



Basis for the Harmonisation of Online Arbitration: E-Arbitration-T[©] Proposal

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**Alberto Fortún
Alfonso Iglesia
Alejandro Carballo
CUATRECASAS**

E-Arbitration-T[©] Project: An Alternative Dispute Resolution for SMEs
<http://www.e-arbitration-t.com>



1. DOES ONLINE ARBITRATION SEEK HARMONISING ACTIONS?

This paper aims to be a basic overview of the issues that Online Arbitration raises when dealing with B2B transactions. The application of new information technologies to both court and out-of-court mechanisms of dispute resolution raises legal and technological issues that would at first glance recommend their harmonization within the European Union (EU).

In this paper, we will examine the needs for standardisation of Online Arbitration in B2B disputes. We will not refer to B2C disputes or other ODR mechanisms. It does not mean, however, that B2B disputes are the most suitable for these types of actions, or even desirable. The question we have to answer is **whether or not Online Arbitration (ONLINE ARBITRATION) demands harmonisation measures to guarantee binding and enforceable electronic awards**¹.

To answer this question, we will depart from the approximation of laws already achieved in matters such as data protection, electronic signatures, and electronic commerce; we will revisit the EU directives on data protection², electronic signatures³ and electronic commerce⁴ on these matters as they also purport to resolve legal issues arising from cyberspace.

Focusing on ADR methods, we will summarily review the EU Recommendations on the principles applicable to the bodies responsible for out-of-court settlement of disputes and the best practices for ADR providers proposed by international organisations.

¹ Albeit controversial, by Online Arbitration we mean a qualified mechanism of Online Dispute Resolution (ODR) which aims at settling both online and offline disputes through electronic means or interconnected networks (usually via internet) so it does not require the physical presence of the parties. The communication channel is novel, but the foundations of arbitration remain the same: a final and enforceable award binding on the parties.

² Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector. OJ L 024 30.01.1998 p.1. available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31997L0066&model=guichett

Available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31999L0093&model=guichett

⁴ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. O. J. L 178, 17.07.2000, p.1. Available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32000L0031&model=guichett

Since international commercial arbitration is one of the best and most successfully harmonised area of law, we will not disregard neither the current status of international commercial arbitration nor the works of the UNCITRAL Group on arbitration to adapt the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 1958) and the 1985 Model Law on International Commercial Arbitration on the use of new technologies. To examine Online Arbitration, we have grouped three main topics: 1) enforcement of arbitration agreements; 2) due process rights; and 3) enforcement of electronic awards. A series of questions will be submitted for comments in global forums.

2. REGULATION OR SELF-REGULATION: PRIVATE VERSUS PUBLIC INTERVENTION

For some years, it has been discussed whether cyberspace should be privately or publicly regulated. While technological advances accelerate, State norm-setting becomes more and more sluggish, forcing the industry to react through self-regulation mechanisms, such as seals or “trustmarks”, as occurred with the *lex-mercatoria*⁵.

Even Governments maintain conflicting approaches. While the United States (US) Government⁶ favours self-regulation, the EU tendency (more interventionist) fits better with regulatory mechanisms protecting consumers and a common market. Despite appearances, some argue that, in the field of e-commerce, US and EU policies converge.⁷

In any event, it is unanimous that cyberspace regulation must be done at an international level as each country does not have the ability to address e-commerce transactions and cyberspace disputes individually.⁸

⁵ See principally WIENER, Alan “*Regulations and Standards for Online Dispute Resolution: A Primer for Policymakers and Stakeholders*”. Other authors: MANEVY, Isabelle “*Online Dispute Resolution: what future?*”; SCHULTZ, Thomas/KAUFMANN-KOHLER, Gabrielle/LANGER, Dirk/BONNET, Vincent in “*Online Dispute Resolution: The State of the Art and the Issues*”; BEVILACQUA, Maurizio, “*NEW ERA... NEW PLAN*” Canada’s 1999 Report of the Standing Committee on Finance, Chap. V.

⁶ The US Commerce Department has declared that the government will act only if necessary, meanwhile leaving the regulation to the private sector (as stated by WIENER, *supra*)

⁷ NEWMAN, Abraham and BACH, David in “*In the Shadow of the State: Self-Regulatory Trajectories in a Digital Age*” available at http://csab.wustl.edu/workingpapers/Newman_Bach.pdf

⁸ Mainly, the *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce*, (December 1999) <http://www.oecd.org/pdf/M0000000/M00000363.pdf> which (in the same way as it did in 1997) encouraged all actors to work together within a co-ordinated international approach to develop fair and efficient alternative dispute resolution. These Guidelines were endorsed by the G-8 nations in the “*Okinawa Charter on Global Information Society*” (July 22, 2000) and the

[Question 1: What is your opinion on the general approach that the EU institutions should follow on ODR and Online Arbitration of B2B transactions? Should the initiatives be limited to B2B transactions?]

3. THE MAIN EUROPEAN INITIATIVES OF HARMONISATION IN THE INFORMATION SOCIETY AND E-COMMERCE

International concerns relating to e-commerce first addressed consumer and data protection issues. While e-confidence was identified as one of the most important keys, attention was turned to ADR mechanisms and, later, to ODR.

3.1 Harmonisation v. Subsidiarity

The public-private conflict merges with the supranational versus national battle within the EU. Any legislative measure aimed at harmonising private law must respect the principle of subsidiarity.⁹

There is an inverse relationship between the power to set rules that limit the norm-making power of all Member States of the EU (inherent to harmonization) and the efficacy of subsidiarity (seeking for the norm-setting to remain within the Member States) which becomes constrained. “*Europeanisation*” of private law only occurs if necessary for the functioning of the common or internal market.

3.2 Regulations, Directives, Recommendations and other Preparatory Works

Several instruments can be used to achieve different types of harmonisation. From a higher to a lower degree of harmonisation, we could classify the following legal tools: Regulations, Directives, Recommendations and Preparatory Works.

“*Building Trust in the Online Environment: Business to Consumer Dispute Resolution*” Conference (December 11-12, 2000) jointly sponsored by the OECD, the Hague Conference on Private International Law and the ICC.

⁹ “*Building Trust in the Online Environment: Business to Consumer Dispute Resolution*” Conference Report (December 2000) clearly points out that: “*Many socio-economic and cultural barriers exist as challenges to implementing fair and effective systems of online ADR on an international scale. In particular, linguistic barriers are a frequent problem, as are differences in how cultures approach disputes and disagreements. It is important that ADR services be sensitised and responsive to these issues*”. <http://www.oecd.org/EN/document/0,,EN-document-0-nodirectorate-no-20-1300-0,00.html>

a) Regulations: According to article 249 TEU, “[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”. European Regulations encompass the strongest enforceability and uniformity of the matters they regulate. Hence, each Member State occasionally shows the strength of cultural solicitude in refusing to approve this type of rule.¹⁰

b) Directives: Unlike regulations, directives only provide for a basic core of uniformity. The principle of subsidiarity (article 5), the exceptions to the freedom of movement of goods (article 30) and the limits established in articles 94 to 96 (approximation of laws) draw the directives’ boundaries so they cannot go beyond what is strictly necessary to obtain their objectives.

In turn, the Member States retain some discretion as to the form and manner of implementation.¹¹ This discretion is limited by (i) the guidelines contained within the directive, (ii) the result that must be attained to ensure full effectiveness of the directive’s objectives, and (iii) the constraint on choosing the most appropriate method of implementation in the context of the specific national system.

Therefore, a directive does not contemplate a total unification but, rather, a mutual approximation of laws to remove existent divergences. National differences are still permitted within the limits of the directive.

c) Recommendations: Generally, recommendations are aimed at obtaining a given action or behaviour from the addressee with a more political than legal effect. Under article 249 TEU, “[r]ecommendations and opinions shall have no binding force”.

d) Preparatory Works: They are no more than ancillary instruments which serve to interpret subsequent legal norms. They are not legally binding either.

3.3. Relevant EU Directives in e-Commerce and ODR

¹⁰ See Tettley, 34 Tulane Maritime Law Journal. Mar. L.J. 2000, pp. 775-856 “international uniformity, because of its predictability and certainty, promotes international justice and order. But world society is not yet ready for a monolithic international law. It cannot give up its diversity of social purpose and manner of doing things”.

¹¹ “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods” (art. 249. TUE *ex article 189* at http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf)

In the matters of data protection, electronic signatures and electronic commerce, the EU has resorted to directives as legal instruments. In ADR, the EU has made use of Recommendations, although the Directive on Electronic Commerce also provides for the recognition of ADR methods.

The EU has discussed and approved three directives that implicitly or explicitly touch on some of the issues arising from Online Arbitration: 1) Directive 1997/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector (hereinafter, Directive on Data Protection); 2) Directive 1999/93/EC on a Community framework for electronic signatures (hereinafter, Directive on Electronic Signatures; and 3) Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (hereinafter, Directive on Electronic Commerce).

According to their preambles, the basis of these EU Directives lies on the existence of divergent rules among the Member States in electronic commerce, which results in a barrier to the use of electronic commerce and the erosion of the internal market (article 14 TEU).¹² It is therefore based on articles 94 to 96 of the Treaty. Directives are the legal instruments that better ensure a high level of legal integration at a community level because they help to clarify some (not all) legal concepts and strengthen EU citizens' confidence in, and acceptance of, the new technologies.

¹² Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector. OJ L 024 30.01.1998 p.1. expressly states: "(8) *Whereas legal, regulatory, and technical provisions adopted by the Member States concerning the protection of personal data, privacy and the legitimate interest of legal persons, in the telecommunications sector, must be harmonised in order to avoid obstacles to the internal market for telecommunications in conformity with the objective set out in Article 7a of the Treaty;[...]; and whereas the harmonisation is limited to requirements that are necessary to guarantee that the promotion and development of new telecommunications services and networks between Member States will not be hindered;*"

Particularly, the Directive on Electronic Signatures, which is based on articles 47(2), 55 and 95 of the Treaty, justifies its enactment on: 1) the existence of divergent rules; 2) the need for increasing consumer confidence in the new technologies; and 3) the need for harmonising the legal effects of digital signatures¹³.

Finally, the Directive on Electronic Commerce establishes that the Directive “*has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services*”. To the extent that the protection of the common market so requires it, the Directive also aims to clarify legal concepts¹⁴.

Remarkably, the Directive on Electronic Commerce encourages out-of-court schemes¹⁵ and includes a specific article (17) on out-of-court dispute settlement, whereby it is provided that:

“1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.”

¹³ Directive 1999/93/EC on a Community framework for electronic signatures. O.J. L 013 19.01.2000 p.12. “(4) *Electronic communication and commerce necessitate “electronic signatures” and related services allowing data authentication; divergent rules with respect to legal recognition of electronic signatures and the accreditation of certification-service providers in the Member States may create a significant barrier to the use of electronic communications and electronic commerce; on the other hand, a clear Community framework regarding the conditions applying to electronic signatures will strengthen confidence in, and general acceptance of, the new technologies; legislation in the Member States should not hinder the free movement of goods and services in the internal market; and (20) Harmonised criteria relating to the legal effects of electronic signatures will preserve a coherent legal framework across the Community; national law lays down different requirements for the legal validity of hand-written signatures [...]”*

¹⁴ See Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market. O. J. L 178, 17.07.2000, p.1 “(6) *In the light of Community objectives, of Articles 43 and 49 of the Treaty and of secondary Community law, these obstacles [arising from divergences in legislation and from the legal uncertainty as to which national rules apply] should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty”*

¹⁵ See Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market. O. J. L 178, 17.07.2000, p.1 “(51) *Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders”*.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.”

[Question 2: Do you think that a directive is the most appropriate regulatory instrument to deal with e-commerce issues? And to deal with ODR methods? Do you think that the European Primary Law provides the EU with a legal basis to adopt a directive on ODR methods?]

3.4. Relevant EU Recommendations in e-Commerce and ODR

a. Commission Recommendation of March 30, 1998 on the Principles Applicable to the Bodies Responsible for Out-of-court Settlement of Consumer Disputes 98/257/CE ¹⁶

The 1998 recommendation contains seven principles that should be respected by “*all existing bodies and bodies to be created with responsibility for the out-of-court settlement of consumer disputes*”. These principles are independence, transparency, adversarial, procedural efficacy, legality of decision, liberty and representation. ¹⁷

b. Commission Recommendation of April 4, 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC) ¹⁸

This second recommendation is also related to out-of-court procedures although it does not apply to arbitration. It addresses procedures limited to a simple attempt to bring the parties

¹⁶ See http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html

¹⁷ Previous instruments, all aware of the possibility for consumers to settle disputes through out-of-court or other comparable procedures, are amongst others: (i) “*Green Paper on the Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market*” (COM(93) 576 final of November 16, 1993); http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf (ii) Consumer Affairs Council of November 25, 1996; and (iii) European Parliament Resolution of November 14, 1996, OJ No C 362, December 2, 1996, p. 275; http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just02_en.html

¹⁸ See http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just12_en.pdf

together to convince them to find a solution by common consent. It also covers the possibility for a third party to be called upon to propose a solution informally, and recommends compliance with four principles: impartiality, transparency, effectiveness and fairness.

[Question 3: Could or should the principles set out in the two recommendations apply indiscriminately to fields other than consumer protection? Of the principles enshrined in the Recommendations, which in your view could be incorporated in the legislation of Member States?]

3.4. Preparatory Works and Other Actions

a) Green Paper on Alternative Dispute Resolution in Civil and Commercial Law [COM(2002) 196 final]¹⁹

Online arbitration is out of the scope of this green paper, although the Commission announces a proximate publication on ODR and arbitration.²⁰ After stating that ADR is a political priority widely recognised by EU Institutions, it addresses ODR in the following terms: “*the role of new online dispute resolution (ODR) services has been recognised as a form of web-based cross-border dispute resolution*”. According to the Green Paper, the ODR mechanisms can be used to resolve disputes which are not connected with electronic commerce, even if the “*e-Europe Action Plan*”²¹ was mainly focused in that field.

b) Statement of the EU and the US on Building Consumer Confidence in e-Commerce and the Role of Alternative Dispute Resolution (December 2000)²²

¹⁹ See http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf

²⁰ In January 2002, the EC presented a Proposal for a Council Directive, based upon arts. 61.c and 65.c of the Treaty, which advocates that “[l]egal aid must be granted on the same terms both for conventional legal proceedings and for out-of-court procedures such as mediation, where recourse to them is encouraged by the law”. (see http://europa.eu.int/eur-lex/pri/en/lip/latest/doc/2002/com2002_0013en01.doc)

²¹ See http://europa.eu.int/information_society/eeurope/action_plan/index_en.htm. The eEurope Action Plan 2005 has been recently approved. It refers to the EC alternative dispute settlement network - the EEJ net – within a frame of “*non-legislative initiatives aimed at promoting self-regulation*”. (see http://europa.eu.int/information_society/eeurope/news_library/documents/eeurope2005/eeurope2005_en.pdf).

²² See http://europa.eu.int/comm/external_relations/us/summit12_00/e_commerce.htm

Another action related to B2C disputes is the joint EU–US statement on building consumer confidence in e-commerce. It confirmed these governments' commitment to the OECD 1999 Guidelines and ratified the benefits of online ADR development and implementation.

4. THE UNCITRAL MISSION OF PROGRESSIVE HARMONISATION AND UNIFICATION OF INTERNATIONAL TRADE

On December 17, 1966, the UN General Assembly resolved (resolution 2205 XXI) to create a United Nations Commission on International Trade Law. Its general mission was “*to further the progressive harmonization and unification of the law of international trade.*” Some years later, in 1985, the general mission of unification specified the international commercial arbitration task. The UN General Assembly recommended in its resolution 40/72 of December 11, 1985:

“that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”²³.

This specific mission resulted in its 1985 Model Law on International Arbitration. Some years later, in 1996, UNCITRAL approved the Model Law on e-Commerce²⁴ concerned with the increasing number of transactions involving electronic means and the great utility of e-technology, an enormous and extended use of electronics which lacked legal certainty because of the divergent solutions or (even existing solutions) adopted by national legislations. In particular, it was considered that some delicate issues required a flexible approach so that Member States could take legislative actions where appropriate.

Lately, the Uncitral Group on arbitration together with the e-Commerce group²⁵ have created a new section on Online Arbitration with the purpose of revising the Model Law on International Commercial Arbitration and adjusting changes in new technologies.

²³ The explanatory Note made by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, after stressing the inadequacy of and disparity among national laws, states that “*The form of a model law was chosen as the vehicle for harmonization and improvement in view of the flexibility it gives to States in preparing new arbitration laws.*” <http://www.uncitral.org/en-index.htm>

²⁴ See the Model Law on e-Commerce at <http://www.uncitral.org/english/texts/electcom/ml-ec.htm>

²⁵ See A/CN.9/508, Report of the Working Group II (Arbitration) on the work of its 36th Session: “*It was noted with approval that, with respect to “online” arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of*

[Question 4: Do you think that the EU should follow the Uncitral Model Laws, or should it leave the regulation of Online Arbitration disputes to national laws?]

5. OTHER PRIVATE PROPOSALS OF HARMONISATION THE ABA E-COMMERCE AND ADR TASK FORCE²⁶

The ABA Task Force on e-Commerce and ADR disputes has been assessing the possibilities of standards and/or best practices for the ODR method since the release of its “*Draft Preliminary Report and Concept Paper*” in May 2001. One year later, they have produced the report “*Addressing Disputes in Electronic Commerce*” and a set of “*Proposed Guidelines for Recommended Best Practices by Online Dispute Resolution Providers*”, which have been discussed in both Europe and the US.²⁷

The ABA tasks force’s mission was “*to propose protocols, workable guidelines and standards that can be implemented by the parties to online transactions and by online dispute resolution providers*”. In relation to ODR, the ABA recommends: 1) the adoption of a set of

communication) (*ibid.*, para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce”. (See http://www.uncitral.org/english/workinggroups/wg_arb/index.htm)

²⁶ There are many other proposals in force such as the American Arbitration Association’s “*e-Commerce Dispute Management Protocol - Principles for Managing Business-to-Business Relationships*” (January, 2001) http://www.adr.org/index2.1.jsp?JSPssid=13799&JSPsrc=upload\LIVESITE\Rules_Procedures\Protocols\ADR_Guides\ecomm_protocol.html; or 2) the joint publication of ICC, BIAC (Business and Industry Advisory Committee to the OECD), AGB (Alliance for Global Business) and other industry organizations “*A Global Action Plan for Electronic Commerce*”, which is supported by many other national and international industry associations, available at <http://www.giic.org/focus/e-commerce/agbecplan.pdf>.

²⁷ The proposed guidelines can be found at the official page of the ABA Task force <http://www.law.washington.edu/ABA-eADR/home.html>.

guidelines for best practices²⁸; and 2) the creation of a structure or entity to educate ODR users, the iADR Center.²⁹

The creation of the iADR center is recommended because, at this stage, it is the “*most timely and useful entity*” (p. 37 *Addressing disputes in electronic commerce*). The ABA envisages a center capable of disseminating information about guidelines and available providers; developing codes, standards and guidelines; and providing multilingual services. Later on, the iADR center could become a trustmark or certifying authority.

Remarkably, “*the task force is not nearly as comforted with the current and prospective realities of B2C e-commerce as we are in the case of B2B e-commerce*”, which suggests that it is appropriate to begin with the evaluation of B2B transactions. Following the US-EU joint declaration, the ABA states that the agreement to provide active support to electronic commerce and ODR transactions requires a global approach.

6. INTERNATIONAL COMMERCIAL ARBITRATION: PEACEFUL WATERS

6.1 Foundations of Arbitration

Foundations of arbitration rest on five distinguishing elements: 1) arbitration agreement; 2) constitution of the arbitral tribunal; 3) due process rights; 4) final and binding award; and 5) enforcement of the award.³⁰

²⁸ The ABA noticed that no ODR guidelines or standards have emerged as a dominant code of practice within the ODR community. Its guidelines somehow resemble the EU recommended principles: 1) adequate means of providing information and disclosure to guarantee transparency; 2) disclosures of the technology used and online environment; 3) impartiality of the neutrals; 4) qualification and responsibility of neutrals’ confidentiality; 5) privacy and information security; and 6) enforcement. A careful analysis of the guidelines proposed by the ABA evidences that E-Arbitration-T would comply with all requirements and best practices. (See <http://www.law.washington.edu/ABA-eADR/home.html>.)

²⁹ The ABA considered six different entities, which all focus on B2C disputes: 1) Global Online Standards Commission; 2) newly funded ODR Trustmark Issuing and Administering Entity; 3) ODR trade Association; 4) Dispute Clearinghouse; 5) use of third-party auditors; and 6) newly funded Informational Entity: iADR Center. (See <http://www.law.washington.edu/ABA-eADR/home.html>.)

³⁰ ALAN REDFERN and MARTIN HUNTER, *Law and Practice of International Commercial Arbitration*, 3rd Edition p.4 and THOMAS SCHULTZ, GABRIELLE KAUFMANN-KOHLER ET AL., in “*Online Dispute Resolution: The State of the Art and the Issues*” but the latter report does not cover a full review of due process in ODR (p. 38), 2001 University of Geneva at <http://www.online-adr.org/reports/TheBlueBook-2001.pdf>

6.2 International Treaties and a Model Law

The main governing laws of international arbitration proceedings are the New York Convention of 1958, the *lex arbitri* (usually the law of the place where the award was made), and the law of the place of enforcement.

131 States are parties to the NYC.³¹ The NYC governs the enforcement of the arbitration agreement (article II) and the enforcement of the award (article V). It determines the grounds to set aside or vacate any award subject to the convention. It establishes which law governs the proceedings if there is no parties' agreement (article V.1). It respects the countries' public policies of recognition and enforcement (article V.2). And finally, it also states the formal requirements that are to be fulfilled to seek the enforcement of the award. Such requirements concern both the arbitration agreement and the award (article IV). In sum, a sole treaty provides business people, lawyers and courts with an agreed and uniform text that controls the main issues of the arbitral institution. Insofar as the final purpose of any arbitration is to obtain a binding and enforceable award, it may be argued that international commercial arbitration enjoys a high degree of uniformity.

Not only has the NYC favoured the harmonisation of international commercial arbitration, but also the Model Law on International Commercial Arbitration of 1985. As a result of the Model Law, many countries have passed arbitration acts welcoming rules of arbitration internationally accepted. Despite some differences, the proximity of most national arbitration acts could make it unsuitable to look for further measures of harmonization. The existence of international organisations (for example, ICC and LCIA) whose arbitration rules have received worldwide recognition, also contribute to a more than acceptable harmonisation status of international commercial arbitration. The use of new technologies and internet could shake some of international arbitration's pillars.

6.3 Breaking Consensus

Notwithstanding the peaceful waters we are navigating, national courts and arbitrators have sometimes dissented on the interpretation of specific issues. Such divergences, once desirable to adapt the old Convention to social changes, now demand the revision of old instruments

³¹ See <http://www.uncitral.org/en-index.htm> (Status of Texts)

(for example, the New York Convention of 1958).³² The question is whether the current regulation may host Online Arbitration or, in contrast, whether any statute should be changed to permit Online Arbitration to fall within the NYC scope.

In summary, Online Arbitration gives rise, among others, to the following problems:

- 1) **Validity and enforcement of arbitration agreement in B2B transactions** : Does an electronic arbitration agreement (that is, exchange of emails or clicking on a website offer) meet the requirements of the NYC (article II)? Is it an electronic agreement made “in writing”? Should it require the signature of the parties? Does an exchange occur when clicking on a website offer? What is the “original” agreement (article IV NYC)? How to prove it? How to obtain a certified copy of it?
- 2) **Due process rights**

The parties may agree on any procedural rules (article V.1.d NYC) provided that their agreements are not contrary to due process rights.

- a. When all communications and notices are electronically managed; when the parties agree on arbitrators through electronic agents; or when there are no physical meetings, is it possible to conclude that every party has been entitled to “a fair and public hearing with a reasonable time by an independent and impartial tribunal established by law”(article 6.1 European Convention of Human Rights)?
- b. Does each party have a full opportunity to present its case (article V.1 NYC) when all evidence is to be produced electronically and hearings are held through video conferences or any other electronic means? Does a screen-to-screen process compare to face-to-face encounters?
- c. What technical requirements should be adopted to secure that the parties have been given “*proper notice of the appointment of the arbitrator or of the arbitration proceedings*” (article V.1 NYC)? What is the best technology to guarantee security, confidentiality and integrity of the communications and their storage?

³² The UNCITRAL WORKING GROUP ON ARBITRATION has already agreed that the New York convention of 1958 cannot be amended. They rather propose a *Declaration regarding the interpretation of article II(2) of the convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York, June 10, 1958* (it can be found at http://www.uncitral.org/english/workinggroups/wg_arb/index.htm)

- d. What technical training, if any, should be given to the parties and the arbitrators to ensure that all players have an equal and full opportunity to present their case? Should the deliberation of arbitrators be permitted through electronic means?³³ What if one arbitrator does not have sufficient skills to discuss online?
 - e. How to guarantee that each Member State's public policies do not hamper a common market when enforcing online arbitration awards (article V.2)? How to boost the user's confidence? Does any certifying authority have to control ODR providers (for example, accreditation, certification or self certification)? How to deter delay tactics of parties that refuse to comply with the agreement to arbitrate online? How should the ODR provider behave in that case? And the arbitrators?
- 3) **Enforcement of electronic award:** Unless the losing party voluntarily complies with the award, it is necessary to seek the enforcement of the arbitral decision before national courts.
- a. Will national courts grant enforcement of electronic awards under the NYC? Does an electronic award meet the NYC's formal requirements (article II)? How should the electronic award be served on the parties to ensure that it is original and cannot be altered? Must (or should) the arbitrators sign the award with electronic signatures? Does an electronic signature guarantee the originality of the award? How may the electronic award be authenticated? Who should carry out this task?
 - b. In countries where the award is to be deposited before the court or a public notary, who shall be responsible for filing it? The parties? The arbitrators? The administering institution? Should or could these formal requirements be eliminated at all? Would it be advisable for public notaries and courts to get more involved in the authentication of electronic awards and their notice to the parties?

7. ONLINE ARBITRATION AGREEMENTS

7.1 Inconsistencies

1. EU Collateral Rules

³³ RICHARD HILL, *On-line Arbitration: Issues and Solutions*, April 1999, International Arbitration, vol. 15, p 199-207, available at <http://www.umass.edu/dispute/hill.htm> .

The recognition of electronic agreements as valid and enforceable contracts is not unusual in e-commerce transactions in Europe. Article 9 of Directive 2000/31/EC on Electronic Commerce dictates that:

“Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of being made by electronic means”.

Further, under article 23.2 of Regulation 44/2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, choice of forum clauses entered into electronically are valid and enforceable provided the communication keeps a durable record of the agreement.

“Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.”

Online arbitration agreements are not expressly regulated. To the extent that arbitration agreements are contracts, it could be argued that Directive 2000/31 already equals the legal effects of traditional arbitration and online arbitration agreements. Even so, the Directive may not be enough to pass the scrutiny of sections II and IV of the New York Convention.

2. The formal demands of the New York Convention

To be enforceable, the NYC requires that any arbitration agreement be “in writing”, included in a contract duly signed or contained in an exchange of letters or telegrams (article II). In addition, it demands that either the original, or a certified copy of the original, is supplied to the recognising and enforcing court (article IV).

Literally interpreted, online arbitration agreements would not comply with the requirements of these articles. So national courts could refuse to enforce such agreements and reduce the desirable degree of uniformity of the NYC. Should national courts give different interpreta-

tions to the validity or enforceability of online arbitration agreements, legal uncertainty would increase and Online Arbitration would fail as a cost-effective method of settling disputes.³⁴

There are at least four controversial issues that may be eligible for policy actions: 1) whether online agreements meet the “in-writing requirement” of the NYC³⁵; 2) whether there is any exchange of web based agreements; 3) whether it is feasible to present the “original” arbitration agreement; 4) whether a certified copy of the original is available.³⁶

The first problem has already been solved in some jurisdictions and is currently subject to the proposals of the Uncitral Working Group on Arbitration. The second has been raised by some legal commentators who argue that an exchange certainly occurs in a website offer,³⁷ but it is still controversial. The last two questions have been tackled by the Uncitral Model Law on Electronic Commerce and the Uncitral Working Group on Arbitration.

7.2. Options

To give a uniform answer to the above inconsistencies we have identified the following choices, which are not exclusive:

- 1) **Flexible interpretation of the NYC**: A flexible interpretation of the NYC, adopting the functional approach proposed in the Uncitral Model Law on e-Commerce, would lead to the conclusion that online arbitration agreements are to be enforced under the New York Convention.³⁸

³⁴ There is at least one court that has already denied enforcement of an award where the arbitration agreement was entered into electronically, for being contrary to the NYC (August 16, 1999 Halogaland Court of Appeal, Norway, STOCKHOLM ARBITRATION REPORT vol. 2, at 121).

³⁵ See TOBY LANDAU for a comprehensive work on this subject. *The requirement of a written form for an arbitration agreement: when “written” means “oral”*, presented at the 16th ICCA CONGRESS (May 12-15, 2002, London).

³⁶ A more detailed study of this subject may be found in WP 2.1 E-Arbitration-T IST-2000-25464/2.1/CAL/3003/DDRR1 Analysis of existing arbitration procedures (pages 23 to 30)

³⁷ RICHARD HILL states that “*there is an exchange of information because the bit stream comprising the offer and received in buyer’s computer is modified by buyer and the modified version is transmitted back to seller*” (see RICHARD HILL, *Online Arbitration*, id. 199-207).

³⁸ See RICHARD HILL, *Online Arbitration: Issues and Solutions*, April 1999, International Arbitration, vol. 15, p 199-207; MIRÈZE PHILIPPE, *Where Is Everyone Going With Online Dispute Resolution (ODR)*, January 2002, at http://www.ombuds.org/cyberweek2002/library/ODR_MirezePhillipe.doc

- 2) **Reliance on national law:** Since some jurisdictions have already adopted a flexible interpretation of the “in-writing requirement” with the purpose of resolving the inconsistencies between the NYC and national laws (for example, section 5 of the 1996 UK Arbitration Act; article 178 of the Swiss Federal Act of Private International Law; article 1021 of the 1986 Dutch Arbitration Act; or article 1031 of the 1998 German Act), the EU should rely on the national laws. Some of these proposals follow article 7.2 of the Model Law which establishes that an agreement is in writing if “*it is contained in...any means of communication which permits it to be evidenced by a text.*” Other jurisdictions such as New Zealand and Sweden even recognise oral agreements.
- 3) **Modification of the Model Law on International Commercial Arbitration :** Within the scope of its competence, the Uncitral Working Group on Arbitration is reluctant to leave this matter to be interpreted by the courts. Hence, a modification of the Model Law on International Commercial Arbitration is about to be passed with the purpose of solving the above-mentioned issues.

The new article 7 of the Model Law on International Commercial Arbitration would be:

“Article 7. Definition and form of arbitration agreement

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

“(2) The arbitration agreement shall be in writing. ‘Writing’ includes any form that provides a [tangible] record of the agreement or is [otherwise] accessible as a data message so as to be usable for subsequent reference.

“[(3) ‘Data message’ means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.]

“(4) For the avoidance of doubt, the writing requirement in paragraph (2) is met if the arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are in writing, notwithstanding that the co-

tract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing.

“(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(6) The reference in a contract to a text containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

“[(7) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.]”

It is expected that Uncitral will also approve a “[d]eclaration regarding the interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York, June 10, 1958 whereby Uncitral:

“12 Recommends [declares] that the definition of agreement in writing contained in article II 2 of the Convention should be interpreted to include [wording inspired from the revisited text of article 7 of the Uncitral Model Law on International Commercial Arbitration]”.

4) Articles 6 to 8 of the Uncitral Model Law on e-Commerce

Along with the definition of “data message” contained in article 2, articles 6 to 8 of the Uncitral Model Law on e-Commerce provide us with a reasoned approach to the questions that may arise in online arbitration agreements, like other electronic contracts:

a. In writing: The Model Law on e-Commerce establishes that a data message is in writing if the information contained in it is accessible, so as to be usable for subsequent reference (article 6). Under article 2, data message means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

b. Signature: Under article 7, a data message meets the legal requirement of signature if:
1) a method is used to identify that person and to indicate that person’s approval of the in-

formation contained in the data message; and 2) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in light of all the circumstances, including any relevant agreement.

c. Original: Pursuant to article 8, where the law requires a signature, the requirement is met if: 1) the integrity³⁹ of the information of a data message is reliably⁴⁰ assured from the time it was first generated in its final form, as a data message or otherwise; and 2) the information is capable of being displayed to the person to whom it is to be presented.

[Question 5: What is your opinion on the controversial issues highlighted in this section? Are they controversial at all? Is this a fictitious debate? What option would you adopt, if any, to solve the inconsistencies? What other alternatives would you propose?]

7.3. Recommended Policy Actions

7.3.1. EU Directive on Online Dispute Resolution Mechanisms for Settling Disputes

Neither court interpretation nor national legislation can be properly called harmonising actions. The harmonising function of the Model Laws, albeit quite successful in the arbitration field, is not a self-enforceable measure either. To achieve its purposes, a Model Law should be adopted by either a sum of individual States or a supranational entity such as the EU, which is more effective. If it were justified under the primary law, the adoption of a directive would guarantee a better approximation of the laws of the Member States.

To set out the principles and whereas of a prospective directive on ODR methods is out of the scope of this paper. However, it can be advanced that the development of an information society within the EU is desirable to eliminate barriers between European citizens. So, legal obstacles that hamper the proper functioning of the internal market should be lifted.

Indeed, article 17 of the Directive on Electronic Commerce establishes that Member States shall assure that their legislation does not hamper the use of out-of-court schemes including appropriate electronic means. Online Arbitration could be one of these schemes.

³⁹ According to article 8.3.a of the UNIFORM MODEL LAW ON E-COMMERCE, “*the standard of integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display*”. <http://www.uncitral.org/english/texts/electcom/ml-ec.htm>

⁴⁰ According to article 8.3.b of the UNIFORM MODEL LAW ON E-COMMERCE, “*the standard of reliability shall be whether the information is capable of being displayed to the person to whom it is to be presented*”. <http://www.uncitral.org/english/texts/electcom/ml-ec.htm>

Following the preamble of Directive 2000/31/CE on Electronic Commerce, it would not be foolish to say that European Primary Law may empower the EU to pass a directive on ODR methods.

7.3.2. Specific provisions to be included in the directive regarding online arbitration

Assuming that the EU is entitled to pass a directive on ODR methods, we recommend that the directive includes the following provisions:

1) Article 9 of the Directive on Electronic Commerce 2000/31/EC shall control arbitration agreements so Member States are obliged to modify their arbitration acts accordingly;

2) The content of articles 6 to 8 of the Uncitral Model Law on e-Commerce shall be laid down to resolve any doubts about the concepts of “in writing”, “signature” and “original” including the concept of data message provided for in article 2.

3) The content of the new article 7 of the Model Law on International Commercial Arbitration (as amended by the Working Group on Arbitration) shall also be adopted.

By following the UNCITRAL Model Law, the directive would secure its consistency with the solutions that third countries could eventually adopt on this matter. Despite its inherent limitations, the directive would also guarantee an appropriate level of uniformity among the Member States without barring national initiatives. The directive proposed would in any case prevent countries from raising legal barriers to electronic commerce.

[Question 6: Do you think that this is an appropriate time to pass a directive on ODR methods? Would you be in favour of a directive on ODR methods? What are, in your opinion, the legal bases, if any, for a directive on ODR methods?]

8. DUE PROCESS RIGHTS: THE CONDUCT OF THE PROCEEDINGS

8.1 Inconsistencies

The principle of party autonomy controls the arbitration proceedings providing that the parties, the arbitrators and the use of technology (may we add) do not breach due process rights. The NYC establishes that an award may be set aside or vacate if: 1) one party is not given proper notice of the appointment of the arbitrators or of the arbitration proceedings; 2) one

party cannot present its case; or 3) if the arbitration proceedings are contrary to the public policy of the law of the place of recognition or enforcement (see articles V.1 and V.2 NYC).

From a legal standpoint, there are no significant contradictions between what every country means by due process rights. A vast majority of legal systems are coincident and so are the international treaties. We can agree that the NYC, along with article 6 of the European Convention of Human Rights, defines what a fair and just procedure must be: 1) a fair and public hearing; 2) with a reasonable time to be heard; 3) by an independent and impartial tribunal. It implies an equal treatment of the parties, with full opportunity to present its case and right to respond to the other side's allegations.

In view of the questions set out in section 6.3 of this paper, the use of new technology makes it uncertain whether due process rights are respected in Online Arbitration.

a) Security, integrity and confidentiality : To be consistent with due process rights, online arbitration technology must guarantee the security, confidentiality and integrity of the information transferred during the proceedings and its storage⁴¹. In this regard, it is essential that the technology provided by the ODR centre permits acknowledging receipt of proper notices. Namely, the technology must guarantee that the parties are given proper notices of the appointment of the arbitrators and of the proceedings.⁴²

b) Electronic signatures : In relation to the above paragraph, it should also be decided whether the use of electronic signatures is necessary or, for example, whether username and passwords are secure enough to avoid fraud. In addition, all communications must keep track of the sender, origin, content of the message, time and date of sending, and receipt of the notice (for example, access to internet)⁴³.

⁴¹ Consistently with the highest degree of security, E-Arbitration-T proposes a double system of notification on internet coupled with email alerts because email notices are less secure than internet. See E-Arbitration-T© IST-2000-25464/7.2/CAL/3010/DDRR/3, RULES OF THE E-ARBITRATION-TRIBUNAL (D 7.2), June 2002

⁴² Secure Multipurpose Internet Mail Exchange (S/MIME) and Pretty Good Privacy (PGP) are some of the most advanced techniques to secure email communications. On the internet, as E-Arbitration-T proposes, secure socket layers (SSL) are securer and included by Microsoft and Netscape for free.

⁴³ See E-ARBITRATION-T©IST-2000-25464/2.2/CAL/3004/DDRR/2, User Requirement Analysis and E-ARBITRATION-T©WP 6.1. A system for secure storage of documents.

c) Impossibility of submitting evidence: Another problem that may arise in Online Arbitration is the impossibility of submitting evidence electronically. The problem is twofold: 1) there are types of evidence that cannot be converted into electronic files; and 2) whether the parties or the administering institution should be in responsible for converting some types of evidence into electronic files.

d) Virtual hearing (if any): Since online arbitration reduces, or even suppresses, the number of hearings, it is advisable that the parties are given the possibility of meeting in a virtual place, if they wish. The interaction and effects of technology in telecommunication may be unexpected. For instance, in the first Online Negotiation Competition that took place during the ADR Cyberweek 2002 (February 25- March 1, 2002)⁴⁴, negotiations took place in a chat forum. The teams experienced that negotiations quickly became hostile when they took place using writing mechanisms; they could not smile online and had to agree on a set of ground rules for the negotiations to reach a good end.

The human factor may not be so important in online arbitration as the face-to-face hearing may not even be necessary (for example, documents-only proceedings of the London Maritime Arbitration Association). Unlike negotiations, arbitration proceedings may be based on the exchange of pleadings, evidence and other written stages.

The Cyberweek experience teaches us that written mechanisms of technology may not be appropriate for conducting virtual hearings. However, the parties' reactions to a virtual hearing will depend on the circumstances of the case and, mostly, on the technology used.

e) Speed of proceedings: Even though technology allows faster communications, the right of the parties to present their case cannot be harmed by too-short time limits.

f) Discrimination for lack of technological skills: As technology requires a higher degree of technique than language, it could be argued that one party does not have sufficient skills to defend itself properly, and that the other side was better prepared to present its case and had more resources to do so. Although the parties' agreement to use a certain type of technology would be a defence against such a type of pleading, it is likely that courts would weigh the relevance of the principle of equal treatment of the parties in such a case.

⁴⁴ This international competition was organized by the Center for Information Technology and Dispute Resolution of the University of Massachusetts. A summary of the experiences may be found at. <http://www.ombuds.org/cyberweek2002/>

g) Deliberation of panels: The same could be said in relation to arbitrators. As a deliberation and discussion of the arbitration must occur, arbitrators have to be capable of presenting their individual position on the case. To guarantee that a discussion takes place, it would be wise for the parties and the arbitrators to agree on the use of any specific technology beforehand.⁴⁵

h) Impartiality of arbitrators: Due process rights could also be breached if the appointment of arbitrators did not guarantee their impartiality.

i) Other issues: There are other questions that may need standard answers. For example, if a party does not comply with the agreement to communicate from and by internet, should the ODR provider communicate by regular mail or should the award be enforced in any event?

8.2 Options

The respect for due process rights is not only a legal issue. It is also a technical challenge to which an interdisciplinary body of lawyers and engineers should respond. To work out these questions, we propose the following alternatives:

1. Parties and arbitrators agree to conduct proceedings through a previously certified technology: The agreement of the parties to use technology is essential. The parties may consent to a standardised technology when entering into the arbitration agreement or, later, before the administering institution or the arbitrators. To accept its appointment, the arbitrator should also agree to conduct the proceedings electronically. In a preliminary hearing, the parties and the arbitrators could confirm their previous consent as well.

2. Technical standards: An interdisciplinary group consisting of engineers and lawyers should discuss the minimum requirements that ODR technology should fulfil to guarantee due process rights⁴⁶. These standards would include document security, protocols used for the communication, compatibility to submit evidence and protocols for converting documents. The technical standards would develop the principles set out in the EU Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of disputes

⁴⁵ RICHARD HILL, *Online Arbitration: Issues and Solutions*, April 1999, International Arbitration, vol. 15.

⁴⁶ As due process rights have been defined in the framework of the EAT project and the technology designed aims to grant maximum guarantees, EAT technology is proposed as the starting point for the discussion.

(98/257/EC). In any event, the expert group's recommendations shall be open, as technology could change faster than rules.

3. Certified technology and authorized ODR bodies: At a European level it may be wise to set up a certifying authority that oversees whether the technology of ODR providers meets the approved due process standards. Accordingly, only the decisions adopted under the administration of ODR providers with certified technology would be recognised.

[Question 7: Do you think that the adoption of European standards for Online Arbitration technologies is necessary? Do you think that the EU has the human and technical resources to dictate European Standards without public discussion? Would it be wise to create an interdisciplinary group capable of negotiating standards with other geographic regions?]

Question 8: Should there be a register of ODR providers or any other administrative control that ensures the respect of due process rights? Would the intervention of a administrative entities impair the development of ODR bodies?]

8.3 Recommended policy action

Adoption of international standards on online arbitration software : Because of their technical nature, we consider that the problems mentioned in this section should be solved under the auspices of an international association able to gather international technical experts and set out minimum standards. We underscore "minimum" because it is essential that the standards are flexible. Both lawyers and engineers should take part in the discussion forums. The *Comité Consultatif International Téléphonique et Télégraphique* (CCITT)⁴⁷, whose rules are reproduced by the International Standard Organisation (ISO) in the IT field, World Wide Web Consortium (W3C) of which the University of Brunel is a member, International Telecommunication Union (ITU) electronic business section, or a similar entity could be appropriate forums of debate. Occasionally, the standards could be laid down in a directive.

⁴⁷ Now known as *International Telecommunication Union* (ITU), its parent company. Definitions for these associations can be found at <http://www.pcwebopaedia.com>

9. ONLINE AWARDS

9.1 Inconsistencies

As the use of technology in courts could differ from one place to another, it is expected that in places where court proceedings are electronically managed (for example, Singapore), electronic awards are more easily recognised than in other jurisdictions.

Online awards combine both legal and technical aspects of the problems we have confronted when dealing with arbitration agreements and due process rights. On the one hand, the NYC requires that the award be authenticated and original (article IV NYC). In addition, some national statutes may require that the award be signed and deposited before a court or public notary. On the other hand, in Online Arbitration, the award is an electronic document which, to be enforceable, must fulfil formal requirements and must be notified to the parties. Thus, it is also necessary to verify that the technology used to notify this electronic document is secure and the document itself cannot be altered.

9.2. Options

1) Common solutions to awards and arbitration agreements

The harmonising solutions given in section 7.2 to the electronic agreements may also apply to the “in-writing requirement” and “original” issues that arise out of electronic awards: **1) flexible interpretation of the NYC; 2) reliance on national law; 3) adoption of the new Uncitral Model law on International Commercial Arbitration and 4) adoption of articles 6 to 8 of the Uncitral Model Law on e-Commerce.**

a) “In writing”: The “in-writing requirement” debate is entirely applicable to electronic awards because the award must be authenticated. Therefore, the award shall be in writing whatever “in writing” signifies.

b) Original: Like online arbitration agreements, the award must also be original to be enforceable. As stated in section 7.2., article 8 of the Model Law on e-Commerce gives a reasonable interpretation of this requirement in demanding the integrity and reliability of the data message together with the capability of being displayed.

2) Harmonising authentication methods: technology and public authorities

Unlike arbitration agreements (where an exchange of information is enough to find the parties' consent), the award must be signed and authenticated (article IV NYC). Considering that "*the authentication of a document is the formality by which the signature thereon is attested to be genuine.*"⁴⁸, there is no doubt that a signature must be included in the electronic document⁴⁹. Article 7 of the Uncitral Model Law on Electronic Commerce establishes that a signature is deemed to be any method capable of drawing from a data message the person to whom the signature belongs, and that the person's approval of the information contained is appropriate. It also provides that its reliability shall be measured according to the circumstances.

a) Appropriate technology: Because the award modifies rights and obligations of the parties, and even may alter their property, the degree of reliability required should be the highest. Currently, the most reliable method is an advanced digital signature as defined in articles 2 and 5 of the Directive on Electronic Signatures. Therefore, it is submitted that electronic awards include advanced electronic signatures.

b) Competent authority: The former question dealt with a technical issue. This one refers to the public authority that should authenticate the award for the purposes of article IV NYC. As authentication powers are generally attributed to the public authorities where the award should be deposited, it might be advisable that the verifying authority of the signature is the depositing authority (such as a public notary or courts). In addition, the public notary could also notify the award to the parties after authentication.⁵⁰ The proposals of the Conference of European Notaries could be considered as an appropriate vehicle for putting this proposal into practice: the or-

⁴⁸ See A. VAN DEN BERG, *the New York Arbitration Convention 1958*, p. 251 (1981)

⁴⁹ Under the EC Regulations on enforcement of foreign decisions, authentic documents must meet the following requirements: "*the authenticity of the instrument should have been established by a public authority; this authenticity should relate to the content of the instrument and not only, for example, the signature; the instrument has to be enforceable in itself in the State in which it originates*". The public authority must be empowered for that by the legislation (see Green Paper, id., at 35).

⁵⁰ The Conference of the European Notaries (see <http://www.cnue.be>) represents over 32,500 notaries in Germany, France, Spain, Italy, Luxembourg, Austria, Belgium, Greece and Portugal. It has launched a proposal for the European electronic signature and proposes a freedom of movement of public deeds. The electronic signature proposal aims to become European law. The Notaries are also preparing a book called "The Europe of Law". The Spanish Notary College presides the association in 2002. Notaries from five other countries were also invited to the meeting in April in Madrid.

ganisation would send the award duly signed to the notary for authentication who, in turn, would send it to the parties.

3) Technical standards for delivery : Traditionally, the award is delivered against a duly signed receipt. In Online Arbitration, however, it is proposed that an interdisciplinary group discusses the minimum requirements that ODR technology should fulfil in order to guarantee due process rights. Such technical standards should also govern the technology delivering electronic awards, which shall respect the principles of security, confidentiality, integrity and reliability of the award.

4) Last resort: As a last resort, the award could also be delivered in a hard copy. Currently, this seems the wisest solution⁵¹. However, it would not resolve the problem, which is to determine whether an electronic notification of the electronic award is valid for the NYC purposes. Hence, we would only recommend it as an interim measure.

9.3. Recommended policy actions

To work out the problems arising out the enforcement of electronic awards, we suggest a triple action: 1) foster private enforcement mechanisms; 2) lay down articles 6 to 8 of the Uncitral Model Law on e-Commerce; and 3) promote European projects whereby courts, notaries and other public authorities have the technology and the power to authenticate, deposit and deliver notice of the award to the parties.

1) Fostering private mechanisms of enforcement: Even though these agreements depend on the parties, it is advisable that the possibility of private enforcement measures be considered as the proper way to enforce awards. The enforcement of charge-back arrangements, judgment funds or escrow accounts should be facilitated.

2) Directive on ODR whereby the arbitrators are obliged to sign the awards with an advanced electronic signature in addition to the implementation of articles 6 to 8 of the Uncitral Model Law on Electronic Commerce

To solve the problems concerning the in-writing condition of the award, its original nature or its signature, the proposal made for arbitration agreements can be imported. Consequently, article 7 of the new Model Law on International Commercial Arbitration should be adopted in

⁵¹ See WP 2.1 E-Arbitration-T IST-2000-25464/2.1/CAL/3003/DDRR1 Analysis of existing arbitration procedures (p. 58).

a directive along with articles 6 to 8 of the Model Law on e-Commerce. In addition, the new directive on ODR mechanisms should request that arbitrators sign the awards with an advanced electronic signature (article 5 of Directive 1999/93/EC on Electronic Signatures).

3) Harmonisation of the public authorities that should be competent to authenticate, deposit and notify the awards

The authentication, deposit (if any) and final delivery of the award are specific issues demanding specific solutions. Taking advantage of the proposal launched by the Notaries of Europe, which envisages an electronic network, it is recommended that the EU considers the possibility of empowering the notaries as the public authorities responsible for the authentication, deposit, and delivery of electronic awards. In European countries, where the certifying authority is not granted to notaries but to courts or other authorities, the power should be granted to such public authorities who, eventually, could also be connected to the notaries' network. Eventually, a network of public authorities could be set up with the purpose of facilitating the transfer of public documents among Member States.

[Question 9: What is your experience in negotiation and enforcement of private mechanisms? Should electronic awards be dealt with in an EU directive?

Question 10: Would you eliminate the formal requirements of deposit and notarization at all? Would you empower notaries and other public authorities to deposit, authenticate and notify the award to the parties? In your opinion, what are the inconveniences of harmonising the formal requirements of deposit and notarisation and attributing more essential faculties to public authorities?]

10. OPEN DEBATE

The discussion about harmonising Online Arbitration of B2B disputes is not a closed one: the place of arbitration (for example, floating awards), the confidentiality of the evidence and/or the award, and the governing law (such as the choice of arbitration venue) may be still points to debate. Further, confronting the interests of some countries and international courts of arbitration to keep their own peculiarities could spur the debate⁵².

⁵² E-Arbitration-T has launched "World of Arbitration Discussion List" with the intention to disseminate the arbitral spirit and to discuss with ODR/ADR professionals all aspects of the online dispute resolution technologies. Main Website: <http://www.e-arbitration-t.com>

11. SUMMARY OF QUESTIONS SUBMITTED FOR DISCUSSION

Question 1: What is your opinion on the general approach that the EU institutions should follow on ODR and Online Arbitration of B2B transactions? Should the initiatives be limited to B2B transactions?

Question 2: Do you think that a directive is the most appropriate regulatory instrument to deal with e-commerce issues? And to deal with ODR methods? Do you think that the European Primary Law provides the EU with a legal basis to adopt a directive on ODR methods?

Question 3. Could or should the principles set out in the two recommendations apply indiscriminately to fields other than consumer protection? Of the principles enshrined in the Recommendations, which in your view could be incorporated in the legislation of Member States?

Question 4: Do you think that the EU should follow the Uncitral Model Laws, or should it leave the regulation of Online Arbitration disputes to national laws?

Question 5: What is your opinion on the controversial issues highlighted in section 7? Are they controversial at all? Is this a fictitious debate? What option would you adopt, if any, to solve the inconsistencies? What other alternatives would you propose?

Question 6: Do you think that this is an appropriate time to pass a directive on ODR methods? Would you be in favour of a directive on ODR methods? What are, in your opinion, the legal bases, if any, for a directive on ODR methods?

Question 7: Do you think that the adoption of European standards for Online Arbitration technologies is necessary? Do you think that the EU has the human and technical resources to dictate European Standards without public discussion? Would it be wise to create an interdisciplinary group capable of negotiating standards with other geographic regions?

Question 8: Should there be a register of ODR providers or any other administrative control that ensures the respect of due process rights? Would the intervention of administrative entities impair the development of ODR bodies?

Question 9: What is your experience in negotiation and enforcement of private mechanisms? Should electronic awards be dealt with in an EU directive?

Question 10: Would you eliminate the formal requirements of deposit and notarisation at all? Would you empower notaries and other public authorities to deposit, authenticate and notify the award to the parties? In your opinion, what are the inconveniences of harmonising the formal requirements of deposit and notarisation and attributing more essential faculties to public authorities?.

E-Arbitration-T[©] Consortium

E-Arbitration-T is a Pan-European consortium made up of Comercio Electrónico Global S.C. (Spain); TIGA Technologies (France), Department of Information Systems and Computing - Brunel University (UK); Department of Ingegneria Informatica e delle Telecomunicazioni - University of Catania (Italy); The Arbitration and Conciliation Chamber of Catania (Italy); Cuatrecasas SL (Spain); The Spanish Digital Law and Economy Association - AEDED Tribunal (Spain).

More information or comments:

Mr. Eduardo Paz Lloveras

Comercio Electrónico Global S.C.

E-Arbitration-T Scientific Co-ordinator

E-Mail: info@e-global.es

URL: <http://www.e-arbitration-t.com/>

Phone: +34 976 212169

Fax: +34 976 212169