession, as well as acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession, and the principle that consumer transactions should apply to the sale of goods or provision of services for personal use. Moreover, it has been identified that ECL has not assigned consumers procedural rights to enforce their substantive rights, or facilitated special procedures for consumer disputes. On top of that, the law has assigned the competent court to adjudicate disputes arising from application of the law and assigned other competent authorities to adjudicate other types of disputes such as disputes related to the delivery of e-commerce goods, which are adjudicated by a committee in the CITC. It has been found that the complexity of litigation procedures, lack of a special procedure for consumer disputes, and lack of procedural rights for e-commerce consumers would deter consumers from gaining easy access to justice. In comparison with the EU jurisdiction, it has been found that the EU has facilitated an easier procedure for consumer disputes. For example, the ODR procedure handled by an ADR entity must not exceed 90 days' duration from the date of receiving the complaint. It has also been found that the EU ADR directive and ODR regulation have addressed e-commerce dispute procedures, specifying special procedures for consumers and e-commerce disputes. In addition, the ODR regulation mainly aims to enhance consumers' confidence in the market by allowing them to submit their complaints through the ODR platform.

6.2 Suggestions

This research has endeavoured to provide suggestions to improve alternative and online dispute resolution for consumer disputes in e-commerce. The suggestions comprise reform and improvement in several ways as The ODR system for consumer e-commerce disputes in Saudi Arabia would entail guaranteeing basic consumer rights. Facilitation of ODR in Saudi Arabia would allow easier access to justice for consumers in e-commerce. This feature would enhance consumer trust in the market as consumers would know that their rights can be restored via the ODR when there is a violation of those rights in e-commerce transactions.

As explained earlier, the Saudi judicial system is a dual judicial system containing both general judiciary and administrative judiciary procedures.¹ Moreover, the Saudi judicial system contains a quasi-judicial committee for dispute resolution.² Within CITC, there are several quasi-judicial committees for consumer dispute resolution,³ such as the parcel transportation dispute resolution committee and the telecommunication dispute resolution committee.⁴ Both committees provide ODR dispute resolution and are available for businesses and consumers free of charge. The committee's decision has binding force.⁵ Moreover, the administrative courts are the competent authorities for appeals after the committees, and for judicial review.⁶ As explained earlier, one of the ways to resolve consumer e-commerce disputes in relation to damage and delivery of products is through the committees under the supervision of CITC which is a public authority under government supervision.⁷ The committee receives e-commerce consumers' complaints in relation to delivery and damage of the products. However, as per the ECL, the general court is the competent authority for resolving disputes concerning contractual relations between consumers and businesses, while the committee in the MOC is the competent authority for sanctions related to the violation of ECL provisions.⁸ As suggested in previous chapters, the dispute resolution procedure for consumer disputes in relation to e-commerce disputes should be unitary.⁹ The unification of the procedure can be applied by amendment of article 20 of the ECL which assigns general courts to adjudicate all disputes related to e-commerce contractual relations. Also, article 19, which assigns the committee under the supervision of MOC for violation of ECL provisions, should be amended to assign the committee under the CITC for all e-commerce consumer disputes and assign administrative courts for appeal and judicial review. This proposal would result in a unitary procedure for e-commerce consumer disputes, which would facilitate easier access to justice. The amendment of the aforementioned articles is the responsibility of the regulatory authority which comprises the Council of Ministers and Consultative Council.¹⁰ The latter should suggest the amendment, and the Council of Ministers should approve the suggestion after consideration as per the Basic Law of Government 1992, Law of the Council of Ministers 1993, and Law of the Consultative

¹ See chapter 3 section 3.2.3.

² See chapter 3 section 3.4.1.

³ CITC, '*The Committee for the Consideration of the Violations*' (CITC, N/A) <<https://www.citc.gov.sa/en/RulesandSystems/ConsiderationCommittee/Pages/default.aspx>> accessed on 3 September 2022.

⁴ *ibid.*

⁵ *ibid.*

⁶ See chapter 3 section 3.2.3.

⁷ See chapter 5 section 5.2.1.

⁸ *ibid.*

⁹ See chapter 5 section 5.3.3.

¹⁰ See chapter 3 section 3.2.2.

Council 1992.¹¹ As per the Basic Law of Government, the amendment of the ECL law would be followed by a Royal Decree, to be declared through the official channels of the government and the CITC website.¹² The CITC website should include information on the unified procedure of consumer e-commerce disputes which can be followed by appeal and judicial review under the Administrative Courts in order to avoid depriving consumers of their litigation rights.

The suggested ODR scheme would help to secure compliance with some of the features of Islamic law and the theory of justice. As illustrated in chapter 3 of the thesis, presenting the background of Saudi culture, the Saudi people are influenced by Islamic law.¹³ It has been illustrated that Islamic law encourages the amicable settlement of disputes without creating conflict between individuals in the society.¹⁴ Moreover, the story of the Prophet Mohammad when he passed by a heap of eatables is considered a model and described as the root of consumer protection in Islamic culture.¹⁵ In addition, it has been illustrated in chapter 2 of the thesis that the main concept of justice is concerned with equality, fairness, fair allocation of rights, fulfilment of duties, and prevention of harm and detriments.¹⁶ The new ODR scheme for consumer disputes in Saudi Arabia takes lessons from the ODR platform and standards in the EU ADR Directive by providing a unitary procedure for consumer e-commerce disputes, like that practised in the EU.¹⁷ Moreover, the new ODR scheme in Saudi Arabia should provide information in the platform, such as: how consumers can solve their disputes with businesses, information on consumer rights in e-commerce, and transparent procedures to enable consumers to know how a decision is reached. Furthermore, the new ODR in Saudi Arabia should learn lessons from the ADR Directive in the EU. Since the EU ADR Directive indicates the need to promote amicable dispute resolution for consumer disputes in e-commerce by encouraging consumers to contact businesses when disputes arise in order to solve their disputes amicably,¹⁸ the new Saudi ODR should provide the same tools as those featured in the EU ADR Directive and the EU ODR Platform. Moreover, the new Saudi ODR scheme should have the same aims as the ADR Directive, which include addressing shortcomings such as lack of consumer awareness, lack of legal quality, and lack of ADR entities: aims which can be applied to the Saudi context and adopted to fill the gap in the legal standards of dispute resolution in

¹¹ *ibid.*

¹² The Law of Government 1992 Article 71 (Saudi Arabia).

¹³ See chapter 3 section 3.3.

¹⁴ *ibid.*

¹⁵ See chapter 3 section 3.3.4.

¹⁶ See chapter 2 section 2.2.1.

¹⁷ See chapter 5 section 5.3.2 on the Differences and Similarities between Saudi Law in Relation to e-commerce law and Dispute resolution and EU's ADR Directive and ODR Regulation.

¹⁸ See chapter 4 section 4.3.1.

Saudi regulation.¹⁹ The detailed suggestions have been introduced earlier in the thesis;²⁰ nevertheless, they need to be summarised to remind the reader, as follows:

- 1- This research found that substantive rights for consumers in ECL in Saudi Arabia are guaranteed, including the right to withdraw, right to reject, and right to rectify errors; however, there is a need for implementation of procedural rights for consumers to enforce their substantive rights when their rights are violated as stated in the law. The facilitation of a procedure to enforce consumer rights would enhance consumer confidence in e-commerce, as one of the significant factors that inhibit Saudi consumers in e-commerce is the lack of systematic enforcement of rights.
- 2- The Saudi ECL includes several procedures and several competent authorities to adjudicate e-commerce disputes depending on the type of the dispute: for example, disputes related to the contract of sale to be adjudicated by the competent court, disputes related to delivery to be adjudicated by a committee in CITC, and disputes related to violations of ECL to be adjudicated by a committee in the Ministry of Trade. Therefore, the study has suggested the unification and simplification of dispute resolution procedures for e-commerce disputes to avoid complexity, so as to fall under one competent authority, which would facilitate easier access to justice for consumers.²¹
- 3- ECL in Saudi Arabia excludes ADR/ODR procedures for e-commerce disputes. E-commerce transactions are based on fast and convenient distance selling, whereas the current procedure for solving e-commerce disputes when they arise is through traditional litigation, which affects the features of e-commerce in terms of convenience for e-consumers. The research has suggested the implementation of an ODR mechanism for e-commerce consumers' disputes such as those used in advanced jurisdictions, to facilitate consumers' access to justice and enhance their trust in e-commerce.²²
- 4- Since the Saudi e-commerce field lacks procedures that can help to enhance consumers' trust in e-commerce, the Saudi e-commerce market can take the EU example as a lesson by adopting similar procedures that do not violate Saudi legal principles: for instance, incorporation of ICT methods into special dispute resolution procedures that allow consumers' disputes to be solved by alternatives to formal court litigation, such as

¹⁹ *ibid.*

²⁰ See chapter 5 section 5.2.3.

²¹ See chapter 5 section 5.2.3.

²² See chapter 5 section 5.2.3.

mediation and arbitration. It has been noted that facilitation of a convenient dispute resolution procedure would enhance consumers' access to justice.²³

- 5- In the course of the literature review and the Saudi ECL analysis, it has been found that the current literature concerning Saudi e-commerce and consumers lacks appropriate characterisation and lack of appropriate definition of consumers; for example, 'acting outside of his profession', while the other party must be 'acting in the course of his profession'. Lastly, consumer transactions should apply to the sale of goods or provision of services for personal use. This issue has been identified in the research and has been discussed as one of the issues in the new ECL. However, it has not been discussed thoroughly as it falls outside of the scope of this research. So, this study has suggested a proper definition of the consumer in the Saudi ECL in accordance with the practice of advanced jurisdictions,²⁴ and recommends enriching this point for the purpose of extensive research in future.

6.3 Implications and insights of the research

After discussing the issues surrounding the Saudi e-commerce market in relation to e-consumer disputes and ODR, and the suggestions for reforming Saudi ECL to provide convenient and accessible ODR for e-consumers, this section will present the potential legal and economic implications of the suggestions when applied. Examples include: the implications of improved consumer protection regulation; economic outcomes such as enhancement of consumer trust in the e-commerce market; and economic growth as a result of improved consumer regulations and facilitation of convenient ODR mechanisms for e-commerce consumers.

- **Legal implications**

The suggestions for reforming Saudi ECL include facilitation of procedural rights for e-consumers whereby consumers can enforce their substantive rights, introducing a unified dispute resolution procedure for e-commerce disputes, providing a clearer definition of 'consumer', and providing convenient access to dispute resolution for e-commerce consumers.

Facilitation of procedural rights is significant in enabling consumers to enforce substantive rights.²⁵ If the substantive rights cannot be enforced through appropriate procedural

²³ See chapter 5 section 5.2.3.

²⁴ See chapter 5 section 5.2.3.

²⁵ Stefan Wrzka, *Consumer Access to Justice Revisited* (Cambridge University Press 2014) 28.

mechanisms, these rights will be worthless in practice.²⁶ Appropriate procedures for enabling consumers to enforce their rights when they have been violated would allow consumers access to justice.²⁷ Moreover, unification of the e-commerce dispute resolution procedure and avoidance of complexity would contribute to easy access to justice for consumers. It is believed that consumers are among the weaker parties who lack knowledge of complex litigation.²⁸ Generally, consumers need support in litigation processes against well-organised businesses due to the differences in legal knowledge and financial resources between consumer and business.²⁹ The complex dispute resolution procedure for e-consumers in Saudi Arabia needs to be unified and simplified. A non-complex and unified dispute resolution procedure for consumers would grant them easy access to justice when their rights are violated and they seek recovery of damages.

In addition, Saudi ECL lacks an appropriate definition of the consumer. The current definition includes consideration of any person falling within the concept of consumer, regardless of the criteria of acting out of one's profession or buying products for one's own use.³⁰ Since consumers are the weaker party to the contract through lack of knowledge, less bargaining power, and imbalance in dispute resolution power,³¹ the protection for e-commerce consumers should define the consumer issues and propose solutions for overcoming them. By reforming Saudi ECL and redefining the consumer, the law would ensure that only the weaker party who needs protection versus the other party is protected. Consumers would receive justice, as it is concerned with fairness, equal delivery of rights, and prevention of disputes.³²

The suggested reforms would also guarantee that consumers could conduct the dispute resolution procedure in a convenient place. As a condition of achieving consumer access to justice in relation to ODR, and of granting consumers convenience, it has been noted earlier that consumers' claims should relate to the place where the transaction occurred, instead of to the seller's domicile.³³ Also, consumers should be able to sue the sellers at the place convenient to themselves, and where the transaction occurred. In relation to e-commerce disputes, ODR

²⁶ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 177.

²⁷ *ibid.*

²⁸ See chapter 2 section 2.3.1, Consumers as weaker parties and distribution of power to them, on Imbalance in litigation and dispute resolution power.

²⁹ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 33.

³⁰ See chapter 5 section 1.2 on Suggestions to reform Saudi ECL.

³¹ See chapter 2 section 2.2.2.

³² See chapter 2 section 2.1.1.

³³ See chapter 2 section 2.1.3 on Consumers' right to conduct dispute resolution in their preferred place or in their domicile.

would be the convenient place for consumers as it is related to the place and environment where the transaction took place and where their rights have been violated. Unlike traditional litigation, which requires the consumer to meet unrelated costs such as travel, ODR would enable consumers to submit their claims and documents and attend hearings online, thus offering the consumer convenience in dispute resolution in the same way as in e-commerce transactions, since it takes place online.³⁴ This convenience and ease would give consumers access to justice. As per Hill, consumers should be able to establish a lawsuit against the seller in a place convenient to the consumer or in the place of their own domicile, as this would enhance their access to justice and redress.³⁵

- **Economic implications**

The potential economic implications would be aligned with potential legal implications. It is believed that e-commerce transactions involve several features that distinguish them from traditional consumer transactions; for example, lack of direct communication with the seller and lack of opportunity to inspect items. This difference could cause consumers to worry that the quality of goods or services may not meet their expectations. This fear on the part of consumers may have an impact on their trust in the e-commerce market. The consumer's fear of e-commerce transactions can be overcome by improving consumer protection measures, while easy access to justice may overcome their lack of trust in e-commerce.³⁶

The importance of consumer confidence in e-commerce cannot be ignored. Such confidence would boost the market and help the economy to flourish.³⁷ Consumers' confidence in the market has value by enhancing the market's efficiency and allowing economic growth.³⁸ Moreover, facilitation of consumer protection measures would improve trust and confidence in the market in order to help the market function.³⁹ This improvement of consumer trust in the market is a potential economic outcome for the Saudi e-commerce market.

In addition to the implication of consumer trust in the market, the Saudi Arabian Government has set out a vision that aims at supporting e-commerce so as to achieve further economic

³⁴ For more on convenience of ODR for consumers, see chapter 2 section 2.1.3.

³⁵ Jonathan Hill, *Cross-Border Consumer Contracts* 221–2 (2008) (Oxford University Press 2008) 187-8.

³⁶ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (London: Routledge 2012) 3; Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 291.

³⁷ For more on confidence in e-commerce and its effect on the market, see chapter 2 section 2.3.2 on Lack of confidence in the market.

³⁸ Kenneth J Arrow, *The Limits of Organisation* (New York: Norton, 1974) 23.

³⁹ Peter Cartwright, 'Consumer Protection Rationales,' *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press 2001) 38.

growth with less dependency on oil income, along with an advanced place in the UNCTAD e-commerce ranking, as per its 2030 Vision.⁴⁰ The Saudi Arabian vision is driven by economic objectives. Therefore, from an economic perspective, it is believed that one of the most effective ways to enhance consumers' trust is to improve their access to justice, which can be achieved through enforcement of consumers' rights by methods such as online ADR.⁴¹ Moreover, allowing consumers access to justice creates an economic interest leading to market efficiency based on free competition delivering the best selection of goods and services at a good level of price and quality. The result would be an environment that encourages consumers to contribute to the e-commerce market,⁴² in turn promoting the profitable economy that the country aims to achieve in its 2030 Vision, as a competitive market combined with consumer trust and generating economic growth.⁴³

⁴⁰ Vision 2030, 'National Transformation Program 2020' (*Vision 2030*, 25 April 2016) <[https://www.vision2030.gov.sa/sites/default/files/attachments/NTP%20English%20Public%20Document 2810 .pdf](https://www.vision2030.gov.sa/sites/default/files/attachments/NTP%20English%20Public%20Document%202810.pdf)> accessed 20 January 2020.

⁴¹ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 37.

⁴² *ibid.*, 51.

⁴³ Jason Freeman, 'Consumer Legislation and E-commerce Challenges' (2015) 2(1) *Italian Antitrust Review* 76.

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