Dispute Resolution in International Electronic Commerce

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Doing business on the Internet, which until recently was a fairly exotic subject for most lawyers, is now experiencing an explosion of interest. Companies have begun offering goods and services over open computer networks on a world-wide scale, and "electronic commerce" has become a term of which lawyers remain ignorant at their peril. With this increase in business activity has come a corresponding interest in the legal problems of doing business over the Internet. National legislators have shown concern for the subject and the United Nations Commission for International Trade Law (UNCITRAL) has adopted a Model Law on Electronic Commerce.1

Strangely enough, one topic has not yet received the attention it deserves, namely dispute resolution.3 While parties prepare for a rapid expansion in Internet-related commerce, they continue to rely on dispute resolution procedures more suited to a country road than to the "Information Highway". Moreover, most legal commentators have so far been silent on this topic.

Internet commerce is already growing explosively, both in the business-to-consumer and business-to-business sectors,4 which will inevitably lead to a growth in international disputes that, in many cases, will require new and creative solutions. Moreover, the universal nature of the Internet and the expanded jurisdictional reach of

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1. The authors recognize that terms such as "electronic commerce", "cyberspace", and "the Information Highway" are in many ways unsatisfactorily vague. However, these terms are widely used to describe world-wide computer networks and the transaction of business on them. They will be used here without an attempt at a precise definition. While the transaction of business on closed networks (such as EDI transactions) should, strictly speaking, be considered distinctly from Internet commerce, this article uses the above terms to refer to both open and closed networks, as it is felt that many of the problems described here are applicable to both.

2. See the Report of UNCITRAL on the work of its 29th Session, UN General Assembly Official Records Supplement No. 17 (A/51/17), Annex 1; now also available as a separate publication, including a Guide to Enactment.

3. Among the activities in related sections, one should mention in particular the Informal Workshop on Dispute Resolution in Telecommunications, chaired by Richard Hill and John Watkinson, which bring together at regular intervals a growing number of experts in the field; see below in Section IV, C.

4. A survey published in The Economist, 25 January 1997, p. 69, estimates that the value of business-to-consumer and business-to-business transactions conducted over the Internet is already more than US$ 500 million each, and predicts that the business-to-business sector alone may be worth over US$ 67 billion by the year 2000.
world-wide electronic commerce brings increased dangers for parties that leave it to the courts to resolve their disputes. As demonstrated by recent court judgments in the United States, parties doing business on the Internet may be subject to the jurisdiction of a far-flung court even though their only contact with the jurisdiction is the transaction of business by means of the Internet with a party residing there. This greatly increased risk of being summoned into a distant court increases the incentive for parties in electronic commerce to agree on a system for dispute resolution.

The following discussion represents a first attempt to take stock of the issues arising in this difficult and important subject, and to point to some directions in which solutions might be found. The discussion of the subject is made particularly difficult by the fact that there is a lack of both relevant materials and practical experience concerning it. However, the authors have no doubt that the subject of dispute resolution is of great relevance to commercial development of the Internet, and hope that this article can contribute to the development of practical solutions to deal with disputes in electronic commerce.

Disputes in electronic commerce have much in common with disputes in other contexts, however, there are also some differences which require new or adapted solutions. It also has to be remembered that the types of disputes which can arise are very diverse in nature; solutions proposed must respond to this diversity. Thus, this article begins with a discussion of the different types of disputes which may arise in the context of electronic commerce. Thereafter, the requirements which should be placed on any dispute settlement procedure and some legal issues arising from the introduction of information technology in dispute resolution systems are considered. This is followed by an outline of possible dispute resolution mechanisms and concluded by the proposal of a model for dispute resolution in electronic commerce.

I. TYPES OF DISPUTES IN ELECTRONIC COMMERCE

A. CONTRACTUAL DISPUTES

When discussing contractual disputes and the methods of their settlement, the differences in the contracts concerned must be taken into account. Three categories of contracts appear particularly relevant.

The first category is that which has perhaps attracted the most attention among practitioners. It concerns the telecommunications infrastructure for electronic commerce, and specifically contracts between enterprises that operate this infrastructure and enterprises that want to use it in order to offer different or competing services to third parties. Such "interconnection" agreements often affect public licences, and therefore have a special legal status.

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5 For example, in Resuscitation Technologies, Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/S, 24 March 1997 (S.D. Indiana), a US federal district court determined that the defendants were subject to jurisdiction in Indiana based on their transaction of business via the World Wide Web and e-mail with the plaintiff in Indiana.
Disputes in this category tend to be particularly complex, for a variety of reasons. They concern, on the one hand, questions of contract interpretation, while at the same time problems of contract modification occur quite frequently, since the conditions of contract can change very quickly and the agreements reached in a contract can be affected by provisions of other contracts. Finally, in many countries regulatory bodies exist which have the power to intervene in the conclusion and execution of such contracts. This last point is probably the main reason why domestic rules of law (especially those relevant to the licensing of telecommunication operations) often contain dispute resolution mechanisms. Disputes of this kind have already arisen and have been brought before the courts or settled in special proceedings.

On the international level, the European Commission has a dispute resolution system in this area, which makes use of national institutions. Outside the European Union, rules relating to the protection of investments are particularly relevant, for example those contained in bilateral investment treaties, or multilateral treaties such as the North American Free Trade Agreement (NAFTA). The World Bank International Centre for Settlement of Investment Disputes (ICSID) may also play a role in this area; so may the new dispute resolution procedures of the World Trade Organization although at present only governments can be party to them.

A second group of contracts consists of those which are concluded between users of the Information Highway and firms that grant access to it. In this group fall contracts regarding telecommunication services, in particular those of “service providers” who grant access to communications networks. The provisions of such contracts are normally set forth in the service provider’s general conditions of contract. Disputes in this area most often concern bills and conditions of access, so that the amount in dispute is generally quite small. However, this category includes more than simple billing disputes, such as controversies with regard to the liability of service providers or duties of the user concerning information transmitted.

The most important and, for this article, the most interesting area is that of contracts between users. It is in this group that the special characteristics of electronic commerce and the variety of relationships to which it gives rise become particularly apparent. In considering contracts between users, one could differentiate between commercial contracts on the one hand and consumer contracts on the other, based on both the differing treatment of these two categories of contracts in national and international law, and by the differing interests involved. However, the criteria for

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6 The draft Swiss Act on Telecommunications, for instance, with respect to interconnection disputes distinguishes between the conditions under which interconnection is granted and those concerning the application of interconnection agreements. The conditions can be fixed by the Telecommunications Commission, with a possibility of appeal to the Supreme Court in administrative law proceedings, while their application and that of substantive agreements are subject to the ordinary courts.

7 This was the case with the dispute between Mercury and OfTfEL, the British regulatory body, concerning the basis on which British Telecom (BT) determined interconnect prices. On 9 February 1995, the House of Lords upheld Mercury’s claim and revised the interpretation which OfTfEL had given to its agreement with BT.

8 In particular the OnP Leased Line Directive (Directive 92/44/EEC of 5 June 1992). In case of infringements, under Article 12 users can complain to the Commission, which can then initiate a conciliation procedure.
differentiation are not entirely uniform and the differences are often difficult to detect, particularly since world-wide computer networks open up a global market even for the smallest offeror of goods and services.

More relevant for consideration of such problems is the differentiation between *ad hoc* contracts on the one hand, as they are concluded for example between an offeror of goods or services somewhere in the world with a purchaser elsewhere, and on the other hand contracts concluded in more or less closed groups of specialized users. The first category covers what is generally thought of nowadays as "electronic commerce", i.e. transactions between buyers and sellers over open computer networks such as the Internet. In the long term this is certainly the mechanism with the highest volume of electronic transactions, as it creates a world-wide market without the necessity for the buyer and seller ever to meet. As mentioned above, this market is growing at an explosive rate, with software companies already selling and transmitting their software over the Internet, and online banks opening accounts with customers in far-flung parts of the world.

The second category includes in particular networks which connect companies and their suppliers, and which facilitate the ordering, shipment and storage of goods electronically. In such networks agreements for electronic data interchange (EDI)\(^9\) are generally concluded, for which a variety of form contracts exist. Here a number of other attempts to regulate aspects of international transactions on an electronic basis must be mentioned, for example, rules for bills of lading,\(^{10}\) and the SWIFT rules for international payment transactions. The area of closed networks will certainly expand greatly and cover many other areas of electronic commerce. There are, for example, already "electronic stock markets" and networks of companies with their customers.

**B. NON-CONTRACTUAL DISPUTES**

In addition to contractual disputes, there are also a wide variety of disputes which can arise in electronic commerce out of non-contractual relations between parties; examples are disputes regarding copyright, data protection, the right of free expression, and competition law, which arise with increasing frequency. When violations of rules in these fields are in issue, the persons concerned often are not confronted in the form of a conflict between two individuals or corporations, so that the question arises whether the situation may properly be classified as a "dispute" in the legal sense. Nevertheless, there is considerable potential for conflict in this area, and it is therefore important that the issues be dealt with efficiently. Non-contractual disputes can concern both individuals (for example, with regard to copyrights or rights of personality), commercial entities (with regard to commercial or competition rights), or even State entities or international organizations.

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\(^9\) For further details on dispute settlement clauses in EDI contracts, see Section IV, A below.

\(^{10}\) In particular Sea Docs, CMI Rules for Electronic Bills of Lading, the BOLERO Project, and the work of UNCITRAL.
It is in the nature of the global Information Highway that such non-contractual disputes may only be regulated internationally by means of treaties and other forms of transnational co-operation; examples are the World Intellectual Property Organization (WIPO) agreements on copyright and the Internet, the Organization for Economic Co-operation and Development (OECD) cryptography negotiations, and the present consultations within the European Union and the G-7 States on Internet content regulation. However, contractual models may provide paradigms for the resolution of non-contractual disputes on the non-State level as well.11

C. SUBSTANTIVE CRITERIA FOR DIFFERENTIATION

In addition to differentiating among disputes according to their legal basis as contractual or non-contractual, one can also distinguish them according to the nature and substance of the dispute.

One important criterion is the differentiation between the application of a legal or contractual rule on the one hand and its interpretation or further development on the other hand. In many disputes, both elements are naturally present in varying forms, so that it is often difficult to allocate a dispute to one or the other category. Nevertheless, such differentiation is important in discussing dispute resolution mechanisms: disputes which only involve the application of individual contractual provisions can more readily be left to the sole discretion of the parties than can disputes which concern the content of legal rules or standard contracts.

This differentiation is, for example, one of the bases for the “statement of case” or “consultative case procedure” in English arbitration law. The evolution there is of some interest for the relationship between dispute settlement and law-making functions. Under the 1950 Arbitration Act, the arbitrator had the power to submit to the High Court any question of law arising in the course of the arbitration; he could also be directed by the High Court to do so.12 The relevant provision was repealed by the 1979 Arbitration Act and replaced by the power of the High Court to determine, under certain circumstances, a “preliminary point of law”.13 The 1996 Arbitration Act has further restricted the powers of the courts in this respect, but reserves it for any question of law “which the court is satisfied substantially affects the rights of one or more of the parties”; in international arbitration, these powers can be excluded by the parties.14 The 1979 Act, while authorizing the parties to international arbitration proceedings to agree on excluding the determination of a preliminary point of law by the courts and on excluding appeals against the award, prohibited such exclusion

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11 An example is the “Cross-Border Complaints System” of the European Advertising Standards Alliance referred to in Section v, A.3 below.
12 Section 21 of the 1950 Arbitration Act; for comments on this provision see e.g. A. Walton, in Russel On The Law of Arbitration, 7th edition, 1963, p. 188 et seq.
13 Section 8(3)(b) and 2 of the 1979 Act.
14 Section 45 of the 1996 Act; in domestic arbitrations, such exclusion is valid only when made after the commencement of the arbitral proceedings (Section 87(1)(a)); for comments see e.g. Harris, Plantrose and Tecks, The Arbitration Act 1996, A Commentary, 1996, p. 182 et seq. and p. 301.
agreements in certain substantive matters, in particular shipping, insurance, and commodity trade disputes. This restriction on exclusion agreements was justified mainly by the argument that disputes in these areas were normally settled by arbitral tribunals, so that exclusion of reference to the courts would cause case law to dry up as a source of the common law.

In legal systems where the predominant role in the development of the law is played by the legislator rather than the courts, the monopolization of dispute resolution by arbitrators may seem less worrisome. However, the Information Highway is now developing into a legal territory of its own, a territory for which no uniform legislator is in sight. Therefore, case law must play an essential role in the development of the law for this new territory. Thus, when devising dispute resolution systems for electronic commerce, their potential for contributing to the development of the law must be taken into consideration.

Another criterion for differentiation between types of disputes relates to their complexity. Many disputes can be reduced to standard situations, mostly to simple questions of fact. For example, the speed with which commodity arbitrations are normally completed can be attributed to the fact that the dispute in many cases merely concerns the quality of a shipment of wheat, sugar, oil seeds or the like. For "commercial men" such "look-and-sniff" arbitration is a matter of days, at most. While disputes in electronic commerce may be quite complex, it must be expected that, in many instances, they can be reduced to one or a few simple questions. This possibility should be taken into account when constructing a dispute resolution mechanism: while providing for the resolution of complex disputes, it should not be overdeveloped for simple cases.

Finally, the nature and qualifications of the parties involved in the dispute should also be taken into consideration. Thus, proceedings involving consumers may need to be structured differently than those for disputes between large international companies. Disputes involving public authorities also present special problems which may require special solutions; however, since such disputes are primarily the domain of domestic regulations, they will not receive further consideration here.

II. REQUIREMENTS FOR DISPUTE RESOLUTION SYSTEMS

A. TIME AND COST EFFICIENCY

The speed of communication is one of the major advantages of the Information Highway; disputes concerning transaction on it should, therefore, be settled as quickly and as cheaply as possible. Speed is required both with regard to access to dispute resolution systems and with regard to the proceedings themselves.

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15 Section 4 of the 1979 Act; for comments see D. Rhidian Thomas, *The Law and Practice relating to Appeals from Arbitration Awards*, 1994, p. 357 et seq.
16 Despite the useful work of such bodies as UNCITRAL and WIPO, they cannot be expected to satisfy fully the demand for rapid development of legal rules in the field of electronic commerce.
Present dispute resolution systems are generally time-consuming and expensive. Proceedings before national courts and arbitral tribunals often last years. Many of the so-called “alternative dispute resolution” (ADR) mechanisms normally require much less time. While there is certainly a possibility of making more efficient use of such ADR methods, their effectiveness is in the end dependent on the existence of proceedings by which a judge or an arbitrator makes a binding decision, if the attempt at an amicable settlement fails.

In searching for ways to speed up the resolution of disputes in electronic commerce, it must be borne in mind that appropriate solutions can only be devised if they take into account other factors which are themselves quite time- and cost-intensive. In particular, procedural fairness and the protection of rights of the parties to be heard require that the parties and their counsel set aside sufficient time in order to prepare and present their case. The resolution of a dispute can be a complex process, particularly in the case of international disputes, and there are limits to the extent to which the proceedings may be speeded up. Nevertheless, the time and money which is now spent in the conduct of many international cases could often be reduced without serious restrictions on the parties’ right to a fair trial.17

B. QUALIFICATIONS OF THE DECISION-MAKER

The persons and institutions which are called to decide the dispute must have the necessary qualifications. The point seems self-evident, but it is difficult to determine the type and degree of the qualifications necessary in general for international disputes and specifically for a particular case.

For the parties who negotiate a contract or for the drafters of standard forms or general conditions, the principal concern in the choice of the persons to whom they turn for settlement of disputes is often familiarity with the subject matter of the contract and with its technical and commercial particularities. Judges and arbitrators who decide disputes in electronic commerce, indeed, must have at least some knowledge of information technology and the workings of electronic commerce. It is, of course, not necessary that they be technical experts in this regard, but a basic familiarity with the technology is certainly desirable.

In addition, legal competence must generally include the areas of conflicts of law and comparative law. In many cases, international contracts are influenced by factors such as practice in a particular industry, standard contracts, rules and recommendations of international institutions, and other factors which go beyond the applicable law and which can be of decisive importance in the interpretation of a contract. Moreover, the parties often come from different legal systems and have differing ideas about the

17 For methods of simplifying international arbitration proceedings and for rendering them more cost efficient without restricting the parties’ rights to be heard, see Schneider, Lean Arbitration, in Arbitration International, 1994, p. 119 et seq.
proceedings. Thus, one of the main duties of the arbitrator is to bridge cultural differences and facilitate communication between the parties.

Finally, linguistic abilities are also important. While English is predominant in cases involving electronic commerce, it is not infrequent that the decision-maker has to have command of other languages, particularly that in which the applicable law is expressed and those in which one or both parties normally use. Moreover, time and money can also be saved if each party can present its case in its own language, without the necessity of translation for the decision-maker’s sake.

C. TRUST AND ACCEPTANCE BY THE PARTIES

Disputes arise from differing positions taken by the parties and, in order to resolve them, one or both parties must change their position. If the parties do not do so voluntarily, for instance with the help of a mediator, then the change must be imposed on them through a decision by a third party, judge or arbitrator. It is obvious that the parties’ trust in the person or the institution that renders the decision is of decisive importance.

In the case of national courts, the judicial body as an institution normally commands such trust. In international relations, limited or absent trust in the courts of a foreign country is one of the main reasons for the widespread use of arbitration. But an arbitrator, even if he is nominated by an institution and enjoys a good reputation, normally does not command the authority of a court and has to win the trust of the parties. The choice of an arbitrator by the parties or by an institution is therefore a delicate task which requires great care. In the conduct of the proceedings the arbitrator and the institution must make special efforts to establish and to maintain the trust of the parties in the fairness of the proceedings and the impartiality of any decisions taken. The need for establishing and maintaining this basis of trust by the parties is an important factor which limits the possibility of saving time and costs in international proceedings.

D. ENFORCEMENT OF THE RESULT

Finally, the result of the dispute resolution process, whether it is an agreed settlement, the decision of a State court, an arbitral award, or some other decision, must also be capable of being enforced.

In so far as arbitral awards are concerned, experience shows that they are generally complied with voluntarily; but this is not always the case. Even in the case of voluntary compliance, it is often the availability of mandatory enforcement which prompts such compliance. The decisions of State courts are more difficult to enforce, unless enforcement can rely on an international treaty between the State of origin and the State of enforcement.
Thus, the availability of an international treaty for the enforcement of the decision must be a decisive factor in choosing a dispute resolution mechanism for electronic commerce. Legal aspects of enforcement are discussed further below.

III. SOME LEGAL ISSUES ARISING FROM THE INTRODUCTION OF INFORMATION TECHNOLOGY IN DISPUTE RESOLUTION SYSTEMS

Disputes in electronic commerce need not be resolved online. They may be and, since there are practically no online dispute resolution services available, normally are resolved in conventional fora. But to an increasing extent, information technology is introduced in these conventional fora.

The introduction of information technology into the dispute resolution process raises a number of legal issues. The precise nature of these issues and the manner in which they are treated may vary from one legal system to another. Nevertheless, there are some general traits. The following explanations may give some indications about the type of issues and possible responses which arise when information technology is used in dispute resolution.

A. THE DISPUTE RESOLUTION AGREEMENT

Contracts concluded by electronic means raise a number of legal issues. The questions and possible answers which arise in this context in principle also apply to the agreement on the resolution of disputes arising out of such a contract, whether these agreements take the form of a contract clause or are made in a separate document. In addition there are some issues specific to dispute resolution agreements.

A major issue in this regard arises from provisions in national laws and international conventions which require that forum selection or arbitration clauses be “in writing”. The written form is required for instance in the Brussels and Lugano Conventions with respect to prorogation agreements and in the New York Convention with respect to arbitration agreements.

The UNCITRAL Model Law on Electronic Commerce now defines “writing” as follows:

“(1) 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.

18 The most important such instruments are, in the case of arbitral awards, the United Nations Convention on
the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 (the “New York
Convention”), and, in the case of court decisions in Europe, the European Conventions on Jurisdiction and
Enforcement of Civil and Commercial Judgments, done at Brussels on 27 September 1968 and at Lugano on 16
September 1988 (the Brussels and Lugano Conventions).
19 See Section II, C below.
20 Article 17.
21 Article II.
(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.22

Specifically in the field of arbitration, some legislation has included provisions which take account of electronic communication. In Switzerland for instance, an international arbitral agreement may take any form which permits it to be evidenced by a text.23 Thus, electronically transmitted arbitral agreements are valid under Swiss law,24 since the decisive element is visual perception and physical reproducibility.25 The UNCITRAL Model Law on International Commercial Arbitration states that the requirement of the written form is fulfilled if the arbitration agreement is contained in a “document signed by the parties...or in...other means of telecommunications which provide a record of the agreement...”26

However, the validity of an electronically transmitted arbitral agreement is less certain under a number of other legal systems. For instance, Dutch law requires “a writing”,27 and the Italian Civil Procedure Law, which was amended in 1994, also requires “a writing”, in which context, oddly enough, only telegrams and telexes are mentioned.28 German law likewise requires that an arbitral agreement be in writing (“Schriftform”), which means written on paper,29 unless the parties are merchants (“Vollkaufleute”) within the meaning of the Commercial Code.30

In addition, there are other national laws which cause obstacles to the conclusion of contracts online and could affect the validity of dispute resolution clauses entered into electronically. For example, the German “Standard Terms and Conditions of Contract Act” (“Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen” or “AGB-Gesetz”) generally provides that contract terms which one party has unilaterally established in advance with the intent of using them in a number of future transactions must be clearly identified to the other party, who must be given a reasonable opportunity to review these terms and approve them in advance.31 If these conditions are not complied with, the terms and conditions will be disregarded and the entire contract will be governed by statutory law.32 The AGB-Gesetz is generally interpreted by the courts in a very consumer-friendly way. Under the AGB-Gesetz, it is unclear to

22 Supra, see footnote 2, Article 6.
23 The 1987 Swiss Federal Private International Law Act (Pill Act), Article 178 para. 1: “Quant à la forme, la convention d'arbitrage est valable si elle est passée par écrit, télégramme, télex, télécopieur ou tout autre moyen de communication qui permet d'énabliter la preuve par un texte” (“...die den Nachweis der Vereinbarung durch Text ermöglicht”); “...consenta la prova per testo”). With respect to domestic arbitration clauses, the written form (“forme écrite”, “Schriftform”, “forma scritta”) is required by Article 6 of the 1996 Intercantonal Arbitration Convention, the Concordat.
25 Werner Wenger, in Basler Kommentar, Internationales Privatrecht, H. Honsell/N.P. Vogt/A. Schnyder (eds.), IPRG 182, n. 12 (1996). However, the author adds the qualification that this is true only if the statement of agreement is not just displayed on the screen, but can be permanently stored or printed out.
26 Article 7(2).
27 Dutch Civil Procedure Law, Article 1021.
28 Italian Civil Procedure Law, Article 807.
29 German Civil Procedure Law, Article 1027(1).
30 German Civil Procedure Law, Article 1027(2) and German Commercial Code, Article 4.
31 AGB-Gesetz, Article 6.
32 AGB-Gesetz, Article 6.
what extent courts will allow parties offering goods or services on the Internet to bind purchasers to the terms of frequently lengthy standard contracts and which typically contain dispute resolution clauses.

Likewise, the German “Law on Revocation of Contracts Concluded Door-to-Door” (“Haustüzderrufgesetz”) gives consumers a wide-ranging right to revoke contracts concluded “door-to-door” within a certain time-limit. The extent to which this law applies to online transactions concluded by consumers in their homes is a matter of debate in Germany. If it did apply, this law could allow consumers to invalidate transactions containing dispute resolution clauses. Similar issues arise with regard to the German Law on Consumer Credit Transactions (“Verbrauchercredigungesetz”).

The New York Convention, when requiring that an arbitral agreement be “in writing”, specifies that the term includes agreements contained in an “exchange of letters or telegrams”. The term “telegram” has been interpreted by some courts to include other modern means of telecommunication. In a recent case, the Swiss Supreme Court decided that the provisions of the New York Convention are to be broadly interpreted within the meaning of the UNICTRAAL Model Law, and thus the form requirements of the New York Convention are substantially equivalent to (the liberally construed) Article 178(1) of the Swiss Private International Law Act referred to earlier. Nevertheless, some commentators interpret Article II of the Convention more restrictively, so that this point is not fully settled even in Switzerland.

B. THE PROCEEDINGS

Other legal problems may arise in the course of the proceedings. In online proceedings it may for instance not be possible to determine a physical location where procedural acts of the arbitral tribunal are performed. Where the applicable law relies on physical location as did, at least with respect to the signature of the award, English arbitration law prior to the 1996 Arbitration Act, this may give rise to difficulties with respect to the determination of the place of arbitration and, hence, the law applicable to the proceedings.

The result could be a “floating arbitration” and a “floating award”, with uncertainties concerning a number of important matters ranging from the law applicable to the proceedings, to the jurisdiction of the courts providing legal support to the arbitration and possible review and enforcement of the award. In legal systems which have adopted the Swiss concept of the “seat” of the arbitration, these difficulties are less likely to arise, since the seat is a legal concept which serves as the factor connecting the

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33 New York Convention, Article II(2).
35 BGE 121 (1995) III 38 at 44.
36 See Lalite/Poudret/Reymond supra, footnote 24, LDIP 178, n. 6.
arbitration to a specific legal system and is independent of the place where the proceedings physically take place.\textsuperscript{38} This concept has now also been adopted in the 1996 English Arbitration Act.\textsuperscript{39}

Significant practical problems may arise in an online arbitration with regard to confidentiality and security of the proceedings, particularly those conducted over open computer networks. The Internet is an inherently insecure medium, so that steps would have to be taken to protect the security of any messages or documents transmitted over it, for instance through the use of encryption.\textsuperscript{40} In this regard various jurisdictions around the world have recently been enacting legislation on digital signatures,\textsuperscript{41} the use of which could be crucial in ensuring an adequate level of security in online proceedings, since they can allow the decision-maker to determine with almost complete certainty that electronic messages did in fact originate from the parties which they purport to originate from, and that they were not altered since being sent. On the other hand, national and international restrictions on the use of encryption for confidentiality could inhibit parties and arbitral tribunals from using it to ensure the confidentiality of information and messages transmitted electronically. In any event, procedural rules of both national courts and arbitral institutions would require modification to meet the security concerns of the parties.\textsuperscript{42}

Most sets of arbitral rules and national procedural laws contain requirements of form which would have to be modified in the context of online arbitration. Thus, the Rules of the London Court of International Arbitration (LCIA) refer to the presentation of evidence “in written form”\textsuperscript{43} and to “hearings”,\textsuperscript{44} and the International Chamber of Commerce (ICC) Rules, in their present form, contain frequent references to “writings”,\textsuperscript{45} so that doubts may arise as to the admissibility of electronic means for such procedural acts. The revised ICC Rules, which will become effective in 1998, now expressly authorize transmission by “any other means of telecommunications that provides a record of the sending thereof”.\textsuperscript{46} Under German law it is unclear whether electronically transmitted messages are admissible as evidence to show that the sender made the statements contained in them, or whether their evidentiary value is subject to

\begin{thebibliography}{99}
\item See Lalove/Poudret/Reymond \textit{supra}, footnote 24, LDIP 176, n. 5; Frank Vischer, in \textit{Basler Kommentar zum IPRG supra}, footnote 25, IPRG 176, n. 5.
\item Sections 3 and 53.
\item See, regarding security problems on the Internet and the legal status of encryption, Christopher Kuner, \textit{Legal Aspects of Encryption on the Internet}, International Business Lawyer, April 1996, p. 186 et seq.
\item See for example the Utah Digital Signature Act, enacted in 1995 (available on the Internet at http://www.state.ut.us), and the proposed German Digital Signature Act and Ordinance (available in English translation on the Internet at http://our.world.compuserve.com/homepages/ckuner), which are to be adopted in late 1997. The matter is now being dealt with by the Working Group on Electronic Commerce of the United Nations Commission on International Trade Law (UNCITRAL), see in particular the Report of the Working Group of 12 March 1997, (Ref A/CN.9/437) and the UNCITRAL Model Law on Electronic Commerce.
\item See UNCITRAL, Draft Notes on Organizing Arbitral Proceedings, A/CN.9/410, §§ 29 and 33-36. However, these questions are treated cursorily in the final version.
\item LCIA Rules, Article 12.2.
\item ICC Rules, Article 12.2.
\item See, e.g. ICC Rules, Article 13(7) (disclosure of potential conflicts of interest by the arbitrator “in writing”) and Article 17(1) (submission by the parties of “pleadings and written statements”).
\item Article 3(2).
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the discretion of the court. In arbitration, the powers of an arbitrator with respect to the conduct of the proceedings can normally be understood to include those for making the arrangements for electronic production and transmission of pleadings, briefs, documentary evidence and other communications which the applicable rules require to be made “in writing”. It is advisable, however, for the arbitrator to discuss such arrangements with the parties so as to avoid subsequent objections. Where the procedural rules provide for Terms of Reference or similar documents setting out the particularities of a specific arbitration, such a document is the suitable place for recording the arrangements on electronic production and transmission of documents.

Finally, it should not be overlooked that the absence of personal, face-to-face communication in online proceedings introduces a risk of misunderstanding. This risk is particularly serious in international arbitration where often at least some of the arbitrators, parties and counsel do not know each other beforehand and where confidence building is particularly important. For this reason, a personal meeting between the arbitrators and the parties at an early stage of the proceedings has become a regular feature in international arbitration. If in online arbitrations such meetings are omitted, ways should be found (for example, video conferences) to reduce the dangers of miscommunication.

C. ENFORCEMENT OF THE DECISION

If the proceedings lead to a binding decision, the parties may comply with it voluntarily. However, voluntary compliance cannot be presumed and the need for enforcement may arise. In this respect, arbitral awards have an advantage over judicial decisions, since their enforcement, almost everywhere in the world, can rely on the New York Convention.

The issues which have just been mentioned may give rise to some difficulties at the enforcement stage also. Thus, defects in the validity of the arbitration clause, for instance due to restrictions with respect to arbitration agreements in consumer contracts, may be raised as objections to enforcement of an arbitral award, or the courts of the enforcing State may consider that the notice requirements of the New York Convention have not been complied with if notice of the proceedings was given online.

Furthermore, difficulties may arise when it has to be determined whether the arbitral procedure was “in accordance with the law of the country where the arbitration

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47 See M. Schwarz (ed.), Recht im Internet, § 6-5.1 (1996); German Civil Procedure Law, Article 416.
48 See e.g. Article 13 of the LCIA Rules or Article 7(h) of the Iba Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration.
49 Terms of Reference are a particularity of the ICC Arbitration Rules which have found application in other proceedings, too. In the 1998 ICC Arbitration Rules the matter will be regulated in Article 18. See Schneider, The Terms of Reference in the forthcoming issue of the Bulletin of the ICC Court of International Arbitration with further reference.
50 Article V(1)(a) of the Convention.
51 Ibid. Article V(1)(b) permits refusal of enforcement if “the party against which the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”. 

took place”. The international differences with respect to the concept of the “seat” of the arbitration have been mentioned above.

Finally, it must be expected that online awards will be difficult, if not impossible, to enforce, unless a hard copy of the award has been issued. Indeed, Article IV of the New York Convention requires that a party applying for enforcement of an award must present “the duly authenticated original award or a duly certified copy thereof”. Thus, the parties to an online arbitration are well advised to require the arbitrators to issue a hard copy of the award, in order to comply with the requirements of form to make it “binding on the parties”.

IV. PRESENT PRACTICE AND AVAILABLE OPTIONS FOR DISPUTE RESOLUTION IN ELECTRONIC COMMERCE

Contracts concluded in electronic commerce or concerning it often contain dispute resolution clauses, however many of these clauses are of questionable effectiveness. Frequently such contracts regulate in minute detail technical aspects but seem to attribute little attention to dispute settlement. Contract provisions in this respect are at best are standard clauses which rarely address the particularities of the electronic medium and not infrequently show little, if any, understanding of the law and practice of international commercial dispute settlement.

A. EDI FORM CONTRACTS

Agreements for electronic data interchange (EDI) have been the subject of important efforts of standardization. This is not surprising, given that EDI was the first business application to make wide use of cyberspace, and that it accounts for a considerable amount of business world-wide. Many of these standard contract forms contain some sort of dispute resolution clause. For example, the “Standard Electronic Data Interchange Agreement” of the British EDI Association contains a general choice of forum clause with the possibility of arbitration. Paragraph 15.1 reads as follows:

“Unless the parties agree to submit the matter to arbitration or other procedure for the resolution of disputes, or to select a different jurisdiction, any matter or dispute arising from, out of or in connection with this Agreement, as to its validity, interpretation, construction or performance shall be subject to the sole and exclusive jurisdiction of the English Courts.”

In the comments to the contract, there is a general reference to the possibility of an arbitration clause, but no further information about its particulars. English law is made applicable, to the extent that foreign law is not agreed to by the parties.

The Italian association EDIFORUM provides in its EDI form contract that disputes

52 Ibid., Article V(1)(d).
53 Under ibid., Article V(1)(e) enforcement may be refused if “the award has not yet become binding on the parties...”.
are to be decided by arbitration under the rules of the International Chamber of Commerce in Paris, without providing further details—the choice of law is left to the parties.

ODETTE,55 the European EDI association of the automobile industry, provides in its interchange agreement that disputes arising under its EDI contract are to be decided by procedures applicable to the underlying transaction.

The form contract for a Canadian “EDI Trading Partner Agreement” provides for arbitration before a single arbitrator, who is to be named by the EDI Council of Canada and must be an EDI expert:

“In the event of any disagreement or dispute between the parties as to any matter arising from or related to this Agreement and which the parties are unable to resolve after good faith negotiations, the matter shall be referred to and determined by arbitration under the Arbitration Act [(Ontario)] by a single arbitrator who shall be an independent expert in electronic data interchange technology appointed by the President for the time being of the EDI Council of Canada, and whose decision shall be final and binding on the parties. Judgment upon any arbitral award may be entered in any court having jurisdiction.”56

The comments to the form contract point out that the parties may choose the substantive law and the law applicable to the arbitration, which is, however, only contemplated as the law of other Canadian provinces.

The EDI contract of the American Bar Association allows the parties to conclude the following arbitration clause:

“Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”57

The commentary to this clause recommends that it be considered whether an arbitration clause or an alternative form of dispute resolution is appropriate, but gives no further commentary. The following statement is made in the introduction to the contract:

“The Study recognised that EDI commercial practices are characterised by speed and increased efficiency. Accordingly, the Task Force determined that, in the event of a dispute arising out of or relating to the use of EDI, seeking expedited resolution of that dispute was consistent with the objectives which EDI attempts to achieve.”58

The task force does point out that the technical EDI knowledge of the arbitrators

55 Organization for Data Exchange via Tele Transmission in Europe.
56 Model Form of Electronic Data Interchange Trading Partner Agreement and Commentary, prepared by the Legal and Audit Issues Committee of the Electronic Data Interchange Council of Canada, 1990, para. 10.01.
could be an advantage in arbitration proceedings, but does not translate this into details specific to EDI disputes.

The European Model EDI Agreement is also not particularly original with regard to dispute resolution:

Alternative 1

*Arbitration clause*

Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by the arbitration of a (or three) person(s) to be agreed by the parties, or failing agreement, to be nominated by ............... in accordance with and subject to the rules of procedure of ............... .

Alternative 2

*Jurisdiction clause*

Any dispute arising out of or in connection with this contract shall be referred to the courts of ............... , which shall have sole jurisdiction.59

The commentary to these provisions demonstrates an incorrect knowledge of international arbitration in several important areas. For example, it mentions UNCITRAL as an appointing authority,60 although the UNCITRAL Secretariat expressly refuses to perform this function. The clauses and comments do not show any specific efforts to take account of the particularities of the electronic medium in disputes under EDI contracts.

In the EDI Form Contract of the UN Economic Commission for Europe (ECE),61 the above clause contained in the European Model EDI Agreement is incorporated verbatim, while some of the mistakes which one finds in the text of the European Model Agreement are avoided. The option for arbitration is described as follows:

"Since those seeking to use electronic communications are most likely attracted to the benefit of speed and efficiency which the technology provides, they may also favour adopting a similar method of dispute resolution, i.e. arbitration (Alternative 1)."62

However, the commentary to the Form Contract does not say how "the benefit of speed and efficiency" to which it refers is to be achieved.

This brief survey of dispute settlement clauses in standard EDI contracts shows that drafters of such contracts, while they make allowance for the possibility that disputes may arise, seem to have given little thought to the particularities and complexities of such disputes, and even less to solutions which are adapted to the electronic medium.

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61 UN ECE Document ECE/Trade/208, January 1996.
62 Section 7.7.
This seems to reflect the situation as it prevails generally in the practice of EDI networks and other closed systems of electronic communication.\textsuperscript{63}

\section*{B. OTHER TYPES OF AGREEMENTS}

The situation is not much better with regard to other types of agreements, indeed, it seems that hardly anyone has thought much about the particular legal problems of electronic commerce in drafting dispute resolution clauses.

For example, the English version of the CompuServe membership agreement provides the following in paragraph 16 (version of 17 September 1996):

“This Member Agreement and all of the parties [sic] respective rights and duties in connection herewith shall be governed by and construed in accordance with the laws of the United States of America and, excluding conflicts rules, of the State of Ohio. Any cause of action of Member, or by users of Member’s account, with respect to the Service or this Member Agreement must be instituted within one year after the claim or cause of action has arisen or be barred.”

The clause is of little help for the settlement of disputes which may arise under the contract. It does not even identify the court before which claims must be brought. The validity itself of the clause seems questionable under certain provisions of national law, such as the German Standard Terms and Conditions of Contract Act discussed above.

More care has been given to the dispute settlement question in the “roaming agreements” for mobile communications. The associations of companies providing such services have prepared standard agreements governing the cross-border exchange of services (“roaming”) and the charges for them. These agreements contain a two-stage dispute settlement clause providing, in the first stage, submission of the dispute to the Committee of the Association and, if no agreement can be reached before that forum, arbitration in Geneva, according to the ICC Rules.

\section*{C. AVAILABLE RULES AND INSTITUTIONS}

Few existing dispute resolution rules or institutions provide for the specific needs of dispute settlement in electronic commerce. However, some of the well-established institutions have started to consider the effect and potential of the electronic medium and have made some adaptations.

The new ICC Arbitration Rules which will become effective in 1998 now specifically provide for the possibility of electronic communication. Article 3, paragraph\textsuperscript{63} For instance, a recent article on “Electronic Communications in an International Franchising Network” discusses electronic communications extensively, including EDI and the Internet (Polsky & Goldman, \textit{Electronic Communications in an International Franchise Network}, International Business Lawyer, May 1997, p. 211). While the article deals with some issues resulting from electronic communications (e.g. contract issues, records, discovery etc.), it does not consider the possible contribution of the electronic medium to the dispute settlement process. Another article in the same issue (Jesse & Lowinger, \textit{Planning for Dispute Resolution in International Franchising Relationships}, p. 221) discusses mediation, arbitration, and litigation in court without reference to the electronic medium.
(2) of the new Rules sets out the means by which the Arbitral Tribunal and the Secretariat may notify the parties; it adds to the means indicated in the previous version a number of others and then concludes by allowing "any other means of telecommunication that provides a record of the sending thereof".

The Geneva Chamber of Commerce and Industry is in the course of reviewing its rules with the aim of adapting them to the needs of electronic communications. At present, the working group has concluded that unregulated use of electronic means of communication would create an excessive legal risk. The revision envisaged leaves it up to the arbitral tribunal to prescribe the means of communication but adds that the use of electronic means requires the express consent of the parties.

In addition to the adaptation of existing rules, a number of mechanisms designed to fit the particular circumstances of electronic commerce are now being developed. Some of these efforts, however, reflect the limited perspectives which have been noted above in the examination of some contract forms relating to electronic commerce.

For instance, a French EDI form contract contains provisions for a special type of arbitration proceeding. The contract, published by the CIREDIT, provides in paragraph 10 for the application of French law, and specifies that this is also the case in international transactions:

"Toute contestation résultant de l'interprétation ou de l'application du présent contrat type qui ne pourra être réglée à l'amiable entre les parties sera de la compétence exclusive du tribunal de commerce de Paris, ou, si les parties préfèrent recourir à un arbitrage, après signature d'une convention à cet effet, le litige sera soumis à l'arbitrage de la Commission FAX-EDI du CIREDIT qui statuera selon son règlement intérieur et dont la sentence aura un caractère obligatoire."

It should be emphasised that arbitration according to this provision, requires that an additional arbitration agreement be "signed". The provision makes recourse to online arbitration doubtful if not impossible.

A variety of other contracts often contain provisions for a type of advisory board or management committee to settle disputes; this is often the case in contracts involving closed networks, where it is particularly important to ensure continued good relations between the parties. In such cases, the parties send representatives to the particular body, where disputes are regularly discussed. Extraordinary meetings can be called in case of disputes which require urgent action. Particular contact persons are named for specific types of disputes, who can consult all those participating in the network. Disputes not settled in this manner are typically brought before an arbitral tribunal.

International organisations, too, have begun to take up the subject of dispute resolution in international computer networks. For example, the European Commission has started work on this subject within the scope of the TEDIS programme.

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64 Centre International de Recherches et d'Etudes du Droit de l'Informatique et des Télécommunications.

65 The above-mentioned standard agreement of mobile telecommunication companies, providing an initial reference to the Committee of the Association, is an example of such a two-tier system. Another example was the British Data Interchange on Shipping (DISH) programme and its Pilot Project Interchange Agreement which provided for a preliminary procedure before the DISH Management Committee.
The questions is also to be considered within the scope of work on the “global market place” by the G-7 and the G-4 States. However, it must be recognized that such efforts are still at a very early stage.

Among the fora where the subject receives attention, the Informal Workshop on Dispute Resolution in Telecommunications should be mentioned, which brings together at regular intervals a growing number of experts in the field and which is developing dispute resolution mechanisms for the telecommunications sector. The group’s members include representatives of industry, companies subject to State regulation, and specialists in the dispute resolution field.

The most advanced efforts in this direction seek to provide for the actual settlement of disputes online. Perhaps the best-known such procedure is the “Virtual Magistrate Project” run jointly by the American Arbitration Association and Villanova University Law School. The Virtual Magistrate provides for an expedited process of dispute resolution, and attempts to resolve complaints within 72 hours after acceptance. Complaints are submitted by e-mail to the Villanova Center for Information Law and Policy, and a request may be made that information pertaining to the complaint remain confidential. The Virtual Magistrate expressly limits its jurisdiction to:

“complaints about messages, postings, and files allegedly involving trademark infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate (obscene, lewd or otherwise contrary to system rules) materials, invasion of privacy, and other wrongful content”.

Thus, the Virtual Magistrate is by its terms limited to disputes involving online services (though it does not deal with questions about billing or financial obligations between users and system operators).

After receiving a complaint, the Virtual Magistrate decides whether to accept it, and then notifies the parties. Upon their agreement to participate in the proceedings, the 72-hour time period begins to run. Once the complaint has been accepted, the American Arbitration Association selects an available magistrate from a pool of specifically qualified persons. A LISTSERV or news group is established for each case, so the participants can post messages thereto; thus, the proceeding itself takes place mainly online. There are no specific procedural rules, except that “the magistrate will conduct fair and appropriate proceedings to reach a decision in the time available”. Private communications are possible between the magistrate and the parties by e-mail, and the parties are also notified of the magistrate’s decision in that manner. Procedural matters not addressed by the Virtual Magistrate rules are to be resolved in accordance with the American Arbitration Association Commercial Arbitration Rules and “general principles of fairness”.

The Virtual Magistrate has many interesting innovations which deserve further study. In particular, it makes use of Internet technology to expedite the proceedings and

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66 See supra, footnote 3. The Workshop is chaired by Richard Hill and John Watkinson; the authors participate in its work.

67 Information on the Virtual Magistrate is available on the Internet at http://vmag.law.vill.edu:8080/.
control costs. It is informal and uses a specially selected pool of magistrates with experience in the technology. Nevertheless, the Virtual Magistrate process has obvious limitations. In particular, the jurisdiction of the process is limited, and enforcement of its decisions, outside the United States does not seem to be assured. Thus, the Virtual Magistrate is a useful beginning and still far away from a fully developed dispute resolution system for electronic commerce.68

Another online dispute resolution system is the mechanism developed by the "International Ad Hoc Committee" for the use of online mediation and expedited arbitration in the resolution of disputes concerning Internet domain names.69 Under this system, applications for domain names administered by a "Council of Registrars" (CORE—a non-profit organisation to be established in Switzerland) must agree to the following:

- "To participate in online mediation under the mediation rules of the Arbitration and Mediation Center of the World Intellectual Property Organisation (Geneva), if such mediation is initiated by a right holder who wishes to challenge the domain name applicant’s right to hold and use the second-level domain name.

- To participate in binding expedited arbitration under the corresponding rules of the WIPO Arbitration and Mediation Center, if such arbitration is initiated by a right holder who wishes to challenge the domain name applicant’s right to hold and use the second level domain name."70

The Final Report states that “applications submitted electronically must include state of the art electronic identification”, which seems to contemplate the use of digital signatures in the conclusion of the dispute resolution agreement.71

Proceedings are held before “Administrative Domain Name Challenge Panels”, comprised of “international experts in the fields of intellectual property and Internet domain names”, and are supervised by the WIPO Arbitration and Mediation Center.72 The proceedings are held online, with a fast-track procedure providing for a decision within 30 days for challenges brought within 60 days of registration of the domain.73 Challenges and proposed decisions are to be made available on the Internet, and third parties may submit comments before a final decision is made.74

This system holds real promise for the further development of online dispute resolution. Its limitation to a strictly defined area (Internet domain names) may increase the chance that it will prove workable in practice. The absence of rules for the conduct of the online proceedings in this system has the advantage of offering flexibility but, at the same time, creates insecurity and the risk of unpredictability. The system has some

68 To be fair, the Virtual Magistrate rules themselves state that “this is an experimental process, and the rules may be amended from time to time based on experience”.
70 Ibid., § 7.1.1.
71 Ibid., § 6.1.5.
72 Ibid., § 7.1.2.
73 Id.
74 Id.
important limitations. In particular, the panels have no legal authority over the parties, and the parties are free to pursue other remedies before courts and arbitral tribunals. However, the fact that the Challenge Panels have authority over the domain names in issue give them a certain amount of leverage over the parties.

D. CONCLUSION

It appears from the investigation presented above that, despite the explosive growth of electronic communication and commerce in the past two years and despite useful initiatives, there are no appropriate dispute resolution mechanisms for most of the conflicts which may arise in electronic commerce, domestically and even more so internationally. The initiatives taken have a very limited scope and are far from satisfactory for companies doing business online. Thus, at least for the moment, it seems that, once a dispute arises, parties engaged in electronic commerce will have to leave the Information Highway and continue their journey on a country road.

V. OUTLINE OF POSSIBLE DISPUTE RESOLUTION MECHANISMS

Given the large variety of different dispute resolution mechanisms now in existence (ranging from mediation and many other forms of ADR to different forms of arbitration and court proceedings), there might not be any need to invent a completely new dispute resolution system for electronic commerce. Nevertheless, such disputes no doubt require changes in existing mechanisms, and may lead to some novel approaches. This section describes some possible mechanisms which could be developed, and some of the factors to be considered in this development.

A. PROCEDURES


One of the most remarkable features of the Internet and of other networks is the ease with which people from all parts of the world can communicate about the greatest variety of subjects. Whoever has a subject which might be of interest to others can publicize his views and invite discussion on it. Innumerable groups have been formed for such discussion and every day new ones are formed. Occasionally such groups reach beyond mere discussion and organize collective action.

An investigation of means for dispute settlement in international electronic commerce should not neglect the resource which such discussion and possible collective

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75 Id. An administrative domain name challenge panel has authority to determine whether a second-level domain name is held in violation of the policy; but otherwise cannot make any decisions binding on the parties. It has no authority to review or enforce any national or regional intellectual property right or obligation, apart from the determination with respect to the domain name. The effect of this determination on the jurisdiction of a court to hear cases interpreting and enforcing intellectual property rights is doubtful.
action may provide. Two kinds of groups might be distinguished, user groups and expert fora, each of which might play a different role.

User groups were probably first formed in the computer industry; they can now be found occasionally in other industries. Such groups bring together users of a product or service for an exchange of their experiences among themselves or with those who offer the product or service. The participants in the exchange are concerned mainly with the most effective use of their equipment and software and with possible improvements. The spectrum of such groups ranges from informal, occasional exchanges among specialists interested in particular products, to large, well-organized associations. Members communicate often by e-mail, but also in newsgroups, LISTSERV groups, or by newsletters.

The exchange of information with other users improves the understanding of the product or service by the users. It provides manufacturers or sellers with suggestions for improvements in their products or services, and assists them in setting their priorities and in communications with users. Such communication between suppliers and users allows for early identification of problems, and thus the avoidance of disputes. Once disputes arise, the user group can cause pressure to be put on the supplier and can contribute to the search for creative solutions.

Thus, user groups can transform the dispute between a supplier and an individual client into a collective process. This in turn can provide new or different forms of consumer protection on a world-wide basis and may offer a basis for negotiation in a more balanced setting, improving the chances for settlement.

Among the various kinds of discussion groups which communicate on the Internet, many are comprised of persons knowledgeable in a particular subject who wish to exchange information in their field of special expertise. Such expert fora can be formed about any subject imaginable, including those relevant for the settlement of disputes. Thus, specialists may communicate about issues concerning electronic signatures, protection of intellectual property, product standards, choice of law issues or liability questions. Groups may also be formed to consider questions of contractual and other relations in particular industries which offer goods and services on the Internet. There may be an expert forum on the sale of software, on banking or insurance services, on telecommunications, travel services and many others. Indeed, many of the subjects just mentioned are dealt with already by operating discussion fora.

These fora allow discussion of disputed points on a world-wide basis and may bring to bear many, or possibly all, relevant points of view. They can contribute to the settlement of disputes in a twofold manner: on the one hand they may assist in the development or clarification of rules in the respective fields of the groups, while on the other hand they may play a role in the settlement of a particular dispute.

The potential of expert fora may best be illustrated by an example set in a specific industry, for instance banking. As part of a dispute settlement mechanism along the lines
described below, a bank offering online services, a group of banks, or the industry as a whole may provide for consultation with specialists in the field. These specialists would communicate in an expert forum and could provide advice or decisive opinions in particular disputes.

Since the disputants may wish to ensure the confidentiality of their relationship and since they may need assistance in identifying the issues for discussion in the expert forum, a neutral person may be called upon, who might be called a “Facilitator”. When a dispute arises, either party could address itself to the Facilitator, who would analyse the nature of the dispute and formulate the issues to be decided. The Facilitator would then address the issues in an anonymous manner to the forum and would provide the disputants with the conclusions of the debate. If the conclusions communicated by the Facilitator did not bring the parties to a settlement, other methods as they are described below would have to be followed.

The intervention of such expert fora would assist the experts by providing them with real-life issues for consideration. Thus, the discussion of the experts and their contribution to rule-making would not depend only on academic speculation, but could be tested and adjusted by the experience of actual contract practice and disputes. The disputants, too, would profit from the process, since the expertise of a large group of specialists could be brought to bear on the solution of the dispute.

2. **Limited Decision-Making by Instances Selected by the Parties**

In contracts which require intensive co-operation between the parties, provisions are often included in which a person or an instance decides how disputes are to be resolved. If one of the parties is not in agreement therewith, then performance of the contract nevertheless continues according to the decision taken however, the decision can be appealed in a more formal proceeding and can be amended later, at least by amending its economic consequences.

The best-known example of such limited decision-making power is the role of the engineer or architect in English and American practice of construction contracts, a role which has found wide international acceptance because of its incorporation in the FIDIC\textsuperscript{76} conditions of contract for international civil engineering projects. Decisions which are similarly limited in scope may be made in urgent matters by the leader in many consortium agreements.

In recent years, the scope of such unilateral decision-making has been reduced or even neutralised by the introduction of new procedures and institutions. An example is the “Dispute Resolution Board” (DRB), which is comprised of independent experts and remains in place during the course of a project. DRBs have been used in a number of

large international projects in the past few years, for example in the construction of the Channel Tunnel.

The advantage of a system of limited decision-making is that a person or an instance well acquainted with the course and requirements of the project can make quick decisions as they may be necessary for its further performance and development, even if there are differences of opinion. The lack of independence of a decision-maker close to one of the parties is compensated by the possibility of later review of the initial decision by an arbitral tribunal.

With regard to electronic commerce, there are already some initiatives in this direction, such as those in respect of committees or similar bodies which operate in closed networks, facilitate the co-operation of the parties to the network, and play a role in the settlement of disputes. This subject will be dealt with later on in this article.

3. complaint and supervisory procedures

The potential for disputes can be significantly reduced if the seller of goods or services maintains a procedure by which errors can be quickly rectified. Such procedures are particularly needed for operators of networks and other types of infrastructure, but also for large companies which participate in electronic commerce. For example, British Telecom has a “Customer Service Guarantee Scheme” which includes a simplified complaint system known as “Complaint Handling Procedures”. A similar system exists in Switzerland for telephone customers.

When a customer makes a complaint to a seller of goods or services in electronic commerce, the latter has an obvious interest in taking effective measures to solve the problem, thus avoiding antagonizing the customer. The situation is more difficult if the complainant is not likely to be a future customer; this is particularly relevant in cases involving violations of intellectual property rights or personality rights, but also with regard to data protection and competition issues. In such cases, either the State or trade associations of the particular branch of industry generally provide for complaint procedures and institutions, such as supervisory boards, data protection officers, ombudsmen, and the like. Such instances can be of considerable importance for resolving disputes in electronic commerce.

The intervention of such institutions is made more difficult by the fact that they can generally only become active within national boundaries, while cases to be resolved in electronic commerce tend to transcend these boundaries. Thus, international institutions or measures and international co-operation are necessary to deal with the problem. An example of such co-operation is the “Cross-Border Complaint System” of the European Advertising Standards Alliance. Complaints brought before this body are always dealt with in the country of origin of the advertising medium by the appropriate instance there.

Complainants from other countries can turn to the appropriate instance in their
home countries, which then passes the complaint on and informs the complainant of the result; this makes it possible to bridge the differences in national rules and to take account of the expectations of the parties. The procedure is carried out under the supervision of the general director of the European Advertising Standards Alliance.\textsuperscript{77}

4. \textit{Involvement of a Neutral Third Party}

Disputes which cannot be resolved by the parties themselves are generally submitted by them to a neutral third party, usually a State court, an arbitrator, or a mediator. Unlike the supervisory and complaint procedures described above, proceedings before a neutral third party are usually rather formal in nature. Conclusion of agreements covering such procedures is quite common in international business transactions, particularly in the form of choice of forum or arbitration clauses. Mediation and other forms of so-called “Alternative Dispute Resolution” (ADR), which try to reach a settlement between the parties, are also being increasingly used, particularly in the United States.

A particular form of dispute resolution which leads neither to an enforceable judgment nor is merely a form of mediation is the arbitral expert opinion. An example of this is the planned DOCTEX system of the ICC, which shows how such expert opinions could be systematically used for dispute resolution; in this case, disputes regarding the interpretation of the Uniform Customs and Practices for Documentary Credits (\textnormal{ERA}/\textnormal{UCP}) can be submitted to a committee of three experts, who state their opinion on it.\textsuperscript{78} This procedure for an expert opinion has some points in common with the expert fora described above.

5. \textit{Multi-tier Dispute Resolution Systems}

In complex contracts, parties sometimes provide that they will first be obligated to attempt a settlement of the dispute in a relatively simple and inexpensive way, and that only when such efforts do not succeed can the dispute be brought before an arbitral tribunal.

Examples have already been cited from construction contracts, such as the submission of disputes to an engineer or to a dispute review board. The European Space Agency (ESA) uses such a multi-tier system to decide disputes regarding changes in development and construction contracts, so far with great success. Changes are first dealt with by a “Change Review Board” composed of representatives of the Agency and of the particular company. If no settlement is reached, then the question is submitted to a “Change Appeal Board” composed of higher-level representatives of both

\textsuperscript{77} Information on the dispute resolution system of the European Advertising Standards Alliance is available on the Internet at http://www.asa.org.uk/faq/europe6.htm.

\textsuperscript{78} Draft of the ICC Documentary Credit Dispute Expertise Rules, ICC Working Party on a Documentary Credit Dispute Resolution System, Document No 470-42/INT.25. The authors are indebted to Carlos Velez-Rodriguez for this information.
organizations. If this procedure is also unsuccessful, the case is then submitted to arbitration. Thousands of changes have been negotiated throughout the history of the ESA, but only in a handful of cases did a dispute have to be referred to the Change Review Board; none of these remained unresolved and in no case did the need arise for arbitration proceedings.\textsuperscript{79}

Similar systems have been used in the telecommunications industry. For example, a standard agreement for interconnection contracts of British Telecom provides for an initial negotiation phase for disputes arising from rate changes, after which the regulatory authorities can be turned to. For other disputes, a three-stage negotiation process is provided, and other dispute resolution procedures may also be used. Procedures in networks which provide for advisory boards or similar organs are other examples of such a multi-tier system.

B. DECISION-MAKING INSTANCES

The responsibility for drafting and implementing dispute resolution procedures can be assigned to many different types of instances, and their jurisdiction may vary considerably. In particular, regulation of the proceedings can be under the responsibility of a third party, or may be left to both the parties or to one of them. A wide variety of possibilities, many of which could also be used in electronic commerce, is available in practice.

1. Collectives, User Groups and Expert Fora

Rules for collective proceedings can be developed, or suggestions for such rules can at least be approved, by the collective itself. For organized groups in closed networks, the decision-making body in the group is also the regulatory instance. However, such rules can also contemplate the participation of outside instances, such as arbitral institutions or courts, or can grant to the parties wide-ranging rights to structure a particular proceeding, as this can be done in particular in an arbitration.

With regard to user groups relating to a particular company or product, the procedure is normally set by the company concerned. However, the choice of procedure is limited in that it must be accepted by the users in order to be at all useful; the same is true for organized expert fora and other forms of communication and discussion groups.

2. Complaint and Supervisory Instances

In complaint and supervisory proceedings, the institution which sets up the system also has the regulatory powers. This can be a company which organizes a complaint proceeding for its customers or suppliers, but can also be a government or government agency which provides for a data protection officer or similar instance. Finally, a trade group can also provide for an instance to which complaints can be made, in order to ensure that its members observe certain rules.

3. Neutral Third Parties

In cases where the dispute resolution mechanism is provided by a neutral third party (such as an arbitral institution or the like), the regulatory power lies with the third party offering such services. A major advantage of an arbitral proceeding or a similar means of dispute resolution is its flexibility and the possibility of adapting it to the needs of the users. In practice, the parties and the arbitrators therefore share regulatory powers with the arbitration institution, except in ad hoc proceedings. Of course, as discussed above, arbitrations are also subject to State legislation, in particular in respect of the arbitral agreement, the course of the proceedings and enforcement of the result, even though governments nowadays content themselves largely with ensuring that minimum procedural standards are observed.

4. Governments and Governmental Instances

With regard to dispute resolution before national courts, the rules are set by the national legislator, and parties have few opportunities to influence them. Adaptation to the requirements of international disputes in electronic commerce can therefore be achieved only through the cumbersome process of legislative reform. Nevertheless, in most civil disputes the parties do have an opportunity for influence through the use of choice of forum clauses.

The court system fulfills a major function in dispute resolution since it is available in all those cases where the parties have not agreed and are not prepared to agree on an alternative. In order to make effective use of this potential for the settlement of international disputes, there is a need for a regulatory body which has the power to place at the disposal of the parties an appropriate system of dispute resolution in those cases where no agreement has been reached on other forms of dispute resolution or where, by the nature of the case, such agreements cannot be expected to be made.

Despite the presence of numerous private dispute resolution procedures, there is certainly a need for an effective governmentally regulated dispute resolution mechanism; this requires both co-operation between governmental instances and the assistance of international bodies. However, when providing such a mechanism, public
VI. A MODEL DISPUTE RESOLUTION SYSTEM FOR ELECTRONIC COMMERCE

Having considered possible solutions for dispute resolution, a more concrete model which takes into account the specific requirements of electronic commerce will now be proposed.

It is to be expected that electronic commerce transactions may give rise to complex international disputes, and any dispute resolution mechanism must therefore be capable of dealing with them, in both closed and open networks. At the same time, it would be a mistake to base the entire system on the requirements of the most difficult case. The solution to this dilemma is a multi-tier, flexible model. At the first stage, speedy and informal intervention should be available for the resolution of simple disputes by a summary procedure before a mediator. If the mediator’s decision is not accepted, then the parties must have the possibility of a regular procedure for all disputed points for which, in their opinion, the expense and trouble of such a procedure is justified. Finally, it must be possible, where appropriate, to incorporate the resolution of individual disputes into the legal rule-making process.

A. THE SUMMARY PROCEDURE

In this system, the seller or provider of goods or services would put at its customers’ disposal a person for resolution of disputes arising from transactions with it; for lack of a better term, this person will be called the “mediator”, although such a person would actually be active not only as a mediator, but would have to make a decision about the dispute.

The mediator would have to be acquainted with the goods and services offered by the seller, and with the customs of the industry. He would also have to enjoy the trust of the seller, and would be appointed and paid by it (including the costs of the procedure), but would otherwise be independent. Such independence could be strengthened by various means, for example by security of tenure through a long-term contract or by granting to consumer organizations certain rights with respect to his appointment. Since the system is operated by the seller, it will probably not be possible to ensure complete independence, such as is the case with a judge or an arbitrator; but this defect is offset by the possibility of reviewing his decisions.

Large companies could appoint their own mediators, while small ones could appoint them jointly with other firms. It is also possible that an entire branch of industry would appoint mediators, such as banks for disputes arising from payment transactions, and credit card companies, telecommunication companies, airlines, tourism companies, etc. The model presented here seems applicable not only to consumers, but also to merchants.

The procedure before a mediator would be informal. Initially, the mediator would
examine the facts as presented by the customer, and could question both the customer and the company. The procedure would take place online, and possibly also with the help of telephone or video conferences. While it can be assumed that English would be the dominant language, it would be necessary for the mediator and his staff to be able to engage in inter-cultural communication, owing to the international nature of electronic commerce.

Normally, the mediator should make his decision within a few days. However, the proceedings could be concluded in a different manner, for instance if the company satisfies the complaint on its own initiative or the customer withdraws it. The mediator should have the possibility of recommending or ordering other proceedings, such as clarification by a specialist or an expert opinion. He may also bring the relevant issues before an expert forum; if such a forum is available, he might also take the role which above has been described regarding the Faciltator.

Either party would be able to appeal the decision of the mediator, which would have to be done within a certain time period, otherwise the mediator's decision would become binding. However, in most circumstances, such decision would not be formally enforceable as an arbitral "award", since neither national laws nor the applicable international conventions provide for such decisions. If no international solutions could be found, then a simplified arbitral proceeding might be added, in which a sole arbitrator rules on the binding nature of the mediator's decision, and thereby creates an enforceable award.\(^{80}\)

B. THE APPELLATE PROCEDURE

Both for reasons of procedural fairness and in order to ensure the functionality and independence of the mediator, the agreement should give the customer the opportunity to appeal the mediator's decision to a court of law, for example at the seat of the company. Alternatively, an "ordinary" arbitration proceeding (meaning a proceeding with the expenditure of time and money which is customary nowadays) could be agreed upon. Since in most cases a full-blown proceeding is not in the customer's interest either in terms of time or money, a simplified arbitration proceeding is suggested here as an option.

Upon choosing a simplified arbitration, the customer would waive all other legal remedies, and thereby secure for himself the advantages of such a proceeding in terms of time and money. The advantage for the company would lie both in simplification of the proceedings and in the assurance that no further proceedings would be instituted other than the arbitration.

Simplification could be accomplished in the formation of the arbitral tribunal. In most cases a sole arbitrator would seem to be preferable. A list of arbitrators from which an arbitrator could be chosen would be drawn up by the company or industry in co-

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\(^{80}\) It should be remembered, however, that this might present legal problems with regard to consumer protection legislation.
operation with consumer organizations, arbitral institutions, other neutral instances, and possibly also with national governments. The persons chosen as arbitrators would have to be qualified, both with regard to the subject matter of the dispute and in international arbitration, and would have to be independent. The arbitrator would be chosen by the customer. Thus, an arbitrator acceptable to both parties could be chosen in a relatively short period of time, and the arbitration could begin. If the customer was not satisfied with any of the possible arbitrators on the list, then he could demand additional candidates, for instance in co-operation with arbitral institutions in his home country, which would again have to reach agreement with the arbitral institution named by the company. An association of national or international arbitration institutions might also be included in the process.

The proceedings could take place online. The electronic exchange of text, setting out the facts and argument together with relevant documents, as well as consultations by telephone or video conferences with the arbitrator, should normally be sufficient. However, the possibility of oral hearings or the examination of witnesses should not be wholly excluded. There may also be cases where technical or legal expert opinions are needed, which could be submitted by e-mail. The determination of the language to be used should be based on the online communication between the customer and the company. There may be cases, however, when a party should have the option of making arguments in English or his own working language.

The costs of operating the dispute resolution system, i.e. all costs other than those for the arbitration proceeding itself, would be borne by the companies or the group of companies that offer it. The customer should be required to bear a proportion of the costs for the procedure. With regard to procedural costs, the result of the summary proceedings would be taken into account. Thus, if the summary decision was rendered in favour of the customer, then he would not have to make an advance payment in the following arbitration proceedings. One might also grant him security for his claim during the proceedings. However, if the customer challenged the mediator’s decision, then the arbitrator should be able to decide that the customer pay an advance to the procedural costs. In the same way, the customer would have to pay part of the procedural costs for the arbitration if the arbitrator’s decision went against him.

At each stage of the proceedings, the arbitrator should be allowed to make attempts at reconciling the parties or to suggest an appropriate settlement to them. The arbitrator should not necessarily be bound by a strict set of arbitration rules, but should be able also to make use of other possible solutions, while at the same time observing the basic principles of due process.

C. CREATION AND APPLICATION OF GENERAL LEGAL RULES

Uncertainty concerning the applicable rules has been, and will continue to be, one of the reasons for disputes on the Information Highway. Thus, an arbitrator deciding
cases in this area does not only have to apply the law, but also helps create it. In new areas such as electronic commerce such problems are of particular importance. Thus, problems may arise with respect to governmental rule-making powers and prerogatives. In some areas, governments or international authorities may not be prepared to allow private arbitrators to create legal rules, but will insist on doing so themselves.

As indicated above, the wholesale transfer of dispute resolution to private arbitration tribunals might hinder development of the law in a particular area. While an increasing number of arbitral awards is being published, normally after being redacted for anonymity, it is generally still true that arbitral proceedings and their decisions are kept confidential. Also, a simplified arbitration system as described here would hardly give the arbitrator the opportunity to consider appropriately the ramifications of the dispute beyond the particular case.

For these reasons, it seems advisable to incorporate the above mechanism into a general system of rule making. Examples could be procedures used by courts in the Member States of the European Union, which must refer certain questions for decision to the European Court of Justice or the reference to the Federal Constitutional Court which German courts must make when certain issues arise. At present, such a reference is not available in arbitration and in many cases it may not be a suitable solution.

Nevertheless, thought should be given to ways in which the arbitrator’s decision could be placed in a broader context. For example, the arbitrator could make use of the English “Special Case Procedure” described above, in order to present new questions of law to national or international bodies. He might also call on an expert forum, if available, or organize a discussion forum in appropriate circles.

D. IMPLEMENTATION OF THE MODEL

The practical implementation of this model must take account of the legal problems discussed above. The differences in legal systems and the prevailing uncertainties in many of them with regard to questions arising in online dispute settlement create formidable obstacles to such an implementation.

A particularly difficult aspect concerns the form and conditions under which the participants, and in particular the customers of a company using the above system, agree to submit their disputes to it. One may attempt to settle the matter at the time when the customer concludes a contract or leave it until the time when a dispute arises.

The first approach, i.e. agreement on the application of the system by a clause in the contract for the sale of goods and services would have the advantage of settling, once and for all, the method of dispute settlement under the contract. However, such a general clause, applicable in all contracts of the company, would have to take account of all or most of the jurisdictions in which its customers are likely to be resident and thus would have to meet a variety of requirements of form. It would not be sufficient, as is now often the case, for companies selling goods and services over the Internet simply to
include in the contracts with customers a dispute resolution clause tailored to the needs of the jurisdiction in which they are used to operate and expect that it would be enforceable anywhere else. Separate agreements on dispute settlement might have to be made by hard copy and in compliance with the law at the place of the customer's residence, or a paper copy of the agreement might have to be sent for signature following electronic conclusion of the transaction.

If the contract and the dispute settlement provisions are agreed by electronic means alone, thought should be given to the means by which the dispute resolution clause is presented to the other party. The use of digital signatures would help to maximize the evidentiary value of the clause. The clause and the entire contract should also be kept short and comprehensible in order to satisfy at least some of the objectives of consumer legislation.

The second approach leaves the formal agreement on a binding dispute settlement mechanism until a dispute with a particular customer has arisen and the specific requirements for the validity of an agreement to this effect can be seen. In this approach the company would offer the first stage of the system without preoccupying itself with the question of whether the agreement or its application would be binding under the various laws that might be applicable to it. The system would be at the option of the customer who could avail himself of it, if he thought this was advantageous. In view of the simplicity of the first stage, it can be expected that, for this first stage, the customer would normally resort to it, irrespective of the binding nature of the clause in which it had been agreed. It would then only be in cases where the customer wished to resort to the appellate procedure that the requirements of form would be given more careful consideration so as to ensure validity of the chosen option and the finality of its outcome.

Questions of enforcement of the summary decision have been considered already. Since the appellate decision would take the form of an arbitral award, its enforcement could rely on the New York Convention, subject to the reservations discussed.

VII. CONCLUSION

The rapid development of electronic commerce must be expected to give rise to many disputes of various kinds. The question of how these disputes can best be resolved has received little attention and there are few, if any, mechanisms available at present which are adequate for the medium. It can be expected that the lack of suitable dispute resolution mechanisms will constitute a serious obstacle to the further development of international electronic commerce.

Both the business and the legal communities need to rethink fundamentally the approach to dispute resolution as it is now practised in court and arbitration proceedings. Not only do existing laws and legal instruments need to be re-evaluated, but dispute resolution mechanisms need to be reviewed to determine how they can be adapted to meet the needs of electronic commerce.
Dispute resolution mechanisms which are consistent with the electronic medium and make use of its potential pose some new legal questions; some of them require domestic and international legislative action, others can be resolved through private action by those directly involved in commercial transactions or professional bodies.

The electronic medium, and in particular the facility of rapid communication with all parts of the world, offers new possibilities to accelerate the proceedings for dispute settlement. It also offers new dimensions for dispute avoidance and resolution, in particular through the possibilities of consulting interested and concerned circles, for instance through collective procedures as they may be developed in user groups or expert fora.

There is a wide spectrum of dispute resolution methods and mechanisms which may be adapted for use in electronic commerce. In view of the variety and complexity of the situations which may arise, it is suggested that a flexible two-tier system of summary proceedings with a possible appeal in arbitration is a suitable solution which combines speed of communication and efficiency with procedural fairness.
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