Chapter – VI

New Facets of International Arbitration
NEW FACETS OF INTERNATIONAL ARBITRATION

“The most fantastic invention of mankind is the phenomenon of INTERNET as the course of future of the world is going to be decided by it.”

Along with the growth of ADR, business men worldwide are rapidly integrating information technology and telecommunication (together referred to as ‘online technology) into the ways they do business. The computer revolution that has taken place over the last twenty years, along with the emergence of the internet, has transformed the face of business. Now project teams work over the internet on round-the-clock cycles, and projects are outsourced to business units around the world without a second thought. Companies that could only support a regional presence in the past are now confronted with the possibility of doing business all over the world.

6.1. INFORMATION MANAGEMENT AND ARTIFICIAL INTELLIGENCE:

Every society is based upon communication and every major development in a society may be measured by the changes in those means of communication. From the spreading of the gospel by mendicant preachers, to fifteenth century explorers of the high seas, information was dispersed to all corners of the globe. The industrial revolution itself was founded upon developments such as Stephenson’s steam locomotive, Telford’s canals and the development of turnpike roads. Naturally, these led the way for the formation of the first official postal system using pre-paid stamps and post boxes in the nineteenth century. Today, it is said that the development of the internet constitutes the next major change in society as it moves from the industrial to the information age. Its history begins with the launch of Sputnik by the USSR in 1957. USA responded through its first electronic network, ARPANET, being constructed in 1969 and the first E-mail program being created by Ray Tomlinson in 1972.

At first used only by the military and academia, it was not until 1990 that the World Wide Web came into being, thanks to Englishman Tim Berners-Lee who, whilst working at CERN in Geneva, implemented a hypertext system to provide efficient information access to the members of the international high-energy physics community. The ‘WWW’ came into being. The final piece of the jigsaw came in 1993 when Marc
Andreessen developed a graphical user interface to the www called “Mosaic for X” which was the first popular web browser for personal computers. Marc Andreessen himself was the first to capitalize on this with the introduction of the Netscape browser and not to be outdone, Microsoft introduced its own Internet Explorer.

Equally as apocryphal as the rise of Netscape and the browser is that of Yahoo!, and the search engine. Started in 1994 in a trailer as a student hobby, it went public in 1996 and by 1 March 2000 had a market capitalisation of $83.45 billion. Once again, where Yahoo! Went, others followed and there is now a plethora of search engines available which help to sift and organise the information now available on-line. The future lies in building upon these developments with, for example, higher speed connections such as ADSL (Asymmetric Digital Subscriber Line) and the convergence of the various forms of media such as television, radio and computers through emerging technologies such as Bluetooth.434

E-MAIL:

Concomitantly, electronic communications developed alongside internet. The biggest hurdle to overcome was to get different computers using different operating systems to be able to read each other’s’ messages. Today, almost all commercial E-mail is sent and received by clients and servers using SMTP (Simple Mail Transfer Protocol) or POP3 (Post-Office Protocol). However, in recent years there has been an explosion in the use of personal e-mail due to the introduction of web-based services such as Hotmail. These allow the use easy access to their email account from computers other than their own, as well as enabling them to maintain the same e-mail address through changes of service provider. In a recent study of the internet by UCLA (www.ccp.ucla.edu), it was found that some 84% of people on-line have e-mail accounts and over 40% check their e-mail more than once a day.

MOBILE PHONES:

Alongside these developments, mobile phone technology developed its own form of data packaging with the development of the short message service (SMS) which was

434 Tim Kevan and Paul McGrath, E-Mail, the Internet and the Law, Universal Law Publishing Co, First Indian Reprint 2007, pp. 3-4.
conceived as part of the Global System for Mobile Communications (GSM) digital standard. This has been followed by the WAP – Wireless Application Protocol which provides for limited access to the internet and for the use of e-mail from a mobile phone. Once again, the speed of the connection will be the key and third generation mobiles utilising the Universal Mobile Telephone System (UMTS) promise to bring the mobile phone into line with other forms of media in this area.

6.1.1. THE LAW:

The law is an organic being which has always managed to evolve to keep up with changes in society. However, the challenge posed by the growth of the internet is perhaps its biggest yet not just because of its sheer size, or the speed with which it has developed. The relationship between law and the internet is based upon a simple conflict:

- Laws exist to regulate society;
- The internet has created a new society founded upon the principle that it should be wholly unregulated.

The history of the internet itself is one of decentralisation. Even as far back as 1962, when Paul Baran was commissioned by the US Government to study how it could survive a nuclear attack, he envisaged a military research network that was decentralised so that if any locations in the USA were attacked, the military could still have control of nuclear arms for a counter-attack. Thus the law has struggled to keep pace with the new developments and it is no surprise that many legal developments have proved to be controversial. Old legal concepts have been successfully adapted to the new technology but the underlying tension remains: Freedom or Regulation? Internet has changed the very perceptions of mankind. Internet today represents and embodies the single most important development in the history of civilization. As on-line culture has become an integral part of modern existence, so has also emerged diverse ramifications of the same-commerce, regulations, exchange of money and thoughts, leisure academics. You want it and you have it on internet. But another extremely important feature of net civilization and web behaviour is the emergence of tremendous disputes, differences, fights and

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435 Ibid, pp.5-6.
controversies on the Internet relating to varied aspects of On-Lineism. The resolution of these cyber disputes has emerged as an extremely important challenge. Courts of law do not present a practical option for reasons more than one:

Firstly, because the world itself becomes a big courtroom.

Secondly, because of the global nature of the internet, the clarity as to which court would have the exclusive Jurisdiction to try the case is missing.

Thirdly litigation and the legal systems in different countries is different and can be extremely expensive and threatening to wipe out millions of legal entities into oblivion. And there is considerable doubt relating to the efficacy of decisions given by the courts of one jurisdiction on a global level. In addition the sanction behind the enforceability of such a court decision in different jurisdiction is itself questionable. The system of adversarial jurisdiction would not stand the test of time in the context of the Internet. In the light of the given scenario, alternate system of dispute resolution emerges as the best bet.\footnote{info@cyberlaws.net}

Finally, Information Technology has invaded Legal Profession too.

Disputes are becoming increasingly international, complex, and growingly include multiparty proceedings and mass claims, while cost constraints remain stringent and demands for speedy resolution increase. It is indeed commonplace now a day to complain about the excessive duration and costs of the administration of justice. In the international arena, the large majority of complex disputes, many of which include state parties, are settled by way of arbitration. One method of remedying the excessive duration and costs of arbitration is to resort to information technology (I.T) tools to accelerate and facilitate the arbitration. I.T. tools have indeed the potential to reduce the costs and time radically, and thereby maintain a necessary level of access to justice.

In spite of its obvious advantages, many practitioners are reluctant to use IT in arbitration. Because arbitration is a quasi-judicial process, it must comply with procedural guarantees, which impose certain constraints on the process. In addition, in the last two decades, arbitration has evolved towards an increasingly formalistic, court-like procedure, which is often very antagonistic. Hence, parties and arbitrators fear that
resorting to IT may jeopardize procedural rights and create grounds for useless procedural complications or even annulment of arbitral awards. Despite these reservations, it appears inevitable that the emergence and development of IT tools for dispute resolution will change the conduct of international commercial arbitration proceedings. The Internet has changed the way in which global commerce operates. The web has shaped business standards, time becomes increasingly shorter and delays are increasingly less tolerated.

Users expect their disputes to be resolved according to the same standards as those under which they carry out the transactions giving rise to such disputes. As opposed to that, arbitration is becoming more formalistic—a manifestation of the so-called ‘judicialization’ or ‘legalization’ of international arbitration. This opposition may be significantly alleviated by the use of IT tools to accelerate the arbitral process, provided this is done in such a fashion that procedural guarantees are safeguarded and the quality of justice is not adversely affected. IT is indeed a very powerful toolbox for international arbitration. It may help accelerate the dispute resolution process. It may also facilitate the handling of the increasingly voluminous records that characterize present-day arbitrations. It is likely to significantly improve the administration of justice in complex, multiparty, or mass claims disputes if put to good use. IT can render arbitration more accessible, for instance making it possible for parties with less economic power to save certain costs that disadvantage them against more powerful ones. The use of IT in the arbitral process is in its infancy, but it is increasingly gathering a strong momentum. For instance, major arbitral institutions like the International Chamber of Commerce, the American Arbitration Association, and the World Intellectual Property Organization Arbitration and Mediation Centre have recently launched projects offering case management websites, virtual case rooms, extranets, and other IT tools allowing multiparty communications.437

6.1.2. PERPLEXING COMPLEXITIES:

“JUDEX NON CALCULAT”, goes the saying; lawyers are not at home in mathematics. The same, unfortunately, often holds true in relation to the machines that

calculate for us: computers. For many very diverse reasons, the use of information
technology in the legal context is still very much below its potential. It is misunderstood,
mistrusted, misused, and generally considered to be someone else’s problem—with the
obvious exception of specific E-commerce law and related matters. Nevertheless,
technological changes have already profoundly affected legal practice. They have
changed how legal information is created, how it is spread, and how it is accessed.
Simple technologies like e-mail have also transformed the way people interact, and thus
what people expect from each other—including what clients expect from their counsel and
what parties expect from the arbitrators appointed to their case. Consequently, whatever
the reason not to gain serious insight into information technology (lack of time, lack of
interest, traditions, general delegation of tasks, past successes without computers, etc.),
most members of the legal community would be well-advised to take the necessary steps
to enter the information age.

The first aspect of enquiry is to consider the effects computers have on the law: to
inquire how independent or unconnected computers changed our relationship to legal
materials. The second relationship between information technology and the law that
became the subject of interest dealt with the effects of networked computers, and in
particular the Internet, on the circulation of information. IT caused legal information to
flow differently, the most obvious example being online legal databases such as Lexis or
Westlaw. This largely unrestrained, instantaneous, and global movement of information
is of course not restricted to legal information, with the consequence that the Internet is
often considered to be one of the main driving factors of economic globalization. 438 This
form of globalization in turn increased the globalization of the law (e.g. the
harmonization of legal regimes and extra-territorial effects) and of dispute resolution
processes. Online dispute resolution (ODR) probably the epitome of a globalized dispute
resolution process, is itself a product of computers and networks. 439 ODR represents the
third main relationship between IT and the law. In fact, it probably embodies the heaviest
reliance of legal processes on IT. The main advantage of ODR is the ease of its access,
which is ubiquitous, and consequently the relatively low costs generated by the

438 T. Friedman, The Lexus and the Olive Tree, New York 2000, p. xvi («this globalization system is also
characterized by a single word: the Web»).
439 Online dispute resolution covers all dispute resolution methods whose essentials elements of procedure
take place using electronic means of communication. See G. Kaufmann-Kohler and T. Schultz, Online
procedures. However, an important finding in the ODR field is that it is almost exclusively usable for small and medium size disputes raising factually simple issues. Large international disputes are still solved essentially by offline processes of dispute resolution. More precisely, the evolution of the ODR movement has gone through a series of phases that testify to the importance of the approach chosen for the present work; promoting the use of information technology in traditional arbitration procedures is a simple extension of the ODR movement

The first reason for the ODR movement was the lack of confidence that characterizes e-commerce. Internet shoppers are in need of a dispute resolution system that relies on the same communication means that were used to conclude the transaction in the first place: electronic means of communication. The electronic accessibility of the procedures allows these consumers to constitute points of reference, landmarks of justice in cyberspace: they may return to the place where the transaction was concluded—and thus where the dispute arose—and find a link to a dispute resolution process specifically adapted to their dispute.440 After this first impulse, which corresponded (and still does) to a concern of consumer protection, it was soon realized that the advantages of ODR could be used to facilitate—and sometimes actually permit—access to justice not only for e-commerce disputes, but also for all small disputes, especially when they involve rather large distances between the parties, or even different countries of residence. It was then clearly recognized that ODR is not merely a by-product of e-commerce, or even a set of tools that belongs to the broader field of cyberspace law, but a change with potentially profound implications for the entire field of dispute resolution. Indeed, electronic communications means, and information technology in general, if used correctly, facilitate almost any form of resolution of almost any dispute.

IT, if used correctly, improves the effectiveness of dispute resolution processes by simplifying information transmission and generally accelerating the proceedings. IT also improves efficiency, i.e. it reduces the costs of dispute resolution processes, in particular by limiting the need for travel. The fourth-and probably the most important-relationship between information technology and the law was also triggered by the ODR movement:

440 See for instance T. Schultz, Does online dispute resolution need governmental intervention? The case for architectures of control and trust, 6 North Carolina Journal of Law & Technology 71 (2004), pp. 84-87.
this time, the focus was on the effects which IT can have on the work of mediators and negotiators. It all started during the final period of the war in Yugoslavia. As the difficult negotiations between Bosnian Serb, Croat, and Muslim ethnic factions seemed to have stalled, the United States brought in a clever and innovative IT solution to help the negotiators and the mediator reach an agreement. They simply gathered the different factions around a digital map of the territories at stake in the negotiations. This very detailed analysis of construction feasibility, minefield clearance operations, and boundary marking. Other typical examples are computer-assisted negotiation systems from afar, where the computer automatically carries out some of the tasks a human third party would usually have to do such as sending reminders, proposing action plans, and suggesting standard settlement terms. Drawing on this example, Ethan Katsh and Janet Rifkin cast the concept of the «fourth party», which stands for «something that is an influence on the process of communication and negotiation, something that adds value to the third party [i.e. the mediator or the arbitrator], something that typically does not replace the third party but can displace her, in the sense that the third party operates with an ally or assistant alongside. This fourth party further takes the form of «applications that enhance the expertise of the third party and thus do more than simply deliver the expertise of the human third party across the network. In other words, the third party, be it the mediator or the arbitrator, is there to help the parties solve their dispute and the fourth party does exactly the same: it is not only an ally to the third party, but also an assistant—next to the third party—to the two disputing parties. The technology that the

442 For concrete examples of such tools being used, see for instance SmartSettle www.smartsettle.com and The Claim Room www.theclaimroom.com. For a description of the former One Accord, see for instance Thiessen/McMahon, Beyond Win-Win in Cyberspace, 15 Ohio St J on Disp Resol 643 (2000). See also the consumer filing forms proposed by many ODR providers (e.g. ECODIR and SquareTrade), and T.Schultz, Connecting complaint filing processes to online resolution systems, 10 Commercial Law Practitioner 307 (2003).
444 Katsh, supra note 6, para. 16.
445 Id., para. 18.
fourth party represents is globally developing along two main lines. First, very simple tools are being developed, such as red flags, emoticons, images or sounds whose goal may be compared to that of pens and flipcharts in traditional offline dispute resolution methods, i.e. to help clearly convey a message or to attract attention. Such tools also serve other, though similar functions by virtue of their automation: e.g., they may help automatically remind participants of deadlines.

On the other hand, very complex and sophisticated technological tools and platforms are being experimented with and sometimes implemented. This use of high technology aims at a much more intense exploitation of the tools that electronic communication technology offers. Virtual workspace is one example—and in many respects an extreme one—of such complex and sophisticated tools. In between these two extremes of simplicity and complexity, a whole range of technologies exist, the best known being extranets and virtual case-rooms, case management websites, and videoconferencing. At this stage, it must be remembered that the fourth party is not limited to ODR or to processes that take places essentially online; it can also be used in all types of dispute resolution processes. Much of the experience gathered in ODR is actually being exploited in the context of off-line arbitration.

The fifth and last relationship between information technology and the law, which follows from all the above, is the effects IT can have on arbitration procedures. The most prestigious arbitration institutions are currently experimenting with IT tools: the International Chamber of Commerce (ICC) with its Net Case program, the American Arbitration Association (AAA) with its Web File scheme, and the World Intellectual

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448 See Katsh, supra note 6, para. 23.
451 For a more developed discussion of this concept of a ‘fourth party’, see Protopsaltou/Schultz/Magnenat-Thalmann, supra note 12
452 See Section I.1 ICC – NetCase,
453 See Section I.2 AAA – WebFile,
Private ventures are developing hardware and software and trying to sell them to the arbitration world, not to mention the various online arbitration programs developed by the Chartered Institute of Arbitrators. Legal commentators have also started to embrace this topic.

In summary, the idea of using IT in arbitration is a burgeoning theme, which follows from experiments related to global electronic information management, the circulation of information in an increasingly globalized and borderless world, the online dispute resolution movement (which more precisely led to lessons regarding procedural setups and techniques of dispute resolution using IT), the idea that IT may displace or on some occasions even replace the neutral third party in dispute resolution, and the gradual introduction of IT tools into everyday business and legal practice. As the use of IT in arbitration is clearly in its early stages of development, the present book will first offer a comprehensive presentation of the IT tools that may be used in arbitration. Thereafter, these technologies will be submitted to legal analyses, both global and specific, and some possible future technologies will be mentioned.

**454** See Section I.3 WIPO – ECAF.

**455** IT tools for offline arbitration are provided by the following ventures: the American Bar Association, see www.abanet.org/tech/ltrc/home.html and www.elawycling.org; NetTech, see www.nettechinc.com/lawtech.htm; Case Central, see www.casecentral.com/cc/home; Documentum, see www.documentum.com/eroom; iManage, see www.imanage.com; LegalFiles, see www.legalfiles.com/main.htm, NetDocuments, see www.netdocuments.com; EliteManager, see www.eliteis.com/solutions/prod_casemanager.asp; CaseShare, see www.caseshare.com; Eversheds, see www.eversheds.com; and Allen & Overy, see www.newchange.com.

6.1.3. FUNCTIONS OF I.T. FOR ARBITRATION:

In its most comprehensive sense, information technology encompasses any use one can make of computers, because every time one uses a computer, one handles information through technology. Hence, speaking of «the use of IT in arbitration» may in fact cover a large variety of radically different actions, which collectively cover—and go beyond—the daily work of most lawyers. Such recourse to technology ranges from the use of handheld devices (such as personal digital assistants or smart phones), to simple word processing, online legal research, billing software, shared calendaring, automated interest calculation, automated conflict of interest checking, e-mailing, videoconferencing, and more exotic technologies like 3D virtual reality. But now the focus will be on issues that involve data transmission, i.e. electronic communication means that can be used in the context of arbitral procedures. The following list provides a general overview of some of the basic types of IT use in arbitration; most other IT functions (legal research aside) are derivatives or combinations of these uses:

Transmitting messages and files: one of the most obvious uses of information technology—beyond text editing—is the transmission of messages and documents using electronic networks. Usual technologies for this purpose are e-mails and web-based means such as web interfaces and bulletin boards.

Meeting from afar: a thin line separates the idea of transmitting messages and files, which can be considered to take place in asynchronous fashion, from something closer to an actual meeting online. Such meetings are based on technologies such as chat rooms and videoconferences, which imply synchronous communications.

Handling documents: documents can be handled (in the sense that their content is interacted with) using IT with some notable benefits. For instance, the ability to rapidly search for occurrences of specific words largely increases access to the information contained in a document (and may consequently increase the probability that the point gets through to the recipient). The possibility of copying and pasting entire sections of documents is another obvious and often-used advantage. In addition, documents can be linked to each other through hyperlinks.
Creating documents: IT facilitates the production of new documents. As suggested above, tools like «copy-paste» accelerate the process of production. Typically, in the context of arbitration, the drafting of an award involves many instances of «copy-pastes» from the parties´ briefs and from documentary evidence. Moreover, IT has generated a new way of producing documents, since it is no longer uncommon that people in different parts of the world collaborate in the drafting of documents.

Managing documents: using documents in electronic form facilitates their management (in the sense that they are interacted with as files, i.e. as information containers), for instance because their storage is facilitated, and searching and finding a document can be significantly accelerated if the naming of the files follows a clear policy.

Managing cases: information technology can also be used to improve the management of cases, for instance by using progress tracking software, which for instance shows at which stage a given case is, what the next expected actions are, and when the deadline is. It may also graphically show the relationships between the various actors of the case.

Visually presenting arguments and facts: IT solutions such as digital slideshows, video depositions and video presentations are increasingly being used during arbitral hearings, because visual presentations, and especially graphic ones, are more memorable and clearer than purely oral presentations.

Tracking: IT has, to put it simply, an amazing memory. IT has given us the possibility to track everything that occurs on our (virtual) desktop and, with the collaboration of others, on their desktops. IT may indeed be used to record and store not only documents, but also presentations, oral statements, and videoconferencing exchanges. The advantage (and sometimes the danger) of this is that such data can be reproduced by anyone gaining access to it with perfect accuracy and at any time.

What can IT do for arbitration?

The purposes of using IT in work environments are fundamentally always the same, regardless of the context in which it is used. Such technologies allow tasks to be accomplished more rapidly, cheaper, and more easily. In other words, they seek to render work processes more effective, more efficient, and more convenient. The question here is how IT can achieve these properties in the context of arbitration. The answer to this
A. Efficiency: The most obvious and acclaimed reason why IT should be used in arbitration is that it provides opportunities to reduce costs and time. The main types of costs that can be reduced relate to travel and document handling. Travel costs can of course only be reduced in the context of online meetings replacing face-to-face meetings, which is currently not very frequent. IT can provide significant cost savings in such situations. In addition to out of pocket expenses, the costs savings also include lost working time (including productivity diminution due to jetlag). Moreover, the travel-related costs of all the participants in the arbitration can be avoided, including those of arbitrators, parties and their counsel, witnesses and experts.

Document handling also generates costs that can be reduced by resorting to IT:

- Document reproduction: as opposed to photocopies, digital copies cost virtually nothing. This is especially beneficial for larger cases with numerous lengthy documents.

- Document storage: digital copies of documents reduce the need for storage space, as a standard CD or DVD can contain thousands of files.

- Document shipment: transmitting files in electronic format, whether by e-mail or stored on a CD or DVD, rather than sending by mail or special courier (if not small van loads) of printed material around the globe can save significant courier costs.

In terms of time saving, IT-related benefits may concern the following areas:

- Time for realization of tasks: specific tasks, such as hearings and other forms of meetings, but also transferring documents, can be undertaken more rapidly when appropriate technologies are used. Such technologies are for instance simple electronic communication means like e-mails for a limited number of relatively small files; more sophisticated tools such as case management websites with powerful en masse uploading and downloading facilities for larger or more
numerous files; videoconferencing for hearings and other meetings such as deliberations.

- Time between tasks: IT may also save time in between specific tasks, in the sense that if travel or shipping times can be reduced or suppressed entirely, more tasks can be carried out in a shorter time space and it also becomes easier for all participants to find common available periods. Consequently, the procedure will be accelerated. The same holds true for the waiting periods due to shipping, whose suppression allows more seamless workflows, thereby increasing productivity and potentially shortening procedures.

B. Effectiveness: In addition to such effects of acceleration of the proceedings, costs reduction and productivity gains of the various people involved in an arbitration, IT may also make certain aspects of an arbitral procedure more effective, in the sense that tasks can be undertaken—or goals can be reached—in a way that may not have been practicable without IT. For instance, in the absence of IT availability, costs and time constraints may lead to renouncing certain actions, like hearing a witness or experts who may not be quickly available, especially in fast-track procedures. This is for instance the reason why witnesses and experts were heard using videoconferences during arbitrations at the Olympics, where time constraints would have prevented their testimony if they had had to be physically present.

In other less radical situations, IT may increase the quality of some actions: for instance, videoconferencing allows a richer information transfer as it conveys a more detailed message than teleconferencing, and research in the field of online dispute resolution has shown that, in general, richer communications have a higher potential to lead to satisfactory results. In this sense, videoconferencing should not be compared with face-to-face meetings, but rather with teleconferencing. The sense of reality conveyed by videoconferencing is midway between teleconferencing and face-to-face meetings and it may thus replace teleconferencing with advantages related to the quality of the discussion and, on those occasions where the level of details of the discussion does not matter so much, it may replace face-to-face meetings (a question of effectiveness) with advantages related to speed and costs (a matter of efficiency).
C. Convenience: Finally, IT may facilitate certain actions related to arbitral procedures in a way that does not concern speed, costs, or the quality of certain tasks, but that simply makes some processes more convenient. For instance, electronic documents can be searched easily using the «find» function available in all word processors. It should be noted, though, that this obviously requires the documents to be in a format where the text is recognized as such, which notably excludes documents that are scanned (for instance in PDF format) without recourse to a text recognition function and a subsequent check of the recognized text. (Although scanning briefs in image format for subsequent transmission to other participants in an arbitration obviously makes little sense, it is not unheard of). Other advantages on the front of convenience that were already mentioned above, are for instance the possibility of archiving documents easily and the ability to carry an enormous amount of files to a hearing without any consideration of their physical weight.

6.2. EVOLUTION OF “CYBER SPACE” AND TECHNOLOGY IN ARBITRATION:

The word ‘cyber punk’ first appeared as the title of a short story “Cyberpunk” by Bruce Bethke, published in ‘AMAZING’ science fiction stories magazine Vol. 57 No.4, in Nov.1983. The word was coined in the early spring of 1980, and applied to the “bizarre, hard-edged, high-tech” SF emerging in the eighties. The story itself is about a bunch of teenage hackers/crackers. Bethke himself tells that the coining of the word “cyberpunk” was a conscious and deliberate act of creation on his part. He was actively trying to invent a new storm that grokked the juxtaposition of punk attitudes and high technology. His reasons for doing so were purely selfish and market-driven. William Gibson didn’t invent the word ‘cyberpunk’, but invented the “CYBER SPACE” and the cyberpunk science fiction. Originally the term ‘cyberpunk’ was meant to be only character type name, meaning “a young, technologically facile, ethically vacuous, computer-assisted vandal or criminal”. Nowadays the term means much more, it’s the name for whole subculture and movement.

Bethke wanted to include these notions in the term: That children have some undefined wiring which enables them to learn languages far easier than adults do, and this ability is not limited to “Organic” languages. That teenager can be dangerous because they live in a sort of ethically neutral state. They have not got the hang of empathy yet, nor have
they really grasped the linkage between their causative actions and resulting effects. That, just as command of a language is power, technological skill is enfranchisement, and in 1980 we were 20 to 30 years away from an explosion of technology that would radically change the distribution of power in society.

**CYBER-** Cyber comes from “cybernetics” which is a science studying control and communication in the animal and the machine, as defined by NORBERT WIENER, coined of the term. The term originates in the Greek word “KUBERNETES” which means ‘pilot’ or ‘steersman’. Originally, cybernetic system, or any system, was a feedback loop that gives controller information on the results of its actions. As computers were adapted for use in many control systems throughout the 1960s and 70s, the term which helped create the computer became associated with it. Wiener would have become dyspeptic at some of the uses of his word in the last forty years, but surely not with ‘cyberpunk’ and ‘cyberspace’. It isn’t cyber-anything without interaction, information, and communication. Nowadays, and in ‘Cyberpunk’, the prefix ‘cyber’ means a synonym, for that kind of cybernetic machine, something mechanic, or something which exists or is produced via a cybernetic machine. Cybernetics also refers to machines that imitate human behaviour.

**PUNK-** was an anarchistic, dense, and fast youth movement which terrorized the world in the 1970s and 1980s. The mess was caused by the loud hard-core rock music that groups such as the Sex Pistols made popular. The word means originally ‘rotten’ or ‘junk’. A ‘punk’ is a trouble maker, an ‘antisocial rebel or hoodlum’. In terms of literature and social movements, ‘punk’ refers to a ‘counterculture’ and a sort of ‘street-level anarchy’, and tends to focus more on attitude and outlook than on music and criminal activity. So the words ‘cyber’ and ‘punk’ emphasize the two basic aspects of cyberpunk: technology and individualism. Cyberpunk could something like ‘anarchy via machines’ or ‘machine/computer rebel movement’.

The technology of cyberpunk is ultra-technology, which mixes genetic material from animal to animal, from animal to man, or from man to animal. This technology raises human embryos for organ transplants, creates machines that think like humans and humans that think like machines. This is a technology designed to keep people within the ‘system’ that dominates the lives of most ‘ordinary’ people. This is the science of
controlling human functions and of electronic mechanical and biological control systems designed to replace them. This Technology visceral. It extends itself into people via brain implants, prosthetic limbs, and cloned organs. It is not outside us but under our skin, inside our minds. Technology pervades the human self; the goal is the merging of man and machine. Cyberpunk is a combination of high tech and low life. In this world of the future, cities have become ‘sprawls’ where only the strong survive. There is bleakness and dread and ‘ecstasy’. In this world, as in any world, there are those who live on its margins: criminals, outcasts… and those who live in the world of the sinless, who are not necessarily registered in the world database. Cyberpunk focuses on these people, these ‘lovers of freedom’ who often use the ultra-technology designed to control them to fight back. The story lines usually bend toward the world of the illegal and there is often a sense of moral ambiguity; simply fighting the ‘system’ does not make these characters ‘heroes’ or ‘good’ in the traditional sense.⁴⁵⁷

6.2.1. APPLICABILITY OF INTERNATIONAL CONVENTIONS TO CYBERSPACE:

Most national laws and international conventions require the arbitration agreement to be in writing. Art. II of the New York Convention requires that the parties’ agreement must be in writing, and shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The writing requirement is necessary to evidence the existence of the intent of the parties. Article 7(2) of the UNCITRAL Model Law and Article 1 (2) of the Geneva Convention allow arbitration agreement to be made electronically provided that evidence of such an agreement can be provided. The term “arbitration agreement” in Article 2 of the Geneva Convention is defined as an “arbitral clause in a contract or an arbitration agreement being signed by the parties or contained in an exchange of letters, telegrams, or in a communication by teleprinter” and the form and writing requirements are interpreted in the light of the NY Convention. In the EU, under Directive 19939/93/EC qualified certificate which are created by a secure-signature-creation device: (a) satisfy the legal requirements of a signature in relation to data in electronic form in the same

⁴⁵⁷ Bruce Bethke, In foreword to “CYBERPUNK”: “Cyberpunk and the New Myth” thesis by mikel@buffnet.net; Times Magazine, March 1, 1993 issue; Mark Dery, Book Escape Velocity – Cuyberculture at the end of the Century; (http://project.cyberpunk.ru/idb/cyber_punk.html)
manner as a handwritten signature satisfies those requirements in relation to paper-based data; and (b) are admissible as evidence in legal proceedings. Thus, Electronic signatures can qualify as writing. Under Article IV (1) of the New York Convention and Article 31 of the UNCITRAL Model Law, the party moving for enforcement must provide an award that is in writing, which is signed by the arbitrators and that is either the authenticated original or a duly certified copy thereof. Unfortunately, under these wordings, electronic signatures would not qualify as writing. Furthermore, most national laws and conventions require the parties to be present, at one point or another.

With the advent of the Internet, new types of conflicts have risen which arises simply from a click in the computer mouse. The increase in Internet users and expansions of types of web activities, demand a new form of dealing with disputes using technologies without requiring the physical presence of the parties. Applying the existing formal law to cyberspace is difficult because they are ill-fitted for cyberspace and does not include the new means of electronic communication. Although the Geneva Convention recognizes that arbitration agreement can be made electronically provided that evidence of such an agreement can be Provided, it has not been ratified by all Member States of the European Union.458

6.3. **E-COMMERCE - ELECTRONIC ARBITRATION:**

The rapid growth of electronic commerce has brought with it an increasing number of cross-border disputes. Some of the disputes concern subject matters unique to cyberspace. During the past years, disputes concerning copyright, E-contracts, and privacy have resulted in judicial decision. Court litigations are lengthy and expensive. If consumer confidence in e-commerce is to be realized, swift and inexpensive mechanisms must be effectively developed to resolve controversies that arise from Internet-based commerce. Online Arbitration is an efficient alternative for transacting over the Internet. The European Union has taken several initiatives to promote alternative dispute resolution. Community Legislation and Recommendations have been adopted to regulate e-commerce transactions and out-of-court dispute settlements. However, online

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arbitration methods have raised complex legal issues with regards to its relationship with other community legislations.

**ELECTRONIC COMMERCE:**

The use of electronic commerce by business in developed countries has grown considerably in the past few years. Every industry is affected by the Internet. It is the fastest-growing medium for conducting business. Ecommerce encompasses the global marketplace. Due to the intangible nature of the Internet, a precise estimate is not available for the amounts being spent online. Forrester Research predicts that by 2004, online commerce will reach $6.8 trillion. From local and regional markets, the low barriers of entry enable small businesses to expand to international market with minimal costs. Customers benefit from decreased cost of information search, greater extent of choice and range available, lower price and convenience. The Internet is the most widely used tool for product and price comparison. In spite of its benefits, online trading is fraught with “perceived” risks. Internet transactions are still limited to products of low transaction value, and goods sold from reputable companies. Consumer confidence in online shopping is still low- with uncertainty stemming from risk attached to payment, non-conformity of the product, and legal problems that will arise from transactions gone awry. Concern over giving out the credit card number is one of the reasons for not shopping online. Another major limiting factor is that a large majority of people do not have access to the Internet. The rapid growth of ecommerce has resulted in an increasing number of cross-border and distance transactions. Because the Internet is a new environment where it is not limited by many of the spatial constraints of the physical environment, conflicts are inevitable to rise. With the multiplicity of Internet transactions and failures, comes also an expansion of conflicts between parties located far from each other. Disputes concerning copyright infringement, contract, hacking, false advertising, obscenity, privacy intrusion and taxes etc., have surfaced. Application of national laws to cyberspace disputes have become problematic because internal disputes present significant challenges for local law, and cyberspace crosses local and international geographical and jurisdictional boundaries. The legal landscape has not been able to deal with many potential issues that arise due to the speed and changes in which the technology of global communication is developing. Since most of the Internet
transactions are confined to goods or services of lower monetary values, consumers are wary of seeking remedies through court litigation. Traditional litigation proceedings are lengthy and expensive. Court proceedings create uncertainty and dissuade the growth of e-commerce. This has spurred a need to resolve disputes arising from online transactions without being hindered by judicial concerns. There has been a growing interest in out-of-court dispute resolution processes conducted by a neutral third party, as a means of improving consumer confidence in electronic commerce. Increasingly becoming popular is “arbitration” as an alternative method of dispute resolution in cyberspace. It can provide an effective and convenient method to costly litigation and uncertainty. As Internet and high speed connections become common, online dispute resolution will grow because of its cost and convenience advantage. In spite of its benefits, it is not problem-free. Online arbitration has raised complex legal issues with regards to its relationship with other Community legislations.\textsuperscript{459}

Cyber arbitration is inexpensive, quick and universally acceptable. At a time when the Julian calendar is being replaced by the concept of web weeks, Cyber arbitration is the most effective and simple method for the best resolution of cyberspace disputes.

**Elements of Cyber-arbitration:-**

1. Cyber-arbitration Agreement.
2. Deposits of Opening costs.
3. Adoption of cyber-arbitration procedures.
4. Appointment of cyber-arbitrator
5. Claims or counter claim along with documents.
6. Framing of contentious issues.
7. Leading of Evidence by way of affidavits all on-line.
   
   Personal hearing, in the physical world if agreed by both the parties. Granting of Cyber-award.

\textsuperscript{459} Sylvia Mercado Kierkegaard, \textit{LEGAL CONUNDRUMS IN CYBER-ARBITRATION}, IADIS International Conference e-Commerce 2004
Procedures in Online Arbitration

Online arbitration is basically carried via the Internet either exclusively or in part. Arbitration involves submission of a dispute to one or more impartial persons for a final and binding decision. The arbitrators may be lawyers or others with expertise in a particular field such as contract law, consumer law, copyright etc. The parties control the range of issues to be resolved by arbitration, the scope of the relief to be awarded, and many of the procedural aspects. In almost all online alternative dispute resolution (ADR) mechanisms, the Claimant files a claim online (using a standard form) and a confidential information form. The filings may be limited to e-mail communications; web-conferences; tele-or video-conferencing may be allowed in addition. The Arbitrator is selected, mostly by the Arbitration Service Provider. Some publish a list of their arbitrators and their qualifications. The Arbitration Service Provider will then contact the other party to the dispute. If the counterparty agrees, the proceedings are opened. Both participants in Online Arbitration agree in advance to abide by the Arbitrator's decision. The Arbitrator maintains confidentiality, coordinates and schedules the presentation of data, makes rulings on admissibility of evidence, and issues a decision based on the evidence presented. All communications, including the presentation of evidence, is supplied in electronic form-text, image, audio, or video and that the award may be filed in any appropriate court. Decisions are not published. The fees for online arbitration are charged on an online basis and borne by the claimant. There are no time limits to arbitration, but procedure normally lasts to an average of 3 months.

6.3.1. LEGAL FRAMEWORKS ON ONLINE ARBITRATION IN THE EUROPEAN UNION:

Article 293 (4) of the EC Treaty states that Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals and the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. This establishes the framework for enforcement and recognition of foreign arbitral awards, in particular the NY Convention. Article 17 of the Directive on Electronic Commerce adopted in June 2000, stipulates that “the Member States should ensure that their legislation does not hamper the use of out-of-court schemes available
under national law, for dispute settlement, including appropriate electronic means”. The Member States are also invited under the terms of Article 17 to encourage “the bodies responsible for the out-of-court settlement and to operate in a way which provides adequate procedural guarantees for the parties concerned” in accordance with the Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of Court Settlement of Consumer Disputes of 1998. However, the scope of Article 17 is limited to consumer disputes.

ADR is expressly referred to in Article 10 of Directive 97/5/EC on cross-border credit transfers, Article 11 of Directive 97/7/EC on the protection of consumers in respect of distance contracts, Article 12 of Directive 2002/65 concerning the distance marketing of consumer financial services, and Article 11 of Directive 2002/92/EC on insurance mediation. Recommendation 98/257/EC and Recommendation 2001/310/EC establish a number of minimum guarantees in the form of 7 principles which the arbitration body should comply: independence, transparency, respect of the adversarial principle, effectiveness, legality, liberty and representation. However, the recommendations do not have any binding effect. The Directive on Electronic Signatures deals with the legal effects of electronic signatures. Arbitration agreements in digital form using qualified certificates would qualify as a signed written document under Art. 5. The E-Commerce Directive complements the E-Signature Directive and directs the Member States to ensure that their legal system allows contracts to be concluded by electronic means.

**Interplay between Online Arbitration and other EU legislation:**

Considerable efforts have been made in the Community to regulate the development of alternative dispute resolution, particularly in e-commerce, and to encourage cross border trade. The level of development of arbitration varies in each Member States- from encouragement to mandatory prior obligation. The EU has undertaken considerable effort in providing consumers access to alternative dispute resolution through European Networks of national bodies such as the EEJ-Net. Financial support has been given to ADR initiatives, such as the ECODIR, and the EU has adopted the E-Commerce Directive to ensure the validity of electronic contracts, including clauses which provide for recourse to ADR. However, online arbitration raises complex legal
issues that are affected by the constraints of the online environment and other community legislation.

**Preliminary Reference:**

Under Article 234 of the EC Treaty, national courts and tribunal may refer to the ECJ issues relating to the interpretation of treaty, validity or interpretation of acts of institutions of the Community or the ECB, interpretation of governing statutes of Community bodies established by act of Council, where the statutes so provide. It permits a state to ask for ECJ preliminary ruling if it feels it is necessary for judgement. It is mandatory a) if the validity of EC legislation is in question because national courts cannot simply decide this because of the potential for fragmented decisions 2) if there is no state remedy c) and mandatory in court of last resort. However, private arbitration may not qualify, even if the agreement stipulates that parties can only refer their disputes to arbitration. Since parties are under no obligation in law or in fact, to refer their disputes to arbitration and the public authorities are not involved in the decision to opt for arbitration, the arbitration tribunal constituted pursuant to an agreement is not a “court” or a tribunal. In *Nordsee Deutsche Hochseefischerei v Reederei Mond* the agreement between the parties contained an arbitration clause excluding recourse to the ordinary courts, and an arbitrator to eventually hear the case. A dispute arose concerning the applicability of the pooling agreements under EC Law. German law makes arbitral awards definitive and provides for judicial enforcements. The arbitrator sought a preliminary ruling from the ECJ concerning the validity of the German law. The ECJ ruled that if questions of Community law are raised in arbitration resorted to by agreement; it is for the national courts and tribunals to examine them and then ascertain whether it is necessary for them to make a reference to the ECJ under Article 234. In an arbitration agreement, parties are free to stipulate which law will be applicable in case of conflict and which court will have jurisdiction. Arbitration is generally excluded from the scope of international conventions which contain regulations on jurisdiction and conflict of law.) Art.1(4) of the Brussels Convention and Art 1(2) (d) of the Rome Convention.

In disputes concerning individuals and entities in the EU, where question concerns the interpretation of EC legislation, the matter can be referred to the national court, which has the *locus standi* to refer the issue to the ECJ. However, a problem may

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arise when the arbitration clause specify that the governing law would be an EC legislation. The following is a wild scenario in a B2C transaction online: The seller is a business entity in Rumania, the consumer is domiciled in Russia and the seat of arbitration is in the United States. Choice of law is EU law – in particular the E-Commerce Directive. The conflict concerns the question of the time when a data message was received under the Ecommerce Directive. Since the arbitration tribunal is not considered a “court” nor is it a “national court” of member states of the EU, how can the arbitration tribunal refer the issue to the ECJ since the arbitration board and the courts of the parties to the dispute cannot avail of Article 234 of the EC Treaty? Since the curial law of the arbitration would be the US law, the issue becomes more complicated if the court of the state where the arbitration board seat, takes a hands-off approach!

**Article 6 of the European Human Rights Convention:**

Access to justice for all is a fundamental right enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Access to justice is an obligation which is met by Member States through the provision of swift and inexpensive legal proceedings, such as legal action by electronic means. Alternative Dispute Resolution such as online arbitration is an integral part of the policies aimed at improving access to justice. Article 6 of the European Convention on Human Rights states,” In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Article 6 gives a right of appeal to anyone who can show that the courts have breached Article by failing to conduct proceedings in a fair and impartial way and failing to ensure that submissions, arguments and evidence are properly examined. Article 6 requires that a party has real and effective access to court, has notice of the time and place of the proceedings, has a reasonable opportunity, equal to his opponent's, to present his case and is given a reasoned decision. The most important elements of fair hearing would be the

1) Right to be heard
2) right to counsel
3) Consent of the parties to the procedure
4) and impartiality of the arbitrator. There is a debate on whether the European Convention on Human Rights applies to arbitration. In *Deweer v Belgium*,\(^{461}\) the court ruled that an arbitration agreement entered voluntarily is treated as a waiver of Article 6 and a renunciation of a right to have the dispute dealt by an ordinary court. However, arbitration agreements are still subject to review on the grounds of public policy. The courts have sufficient powers to interfere with an arbitration or award that contravenes the Convention through review on the basis of procedural unfairness or through public policy. In *KR v Switzerland*,\(^{462}\) the Court ruled that voluntary waiver of court proceedings in favour of arbitration is acceptable, but the waiver is not necessarily considered a waiver of all rights under Article 6 such as procedural guarantees to a fair hearing by an independent and impartial tribunal. In B2C disputes, a consumer’s waiver is limited as he is protected by the Council Directive on Unfair Contract Terms.

**Procedural Guarantees and Commission Recommendations:**

Most of the online arbitration service institutions have adopted arbitration rules which govern the rule for procedure or a requirement that the arbitrator has the right to determine the procedure based on a variety of legal framework. This means that national arbitration laws are not applicable unless they contain mandatory rules of the law constituting public policy. Since most of these institutions are American-based, the rules emanate from the American Arbitration Association, and are based on the NY Convention. However, parties may still freely choose the law to govern the arbitration procedure. In cases where the procedural guarantees of the member states of the EU are different from those of the NY Convention, Art.VII (1) of the NY Convention provides for a more favourable right rule. Art. 17 of the European Ecommerce Directive obliges Member States to provide adequate procedural guarantees, which include reference to the Commission Recommendation 98/257/EC and Recommendation 2001/310/EC. However, since recommendations do not have a binding effect, many arbitration institutions have failed to provide the following basic procedural guarantees of the Right of Access and the Right to a Fair trial, Public Access.

Arbitration proceedings are not required to be accessible to the public. The parties prefer arbitration because of the confidentiality and privacy of the proceedings proper.

\(^{461}\) 1980 2EHRR 439; Series A.No.35

\(^{462}\) Application No. 10881/84 Decision of the Commission as to the admissibility 4 March 1987
Decisions are not publicized. On the other hand, in order to boost consumer confidence, it may be necessary to open the proceedings and to publish the decision so that consumers can judge the effectiveness of the ADR. For example, all dispute resolution providers which operate under ICANN Uniform Domain-Name Dispute Resolution Policy are required to publicize all decisions in full text on the Internet, except when a panel decides otherwise, which can occur in exceptional circumstances Confidentiality. Some ADR providers prohibit the parties from using the documents presented in the course of the procedure to be used in the court. Impartiality The problems of impartiality arise if the arbitration service provider chooses the Arbitrator. In order to avoid this problem, a roster of all registered and accredited arbitrators must be made available online from whom the parties can choose. All arbitrators must be accredited by the national bodies and possessing the competence and background necessary in dealing with legal issues. They must have been screened to ensure impartiality. No party should have a unilateral communication with the Arbitrator. Opportunity to Present Evidence (Adversary System). The party has right to be heard with its argument and to present evidence, including witnesses. Credibility is important. How witnesses should be heard is an important procedural device. Many dispute resolution bodies rely on documents only and insist on oral hearing when the dispute is material. Video-conferencing and e-mail exchanges are sufficient when affidavits and exhibits are the only requirements. Video and audio technologies are available to allow witnesses to testify with their voices and images available to the parties and the Arbitrator. Video-conferencing enables the parties and the witnesses to give evidence and to be cross-examined without the need to travel. It allows the Arbitrator and Counsels to detect voice and facial changes, as well as to cross-examine the witnesses. It must also be assured that all parties are participating in the conference and no other third parties, except their respective counsels, are allowed. Each message must be provided to the other party Evidence. The documents exchanged between the business enterprise and the consumer constitutes the only evidence for the conclusion and performance of the contract. To be a valid arbitration agreement, the electronic document must include the identity of the parties, the agreement itself and the specific terms and the general conditions). This information must be stored in a manner that allows its accessibility for further reference and its admissibility as evidence. The
authenticity, non-reputability, identity and integrity of the information must be guaranteed to ensure that they are not tampered, such as qualified signatures.

**Directive on Unfair Contract Terms:**

Agreements to arbitrate may not be valid at all in a B2C transaction. The EU Directive on unfair terms in consumer contracts (Directive 93/13/EEC), for instance, declares unfair those clauses that are “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.” Situations where the parties have substantially different bargaining powers are non-arbitral subject matters because they go against public policy. (Art.3) The annex to the directive contains an indicative and non-exhaustive list of clauses which can be declared unfair.

The judgement of the ECJ in *Oceano Grupo Editorial v Rocio Quintero* stated, “‘It follows that where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier within the meaning of the Directive and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

“The arbitration clauses in electronic commerce are normally standard clause where the consumer is unable to influence the terms. According to the judgment of the ECJ, standard clauses would be considered “unfair” in the sense of the Directive because of the weakness in the bargaining power of the consumer. However, “a reference of a dispute to arbitration is not considered “unfair” in a situation where the consumer excludes his right to litigate in individually negotiated contractual terms.

**COUNCIL REGULATION 44/2001 AND THE ROME CONVENTION:**

In Article 3(3) of the Directive on Electronic Commerce 200/31/EC, the “state of origin” is not applicable to the freedom of the parties to choose the law applicable and contractual obligations concerning consumer contracts. This means that the Directive

\[C-240/98\]
does not affect the mandatory laws concerning consumer protection such as the Directives on Unfair Contract Terms, Distance Contract etc. This would indicate that Arbitration must apply the mandatory rules of protection. Under the principle of legality contained in the Commission Recommendation, the decision of the arbitration board should not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the Member State provided for under Art. 5 of the Rome Convention the Directive on Ecommerce take its departure from the consumer protection provisions of the Rome Convention on the Law Applicable to Contractual Obligations. Article 5 of the Rome Convention provides that a choice of laws of the parties cannot deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence

1. if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

2. If the other party or his agent received the consumer's order in that country, or

3. If the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy. However, according to Article 1 (2) (d) and 1 (2) (d) the Rome Convention on the Law Applicable to Contractual Obligations , the Rome Convention does not apply to Arbitration. Since arbitration is excluded in the Rome Convention, the principle of legality contained in the Recommendation becomes irrelevant.

Similarly, the provisions of Article 1(2) (d) of Council Regulation 44/ 2001 on Jurisdiction and Recognition of Enforcement of Judgments in Civil and Commercial Matters would not be applicable to arbitration. When the Regulation was adopted, the Council and the Commission stressed in a joint declaration the importance of Alternative Dispute Resolutions: “The Council and the Commission take the view that in general it is in the interest of consumers and undertakings to try to settle their disputes amicably before resorting to the courts. The Council and the Commission stress in this connection that the purpose of the Regulation, and in particular of Articles 15 and 17 thereof, is not to prohibit the parties from making use of alternative methods of dispute settlement.“ Arbitration is excluded from the ambit of the Regulation because a settlement obtained
through the Alternative Dispute Resolution is not enforceable because it is neither ordered nor recorded by a person exercising public authority. Arbitration agreements with consumers are valid unless they violate the public policy of the country recognizing and enforcing the awards. (Article V) (2) (b) of the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards.464

Auckland Cyber Arbitration Demonstration:

   At the IPBA (Inter-Pacific Bar Association) annual conference in New Zealand, we conducted the Cyber Arbitration demonstration using Picture Tel video conferencing technology, which is widely used internationally. PictureTel has many configurations with various quality levels. We chose to use the 128K system, which is equivalent to two ISDN channels, because ISDN is either deployed or is being deployed in most countries and is the most common transmission speed used for video conferencing today. The purpose of using such technology was to give a true-to-life example of what a Cyber Arbitration might look like using widely available technology. Because a videoconferencing bridge was used to allow split screen multi-point video conferencing this also caused an inevitable delay in sound and picture transmission since the bridge has to decode everyone's video signals and create a multi-screen signal to send to each participant.

Cyber Arbitration and the Internet:

   Although the Auckland Cyber Arbitration demonstration showed that an arbitration using multipoint videoconferencing technology was feasible even given the low-level of current widely available technology (and, per force, will be much more feasible with the rapid advance of the general level of technology), one of the critical issues highlighted by the demonstration was cost. ISDN, telephone and leased lines offer dedicated circuits which allow high quality communications, but the cost of creating a network of high speed ISDN connection worldwide for several hours can become prohibitive. This is where the Internet comes in. The Internet promises to lower the cost of communications by allowing multiple users to share circuits, making communications much more efficient, thus lowering the cost. Nevertheless, at present, one of the primary

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problems with trying to conduct video conferencing over the Internet is that the Internet is what is called "best effort" connectivity. On the Internet, one traditionally does not have a dedicated circuit, but instead, shares the circuit with everyone else who happens to have their routes going over the same lines. When any segment of the chain of routers, leased lines or servers that one would go through to reach each other gets crowded, the connectivity slows down and video frames freeze up and audio starts to cut out. This sort of "lousy" video is now quite common on the Internet, but is used primarily for non-critical or entertainment applications. It is absolutely inadequate for the requirements of a real Cyber Arbitration, and is why we were unable to demonstrate a Cyber Arbitration using the internet in Auckland.

Nevertheless, high quality video transmission and video conferencing is currently being tested around the world. Using high speed lines with special routing technology, Internet service providers will be able to guarantee bandwidth to users requiring high quality and high speed lines. Applications are being developed to allow personal computers and hardware from many vendors to communicate using open standards, thus lowering the price of video conferencing equipment. It is likely that, over the next several years, it will be quite common to find video conferences being conducted over the Internet at quality levels equivalent to, if not superior to the quality currently being achieved using 128K ISDN and PictureTel. Until such time, however, it will still be of benefit to use the infrastructure and technology available to us today to work out many of the legal and procedural issues that we can identify only through actually conducting Cyber Arbitrations.

The Internet and Security:

One of the primary concerns in the age of open networks is security. E-mail and other internet communications (such as the types that would be necessary to conduct Cyber Arbitrations) are typically transferred through several servers and travel over open networks. It is a trivial matter for even a minimally computer-literate individual to, for example, intercept and even replace e-mail while it is travelling between a lawyer and his client. In the age of advanced digital technology, wiretaps are not conducted by people "listening" to phone calls, they are conducted by voice recognition software which can scan thousands of connections or scan stored conversations in databases. E-mail is
searched by keyword or intelligent pattern matching software that can search through and organize billions of pages easily. Not surprisingly, therefore, thousands of computers which serve mail are penetrated each year and corporate espionage on computer networks has become a growing concern and a real threat. This is why cryptography and digital signatures are essential to ensure the integrity of a Cyber Arbitration system. Digital signatures using public key cryptography are becoming more and more widely used. Digital signatures allow e-mail or any other form of electronic message to be digitally signed by the sender and for that signature to be verified by the recipient. Digital signatures are typically authenticated by a certification authority ("CA"). The CA uses some method of identification verification and then certifies the key which is used to sign documents.

Using public key cryptography, documents can also be encoded in a way that allows only the holder of a particular key to decode and view the document. Public key cryptography is unique in comparison to other forms of cryptography in that the key used to encode (encrypt) the document is different from the key used to decode (decrypt) the document. The key used to encrypt the document is referred to as the public key and the key used to decode the document is referred to as the secret key. By distributing one’s public key widely, anyone who receives the public key can then send confidential encrypted documents to the holder of the secret key without fear of the un-encrypted (plaintext) data falling into the hands of unauthorized viewers. In combination with digital signatures which use the same public and secret keys as public key encryption technology, public key technology allows people to conduct private and authenticated communications over the internet. It also allows the creation of tamperproof documents and allows electronic documents to be presented "in writing" which cannot be modified without breaking the digital signature associated with the document.

The risk that a public key that you believe belongs to a trusted colleague is not actually the correct key is supposed to be managed by the CA. The problem with the CA is whether one can trust the CA. Companies running CA’s are not infallible and possibly more importantly, they are overseen by government agencies which may be incentivized to allow forgeries or deception to occur in order to collect information about unfriendly governments, organizations or individuals. A Certification Authority managed by the IPBA with an identification verification procedure which is open, capable of being
audited, and conducted face to face at the IPBA’s annual meetings could easily become one of the few trusted forms for authentication of keys. Such an authentication mechanism could be used not only to ensure the integrity and confidentiality of Cyber Arbitrations, but also could be used to manage membership, standardize document execution, store and date evidence, conduct encrypted telephone and video conferencing, and a myriad of other applications.

New technology will allow international arbitration and negotiation to become faster, more efficient and less expensive. Although procedures and law will have to be developed and modified as technology develops, many of the issues (including security issues) will only become apparent as these new technologies are deployed and tested by real lawyers and arbitrators. This is why continued research and development of a Cyber Arbitration system by the IPBA is so important to ensuring a bright and new technological future for international arbitrations. The IPBA is in a unique position to create a test bed for developing a workable Cyber Arbitration system and should not let this opportunity slip from its grasp.

6.4. CYBER ARBITRATION – ONLINE INTERNATIONAL COMMERCIAL ARBITRATION:
Compatibility with the Indian Arbitration and Conciliation Act and The Scope For Development In The Indian Context

Global Development of Online Arbitration:

Information Technological developments have significantly changed traditional arbitral practices and procedures. To match these developments, ICC took a lead and has issued guidelines on the use of Information Technology (IT) in arbitration, devised a web-based system for conducting and managing arbitration proceedings, and established an online clearinghouse system for small claims. Electronic submissions by e-mails or VoIP (Voice over Internet Protocol) or videoconferencing pioneered the IT-intensive online arbitration. Arbitration agreements are concluded, proceedings conducted, and awards rendered by electronic means in online settings. The issue is whether an online arbitration is fully admissible and effective under the current legal framework? Before

coming to the specific legal obstacles that might be encountered, a general picture of online arbitration, including its background and definition, is discussed herein after.

The arising issues will be divided into three major categories relating to:

(i) arbitration agreements,
(ii) arbitral proceedings, and
(iii) arbitral awards.

There can be three possible situations for submitting or referring a claim, dispute or difference to an online arbitration.

Firstly, an e-contract containing an online arbitration clause. Secondly, a written contract providing for online arbitration; and lastly, reference to online arbitration after the dispute has arisen.

The agreement of the parties to refer their disputes to the decision of the arbitral tribunal must be intended to be enforceable by law and hence, it must satisfy the requirement of enforceability as prescribed by Section 10 of the Contract Act, 1872 with a clear intention of entering into a legally binding relationship and parties must be *ad-idem*. Arbitration Agreement has been defined under Section 7 of the Arbitration and Conciliation Act, 1996. If an online arbitration clause passes a test of Section 7 then it is deemed to be a valid arbitration clause. Exchange of letters, telex, telegrams or “other means of telecommunication” should signify an active assent by both parties and a demonstrable meeting of minds as to the arbitration agreements.\(^{466}\)

Whether any agreement entered into through such other means of telecommunication is enforceable? What would be included in such other means of telecommunication? Can exchange of emails embodying an agreement to arbitrate be covered under Section 7? The e-mail exchange may also refer to a separate written arbitration agreement (“incorporation by reference”). The parties may also wish to reach agreement through a website. In such case, an exchange of electronic communications occurs through the parties’ browser software. Either method (e-mail or website) will ultimately lead to the same question as to whether an electronic communication provides a required record of the agreement. The answer was given in affirmative by the Hon’ble

\(^{466}\) *Shakti Bhog Foods Ltd. V. Kola Shipping Ltd.*, AIR 2009 SC 12
The author has referred to the article titled as “*Online Arbitration*” by Rafal Morek as available on the website „[http://www.odr.info/Re%20greetings.doc](http://www.odr.info/Re%20greetings.doc)“
Supreme Court in the case of **Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.**\(^{467}\) In this case, the Petitioner submitted commercial offer through email for supply of bauxite to Respondent. Respondent conveyed acceptance of offer through e-mail and the Parties entered into contract. The Contract contained an Arbitration Clause for resolution of disputes between the parties. Thereafter, Respondent refused to honour contract on the ground that there was no concluded contract between the parties and the parties are still not ad idem in respect of various essential features of the transaction. It was held by the Hon’ble Court that if the intention of the parties to arbitrate any dispute has arisen in the above offer and acceptance thereof, the dispute is to be settled through arbitration. Once the contract is concluded, the mere fact that a formal contract has to be prepared and initialled by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialled. Needless to state that Section 4 of the Information Technology Act, 2000 renders legal recognition of such electronic transfer of communication which is admissible as evidence. Though, e-commerce laws have “legitimized” electronic communications in the light of traditional paper-based legal requirements, it does not mean that the controversies about arbitration agreement concluded online completely disappeared. Nor could one assume that every arbitration agreement concluded by an exchange of e-mails or electronic data interchange will be valid. The means of telecommunication applied must satisfy certain conditions, i.e. provide the agreements record that is “accessible so as to be usable for subsequent reference”.

### 6.4.1. Applicable regulations of international and domestic laws:

A number of arbitration institutions have already opened the possibility to perform arbitral proceedings online. They have made an effort to either acclimatize their existing arbitration rules to the online environment, or to set up new sets of rules for online arbitration. The legal framework for online arbitration requires multiple layers of regulation at different level. The international commercial arbitration not only encompasses the institutional rules of arbitration and private contractual agreements but also international conventions, bilateral treaties, model laws (such as UNCITRAL model laws) and national arbitration laws. All these aspects need to be taken care of even in online arbitration. Entering into arbitration agreements in certain online settings may

\(^{467}\) (2010) 3 SCC 1
conflict with the basic principle of international arbitration law that the consent of the
parties is a condition sine qua non to validly agree on arbitration.\textsuperscript{468} To give an example
of a peculiar but common situation, when a single mouse click suffices to accept an offer
with an arbitration clause, it may of course sometimes happen that an alleged acceptance
does not reflect the fully informed consent of a party. It is important in an online
arbitration that the contents of the arbitration clause are meticulously drafted and take
into account, inter alia, the governing law of the arbitration agreement, jurisdiction of the
courts (whether exclusive or nonexclusive), procedure for the nomination and/or
appointment of the arbitral tribunal, place or seat of the arbitration, language of the
arbitral proceedings and applicable institutional rules on online arbitration.

\textbf{Arbitral proceedings:}

Information Technology is already used rampantly in arbitral proceedings. It is
indeed cost effective and convenient but involves legal questions of vital importance to
be settled first. Parties are free to agree that the whole or part of arbitral proceedings are
conducted online, with the use of whether asynchronous (E.g. e-mail) or synchronous
(e.g. video- or audio-conference) electronic means. It is pertinent to analyse the
applicable mandatory rules of procedure as place, or seat, of online arbitration is literally
“virtual”. The principles of tribunal impartiality and equal treatment of parties, enshrined
in Section 18 read with section 12 of the Arbitration and Conciliation Act, are relevant.
These online techniques can be used in arbitral proceedings, provided that their
application does not prejudice. Asynchronous electronic means are those where there is a
time lapse between an initial communication and a reply. One party for example “if it had
less access to or know-how of the technology than the other party”

There is a view that in order to safeguard the fairness of online arbitral
proceedings, the implementation of information technology, regardless of its scope,
should be suitably and carefully codified in procedural orders issued by the arbitral
tribunal or, preferably, by agreement between the parties at the outset. If parties agree on

\textsuperscript{468} A. Broches, \textit{Commentary on the UNCITRAL Model Law on International Commercial Arbitration}
avan den Berg, \textit{The New York Convention of 1958: Towards a Uniform Judicial Interpretation} (Antwerp:
Kluwer, 1981) at 173
institutional online arbitration, applicable rules also have to be taken into account. Article 3(2) of the ICC Rules specifically authorizes electronic communication with the Court and the Secretariat of the ICC. If there is any conflict between the institutional rules on online arbitration and the intent of the party then such rules can be categorically amended/ deleted by an express agreement between the parties. The need for clarity may arise when provisions of applicable arbitration rules require inter alia, references in a written form or a physical appearance of the parties before the arbitral tribunal. As already stated above, many arbitration institutions have already adapted or supplemented their rules to include online proceedings. It will not be pre-mature to say that such problems are gradually reducing. In online arbitration, parties may decide to conduct hearings online and to examine and cross-examine witnesses, or hear experts, using teleconferencing or videoconferencing technology. However, according to my understanding two major problems may hinder the use of Information technology in the online arbitration, either under domestic or international scenario. First of them relates to technology itself, and the other to law.

Cost of procuring equipment for online proceedings is no less and even after large investment quality of transmission is still a cause of concern. Delays and interruptions cannot often be avoided, and witnesses are not clearly seen and heard. Other issues pertaining to technology as prevalent in India are the issue involving data protection, confidentiality of the documents and evidence adduced during the arbitral proceedings and privacy of the parties. India has introduced Personal Data Protection Bill 2006 but it could not see the light of the day. Section 72 of the Information Technology Act takes care of the Hornem. The use of tele- and video-conferences in court proceedings is currently admissible in many jurisdictions. Probably the most innovative web-based broadband video conferencing system, that allows solicitors to conduct their court hearings from a remote source, has been recently set up in Singapore.469 The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location. Confidentiality and privacy of the electronic record, book, register, correspondence, information, document or other material without the consent of the

person concerned. A major legal issue concerning electronic hearings in online arbitration concerns the legal significance of evidence produced online. Many practitioners and academicians have mooted for a blend of both online and offline methods for procuring or taking evidence on record.

There can be online filing platforms where the parties to the online arbitration may file their documents and evidence through an independent and authorised third party provider. Such online filing is part of the institutional rules or necessary procedural orders passed by the Arbitral tribunal. Documents and evidence that are filed before the Arbitral tribunal may be scanned copies of the originals or can be protected and authenticated with the help of digital signatures. If a document bears a digital signature then it is presumed to be unaltered.\textsuperscript{470}

\textbf{The place of arbitration:}

It will not be an exaggeration to state that international commercial arbitration has achieved a considerable degree of independence from national courts.\textsuperscript{471} Nonetheless the whole arbitral proceedings remain subject to the laws of the many jurisdictions in which arbitration takes place and in which award is to be enforced.

If arbitral proceedings are conducted entirely online at a distance, with parties and arbitrators in distinct places, \textit{prima facie}, it seems difficult, or even impossible, to determine the place, or seat,\textsuperscript{472} of the arbitration. It is indispensable to ascertain the seat or place of arbitration which is online. The issues involving jurisdiction in online arbitration will be more complex as compared to conventional arbitration unless a formal seat of arbitration is decided either unanimously by the parties or by the Arbitration Rules or by the arbitral tribunal. Section 20(1) of the Act states that the parties are free to agree on the place of arbitration. Importantly, Section 20(2) indicates that if the parties have not agreed to such place then arbitral tribunal would determine the place of arbitration having regard to the \textit{circumstance of the case including the convenience of the parties}. Parties sometimes choose the place of institution to be the place of arbitration. Thus, deciding a place of online arbitration can be achieved through unanimous decision of parties (either

\textsuperscript{470} Electronic signatures can provide for both authenticity and integrity (they encrypt the contents of the message in such a way that its content cannot be altered without prior decryption and subsequent re-encryption). They are comparable to handwritten signatures and should carry the same evidential weight.


directly or by reference to the arbitration rules) or by arbitrators if the rules are silent or if parties fail to decide the same unanimously. Case law allows the seat of arbitration to be “a strictly legal concept dependent on the will of the parties”.473

6.4.2. Arbitral Awards:

There are legal impediments which have to be taken care of when it comes to Arbitral Awards. According to my understanding these can primarily be: Can an arbitral award be validly pronounced by the Arbitral Tribunal over the internet or online? And whether such online arbitral award be enforced by national courts within the existing legislative framework? Section 31 of the Arbitration and Conciliation Act deals with Form and contents of the arbitral award. Such an award must be in writing and signed by the members of the arbitral tribunal. Such an award must state the reasons upon which it is based unless the parties have agreed that no reason is required or the award is pursuant to the settlement between the parties. It is important to note that the Act also makes it mandatory to incorporate the date and the place of the arbitration so that it shall be deemed to have been made at that place. An arbitration clause contemplating an online arbitration must specifically fix the place of arbitration even though the arbitral proceeding would be held online. Section 31(5) states that after the arbitral award is made, a signed copy shall be delivered to each party. The New York Convention on Recognition and Enforcement of Foreign Awards (herein after referred to as “the NYC”) merely requires a party seeking enforcement to furnish the duly authenticated original award or a duly certified copy thereof. I am of the opinion that electronic documents can be considered „originals within the meaning of the NYC by invoking the doctrine of “functional equivalence”474 Section 15 of the Information Technology Act, 2000 deals with secure digital signature. Electronic signatures can provide for both authenticity and integrity (they encrypt the contents of the message in such a way that its content cannot be altered without prior decryption and subsequent re-encryption). They are comparable to handwritten signatures and should carry the same evidential weight. Recognised electronic signatures should not be restricted to digital signature, but extend to all types

474 The “functional equivalent” approach is promoted by the Model Law on Electronic Commerce. See also: Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (New York, 1997) at 20 (section 15).
of procedures used to electronically attach a signature to a document, provided they
(a) identify the user,
(b) Are in the exclusive control of the user and
(c) Encrypt document in such a manner that any subsequent alteration is noticeable. It can
be inferred from the combined reading of Sections 15 and 11 of the Information
Technology Act, 2000 that a secure digital signature can be attributed to the originator of
such signature. Thus, if an award is digitally signed by the arbitrator then it can be
deemed to have been signed by him. Further, if the arbitrators digitally sign the
arbitration agreement and the award, the goal of the New York convention appears to be
met. Would such a solution be recognized? This poses a double question: first, whether
such certification is acceptable; second, who should be capacitated to certify.

The New York convention does not determine the law applicable to certification. This silence is usually interpreted as allowing the enforcing court to apply the law of
either the country of origin of the award or country in which enforcement is sought, at the
option of the party seeking enforcement.\(^{475}\) The issue would be resolved if law of one of
these two countries recognizes digital signatures as equivalent to handwritten signatures.
In that event the enforcement court should hold that the arbitration and the award are
validly certified by way of a digital signature.\(^{476}\) These issues regarding the recognition
and enforceability of online arbitral awards can be reduced if the online arbitration clause
is drafted meticulously and with due care or if it refers to specialised institutional rules on
online arbitration. Indeed the New York Convention is “the single most important pillar
on which the edifice of international arbitration rests”.\(^{477}\) Arbitral awards rendered in
online procedure have all attributes of traditional arbitral awards: they are authoritative,
binding and final, subject to an action to set aside for limited procedural and substantive
grounds. Needless to state that online arbitral awards inescapably fall within the national
legal framework where the award is sought to be enforced or challenged and, to the same
extent as offline arbitration. Such awards are subject to be reviewed by the national court.
The recognition and enforcement of such online awards are hit by “the territorial

\(^{475}\) See E. Gaillard and J. Savage (eds), Fouchard Gaillard Goldman on International Commercial
Arbitration para. 1675; J.F. Poudret and S. Besson, Droit compare de arbitrage international, para. 920; and

\(^{476}\) See R. Hill, Online Arbitration: issues and solutions 1999 (published by Kluwer Law International),
page 222.

1 Amer. Rev. of Int'l Arb. 91 at 93.
principle. Article I.1 of the NYC, which defines the scope of the NYCs application by the reference to “arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought”.

If parties or arbitrators have specified the juridical seat of the arbitration in one of the member States then such award will get the shelter of the NYC. Under the NYC, an arbitral award is deemed to be made at the seat of arbitration,\\(^{478}\) irrespective of the place of hearing, or where the arbitrators signed the award. Further, Article V.1. (d) Of the NYC provides that the recognition and enforcement of an award may be refused, if “the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”. If the seat of arbitration is specified by the parties or by the Tribunal then the multiple locations of procedural acts, and ambiguities about territorial locations of procedural acts conducted online do not hinder the recognition and enforcement of the online arbitral award under the NYC. In the event where the parties or the Arbitrators fail to determine the place of arbitration then it will lead to confusion relating to the jurisdiction of the national courts and otherwise.

The “dematerialised arbitration” resulted in the increasing interest in the question of whether an online arbitration is valid within the Indian legal framework. Such evolved mechanism of dispute resolution which is online arbitration may run into complications in the application of traditional principles of international commercial arbitration. Prima facie, it is believed that an online arbitration is the change in platform rather than in essence. The application or use of online arbitration cannot be restricted merely by formal requirements. Online arbitration is now considered as an acceptable legal mechanism that is hopeful but it must be cautiously handled due to the above mentioned legal uncertainties. It gives a new dimension to the conventional form of arbitration. The acceptability and formulation of online arbitration rules by leading Arbitration Institutions apparently reflect the change of course in the area of arbitration towards this new mechanism.

\\(^{478}\) See: Article 31 (3) of the Uncitral Model Law of Arbitration: “The award shall state its date and the place of arbitration as determined in accordance with Article 20(1). The award shall be deemed to have been made at that place”.

* The author has referred to the article titled as “Online Arbitration” by Rafal Morek as available on the website - “http://www.odr.info/Re%20greetings.doc
6.5. ON-LINE DISPUTE RESOLUTION (ODR):

Robert Briner, who chaired the International Court of Arbitration, has carved a niche in promoting and developing arbitration around the world through his distinctly pragmatic and relentless efforts to benefit its users. In just a few years the picture has changed dramatically. Each year close to a million disputes are resolved online and over a hundred online dispute resolution providers offer their services worldwide. From a technology gadget, ODR has become a major phenomenon in dispute settlement. Admittedly, it may appear to lack any connection with international commercial arbitration, yet the day-to-day operation of commercial arbitration cannot remain unaffected by such a vast phenomenon. Well aware of these realities, ICC, whose International Court of Arbitration is chaired by Robert Briner, has launched several projects in the area of IT. These include issuing guidelines on the use of IT in arbitration\(^{479}\) devising a web based system for conducting and managing arbitration proceedings\(^{480}\) and setting up an online clearinghouse system for small claims.\(^{481}\)

Present-day reality of online justice:

1. Surf on the Web reveals that there are currently over a hundred institutions offering dispute resolution services and an additional fifteen to twenty new providers emerge each year\(^{482}\) What strike the observer first and foremost is the multifarious nature of the offer and the diversity of the methods. In an attempt to put some order into this diversity, one can distinguish three traditional methods of dispute settlement—

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\(^{481}\) ICC is working towards the creation of a global business-to-consumer online dispute resolution clearinghouse. The clearinghouse is to be a worldwide central filing platform for business-to-consumer complaints, which would receive consumer disputes and refer them to appropriate ODR providers; see C. Rule, *Online Dispute Resolution for Business. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (San Francisco: Jossey-Bass, 2002) at 115.(Gabrielle Kaufmann-Kohler , Online Dispute Resolution and its Significance for International Commercial Arbitration, *Global Reflections on International Law, Commerce and Dispute Resolution* Liber Amicorum in honour of Robert Briner, ICC Publishing. Publication 693), (www.iccbooks.com)

negotiation, mediation and arbitration—plus a number of other methods such as dispute assessment, mock trials and prevention mechanisms.

2. **Automated and assisted negotiation:**

There are two main forms of negotiation available for settling disputes on the Internet: automated and assisted negotiation. Automated negotiation is particularly interesting because it is a product of the medium. There are about twenty dispute resolution providers active in this field, some of which administer up to three thousand disputes per month. In a little over five years, some one hundred thousand disputes have been solved with settlements totalling around seven hundred and fifty million dollars.\(^4\)

Automated negotiation is a process of blind bidding. First, the parties jointly determine the range or spread within which they agree to settle. For instance, they say they will settle if their offers are within 10 per cent of each other. Each party then makes an offer, unaware of its opponent’s offer. If the offer is within the agreed spread, the computer calculates the mean value and the dispute is settled for that amount. If the offers are outside the spread, then no settlement is reached and the computer invites the parties to proceed to a new round of blind bids. The process is simple and efficient, but very basic. Indeed, it is limited to disputes where liability is undisputed and the only issue is to determine the amount to be paid. By contrast, assisted negotiation is more sophisticated because it can handle all types of settlement terms and conditions and is not restricted to payment. It is widely used. At the time of writing, the most active centre, Square trade, had administered approximately two million disputes since mid-2000. The number has grown exponentially, with more than eight hundred thousand disputes handled in 2004. Of these, 75 per cent were resolved by assisted negotiation usually within less than two weeks and at a success rate of 75 per cent. The remaining 25 per cent were settled by mediation with an 80 per cent success rate. The amounts in dispute range from one dollar to one million dollars, with most being below five hundred dollars. Assisted negotiation is essentially negotiation between two parties without the involvement of a third neutral, but with the assistance of a computer. The ODR provider makes available a web

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\(^4\) This range varies, depending on the dispute resolution provider and the preference of the parties, between 5 and 30 per cent, or it could be a predetermined amount of money. See further G. Kaufmann-Kohler & T. Schultz, *supra* note 4 at 17–21. *Gabrielle Kaufmann-Kohler* 439.
communication platform, guidelines, advice to parties on how to proceed, standard forms and such like.\footnote{This has led some authors to consider the computer as a kind of ‘alternate third party’, referred to as the ‘fourth party’: E. Katsh & J. Rifkin, \textit{Online Dispute Resolution. Resolving Disputes in Cyberspace} (San Francisco: Jossey-Bass, 2001) at 93–116.}

\textbf{Mediation:}

Mediation is less popular on the Web. Essentially, the procedure is the same as offline, except that the facilitative and evaluative techniques are here combined with IT. There is generally one chat room for joint sessions, one for caucuses and a place for filing and storing documents. Using a chat room is not very different from a telephone conversation: one simply types on a keyboard instead of speaking, and reads on a screen instead of listening. At first sight, the online environment would not seem conducive to successful mediation. Offline, the human element and the personal authority of the mediator whom the parties trust are keys to the success of the process. Surprisingly, a survey conducted among both online mediation practitioners and mediators without any online experience showed the latter to be sceptical while the former were convinced of the benefits of the process and witnessed high settlement rates online.\footnote{L. Meylan, ‘Online Mediation: The Practitioners’ Point of View’ [publication forthcoming 2005].} The main reasons for the positive assessment of online mediation lie in the advantages gained from asynchronous communication that allows time to reflect before reacting to a proposal from the other side or from the mediator. Other benefits are significant savings in cost and time, and convenience.\footnote{\textit{Ibid.}, L.J. Gibbons, R.M. Kennedy & J.M. Gibbs, ‘Frontiers of Law: The Internet and Cyberspace: Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message’ (2002) 32 \textit{New Mexico Law Review} 27 at 42–43 and passim.} On the basis of this survey, online mediation could well develop and deliver beyond initial expectations, provided potential users abandon their perception of this method as unsuited to electronic means of communication.

\textbf{Arbitration:}

The methods discussed above are all non-binding in that they do not result in enforceable decisions but in settlements or, in the event of failure, in nothing at all. The only binding method available on the Internet is arbitration. Ironically, however, the arbitration generally used in an electronic environment is so-called ‘non-binding arbitration’. This may seem a contradiction in terms. An out-of court dispute resolution
process is either binding—in which case it is arbitration- or non-binding-in which case it is not arbitration.

Irrespective of its legal characterization (which will be discussed below), a method that providers and users call non-binding arbitration does in fact prosper on the Web. When referring to non-binding arbitration, one needs to specify in what respect it is not binding. There are two possibilities: the process can be non-binding at the outset or at the end. Recourse to arbitration is optional, i.e. the arbitration agreement is not binding; or the outcome of the arbitration can be accepted or rejected, i.e. the award is not binding. On the Internet both features are sometimes combined. Also, sometimes the arbitration—be it the agreement, the award, or both—is binding on one party and optional for the other, which makes it a unilaterally binding process. Ford Journey, an online motor vehicle sales dispute resolution programme managed for Ford by the Chartered Institute of Arbitrators in London, provides a good illustration of a unilaterally binding mechanism.

On the Ford Journey site, one reads: ‘The Claimant [customer] has a choice of taking advantage of the Service or using the courts instead’. The respondent, however, has no choice. Hence, the process is unilaterally binding at the outset. It is also unilaterally binding at the end: ‘The Parties will be bound by the Arbitrator’s decision subject to either Party’s right of appeal under the Arbitration Act, 1996, and also the Claimant’s right to reject the award by pursuing the claim afresh in the courts.’


489 See e.g. the Rules of the Independent Arbitration Scheme for the Travel Industry, administered by the Chartered Institute of Arbitrators.

490 Rules 1.2 of the Rules of the Independent Dispute Resolution Service for Purchasers from Ford Journey, <www.arbitrators.org/fordjourney/Index.htm>. On the admissibility of this kind of procedure under English law, see section 58.1 of the English Arbitration Act 1996 (emphasis added): ‘Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.’
The ICANN system for disputes over domain name registrations under the Uniform Dispute Resolution Policy (UDRP), which is administered by a number of ODR providers including WIPO, adopts a somewhat different approach. The submission to arbitration is binding on the respondent (the domain name holder), whilst the outcome is binding on neither party. Each is free to start a court action at any time. Apart from these non-binding mechanisms, one also finds binding or ‘true’ arbitration on the Internet. The AAA, for instance, will administer arbitrations conducted exclusively online under its Supplementary Rules for Online Arbitrations. However, statistics show that although parties increasingly file their cases online, they are loath to engage in proceedings conducted exclusively via the Internet.

6.5.1. LEGAL CHARACTERIZATION:

How should these various methods be characterized legally? For mediation and negotiation, the answer is easy: they are purely contractual mechanisms. The answer is also easy for binding arbitration: as true arbitration it is subject to the relevant arbitration law. Things are more difficult when it comes to non-binding arbitration.

The binding character of the arbitration agreement does not appear relevant for the purpose of characterization. What matters is the outcome. Whenever the parties intend the outcome to be binding for both of them—binding like a judgment rather than a

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492 See interview with Debi Miller-Moore, Vice-President of AAA’s eCommerce Services, in G. Kaufmann-Kohler & T. Schultz, supra note 4 at 278ff.

contract—the process can be regarded as arbitration. Whenever the outcome is optional for both parties, the process cannot be regarded as arbitration, but is merely subject to contract law and to the rules of the ODR centre managing the dispute resolution, which are incorporated into the contract by reference. Unilaterally binding arbitration is more difficult to characterize. Whether a process produces a binding result depends on the parties’ intent. In this kind of arbitration, the intention is that one party be bound by the forthcoming outcome from the outset while the other is given the option until the end of the proceedings. At first sight this would thus appear to be a contractual setup. Upon further reflection, however, one may ask whether the expression of the party’s intention to be bound may not be staggered, with one party expressing its intention when entering into the dispute resolution agreement and the other at the end of the dispute resolution process. The result would be that the process qualifies as true arbitration whenever the party that is given the option chooses to be bound.

There are obvious advantages to such a characterization. First, it better protects the interests of the weaker party, which will generally be the creditor, who, if the process qualifies as arbitration, may enforce the outcome as an award if not voluntarily performed. If, on the other hand, the process were regarded as contractual, the creditor would need to file a court action for specific performance, which it is unlikely to do due to the additional cost and delay. Second, characterization as true arbitration would also be in the public interest. It would be inefficient and a waste of public resources to start a court action on a matter already resolved in a process chosen by the parties and conducted in conformity with the procedural guarantees applicable to arbitration. Although objections may be raised against characterization as true arbitration, they do not seem to withstand scrutiny.\footnote{For a more detailed analysis of these objections (and other, less important, ones), see G. Kaufmann-Kohler & T. Schultz, supra note 4 at 162–64; T. Schultz, Réguler le commerce électronique par la résolution des litiges en ligne (Brussels: Bruylant, 2005).} It could be argued that the uncertainty over the legal nature of the process during the entire procedure is unacceptable because it makes it impossible for the arbitrator to know which procedural standards must be met and for the courts at the seat of the arbitration to determine whether or not they have jurisdiction over applications for assistance. This objection appears largely academic, for it is not particularly burdensome for arbitrators to meet the procedural standards applicable to
arbitration whatever the nature of the process, and, given that online arbitration is always institutional, institutions will perform the tasks that local courts would otherwise perform.

Another objection is the potential uncertainty over the moment when the award becomes res iudicata and the time allowed for filing an action to set aside starts to run. To answer this objection, the parties may specifically agree on the moment when the intent to be bound becomes effective. Accordingly, they may provide that the outcome of a unilaterally binding process becomes an award

1. Upon expiry of the reflection period when there has been no rejection, or
2. upon express acceptance during such reflection period. Such a provision may be included in the rules of the ODR centre and, to avoid any doubt, may be expressly restated by the parties at the start of the proceedings.

Implementation, quality and effectiveness

Consideration will be given here to three issues. First, how is ODR implemented, or how is consent to ODR achieved? Second, what quality standards must ODR outcomes, or how are they enforced?

Implementation or consent

Unlike mediation and negotiation, arbitration is subject to mandatory requirements, some of which may cause difficulties in an electronic environment. This is particularly true of admissibility, the writing requirement and incorporation of the arbitration agreement by reference. First, arbitration must be admissible. This requirement is undoubtedly met for business-to-business (B2B) disputes. Consequently, the focus here will be on business-to-consumer (B2C) matters, where the position is more complex. The issue is not whether consumer disputes are arbitrable in the technical sense of objective arbitrability, i.e. due to their subject matter. Consumer disputes are arbitrable as a matter of principle.

However, their arbitrability may be subject to restrictions. Hence, the question is what restrictions apply to arbitrability? There are generally restrictions on the validity of pre-dispute arbitration agreements. Under the EC Directive on Unfair Terms in Consumer Contracts, unfair clauses in consumer contracts do not bind the consumer. Such unfair clauses include, in particular, those that have the effect of ‘excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions’.

In *Océano v. Rocio Murciano Quintero*, the European Court of Justice applied this provision to a choice-of-court clause and held such a clause to be unfair ‘in so far as it causes . . . a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’. The same test can certainly be applied to arbitration clauses, including clauses providing for online arbitration. If the online arbitration procedure is inexpensive and does not require particular computer skills, there is no reason why it should cause any imbalance to the detriment of the consumer. Quite the contrary, it makes justice more easily accessible to the consumer. In EU member States, restrictions on consumer arbitration may in addition arise from national law. In France, for example, pre-dispute consumer arbitration clauses are invalid in domestic matters.

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497 Para. 1(q) of the Annex to Directive 93/13/EEC.
498 European Court of Justice, judgment of 27 June 2000, joined cases C-240/98 to C-244/98, reported in [2000] ECR I 4941 at para. 24: ‘where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier . . . and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’.
In international arbitration, however, the validity is disputed. The French Court of Cassation has on two occasions held that pre-dispute consumer arbitration agreements are valid in international contracts, because French consumer protection law concerning jurisdiction (French Civil Code, Art. 2061 and French Consumer Code, Art. L. 132(2)) does not apply to international situations. These decisions have been criticized by French commentators, arguing that consumers deserve the same protection in international and domestic situations. In the United States, generally much more in favour of consumer arbitration, recent decisions have revealed the emergence of an ‘excessive costs test’. In a few cases contract defences mainly unconscionability have been applied. To invalidate arbitration clauses in adhesion contracts with the result that Pre-dispute arbitration clauses incorporated into general terms of contract may in particular be deemed unconscionable if they impose excessive costs on the consumer, thus precluding him or her from seeking relief. For instance, in *Green Tree Financial Corp. v. Randolph*, the Supreme Court held that prohibitive costs may justify the invalidation of a pre-dispute arbitration agreement, but that the plaintiff had not shown ‘the likelihood of incurring such costs’ In *Cole v. Burns International Security Services*, the Court of Appeals of the District of Columbia found that the arbitration costs were indeed prohibitive and held that they should be borne by the employer alone. In *Gutierrez v. Auto west*, the California Court of Appeal stated that ‘consumers may challenge a pre-dispute arbitration clause as unconscionable if the fees required to initiate


505 105 F.3d 1465 (D.C. Cir. 1997).

the process are unaffordable, and the agreement fails to provide the consumer an effective opportunity to seek a fee waiver. Based on the same concern about costs, the Ninth Circuit Court of Appeals held in Ting v. AT&T.\textsuperscript{507} that arbitration clauses were unconscionable because they prevented consumers from filing a class action in a State where such a right existed.

On balance, one can conclude that under both US and EU law pre-dispute arbitration agreements providing for easily accessible and inexpensive arbitral procedures in B2C contracts are valid. In spite of this conclusion and in view of partly stronger requirements in national laws, some uncertainty remains about the admissibility of binding consumer arbitration. This may well be the reason why non-binding arbitration largely prevails on the Internet.\textsuperscript{508} As an additional requirement, many national laws and international conventions require that an arbitration agreement be made in writing. Can electronic communications be considered as being in writing? By now it is well established that data messages meet the writing requirement, provided they are accessible for later reference. One of the seminal texts in this field is Article 6.1 of the UN\textsc{citral} Model Law on Electronic Commerce, which is based on the principle of functional equivalence.\textsuperscript{509} Functional equivalence advocates media neutrality when electronic documents fulfil the same function as paper communications.\textsuperscript{510} Wording identical or


\textsuperscript{508} For an analysis of how non-binding arbitration may circumvent legal obstacles and still be effective, see T. Schultz, ‘Online arbitration: Binding or Non-binding?’ ADROnline Monthly (November 2002) \textcopyright www.ombuds.org/center/adr2002-11-schultz.html.\textsuperscript{509} Article 6(1) of the UN\textsc{citral} Model Law on Electronic Commerce provides: ‘Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.’ According to the Guide to Enactment of the Model Law on Electronic Commerce, § 50: ‘The use of the word “accessible” is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained.’\textsuperscript{510} On the concept of ‘functional equivalence’, see especially Article 5 of the UN\textsc{citral} Model Law on Electronic Commerce: ‘Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message’. See also Article 9(1) of the European Directive on electronic commerce (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market), which provides: ‘Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for
similar to that of Article 6 of the UNCITRAL Model Law on Electronic Commerce has been introduced into a number of other instruments, such as the US Uniform Computer Information Transactions Act (UCITA)\(^\text{511}\) the US Uniform Electronic Transactions Act (UETA)\(^\text{512}\) the UNIDROIT Principles of International Commercial Contracts\(^\text{513}\) and the Brussels I Regulation.\(^\text{514}\) A number of existing provisions are couched in terms broad enough to cover data messages.\(^\text{515}\) Some other texts, drafted at a time when writing necessarily meant ink on paper and not bytes on a hard disk, may need to be construed evolutively to arrive at the same result.\(^\text{516}\) At the time of writing, the UNCITRAL Working Groups on Arbitration and on Electronic Commerce are considering including a reference to the New York Convention in the future Convention on Electronic Contracting, which would mean that the latter would apply to the former and, more

\(^{511}\) Article 102(a)(55) provides that ‘“record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form’, while Article 107(a) states that: ‘[a] record or authentication may not be denied legal effect or enforceability solely because it is in electronic form’.

\(^{512}\) Article 7: ‘(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. (c) If a law requires a record to be in writing, an electronic record satisfies the law.’ Article 8(a): ‘If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt.’

\(^{513}\) Article 1.11 defines the written form as ‘any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form’. 36 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 23(2) of which states: ‘Any communication by electronic means which provides a durable record of the agreement shall be equivalent to “writing”.’

\(^{514}\) e.g. Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration; § 1031(1) of the German Zivilprozessordnung; section 5(6) of the English Arbitration Act 1996; Article 178(1) of the Swiss Private International Law Act; Article 2 of the US Federal Arbitration Act.


\(^{516}\) Article 9(2) of the current UNCITRAL Draft Convention on the use of electronic communications in international contracts provides that the writing requirement ‘is met by an electronic communication if information contained therein is accessible for further reference’, Doc. A/CN.9/WG.IV/WP.110, 18 May 2004.
specifically, that the written requirement in Article II of the New York Convention would

The third requirement for a valid arbitration clause that may give rise to
difficulties in an electronic environment is incorporation by reference. On the Internet, 
practically all arbitration clauses are contained in general conditions, and not on the order 
form on which the customer clicks. If the order form makes specific reference to the 
arbitration clause, then the incorporation is undoubtedly valid.\footnote{See G. Kaufmann-Kohler, supra note 38 at 364–68.}

If, however, the order form only contains a global reference to the general 
conditions without specific reference to arbitration, then the validity of the reference will 
depend on the national law.\footnote{General references are accepted in Belgian, Dutch and German law. The English Arbitration Act 1996 does not deal with the question, but case law indicates that specific references are admissible, whereas the admissibility of global references will depend on the situation. A similar line is taken by Swiss law: general references will in principle be admissible in contexts where arbitration clauses are usual; see the Stanley Roberts v. Fédération Internationale de Basketball, Swiss Supreme Court, 7 February 2001, ASA Bulletin 2001, 523. In French and Italian law, the accent is placed on the parties’ awareness of the existence of the arbitration clause and their intent to incorporate it. Under Article II(2) of the New York Convention, the validity of a general reference is uncertain: it is only admissible if the parties have easy access to the clause (which is the case if the clause is on the same paper document or on a separate document that has been communicated to the parties) or are in a business context where recourse to arbitration is common. Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration provides that ‘[t]he reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and that the reference is such as to make that clause part of the contract’. According to background documents, this should be interpreted as allowing general references; see 5th Working Group Report, A/CN.9/246, 6 March 1984, and 7th Secretariat Note, Analytical Commentary on Draft Text, A/CN.9/264, 25 March 1985.}
another method of dispute resolution. To ensure procedural fairness in such instances, initiatives have been taken to draft codes of conduct and other guidelines setting out fundamental principles of online justice. Some of these initiatives are governmental others have been taken by consumer associations business organizations and professional organizations. From these various initiatives a consensus emerges over five principles. Although these principles are largely in accord with general principles of procedural fairness, online justice calls for some particularization. The principles are as follows:

- **Transparency**: This covers information given to users on the procedural rules and the outcome of the process and is particularly important when dealing with consumers.

- **Accessibility**: also important in a consumer context, this includes the absence of cost barriers. Due to the delocalized nature of the online medium, accessibility is

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520 See e.g. Article 13, Variant B, UNCITRAL Draft Convention on Electronic Contracting, supra note 39.
of course one of the main assets of ODR: users can stay at home and dispute resolution is a mere mouse click away.

- **Independence**: this is a traditional requirement and may raise funding issues in an online context.

- **Timeliness**: speed is another of ODR’s principal advantages, especially as the slowness of traditional court proceedings has become endemic.

- **Fairness**: with independence, this constitutes the essence of procedural guarantees.

Of these five principles, fairness and independence deserve closer attention, as does the question of quality control. Fairness must be observed whatever method of dispute resolution is adopted. However, its requirements vary on a sliding scale. At the top of the scale lies arbitration, a binding method where all the guarantees apply. Compliance with due process guarantees may sometimes, especially in evidentiary proceedings, make it necessary for the tribunal to use other than IT means. At the other end of the scale are the ‘basic’ methods, such as automated negotiation, where procedural guarantees are reduced to the possibility of making an offer and the availability of operational software. Between these extremes are all the other methods, varying in sophistication. Thus, procedural guarantees are not a rigid concept, but comprise an unwaivable core, beyond which their scope depends on the type of justice chosen. Independence is required irrespective of whether the method is binding or not. Even though mediators do not have the adjudicatory powers of arbitrators, they may greatly influence the outcome and their impartiality is essential to the quality of the process. Our purpose here is not to dwell on independence requirements, which are well known, but rather to consider the specific question of the independence of ODR institutions with regard to their funding. For many ODR providers the financial equation is difficult to balance: the initial investment is substantial and the disputes that today give rise to online

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procedures are small; ODR fees are necessarily modest too and not enough to keep an institution alive, even a virtual one. Hence, apart from automated methods used on a large scale, the provision of ODR services may prove to be non-self-financing, let alone profitable and outside funds may be required. These funds can be public or private:

- A State-funded ODR site, e.g. for small claims, is quite conceivable. Despite much discussion at government level about the benefits of ODR, no concrete action has so far been taken, apart from the ECODIR site funded by the European Commission and the Irish Government.527

- In a largely privatized and unregulated environment like the Internet, private funding is the more likely situation. A single supplier, like Ford with the Ford Journey site, or a group of suppliers, may offer their customers access to an ODR process as a kind of after-sales service. Electronic marketplaces, i.e. websites where suppliers and clients, or simply private individuals, meet to conduct business, also offer and finance ODR services, because the presence of an ODR system attracts business to the marketplace.95 Does this mean that the party providing the funds—and, incidentally, repeatedly involved as a player—will have a prevailing influence over the dispute resolution process? Not necessarily. However, especially when the ODR operator is economically dependent upon a single supplier, particular attention will need to be given to the structure and the organization of the ODR process and the method of appointing neutrals.

Another relevant question in this connection is who checks whether these guarantees are complied with? Offline, this is a task of the courts when ruling on actions to set aside arbitral awards. Such actions are unlikely online, especially when the stakes are small, as is generally the case. Moreover, such actions would not be available when non-binding methods are used. Hence, another solution needs to be found, unless quality control is abandoned altogether. One possibility is to provide for trust marks, which are a kind of certification and already widespread on commercial sites but not yet used on ODR sites. An ODR Trustmark would certify that the site complies with due process. Regular controls would monitor the continuity of compliance and, in the event of non-

527 See e.g., on SquareTrade, the online dispute resolution provider for eBay, S. Abernethy, ‘Building Large-Scale Online Dispute Resolution & Trustmark Systems’ in E. Katsh & D. Choi, eds., Online Dispute Resolution (ODR): Technology as the “Fourth Party” (Amherst, Mass.: UN and University of Massachusetts, 2003) 70 at 85.
compliance; the Trustmark would be withdrawn in the hope that withdrawal would lower the standing of the site in users’ eyes. It then remains to decide who would award the trust marks and whether a private institution should control the controller.\(^{528}\) Although the questions remain open, these are certainly avenues to be explored.

### 6.5.3. EFFECTIVENESS OR ENFORCEMENT OF DECISIONS:

The fabulous advantage of online disputes is that distances are abolished. A dispute is resolved in the same manner as the contract was entered into and performed, if it was performed by downloading software. As a general rule, an efficient dispute resolution method is one that has a conceptual affinity with the activities that gave rise to the dispute. This, however, is a broader topic that extends far beyond ODR. As far as online justice is concerned, if the competent court is located far away from the claimant’s home, ODR will guarantee access to justice that might otherwise be impracticable. This is all the more necessary as on the Internet people and businesses whose paths would never have crossed offline now enter into contracts with each other. The advantage of ODR in overcoming geographical limitations holds true until it comes to enforcing the outcome of the ODR procedure. If the outcome is a binding award, the winner will have to apply for an exequatur, possibly on the other side of the globe, as online award enforcement is still far away. If the outcome is a settlement that is not being performed, then the situation is even more problematic, as the creditor will have to start a new court action, not simply enforcement proceedings. This is hardly satisfactory. For the full potential of ODR, in particular of its accessibility, to be realized, other means of enforcement without recourse to the courts must be found. Many ideas have been put forward\(^{529}\) some of which have partly come to fruition. In essence, there are three methods of enforcing the outcome of ODR proceedings without going to court. The first is based on money, the second on technical control and the third on reputation:

- Methods of enforcement relying on money include financial guarantees, escrow accounts, and insurance and charge-back agreements with credit card companies.

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\(^{528}\) On these issues in general, see M. Philippe, ‘Where is everyone going with online dispute resolution (ODR)?’ (2002) 13 IBLJ/RDAI 167 at 183–184; American Bar Association Task Force on E-Commerce and ADR, supra note 47. On who should exert control over ODR and how, see T. Schultz, ‘Does online dispute resolution need governmental intervention? The case for architectures of control and trust’ (2004) 6 North Carolina Journal of Law & Technology 71, who concludes that the State should be the main controller of ODR.

\(^{529}\) For further discussions of these issues, see L.M. Ponte, supra note 49 at 69; H.H. Perritt, ‘Will the Judgment-Proof Own Cyberspace?’ (1998) 32 International Lawyer 1121 at 1123.
An alternative might be for business suppliers joining an ODR site to set up a ‘judgment fund’ to cover the outcome of ODR proceedings

- In very specific situations, technical control may be used to make ODR decisions self-enforcing. The UDRP procedure for domain name disputes is a good example. Ten days after the decision by the panel of experts, the domain name is either cancelled or transferred to the winning party, depending on the panel’s decision and provided the loser has not furnished evidence of having started a court action to challenge the decision. The decision is implemented by the registrar that registered the domain name and exercises technical control over the registration.530

- Reputation may provide leverage causing businesses to voluntarily comply with ODR decisions. Imagine a business site is granted a Trustmark certifying that it complies with a certain code of conduct that provides for ODR and for compliance with the resulting decisions. Failure to comply would lead to the suspension or removal of the Trustmark, which would damage the Trustmark holder’s reputation and—it is hoped—deter potential clients from using the site. To avoid losing business, the Trustmark holder will therefore endeavour to comply with the ODR decisions.531

Such methods, often called self-enforcement or built-in enforcement, respond to a real need and deserve to be further developed.

What is the future of ODR

Although the initial euphoria has subsided, turnover on the Internet continues to increase. In 2004, the turnover in B2B electronic commerce amounted to six trillion dollars worldwide532 and for B2C transactions to forty billion euros in Europe. It is estimated that in 2009 online retailing may amount to 8 per cent of all sales, for a total of

530 See G. Kaufmann-Kohler & T. Schultz, supra note 4 at 223ff.
531 On the power bestowed by technical control, see E.G. Thornburg, ‘Going Private: Technology, Due Process, and Internet Dispute Resolution’ (2000) 34 University of California Davis Law Review 151 at 197.
one hundred and sixty seven billion euros in Europe.\textsuperscript{533} These figures mean that the number of disputes arising out of electronic commerce will necessarily increase in the coming years. They also show that the Internet is part of our daily lives. Taking these two observations together, there is no doubt that ODR has a growing role to play. This role will depend on the type of dispute and the method of dispute resolution. Disputes arising out of large international commercial transactions, which constitute the major part of the traditional arbitration caseload, are unlikely to be referred to ODR. These disputes will progressively assimilate IT techniques as a means of improving the management of the arbitration, but will never be entirely online. The amounts at stake will not act as an incentive to replace live hearings with e-mails and chat rooms.

By contrast, small and medium-sized disputes, including B2B disputes, can very effectively be resolved by way of ODR. There is no reason to restrict ODR to contracts entered into electronically and no reason to limit ODR to disputes submitted to private justice. Some courts already accept online filing and some plan to allow proceedings to be conducted exclusively online.\textsuperscript{534}

It is likely that non-binding methods of dispute resolution will continue to be prevalent in ODR—a reflection of what the French legal philosopher Murielle Delmas-Marty calls ‘véritable triomphe du mou, du flou, du doux’ (blandly, the true victory of soft law).\textsuperscript{535} This is a general trend in contemporary law and one of the explanations for the success of ADR, which is certainly a reaction to the inefficiencies of traditional justice, classical arbitration included. But it is at the same time also a reflection of a change in the function of the judge or of any adjudicator, who is increasingly called upon to assess, counsel, conciliate and not only to make decisions.\textsuperscript{536}

Does that mean that arbitration—true arbitration—has no future on the Internet? The answer is surely no: for small and medium enterprises, especially when they are far apart or depend on quick decisions, binding online arbitration may present major advantages.

This chapter elaborates the refulgence of new dimensions of international commercial arbitration as a sequel to the advanced scientific, technological and knowledge based world. It describes reasonably the revolution of Information Technology and Cyber World, and how the ‘Virtual world’ is over-shadowing the ‘Real world’; the role E-Commerce and electronic arbitration taking new and great strides in the present day rocket-civilization. On Line Dispute Resolution has become an outstanding evolution both in the sphere of human intelligence and artificial intelligence.